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

RIKKI HELD, et al.

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

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

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STATEMENT OF THE CASE, STATEMENT OF THE FACTS, AND STANDARD OF REVIEW

Treasure State Resources Association ("TSRA") adopts the Statement of the Case, Statement of Facts, and Standard of Review set forth by Appellants the Department of Environmental Quality ("DEQ"), Department of Natural Resources and Conservation, and Department of Transportation.

SUMMARY OF THE ARGUMENT

TSRA is an association of labor organizations, mining, timber, transportation, energy, construction, agriculture, and recreation businesses and groups that engage in the responsible use and development of Montana's natural resources. They all, in some fashion, rely on a variety of "state actions" through permits, leases, licenses, or other authorizations. Greenhouse gases ("GHGs"), in particular carbon dioxide ("CO2"), are a component of Montanans simply living their lives, pursuing life's basic necessities, and making a living through the responsible use and development of Montana's natural environment.

The District Court's Order ("Order") creates uncertainty for TSRA's members. Namely, it mires basic activity and daily life with the prospect of analysis-paralysis and litigation based on subjective standards that are not a part of any environmental regulatory program. The Order, or at least the Appellees' interpretation thereof, requires state agencies to engage in a nebulous analysis of state-based GHGs, which are not regulated even under the federal Clean Air Act

("CAA"), and whose impact in the global context is insignificant. Requiring an impact analysis of GHGs, and the subjectivity of such analysis, will effectively make Montana courts the permitting entity for every state action. Affirmation of the Order will envelop TSRA members in lengthy litigation to determine whether GHGs were adequately analyzed for every "state action." The adequacy of a GHG analysis will always be subjective and third parties will have a new tool to delay and increase the costs of pursuing projects despite no substantive regulatory provision that would prohibit the endeavor.

Consider the construction of two grain elevators in different areas of the state, both requiring permits under the Montana Air Quality Act. *See* Admin. R. Mont. 17.8.743 (a "state action" under the Montana Environmental Policy Act ("MEPA")). Where two identical grain elevators, with identical GHG emissions, seek air quality permits with the only difference being their location, the Order creates the potential for two very different results based on whether third parties disfavor a project and challenge the adequacy of GHG analysis. One project may be subject to GHG litigation, significantly increasing the costs and delaying the project, while the other is not, simply because no person challenged the GHG analysis. At the end of the day, CO2 emissions would continue to be unregulated rendering the entire GHG analysis and litigation pointless. Yet GHG lawsuits would continue to flood courts, which, under the Order's standard that "every ton of emissions is an injury," would

arbitrarily and subjectively determine the adequacy of the GHG analysis. *See* Order, at 24.

Appellees have cited to the Order demanding the State analyze GHGs and demanding the cessation of any new GHG emissions in Montana by threatening DEQ with contempt of court proceedings. *See* Our Children's Trust Demand Letters (2023) (attached as TSRA Appendix 1). Not only do these demands open the floodgates to endless interpretation and evaluation of what constitutes adequate GHG analysis, but Appellees overlook the multitude and breadth of activities, objects, and mechanisms which emit GHGs. Presently, a vast litany of GHG emissions in Montana are not subject to MEPA or GHG analysis. The District Court ignored the myriad of state actions, "ministerial" in nature, that also result in GHG emissions. For example, the state authorizes and licenses the operation of motor vehicles and equipment. Based on the Order and Appellees' demands, are Montana and its agencies required to undertake GHG analysis and limit the GHG emissions from every vehicle license issued?

Montana courts cannot stop emissions elsewhere in the country or globally. Those emissions will continue regardless of anything that happens in Montana.[1]

[1] CO2 emissions from Montana sources have decreased over time. Based on EPA data measuring between 1990 and 2020, gross CO2 emissions in Montana decreased by 21% between 2007 and 2020. *Draft Supplemental EIS and Potential RMP Amendment*, BLM (Miles City Field Office), p. 3-83 (May 2023), https://eplanning.blm.gov/public_projects/2021155/200534253/20077676/250083858/MCFO_DSEIS_May2023_508.pdf (last accessed February 8, 2024).

