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

RIKKI HELD; LANDER B., by and through his guardian Sara Busse; BADGE B., by and through his guardian Sara Busse; SARIEL SANDOVAL; KIAN T., by and through his guardian Todd Tanner; GEORGIANNA FISCHER; KATHRYN GRACE GIBSON-SNYDER; EVA L., by and through her guardian Mark Lighthiser; MIKA K., by and through his guardian Rachel Kantor; OLIVIA VESOVICH; JEFFREY K., by and through his guardian Laura King; NATHANIEL K., by and through his guardian Laura King; CLAIRE VLASES; RUBY D., by and through her guardian Shane Doyle; LILIAN D., by and through her guardian Shane Doyle; TALEAH HERNÁNDEZ,

Plaintiffs/Appellees,

v.

STATE OF MONTANA, GOVERNOR GREG GIANFORTE, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA DEPARTMENT OF TRANSPORTATION,

Defendants/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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DEFENDANTS/APPELLANTS STATE OF MONTANA'S REPLY BRIEF

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INTRODUCTION

In this case of first impression, the Court must determine whether Montana's constitutional right to a clean and healthful environment mandates MEPA review of potential impacts to global weather patterns from greenhouse gas emissions in Montana. Literally, an affirmative decision will mean that "environment" and "climate" (or as the District Court described it, a "life support system") are equivalent terms theoretically subject to equivalent regulatory power by the State of Montana.

Factually, invalidating the challenged statutes does not and cannot give Appellees what they want. Even more, standing alone, Montana cannot influence global climate to any appreciable or measurable degree. Legally, the regulatory confusion caused by finding a narrow limitation to an entirely procedural statute violative of a fundamental constitutional right will outweigh any possible benefit, which in any case would not include ameliorating Appellees' injuries.

At its core, the District Court's decision suffers from the obvious, but misguided, desire to meaningfully address the frustrations and angst about climate change expressed by the young Appellees. But the legislature is the proper forum for airing the thorny, technical, and social issues raised by Appellees, not the judiciary. Montana's unique constitutional provisions on the environment should not be the vehicle that substitutes litigation for legislative action.

ARGUMENT

I. Appellees have not proven case or controversy standing.

The fundamental elements of this dispute are twofold: First, Appellees assert they "are experiencing constitutional injuries, stemming from the violation of their constitutional rights, including climate injuries, caused by GHG pollution and the attendant climate harms." Response Br. at 12. Second, the District Court found that, "[b]ased on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, climate is included in the 'clean and healthful environment' and 'environmental life support system.'" Doc. 405, *Findings of Fact, Conclusions of Law, and Order* at COL 49 (hereinafter *Order*). From these premises, Appellees contend that a narrow limitation in a purely procedural statute, the Montana Environmental Policy Act ("MEPA"), has caused their injuries, entirely ignoring entire reams of statutes that govern the substantive agency decisions that actually evaluate and decide, one way or another, whether a proposed action is permissible. Further, the trial record shows that GHG emissions in Montana do not come close to having a meaningful influence on global climate. To synthesize a finding to the contrary, Appellees' experts went so far as to calculate Montana's GHG emissions by adding up the total annual fossil fuels produced "or transported" through Montana. That is, Appellees—and later the District Court—held Montana accountable to, for example, coal produced in

Wyoming that is transported by rail through Montana or oil produced in North Dakota that is transported by pipeline through Montana. *See e.g.* Doc. 405, *Order* at FOF 217. In other words, even if it was in any way appropriate to hold the State accountable for fossil fuels produced elsewhere, Montana still has no practical or legal power over more than 99% of the source of Appellees' alleged injuries.

A. Appellees Did Not Prove An Actual Link Between the Contested MEPA Provision and Their Claimed Injuries

Appellees argue that "the MEPA Limitation causes [Appellees'] constitutional injuries because it prevents state agencies from analyzing information necessary to make fully informed and constitutionally compliant permitting decisions, including decisions to deny or condition fossil fuel permits." Response Br. at 12. Again, Appellees simply ignore the fact that the MEPA Limitation has no direct impact on Montana's environmental permitting statutes. It does not require the agency to reach a particular decision, nor does it require analysis of an environmental effect unless the agency has existing authority to prevent it. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶¶ 18, 33, 388 Mont. 453, 401 P.2d 712 (hereinafter *Bitterrooters*). Nor does MEPA require a private permittee to consider other types of facilities or modify a proposed project or action, §§ 75-1-201(4)(a), (c), MCA. These circumstances mean that Appellees cannot fairly trace the MEPA Limitation to

Appellees' so-called climate injuries, even if the focus ignores the miniscule physical connection attributable to Montana.

