No. DA 23-0575

IN THE

Supreme Court of the State of Montana

RIKKI HELD, ET AL.,

Plaintiffs and Appellees,

VS.

THE STATE OF MONTANA, ET AL.,

Defendants and Appellants.

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY
THE HONORABLE KATHY SEELEY, PRESIDING
CASE NO. CDV-2020-307

BRIEF *AMICI CURIAE* OF THE MONTANA CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BILLINGS CHAMBER OF COMMERCE, HELENA CHAMBER OF COMMERCE, AND KALISPELL CHAMBER OF COMMERCE

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INTEREST OF *AMICI CURIAE*

Established in 1931, the Montana Chamber of Commerce's mission is to advocate on behalf of Montana businesses and be the driving force in promoting a favorable business climate in the State of Montana. The Montana Chamber of Commerce, Billings Chamber of Commerce, Helena Area Chamber of Commerce, and Kalispell Chamber of Commerce ("Montana Chambers") collectively represent more than 4,000 businesses large and small across the State. The Montana Chambers serve business members by working to create and to sustain an optimal business climate, business prosperity, and a strong Montana economy. Through advocacy, education, and collaboration, the Montana Chambers work to provide an empowered and educated workforce, reduce business growth obstacles, and advance positions that promote success for Montana businesses.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests

of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Montana Chambers and the U.S. Chamber (collectively, the "Chambers") are concerned about the impacts of this case on electricity costs and reliability, infrastructure investments, business facilities, business operations, and cost inflation, and about the precedential impacts in other contexts of a decision by this Court.

First, the Chambers are concerned that if the district court's decision is not corrected, it will delay or derail necessary investments and expansion of reliable electric supply and infrastructure in Montana.

Second, the Chambers view federal, state, and local investment in infrastructure to be critical for business success and community quality of life across Montana. With limited funds available for roads, bridges, schools, and other infrastructure, it is critical that permitting for construction and materials mining not be delayed or complicated by the onerous requirements that the district court's decision imposes on state agencies. Similarly, permitting and supplies of materials for business

facilities will also face delays and increased costs if the district court's decision is not corrected.

Third, for the many businesses that require state permits or access to natural resources for their operations, the Chambers see the district court's decision as a significant threat to business operations and high-wage employment for Montanans.

Finally, the Chambers are concerned that member businesses will face significant hardship from cost inflation as a result of the onerous new requirements imposed by the district court's decision. If not corrected, those requirements will drive up costs for materials, transportation and nearly every aspect of business.[1]

SUMMARY OF ARGUMENT

1. Plaintiffs' claims are not justiciable.

For Plaintiffs to have the requisite standing to assert their claims, they must prove (in addition to injury in fact) both causation and redressability. But they cannot prove causation, because there is no reasonably

[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person — aside from *amici curiae*, their members, or their counsel — made any monetary contribution intended to fund the preparation or submission of this brief.

close causal relationship between Defendants' permitting activities and Plaintiffs' alleged injuries. This is true as a matter of fact, as Defendants' activities do not meaningfully contribute to climate change. And this is true as a matter of law, as Defendants lack statutory authority to prevent the overwhelming majority of the Montana-originated GHG emissions identified by the district court. For much the same reasons, Plaintiffs cannot prove redressability either.

2. On the merits, the district court erred in invalidating the challenged MEPA Limitation as contrary to the Montana Constitution. As for the 2011 version, there is no conflict between the statute and the Constitution: the statute limits analysis of the climate change-related impacts "beyond Montana's borders," but the Constitution is necessarily focused on a clean and healthful environment "in Montana." As for the 2023 version, the limitation is consistent with this Court's MEPA jurisprudence, which requires analysis only of impacts that have a reasonably close causal relationship to triggering state actions and which conversely does not require analysis of impacts that an agency "cannot prevent." The 2023 limitation simply enforces those precepts in the context of Montana-originated GHG emissions.

3. Because this case is not justiciable, and because Plaintiffs' claims would fail on the merits in any event, Plaintiffs are entitled to no relief in this litigation. But in the event this Court disagrees and grants relief to Plaintiffs, the Court should carefully exercise its remedial discretion. In particular, the Court should balance the equities; sever any invalid provision; protect the Legislature's flexibility to craft a reasonable scope of analysis; and confirm the validity of previously issued permits or approvals, including permits and approvals still subject to judicial review.