GHGs will continue to be released into the atmosphere and Appellees' alleged injuries will continue. TSRA's members will suffer the hardships imposed by the Order and Appellees' objectives will remain unrealized.

The Order was decided in a vacuum. The Order fails to place sideboards on evaluations of GHG emissions and provides no consideration of other constitutional rights or federal implications, instead elevating the right to a clean and healthful environment over any other consideration. TSRA's members' abilities to conduct businesses, use their property, employ individuals, and provide the necessities of food and energy will be impacted by the implications of the Order.

The Order is legally flawed, leads to absurd results, and will stymie basic activities by way of endless litigation. This Court should overturn the Order and remand for dismissal for any of the following reasons: (1) the Montana Legislature has satisfied its obligation to provide a clean and healthful environment pursuant to Mont. Const. art. IX, § 1; (2) the District Court failed to balance competing and related inalienable rights under Mont. Const. art. II; (3) the Order conflicts with existing caselaw which only requires MEPA consideration of an impact where the state has the authority to affect that impact; (4) the District Court failed to consider conflicts with federal laws; and/or (5) the District Court evaluated matters which constitute a political question and should permit the legislative and executive branches to address the matter.

ARGUMENT

I. The Legislature Satisfied It's Constitutional Directive Under Article IX of the Montana Constitution.

Article IX, § 1 of the Montana Constitution provides that the state shall maintain and improve a clean and healthful environment, and that the Legislature shall provide for the administration, enforcement, and adequate remedies to prevent unreasonable depletion and degradation of the state's natural resources. In fulfilling this constitutionally-imposed duty, the Legislature enacted both Senate Bill 557 and House Bill 971 in the 2023 Legislative Session. Both satisfy the Legislature's obligation under Article IX, § 1.

Not all Delegates to the Constitutional Convention agreed the right to a clean and healthful environment was the strongest environmental protection in the nation. In fact, the Chairperson of the Natural Resources Committee specifically disagreed with the notion of "the strongest constitutional environmental section of any existing state constitution." *See generally* Con. Trans. 1199 (Delegate Cross) (1972). Desiring stronger protection for the environment, Delegate Cross considered the provision advanced from committee to be weak and "restrictive in a direction which is not readily apparent." *Id.*

Other Delegates noted the "clean and healthful" provision of the Constitution recognized that use of non-renewable resources was to be expected, not prohibited, and it was rightfully the purview of the Legislature to determine what "unreasonable

depletion" of the natural environment was. *See generally* Con. Trans. 1201 (Delegate McNeil). Some Delegates expressed that degradation and use of Montana's natural resources would not cease, but instead must be balanced with the needs of society. *See* Con. Trans. 1267 (Delegate Murray) and 1268 (Delegate Berg).

Case law interpreting the constitutional right to a clean and healthful environment provides additional instruction:

> The delegates repeatedly emphasized that the rights provided for in subparagraph (1) of Article IX, Section 1 *were linked to the legislature's obligation* in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent *unreasonable* degradation of natural resources.

Montana Envtl. Info. Ctr. v. Dept. of Envtl. Quality, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 (emphasis added). In other words, it was the intention of the delegates that the Legislature enact reasonable and meaningful laws—to enact laws having actual impact on Montana's environment and recognizing that use of natural resources was necessary.

The Legislature periodically amended MEPA to refine the right to a clean and healthful environment. To oversee environmental regulations relating to MEPA and the constitutional right to a clean and healthful environment, the Legislature created the Environmental Quality Council ("EQC"). The EQC was intended to be the appropriate forum to evaluate and address activities of state agencies and recommend changes to policy and legislation concerning environmental regulation.

Mont. Code Ann. § 75-1-324. Furthermore, the Legislature enacted HB 971 and SB 557, minding their duties to provide adequate remedies and meaningful laws, while also recognizing the balance required by economic policy decisions.

