IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0575

RIKKI HELD, ET AL.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, ET AL.

Defendants and 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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APPELLANT STATE AGENCIES' AND GOVERNOR'S REPLY BRIEF

DALE SCHOWENGERDT
Landmark Law PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Lee M. McKenna
Montana DEQ
P.O. Box 200901
Helena, MT 59620-0901
406-444-6559
Lee.mckenna@mt.gov

Attorney for Appellants-Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation and Governor Gianforte

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
406-444-2026
michael.russell@mt.gov
thane.johnson@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
406-384-7990
emily@joneslawmt.com

Mark L. Stermitz
CROWLEY FLECK, PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801-2701
406-523-3600
mstermitz@crowleyfleck.com

Selena Z. Sauer
CROWLEY FLECK, PLLP
PO Box 759
Kalispell, MT 59903-0759
406-752-6644
ssauer@crowleyfleck.com

Attorneys for Appellant-Defendant State of Montana

Roger Sullivan
Dustin Leftridge
McGARVEY LAW
345 1st Avenue East
Kalispell, TM 59901
406-752-5566
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Nathan Bellinger (pro hac vice)
Andrea Rodgers (pro hac vice)
Julia Olson (pro hac vice)
OUR CHILDREN'S TRUST
1216 Lincon Street
Eugene, OR 97401
413-687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Melissa Hornbein
Barbara Chillcott
WESTERN ENVIRONMENTAL
LAW CENTER
103 Reeder's Alley
Helena, MT 59601
406-708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Philip L. Gregory (pro hac vice)
GREGORY LAW GROUP
1250 Godetia Drive
Redwood City, CA 94062
650-278-2957
pgregory@gregorylawgroup.com

Attorneys for Appellees-Plaintiffs

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INTRODUCTION

Held's response brief fails to patch the holes in her flawed standing theory. The Ninth Circuit has recognized that slowing climate change will require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world." *Juliana v. United States*, 734 F.3d 1159, 1171 (9th Cir. 2020). Held's complaint likewise concedes that slowing climate change will require (1) a global effort to reduce GHG emissions by 11% every year from now until the year 2100; and (2) a rapid transition to 100% renewable energy. Doc. 1 at 87–88. Striking one subsection of MEPA—a procedural statute that does not give agencies any authority to condition, modify, or deny permits—cannot stop, alter, or meaningfully slow global climate change. That should have led the District Court to conclude that Held lacks standing. It did not.

The District Court's conclusion that Held had proven causation and redressability resulted from several analytical missteps. To name a few, the District Court:

- relied on vague, conclusory assertions about the relationship between Montana and climate change, *see, e.g.*, FOF 139 ("[a]ctions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs");

- failed to analyze to what extent section 75-1-201(2)(a) contributed to Montana's GHG emissions;

- conflated State actions dating back to the 1960's with a statute first enacted in 2011;

- and attributed hundreds of millions of annual out-of-state emissions to Montana simply because fuel sources leading to those emissions were extracted from or transported through Montana without considering whether a MEPA review had any connection to these emissions.

Held's' response brief retraces the District Court's missteps. Like the District Court, Held leans on vague assertions that "every ton of emissions matters" and state actions have, to some unspecified degree, led to GHG emissions. Resp. Br. 28, 33–39. But Held has not shown any meaningful causal link between section 75-1-201(2)(a) and the emissions resulting in plaintiffs' alleged climate injuries. The question here is whether a subsection of a procedural statute is to blame. It is not. MEPA provides information about potential impacts, § 75-1-102(3)(a), but by its own express terms, does not give agencies authority to condition, modify, or deny permits. § 75-1-201(4)(a), MCA. While every ton of emissions may matter, Held failed to show that section 75-1-201(2)(a) is responsible for a single ton of emissions.

And while Held speculates that striking section 75-1-201(2)(a) will encourage state agencies to deny future permits for projects that emit greenhouse gases, she points to no evidence this will occur. Nor does she make any attempt to quantify the extent to which this speculative future change will slow climate change.

Instead, like the District Court, Held retreats behind overbroad generalizations. *See* Resp. Br. 37 ("GHG emissions that result from Defendants' uninformed permitting of fossil fuel projects … cause and contribute to the climate crisis because every additional ton of CO2 emissions permitted by Defendants worsens an already dangerous situation and makes recovery more difficult.") Proving standing requires more than reciting conclusory magic words.