The judgment of the district court should be reversed.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

This Court has consistently reaffirmed that, under the Montana Constitution, the jurisdiction of Montana courts "is limited to justiciable controversies." *E.g., Water for Flathead's Future, Inc. v. Montana DEQ*, 2023 MT 86, ¶ 14, 412 Mont. 258, 530 P.3d 790 (citing *Plan Helena, Inc. v. Helena Regional Airport Authority Board*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567). A key component of justiciability is standing, and "the irreducible constitutional minimum of standing" includes the element of **causation**, which demands "a fairly traceable connection between

the injury and the conduct complained of." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 255 P.3d 80 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Standing also includes the element of **redressability**, which demands "a likelihood that the requested relief will redress the alleged injury." *Id.*

As elaborated in the following two sections, the district court erred in concluding that Plaintiffs had satisfied their burden to prove causation and redressability.

A. Causation is lacking, because there is no reasonably close causal relationship between Defendants' permitting activities and Plaintiffs' alleged injuries.

In its Findings of Fact, Conclusions of Law, and Order (Order), the district court purported to find that "Defendants' actions cause emissions of substantial levels of GHG pollution into the atmosphere within Montana and outside its borders, contributing to climate change." Order at 79, ¶ 267. Based principally on this purported finding, the district court concluded that "[t]here is a fairly traceable connection between the MEPA Limitation and the State's allowance of resulting fossil fuel GHG emissions, which contribute to and exacerbate Plaintiffs' injuries." *Id.* at 87, ¶ 12. That is, the "State authorizes fossil fuel activities without

analyzing GHGs or climate impacts, which result in GHG emissions in Montana and abroad that have caused and continue to exacerbate anthropogenic climate change." *Id.* at 88, ¶ 13.

In so concluding, the district court erred both factually and legally.

1. As a matter of fact, Defendants' activities do not meaningfully contribute to climate change.

In *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013) (*Bellon*), the U.S. Court of Appeals for the Ninth Circuit persuasively analyzed the causation element of standing in a case (like this one) in which the plaintiffs alleged climate-related injuries stemming from government agencies' alleged failure to sufficiently deal with GHG emissions. The defendant agencies argued that "the chain of causality between [the Agencies] alleged misconduct and [Plaintiffs] injuries is too attenuated," such that "Plaintiffs do not, and cannot, show causality." *Id.* at 1141. Applying essentially the same standard that this Court applied in *Heffernan* — "Plaintiffs must show that the injury is causally linked or 'fairly traceable' to the Agencies' alleged misconduct," *id.* — the Ninth Circuit agreed.

First, the Ninth Circuit observed that under the "fairly traceable" standard, the "line of causation between the defendant's action and the

plaintiff's harm must be more than attenuated"; that is to say, "where the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, . . . the causal chain is too weak to support standing." *Id.* at 1141–42 (ellipses in *Bellon*) (quoting *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013)). Though this Court has not employed precisely the same language, it has rightly distinguished (in the MEPA context, no less) between impacts that are truly "caused by the permitted action" and "the much **broader and more attenuated** action and resulting impacts that would not occur 'but for' the issuance of the permit." *Bitterrooters for Planning, Inc. v. Montana DEQ*, 2017 MT 222, ¶ 24, 388 Mont. 453, 401 P.3d 712 (emphasis added). The latter standard, which deems causality satisfied even when the link is "attenuated," is "erroneous as a matter of law." *Id.* at 465.

Second, focusing on the attenuated nature of the alleged harm, the Ninth Circuit ruled that the plaintiffs' "causal chain — from lack of [regulatory] controls to [their] injuries — consists of a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or other evidentiary basis that the [local] emissions

are the source of their injuries." *Bellon*, 732 F.3d at 1142. Although the plaintiffs "need not connect each [GHG] molecule to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing." *Id.* at 1142–43.