B. The State Did Not Make The Concessions Claimed by Appellees

Appellees' climate experts did not supply the missing causal link. Dr. Steve Running only focused on global climate change. TT 174: 2-6. Dr. Fagre conceded that there was no evidence of impacts on Montana's glaciers from Montana's GHG emissions. TT 440:6‑14. Mr. Erickson agreed that "it would be difficult to measure using scientific equipment how much any given actor changed warming…" TT 993:18-23.

To shore up these gaps in causation, Appellees rely heavily on alleged concessions made by the State. For example, Appellees say "[d]efendants now concede Appellees are experiencing cognizable injuries to their physical health resulting from climate change…State Br. 4…." Response Br. at 17. To the contrary, Montana's opening brief stated: "Appellees' alleged mental health and physical injuries from climate change will not be redressed by declaring a MEPA provision unconstitutional…." Opening Br. at 4 (emphasis added). How that can be interpreted as a concession is a mystery.

Contrary to Appellees' claims, Montana has never conceded a link between even one ton of the state's GHG contributions and impacts to Appellees. Montana did not call its own expert at trial, because Appellees' own experts provided

enough evidence to contradict Appellees' allegations, but the District Court's findings simply omit any concession made by Appellees' own witnesses.

C. MEPA Alone Cannot Be the Source of the Alleged Injuries

"[I]t is not the purpose of [MEPA] to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency." § 75-1-102(3)(b), MCA. The District Court erred in its evaluation of causation by misinterpreting the reach of agency discretion under MEPA and grossly oversimplifying a complex set of environmental statutes.[1] The District Court relied on a broad generalization: "Pursuant to its statutory authority, DEQ has discretion to deny and revoke permits." Doc. 405, *Order* at FOF 33. The discretion to which the District Court refers is not grounded in MEPA. Rather, it resides in Montana's individual environmental permitting laws, of which none are at issue in this case. *See, e.g.,* §§ 75-2-103 (1)-(3), 75-2-203, 75-2-204, 75-2-211(2)(a), 75-2-217(1), 75-2-218(2), 75-20-301, MCA (carbon dioxide is not an air pollutant that the state regulates). The District Court's attempt to plug that gap by saying MEPA will "give [the agencies] the necessary information to deny permits for fossil fuel activities" (Doc. 405, *Order* at COL 18) is also erroneous. For example, Montana's environmental permitting statutes for fossil fuel facilities do not supply authority to

[1] Findings undermined by that failing include but are not limited to FOFs 91-92, 98, 193-194, 259-261, 265, 267-268. *See* Doc. 405.

deny a permit based on GHG emissions. *See*, *e.g.*, §§ 82-4-221, 82-4-222, 82-4-227, MCA.

The District Court's incorrect conclusion that MEPA alone can be responsible for a permitting decision on a fossil fuel project is directly contrary to this Court's prior holding that state agencies are not required to conduct a MEPA review on an issue that exceeds the agency's "lawful exercise of its independent authority." *Bitterrooters*, ¶¶ 33-34. To continue the example, if the statutes applicable to permitting fossil fuel facilities do not allow the State to deny a permit based on GHG emissions, then there can be no error in restricting the State's ability to consider GHG emissions in the MEPA process. Further, MEPA requires a reasonably close causal relationship between the triggering state action and the subject environmental effect and—as argued previously—there is no connection between a narrow limitation in a procedural statute and Appellees' claimed injuries. *Park Cnty. Env't Council v. Montana Dep't of Env't Quality*, 2020 MT 303, ¶ 32, 402 Mont. 168, 477 P.3d 288.

D. The potential risk of uniformed decision-making does not confer standing.

To be clear, the MEPA Limitation does not foreclose an agency's ability to evaluate and consider GHG-related impacts if relevant to a specific agency action. Nevertheless, Appellees assert that the *risk* of uninformed decision-making during the MEPA process, standing alone, is sufficient to confer standing. Response Br.,

28. There is no support in this Court's jurisprudence for such a broad expansion of standing.

When this Court has found standing in somewhat similar cases, it has required a tangible impact or at least a clear indication that such an impact would occur. For example, in *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 15, 296 Mont. 207, 988 P.2d 1236, this Court found Appellees had standing because the addition of arsenic—an established carcinogen—to a waterbody without nondegradation review under the Montana Water Quality Act would implicate Montana's constitutional environmental provisions. There is nothing similar in this case.

