IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs / Appellees

v.

STATE OF MONTANA, et al.,

Defendants / Appellants

APPELLEES' AMENDED BRIEF IN OBJECTION TO APPELLANTS' RULE 22 MOTION FOR STAY OF ORDER PENDING APPEAL

On appeal from the Montana First Judicial Court, Lewis and Clark County
Cause No. CDV 2020-307, the Honorable Kathy Seeley, Presiding

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INTRODUCTION AND BACKGROUND

Following a seven-day trial, where the District Court heard testimony from twenty-seven witnesses, including twelve youth Plaintiffs, and considered as part of the record one hundred and seventy-two exhibits, the Court adjudged Defendants are violating the constitutional rights of the sixteen youth Plaintiffs, who are now between the ages of six and twenty-two. Based on the extensive trial record before it, the Court declared unconstitutional the Montana Environmental Policy Act Limitation ("MEPA Limitation"), § 75-1-201(2)(a), MCA, and § 75-l-201(6)(a)(ii), MCA, and enjoined Defendants from enforcing or acting in accordance with the unconstitutional statutes. Stay App. 102-103, 112-113. The District Court found, based on uncontroverted evidence, that already "there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change," and the harms will worsen as long as Defendants continue to disregard greenhouse gas ("GHG") pollution and climate change pursuant to the unlawful MEPA Limitation. Stay App. 057 (FF #193, 194).

The District Court ruled that, "[e]very additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries." Stay App. 098 (CL #6). Based in part on testimony from Defendants' own witness, the District Court also found Defendants have the ability *now* to do a MEPA analysis that evaluates GHG emissions and climate impacts, as Defendants conducted such

analyses in the past. Stay App. 084-085, 112 (FF #252, 257; CL #64).

Defendants asked the District Court to stay its Findings of Fact, Conclusions of Law, and Order ("August 14 Order"). In denying Defendants' motion, the Court emphasized that "Plaintiffs are already experiencing substantial injuries and infringement of their constitutional rights," and their injuries will get worse as long as Defendants implement the MEPA Limitation. Stay App. 010. Considering the gravity of Plaintiffs' injuries, including the "rapidly closing window of opportunity to secure a livable and sustainable future," and Defendants' failure to show a strong likelihood of success on the merits, irreparable harm, or that a stay is in the public's interest, the District Court exercised its discretion to deny Defendants' request for a stay. Stay App. 009. The District Court's stay order is supported by its August 14 Order, the extensive trial record, and Montana's Constitution and jurisprudence.

Defendants' present motion fails to comply with the requirements of Rule 22, M. R. App. P., repeatedly applies the wrong standard of review, and falls short on substance. Defendants cannot be permitted to continue their unconstitutional conduct and cause further harm to Montana's children pending their appeal. Because Defendants do not establish the District Court's order denying their request for a stay was an abuse of discretion, their Rule 22 motion must also be denied.

STANDARD OF REVIEW

Defendants misstate the legal standard. The correct standard is whether the

District Court abused its discretion in denying Defendants' motion for a stay. *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *2 (Mont. Sup. Ct. Aug. 6, 2019) (citation omitted). "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *Id*. The party seeking reversal has the burden to demonstrate an abuse of discretion. *State v. Norquay*, 2010 MT 85, ¶ 19, 356 Mont. 113, 233 P.3d 768.

In determining whether the District Court abused its discretion, this Court is "guided by" Rule 22(2)(a)(i), which puts the burden on the applicant, here Defendants, to demonstrate "good cause" for the stay. *MTSUN*, DA 19-0363, *2. This Court also considers: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*.

ARGUMENT

I. Defendants' Motion Does Not Comply With Rule 22.

Defendants' motion for stay should be summarily denied for non-compliance with Rule 22. Defendants do not support their motion with an affidavit. M. R. App. P. 22(2)(a)(i). Defendants cannot rely on the affidavit submitted with its request for stay filed with the District Court because Defendants' instant motion cannot exceed

ten pages, including the affidavit. M. R. App. P. 22(2)(a)(iv). Defendants provide no explanation for their failure to comply with Rule 22 and, therefore, their motion should be denied summarily. M. R. App. P. 22(4).

II. Defendants Have Not Met Their Burden To Demonstrate The District Court Abused Its Discretion In Denying Their Stay Motion.

