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. DDV 2013–407, the Honorable Kathy Seeley, Presiding

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APPELLANT STATE AGENCIES' AND GOVERNOR'S OPENING BRIEF

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ISSUES PRESENTED

1. Because § 75-1-201(2)(a) of the Montana Environmental Policy Act is merely a restriction on the scope of MEPA reviews, but has no regulatory or permitting authority, have the Held plaintiffs ("Held") established the required elements of causation and redressability for a justiciable claim?

2. Even if § 75-1-201(2)(a)'s limitations were struck, is determining whether and how to analyze greenhouse gas emissions and climate impacts in MEPA reviews a matter left to agency discretion and legislative policymaking?

STATEMENT OF THE CASE

This appeal involves sixteen plaintiffs' facial constitutional challenge to one provision of the Montana Environmental Policy Act (MEPA), 75-1-201(2)(a), MCA. The case began much more ambitiously. In 2020, Held filed a complaint claiming that a diverse array of actions in Montana had contributed to climate change since the 1960's, which they alleged had harmed them physically and psychologically. Held sought broad injunctive relief "to effectuate reductions of GHG emissions in Montana consistent with the best available science" under the supervision of a court-appointed special master. (Doc. 1 at 103.)[1]

[1] This statement of the case describes Held's claims and the procedural history of the case most relevant to the appeal. The full, and lengthy, procedural history is described in the District Court's Findings of Fact and Conclusions of Law (Doc. 405), pages 2-9.

Held blamed climate change's impacts on two statutory provisions: (1) portions of the now-defunct "State Energy Policy" which provided an aspirational set of policy statements designed to guide Montana's government in making future energy decisions; and (2) the 2011 subsection of MEPA which barred state agencies from "includ[ing] a review of actual or potential impacts beyond Montana's borders" when conducting MEPA environmental reviews. § 75-1-201(2)(a), MCA (West 2022).[2]

Despite Held's initial vision, however, the scope of this case was modest by the time of trial in June 2023. In August of 2021, the District Court dismissed Held's requests for a court-ordered overhaul of Montana's energy system. Doc. 46 at 21. Plaintiffs' remaining claim at trial was that MCA § 75-1-201(2)(a) (2023) violated the clean and healthful environment provisions of Article IX and Article II, Section 3 of the Montana Constitution.

After a 7-day trial, the District Court issued a 103-page order holding that § 75-1-201(2)(a) caused Held's climate change injuries, invalidating it would

[2] On May 8, 2023, one month before trial, the Legislature amended § 75-1-201(2)(a) to restrict State agencies conducting MEPA reviews from "evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's boarders." A few minutes before trial, the District Court informed the State that the trial would take place on the 2023 version, thus allowing Held to challenge § 75-1-201(2)(a) as amended in May 2023.

redress their injuries, and subsequently declared it unconstitutional, and enjoined the State from acting in accordance with it. Doc. 405.

STATEMENT OF FACTS

A. Overview of Plaintiffs' Complaint

Plaintiffs are a collection of sixteen young people concerned about global climate change. Plaintiffs allege impacts from climate change have caused them anxiety, adverse health effects, and have impacted their recreational activities. *See, e.g.,* Doc. 1, ¶¶ 14-81. Plaintiffs also allege that a diverse body of actions taken by Montana's government were—to some, unspecified degree—responsible for their climate change injuries. *See, e.g.*, Doc. 1 ¶¶ 118–142; *see also id.* ¶ 152 (noting temperature changes in Montana between *1950* and 2015). According to the Complaint, the State "breached [its] affirmative duty to protect and improve a clean and healthful environment in Montana" through a series of "aggregate and systemic actions." Doc. 1 ¶ 250. Many of these actions, however, predated the two statutory provisions that Plaintiffs asked the District Court to enjoin. *See e.g.*, Doc. 1, ¶ 190 (citing a 1968 conference held by the Montana Department of Health as evidence that Montana has not done enough to combat climate change over the last 50 years).

Plaintiffs wanted these activities to change. "The best available science," the Plaintiffs alleged, "prescribes that global atmospheric concentrations must be

restored to no more than 350 ppm by 2100 (with further reductions thereafter) in order to stabilize Earth's energy balance and restore the climate system on which human life depends." Doc. 1, p. 87, ¶ 201. According to Plaintiffs, this will require annual global reductions of greenhouse gas (GHG) emissions by an average of 10.9% per year, along with the sequestration of 100 gigatons of CO2 by 2100. Doc. 1 ¶ 203. Even so, Plaintiffs conceded that "Montana cannot on its own achieve the GHG emission reduction and sequestration measures needed to restore the entirety of Earth's energy imbalance and stop dangerous climate disruption entirely[.]" Doc. 1 ¶ 205.

The most notable aspect of Plaintiffs' complaint was the relief they sought. Plaintiffs requested broad forms of injunctive relief, including an "order requiring [the State] to prepare a complete and accurate accounting of Montana's GHG emissions," an "order requiring [the State] to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana consistent with the best available science," an order appointing "a special master or equivalent … to assist the Court in reviewing the remedial plan for efficacy," and "an order retaining jurisdiction over this action until such time as [the State] has fully complied with the orders of this Court[.]" Doc. 1 ¶ 103. And they sought: (1) declaratory relief that their constitutional rights had been violated; (2) declaratory relief that the

challenged statutes were unconstitutional; and (3) an injunction against the challenged statutes.

B. The Legal Issues in this Case

Before the case finally went to trial in 2023, the District Court dismissed Plaintiffs' requests for a remedial plan, a statewide "GHG accounting," and the appointment of a court-supervised "special master" to oversee the implementation of both. Doc. 46 at 18–19. After this, the only remaining requests for relief were that the District Court declare § 90-4-1001(c)-(g), MCA and § 75-1-201(2)(a), MCA (2011) unconstitutional and enjoin them. The District Court would later explain that "the relief contemplated by the Court *has always* been limited to declaratory judgment on the constitutionality of the [statutory provisions at issue] and an injunction on the enforcement of those provisions." Doc. 379 at 3–4 (cleaned up) (emphasis added). The court further explained that "declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal." Doc. 379 at 14. So, despite the breadth of Plaintiffs' initial requests for relief, the case had been distilled to something more modest: a facial constitutional challenge to two statutes.