Bitterrooters further shows why the District Court and Held are incorrect in thinking that MEPA requires State agencies to evaluate GHG impacts for fossil fuels transported through or extracted in Montana but combusted out of state. Under *Bitterrooters*, an agency's permitting decision allowing the transportation or extraction of fossil fuels is not a "cause" of combusting those fossil fuels. MEPA, therefore, does not require the evaluation of downstream impacts related to their combustion. Plus, the Federal Commerce Clause does not allow Montana state agencies to regulate GHG emissions and their impacts beyond Montana. With or without section 75-1-201(2)(a), MEPA would not require agencies to review these impacts.

At bottom, Held blames a subsection of MEPA for a host of problems that MEPA did not cause and cannot prevent. Section 75-1-201(2)(a) is not responsible for emissions occurring beyond Montana's borders. Nor can section 75-1-201(2)(a)

impede a transition to 100% renewable energy by 2035. MEPA exists to inform the public and the legislature about environmental impacts that are within the ambit of an agency's regulatory authority. To ask MEPA to solve—or even slow—climate change is to ask too much.

Should this Court reach the merits, Held's facial challenge to section 75-1-201(2)(a) fails to show that the statute is unconstitutional in every conceivable application. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1311 ("*MCIA*"). The 2023 amendments to MEPA allow agencies to consider GHG emissions when conducting joint environmental reviews with federal partners. *See* § 75-1-201(2)(b)(i). State agencies often conduct environmental reviews with federal partners. And current federal guidance directs federal agencies to consider GHG emissions and climate change in NEPA reviews. Thus, in many cases, MEPA authorizes precisely the kind of environmental review Held seeks.

Finally, even if this Court strikes section 75-1-201(2)(a), it should clarify that the District Court lacked power to affirmatively order state agencies to incorporate GHG emissions and climate impacts into MEPA. Courts may strike statutes that violate the constitution. But crafting a replacement statute is an exercise of legislative, not judicial power.

ARGUMENT

I. Held's injuries are not fairly traceable to section 75-1-201(2)(a). And enjoining section 75-1-201(2)(a) will not redress those injuries.

Held implies that standing is a watered-down formality in Montana courts. *See* Resp. Br. 22–23. Not so. Under our constitution, a court lacks power to resolve a case brought by a party without standing. *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427. Standing is a crucial constitutional guardrail that limits courts to resolving concrete disputes between litigants, rather than making policy. *See Bullock v. Fox*, 2019 MT 50, ¶¶27–28, 395 Mont. 35, 435 P.3d 1187. Standing doctrine "protects liberty," *Juliana*, 734 F.3d at 1174, by holding courts to their "proper—and properly limited—role … in a democratic society." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (cleaned up). It preserves the "sacrosanct separation of powers dictated by the Montana Constitution" and prevents courts from entangling themselves "in the political firestorm of the day." *Mont. Dem. Party v. Jacobsen*, 2024 MT 66, ¶¶ 171–172, 2024 WL 1291935 (Sandefur, J., concurring in part and dissenting in part). Were standing a mere formality, "individuals and groups could invoke the authority of a … court to forbid what they dislike for no more reason than they dislike it." *American Legion v.*

American Humanist Ass'n, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring in judgment).[1]

The District Court departed from these bedrock principles and crafted policy. That departure from constitutional limits, however well-intentioned, is reversible error.

Held recasts the District Court's standing analysis as a series of factual findings subject to deferential clear error review, Resp. Br. 14, 16, 22, 34, 38, 51, 53, but standing is a question of law which this Court reviews de novo. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 28, 360 Mont. 207, 255 P.3d 80. True, the District Court made hundreds of factual findings. But the District Court's *standing analysis* comprised legal conclusions. *See* Doc. 405 86–90. This is true even though the District Court listed some of those legal conclusions in the "findings of fact" section of its order. *See, e.g.*, Doc. 405 at 79 ("Defendants' actions *cause* emissions of substantial levels of GHG pollution into the atmosphere within Montana and

[1] Plaintiffs ask this Court to open "the courthouse doors … a little wider" than the federal Constitution allows. *See* Resp. Br. 15. But this Court has squarely held that the Montana Constitution "embodies" the same justiciability limitations as Article III of federal constitution. *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567. Thus, federal standing precedents "are persuasive authority for interpreting the justiciability requirements" of the Montana Constitution. *Id.*

outside its borders, contributing to climate change."); *see also* Doc. 405 at 86 ("To the extent that any of the foregoing Findings of Fact incorporate Conclusions of Law … they are incorporated herein as Conclusions of Law."). This Court should reject Held's attempt to shield the District Court's standing analysis from meaningful appellate review.