The same is true here. In a section of its opinion purporting to find that "Defendants' Actions Contribute to Climate Change and Harm Plaintiffs," Order at 65, the district court proffered a superficially impressive array of numbers. These included that in 2019, "total CO_2 emissions due to Montana's fossil fuel-based economy" — the vast majority of which resulted from combustion **outside the State** — "is about 166 million tons." *Id.* at 67, ¶ 218. But the court never explained how these 166 million tons — a **mere 0.33% (or less than 1/300th)** of global CO_2 emissions[2] — actually cause climate change, let alone Plaintiffs' alleged injuries. Like

[2] For 2020, the U.S. Bureau of Land Management (BLM) estimated total global GHG emissions at 50,100 million tons. *See* 2021 BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends, at Table 7-1, https://www.blm.gov/content/ghg/2021/. For 2021, the estimate declined slightly to 49,500 million tons. *See* 2022 BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends, at Table 9-2, https://www.blm.gov/content/ghg/2022/.

the plaintiffs in *Bellon*, the district court offered only "conclusory, generalized statements of 'contribution,'" that is to say, contribution "in some undefined way and to some undefined degree." *See, e.g.*, Order at 69, ¶ 233 ("Defendants have authorized fossil fuel extraction, transportation, and combustion resulting in high levels of GHG emissions that contribute to climate change."); *id.* at 70, ¶ 236 ("DEQ has authorized fossil fuel extraction, transportation, and combustion, which generate GHG emissions, contribute to climate change, and harm Plaintiffs.").

The conclusory and indefinite character of the district court's findings should come as no surprise. As *Bellon* explained, "there is a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect," because GHGs, "once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime." 732 F.3d at 1143. Moreover, because "research on how greenhouse gases influence global climate change has focused on the cumulative environmental effects from aggregate regional or global sources," it was "'beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts at an exact location.'" *Id.* (quoting letter from Director, U.S. Geological Survey).

Nothing essential has changed since *Bellon* was decided. The Biden Administration — which has stated that it is "spearheading the most significant climate action in history at home and leading efforts to tackle the climate crisis abroad," The White House: Fact Sheet (Dec. 2, 2023), https://bit.ly/42yvkL8 — has repeatedly acknowledged that "the ecological impacts that are attributable to the GHGs are not the result of localized or even regional emissions but are entirely dependent on the collective behavior and emissions of the world's societies." 2021 BLM Specialist Report, *supra* note 2, § 3.0; 2022 BLM Specialist Report, *supra* note 2, § 3.0.

The conclusory and indefinite character of the district court's causation analysis cannot be salvaged by measuring the contributions of the aforementioned 166 million tons of Montana-originated GHG emissions "incrementally and cumulatively." Order at 88, ¶ 15. The link between that volume of emissions and global climate change is (contrary to the district court) **not** "globally significant." *Id.*, ¶ 16. Rather, the link is what *Bellon* called "scientifically indiscernible." 732 F.3d at 144.

According to the Administration, the "Total GHGs from all Fossil Fuel Authorizations" by BLM was 914 million tons in 2020, or more than five times the Montana-originated 166 million tons. 2021 BLM Specialist

Report, *supra* note 2, § 7.0 (Table 7-1). Yet even at that much greater annual volume, the Administration's modeling yielded the projection that "**30-plus years** of projected federal emissions would raise average global surface temperatures by approximately 0.0158°C," i.e., just **1/60th of a degree**. *Id.*, § 7.3 (emphasis added). Even more extensive modeling the following year projected nothing higher. *See* 2022 BLM Specialist Report, *supra* note 2, at Tables 9-3 and 9-4 (showing 0.0150°C as the very highest predicted global temperature increase under multiple scenarios).

Defendants' permitting activities do not meaningfully contribute to climate change as a matter of fact. The requisite causation is lacking.

2. As a matter of law, Defendants lack authority to prevent the overwhelming majority of GHG emissions identified by the district court.

Causation is lacking for a second and independent reason. This Court has joined the U.S. Supreme Court in holding that "an 'agency cannot be considered a legally relevant "cause"' of an effect when the agency cannot prevent the effect in the lawful exercise of its limited authority." *Bitterrooters*, ¶ 28 (quoting *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004)). Conversely, therefore, "an agency action is a legal cause of an environmental effect only if the agency can prevent

the effect through the lawful exercise of its independent authority." *Id.*, ¶ 33.

The district court gave a nod to these precepts when it concluded that Defendants have authority "to deny permits for fossil fuel activities when inconsistent with protecting Plaintiffs' constitutional rights," because "[p]ermitting statutes give the State and its agents discretion to deny permits for fossil fuel activities." Order at 89, ¶¶ 18, 22. In so concluding, the district court erred as a matter of law.

