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

RIKKI HELD; LANDER B., by and through his guardian Sara Busse; BADGE B., by and through his guardian Sara Busse; SARIEL SANDOVAL; KIAN T., by and through his guardian Todd Tanner; GEORGIANNA FISCHER; KATHRYN GRACE GIBSON-SNYDER; EVA L., by and through her guardian Mark Lighthiser; MIKA K., by and through his guardian Rachel Kantor; OLIVIA VESOVICH; JEFFREY K., by and through his guardian Laura King; NATHANIEL K., by and through his guardian Laura King; CLAIRE VLASES; RUBY D., by and through her guardian Shane Doyle; LILIAN D., by and through her guardian Shane Doyle; TALEAH HERNÁNDEZ,

Plaintiffs/Appellees,

v.

STATE OF MONTANA, GOVERNOR GREG GIANFORTE, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA DEPARTMENT OF TRANSPORTATION,

Defendants/Appellants.

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

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DEFENDANT/APPELLANT STATE OF MONTANA'S OPENING BRIEF

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STATEMENT OF ISSUES

1. Did the District Court fail to adequately consider threshold jurisdictional safeguards so that it could reach and decide nonjusticiable claims?
2. Did the District Court Apply Montana's Constitutional Environmental Provisions Contrary to This Court's Precedent and the Intentions of the Framers?
3. Was the District Court's denial of Defendants' request for an independent medical evaluation of Plaintiffs reversible error, in light of the pervasive role Plaintiffs' mental health played in the District Court's ruling on injury, standing, and justiciability?

STATEMENT OF THE CASE

This is an appeal from a judgment following a bench trial in which the District Court found that a discrete procedural provision in the Montana Environmental Policy Act (§ 75-1-201(2)(a), MCA—the so-called "MEPA Limitation") prohibiting the evaluation of greenhouse gas emissions ("GHGs") and climate change in MEPA reviews unconstitutional because it violated Mont. Const. Art. IX, §1(1): "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."

The District Court held that Plaintiffs suffered "past and ongoing injuries resulting from the State's failure to consider GHGs and climate change, including

injuries to their physical and mental health." Doc. 405 at COL 4. The District Court found a "traceable connection between the MEPA Limitation and the State's allowance of resulting fossil fuel GHG [greenhouse gas] emissions" and Plaintiffs' alleged injuries, sufficient to supply standing and causation. The District Court found that connection even though MEPA does not authorize or permit any activity, including those involving fossil fuels.

Although Plaintiffs had no claim challenging it, the District Court also "permanently enjoined" a remedy provision of MEPA (§ 75-1-201(6)(a)(ii), MCA) because, *inter alia*, it prohibits vacating, voiding, or delaying any permit issued by the State in any action based on GHGs or climate change. Doc. 405, COL 9.

Part of the relief originally sought by Plaintiffs was an order "to develop a remedial plan to reduce statewide GHG emissions; retain jurisdiction until Defendants have fully complied with the District Court's orders; and, if necessary, appoint a special master to review the remedial plan for efficacy." Doc. 405 at 3. The District Court denied that request in a pretrial ruling, but its post-trial ruling stated that that the "judgment *will influence* the State's conduct by invalidating statutes prohibiting analysis and remedies based on GHG emissions and climate impacts, alleviating Youth Plaintiffs' injuries and preventing further injury." Doc. 405 at COL 5 (emphasis added).

Plaintiffs responded to the judgment by demanding that the State calculate greenhouse gas emissions for *any* proposed project, or face contempt of court motions. *See* Doc. 424, Exs. 1 and 2. The two projects targeted in Plaintiffs' post-trial demands are a recycling center in Great Falls, and Malmstrom Air Base's change from a fighter plane to an aerial refueling mission. *Id*. This portion of the record on appeal presents an unusual circumstance in which the impact on the State agencies of the District Court's ruling is immediately apparent, at least in Plaintiffs' view: every permit or other State authorization must include a climate change evaluation as a Constitutional requirement.

STATEMENT OF FACTS

In the interest of efficiency and convenience of the Court, the State of Montana adopts the Statement of Facts set forth in the opening brief filed by Appellant Montana Department of Environmental Quality, et al.

STANDARD OF REVIEW

In an appeal from a bench trial, the Court reviews the District Court's findings of fact for clear error. *O'Brien v. O'Brien*, 2022 MT 246, ¶ 13, 411 Mont. 101, 532 P.3d 831 ("A finding of fact is clearly erroneous if not supported by substantial evidence, if the district court has misapprehended the effect of evidence, or if a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed.") *Id*. (citing *In Re Estate of Dern*

Fam. Trust, 279 Mont. 138, 144, 928 P.2d 123 (1996)). The district court's conclusions of law are reviewed *de novo* to determine they are correct. *Id*.

SUMMARY OF THE ARGUMENT

The District Court's 100-page ruling masks its disturbing failure to exercise fundamental limitations on its jurisdiction. The District Court ruling casts Montana as the legal epicenter in the global problem of GHGs and climate change, by minimizing the lack of a causal connection between the statutes in question and Plaintiffs' alleged injuries. The District Court may have signaled its awareness of this jurisdictional problem when it described its findings as intended "to influence" Montana's approach to managing fossil fuels and greenhouse gasses, a candid if somewhat veiled recognition that its ruling ventures into the political arena.

Plaintiffs' alleged mental health and physical injuries from climate change will not be redressed by declaring a MEPA provision unconstitutional, because no fossil fuel or greenhouse gas related project is permitted by MEPA, and Plaintiffs' claims did not include a challenge to any substantive permitting statute. The statute challenged by Plaintiffs is a prohibition on state action; striking it down removes the prohibition but does not supply authority. Yet, the District Court's ruling conflates enjoining a statutory prohibition on state action with authorizing or even *mandating* that action.