A. The District Court's Determination That Defendants Failed To Show They Are Likely To Succeed On The Merits Was Not An Abuse Of Discretion.[1]

Defendants had the burden to establish "a strong showing of a likelihood of success on the merits," not just a "mere possibility." *Nken v. Holder*, 556 U.S. 418 (2009). Before the District Court, Defendants' sole argument regarding their likely success on the merits related to Plaintiffs' Complaint's request for a remedial plan as one component of relief, that the District Court had previously denied over two years ago, was not addressed in the District Court's August 14 Order, and is not the subject of Defendants' appeal. Stay App. 195-196. The District Court correctly ruled Defendants were not likely to succeed on this inapposite argument and that Defendants identified no errors with the Court's August 14 Order (or any of the Court's other orders). Stay App. 005-006.

Now, for the first time before this Court, Defendants argue the District Court's holdings on standing and the clean and healthful environment are "unsettled" and

[1] Defendants completely misstate this factor, without explanation. Defs.' Br. at 5.

"serious" legal questions, justifying their stay. *See* Defs.' Br. at 5-7; Stay App. 181-197 (never mentioning standing or clean and healthful environment). Not only do Defendants apply the wrong standard, their new arguments do not support a finding that the District Court abused its discretion in denying their motion for a stay because they are raised for the first time here, and "it is unfair to fault the trial court on an issue that it was never given an opportunity to consider." *Kellogg v. Dearborn Info. Servs., LLC*, 2005 MT 188, ¶ 15, 328 Mont. 83, 119 P.3d 20.

Regardless, Defendants' new arguments fail to establish a strong likelihood of success on the merits. The District Court's holding that a statute precluding analysis of pollutants known to harm human health and the environment violates the right to a clean and healthful environment and other constitutional rights is far from novel. *Mont. Env't Info. Ctr. v. Dep't of Env't Quality* ("*MEIC*"), 1999 MT 248, ¶¶ 1, 79-80, 296 Mont. 207, 988 P.2d 1236; *Park Cnty. Env't Council v. Dep't of Env't Quality*, 2020 MT 303, ¶ 70, 402 Mont. 168, 477 P.3d 288. The District Court's constitutional analysis and holdings are properly grounded in Supreme Court precedent and Montana's Constitutional Convention records, and are supported by detailed factual findings, scientific evidence, and legal conclusions. *See, e.g.*, Stay App. 095-097, 106-108 (FF #284-289; CL #41-45, 47-48); *MEIC,* ¶¶ 65-77; *Park Cnty.,* ¶¶ 61-64. The District Court's August 14 Order applied constitutional law, declared rights, and

enjoined unconstitutional conduct. None of that is novel. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 109-10, 765 P.2d 745, 748 (1988).

Defendants' bare assertion that the District Court's standing analysis was novel also fails to meet their burden of establishing a strong likelihood of success on the merits. The Court's standing analysis is supported by detailed findings of fact based on *undisputed* trial evidence, including testimony from twelve Plaintiffs and ten experts. The uncontroverted evidence demonstrates Plaintiffs are *currently* experiencing particularized injuries to their physical and mental health, homes and property, tribal and cultural traditions, economic security, and recreational and spiritual interests. *See, e.g.*, Stay App. 057-075 (FF #194-208); *MEIC,* ¶ 45; *Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997). Plaintiffs' injuries are fairly traceable to the challenged laws and conduct, *see, e.g.*, Stay App. 078-080, 083, 085-091, 098 (FF #218, 222, 234, 243, 253-257, 259-268; CL #12-13), and a favorable ruling will help to alleviate Plaintiffs' injuries. *See, e.g.*, Stay App. 085-086, 092, 095, 099-100 (FF #253-257, 259, 270, 282; CL #18, 20); *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80. Defendants have not shown a strong likelihood that they will be able to meet their burden on appeal to show that these *uncontroverted* factual findings are clearly erroneous. *Kellogg*, ¶ 9. In short, Defendants have not established that the District Court abused its discretion in evaluating Defendants' likelihood of success. *MTSUN*, DA 19-0363, *2-3.