Consider the statutes cited by the district court in support of its conclusion. The first are §§ 75-2-203, 75-2-204, 75-2-211(2)(a), 75-2-217(1), 75-2-218(2), 75-20-301, MCA, which grant DEQ "discretion under [the] Clean Air Act of Montana to prohibit facilities that cause air pollution." Order at 89, ¶ 22. But "air pollution" is statutorily tied to "air pollutants," and carbon dioxide is simply not a regulated air pollutant for which a Montana ambient air-quality standard has been established under the Act. *See* § 75-2-103(1)–(3), MCA; ARM 17.8.210–.223, .1201(28), .1501(1).

Next are §§ 77-3-301 and 77-3-401, under which the State Board of Land Commissioners "may" lease state lands for coal and for oil and gas, respectively. The district court apparently read these statutes to grant

the Board unlimited discretion to categorically refuse to lease any state lands for such purposes. But this Court has said otherwise: although the Board "has considerable discretionary power" over leasing of state lands, this "is not to say the Board has unfettered discretion, or that its discretion is unlimited." *Friends of the Wild Swan v. DNRC*, 2005 MT 351, ¶ 10, 330 Mont. 186, 127 P.3d 394. The district court cited no legal authority for the Board abruptly to cease the leasing of state lands that has occurred continuously for decades and with considerable benefit to the people of Montana.

The district court read § 82-4-103(3)(a), MCA, to grant DEQ categorical authority to "either approve or disapprove" new coal mines, such that DEQ could simply disapprove them all. Order at 90, ¶ 22. But the statute actually vests in DEQ "the authority to adopt rules and to review new strip-mine and new underground-mine site locations and reclamation plans and either approve or disapprove those locations and plans and to exercise general administration and enforcement of this part." Contrary to the district court's reading, the plain import of this statute is to give DEQ the authority to approve or disapprove mines **in accord with the statute and with the rules adopted by DEQ**. *Cf.* § 82-4-142(1),

MCA (authorizing citizens to bring an action of mandamus whenever "a requirement of this part or a rule adopted under this part is not being enforced by a public officer or employee whose duty it is to enforce the requirement or rule").

Finally, while § 82-4-227, MCA, does grant DEQ "**wide** discretion to refuse mining permits," Order at 90, ¶ 22 (emphasis added), the statute cannot reasonably be read to grant DEQ **unlimited** discretion to categorically refuse permits that satisfy all applicable requirements.

The district court implicitly conceded that it was over-reading the discretion afforded by the cited statutes when it opined that the State **must** "have discretion to deny permits for fossil fuel activities when the activities would result in GHG emissions" that allegedly harm Plaintiffs — or "the permitting statutes themselves must be unconstitutional." Order at 90, ¶ 23. In short, the district court reasoned that a wide swath of the environmental statutes of this State must be read as no other court has read them — or else those statutes are unconstitutional. This Court has rightly condemned such "expansive tail-wagging-the-dog reasoning" in a similar context, *Bitterrooters*, ¶ 25, and it should do so here.

Accordingly, under any reasonable reading of the relevant statutes, Defendants largely "cannot prevent [GHG emissions] in the lawful exercise of [their] limited authority." *Id.*, ¶ 28. Thus, Defendants, "cannot be considered a legally relevant 'cause'" of those emissions. *Id.* The requisite causation is lacking for this reason as well.

B. For much the same reasons, redressability is likewise lacking.

As quoted above, redressability requires "a likelihood that the requested relief will redress the alleged injury." *Heffernan*, ¶ 32. The federal courts have observed that "the 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.'" *Bellon*, 732 F.3d at 1146 (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). The two components overlap here in both aspects of causation.

First, because Defendants' activities do not meaningfully contribute to climate change as a matter of fact, the relief granted by the district court will not redress Plaintiffs' alleged climate change-related injuries. Recall that categorically eliminating "30-plus years of projected federal emissions would [prevent raising] average global surface temperatures by approximately 0.0158°C," or only 1/60th of a degree. *See supra* pp. 11–12.

Given that those federally-created GHG emissions are five times the district court's highest estimation of Montana-originated GHG emissions, the likelihood is negligible that even **categorically eliminating** all of these emissions would redress Plaintiffs' alleged injuries resulting from rising global temperatures.