HB 971 and SB 557 do not represent inaction of the Legislature, nor a disregard of GHGs. Instead, it is a recognition of reality and a nuanced balance of state government resources, economic policy, and a cost-benefit analysis. HB 971 specifically authorizes evaluations of GHGs and impacts to climate if CO2 is a regulated pollutant. *See* Mont. Code Ann. § 75-1-201(2)(a)-(b). Similarly, SB 557 prevented the frustration of a project due to GHG analysis adequacy unless CO2 was a regulated pollutant. Mont. Code Ann. § 75-1-201(6)(a)(ii).[2] SB 557 and HB 971 are the Legislature expressing the need for analysis of GHGs if CO2 is regulated. That is to say, if objective standards for GHG releases exist. Thus, the MEPA Amendments are a recognition that analyzing GHGs in Montana would prove insignificant without a collective national—and global—effort to reduce GHG emissions. These considerations and the resulting legislation are "reasonable" under those realities. *MEIC*, ¶ 77.

GHG emission occurs on a national and global scale and requires national and global coordination; it is not just a Montana problem. Appellees' alleged injuries can

[2] The District Court refers to Mont. Code Ann. § 75-1-201(2)(a)-(b) and (6)(a)(ii) as the "MEPA Limitation" in its Order (hereinafter referred to as the "MEPA Amendments").

only be addressed by the legislative and executive branches of the government. At the state level, courts cannot and should not attempt to formulate such a policy—to do so would obfuscate the Legislature's role in creating meaningful policy and regulation. That role is properly tasked to the Legislature, and the EQC, which fulfilled its duties and responsibilities under Article IX, § 1 with enactment of the MEPA Amendments.

Additionally, the Order destroys the intentions of the delegates regarding the ability of individuals to sue to enforce a right to a clean and healthful environment. As evidenced by the demands of the Appellees, the Order, if upheld, will be used countless times by individuals to enforce their right to a clean and healthful environment. *See* TSRA Appdx. 1. The Delegates specifically intended to avoid such situations and to limit lawsuits regarding the right to a clean and healthful environment where no relief could be realized and the only impact would be to frustrate others' rights to pursue necessities and possess property for economic activity. *See generally* Con. Trans. 1257-1258 (Delegate Dahood).

While both *MEIC* and *Park Cnty. Envtl. Council v. Montana Dept. of Envtl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288, repeatedly reference the comments of Delegate Robinson regarding an individual's ability to seek enjoinment of actions to prevent environmental degradation, neither opinion recognizes the fact that Delegate Robinson's comments were made in support of an amendment

specifically granting a right to sue. That amendment failed and the right to sue is not explicitly present in Mont. Const. art. IX, §1. *See generally* Con. Trans. 1241 (Delegate Robinson).

II. The Order Fails to Consider Other Inalienable Rights.

Article II, § 3 states:

> All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment and the rights of pursuing life's basic necessities*, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. (Emphasis added.)

Article II, § 3 provides not only the right to a clean and healthful environment, but also every Montanan's ability to pursue life's basic necessities and the right to possess property.

Unquestionably, life's basic necessities include energy for warmth, cooking, transportation, indoor lighting, etc. Realistically, an individual's home cannot be heated, the production and transportation of food cannot happen, and the treatment and pumping needed to obtain safe drinking water cannot occur without emissions of GHGs.

The Order elevates the inalienable right to a clean and healthful environment over and above any other right in Mont. Const. art. II, § 3. The Order ignores an individual's pursuit of necessities as well as one's ability to possess and use property. The District Court never considered its Order's impact on the fundamental rights of

every Montanan to be employed, to be warm, to obtain clean water, and ignores that the right to the clean and healthful environment is the only inalienable right delegated to the Legislature to reasonably provide for. *See* Mont. Const. art. IX, § 1 (Note that none of the other inalienable rights require reasonable implementation by the Legislature).

Given the irreconcilable conflict presented in the Order, this is such a case where balancing of these inalienable rights is appropriate. *Park County*, ¶ 80 ("Balancing may be appropriate when a case presents an irreconcilable conflict between the co-equal rights of the parties."). The cessation of GHG emissions directly conflicts with every person's ability to pursue basic necessities and to possess property—i.e., the pursuit of energy, food, transportation, property use and ownership, and potable water. The District Court's failure to undertake an analysis to balance other inalienable rights housed within Article II, § 3 is a clear violation of the rights of every Montanan, including TSRA's members.

