IN THE SUPREME COURT OF MONTANA

Cause No. DA 25-0808

GATEWAY CONSERVATION ALLIANCE,

Plaintiff-Appellant,

vs.

STATE OF MONTANA, and MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee,

and

TMC, INC.,

Intervenor-Appellee.

ANSWER BRIEF OF INTERVENOR-APPELLEE TMC, INC.

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County
Cause No. DV-16-2024-0000838-OC

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ISSUE PRESENTED FOR REVIEW

Is exhaustion of the administrative remedies in the Montana Administrative Procedure Act a jurisdictional prerequisite to filing a district court claim that the Montana Opencut Mining and Reclamation Act is unconstitutional?

STATEMENT OF THE CASE

TMC, Inc. holds Opencut Permit #3462, issued by the Montana Department of Environmental Quality (DEQ), authorizing gravel mining and a reclamation plan for a site near Gallatin Gateway in Gallatin County. Opencut permit applications are reviewed and issued under the terms of the Montana Opencut Mining and Reclamation Act (Opencut Act), Mont. Code Ann. §§ 82-4-401, *et seq.* Persons who participate in and are aggrieved by the result of the Opencut Act's administrative process may appeal DEQ's permitting decision to the Montana Board of Environmental Review by way of a contested case proceeding under the Montana Administrative Procedure Act (MAPA).

Appellant Gateway Conservation Alliance (Gateway) appealed DEQ's decision to issue Permit #3462 to the Board of Environmental Review, alleging errors in DEQ's Title 82, Opencut Act review of TMC's permit application. Some months after its appeal with the Board of Environmental Review was underway, Gateway began this case when it sued DEQ in Gallatin County to obtain a

judgment that the Opencut Act, as amended by House Bill No. 599, 2021 Mont. Laws Ch. 545, §§ 1-9 (HB 599) is unconstitutional both on its face and as applied.

The District Court disposed of Gateway's claims by granting two motions to dismiss – one covering Gateway's as-applied constitutional claim, and one dismissing Gateway's facial claim. *See* Doc. 27 and 36, respectively. The grounds for both decisions were Gateway's failure to exhaust its administrative remedies (here the Board of Environmental Review), as instructed by *City of Great Falls v. Int'l Ass'n of Fire Fighters*, 2024 MT 302, 419 Mont. 262, 560 P.3d 621. The District Court entered judgment covering both the first dismissal and the second. Gateway's appeal to this Court followed.

STATEMENT OF FACTS

HB 599 (Appendix 1) amended the code provisions governing when an Opencut permit must be obtained from DEQ (in part):

- Clarifying that county zoning regulations purporting to restrict gravel mining must be in effect before a permit applicant begins the application process. Amended §§ 76-2-209(2) and (3), MCA.
- Defined the term "occupied dwelling unit" (relating to the notice an Opencut permit applicant must provide) as "a structure with permanent water and sewer facilities that is used as a home, residence, or sleeping place by at

least one person who maintains a household that is lived in as a primary residence." Amended § 82-4-403, MCA with new subsection (7).

- Defined "water conveyance activities" (relating to the necessity of a permit) as "existing diversions, aqueducts, canals, ditches, drains, flumes, headgates, syphons, or other structures or infrastructure actively used to facilitate the beneficial use of a water right under Title 85." Amended § 82-4-403, MCA with new subsection (16).
- Amended operations requiring an Opencut permit to include those removing less than 10,000 cubic yards of material if the operation "affects surface water, including intermittent or perennial streams, ground water, or water conveyance facilities." Added new subsection (b)(i) to § 82-4-431(1), MCA.
- Provided that an operator with an existing opencut permit "may conduct a limited opencut operation" without an amended or additional permit, unless the operation is located more than one-half mile from the permitted site, or more than 10,000 cubic yards of material will be removed, or the total area to be mined exceeds 5 acres. Amended § 82-4-431(2), MCA.
- Specified that a limited opencut operation is not available if it is in any area that "will affect surface water, ground water, a water conveyance facility, or any slope that is steeper than 3:1." *Id*.

- Allowed landowners to remove up to 10,000 cubic yards of material on their own property without an Opencut permit only for personal or agricultural use "unless the removal affects surface water, including intermittent or perennial streams, ground water, or water conveyance facilities." Added § 82-4-431(3), MCA.

HB 599 also amended what is required to be included in an application for an Opencut permit (in part):

- A lengthy list of information on DEQ forms is required for operations "that affect ground water or surface water, including intermittent or perennial streams, or water conveyance facilities; or where 10 or more occupied dwelling units are within one-half mile of the permit boundary of the operation." New § 82-4-432(1)(b)(i) and (ii), MCA.
- Clarified that DEQ must hold a public meeting in the area of the proposed gravel operation where "51% of the real property owners on which occupied dwelling units exist or 10 real property owners on which occupied dwelling units exist, whichever is greater, notified pursuant to this section. For the purposes of this subsection (9)(a)(ii), multiple owners of the same occupied dwelling unit are to be counted as a single real property owner." Amended § 82-4-432(9), MCA.