Second, because Defendants have no authority to prevent the overwhelming majority of GHG emissions, *see supra* pp. 12–16, the main relief afforded by the district court — more "analysis of GHG emissions and corresponding impacts to the climate," Order at 102, ¶ 6 — will not even begin to meaningfully reduce actual emissions. For example, the court found that 80 million tons of annual GHG emissions (i.e., about half the 166 million tons total) came from "fossil fuels transported and processed in and through Montana" but ultimately combusted elsewhere. *Id.* at 67, ¶ 217. Neither the Clean Air Act of Montana nor any other statute cited by the district court, *see id.* at 89–90, ¶ 22, grants Defendants authority to eliminate that transportation and processing. In the end, Plaintiffs will have only the "psychological satisfaction of prevailing in this lawsuit," *id.* at 88, ¶ 17, which even the district court acknowledged was insufficient to establish redressability.

* * * * *

Two of the three constitutionally required elements of standing — causation and redressability — are lacking in this case. Thus, Plaintiffs lack standing, and their claims are not justiciable.[3]

II. On the merits, the district court erred in invalidating the MEPA Limitation as contrary to the Montana Constitution.

We consider separately the 2011 and the 2023 versions of the MEPA Limitation challenged by Plaintiffs. As set forth below, there is no conflict between the 2011 version and the Constitution, and the 2023 version is consistent with this Court's MEPA jurisprudence.

A. 2011 MEPA Limitation

When Plaintiffs initiated this case in 2020, they attacked the MEPA Limitation enacted in 2011. *See* 2011 Mont. Laws ch. 396, § 2. That enactment added a new paragraph (2)(a) to § 75-1-201, MCA: in general, an environmental review under MEPA "may not include a review of actual or potential impacts **beyond Montana's borders**" and "may not include actual or potential impacts that are **regional, national, or global in**

[3] The third required element is "injury in fact," i.e., "(a concrete harm that is actual or imminent, not conjectural or hypothetical." *Heffernan*, ¶ 32. This brief takes no position on the question whether Plaintiffs suffered such injury.

nature" (emphasis added). The plain import of these provisions is to limit MEPA review of environmental impacts (related to climate change or otherwise) to impacts **within** Montana's borders, i.e., impacts that are **local** (in-state) in nature.

Nothing in this limitation fundamentally conflicts with the principal provision of the Montana Constitution on which Plaintiffs rely, namely, the mandate that the "state and each person shall maintain and improve a clean and healthful environment **in Montana** for present and future generations." Art. IX, § 1(1) (emphasis added). On its face, that provision focuses on the environment **within** Montana's borders, i.e., the **local** (in-state) environment. The local focus of the Constitution and the local focus of the 2011 MEPA Limitation are entirely compatible with one another. In sum, there is no conflict between the 2011 MEPA Limitation and Article IX, Section 1 of the Montana Constitution. The district court erred in holding otherwise.[4]

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[4] It is true that the other constitutional provision on which Plaintiffs rely (Article II, Section 3) refers to a "clean and healthful environment" without using the phrase "in Montana." But that limitation is implicit if not explicit: the Preamble to the Montana Constitution makes clear that the charter was ordained and established by and for "the people **of Montana**" (emphasis added). Those people cannot be said to have claimed the right to a clean and healthful environment in, say, Alaska or Argentina.

B. 2023 MEPA Limitation

The MEPA Limitation was amended while this case was pending in the district court. *See* 2023 Mont. Laws ch. 450, § 1. That amendment changed § 75-1-201(2)(a), MCA, to provide (with certain exceptions) that an environmental review under MEPA "may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate **in the state** or beyond the state's borders" (emphasis added). That limitation is undoubtedly broader than its predecessor.

Even so, the 2023 MEPA Limitation does not contravene Article IX, Section 1. This Court has consistently affirmed that MEPA and its remedies have reasonable limits. Accordingly, this Court has held that MEPA requires analysis of an alleged environmental effect **only if** there is "a reasonably close causal relationship between the triggering state action and [that] effect." *Water for Flathead's Future*, ¶ 32 (quoting *Bitterrooters*, ¶ 33). As described in Section I.A.1 above (pp. 7–12), there is no such relationship between the actions of Montana agencies and "greenhouse gas emissions and corresponding impacts to the climate in the state."

This Court has further held that MEPA does not require "expansive tail-wagging-the-dog" analysis of environmental impacts that an agency

"cannot prevent." *Bitterrooters*, ¶¶ 25, 28. As described in Section I.A.2 above (pp. 12–16), Montana agencies simply cannot prevent — for lack of statutory authority — the vast majority of the GHG emissions at issue.