III. No Montana Agency is Authorized to Prevent the Emission of GHGs, in Particular CO2.

MEPA requires an environmental review for any "state action." Mont. Code Ann. § 75-1-201(1)(b)(iv). The list of state actions MEPA applies to is broad and includes:

> [A] project, program or activity directly undertaken by the agency; a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency, either

> singly or in combination with one or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

See Admin.R.Mont. 17.4.603.

This Court has previously recognized that "MEPA requires 'a reasonably close causal relationship between the triggering state action and the subject environmental effect.'" *Water for Flathead's Future, Inc. v. Mont. Dep't of Envtl. Quality*, 2023 MT 86, ¶ 32, 412 Mont. 258, 530 P.3d 799. And that "requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 33, 388 Mont. 453, 401 P.3d 712.

MEPA is largely modeled on the National Environmental Policy Act ("NEPA"). *Montana Wildlife Fedn. v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 32, 365 Mont. 232, 280 P.3d 877. Thus, just like its national counterpart "MEPA is 'essentially procedural'" and "does not demand that an agency make particular substantive decisions." *Id*. Additionally, a central tenant of a NEPA analysis is that "[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority *to act on that information*." *Sierra Club*

v. FERC, 867 F.3d 1357, 1372, 85 ERC 1035, 432 U.S. App. D.C. 326, 341 (D.C. Cir. 2017) (emphasis in original).[3]

No law in Montana regulates, caps, or limits CO2 and no Montana agency is authorized to limit the amount of CO2 released by any individual or activity. There being no statutory authority to act on the amount of CO2 released, there should be no obligation to gather or consider the release of CO2. The MEPA Amendments, in fact, require an analysis of GHGs when CO2 becomes a regulated pollutant. Mont. Code Ann. § 75-1-201(2)(b)(ii) and (6)(a)(ii). In other words, C02 emissions are to be analyzed upon a Montana agency having the authority to act on that information. *Sierra Club*, 867 F.3d at 1372; *Bitterrooters*, ¶ 33. To hold otherwise would result in endless, subjective litigation and pointless analysis. Third party actors would have the ability to claim GHG analysis was inadequate, delaying and increasing the cost of any project. Appellees' demands and the Order requiring GHG analyses only result in increased costs in pursuing necessities and offers no environmental protections.

The Order clearly invalidates the MEPA Amendments, but does not clearly define the breadth of activities requiring GHG analysis. Appellees' case focuses heavily on GHG emission analysis for permits regarding thermal electricity

[3] Notably, all actions under the CAA [42 U.S.C. 7401] are exempted from the requirements of NEPA. 15 U.S.C. 793(c)(1).

generation and for the extraction of coal, oil, and natural gas. However, Mont. Code Ann. § 75-1-201(1)(b)(iv), applies to a broad array of state government functions.

For instance, the state authorizes and licenses the operation of motor vehicles and equipment. *See generally* Mont. Code Ann. § 61-3-301 et seq. and § 61-5-101 et seq. There are hundreds of thousands of commercial and non-commercial vehicles registered and licensed with the state which emit GHGs. Does the licensing and operation of vehicles constitute a state action affecting the quality of the human environment? *See* Mont. Code Ann. § 75-1-201(1)(b)(iv). If the Order is affirmed, does every vehicle within the state require a GHG analysis prior to registration and licensure by the state? Is that analysis, and the licenses and registrations themselves, subject to litigation?

Finally, without any sideboards stating where in the stream of commerce GHG analysis begins and ends, the Order implies that courts are to set that policy—inappropriately stepping into the role of the political branches and as specifically reserved to the Legislature in Mont. Const. art IX, § 1.

IV. The Invalidation of Mont. Code Ann. § 75-1-201(6)(a)(ii) was Improper.

SB 557, enacted as Mont. Code Ann. § 75-1-201(6)(a)(ii) (2023), specifies that a state authorization cannot be denied or delayed based on a claim that the analysis of GHGs or climate change was inadequate. The statutory changes therein

had never been applied to any permit, application, or state authorization. The District Court simply invalidated Mont. Code Ann. § 75-1-201(6)(a)(ii).

"[C]ourts have no 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." *Brisendine v. State, Dep't of Com., Bd. of Dentistry*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (1992) (quoting *Montana Dep't of Nat. Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976)).