TMC's permit application was evaluated under the Opencut Act's full scope. None of HB 599's amendments involving the limited opencut operation are applicable to Opencut Permit # 3462.[1]

STANDARD OF REVIEW

The Court reviews de novo a district court's ruling on a motion to dismiss pursuant to Mont. R. Civ. P. 12. *Tai Tam, LLC v. Missoula County*, 2022 MT 229, ¶ 8. "A court's decision that a party failed to exhaust administrative remedies presents a conclusion of law reviewed for correctness." *Flowers v. Bd. of Personnel Appeals, et al*., 2020 MT 150, ¶ 6, 400 Mont. 238, 465 P.3d 210, citing *Schuster v. Northwestern Energy Co.*, 2013 MT 364, ¶ 6, 373 Mont. 54, 314 P.3d 60.

SUMMARY OF ARGUMENT

The District Court correctly dismissed Gateway's constitutional claims based on *City of Great Falls v. Int'l Ass'n of Fire Fighters,* 2024 MT 302, 419 Mont. 262, 560 P.3d 621, which is controlling precedent. Gateway has administrative remedies it did not exhaust before filing its district court lawsuit,

[1] The Statement of Facts in Gateway's opening brief largely consists of citations to its own arguments or allegations in the First Amended Complaint. Even where the citation is to the actual source of the statement, Gateway attaches its commentary. As a result, Gateway's Statement of Facts cannot be taken at face value.

namely a Montana Administrative Procedure Act contested case in the Board of Environmental Review.

Although *City of Great Falls* did not change "a narrow pure question of constitutional law exception" to administrative remedies exhaustion in MAPA (Mont. Code Ann. § 2-4-702(1)(b)), in this case Gateway wants it both ways: simultaneously claiming that it seeks a narrow constitutional ruling while making voluminous, factually untested allegations the administrative process is designed to scrutinize.

ARGUMENT

I. The *City of Great Falls* Is Controlling Precedent Affirming the District Court's Dismissal of Both Constitutional Claims.

"The time has come to borrow William of Occam's razor…" *Chaffeurs, Teamsters and Helpers. Local No. 391 v. Terry*, 494 U.S. 574-575 (1990) (Brennan, J., concurring). In this case the simplest answer is correct. *City of Great Falls v. Int'l Ass'n of Fire Fighters (City of Great Falls),* 2024 MT 302, 419 Mont. 262, 560 P.3d 621 binds the Court's analysis here, because what Gateway wants was squarely repudiated in that case.

In *City of Great Falls*, labor unions filed unfair labor practice complaints with the Montana Board of Personnel Appeals. *City of Great Falls*, 2024 MT 302, ¶ 4. That triggered a MAPA contested case process. *Id*. ¶ 5. Before those

administrative proceedings were completed, the City filed a petition for judicial review pursuant to Mont. Code Ann. § 2-4-701, a MAPA provision providing that a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." MAPA's provision for judicial review of administrative decisions extends, however, only to "a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case…" Mont. Code Ann. § 2-4-702(1)(a). The City's justification for petitioning the district court before a final written decision in the MAPA contested case was that the administrative exhaustion requirement in Mont. Code Ann. § 2-4-702(1)(a) did not apply to pure questions of law. *City of Great Falls*, ¶ 7.

Gateway devotes many pages of tightly parsed discussion of various cases pre-dating the *City of Great Falls*, which said:

> [A] sweeping jurisprudential pure question of law, or narrower pure question of constitutional law, exception to § 2-4-702(1)(a), MCA, would irreconcilably conflict with the authorized scope of the final agency review remedy expressly provided by §§ 2-4-621(1)-(3) and -623(1), MCA (inter alia providing for party "exceptions" of "fact or law" and final agency review of hearing examiner's proposed conclusions and applications of law in MAPA contested case proceedings).

City of Great Falls, ¶ 28.

One could simply substitute "Board of Environmental Review" for "Board of Personnel Appeals" to highlight the similarity between Gateway's approach and

the unsuccessful effort by the City of Great Falls. Both entities took advantage of the right to challenge an agency's decision by filing a MAPA contested case appeal with a citizen board, knowing that MAPA's provision for judicial review depended on obtaining the board's final decision. And both entities then filed district court petitions in the middle of that administrative process.[2]

As *City of Great Falls* emphasized, there is definite value in allowing the administrative process provided in a MAPA contested case to run its course. First, it gives the involved agency "an opportunity to correct its own errors before a court interferes" with the administrative process. *Id.* ¶ 17. Requiring exhaustion of administrative remedies "also furthers both the interests of 'judicial economy'…and the interest of agency 'efficiency' in the attendant performance of legislatively-assigned legal duties and functions." *Id.* ¶ 18. There is nothing unfair or unduly prejudicial to Gateway in requiring it to support its allegations in the administrative process before petitioning the district court with them.