These holdings from *Bitterrooters* and *Water for Flathead's Future* are reasonable, and doubtless the Court would not have delivered them unless they were consistent with both Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Indeed, the Court issued its interpretations of MEPA expressly in light of "the Legislature's constitutional duty to maintain and provide for a clean and healthful environment." *Bitterrooters*, ¶ 17 & n.5 (citing both constitutional provisions).

In either its 2011 or its 2023 incarnation, the MEPA Limitation is consistent with the Montana Constitution. The district court erred in holding otherwise.

III. In the event this Court holds that this case is justiciable and grants relief to Plaintiffs, the Court should carefully exercise its remedial discretion.

Numerous members of the Chambers must obtain permits and approvals that are subject to MEPA. An adverse decision in this case could well make many of those permits more difficult, time-consuming, and

expensive to obtain, and could cast doubt on the validity of many existing permits and approvals. Accordingly, in the event this Court concludes that this case is justiciable and holds in favor of Plaintiffs in any respect, the Court should consider carefully the scope of any remedy.

This Court has recently reiterated that "injunctive relief is an extraordinary remedy not available as a matter of right." *Netzer Law Office, P.C. v. State ex rel. Knudsen*, 2022 MT 234, ¶ 17, 410 Mont. 513, 520 P.3d 335 (citing *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73). Indeed, "injunctive relief is highly discretionary and critically dependent on the particular facts, circumstances, and equities of each case." *Id.* (quoting same). Thus, this Court awards such relief only where and to the extent "appropriate on balance of the equities." *Id.* The equities should guide this Court's discretion in several respects were it to grant any relief to Plaintiffs.

First, the Court should sever any provisions found to be invalid in accordance with the Legislature's express embrace of severability. *See* 2023 Mont. Laws ch. 450, § 3.

Second, to the extent that the Court holds that additional MEPA analysis is required, the Court should protect the Legislature's flexibility

to craft a reasonable scope of analysis. The possible methods and scope of evaluating GHG emissions and their effects are myriad. Such potential variety and complexity would appear especially ill-suited for judicial resolution in the first instance, and would be especially appropriate for the exercise of both legislative and agency discretion. *Cf.* Mont. Const. art. IX, § 1(2) (Legislature must "provide for the administration and enforcement" of State's duty to maintain clean and healthful environment in Montana). Tiering is an obvious tool that could be used under MEPA in this context. *See Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation*, 2012 MT 128, ¶ 38, 365 Mont. 232, 280 P.3d 877 (approvingly describing tiering as "the process of incorporating by reference coverage of general matters in broader environmental impact statements . . . [into] site-specific statements").

Finally, because the MEPA Limitation has been in effect since 2011, state agencies have issued countless permits where the MEPA analysis has incorporated the Limitation. Given this Court's long-standing "concerns for stability, predictability, and equal treatment," *State v. Running Wolf*, 2020 MT 24, ¶ 21, 398 Mont. 403, 457 P.3d 218 (citing *Formicove, Inc. v. Burlington Northern Inc.*, 207 Mont. 189, 194, 673 P.2d 469 (1983)),

any adverse decision by this Court should expressly confirm the validity of previously issued permits or approvals, including those that are still subject to judicial review.

Moreover, despite the "general rule" that gives "retroactive effect to judicial decisions," the Court allows "for an exception to that rule when faced with a truly compelling case." *Dempsey v. Allstate Insurance Co.*, 2004 MT 391, ¶ 29, 325 Mont. 207, 104 P.3d 483. The exception applies if the new rule satisfies the three-factor test set forth in *Dempsey*. *See id.*, ¶ 21 (drawing on *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971)).

A ruling by this Court casting doubt on any aspect of the MEPA Limitation would satisfy all three factors described in *Dempsey*. One, such a ruling would truly establish a "new principle" by "deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* Two, the relevant "merits and demerits" here, *id.*, are the balance of the equities and concerns for stability, predictability, and equal treatment. To nullify the many permits and approvals that have already undergone the time-consuming, expensive MEPA process would have severe economic impacts, destabilizing Montana's economy and deterring future invest-

ment. Three, these effects are precisely the "injustice or hardship," *id.*, that nonretroactivity is intended to avoid.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted this 16th day of February, 2024.

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Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I hereby certify that this brief is double-spaced, is proportionately spaced, and uses the Century Schoolbook typeface in 14-point size; and that the word count of the body of the brief (including footnotes) calculated by Microsoft Word is 4,922 words.

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