The District Court's declaration that Sections 75-1-201(2)(a) and 75-1-201(6)(a)(ii), MCA, are unconstitutional represents a quantum leap from previous Montana Supreme Court decisions interpreting the constitutional "clean and healthful environment" provisions and, despite the District Court's statement to the contrary, conflicts with the true intent of the Framers of Montana's Constitution, as discussed in the Constitutional Convention. The District Court ruled that it need not determine whether the environmental constitutional provisions are self-executing, and its mistaken reliance on the "legislative act" exception to that requirement resulted in the Court ruling on a non-justiciable political question. The District Court's constitutional rationale, which concluded that the MEPA Limitation could not withstand strict scrutiny, was also erroneous because, contrary to the Court's decision, compelling state interests do underlie that MEPA provision.

Each Plaintiff alleged that she or he has suffered mental health injury directly caused by the State's MEPA law, they devoted many hours at trial to describing them, and they called as a witness an expert psychiatrist who had interviewed some of the Plaintiffs. The District Court's ruling reflects that emphasis and is replete with reference to the mental health damage allegedly caused by Montana's purported contribution to climate change. Those issues figured largely into the District Court's rulings on standing and redressability, the

most critical legal issues in this case. Therefore, the District Court caused reversible prejudice to Defendants when it denied their request to conduct independent medical examinations of some Plaintiffs.

ARGUMENT

I. The District Court Glossed Over Basic Jurisdictional Thresholds to Reach and Decide Nonjusticiable Claims

The District Court's decision that Montana's constitutional "clean and healthful environment" provisions include world-wide climate conditions is a reckless intrusion upon the province of the Legislature. To reach its intended result, the District Court reviewed the nonjusticiable political claims of Plaintiffs who lack case-or-controversy standing. As noted in the State of Montana's closing argument, "[t]he state's focus on causation and redressability is not because it disrespects the Plaintiffs or wants to shirk its duties under Montana law, it's because the law demands it." Trial Transcript (TT) 1514:10–13.

Montana courts do not possess jurisdiction to "determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Broad Reach Power, LLC v. Montana Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, ¶ 8, 410 Mont. 450, 520 P.3d 301 (internal quotations omitted). In contrast to a purely political, administrative,

philosophical, or academic issue, in Montana a legal claim is justiciable if it is within the constitutional power of a court to decide, is an issue in which the asserting party has an actual, non-theoretical interest, and an issue upon which a judgment can effectively operate and provide meaningful relief. *Larson v. State*, 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241 (internal quotations omitted).

These fundamental standards for invoking district court jurisdiction do not countenance a "climate" right, or a right to a "stable climate system," when a justiciable controversy "requires that parties have existing and genuine, as distinguished from theoretical, rights or interest." *Northfield Ins. Co. v. Montana Ass'n of Counties*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813. Important considerations of standing and the political question doctrine counsel that "courts generally should not adjudicate matters 'more appropriately' in the domain of the legislative or executive branches or the reserved political power of the people." *Larson*, ¶ 18 n.6. The political question doctrine precludes courts from hearing "controversies … which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government . . .." *Id.* at ¶ 39 (internal quotations omitted).

Other courts have weighed in on whether the judiciary should attempt to cure alleged climate related injuries purportedly caused by a government's policy choices. They have answered in the negative. *See Juliana v. United States*, 947

F.3d 1159, 1171 (9th Cir. 2020) (ameliorating injuries from climate change, would require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world."); *Aji P. by & through Piper v. State*, 16 Wash. App. 2d 177, 191, 480 P.3d 438, 449 (Wash App. 2021) (concluding that the "Youths' claims present a political question to be determined by the people and their elected representatives, not the judiciary.").

A. The District Court Insufficiently Considered Legitimate Questions About Standing

When Defendants moved for dismissal on the grounds that Plaintiffs lacked standing and the case was not justiciable, the District Court held that Plaintiffs "sufficiently demonstrate that finding State Energy Policy and Climate Change Exception to MEPA unconstitutional would alleviate their injuries." Doc. 46 at 17:1–18:17 (citing *Larson*, ¶ 46). Yet, on summary judgment when Defendants asserted the *Larson* requirement of a "direct causal connection" between the alleged government action and a plaintiff's alleged injury, the District Court declined to follow *Larson*. Doc. 379 at 10:15–24. Noting that the *Larson* language applies to a "general or abstract interest in the constitutionality of a statute," the District Court said, "[i]t is unclear how this Court should interpret and apply [the "direct causal connection"] phrase from *Larson* to this case." *Id*. Ultimately, the District Court concluded that "causation is a factual issue to be proven at trial, not

summary judgment." *Id*. at 12:4-8 (citing *Prindel v. Ravalli County*, 2006 MT 62, ¶ 46, 331 Mont. 338, 133 P.3d 165).

The District Court found that the disputed material facts include whether Plaintiffs' injuries are mischaracterized or inaccurate, whether Montana's GHG emissions can be measured incrementally, whether climate change impacts to Montana's environment can be measured incrementally, whether climate impacts and effects in Montana can be attributed to Montana's fossil fuel activities, and whether a favorable judgment will influence the State's conduct and alleviate Plaintiffs' injuries or prevent further injury. Doc. 379 at 5:20–6:6.

At trial, while Plaintiffs submitted evidence of Montana's purported contribution to global GHG emissions, they presented no evidence quantifying the impact on Plaintiffs or their alleged injuries from that contribution, i.e., Montana's "incremental impact," much less *any* evidence linking that contribution to the 2023 version of the MEPA Limitation or its implementation.[1] Put another way, there was a complete absence of proof on a key element of standing – the direct causal connection between Montana's actions and Plaintiffs' alleged injuries.

[1] Mont. Code Ann. § 75-1-201(2) (2023) became effective on May 10, 2023, approximately one month before the start of trial on June 12, 2023. Mont. Code Ann. § 75-1-201(6)(a)(ii) (2023) became effective on May 19, 2023.