A. Held failed to prove causation at trial.

Standing requires a plaintiff to prove a meaningful causal link between her injuries and state "[a]gencies' alleged misconduct." *Washington Envt'l Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013); *see also Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241.[2] "The line of causation between the defendant's action and the plaintiff's harm must be more than attenuated." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citation and quotes omitted). And "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." *Native Vill. of Kivalina*, 696 F.3d at 867.

[2] Plaintiffs suggest that causation is not an explicit requirement of case-or-controversy standing in Montana. That is incorrect. *See Larson*, ¶ 46 (standing requires "*a direct causal* connection between the alleged injury and specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff") (emphasis added).

1. The District Court's generalized conclusions about Montana's contribution to climate change do not establish that section 75-1-201(2)(a) is responsible for Held's injuries.

The Ninth Circuit's *Bellon* decision illustrates why Held has failed to establish causation. The *Bellon* plaintiffs sought to compel Washington state agencies to set standards for regulating GHG emissions from the state's five oil refineries. *Id.* 1135. Like Held, the *Bellon* plaintiffs claimed that the agencies' failure to set these standards "contributed to greenhouse gas pollution" and caused them to suffer various injuries. *Id.* at 1140. But the *Bellon* plaintiffs offered "only vague, conclusory statements that" the agencies' failure to regulate GHGs "contributes to [GHG] emissions, which in turn, contribute to climate-related changes that result in their purported injuries." *Id.* The Ninth Circuit concluded that the plaintiffs' causal chain was not enough for standing, because it "consist[ed] of a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or evidentiary basis that the refineries' emissions are the source of their injuries." *Id.* at 1142.

The *Bellon* plaintiffs' "vague, conclusory statements" almost seem specific when compared to the District Court's findings and Held's arguments here. *Compare Bellon*, 732 F.3d at 1142-43 *with, e.g.*, Doc. 405, 70 ("[w]hat happens in Montana has a real impact on fossil fuel energy systems, CO2 emissions, and global

warming"). The District Court made hundreds of findings about the impact of climate change in Montana. *See* Doc. 405 at 17–70. But when it came time to link those impacts to section 75-1-201(2)(a), the District Court retreated into abstraction. *See, e.g.*, Doc. 405 at 79 ("Montana's annual, historical, and cumulative GHG emissions are *increased* by Defendants' actions to permit and approve fossil fuel activities with no environmental review of their impact on GHG levels in the atmosphere and climate change.") (FOF # 266); *id.* ("Defendants' actions cause emissions of substantial levels of GHG pollution into the atmosphere within Montana and outside its borders, contributing to climate change.") (FOF # 267); *id.* at 88 ("Montana's GHG contributions are not *de minimis* but are nationally and globally significant.") (COL # 16); *id.* at 88 ("Montana's GHG emissions cause and contribute to climate change and Plaintiffs' injuries and reduce the opportunity to alleviate Plaintiffs' injuries.") (COL #16). These talismanic recitations of "contribution" did not attempt to connect the impacts of climate change to the statute challenged in this case. *Bellon*, 732 F.3d at 1142–43.

Held's arguments on appeal double down on the District Court's errors. Like the District Court, Held blames Montana for 166 million tons of annual CO2 emissions, but ignores that most of these emissions result from energy sources combusted in other states and countries. *See* Resp. Br. 34–35. Held also relies on

her experts' dutiful recitation that "every ton of CO2 matters." *See* Resp. Br. 37, 52. These experts' "conclusory, generalized statements of 'contribution,'" *Bellon*, 732 F.3d at 1142, carefully avoided definitive statements about how much Montana contributes to climate change. *See, e.g.*, Tr. 279:19-20 ("[E]very ton of CO2 put in the atmosphere contributes to global warming"); *id.* 314:23-25 ("[A]s I said earlier, every ton of CO2 that's released to the atmosphere impacts the climate."); *id.* 379 ("[E]very ton of CO2 makes a difference"); 952:14–15 ("Every ton of CO2 emissions adds to global warming" by some unspecified degree).

Aside from these generalities, Held points to no evidence attempting to quantify—even at a general level— how many emissions section 75-1-201(2)(a) has caused or will cause. Asserting that Montana's government has "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." *Bellon*, 732 F.3d at 1143 (cleaned up). Held failed to provide any "plausible scientific or other evidentiary basis" to show that section 75-1-201(2)(a) is the source of Plaintiffs' injuries. *Id.* at 1142; *see Larson*, ¶ 46 ("[A] general or abstract interest in the constitutionality of a statute … is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered, by

the plaintiff."). When pressed, even Held's experts conceded that eliminating *all* of Montana's emissions would not stop the impacts of climate change. *See, e.g.*, Tr. 178:9-22 (eliminating all Montana emissions *might* slow climate change if it inspired "a significant social movement" that "extrapolate[d] to countries all around the world").