Appellees also rely on *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 316 P.3d 831, but that case is inapposite. There, the constitutional right to know and participate was at issue and standing depended on redressability: "whether the constitutional or statutory provision ... can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* ¶ 21 (internal citations omitted).

Appellees and the District Court tied causation arguments to expert witness Erickson, who calculated that Montana contributes 166 million tons of CO2 to the atmosphere every year but made that calculation by considering the total emitted, extracted, processed, and transported through Montana. *See* TT 950:7-18; 985:2-3; 1001:4-12. His testimony featured largely in the District Court's narrative. *See*

e.g., Doc. 405, *Order* at FOF 210. But Erickson's approach—comparing fossil fuels originating in or transported through Montana to emissions of other countries—distorts Montana's place in the global scenario.[2] Ultimately, Erickson conceded at trial that he did not know what impact removing one ton of GHG emissions from Montana would have and admitted that "it would be difficult to measure using scientific equipment how much any given actor changed warming…." TT 992:6-11, 993:18-23.

These concessions, and others made by Appellees' witnesses, expose "every ton matters" as a slogan rather than a scientific fact, or more importantly, as a measurement of harm to Appellees.

E. The Inability to Redress the Alleged Injuries Relates to Causation

Causation and redressability are two sides of the same issue. *Washington Environmental Council v. Bellon,* 732 F.3d 1131, 1146 (9th Cir. 2013) ("[T]he fairly traceable and redressability components for standing overlap and are two facets of a single causation requirement.") To meet the redressability requirement for standing, Appellees must show that invalidating the MEPA Limitation would

[2] Finding of Fact 217 states that "in 2019, total annual fossil fuels *transported and processed in and through Montana* led to at least 80 million tons of CO2 released into the atmosphere once those fuels were combusted. [PE 923:19-924:4, 950:14-15]. That is equivalent to all the *GHG emissions* from Columbia, which has 50 times the population of Montana. [PE 930:11-23; PE-17, PE-20]." (Emphasis added).

alleviate their climate related injuries. *See Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241.

Under the plain language of Montana's environmental permitting statutory scheme, declaring the MEPA Limitation unconstitutional will not have *any* impact on Appellees' alleged climate related injuries, much less alleviate them. This reality was clearly established in the record below. *See e.g.* Doc. 405, *Order* at FOF 29, 31–33, 37–39. Further, even accepting the premise that a favorable ruling will have a domino effect that causes change is insufficient to confer redressability "Redressability requires that the court be able to afford relief *through the exercise of its power*…." *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (Scalia, J. concurring) (emphasis in original).

Appellees' argument that declaratory relief independently establishes redressability is also mistaken. Response Br. at 42. The Uniform Declaratory Judgments Act ("UDJA") does not independently confer standing. *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 42, 389 Mont. 122, 406 P.3d 427 ("Without an independent ground for standing, [Appellees] cannot assert a claim under the [UDJA].").

Appellees conclude that, as soon as the MEPA Limitation is declared unconstitutional, DEQ's "constitutionally compliant MEPA reviews will provide Defendants with the information necessary to make fully informed permitting

decisions that are consistent with Defendants' statutory and constitutional duties." Response Br. at 46. Agencies follow the constitution by adhering to statutes that they implement through their limited regulatory power. *MT SUN, LLC v. Montana Dep't of Pub. Serv. Regul*., 2020 MT 238, ¶ 70, 401 Mont. 324, 472 P.3d 1154. If a statute does not provide discretion for the agency to regulate GHGs or deny a permit on the grounds of GHG emissions, the agency cannot do so. *See Utility Air Regulatory Group v. Environmental Protection Agency,* 573 U.S. 302, 134 S.Ct. 2427 (2014). Appellees cannot escape the simple fact that Montana's environmental permitting statutes (to which MEPA applies) supply independent authority to evaluate GHG emissions when relevant.