Mont. Code Ann. § 75-1-201(6)(a)(ii) has never been utilized and Appellees never challenged any particular state action. In fact, Appellees have never alleged that any distinct authorization inadequately reviewed GHGs. Regardless, the District Court found that Mont. Code Ann. § 75-1-201(6)(a)(ii) was facially unconstitutional because it eliminated a litigant's ability to halt irreversible degradation.

Succeeding in a claim of facial invalidity is "difficult" and requires showing that "no set of circumstances in which the statute could be constitutionally applied." *City of Missoula v. Mont. Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685. No showing was undertaken in this case and the District Court undertook no analysis of whether or not the statute could be enforceable in any situation. Furthermore, the Appellees never even alleged Mont. Code Ann.

§ 75-1-201(6)(a)(ii) (2023) was unconstitutional when they filed their 2020 action. The District Court's invalidation of Mont. Code Ann. § 75-1-201(6)(a)(ii) is speculative and advisory, and thus non-justiciable. *Brisendine*, at 365. This Court should reverse the District Court's decision regarding Mont. Code Ann. § 75-1-201(6)(a)(ii).

V. The Order Conflicts with Federal Law.

U.S. Const., art. VI, ¶ 2 establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It generally prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusive to the federal government.

Federal preemption questions are analyzed based on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615 (1984), which states:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within the field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. (Emphasis added.)

Under the CAA, the Environmental Protection Agency ("EPA") has the authority to issue national air quality standards establishing the maximum allowable concentration of a given pollutant. *Id.* The CAA establishes a system of State

Implementation Plans ("SIPs"), whereby states submit proposed methods for maintaining air quality. *Id.* The CAA, therefore, places much of its enforcement burden on the states, which are required to submit SIPs that show how states will attain the standards for air pollutants. *Id.* Thus, Congress, through the CAA, expressed no intention of occupying the field for the purpose of installing state regulations of emissions, but rather would provide guidance and limitations on the SIPs approved. However, if a state were to propose or implement new standards or regulations pertaining to emissions, those standards and regulations could be preempted if they actually conflict with federal purposes, i.e., emission standards for vehicles across the state.

For example, the CAA's preemption clause states that no state or any political subdivision thereof shall adopt or attempt to enforce any standard *relating to* the control of emissions from new motor vehicles or new motor engines. 42 U.S.C. 7543(a); *see also Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 124 S. Ct. 1756 (2004) (establishing only California could qualify for a waiver of federal preemption under the CAA for CO2 emissions for new vehicles). Based on recent CAA caselaw, any emission-based regulation Montana sought to implement would face preemption. As it stands, the Order has such broad implications that any proposed emission standards or regulations would undoubtedly be preempted by the federal purposes under the CAA. The Order requires

measurement and analysis of GHGs, but for no meaningful or actionable purpose. The Legislature has purposefully not enacted a limitation or regulation on GHG emission, and no state agency has the legal authority to limit or otherwise cap the emission of CO2. *See generally* MEPA Amendments. Even if the Legislature enacted such a control, it would conflict with existing federal law and be preempted.

Furthermore, the requirements imposed by the Order conflict with the Interstate Commerce Clause. U.S. Const., art. 1, § 8 gives Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. *US v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995), established that Congress can regulate only the channels and instrumentalities of interstate commerce and activities that substantially affect or relate to interstate commerce. Based on *Lopez*, emission of GHGs would likely be characterized as a regulated activity under the Commerce Clause. More importantly, any law that regulates the production of electricity or goods that are sold across state lines would certainly qualify as a regulation of persons or things in interstate commerce and require federal consideration, and quite possibly preemption of state law. Montana is an energy exporter, and thus, coal mined in the state is shipped nationally and internationally, e.g., the Colstrip Generating Station burns coal to produce electricity purchased by utilities for metropolitan areas in Oregon and Washington. If Montana's Constitution required analysis of GHG emissions as required by the Order, and regulated as

implicated by the Order, the impact on interstate commerce would be undeniably significant.