By accepting Held's attenuated causal chain, the District Court treated standing as a pro forma box to check, rather than a threshold constitutional limitation on its power. That is reversible error.

2. MEPA cannot be the cause of emissions from energy projects, because MEPA does not allow agencies to deny or modify permits.

Held's standing arguments continue to misunderstand the purpose of MEPA. While Held blames section 75-1-201(2)(a) for the effects of climate change, MEPA does not authorize state agencies to deny or modify permits for so-called "fossil fuel projects." § 75-1-201(4)(a), MCA. Held concedes this, Resp. Br. 47, but still insists that striking section 75-1-201(2)(a) will somehow reduce emissions in Montana. *See, e.g.*, Resp. Br. 28–31. That is pure conjecture. No evidence at trial supported this conclusion. Nor did the District Court make any findings about whether, how, and how much striking section 75-1-201(2)(a) will slow the process of climate change. No one argues that MEPA is unimportant, *see* Resp. Br. 27–28,

but that does not mean MEPA can prevent GHG emissions and stop climate change.

Held counters that she need not show that section 75-1-201(2)(a) is the *sole* cause of her injury. Resp. Br. 15, 36–39, 41, 51. As a general legal principle, that is true enough. But Held fails to show *any* meaningful causal link between section 75-1-201(2)(a) and their injuries. Like the District Court, Held instead relies on broad assertions such as "all GHG emissions matter," and "[a]ctions taken by the state to prevent further contributions to climate change will have significant health benefits to Plaintiffs." Resp. Br 51–52. Held makes no effort to explain what these "actions" are, how they will slow climate change, or what the resulting "significant health benefits" will be. *Bellon*, 732 F.3d at 1141–45. Held has not proven a meaningful causal link between section 75-1-201(2)(a) and her climate injuries.

B. Held failed to establish redressability at trial.

Held fails to show redressability for similar reasons. "Redressability" requires the plaintiff to show that it "is likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up). It is not likely, or even plausible, that enjoining section 75-1-201(2)(a) will slow climate change. According to Held's complaint, slowing climate change will require, at a minimum, a *worldwide*

reduction in GHG emissions by nearly 11% every year from now until 2100. Doc. 1 at 87. Held's experts conceded this at trial, too. Tr. 953:1–2 (Dr. Erickson testifying, "We're at a point where we *rapidly* need to reduce emissions *globally*[.]") (emphasis added). In *Juliana*, the Ninth Circuit summed it up: even "*reducing* the global consequences of climate change" will require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world." 947 F.3d at 1170–71 (emphasis added).

Held never explains how striking one subsection of MEPA will slow climate change and address her injuries. Resp. Br. 46–50. Nor could she. MEPA's plain text prohibits agencies from denying or modifying a permit. § 75-1-201(4)(a). And substantive permitting statutes do not give DEQ discretion to deny permits because of a project's GHG emissions. Tr. 1389:20–1390:17. Indeed, the Montana Legislature has considered and rejected many bills that would have authorized agencies to regulate GHG emissions in Montana.[3] Held may disagree with the Legislature's choice, but that is a political dispute which she is free to press

[3] *See, e.g.*, House Bill 431 (2023 legislative session, died in standing committee), available at https://tinyurl.com/39c7u4dc; House Bill 150 (2021 legislative session, died in standing committee), available at https://tinyurl.com/fusnf57r. House Bill 193 (2019 legislative session, died in standing committee), available at https://tinyurl.com/3zh9nsrh.

through the normal democratic process. "Not every problem posing a threat … can be solved by … judges." *Juliana*, 947 F.3d at 1174.

Like the District Court, Held assumes that if agencies consider GHG emissions during MEPA review of proposed projects, they will ultimately deny permits for at least some of those projects. Resp. Br. 41–51. But the trial evidence points the other way. Held's expert Anne Hedges testified that when DEQ analyzed three projects' GHG emissions prior to the 2011 MEPA amendments, it nevertheless approved the requested permits. *See* Tr. 808–812.

Held notes that standing does not require a plaintiff to "show that a favorable decision will relieve his *every* injury." Resp. Br. 41 (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 91982)). That may be true as a general matter, but it misses the point: Held had to show a non-speculative *likelihood* that striking section 75-1-201(2)(a) will slow climate change to some degree. *Lujan*, 505 U.S. at 561. She did not.