Instead, the District Court leapt to an erroneous conclusion that "every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries." Doc. 405 at COL 6. No credible evidence exists linking any alleged injury to a single metric ton of GHG emissions or links any of Plaintiffs' alleged harms to a measurable quantity of GHG emissions. While the District Court accepted Plaintiffs' calculations of "the amount of CO2 and GHG emissions that results from fossil fuel extraction, processing and transportation, and consumption activities that are authorized by Defendants" (Doc. 405 at FOF 214), the District Court did not tie any of the alleged harm triggers (e.g., wildfire, flooding, drought, heat, and decreased snowpack alleged by Plaintiffs) to any measurable quantity of GHG emissions.

B. Plaintiffs Failed to Establish Case or Controversy Standing

Though substantively cognizable, a declaratory judgment claim is not justiciable if the Plaintiffs lack personal standing to assert the claim. *Larson*, ¶ 45 (citing *Mitchell v. Glacier County*, 2017 MT 258, ¶ 42, 389 Mont. 122, 406 P.3d 427). To establish case-or-controversy standing: (1) "the complaining party must clearly allege past, present, or threatened injury to a property or civil right," and (2) "the alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. In

other words, "the injury must be able to be "alleviated by successfully maintaining the action." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (internal citations omitted).

This "case-or-controversy requirement [is] imposed by the Montana and United States Constitutions." *350 Montana v. State*, 2023 MT 87, ¶ 15, 412 Mont. 273, 529 P.3d 847 (citing *Bullock*, ¶ 30; Mont. Const. Art. VII, § 4(1); and U.S. Const. Art. III, § 2); *see also Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567 ("Article VII, Section 4(1) [of the Montana Constitution] embodies the *same limitations* imposed by Article III [of the Federal Constitution.]") (emphasis added).

As noted by the District Court, "[a]lthough Montana's standing requirements do not expressly direct Plaintiffs to prove causation, causation is nonetheless implicit in establishing standing." Doc. 46 at 8:6–10. The District Court focused on federal case law regarding causation and standing. The Court's order denying Defendants' motion to dismiss cited *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), for the proposition that the Plaintiffs' injuries must be traceable "to the challenged action of the defendant[s]...." The District Court also noted that the Plaintiffs could establish causation through "multiple links in the chain . . . as long as the chain is not hypothetical or tenuous." Doc. 46 at 8:15-19 (citing *Juliana*, 947 F.3d at 1169) (internal quotations and citations omitted). Under the federal

approach, the District Court also recognized that causation could be established even where there are multiple sources of injury ("so long as a defendant is at least partially causing the alleged injury"). *Id*. at 8:20 (quoting *WildEarth Guardians* v. *United States Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015)).

Here, unless Plaintiffs could show that their alleged injuries have been caused by Montana's incremental addition of GHG actually caused by the MEPA Limitation, they lack the necessary proof of causation. There is no doubt that the MEPA Limitation is where causation must lie because that is how Plaintiffs presented their entire case at trial. But that causal connection between § 75-1-201(2), MCA, and Plaintiffs' injuries was never established.

C. Redressability is Lacking Because There is No Measurable Connection Between the Functions of Mont. Code Ann. Section 75-1-201(2) and Plaintiffs' Alleged Injuries

The third requisite element of standing is redressability, which is the "likelihood that the requested relief will redress the alleged injury." *Heffernan*, ¶ 32; *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 26, 389 Mont. 270, 405 P.3d 88.

Even if both the 2011 version and 2023 versions of § 75-1-201(2), MCA, were declared unconstitutional, Plaintiffs' harms would not be redressed, nor would the absence of the MEPA provisions have any bearing on the State's decision to permit or deny GHG contributing projects. *Bitterrooters for Planning,*

Inc. v. Mont. Dep't of Envtl. Quality, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712 (MEPA does not "require an agency to reach any particular decision in the exercise of its independent authority."). MEPA is procedural—not substantive. *Northern Plains Res. Council, Inc. v. Mont. Bd. Of Land Comm'rs*, 2012 MT 234, ¶ 14, 366 Mont. 399, 288 P.3d 169. As a procedural statute, MEPA's purpose and meaning is to inform the permitting agency and the public. *Id.* (MEPA's constitutional purpose is to ensure the public and Legislature are informed. §§75-1-102(1)(a)–(b), MCA. Information about the amount of GHGs a permitted activity produces, by itself, will not alleviate Plaintiffs' alleged climate related injuries.

MEPA includes an express disclaimer that the Legislature did not intend, through MEPA, to expand regulatory authority to any agency beyond that authority explicitly granted to the agency by statute. § 75-1-102(3)(b), MCA ("it is not the purpose [of MEPA] to provide for regulatory authority, beyond authority explicitly provided for in existing statute [sic] to a state agency."); *Bitterrooters for Planning*, ¶ 30 (explaining that pursuant to §§ 75-1-102(3)(b), and 104(1), MCA, "MEPA provides no additional regulatory authority to an agency and does not affect an agency's specific statutory duties to comply with environmental quality standards"). In fact, MEPA expressly states that an "agency may not withhold, deny, or impose conditions on any permit or other authority to act based on

[MEPA]" and that MEPA "does not confer authority to an agency that is a project sponsor to modify a proposed project or action." §§ 75-1-201(4)(a),(c), MCA.

Still, Plaintiffs and the District Court claim that a declaration that MEPA is unconstitutional ensures that "the agency will exercise its discretion under the substantive permitting statutes it implements to make a better decision once it understands how its actions will affect the natural environment and to ensure protection of Montanans constitutional rights…." Doc. 402 at 3 (citing *Park County Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶¶ 56, 76, 402 Mont. 168, 477 P.3d 288). The assertion that the agency *will* exercise its discretion to somehow curtail the legal permitting of fossil fuel intensive activities is without basis. DEQ does not have discretion under the substantive permitting laws to deny a private permittee's proposed permit or to consider an alternative that would impose fundamental differences to the proposed project based on that project's carbon footprint or downstream emissions. TT 1373:11-24, 13741-8.