The concept that a MEPA evaluation of "every ton" of GHG will redress Appellees' alleged climate injuries implicates behaviors beyond the reach of a ruling in this case. Appellees' leading expert Dr. Running raised that point, perhaps inadvertently. He was asked: "If the judge ordered that we stopped using fossil fuels in Montana, would that get us to the point where these Appellees are no longer being harmed, in your opinion?" His response: "We can't tell in advance because what has been shown in history over and over and over again is when a significant social movement is needed it often is started by one, or two, or three people." TT 178:5-17. This non-scientific response reflects the thinking of the

District Court as well, highlighting the fluidity with which its findings and conclusions move between limited science, social influence, and rank speculation.

II. The MEPA Limitation is not Unconstitutional

The so-called MEPA Limitation currently bars Montana's agencies from considering greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders, but only in the context of a MEPA analysis and only if the underlying project does not fall into one of two categorical exceptions. § 75-1-201(a)–(b), MCA. Appellees' argument falls well short of demonstrating why the District Court should not be reversed in this unique and novel case.

A. The referenced constitutional provisions are non-self-executing.

The District Court resolved this case without determining that Article II, Section 3, or Article IX, Section 1, were self-executing by invoking an exception to the general rule that challenges based on non-self-executing clauses of constitutions present non-justiciable political questions. Doc. 405, *Order* at COL 31–33 (citing *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 15, 326 Mont. 304, 109 P.3d 257 (hereinafter *Columbia Falls*)). The *Columbia Falls* exception acknowledges that this Court retains jurisdiction to interpret legislative acts that implement non-self-executing constitutional clauses but only so far as to ensure said acts "comport with" said provisions. *Id.* On appeal, the

State argued this was error. Opening Brief at 21–27. Appellees respond with two narrow arguments, both of which are deeply flawed.

First, Appellees are wrong to assume the referenced constitutional provisions are self-executing. The threshold question implicit in every constitutional challenge to a legislative enactment is whether the language of the invoked constitutional provision is addressed to the Courts or to the Legislature. *Columbia Falls*, ¶ 16; *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P.2d 689, 700 (Mont. 1942). Determining whether a relied-on constitutional provision is self-executing is not just a box to be performatively checked. Because claims invoking non-self-executing constitutional provisions ordinarily present non-justiciable political questions, that analysis is a guardrail meant to ensure that a case is properly before a court. *Columbia Falls*, ¶ 15.

Appellees claim this Court has already held that "Article II, Section 3, and Article IX, Section 1 are self-executing and immediately enforceable." Response Br. at 55. As support, Appellees cite one paragraph in the background discussion of *Montana Env't Info. Ctr. v. Dep't of Env't Quality*—decided in 1999. Appellees simply ignore *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, where this Court expressly stated that it had not yet determined whether Article II, Section 3, is self-executing: "We deem it possible . .

. to resolve this case without . . . determining whether Article II, Section 3, is self-executing[.]" *Id.* ¶ 62.

In attempting to frame the referenced constitutional provisions as self-executing—despite not challenging the District Court's conclusion to the contrary on appeal—Appellees present a revisionist history of the Constitutional Convention. They cite the statements of Delegate Robinson, but ignore the fact that the self-executing language Delegate Robinson proposed was ultimately defeated:

> [. . .] Each person shall have the right to a high-quality environment which is clean, healthful and pleasant, and the duty is to act in accordance with this public policy. Each person may enforce such right against any party, governmental or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as may be provided by law.

Con. Conv. Tr. Vol. 5 at 1229 (emphasis added); *see also* Vol. 5 at 1237. Entirely absent from the current text is any reference to a person's right to sue to enforce the right granted by the provision.

B. The MEPA Limitation is not a "legislative act" under *Columbia Falls* and does not implicate either constitutional provision.

Because neither referenced constitutional provisions are self-executing, the threshold—and dispositive—question before this Court is whether the MEPA Limitation constitutes a legislative enactment implicating either Art. II, Sec. 3, or Art. IX, Sec. 1. *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548 ("once the Legislature has acted, or 'executed,' a provision that implicates

individual rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility."). The State challenged the District Court's conclusion on both grounds: first, the MEPA Limitation does not constitute a "legislative act" within the meaning of *Columbia Falls*, Opening Brief at 21–25; and second, the MEPA Limitation does not implicate either Art. II, Sec. 3 or Art. IX, Sec. 1, Opening Brief at 25–27.