Held, like the District Court, assumes that agencies "can alleviate the harmful environmental effects of Montana's fossil fuel activities" if they consider GHG emissions during MEPA reviews. Resp. Br. 42. That is untrue, but even if it were true, it would not prove redressability. That an injury *can* be redressed does not establish "a substantial likelihood" that it *will* be. *Lujan*, 505 U.S. at 561;

Brown, 902 F.3d at 1083. If "a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability … unless she adduces facts to show that the defendant or a third party are nonetheless likely to provide redress as a result of the decision." *Brown*, 902 F.3d at 1083. No record evidence establishes that striking section 75-1-201(2)(a) will alter agency conduct in a way that meaningfully reduces GHG emissions in Montana or in the wider world.

Held also claims that declaratory relief, alone, will redress the plaintiffs' injuries. Resp. Br. 42–46. Not so. "Without an independent ground for standing," a plaintiff cannot "assert a claim under the Declaratory Judgments Act." *Mitchell*, ¶ 42 (citation omitted); *see also Larson*, ¶ 45. Held's requested relief will not remedy her alleged injuries. And "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into … court." *Steel Co v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998).

Finally, applying bedrock standing rules would not, as Held claims, "immunize all of MEPA from judicial review." Resp. Br. 13, 28. In other MEPA challenges, plaintiffs had standing because they alleged that permitting a *specific* project would directly harm them in specific ways. *See, e.g.*, *MEIC v. DEQ.* 1999 MT 248, ¶45, 296 Mont. 207, 988 P.2d 1236 ("*MEIC I*") (finding plaintiffs had

standing to challenge action with arguably adverse impact on waterway in which they "fish and otherwise recreate"); *Park Cnty. Env't'l. Council v. Mont. DEQ.*, 2020 MT 303, ¶¶21–24, 402 Mont. 168, 477 P.3d 288 (finding plaintiffs had standing to challenge an exploration permit for a mine that could impact an area in which they "hiked, climbed, skied, and biked"). But unlike those plaintiffs, Held chose the more difficult path of facially challenging section 75-1-201(2)(a) and attempted to pin decades of climate change-related issues throughout Montana on this procedural statute. Held's reliance on cases involving challenges to specific permitting decisions is, therefore, misplaced. *See* Resp. Br. 44–45.

Held's blunderbuss facial challenge to section 75-1-201(2)(a) illustrates why judicial review of agency action "stands on surer footing when it takes place in the context of a specific factual record." *Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, ¶ 25, 340 Mont. 309, 174 P.3d 496. The breadth of Held's claims led the District Court to find standing based on GHG emissions that occurred in other states and countries and before any version of the challenged statute was enacted, and to couch legal conclusions about the constitutionality of large swathes of the Montana Code in the form of a hypothetical. *See* Doc. 405 at 90 ("The State must either: 1) have discretion to deny permits for fossil fuel activities . . . or 2) the permitting statutes themselves must be unconstitutional.").

"Courts" must "seek to resolve the controversy at hand, not to speculate about the constitutionality of hypothetical fact patterns." *Park Cnty.*, ¶ 86.

II. The District Court's expansive findings requiring State agencies to review downstream impacts of GHG emissions are inconsistent with *Bitterrooters*.

In their opening brief, the State agencies argued the district court's broad analysis that agencies would have to examine impacts from fossil fuels extracted or transported through Montana—but not combusted in Montana—violated the Federal Commerce Clause and this Court's decision in *Bitterrooters for Planning, Inc. v. Mont. DEQ.*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712. Agency Opening Br. at 21–23. Held responds that the District Court was right to take such an expansive view of MEPA because agencies under MEPA are required to evaluate "all foreseeable impacts from such authorizations, including emissions of GHGs and attendant climate impacts." Resp. Br. at 32.

Held misunderstands the scope of MEPA review described in *Bitterrooters*. *Id.* at 31–33. In *Bitterrooters*, this Court held that MEPA requires agencies to review "an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority." *Id.* ¶ 33. MEPA does not require "a state agency to consider environmental impacts it has no authority to lawfully prevent," because that "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." *Id.* ¶ 33.