When it denied Defendants' motion to dismiss, the District Court explained that causation existed in *Juliana* because the United States is responsible for a significant amount of carbon emissions and federal action continues to increase those emissions. Doc. 46 at 9:5-12; *see also Juliana*, 947 F.3d at 1169. Thus, a factual question existed "as to whether those polices were a 'substantial factor' in causing the Plaintiffs' injuries." *Id.* (other citations omitted). At the motion to

dismiss stage, the District Court believed that issue applied here. Doc. 46 at 9:13–17. The District Court approached the causation issue differently at summary judgment:

> The State may not have the power to regulate out-of-state actors that burn Montana coal, but it could consider the effects of burning that coal before permitting a new coal mine. This Court cannot force the State to conduct that analysis, but it can strike down a statute prohibiting it.

Doc. 379 at 13:9-11. The District Court's acknowledgment that declaring § 75-1-201(2), MCA, unconstitutional would not compel affirmative agency action should have triggered a corresponding determination that the causation element of case and controversy standing was absent.

D. Montana's Miniscule Contribution to GHG Emissions Is Insufficient to Confer Standing

At trial, Plaintiffs' witness MEIC Executive Director Anne Hedges was asked what difference it would make if the Defendants considered GHG emissions in their environmental review of permits. Ms. Hedges stated, "it would allow the public to provide information to the decision makers. It would better inform the legislature, and it would inform the public…, [a]gencies could use that information to mitigate the harm, to decrease the admissions [sic] that are allowed at certain times of year when the system is already stressed, for example." TT 823:6–10.

This statement is an excellent example of the jurisdictional problem the District Court refused to squarely address. Even if MEPA hypothetically required a

decrease in emissions at one facility or all facilities in Montana at a certain time of the year, no measurable change would occur with an impact of GHG emissions on the ground in Montana. TT 439:20–440:23. For example, Plaintiffs' expert witness on the impact of climate change on glaciers, Dr. Fagre, was asked if he was aware of any credible scientific evidence or studies that could calculate the impacts on Glacier Park of siting an oil refinery immediately upwind from the Park, and he responded that he was unaware of any such calculations. TT 440:6–14. Dr. Fagre conceded that he had no opinion on the amount of fossil fuel use by the State of Montana that could be reflected on the ground at Glacier Park. TT 440:16–23.

The basic problem Plaintiffs face with redressability for alleged injuries caused by GHG emissions from any particular source is that the phenomenon of global warming is caused by a buildup of GHG gases in the atmosphere holding in heat. It is simply not scientifically possible to tie GHG emissions from any particular permitted activity in Montana to impacts at a specific location. As Plaintiffs' expert Dr. Running stated, "it doesn't matter to the atmosphere where it's burned. It can be burned here or it can be burned at the other end of the planet. It all ends up in the atmosphere and is mixed all together in a matter of weeks, so it really doesn't matter where." TT 107:2–7.

Plaintiffs' expert Mr. Erickson testified that he calculated that Montana contributed 166 million tons of CO2 into the atmosphere in 2019, with about half

of that being the amount of fossil fuels that are transported through Montana. TT 950:7–18; 1001:4–12. And, while Plaintiffs and the District Court persist in labeling Montana a "significant" GHG contributor, Plaintiffs' own expert testimony shows otherwise. During cross examination, Mr. Erickson stated that annual global emissions are "on the order of 40 billion tons of CO2" in recent years (TT 985:2–3) and that China alone emits around 9 or 10 billion tons of CO2 per year. TT 985:15–24. Although Mr. Erickson would not do the math, using the Plaintiffs' inflated[2] 166-million-ton figure in comparison to global emissions obviously shows that Montana's contribution is miniscule. Connecting Plaintiffs' alleged climate change injuries to such a microscopic figure, and further attenuating the injuries by tying them to a statute that the District Court conceded it cannot turn into an affirmative duty, eviscerates the District Court's findings on redressability and standing.

II. The District Court Misapplied Montana's Constitutional Environmental Provisions

This Court has noted 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."

[2] As noted, Plaintiffs' experts attributed about one-half of Montana's fossil fuel contribution to fossil fuels that are simply transported through Montana. These are fossil fuels that Montana does not produce, does not consume, does not emit, and does not control in interstate commerce.

Park County, ¶ 78. Constitutional text and intent show that the Framers intended these provisions to address localized concerns within Montana's borders. Constitutional interpretation begins with the plain text of a provision. *See Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. This Court has also recognized the difficulty inherent in answering exactly what is meant by "healthful." *See Park County*, ¶ 78.

The plain text of the Constitution's environmental provisions makes clear that the environment they protect is Montana's environment. Article IX, Section 1(1) provides "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. Art. IX, §1(1) (emphasis added). This Court also "determine[s] constitutional intent … 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 (citation omitted).

A. Discussions in the Constitutional Convention Run Contrary to the District Court's Conclusions

The Framers drafted Article IX in "broad and general terms." *Cf. Nelson*, ¶ 17. The delegates were uncertain about what attributes, precisely, constitute a "clean and healthful environment." *See, e.g.*, Mont. Const. Convention, Verbatim Transcripts, Vol. 4 at 1203 (noting that none of the 95 witnesses before the Natural

Resources and Agricultural Committee could define what "healthful" meant) (Del. Kamhoot).

The Framers did not intend the right to a clean and healthful environment to resolve global environmental issues or require the State to respond to global issues. The Natural Resources and Agricultural Committee's original proposal for Article IX, Section 1(1) stated, "The State of Montana and each person must maintain and enhance the environment of the state for present and future generations." Mont. Const. Convention, Verbatim Transcripts, Vol. 4 at 1200. The delegates debated whether it was necessary to include adjectives describing the type of environment they intended Article IX to guarantee before they ultimately approved Delegate Campbell's amendment adding the descriptive adjectives "clean and healthful." *See* Mont. Const. Convention, Verbatim Transcripts, Vol. 5 at 1249.