The case became even narrower after the 2023 Montana Legislature rescinded "the State Energy Policy," which mooted all Plaintiffs' claims related to the constitutionality of MCA § 90-4-1001(c)-(g). *See* Doc. 379. Thus, at the time

of trial, the only remaining claim was Plaintiffs' request that the Court declare MCA § 75-1-201(2)(a) (2011) unconstitutional and enjoin state agencies from implementing it.

C. Trial and Order

After a seven-day trial at which the Plaintiffs and various experts for the Plaintiffs and the State testified, the District Court issued a 103-page Findings of Fact and Conclusions of Law ("Order"), ruling in Plaintiffs' favor. Doc. 405. Much of the trial testimony focused on climate change at a general level. The District Court's Order adopted Plaintiffs' proposed Findings of Fact and Conclusions of Law—paraphrasing them in some places and copying them verbatim in others.

Most of the Order was devoted to detailing the science and impacts of climate change (which Defendants did not dispute), and decades of state action that authorized the development of energy projects in Montana. *See* Doc. 405 at 1–84. In a few pages of legal conclusions, the District Court deduced (1) that there was a "fairly traceable connection between" section 75-1-201(2)(a) "and the State's allowance of resulting fossil fuel GHG emissions, which contribute to and exacerbate Plaintiffs' injuries"; "a reduction in Montana's GHG emissions that results from a declaration that Montana's MEPA Limitation is unconstitutional would provide partial redress of Plaintiffs' injuries"; (3) and that § 75-1-201(2)(a)

violated Article II Section 3 and Article IX, Section 1 of the Montana Constitution. Doc. 405 at 87, 88, 94.

The plain language of the ruling removed the statutory impediment to GHG emissions and climate change impacts analyses in MEPA reviews. It did **not** require State agencies to begin including GHG emissions and climate change impacts analysis in every MEPA review. After all, the District Court had said that "declaring [MCA § 75-1-201(2)(a)] unconstitutional *is not congruent* with commanding the State to consider climate change in every project or proposal." Doc. 379 at 14 (emphasis added).

D. Post Judgment Proceedings

Plaintiffs, however, read the District Court's Order differently. In two letters addressed to DEQ, Plaintiffs' attorneys claimed that, to comply with the Order, "DEQ must now calculate the GHG emissions that will result from proposed projects" and threatened DEQ with contempt if it did not. Doc. 424 Ex. 1 at 6–7, Ex. 2 at 6–7. Based on the District Court's decision, three lawsuits have since been filed challenging Environmental Assessments and permitting decisions. Plaintiffs in those lawsuits claim that *Held* requires DEQ to analyze GHG emissions and climate impacts as part of its MEPA reviews.[3] *But see* Doc. 379 at 18 ("[D]eclaring

[3] See *Montana Environmental Information Center v. DEQ*, Case No. DV-56-2024-00004, Thirteenth Judicial District Court (filed January 2, 2024), ¶ 42 (asserting that not analyzing GHG emissions and climate impacts in MEPA review violates

[MCA §75-1-201(2)(a)] unconstitutional *is not* commanding the State to consider climate change in every project or proposal.").

The Governor and State Agencies asked the District Court to clarify and stay its August 14, 2023 Order. It declined to do so. Doc. 432. This Court also denied the Governor's and State Agencies' Rule 22 Motion to Stay the District Court's Order.

STANDARD OF REVIEW

This Court reviews the District Court's "findings of fact for clear error, conclusions of law de novo, discretionary rulings for an abuse of discretion, and mixed questions of law and fact de novo." *Alto v. Jake Holdings, LLC v. Donham*, 2017 MT 297, ¶ 14, 389 Mont. 435, 406 P.3d 937; *see also Stanley v. Lemire*, 2006 MT 34, ¶ 26, 334 Mont. 489, 148 P.3d 643. The Court reviews issues of justiciability de novo. *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455. Appellees' facial challenge "is a difficult task, requiring [them] to demonstrate no set of circumstances exists under which the challenged sections would be valid." *City of Missoula v. Mountain Water, Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685 (citation and quotation omitted).

District Court's Order); Montana Environmental Information Center v. DEQ, Case No. DV-6-2024-1, Sixteenth Judicial District Court (filed January 8, 2024) (same); *Montana Environmental Information Center v. Signal Peak Energy, LLC and DEQ*, Case No. DV-56-2023-1373 (filed December 28, 2023) (same).

SUMMARY OF ARGUMENT

This Court should decide this case in favor of Appellants on justiciability grounds. The District Court never should have reached the merits of this lawsuit because the Held plaintiffs lack case-or-controversy standing. MEPA— which is comprised of solely procedural statutes —did not cause Plaintiffs' alleged climate change injuries; invalidating § 75-1-201(2)(a) within MEPA will not redress the Held plaintiffs' claimed injuries. Nor would enjoining this subsection redress Plaintiffs' injuries—which, if caused by climate change, were indisputably caused by *global* climate change. Because no provision of MEPA has any permitting or regulatory authority, it would be a legal impossibility for the narrow subsection at issue to cause Held's claimed injuries or for a court to provide redressability by invalidating § 75-1-201(2)(a).

The District Court erred in concluding otherwise. While the District Court made detailed findings about how climate change—writ large—contributed to Plaintiffs' injuries, the district court made no findings about empirically how much MCA § 75-1-201(2)(a) contributed to climate change. Nor could it have. MEPA is a "procedural" statute that does not allow agencies to "deny, withhold, or modify" permits. § 75-1-201(4)(a), MCA. Thus, MEPA does not—and cannot—authorize the construction of the so-called "fossil fuel projects" that Plaintiffs believe contribute to climate change. Nor can MEPA impose restrictions on greenhouse

gas emissions. In short, no provision of MEPA can be the cause of Plaintiffs' climate-change-induced injuries. While the District Court's Order perhaps highlighted legitimate policy concerns, the Court had no authority to decide this case because it did not present a justiciable case or controversy.

Even if this Court finds that Held has standing and § 75-1-201(2)(a) is unconstitutional, agencies are not *required* to analyze GHG emissions and climate impacts in MEPA reviews—it is up to each individual agency to determine the appropriate scope of its analyses under MEPA. Under separation of powers principles and political question doctrine, the District Court cannot order the Executive Branch agencies to affirmatively include GHG and climate change analyses in their MEPA reviews. Judicial authority is limited to reviewing a completed MEPA review and determining, within the scope of MEPA, whether a violation has occurred.

ARGUMENT

I. Plaintiffs lack standing because section 75-1-201(2)(a) is not the cause of their injuries and enjoining that provision will not redress their injuries.