Bitterrooters teaches that State agencies are not required to evaluate GHG emissions from fossil fuels transported or extracted in Montana because regulating the combustion of these fossil fuels exceeds "the lawful exercise of [the State agencies'] independent authority." *Id.* ¶ 33. While Plaintiffs and the District Court blame state agencies for emissions from combustion of fossil fuels that occur in other states, Resp. Br. 34–35, the Federal Commerce Clause does not allow Montana agencies to regulate beyond state borders. *See* Agency Br. 21–22; *Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986).[4] Thus, under *Bitterrooters*, even if section 75-1-201(2)(a) is enjoined, MEPA *still* will not require agencies to analyze downstream GHG emissions they have no authority to prevent. *Bitterrooters*, ¶ 33, and Held's injuries *still* will not be remedied.

[4] This Court exercises "plenary review" of issues involving "interpretation of the U.S. Constitution and Montana statutes." *Tiegs v. Dep't of Rev.*, 2023 MT 168, ¶ 8, 413 Mont. 223, 535 P.3d 220 (citation omitted). The District Court's order swept in emissions in other states and countries, thus implicating the Federal Commerce Clause for the first time in the case. Doc. 405 at 67. The expansiveness of the District Court's order requires this Court to consider whether extending MEPA review beyond Montana's borders would conflict with the Federal Commerce Clause.

Held's reliance on NEPA cases holding that federal agencies must consider GHG emissions is misplaced. Resp. Br. 34, 35, 36, 45, and 52 (citing *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008) and *350 Mont. v. Haaland*, 50 F.4th 1254 (9th Cir. 2022)). MEPA is not NEPA—federal agencies have authority to regulate interstate environmental impacts, because Congress can give them such authority under the Commerce Clause. *See, e.g.*, *Preseault v. I.C.C.*, 494 U.S. 1, 17–19 (1990). But Montana agencies may not regulate activity beyond the State's borders. *Healy*, 491 U.S. at 336.[5]

III. Plaintiffs have not met the exacting standard for facially challenging section 75-1-201(2)(a).

Should this Court reach the merits, Held failed to meet her burden to show section 75-1-201(2)(a) unconstitutional in every application. *MCIA*, ¶ 14. Instead of challenging a specific MEPA review or substantive permitting decision, Held undertook the "a difficult task" of attempting to show there is "no set of circumstances exists under which [section 75-1-201(2)(a)] would be valid." *City of*

[5] Held's brief alters a quotation from *Ctr. for Biological Diversity* by swapping out "[the agency]" for "[the state]." *Compare* Resp. Br. 52 *with Ctr. for Biological* Diversity, 538 F.3d at 1217. This alteration changes the meaning of the Ninth Circuit's statement. A federal agency *can* regulate economic activity that crosses state lines. But the Federal Commerce Clause restricts states from regulating beyond their borders.

Missoula v. Mountain Water Co., 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685 (cleaned up).

Held fails to meet this exacting burden because she overlooks that the 2023 amendments to MEPA *allow* state agencies to analyze GHG emissions during MEPA reviews "conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency." § 75-1-201(2)(b)(i) (West 2023). Current guidance from the federal Council on Environmental Quality directs federal agencies to analyze GHG emissions and climate change during NEPA reviews. *See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate* Change, Council on Envt'l Quality, 88 Fed. Reg. 1196–1212 (Jan. 9, 2023). Thus, even if the Constitution requires MEPA reviews to incorporate GHG analysis, the 2023 amendments to MEPA expressly allow such analysis in many circumstances.[6] Held does not grapple with section 2(b) and has therefore failed to show the statute she challenges is facially unconstitutional. *City of Missoula*, ¶ 21; *MCIA*, ¶ 14.

[6] Since 2011, DEQ has produced six EIS documents with a federal partner, four of which have included GHG emissions analysis. MEPA analyses are available at https://leg.mt.gov/mepa/search/.

IV. At a minimum, this Court should hold that the District Court lacked power to affirmatively require agencies to analyze GHG emissions in every MEPA review.

Finally, Held continues to suggest that the District Court's Order did not just strike section 75-1-201(2)(a), but also rewrote MEPA to *require* state agencies to consider GHG emissions in every MEPA review. *See* Resp. Br. 43 (describing the District Court's ruling as "clarifying that State Agencies can, *and must*, evaluate GHG emissions and climate impacts during environmental reviews") (emphasis added); *id.*, 44 (claiming that the State now has an "*obligation* to analyze GHG pollution and climate impacts in Montana under MEPA") (emphasis added). If Held is right, then the District Court violated the separation of powers. Held evidently thinks this is no big deal, Resp. Br. 43–46, but our Constitution says otherwise.