Delegates on both sides of this debate made clear that they were concerned with and addressing specific, localized environmental problems within Montana. For instance, Committee Chair Delegate McNeil said of the original committee proposal "The majority felt very strongly that the [']environment of this state['] describes what we have in Montana." Mont. Const. Convention, Verbatim Transcripts, Vol. 4 at 1205. (Del. McNeil) (quoting the original Committee Proposal). Consequently, the term "environment" in the proposal referred to Montana's environment: "It's the clear, unpolluted air near Bob Marshall

wilderness; it's the clear water and the clear air in the Bull Mountains; and it is the stench in Missoula. But that is the Montana environment[.]" *Id*.

Delegate Robinson spoke in favor of including the descriptive adjectives "clean" and "healthful" precisely because she wanted to ensure that localized environmental concerns would be improved. *See id*. at 1204 (Del. Robinson) ("It's clear we do not want to maintain the present environment, for example, in Missoula or Columbia Falls or other places, since the rate of death by cancer is twice as high in Butte and Anaconda as it is anywhere else in the State of Montana.") So, for Delegate Robinson, including the adjectives "clean and healthful" would ensure that specific, local environmental issues in Montana were addressed.

In sum, the delegates clearly stated their intent for Article IX, Section 1 to address localized environmental issues within Montana's borders (such as pollution from Missoula that had begun to reach the Flathead Valley.) In contrast, no Delegate expressed an intent to stave off global environmental issues, even though at the time—as now—global environmental concerns were also part of the zeitgeist. That same year, the United Nations held the famous "United Nations Conference on the Human Environment," to discuss an international response to global environmental concerns about air and water pollution, deforestation, loss of biodiversity, waste management, and marine pollution. *United Nations*

Conference on the Human Environment, 5-16 June 1972, Stockholm, https://www.un.org/en/conferences/environment/stockholm1972 (last visited February 12, 2024). Nevertheless, the Delegates expressed no intention for Article IX—and, later, Article II section 3—to respond to these pressing global issues. They adopted the provision to preserve Montana's unique environment and improve Montana's specific environmental problems.

To be sure, many delegates expressed uncertainty about what attributes comprise a "clean and healthful" environment and hoped that judicial interpretation would resolve that question. *See, e.g.*, Mont. Const. Convention, Verbatim Transcripts, Vol. 5 at 1235. But that does not mean that the Delegates intended this Court to expand the right to require a response to global environmental issues. No delegate ever said such a thing. The weight of the evidence points in the other direction.

B. The constitutional provisions at issue are non-self-executing, and a policy statement lacking any substantive import does not amount to "legislative action."

The District Court stated that it did not need to decide whether the environmental constitutional provisions are self-executing because:

> A determination that a right is non-self-executing "does not end the inquiry. As here, (1) once the Legislature has acted, or 'executed,' a provision (2) that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility.

Doc. 405 at COL 32 (citations omitted). The Court further reasoned that "although the provision may be non-self-executing, thus requiring initial legislative action, the courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution.'" *Id*. at COL 33 (quoting *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548). Thus, the question is whether the MEPA Limitation constitutes a 'legislative act' within the meaning of this Court's jurisprudence. For the following reasons, the MEPA Limitation cannot be construed in such a manner and the claim that the MEPA Limitation is unconstitutional is a nonjusticiable political question.

The circumstances under which this Court has exercised the legislative act exception to the self-executing requirement demonstrate that the legislative act itself must decide, one way or the other, the "threshold political question." *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 19, 326 Mont. 304, 109 P.3d 257 ("*Columbia Falls"*). For example, in *Brown v. Gianforte*, the Legislature decided the threshold political question presented by Article VII, Section 8(2), by delegating control over the selection of nominees to fill judicial vacancies to the Governor. *Brown*, ¶ 23. In *Columbia Falls*, the Legislature had decided the threshold political question by creating a basic system of free public schools. *Columbia Falls*, ¶ 19.

The "legislative act" relied on by the District Court here—the passage of the MEPA Limitation—is not a decision on the threshold political question posed by either Article II, Section 3, or Article IX, Section 1, at all. Instead, it is a policy statement in a procedural statutory scheme that lacks any substantive or regulatory power over an agency's decision making process. *Park County,* ¶ 70 (citing § 75–1–102(1), MCA). "MEPA's role in fulfilling the Legislature's constitutional mandate is essentially procedural," *id.*, and does not "demand that an agency make particular substantive decisions." *Water for Flathead's Future, Inc. v. Montana Dep't of Env't Quality*, 2023 MT 86, ¶ 19, 412 Mont. 258, 530 P.3d 790 (citations omitted).

The error in the District Court's analysis on this point highlights why the claims at bar present nonjusticiable political questions. The District Court determined that the MEPA Limitation "especially in conjunction with § 75-1-201(6)(a)(ii), MCA, removes the only preventable equitable relief available to the public and MEPA litigants concerned about GHGs and climate change." Doc. 405 at COL 34. Not so. MEPA lacks any regulatory authority beyond informing the public and requiring the agency to take a "hard look" at the impacts of its decisions. § 75-1-102(3)(b), MCA; § 75-1-102(4)(a), MCA; TT 1292:10–17, 1385:11–1389:2. Just as in *Bitterrooters* and forty years earlier in *Montana Wilderness Ass'n. v. Mont. Bd. of Health & Env'tl Sciences* (171 Mont. 477, 559

P.2d 1157 (1976)), the District Court "simply cannot properly stretch MEPA beyond the limits of its language and stated purpose to fill an environmental review gap created by the Legislature and remaining within its domain to remedy if so inclined." *Bitterrooters*, 2017 MT at ¶34.