"Not every problem posing a threat… can be solved by … judges." *Juliana v. United States*, 947 F.3d 1159, 1174 (9th Cir. 2020). Recognizing this, the Montana Constitution vests courts with the important—but limited—power to decide justiciable cases and controversies. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142. "This limitation prevents

courts from issuing decisions about purely political or theoretical disputes." *350 Mont. v. State*, 2023 MT 87, ¶ 14, 412 Mont. 273, 529 P.3d 847.

Case-or-controversy standing is "one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases' and 'controversies.'" *Heffernan v. Missoula City* Council, 2011 MT 91, ¶ 29, 460 Mont. 207, 255 P.3d 80. It is a threshold requirement that must be met in every case before a court reaches the merits of a party's claim. *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187; *Heffernan*, ¶ 29 (citation omitted).

To establish case-or-controversy standing, a plaintiff must prove (1) a past, present, or threatened injury to a property or civil right; (2) causation; and (3) redressability. *Brown v. Gianforte*, 2021 MT 149, ¶ 21, 404 Mont. 269, 488 P.3d 548. (quoting *Bullock*, ¶ 31); *see also 350 Mont.,* ¶ 15; "A plaintiff has legal standing to assert an otherwise cognizable claim only if (1) the claim is based on an alleged wrong or illegality that *has in fact caused, or is likely to cause*, the plaintiff to suffer specific, definite, and direct harm to person, property, or exercise of right and (2) the alleged harm is of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241. The plaintiff also bears the burden of proof to establish standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 561 (1992).

The District Court seemed to believe that looser standing requirements applied under the Montana Constitution than under the federal Constitution. *See* Doc. 217 at 2. For instance, in denying the State's Motion to Dismiss for lack of standing, the District Court reasoned that the standard for proving redressability is lower in Montana than in the federal courts. *See* Doc. 46 at 17 (attempting to distinguish the federal standard for redressability from *Larson*, ¶ 46). But this Court has made clear that the Montana Constitution's justiciability requirements "embod[y] the same limitations" as the "case-or-controversy language" in Article III of the United States Constitution. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567; *see also McDonald v. Jacobsen*, 2022 MT 160, ¶ 8, 409 Mont. 405 515 P.3d 777 (same). Under this Court's longstanding precedent, causation and redressability are baseline standing requirements, just as they are under federal precedent. *350 Montana*, ¶¶ 14-15 (plaintiff must show their injuries are "redressable through court action").

The District Court's misunderstanding pervaded its justiciability analysis throughout this litigation. Declaring unconstitutional one narrow provision of MEPA will not alleviate global climate change, and Plaintiffs submitted no evidence that it would. Although Plaintiffs presented evidence that they have been psychologically and physically injured by climate change, the Plaintiffs failed to prove both causation and redressability. Section 75-1-201(2)(a) that Plaintiffs

challenged is not the cause of their injuries. And the relief the Plaintiffs sought—invalidating the statute—will not redress their injuries.

A. Section 75-1-201(2)(a) cannot be the cause of Plaintiffs' injuries because MEPA is a procedural statute with limited scope, not a substantive permitting statute.

The District Court found that global climate change has injured Plaintiffs physically, economically, and psychologically. *See e.g.* Doc. 405 at 26–64, 86; Doc. 1 at 5–26. But Plaintiffs were not suing to stop climate change. They were suing to challenge the constitutionality of specific provision of MEPA: section 75-1-201(2)(a). The causation element of standing thus requires the Plaintiffs to prove that section 75-1-201(2)(a) "has in fact caused, or is likely to cause," their climate change injuries. *Larson*, ¶ 46.

Appellants did not—and cannot—show that section 75-1-201(2)(a) caused their injuries. It is legally impossible for procedural MEPA to be a permitting statute. No part of MEPA has permitting or regulatory authority, including § 75-1-201(2)(a) which simply exempts a narrow category (GHGs and climate change) from impacts analysis in procedural MEPA reviews. Yet, without citing any controlling authority, the District Court held that section 75-1-201(2)(a) is, to some degree, responsible for Montana's permitting of fossil fuel projects. The District Court was incorrect.

Section 75-1-201(2)(a) is part of MEPA, a "procedural" statute that does "not require an agency to reach any particular decision in the exercise of its independent authority." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712; *accord* § 75-1-102(1), MCA. MEPA does not allow state agencies to "withhold" or "deny" permits for projects. § 75-1-201(4)(a), MCA. It does not give state agencies any regulatory authority. § 75-1-102(3)(b) ("it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.") MEPA exists to inform the Legislature and the public about the environmental impacts of government actions. §§ 75-2-102(1)(b) and (3)(a), MCA. And "[w]ith its limited focus on identification and assessment of relevant environmental impacts of proposed state agency actions, MEPA does not govern what information an application must contain for issuance of an agency permit subject to MEPA review." *Bitterrooters*, ¶ 41.

The authority to grant or deny permits for projects impacting the environment is found in substantive environmental statutes and their accompanying regulations. *See* Trial Tr. 1362:3–11. For example, a party who wishes to mine must obtain a permit under the Montana Mining and Metal Reclamation Act (MMRA), not MEPA. *See Park Cnty. Envtl. Council*, ¶ 81 ("Restrictions on Lucky's ability to conduct mining operations on its private

property stem from the MMRA, rather than MEPA."). A party seeking to discharge water from a retail store must obtain a permit under the Montana Water Quality Act (MWQA). *See* MCA §§ 75-5-401–411; A.R.M. 17.30.101–17-30-2006; *see also Bitterrooters*, ¶¶ 41–44. A party seeking to mine gravel must obtain a permit under the Opencut Mining Act. *See* § 82-4-431, MCA. Many other substantive environmental statutes exist. *See* Doc. 12 at 9 (collecting substantive environmental statutes). The District Court cited several substantive statutes that provide permitting authority (Order, ¶¶ 21-25), but Plaintiffs have challenged none of those statutes. They only facially challenged one provision of MEPA, which provides no authority to grant, withhold, deny, or modify any substantive permit. § 75-1-201(4)(a), MCA.