B. The District Court Did Not Abuse Its Discretion In Ruling Defendants Failed To Show Irreparable Harm Absent A Stay.

The District Court likewise did not abuse its discretion in ruling Defendants failed to meet their burden of demonstrating that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). There is no support for Defendants' untenable position that they should be allowed to continue to implement an unconstitutional statute pending appeal and compound Plaintiffs' injuries. This case is not subject to the Montana Administrative Procedure Act standard of review, and there is no statute that automatically allows for a stay pending appeal. Defs.' Br. at 9; *Grenz v. Mont. Dep't of Nat. Res. & Conservation*, 2011 MT 17, ¶¶ 16, 20, 359 Mont. 154, 248 P.3d 785.[2]

Defendants' purported injury, expending (unidentified) resources to comply with the District Court's order, is vague, not supported by an affidavit, and fails as a matter of law. Administrative burdens, including processing permit applications, do not constitute irreparable harm. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020). Any resources required by

[2] The other cases cited by Defendants are also distinguishable. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Maryland wanted to use a "law enforcement tool" meant to *protect* people, pending appeal, while here, Defendants want to continue implementing law that has been proven to *injure* people); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (declining to stay implementation of a law the Court had already determined was constitutional); *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017) (*Plaintiffs*, not Defendants, established irreparable harm from being subjected to unconstitutional executive actions).

Defendants to comply with their statutory and constitutional obligations do not constitute irreparable harm but do implicate Defendants' obligation to comply with the law. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("[E]ven if the government faced severe logistical difficulties in implementing the order," that would merely represent the burden of complying with legal obligations.).

Moreover, Defendants ignore trial testimony from their *own witness* stating DEQ knows how to consider climate impacts and GHG emissions now, has done so in the past, and would do so, if the MEPA Limitation were declared unconstitutional. Stay App. 256. The District Court found: "If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change." Stay App. 085 (FF #257).

Defendants' "potential litigation risk," Defs.' Br. at 9, is not only entirely speculative, even if actualized, it would not constitute irreparable harm. *See, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (even unrecoupable litigation costs are not irreparable injury). In short, Defendants' alleged harms are speculative, not irreparable, and are being manufactured by their own begrudging processes of complying with the District Court's order.

C. The District Court Did Not Abuse Its Discretion In Finding Plaintiffs' Ongoing Injuries Will Be Exacerbated By A Stay.

Defendants completely ignore the District Court's factual findings and conclusions of law, based on undisputed trial testimony, detailing the current and

ongoing infringement of Plaintiffs' constitutional rights, which establishes irreparable harm to Plaintiffs. *See, e.g.*, Stay App. 057-075, 109 (FF #194-208; CL #50); Stay App. 009-010; *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (loss of constitutional right, pending final resolution of a case, constitutes irreparable harm). Defendants do not argue the District Court abused its discretion when it found "Plaintiffs are already experiencing substantial injuries and infringement of their constitutional rights" and those injuries "will be exacerbated if Defendants continue to ignore climate change and GHG emissions in MEPA reviews." Stay App. 010. As the District Court found:

> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Stay App. 057; *id.* at 035-036, 045, 057, 098 (FF #89, 92, 98, 139, 193; CL #7).

"MEPA is an essential aspect of the State's efforts to meet its constitutional obligations." *Park Cnty.*, ¶ 89; *id.* at ¶¶ 70-71. Allowing any projects to go forward during the pendency of this appeal without proper MEPA review risks "irreversible mistakes depriving Montanans of a clean and healthful environment." *Id.* at ¶ 70. Under these trial proven facts, there is no justification to grant a stay that would allow Defendants to continue violating Plaintiffs' constitutional rights.

D. The District Court Did Not Abuse Its Discretion In Finding The Public's Interest Weighs Against Granting A Stay.

The District Court correctly concluded, "[t]he public interest lies in protecting Montana's clean and healthful environment and in protecting the constitutional rights of all Montanans, especially the youth." Stay App. 010 (*citing Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, DA 22-0064, *9 (Mont. Sup. Ct. Aug. 9. 2022)). Defendants' assertion that the public will be deprived of its right to notice and comment is wholly unsupported. Defendants have not presented any evidence they will adopt, amend, or repeal any rules during the pendency of their appeal that would require notice and comment pursuant to § 2-4-302, MCA. On the contrary, the evidence shows it is overwhelmingly in the public's interest for Defendants to stop issuing permits without considering GHG emissions and their corresponding impacts to the climate. Stay App. 085-086 (FF #257, 259-261). Defendants failed to satisfy their burden of establishing the District Court abused its discretion in finding the public's interest weighs against issuing a stay.

CONCLUSION

Defendants' Rule 22 motion must be denied because Defendants' motion fails to comply with the requirements of Rule 22 and Defendants have failed to show the District Court acted arbitrarily and caused Defendants substantial injustice.

RESPECTFULLY SUBMITTED this 18th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 and Rule 22 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for indented material; and does not exceed 10 pages, excluding those sections exempted under Rule 11(4)(d).

DATED this 18th day of December, 2023.

/s/ Barbara Chillcott
Barbara Chillcott