The District Court failed to appreciate the critical distinction between MEPA and the regulatory and substantive statutes governing issuance of permits under, for example, the Montana Strip and Underground Reclamation Act ("MSUMRA"), the Montana Clean Air Act, the Montana Water Quality Act, and the host of other environmental permitting laws which are the mechanisms the State uses to authorize, deny, condition, or modify the permitted activity. As a procedural statute MEPA cannot fill a void in permit review. *Bitterrooters for Planning* addressed this very point:

> Regardless of MEPA's manifest beneficial purpose and Bitterrooters' otherwise compelling public policy arguments, we simply cannot properly stretch MEPA beyond the limits of its language and stated purpose to fill an environmental review gap created by the Legislature and remaining within its domain to remedy if so inclined.

Bitterrooters for Planning, ¶ 34.

Because MEPA does not regulate the permitted activity, MEPA amendments cannot decide the "threshold political question" as required by *Columbia Falls* and *Brown*. For these reasons, the "legislative action" exception to the self-executing

requirement is not met and Appellees' challenge to the MEPA Limitation presents a nonjusticiable political question.

C. Under this Court's precedent, the MEPA Limitation does not implicate the fundamental right to a clean and healthful environment

A statute must implicate a fundamental constitutional right before it may be challenged on constitutional grounds. *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 64, 296 Mont. 207, 988 P.2d 1236 ("*Mont. Environmental Info. Ctr.*") (noting that a statute must implicate either Article II, Section 3, or Article IX, Section 1, for strict scrutiny to apply). For that reason, the MEPA Limitation must implicate the fundamental right to a clean and healthful environment. If the MEPA Limitation does not implicate the rights guaranteed by Article II, Section 3, or Article IX, Section 9, the District Court must be reversed, and Appellees constitutional challenge must be denied.

A statutory provision containing a policy statement lacking any substantive effect cannot implicate a fundamental right because it cannot lead to any harm. Again, the MEPA Limitation lacks any regulatory authority and has no regulatory bearing on state agency permitting decisions. § 75-1-102(3)(b), MCA; §75-1-102(4)(a), MCA; TT 1292:10–17, 1385:11–1389:2. This Court has already so held. In *Netzer Law Office, P.C. v. State by & Through Knudsen*, this Court agreed that a statute that did not prevent the alleged harm could not implicate the fundamental

right to a clean and healthful environment. 2022 MT 234, ¶¶ 21–22, 410 Mont. 513, 520 P.3d 335.

Consider the issuance of a permit under any of Montana's regulatory authorities such as the Air Quality Act. Assuming *arguendo* the District Court's order were upheld, the agency could review, under MEPA, the attendant GHG emissions. But even that review found that the permitted activity may create significant harm from GHG emissions, the agency would have no authority *under MEPA* to deny the permit. TT 1415:10–20. If invalidating a statutory provision does nothing to alleviate the alleged constitutional harm, then that statutory provision does not implicate the underlying constitutional provision.

The District Court simply would not confront the interplay between regulatory and substantive statutes regulating permitted activities and the procedural role played by MEPA. For these reasons, the District Court's ultimate conclusion—that the MEPA Limitation violates both Article II, Section 3 and Article IX, Section 1—is far outside the scope of any decision this Court has previously issued. *See, e.g.*, *Mont. Environmental Info. Ctr.*, ¶ 79 (finding the constitutional rights at issue here implicated by the addition of "a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water").

"The government need not demonstrate that a law survives strict scrutiny or any level of scrutiny where the movant fails to make out a prima facie case of a violation of its constitutional rights." *Netzer Law Office*, ¶ 34; *see also Northern Plains Res. Council*, ¶ 19 (finding the challenged action did not implicate the right to a clean and healthful environment). Because the MEPA Limitation does not implicate a fundamental right, the District Court's decision should be reversed, and Appellees' constitutional challenge should be denied.

D. As a policy statement with no regulatory bearing on state action, the MEPA Limitation survives strict scrutiny

The District Court's application of strict scrutiny to the MEPA Limitation is equal parts cursory and flawed. Doc. 405 at COL 60–67. The District Court wrongly concluded that the State has no compelling interest at play here. *Id*. at COL 63. Indeed, there are several. MEPA itself establishes the State has a compelling interest in attaining the "widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences," protecting "the right to use and enjoy private property free of undue government regulation," and achieving "a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities," among other things. § 75-1-103(2), MCA. In short, the State has a compelling interest in balancing the right to use property with the right

to live in a healthful environment. § 75-1-103(3), MCA; *see also* § 75-1-102, MCA.

The District Court's determination that the MEPA Limitation was not narrowly tailored to a compelling interest was wrong, too. A narrowly tailored law is the "least onerous path that can be taken to achieve the state objective." *Weems v. State by & through Knudsen*, 2023 MT 82, ¶ 44, 412 Mont. 132, 529 P.3d 798 (citations omitted). That test is met here. Consider the State's compelling interest in protecting the right to use and enjoy private property free from undue government regulation. The MEPA provision(s) at issue show that the Legislature decided, as a matter of policy, that considering GHGs and attendant climate impacts is not an appropriate function for MEPA. The Legislature did not, however, amend any permitting statute to foreclose a GHG or climate analysis if the applicable regulatory or substantive statutory scheme required it.

Instead of preventing state agencies from analyzing GHGs or climate impacts during a substantive and regulatory review of agency actions like granting an air quality permit, the Legislature chose to enact the MEPA Limitation. By doing so, the Legislature executed its policy goal and acted in line with its constitutional directive to make such decisions, *see* Mont. Const. Art. V, § 1, all while refraining from altering the substantive or regulatory scheme applicable to various aspects of resource development. That is a narrowly tailored law.