This Court has compared MEPA to a statute that requires "a mandatory aircraft inspection" before "takeoff." *Park Cnty. Envtl. Council*, ¶ 72. But the authority to greenlight or halt that "takeoff"—to continue this Court's *Park County* analogy—comes from substantive statutes like the MSUMRA, the Opencut Act, the MMRA, and many others. *See* Trial Tr. 1385:2, 1386:1-9; 1387:9–25; 138817–13892; 1284–1286); (Doc. 12 at 15.) (containing a table of substantive environmental statues). It is not found in MEPA, which, again, does not permit agencies to deny or require modification of a permit. § 75-1-201(4)(a).

Moreover, those substantive environmental permitting statutes do not give State agencies authority to deny permits based on GHG emissions or climate impacts. *See* Trial Tr. 1389:20–1390–17 (State's hybrid expert testifying that the MSUMRA, Montana Clean Air Act, and Major Facility Siting Act give DEQ no authority to deny a permit based on GHG emissions of climate impacts). Again, Plaintiffs did not challenge the constitutionality of those statutes.[4]

Plaintiffs and the District Court faulted several energy projects in Montana for climate-based harms. *See* Doc. 405 at 73–80. But none of those projects were approved or denied because of MEPA. MEPA does not allow agencies to prevent those projects from being approved. § 75-1-201(4)(a); *Bitterrooters*, ¶ 18.

To be sure, that MEPA is "[p]rocedural … does not mean [it is] unimportant." *Cf. Park Cnty. Entvl. Council*, ¶ 70. MEPA plays a critical role in ensuring "that information [is] gathered and carefully considered" by the public and the State prior to any government action that impacts the environment. *Id.* ¶ 71; *see also* § 75-1-102(1)(a)–(b). But that is not the issue here. To have standing

[4] The District Court postulated that DEQ either would have discretion to deny air quality permits under the Clean Air Act of Montana or if it did not have such discretion, these statutes would be unconstitutional. Doc. 405 FOF ¶ 23. The District Court's speculation about the constitutionality of other statutes not before it in this litigation is an improper advisory opinion*, see Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, ¶ 13, 410 Mont. 450, 520 P.3d 301, and is indicative that § 75-1-201(2)(a) does not cause Held's alleged injuries.

to challenge section 75-1-201(2)(a), Plaintiffs had to show that the provision *caused* their injuries. *Larson*, ¶ 46. And section 75-1-201(2)(a)—like all of MEPA—could not have caused Plaintiffs' climate change injuries because it does not give State agencies authority to "withhold, deny, or impose condition on any permit or other authority to act." § 75-1-201(4)(a), MCA.

Plaintiffs' expert Dr. Erickson conceded as much at trial. At trial, Dr. Erickson attempted to quantify Montana's GHG emissions for the year 2019. But Dr. Erickson provided no testimony about the extent to which section 75-1-201(2)(a) contributed to Montana's total GHG emissions or climate change. In fact, when questioned on cross-examination, Dr. Erickson did not know that Plaintiffs' lawsuit was challenging section 75-1-201(2)(a); nor did he know what section 75-1-201(2)(a) was. *See* Trial Tr. 980:3–981:10.

The District Court devoted less than one page In its 103-page Order to analyzing the causation element of standing. *See* Doc. 405 at 87-88. The District Court summarily found that "[t]here is a fairly traceable connection between the State's disregard of GHG emissions and climate change, pursuant to the MEPA Limitation,[5] GHG emissions over which the State has control, climate change

[5] The District Court invented the term "MEPA Limitation" as a shorthand for section 75-1-201(2)(a) later in the litigation. Originally, the District Court borrowed Plaintiffs' nickname for the statute: "the Climate Change Exception" to MEPA. *See generally* (Doc. 21.).

impacts, and Plaintiffs' proven injuries." Doc. 405 at 87. But this cursory analysis ignored the fact that MEPA does not authorize State agencies to deny permits for projects that emit greenhouse gases.

This Court's decision in *Bitterrooters* reinforces this conclusion. In *Bitterrooters*, this Court explained that "for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority." *Id.* ¶ 33. While *Bitterooters* involved causation under MEPA, not causation for the purpose of establishing standing to sue, this Court should apply the same reasoning here. MEPA cannot be the legal cause of climate change injuries if MEPA does not give agencies any legal authority to prevent the environmental effects of climate change. *Id.*

Remove section 75-1-201(2)(a), and Plaintiffs are in the same position. Even after the District Court's injunction of section 75-1-201(2)(a), the permitting of projects will continue—as before—under substantive environmental permitting statutes. *See* Trial Tr. 1299:3-22. Plaintiffs could have challenged the facial constitutionality of those substantive statutes. They did not. Plaintiffs also could have challenged the constitutionality of any discrete project approved under those

statutes.[6] They did not. Instead, they chose to facially challenge a provision of a procedural statute that did not—and could not have—caused their climate injuries. Because of that, they lack case-or-controversy standing and the District Court's August 14, 2023 Decision and Order should be reversed.

B. Enjoining section 75-1-201(2)(a) cannot redress Plaintiffs' injuries.

For similar reasons, Plaintiffs' injuries will not be redressed by winning this lawsuit. To be redressable, a plaintiff's injury must be "of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson*, ¶ 46. In other words, Plaintiffs had to show "that it is 'likely, as opposed to merely speculative, that [their] injuries will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see also 350 Mont.*, ¶ 15.

Plaintiffs sought redress for a host of psychological and physical harms they have allegedly suffered due to climate change. Thus, Plaintiffs had to prove that the relief they sought—enjoining MCA section 75-1-201(2)(a)—would "effectively alleviate, remedy, or prevent" their climate change injuries. *Larson*, ¶ 46. Because 75-1-201(2)(a) has no substantive authority to permit or regulate any

[6] The Montana Environmental Information Center, a group aligned with Held's interests, has argued that § 75-1-201(2)(a), MCA, as amended in the 2023 legislative session, permitted DEQ to consider GHG emissions in its MEPA analysis. Doc. 425, Pt.2, PDF p. 146–52. DEQ should first be given an opportunity to interpret § 75-1-201(2)(a), MCA, in the context of a specific challenge to an issued EA or EIS prepared under MEPA, *before* this Court renders a decision on the general constitutionality of this subsection.

activity, enjoining section 75-1-201(2)(a) will not remedy Plaintiffs' climate change injuries.

1. MEPA, a procedural statute, does not authorize State agencies to take any action that would meaningfully alleviate or redress Plaintiffs' injuries.