The Constitution divides the "legislative, executive, and judicial" powers and bars anyone "charged with the exercise of power properly belonging to one branch" from exercising "any power properly belonging to either of the others[.]" Mont. Const. art. III, § 1. Within this system, courts get to *review* the constitutionality of laws in the context of a justiciable case controversy, but only the Legislature can *make* law. Mont. Const. art. V, § 1 (vesting the legislature with exclusive legislative power); *see also Legislative Power*, Black's Law Dictionary, (11th

ed. 2019) ("a legislative body's exclusive authority to make, amend, and repeal laws").

If Held's expansive view of the District Court's ruling is correct, the District Court transgressed these boundaries and crafted a statute in chambers to replace section 75-1-201(2)(a), despite assuring the parties that "the relief contemplated by the Court has always been limited to declaring [section 75-1-201(2)(a)] unconstitutional and enjoining [its] enforcement." (Doc. 379 at 3-4). This Court should clarify that the District Court did not have power to invert the judgment of the Legislature and replace a section 75-1-201(2)(a) with a judicial mandate requiring what the Legislature previously forbade. *See Brown*, 902 F.3d at 1087 ("The *absence* of a law … has never been held to constitute a substantive result subject to judicial review") (cleaned up).

CONCLUSION

This Court should reverse the District Court and remand this case with instructions to dismiss Held's complaint. If the Court determines to strike section 75-1-201(2)(a), it should clarify that the District Court lacked power to order state agencies to analyze GHG emissions in every MEPA review.

DATED this 26th day of April, 2024.

/s/ Dale Schowengerdt

DALE SCHOWENGERDT
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Lee M. McKenna
Montana DEQ
P.O. Box 200901
Helena, MT 59620-0901
406-444-6559
Lee.mckenna@mt.gov

Attorneys for Appellants-Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation and Governor Gianforte

CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Equity A typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 4,925 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-26-2024:

Nathan Bellinger (Attorney)
1216 Lincoln St
Eugene OR 97401
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Andrea K. Rodgers (Attorney)
3026 NW Esplanade
Seattle WA 98117
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Melissa Anne Hornbein (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Philip L. Gregory (Attorney)
1250 Godetia Drive
Woodside CA 94062

Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Selena Zoe Sauer (Attorney)
1667 Whitefish Stage Rd.
#101
Kalispell MT 59901-2173
Representing: State of Montana
Service Method: eService

Lee M. McKenna (Govt Attorney)
1520 E. Sixth Ave.
HELENA MT 59601-0908
Representing: MT Dept Environmental Quality
Service Method: eService

Quentin M. Rhoades (Attorney)
430 Ryman St.
2nd Floor
Missoula MT 59802
Representing: Friends of the Court
Service Method: eService

Brian P. Thompson (Attorney)
PO Box 1697
Helena MT 59624
Representing: Treasure State Resource Association of Montana
Service Method: eService

Steven T. Wade (Attorney)
PO Box 1697
Helena MT 59624
Representing: Treasure State Resource Association of Montana
Service Method: eService

Hallee C. Frandsen (Attorney)
PO Box 1697
801 N. Last Chance Gulch, Ste. 101
Helena MT 59624
Representing: Treasure State Resource Association of Montana
Service Method: eService

Keeley Cronin (Attorney)
c/o Baker & Hostetler LLP
1801 California Street, Suite 4400
Denver CO 80202
Representing: The Frontier Institute
Service Method: eService

Lindsay Marie Thane (Attorney)
1211 SW 5th Ave
#1900

Portland OR 97204
Representing: Navajo Transitional Energy Company, LLC
Service Method: eService

Ryen L. Godwin (Attorney)
1420 Fifth Ave., Ste. 3400
Seattle WA 98101
Representing: Navajo Transitional Energy Company, LLC
Service Method: eService

Matthew Herman Dolphay (Attorney)
401 N. 31st Street, Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Montana Chamber of Commerce, Chamber of Commerce of The United States of America, Billings Chamber of Commerce, Helena Chamber of Commerce, Kalispell Chamber of Commerce
Service Method: eService

Frederick M. Ralph (Attorney)
125 Bank Street
Suite 600
Missoula MT 59802
Representing: Northwestern Corporation
Service Method: eService

John Kent Tabaracci (Attorney)
208 N. Montana Ave. #200
Helena MT 59601
Representing: Northwestern Corporation
Service Method: eService

Abby Jane Moscatel (Attorney)
PO Box 931
Lakeside MT 59922
Representing: Montana Senate President as Officer of the Legislature and Speaker of the House of Representatives as Officer of the Legislture
Service Method: eService

Timothy M. Bechtold (Attorney)
PO Box 7051
317 East Spruce Street
Missoula MT 59807
Representing: Public Health Experts and Doctors
Service Method: eService