The District Court failed to recognize that, no matter how difficult the factual record, a plaintiff does not fight on a level playing field when attempting to invalidate a statute on constitutional grounds. Laws must be presumed constitutional. *Powder River County v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. That means that every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Id*. at ¶¶ 73–74. Here, the District Court took a different approach and, through its cursory analysis, asked whether it was possible to condemn the statute—rather than uphold it. That approach is legally incorrect and should be reversed. *Saterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 3368, ¶ 10, 353 Mont. 265, 222 P.3d 566.

III. By Denying an IME, the District Court Prevented Defendants from Obtaining Direct Evidence of the Plaintiffs' Central Claim: Mental Health Injuries Caused by MEPA

The District Court made thirty-nine findings of fact (not including subparts) under the category, "Climate Change Harms Children and Specifically the Youth Plaintiffs." Doc. 405 at FOF 100–139. Among these many findings are broad statements about climate change in relation to the general populace, for example, "Climate change can cause increased stress and distress which can impact physical health." *Id*. at FOF 109; "Increased heat and temperature negatively affect cognition and are linked to increased incidence of aggression and exacerbation of pre-existing mental health disorders." *Id*. at FOF 110; "Drought is associated with

anxiety, depression, and chronic despair." *Id*. at FOF 112; and "All children, even those without pre-existing conditions or illness, are a population sensitive to climate change because their bodies and minds are still developing." *Id*. at FOF 107. The District Court found that young persons "are more vulnerable to the mental health impacts of climate change because younger people are more likely to be affected by the cumulative toll of stress and have more adverse childhood experiences." *Id.* at FOF 134. The Court made extensive findings on the impact of climate change on children generally. *See, e.g.*, *id*. at FOF 119–136.

The District Court's ruling also states that the "psychological satisfaction of prevailing in this lawsuit does not establish redressability," Doc. 405 at COL 17, and Plaintiffs' "mental health injuries resulting from government inaction alone do not establish a cognizable, redressable injury". Id. at COL 30(c). However, those qualifications ring hollow, given the Court's emphasis on mental health claims and injuries that otherwise saturates its Findings and Conclusions.

The primary source for the Court's mental health findings, aside from the Plaintiffs' themselves, is Plaintiffs' expert psychiatrist Dr. Lise Van Susteren (cited in the District Court's Findings of Fact as "LVS"). Dr. Van Susteren's role in the case went beyond merely providing expert advice on climate change and mental health generally, however. She interviewed five of the Plaintiffs and provided a

report under seal that the District Court described as a "profile" of the individuals she interviewed. *See* Doc. 225, Order on Rule 35 Motion for IME.

However, as the trial showed (and Defendants demonstrated in pretrial motions), Dr. Van Susteren's role and her report went far beyond a mere "profile" (the District Court's description) of the individuals with whom she met. Relying heavily on Dr. Van Susteren, the District Court made many findings on the mental health of the individual Plaintiffs, describing them as "fearful," suffering "significant distress," "despair," and "fear and loss". *Id*. at FOF 109. Even where the Plaintiffs themselves testified to their own mental health, the District Court attributed the associated Finding of Fact at least in part to Dr. Van Susteren. *See, e.g.*, *id*. at FOF 129 ("Plaintiffs Olivia and Grace are distressed by feeling forced to consider foregoing a family because they fear the world that their children would grow up in." (citing, *inter alia*, "LVS 1214:21–1215:1, 1221:19–1222:5")).

In the strictly legal context, the District Court found: "Plaintiffs' mental health injuries directly resulting from State inaction or counterproductive action on climate change, on their own, do not establish a cognizable injury." Doc. 405 at COL 5 (citing *Steel Co. v. Citizens for a Better Envt*., 523 U.S. 83, 107 (1998)). Nevertheless, the District Court then determined that "Plaintiffs' mental health injuries stemming from the effects of climate change on Montana's environment,

feelings like loss, despair, and anxiety, are cognizable injuries." *Id*. The Court further found that "[e]very additional ton of GHG emissions exacerbates Plaintiffs' injuries," that those "injuries will grow increasingly severe and irreversible without science-based actions to address climate change," that "as children and youth, they are disproportionately harmed by fossil fuel pollution and climate impacts," and "that they have suffered injuries that are concrete, particularized, and distinguishable from the public generally." *Id*. at FOF 6–9.

Indeed, Plaintiffs devoted much of their time at the trial discussing their mental health and attempting to tie it to State action or inaction, including the testimony of Dr. Van Susteren. Plaintiffs cited their mental health in addressing critical threshold jurisdictional matters such as justiciability, causation, redressability, and standing. It is no surprise, therefore, that the District Court's findings and conclusions are replete with references to the Plaintiffs' mental health, making that topic the very heart of the District Court's reasoning. Dr. Van Susteren's opinions run throughout.

During discovery, the State of Montana filed a motion under Mont. R. Civ. P. 35(a) for an independent medical examination (IME) of Plaintiffs to assess their injuries, including the causes. *See* Doc. 172. Defendants noted in the motion that it "would be highly prejudicial and patently unfair to allow Plaintiffs to be examined by a medical professional and provide expert opinions yet deny the State the same

opportunity." *Id*. Unfortunately, the District Court did just that. Doc. 225. The State argued that the IME was necessary because Plaintiffs' "mental health [is] at the center of this case," and that it was particularly relevant to the issue of standing. *Id*. at p. 3.[3]

Yet, the District Court reasoned: "Plaintiffs have not placed their mental health at the center of this case, nor is it really and genuinely in controversy." *Id*. at p. 6. Similarly, the District Court rejected the State's concern that the issue of standing may turn on the question of psychological harm, and that "emotional harm issue is not a core issue in the case," and that Defendants "failed to show that Plaintiffs' mental health is really and genuinely in controversy." *Id*. The District Court stated that Defendants were adequately able to defend the allegations of Plaintiffs' expert Dr. Van Susteren because they had her report, could cross-examine her on it, and have their own expert testify at trial. *Id*. at p. 8.