The District Court found that Montana's "fossil-fuel-based economy"—which the District Court defined as the extraction from, transportation through, and consumption of "fossil fuels" in Montana—significantly contributes to climate change. *See* Doc. 405 at ¶¶ 212–234. The District Court also concluded that section 75-1-201(2)(a) contributes to "the State's allowance of resulting fossil fuel GHG emissions, which contribute to and exacerbate Plaintiffs' injuries." (Doc. 405, at 87, ¶ 12.) But as explained, MEPA does not allow state agencies to withhold, deny, or modify permits for any project. § 75-1-201(4)(a), MCA. "MEPA requirements are merely 'procedural' and do not require an agency to reach any particular decision in the exercise of its independent authority." *Bitterrooters*, ¶ 18.

In addition to that narrow scope, an agency's MEPA review is further confined to analyzing potential impacts caused by the permitted action. *Bitterrooters*, ¶¶ 24-25 (rejecting MEPA analysis of impacts "that would not occur 'but for' the issuance of the permit"). "MEPA, like NEPA, requires a 'reasonably close causal relationship' between the subject government action and the particular environmental effect." *Id.*, ¶ 25 (quoting *Department of Transportation v. Public*

Citizen, 541 U.S. 752, 767 (2004) (concluding that agency's NEPA review narrowly focused vehicle safety regulations and could not include broader emissions impacts from commercial truck traffic)). That means, for example, analyzing GHG emissions of coal combusted in another state or country, but extracted in or transported through Montana, is likely outside the scope of a MEPA review for a project in Montana. *See also* § 75-1-220(5), MCA (the definition of environmental review under MEPA is limited to evaluating "the effects and impacts of the proposed action on the quality of the human and physical environment *within the borders of Montana* as required under this part.") (emphasis added). While those impacts may be analyzed under the National Environmental Policy Act (NEPA), nothing in MEPA authorizes Montana agencies to analyze them.

Nor are State agencies permitted to conduct MEPA or base permitting decisions under substantive statutes on impacts occurring out-of-state because doing so would likely conflict with the federal Dormant Commerce Clause. The "Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989) (cleaned up); *see also Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1326 (9th Cir. 2015) (holding that a California law requiring the payment of royalties to an artist

after the sale of fine art outside of California violated Commerce Clause). Similarly, "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce" in violation of the Federal Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986); *N. Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016) (same). Montana is "without power to exercise extra territorial jurisdiction, that is to regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954) (quotation cleaned up).

Yet the District Court unreasonably blamed Montana for categories of emissions that are not emitted within Montana and cannot be regulated by Montana under MEPA or any Montana permitting statute. For example, the District Court held Montana responsible for the combustion of 80 million tons of CO2 that resulted from fossil fuels that were neither extracted from Montana, nor combusted in Montana, but merely *transported through Montana*. *See* Doc. 405 at 67, ¶ 217; Trial Tr. 997:21–998:1.

The District Court borrowed this analysis from Plaintiffs' expert Dr. Erickson, who counted 80 million tons of CO2 transported through "Montana and then leaving again *without being combusted in state*" toward Montana's total GHG emissions. *See* Peter Erickson Testimony, Trial Tr. 923:22-924; 997:21-998:1;

see also id. at 926-27 ("Montana is a thoroughfare for fossil fuels" that are not extracted from Montana and consumed in other states). As the District Court and Plaintiffs' experts noted, much of the energy extracted in and transported through Montana is *consumed* in other states. *See, e.g.* Trial Tr. at 943:12–15 (Plaintiffs' expert testifying that "most" of the "coal that the state permits to be mined" is "consumed" "out of state."); *see also id.* at 947:1–13 **(**Plaintiffs' expert opining that 95% of oil extracted from wells in Montana is exported for consumption outside Montana**);** *See* Doc. 405 at 68, ¶ 223 (District Court finding that "Montana is *a substantial exporter* of coal.") (emphasis added); *See* Doc. 405 at 68, ¶ 225 ("Montana is a substantial producer of oil and gas *in the U.S.*") (emphasis added); *See 350 Montana v. Haaland*, 50 F.4th 1254, 1268 (noting that 97 percent of GHGs emitted by a proposed expansion to the Signal Peak mine in south-central Montana would "result from coal combustion, *primarily in Japan and the Republic of Korea*.") (emphasis added).

Dr. Erickson further conceded that FERC—a federal agency—has predominate authority to regulate interstate and international pipelines. Trial Tr. At 1001:21–1002:5. Yet, for some reason, the District Court held Montana to blame for these emissions. *See* Doc. 405, ¶ 217. And with this inaccurate scale, the District Court compared Montana's emissions to the emissions of Argentina, the Netherlands, and Pakistan.

Similarly, Plaintiffs' expert attributed all the coal extracted in Montana to Montana's state government, without accounting for the fact that a large percentage of coal extracted in Montana comes from federal and tribal lands. *See* Trial. Tr. 1005:1–19. The District Court likewise did not parse what amount of coal or oil extracted in Montana comes from federal lands outside of the State's regulatory purview. *See* Doc. 405 at 67, ¶¶ 215–218.

It was factually and legally erroneous for the District Court to attribute these emissions to Montana and more specifically, to section 75-1-201(2)(a). Given State agencies' limited authority under MEPA, simply evaluating a narrow scope of GHG emissions with no consequent permitting authority or authority to regulate emissions outside Montana, enjoining 75-1-201(2)(a) cannot possibly alleviate climate change or redress Plaintiffs' injuries.

2. Plaintiffs' broad allegations about climate change were not tied to § 75-1-201(a).

Most of the District Court's factual findings had nothing to do with the narrow MEPA statute Plaintiffs were challenging. The District Court issued dozens of pages of factual findings about climate change, Plaintiffs' injuries due to climate change, and how certain fossil fuel activities in Montana purportedly contribute to climate change. *See* Order, pp. 17-46. But almost all the District Court's analysis was unmoored from the statute the Plaintiffs were challenging. Without much

explanation, the District Court seemed to fault section 75-1-201(2)(a) for the sum of Montana's GHG emissions.

The District Court, however, did not make any findings about *how many* additional GHG emissions in Montana were traceable to section § 75-1-201(2)(a). Nor did the District Court make any findings about how much these emissions raised the global temperature. It simply asserted, without any empirical analysis that "[w]hat happens in Montana has a *real impact* on fossil fuel energy systems, CO2 emissions, and global warming." Doc. 405, 70, ¶ 237.