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580

Representing: Environmental and Constitutional Law Professors'
Service Method: eService

Lawrence A. Anderson (Attorney)
Attorney at Law, P.C.
P.O. Box 2608
Great Falls MT 59403-2608
Representing: Former Justices
Service Method: eService

John Martin Morrison (Attorney)
401 North Last Chance Gulch
P.O. Box 557
Helena MT 59624-0557
Representing: Children's Rights Advocates
Service Method: eService

Paul J. Lawrence (Attorney)
1191 Second Avenue
Suite 2000
Seattle WA 98101
Representing: Outdoor Recreation Industry
Service Method: eService

Amanda D. Galvan (Attorney)
313 East Main Street
Bozeman MT 59715
Representing: Tribal and Conservation
Service Method: eService

Jenny Kay Harbine (Attorney)
313 E Main St
Bozeman MT 59715
Representing: Tribal and Conservation
Service Method: eService

Justin P. Stalpes (Attorney)
610 Professional Drive
Bozeman MT 59718
Representing: Trial Lawyers Association
Service Method: eService

Domenic Cossi (Attorney)
303 W. Mendenhall, Ste. 1
Bozeman MT 59715
Representing: Montana Outdoor Athletes
Service Method: eService

Monte Tyler Mills (Attorney)

William H. Gates Hall
Box 353020
Seattle WA 98195-3020
Representing: Denise Juneau, Kathryn Shanley, Native Nations in Montana
Service Method: eService

Robert J. Guite (Attorney)
4 Embarcadero Center, 17th Fl
Sheppard Mullin
San Francisco CA 94111
Representing: Montana Interfaith Power and Light
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: American Civil Liberties Union, ACLU of Montana
Service Method: eService

Juan Carlos Rodriguez (Interested Observer)
Service Method: E-mail Delivery

Byron L. Trackwell (Amicus Curiae)
7315 SW 23rd Court
Topeka KS 66614
Service Method: E-mail Delivery

Alex Guillen (Interested Observer)
Service Method: E-mail Delivery

Julia A. Olson (Attorney)
1216 Lincoln St.
Eugene OR 97401
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: E-mail Delivery

Shannon M. Heim (Attorney)
2898 Alpine View Loop
Helena MT 59601-9760
Representing: Northwestern Corporation
Service Method: E-mail Delivery

Robert Cameron (Attorney)
203 N. Ewing Street
Helena MT 59601
Representing: State of Alabama, State of Alaska, State of Arkansas, State of Idaho, State of North Dakota, State of Indiana, State of Mississippi, State of Missouri, State of Nebraska, State of South

Carolina, State of South Dakota, State of Utah, State of Wyoming, Commonwealth of Virginia, State of Iowa
Service Method: E-mail Delivery

Rebecca Leah Davis (Attorney)
1939 Harrison St., Suite 150
Oakland CA 94612
Representing: Outdoor Recreation Industry
Service Method: E-mail Delivery

Brian Flynn (Attorney)
1939 Harrison St., Suite 150
Oakland CA 94612
Representing: Outdoor Recreation Industry
Service Method: E-mail Delivery

Caleb Jaffe (Attorney)
580 Massie Road
Charlottesville VA
Representing: Public Health Experts and Doctors
Service Method: E-mail Delivery

Andrew B. Cashmore (Attorney)
Prudential Tower
800 Boylston St
Boston MA 02199
Representing: American Civil Liberties Union, ACLU of Montana
Service Method: E-mail Delivery

Joshua Dulberg (Attorney)
Prudential Tower
800 Boylston St
Boston MA 02459
Representing: American Civil Liberties Union, ACLU of Montana
Service Method: E-mail Delivery

Kaitlin R. O'Donnell (Attorney)
1211 6th Ave
New York NY 10036
Representing: American Civil Liberties Union, ACLU of Montana
Service Method: E-mail Delivery

Robert A. Skinner (Attorney)
Prudential Tower
800 Boylston St
Boston MA 02199
Representing: American Civil Liberties Union, ACLU of Montana
Service Method: E-mail Delivery

Chris Winter (Attorney)
University of Colorado Law School
Wolf Law Building, 401 UCB
Boulder CO 80309
Representing: Montana Outdoor Athletes
Service Method: E-mail Delivery

Sarah A. Matsumoto (Attorney)
2450 Kittredge Loop Road
Boulder CO 80309
Representing: Montana Outdoor Athletes
Service Method: E-mail Delivery

Electronically Signed By: Dale Schowengerdt
Dated: 04-26-2024