A. The Plaintiffs' Mental Health Is Squarely In Controversy

An IME should be ordered when (1) a party's "mental or physical condition … is in controversy" and (2) there is "good cause" for ordering the examination. Mont. R. Civ. P. 35 (a)(1)–(2)(A). If there was any question about whether

[3] The briefing and decision on the IME issue was filed under seal, because they included personal psychological or medical information on Plaintiffs, some of whom were minors. Here, this discussion only includes information publicly available through the District Court's order or the trial transcript.

Plaintiffs' mental or physical condition was in controversy, their testimony at trial eliminated it. Indeed, the majority of Dr. Van Susteren's lengthy direct examination covered her opinions on children (and adults) generally, but after giving her opinions on the effects of climate change on "America's 70 million children", Dr. Van Susteren opined that these Plaintiffs are "experiencing mental health impacts related to climate change." TT 1216:24. She then discussed each Plaintiff individually and gave – after testifying at great length – what she called "a quick, superficial thumbnail sketch of the range of abandonment, betrayal, despair, terror, very real consequences from these plaintiffs and from the state – the experience of living in the state that they love and they know is under severe threat." TT 1222:5–11.

Dr. Van Susteren then gave her opinion "that plaintiff's mental health injuries are related to the climate change exception to MEPA." TT 1222:23–1223:1. Venturing into legal analysis, she also opined that the "one" legal remedy that would provide "the most effective way" to "have the plaintiffs feel better about the emotional impacts" they described, would be to prevail in their challenge to "the promotion of fossil fuels and the rulings within the state that expressly prohibit consideration of climate impacts." TT 1225:20–1226:6.

Despite having interviewed plaintiffs and preparing a detailed report on the interviews, Dr. Van Susteren explicitly avoided referring to the interviews in her

testimony (TT 1175:20–1176:4), stating that she did not have a doctor-patient relationship with the plaintiffs she interviewed, and that she did not diagnose them or recommend a treatment plan. TT 1174:6–13. Dr. Van Susteren testified that she viewed herself as "speaking for the children." TT 1170:22–1171:5. She viewed her role as an advocate for the Plaintiffs on the "emotional toll" specifically caused by the impact from "the MEPA climate exception." TT 1233:7–18. Through this approach, Plaintiffs were able to have their evidentiary cake and eat it, too: Dr. Van Susteren was permitted to testify in explicit detail about the mental health of individual plaintiffs based on observing the trial and her professional background but shielded herself from questioning on any diagnosis.

Quite literally, Plaintiffs could not have made their mental health any more relevant or tied it more directly to the legal issues in the trial. When the District Court describes Plaintiffs' testimony as "undisputed", *e.g.*, Doc. 405 at FOF 208, that is due in this instance to the District Court's ruling.[4]

[4] The District Court described some key facts as "undisputed" at trial, a characterization only made possible by ignoring any testimony elicited during cross-examination of Plaintiffs' witnesses. The District Court did not adopt Plaintiffs' proposed findings and conclusions verbatim, but it did adopt them all, while the 100-plus pages are devoid of any contradictory testimony brought out in cross examination. The District Court relied upon Plaintiffs' proposed findings "to the exclusion of a consideration of the facts and the exercise of [its] own judgment." *See In Re Marriage of Hunter*, 196 Mont. 235, 246, 639 P.2d 489, 495 (1982).

B. Good Cause Existed for an IME

A plaintiff who places mental injury in controversy provides good cause for an independent medical examination to determine the existence and extent of the mental injury. *Winslow v. Montana Rail Link, Inc*., 2001 MT 269, ¶ 9, 307 Mont. 269, 38 P.3d 148. In that case, the Court held that pleading a tort claim for emotional distress was sufficient to satisfy the "good cause" requirement under Mont. R. Civ. P. 35. *Id.* at ¶ 13. In *Lewis v. Montana Eighth Jud. Dist. Ct.*, 2012 MT 200, ¶ 8, 366 Mont. 217, 286 P.3d 577, the Court said that "most cases in which courts have ordered mental examinations pursuant to Rule 35(a) involve something more than just a claim of emotional distress." *Id.* (citation omitted). In *Lewis*, the Court stated that the party seeking the examination must show that "each condition as to which the examination is sought is *really and genuinely* in controversy and that good cause exists for ordering each particular examination." *Id*. at ¶ 7.

Courts apply various criteria to judge the good cause element, most of which do not quite fit the present situation because, while Plaintiffs have put their mental health at the center of their case against MEPA, it is not in conjunction with tort claims or emotional distress damages. Moreover, Plaintiffs used an expert witness and their own testimony to assert mental health injuries that they claim can only be addressed by declaring a MEPA provision unconstitutional. While Defendants

could have called an expert to perhaps counter Dr. Van Susteren's scholarship or opinions regarding the effects of climate change on the mental health of the general population (including children) generally, that witness would have been handicapped by not having seen any Plaintiff to evaluate his or her claimed injuries, or other causes that may have been causing or contributing to the distress a plaintiff described at trial. In other words, denying an IME was another way the District Court unfairly relieved causation from Plaintiffs' burden of proof, not only for standing but for Plaintiffs' substantive claims.

Without that professional evaluation of the individual Plaintiffs, the remaining option would have been cross-examining each young Plaintiff at trial about her or his mental health. That public spectacle in the widely followed trial would have been more intrusive and potentially traumatic than a private interview with a mental health professional. Under these unique circumstances, common sense, basic fairness, and the importance of Plaintiffs' mental condition to their claimed injuries justified an IME. The District Court's order denying Defendants' motion for an IME was an abuse of discretion and reversible error.

CONCLUSION

For the reasons set forth above, the Court should direct the District Court to vacate its Judgment and dismiss Plaintiffs' claims.

RESPECTFULLY SUBMITTED this 13th day of February, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman typeface size 14-point font; is double spaced; and the word count calculated by Microsoft Word is 8,598, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

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