The District Court later asserted (in a heading) that section 75-1-201(2)(a) "prevents full review of the technologically and economically available alternatives to fossil fuel energy in Montana." Doc. 405 at 80. These cursory findings were inadequate to conclude that, absent § 75-1-201(2)(a), Plaintiffs' climate-based injuries could be redressed. The District Court is also wrong as a matter of law. Under § 75-1-220(1), agencies are prohibited from developing alternatives for other types of energy generation. In other words, if an applicant proposes a natural gas power plant, agencies are prohibited from conducting an alternatives analysis that directs the applicant to build a wind farm instead.

Analyzing whether Plaintiffs have standing requires a court to do more than recite vague generalities, especially in a case of this magnitude. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("[r]elief that does not

remedy the injury suffered cannot bootstrap a plaintiff into … court; that is the very essence of the redressability requirement.")

Moreover, most of the GHG emissions within Montana about which Plaintiffs complained have already occurred. *Juliana*, 947 F.3d at 1170 (noting that ceasing the federal government's fossil fuel activities would not redress plaintiffs' climate change injuries because "many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources"). The District Court found that actions by Montana's government over the course of several decades had contributed to climate change. *See e.g.,* Doc 405 ¶ 221 ("The cumulative CO2 emissions from all fossil fuels extracted in Montana ***since 1960*** is 3.7 billion metric tons of CO2.") (emphasis added); Tr. Tr. 93-:19-23 (Plaintiffs' expert Dr. Erickson testifying to the same). But the previous version of § 75-201(2)(a) did not exist until 2011. Emissions from the 1960's,70's, 80's, 90's, and 2000's have no bearing on the constitutionality of a MEPA statute enacted in 2011 or 2023. Enjoining § 75-1-201(2)(a) will do nothing to redress any climate injuries caused by those past actions under substantive permitting statutes. *See Clean Air Council v. United States*, 362 F. Supp. 3d 237, 249 (E.D. Pa. 2019).

The District Court fundamentally erred by tacitly attributing decades of state GHG emissions actions to a statute that was enacted in 2011 and amended in 2023. Instead of asking whether the *specific relief* Plaintiffs requested would redress their

injuries, the District Court seemed to believe that enjoining section 75-1-201(2)(a) could reverse decades of greenhouse gas emissions. The District Court's evident confusion on this point led it to find standing when it should not have.

It is, at best, speculative whether removing an impediment to GHG analysis in MEPA review will reduce future GHG emissions. At trial, Plaintiffs' expert Dr. Erickson conceded that he was "unaware" of "any … data or forecasts on what is likely to happen in the future in Montana[.]" Trial Tr. 951:15–16. And with good reason: whatever happens to GHG emissions in the future depends on the speculative future actions of billions of third parties. Standing cannot rely on speculation about "the unfettered choices made by independent actors not before the court." *Lujan*, 504 U.S. at 562 (cleaned up).

Plaintiffs' Complaint alleged that a concerted global effort to reduce GHG emissions to 350 parts per million by 2100 is necessary "to stabilize Earth's energy balance and restore the climate system on which human life depends." (Doc. 405, ¶ 201). Enjoining a procedural Montana statute will not accomplish this. MEPA does not prevent private citizens around the world from driving vehicles powered by gasoline. MEPA cannot force companies in Montana or around the world to begin developing renewable forms of energy. MEPA cannot not stop fossil fuel use in Montana, in the United States, or in other countries like China. *See, e.g.*, Trial Tr. at 985:10–23 (Plaintiffs' expert testifying that China contributes roughly 25 % of

the entire world's GHG emissions). The District Court's analysis of redressability failed to take any of these third-party actions into account. *See Lujan*, 505 U.S. at 571 (no redressability where it "[wa]s entirely conjectural whether the nonagency activity that affect[ed] respondents w[ould] be altered or affected by the agency activity they s[ought] to achieve.")

According to Plaintiffs' expert Dr. Mark Jacobson, this will require, among many other things, a swift (some might say fantastically swift) transition to renewable energy. *See* Doc. 1 at ¶ 207; Trial Tr. at 1026:3-15; 1035:9-17. The District Court adopted the opinion of Dr. Jacobson that Montana can feasibly transition to **80%** renewable energy by 2030 and 100% renewable energy "no later than 2050, but as early as 2035." Doc. 405 at 81, ¶ 272. Setting aside the implausibility of this finding, the District Court never explained how section 75-1-201(2)(a) is responsible for preventing this energy revolution. A radical overhaul of Montana's energy system within a decade will not occur simply because the District Court enjoined section 75-1-201(2)(a). *See* Trial Tr. 1299:23-1300:4; 1300:20–24 (State's expert testifying that MEPA does not give state agencies authority to permit or deny a transition to renewable energy). Instead, such a transition would require actions from numerous third parties, private actors, private companies, and even the federal government. It would, as the Ninth Circuit stated,

require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world." *Juliana*, 947 F.3d at 1171.

Montana invests significantly in renewable energy. *See* Trial Tr. 1362:8–1363:24 (describing the State's multimillion dollar expenditures on renewable energy development). The District Court's conclusion, without analysis, that § 75-1-201(2)(a) prevents development of alternatives was wrong. Doc. 405 at 80. As DEQ Director Chris Dorrington explained at trial, MEPA has nothing to do with renewable energy development. *See* Trial Tr. 1299:23-1300:4; 1300:20–24. MEPA does not prevent private citizens from consuming renewable energy. MEPA does not prevent private companies from developing renewable energy. MEPA does not prevent the State or federal government from incentivizing renewable energy development, nor does it allow agencies to *require* those alternatives. *See* § 75-1-220(1). It was wrong for the District Court to conclude—without any analysis—that section 75-1-201(2)(a) bars the promotion and development of renewable energy sources.

At bottom, no single judicial action in Montana can meaningfully reduce climate change, and thus redress Plaintiffs' injuries. That would require a fundamental transformation of the world's energy system. *Juliana*, 947 F.3d at 1170–71. That conclusion should apply with even greater force here: reducing the global consequences of climate change requires much more than an injunction of

one subsection within a procedural statute in Montana. As discussed above, Held facially challenged only § 75-1-201(2)(a); there is no claim against any substantive permitting statute. The Court cannot make general pronouncements about Held's rights based on a narrow claim against a procedural, non-regulatory statute. Rather, to pursue the relief that they are seeking, plaintiffs must challenge substantive permitting statutes and show that the permitting statues gave rise to their claimed injuries. *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont 228, 292 P.3d 364; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (plaintiffs cannot bootstrap claims to satisfy redressability). The Plaintiffs' claimed injuries here will not be redressed by enjoining section § 75-1-201(2)(a).