Another example is our national transportation system, which is substantially powered by internal combustion, resulting in emission of GHGs. The cars, trucks, trains, and airplanes of our transportation system burn fossil fuels to effectuate interstate commerce. These certainly fall within the traditional category of instrumentalities of interstate commerce. The rationale of *Lopez* forecloses the argument that all activities which may be associated with or undertaken in furtherance of traditionally economic activities qualify as economic activities in their own right. *Lopez*, 514 U.S. at 559.

The Order would also require federal review and consideration as it contains issues of major national significance under the major questions doctrine. *See Util. Air Regulatory Grp. v. Envtl. Protection Agency*, 573 U.S. 302, 134 S. Ct. 2427 (2014). Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast economic and political significance, and (2) Congress has not clearly empowered the agency with authority over the issue." *Id.*

The Supreme Court has not defined what "vast economic and political significance" means in applying the major questions doctrine, but has applied the doctrine, twice, to questions pertaining to GHG emissions. *See Massachusetts*

v. EPA, 549 U.S. 497 (2007) (rejecting EPA's argument that it did not have legal authority to regulate GHG emissions from motor vehicles) and *West Virginia v. Envtl. Prot. Agency*, 597 U.S. 697, 142 S. Ct. 2587 (2022) (rejecting an EPA regulation of GHG emissions premised on generation shifting). Thus, one could argue, GHG emissions and regulation of such are questions of vast economic and political significance requiring an analysis under the major questions doctrine. In essence, an agency will lack the ability to determine authoritatively a major question if it lacks "clear congressional authorization." If Congress wants an agency to decide an issue considered to be of vast economic and political significance, Congress should clearly specify that intention in a statute. Applicable here, Congress clearly mandated the authority to consider and approve SIPs to the EPA and any alteration or addition to an SIP would require EPA oversight and, most likely, federal preemption.

The Order is essentially a policy decision, which does not provide the agencies with the rubric to make detailed findings to support the narrowly tailored application of the Commerce Clause to emissions regulations. Without consideration of resulting impacts of climate change on commerce, regulations pertaining to the emission of GHGs would likely burden agencies and require businesses, small operations, and individuals to incur financial costs. In its entirety, the Order is an impermissible restriction on interstate commerce.

Finally, the Order presents a political question relating to GHG emissions and must be reserved for the proper political branches of government, not the courts or the state agencies. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962) requires political question inquires to evaluate "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Dependent upon the issues before the court, a political question doctrine analysis may be textual—asking whether commitment of the issue to an elected branch is "prominent on the surface"—or prudential—applies in the absence of a textual commitment, but when there are functional reasons for judicial restraint. *Baker*, 369 U.S. at 217.

California v. General Motors Corp, 2007 WL 2726871 (N.D. Cal, Sept. 17, 2007), is the leading case finding there to be a "textually demonstrable constitutional commitment" of climate change issues to a coordinate political department. The court held that "concerns raised by the potential ramifications of a judicial decision on global warming in this case would sufficiently encroach upon interstate commerce, to cause the [c]ourt to pause before delving into such areas so constitutionally committed to Congress." *California*, at *14. The *California* court also held that "congressional inaction signaled a deliberate decision to refrain from any unilateral commitment to reducing GHG emissions domestically *unless*

developing nations make a reciprocal commitment;" thus, the federal question common law raised a nonjusticiable political question. *Id*. (emphasis added).

Here, the Order, and, in turn, Appellees' demands, implicate a political question similar to that evaluated in *California*. Like the *California* court, Montana's Legislature specifically and purposefully refrained from GHG analysis unless CO2 becomes a regulated pollutant. Until the federal government requires all states to regulate GHG emissions, and provides metrics for how to analyze GHG emissions in authorizing a permit, license, grant, etc., such unilateral requirements—like those imposed by the Order—constitute a nonjusticiable political question.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order and remand for dismissal.

Dated this 16th day of February, 2024.

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In compliance with Rule 11(4)(a), M.R.App.P., counsel for Amicus Curiae certifies that the foregoing Amicus Curiae Brief is printed with a proportionately spaced Times New Roman font of 14 points; is double-spaced (excluding captions and quotes); and the word count calculated by Microsoft Word is no more than 5,000 words (excluding this certificate of compliance and the following certificate of service).

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