As this Court has said, the doctrine of stare *decisis* "is of fundamental and central importance to the rule of law. Indeed, there is no question but that very weighty considerations underlie the principle that courts should not lightly overrule

[2] Gateway is obviously sensitive to the appearance of these tactics, because it claims it "brought a separate BER appeal" that was "[c]concurrent with this case," when the opposite is true – Gateway filed its administrative appeal and then later decided to pursue this case. *See* Gateway Br. p. 4.

past decisions." *McDonald v. Jacobsen*, 2022 MT 160, ¶ 30, 409 Mont. 405, 515 P.3d 777. The Court has seen this case before and the same result should apply here.

II. Gateway's Constitutional Claim Cannot Be Totally Divorced From The Facts.

At this juncture, after loading the district court file with reams of factual allegations, Gateway tries to thread the needle through "the narrow MAPA contested case exception embodied in Mont. Code Ann. § 2-4-702(1)(b)." *Id*. ¶ 30. That provision permits a district court challenge to a particular statute, *if it was raised before the agency*, "unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency." Mont. Code Ann. § 2-4-702(1)(b). *City of Great Falls* emphasized that a "pure question" of constitutional law cannot be "accompanied by an issue regarding a fact-based determination within the subject matter jurisdiction of the involved agency." *Id*. ¶ 24.

Gateway suggests that its facial constitutional claim is not a fact-based determination because: "The specific facts related to the Black Pit in Gallatin County are relevant to the extent they establish standing for Gateway and provide context but were not plead in any way as being relevant to, or dispositive of" Gateway's claim that the Opencut Act is unconstitutional on its face. Gateway Br. p. 4. The fallacy of that contention is immediately revealed in the remainder of the

sentence, which goes on to say that "the singular question before the District Court" was whether "the legislature has authority to *remove all hydrological analysis and environmental protection measures*" from the Opencut Act. *Id*. (emphasis added). If Gateway's case for avoiding exhaustion of administrative remedies is based on accepting the statement that "all" environmental protection measures were removed from the Opencut Act, Gateway's case fails coming out of the gate because that statement is demonstrably contradicted by the very contents of the Opencut Act. *See e.g*. Mont. Code Ann. § 82-4-432(1) (requiring permit for operations that affect ground water or surface water, *inter alia*); Mont. Code Ann. § 82-4-432(2)(b)(iii) (requiring that the opencut permit application must include a plan of operation containing sufficient information to meet the requirements of Mont. Code Ann. § 82-4-434); and Mont. Code Ann. § 82-4-434 (specifying detailed requirements for a plan of operation, which include measures for handling and protection of soil, vegetation, and protection of water quality, *inter alia*.)

Gateway's heavy use of categorically incorrect statements about environmental protection in the Opencut Act (*all* environmental protection removed, *no* plan of operation required, etc.) probably explains why the District Court said, "In this case, so as to have an adequate picture of the constitutional implications of the challenged statute, the Court needs facts that pertain to that question." Doc. 36, p. 3. The intent of Gateway's appeal and the district court

effort is obviously to avoid subjecting its factual claims to scrutiny. Gateway will contend otherwise, but nothing else explains why, if Gateway's factual claims are truly only for purposes of standing (not even contested in this appeal) or "context," Gateway submits pages of factual allegations.

With regard to the facts relating to a claim that a statute is unconstitutional on its face, this case is nothing like *Held v. State*, 2024 MT 312, 419 Mont. 403, 560 P.3d 1235. In *Held*, the legislature eliminated any consideration of climate change in environmental reviews under the Montana Environmental Policy Act. In this case, the legislature revamped many aspects of a lengthy and heavily technical permitting statute, and Gateway's entire case is geared to reversing the pieces of those amendments with which it does not agree so it can argue that the opencut permit is invalid. Under Montana law, Gateway could not do that without its contested case in the Board of Environmental Review. Gateway should not be allowed to simultaneously make outlandish claims about the legislature's actions while shielding them with a facial constitutional argument, at least not until those claims have been fairly examined in the administrative process designed for that purpose.

CONCLUSION

For the reasons set forth above, the Court should affirm the District Court's dismissal of Gateway's amended complaint.

RESPECTFULLY SUBMITTED this 25th day of March, 2026.

CROWLEY FLECK PLLP

By: /s/ *Mark L. Stermitz*
Mark L. Stermitz

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CERTIFICATION 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 2,453, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

/s/ *Mark L. Stermitz*

CERTIFICATE OF SERVICE

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