Alternatively, policymaking through the democratic process, not a lawsuit, is the appropriate vehicle for the relief Plaintiffs seek. "[S]ome questions—even those existential in nature—are the province of the political branches." *Juliana*, 947 F.3d at 1173. By ignoring bedrock principles of constitutional standing, the District Court exceeded its authority. This Court's justiciability doctrine requires reversal.

3. This narrow subsection of MEPA cannot redress Held's injuries.

In *Juliana*, the Ninth Circuit analyzed the entire federal government's GHG emissions and expressed doubt that reducing even this amount to zero overnight would significantly impact climate change and thus redress the plaintiffs' injuries.

947 F.3d at 1170–72. Alleviating the harms of climate change, the Ninth Circuit said, would require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world." *Juliana*, 947 F.3d at 1171 Such broad relief would involve "everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft." *Id.*; *see also id.* at 1170–71 ("The plaintiffs' experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that *even the total elimination* of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth" or "prevent further injury to plaintiffs").

If cessation of the *entirety* of the federal government's climate-impacting activity would not redress plaintiffs' injuries in *Juliana*, enjoining one narrow provision of MEPA that does not even allow permit denial or modification certainly would not. "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005).

Plaintiffs' Complaint admitted the same, alleging that "[t]he best available science today prescribes that global atmospheric CO2 concentrations must be restored to no more than 350 ppm by 2100 (with further reductions thereafter) in

order to stabilize Earth's energy balance and restore the climate system on which human life depends.") (Doc. 1, ¶ 201.) Their Complaint likewise conceded that "Montana cannot on its own achieve the GHG emission reduction and sequestration measures necessary to restore the entirety of Earth's energy imbalance and stop dangerous climate disruption[.]" (*Id.* ¶ 205.)

The evidence Plaintiffs presented at trial also established Montana's inability to meaningfully slow climate change. Plaintiffs' trial witnesses were careful to avoid making definitive statements about how much Montana could slow climate change. *See, e.g.*, Trial Tr. 952:14–15 (Plaintiffs' expert testifying that "Every ton of CO2 emissions adds to global warming" by some unspecified degree). But even they conceded that addressing climate change will require far more than a court order enjoining part of MEPA. Dr. Erickson, for instance, stated that "[w]e're at a point where we rapidly need to reduce emissions *globally*[.]" Trial Tr. 953:1–2.

Yet the District Court found that one procedural MEPA statute in Montana—without any permitting or regulatory authority —was responsible for Plaintiffs' climate-based injuries. The Court asserted that "Montana's GHG contributions are not *de minimis* but are nationally and globally significant." Order, p. 88. The District Court also concluded, without explanation, that "Montana's GHG emissions ***cause*** and contribute to climate change and Plaintiffs' injuries and reduce the opportunity to alleviate Plaintiffs' injuries." *Id.* (emphasis added). The

Court did not attempt to quantify what percentage of global or national GHG emissions come from Montana, much less how § 75-1-201(2)(a) meaningfully impacts the amount of GHG emissions. Nor did it explain what it meant by "nationally and globally significant." Instead, the District Court offered only "vague, conclusory statements that" section 75-1-201(2)(a) "contributes to greenhouse gas emissions, which in turn, contribute to climate-related changes that result in [Plaintiffs'] purported injuries." *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013). The District Court's causal chain consisted "of a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or evidentiary basis" that a Montana procedural statute is the cause of Plaintiffs' injuries. *Id.* "While Plaintiffs did not need to connect each molecule to their injuries," simply saying that Montana–through a subsection of MEPA–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." *Id.* at 1142-433 (citation and internal quotation marks omitted).

If stemming the tide of climate change requires a transformation of the world's energy system, *Juliana*, 947 F.3d 1159, 1171, a narrow subsection of a Montana procedural statute cannot be responsible for climate change. Yet that is precisely what the District Court incorrectly determined.

Standing is an essential check on the separation of powers. It requires courts to "respect their 'proper—and properly limited—role … in a democratic society.'" *M.S. v. Brown*, 902 F.3d 1076, 1087 (9th Cir. 2018) (quoting *Gill v. Whitford*, 138 S. Ct. 1916 (2018)). It also exists to prevent courts from "issuing decisions about purely political or theoretical disputes." *See 350 Mont.*, ¶ 14. By ignoring bedrock standing principles, the District Court improperly decided a case that was not properly before it—the decision did not resolve a justiciable case or controversy. It pronounced policy. In our constitutional system, however, "democracy is the appropriate process for change," *Brown*, 902 F.3d at 1087 (citation omitted). Even if this Court agrees with the outcome of the District Court's policy concerns regarding climate change, this Court must still reverse. A procedural statute that confers no permitting authority did not cause Plaintiffs' climate change injuries. Invalidating and enjoining it will not redress their injuries. The District Court lacked power to rule on Plaintiffs' claims.

II. Even if § 75-1-201(2)(a) did not exist, determining whether and how to analyze GHG emissions and climate impacts in MEPA reviews is left to agency discretion and legislative policymaking.

The issue in this case was whether a single provision of MEPA forbidding review of GHG emissions and climate change impacts violated the Montana Constitution. Even if the statute did not exist, determining if, when, and how to analyze GHG emissions and climate impacts in MEPA reviews is up to agencies.

As the District Court repeatedly acknowledged, courts lack authority to require that analysis because it would violate the political question doctrine and the separation of the powers.

Early in the litigation, the District Court recognized that it lacked power to craft a new regulatory regime to respond to climate change. The Court reasoned that granting Plaintiffs' request for a court-supervised "remedial plan" requiring the State to reduce its emissions "would require [it] to make or evaluate complex policy decision[s] entrusted to the discretion of other governmental branches." (Doc. 46 at 21.) Thus, the District Court allowed only Held's claims for declaratory and injunctive relief against 75-1-201 to move forward. (Doc. 46 at 22.; Doc. 158 at 2-3.)

And throughout the litigation, the District Court informed the parties about the narrowness of the issues remaining in the lawsuit. For example, the District Court explained that its sole remaining task in the case was to "a) declare statutes unconstitutional, and b) prevent the State from enforcing unconstitutional statutes." (Doc. 217 at 7.) It would later reaffirm that "the relief contemplated by the Court has *always* been limited to declaring the 'challenged statutory provisions' unconstitutional and enjoining the enforcement of those provisions." (Doc. 379 at 3–4) (emphasis added; quotation marks in original). Lest any doubt remained, the Court made it explicit that "declaring [MCA § 75-1-201(2)(a) unconstitutional *is*

not congruent with commanding the State to consider climate change in every project or proposal." *Id.* at 14. It is difficult to see how the District Court could have been clearer that it was only considering the constitutionality of statues; it was not contemplating replacing those statutes with an affirmative order requiring the State to take specific steps to respond to climate change.

Yet shortly after the District Court issued its August 14, 2023, Order, Plaintiffs' attorneys claimed that the District Court had done precisely what it said it was never contemplating. In two letters addressed to DEQ, Plaintiffs' attorneys claimed that to comply with the Order, "DEQ must now calculate the GHG emissions that will result from proposed projects" and threatening DEQ with contempt if it did not. Doc. 424, Ex. 1 at 6–7, Ex. 2 at 6–7. Since the District Court's Order, at least three lawsuits have been filed challenging environmental reviews and permitting decisions, claiming the District Court's decision not only struck § 75-1-201(2)(a), but also affirmatively *requires* analysis of GHG emissions and climate impacts in MEPA reviews. *See, supra*, fn. 3.

Held cannot recast the District Court's Order to require what the Court explicitly rejected. Montana's Constitution provides that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others[.]" Mont. Const. art. III, § 1. The political question doctrine ensures courts do not "adjudicate matters" that

belong to "the legislative or executive branches or the reserved political power of the people." *Brown*, ¶ 20 (quoting *Larson* ¶ 18 n.6).

Ordering the state to adopt a particular policy stance toward climate change would violate these principles. That is what the Ninth Circuit recognized when it dismissed similar federal claims in *Juliana*, 947 F.3d at 1171 ("any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches"). Several state courts concluded the same. *See Sagoonick v. State*, 503 P.3d 777 (Alaska 2022); *Natalie R. v. State of Utah*, No. 220901658 (Third Jud. Dist., Salt Lake County), (dismissing claims as nonjusticiable political question); *Aji P. v. State*, 16 Wash. App. 2d 177 (2021) (denying plaintiffs' claims on political question grounds); *see also Clean Air Council v. United States*, 362 F. Supp. 3d 237 (E.D. Pa. 2019) (denying similar claims on political question grounds).

Like these Courts, the District Court recognized that ordering state agencies to take affirmative steps to respond to climate change would violate the political question doctrine. In 2021, it dismissed Plaintiffs' requests for a remedial plan, "GHG accounting," and court-appointed special master, and reasoned that it lacked power to "craft a remedy 'committed for resolution to other branches of

government[.]'" Doc. 46 at 18–19 (quoting *Larson* ¶ 39); *see also* Doc. 379 at 3–4; Doc. 217 at 7.[7]

Requiring State agencies to analyze GHG emissions and climate impacts in every MEPA review is inconsistent with the political question doctrine and the separation of powers because that is a policy decision entrusted to the Legislature and Executive agencies. Courts have power to enjoin unconstitutional statutes. But they do not have power to replace an enjoined statute with judicially created mandates. That is a power the District Court acknowledged "lies exclusively with the Montana Legislature." (Doc. 46 at 19); see also Doc. 46 at 18–19 (district court declining Plaintiffs' invitation to "create laws, policies, or regulations" and to "craft a remedy 'committed for resolution to other branches of government[.]'") (quoting *Larson*, ¶ 39)*; see also Brown,* 902 F.3d at 1087 ("The absence of a law

[7] The District Court made findings about the economic feasibility and technological availability of achieving a 100% renewable portfolio standard by 2050. Doc. 405 FOF ¶¶ 270–274. Determining the legal requirements for a renewable portfolio standard has been the responsibility of the Montana Legislature. *See* Doc. 12 at 15 (noting that a Montana statute previously imposed a renewable portfolio standard requiring utilities to obtain 15% of their retail electrical energy from renewable resources) (citing § 69-3-2004 (4)(a), MCA (2019), repealed by 2021 Mont. Laws 2218, ch. 543, § 5). The District Court's determination—through factual findings—of what Montana's electric supply portfolio can and should look like in the future is a contradiction of its prior dismissal of Held's request for a remedial plan under the political question doctrine. Doc. 46 at 19–22. If this Court does not limit the scope of the District Court's ordered remedy, these factual findings will surely be used by future litigants to attempt to dictate Montana's electricity supply portfolio.

… has never been held to constitute a 'substantive result' subject to judicial review[.]").

It would also disregard this Court's clear directive that all Montana courts must "afford great deference" to state agency decisions involving technical or scientific expertise. *See Park Cnty. Envtl. Council*, ¶ 43 ("The process of assigning relative weights to conflicting data for predictive purposes is essentially a technical exercise requiring agency expertise that should be afforded substantial deference."). Determining how, whether, and when to incorporate GHG analysis into MEPA reviews requires technical agency expertise. While the District Court recognized these principles, it erred in concluding that Held's claims were nonetheless redressable by striking § 75-1-201(2)(a).

There is no doubt that many Montanans are understandably concerned about climate change. But addressing that issue is a matter to be addressed by the policymaking branches. *See Juliana*, 947 F.3d at 1173 ("Because it is axiomatic that the Constitution contemplates that democracy is the appropriate process for change, some questions … are the province of the political branches.") (quotation cleaned up). Aside from redressability concerns, even if this Court affirms the District Court's Order striking § 75-1-201(2)(a), it should also affirm that courts lack authority to require Executive agencies to conduct analysis of GHG emissions and climate impacts in every MEPA review.

CONCLUSION

This Court should reverse the District Court and remand this case with instructions to dismiss Plaintiffs' complaint. The District Court improperly conflated MEPA with substantive permitting statutes and erred, as a matter of law, in concluding that Plaintiffs claimed injuries were caused by § 75-1-201(2)(a) and that the claimed injuries would be redressed by striking the statute. Neither conclusion of law is correct.

If the Court nonetheless determines to strike the statute, it should affirm that agencies may determine if, when, and how to conduct analysis of GHG emissions and climate impacts in MEPA review. The Court should also correct the District Court's misunderstanding that MEPA affords agencies authority to deny or approve permits.

DATED this 12th day of February, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Times New Roman typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 9,215 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

District Court Order

Document Title	Tab
Findings of Fact and Conclusions of Law, August 14, 2023 (Doc. 405)	1

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Dated: 02-12-2024