1. Under *Columbia Falls*, a "legislative act" must resolve the "threshold political question" arising out of the non-self-executing constitutional provision.

Appellees say the State's argument that the MEPA Limitation does not constitute a legislative act is "novel" and contend the State is attempting to install a "new test" by stating that a "legislative act" under *Columbia Falls* must resolve a "threshold political question." Response Br. at 56. Appellees are wrong. This Court created that requirement in *Columbia Falls*: "In the case sub judice, the Legislature has addressed the threshold political question: it has executed Article X, Section 1(3), by creating a basic system of free public schools." *Columbia Falls*, ¶ 19 (emphasis added).

The District Court was wrong to invoke *Columbia Falls* because the MEPA Limitation does not answer the "threshold political question" posed by Art. II, Sec. 3, or Art. IX, Sec. 1. If MEPA is a procedural statute that does not "demand that an agency make particular substantive decisions," then the MEPA Limitation cannot

have a substantive effect as a matter of law. *See Water for Flathead's Future, Inc. v. Montana Dep't of Env't Quality*, 2023 MT 86, ¶ 19, 412 Mont. 258, 530 P.3d 790 (citations omitted).

In *Brown v. Gianforte*, the Court invoked the *Columbia Falls* exception to reach an otherwise non-justiciable political question, but that case presented starkly different circumstances from the case at bar. *Brown*, ¶¶ 23–24. *Brown* involved SB 140, which unlike the procedural MEPA provision, carried out the delegation of authority in Article VII, Section 8,[3] by changing the method of selecting judicial nominees. *Brown*, ¶¶ 23–24, 34. That is, SB 140 "executed" the Constitution's delegation of power to the Legislature and answered the political question by determining how nominees for judicial vacancies were selected. *See id.* The MEPA Limitation does nothing of the sort. At most, it might limit some information gathered as part of an agency's procedural MEPA analysis, but that information could—and would—still be gathered if relevant during the agency's substantive decision-making process. A statute that does not carry out the substance of the referenced constitutional provision cannot constitute a "legislative act" within the meaning of *Columbia Falls*.

2. The MEPA Limitation does not implicate either constitutional provision.

[3] Mont. Const. art. VII, Sec. 8, requires the Governor to appoint supreme court justices and district court judges "from nominees selected in the manner provided by law."

Appellees also argue that the MEPA Limitation "prohibits government consideration of known pollutants, GHG emissions, and their ensuing climate harms" and that it "renders it impossible for agencies to exercise their existing authority." Response Br. at 64. The MEPA Limitation does neither of those things as a matter of law. *See* Opening Brief at 23–27.

The MEPA Limitation allows state agencies to avoid gathering information about some GHG impacts in narrow circumstances and only when conducting their MEPA analysis. But because MEPA contains no regulatory language, *Montana Wilderness Ass'n v. Board of Health & Envtl. Sciences*, 171 Mont. 477, 485, 559 P.2d 1157, 1161 (Mont. 1976), and because an agency is statutorily prohibited from withholding, denying, or imposing any conditions on any permit or other authority to act based on said MEPA analysis, § 75–1–201(4)(a), MCA, and because MEPA is procedural not substantive, *Bitterrooters*, ¶ 18, the Legislature has not created anything substantive to be evaluated by this Court in light of the right to a clean and healthful environment. Without a substantive effect, the MEPA Limitation cannot implicate the constitutional provisions at issue here.

3. The Legislature's enactment of the MEPA Limitation "comports with" both cited constitutional provisions.

Because the MEPA Limitation neither implicates the constitutional provisions at issue, nor constitutes a legislative act under *Columbia Falls*, the exception to the general prohibition of claims based on non-self-executing

constitutional provisions is not met, and this case should be dismissed for lack of standing. Even assuming *arguendo* that the *Columbia Falls* exception were met, the MEPA Limitation clearly "comports with" the requirements of Art. II, Sec. 3, and Art. IX, Sec. 1—that is, enacting the MEPA Limitation is within the power delegated to the Legislature under either cited provision. Under *Columbia Falls* and *Brown*, that is the only question that should be before this Court.

B. Appellees' Notice of Supplemental Authority Does Not Support Their Claims.

Appellees' Notice of Supplemental Authority references *Montana Democratic Party v. Jacobsen*, 2024 MT 66, __ Mont. __, __ P.3d __ (hereinafter *Jacobsen*). If that decision applies here, it is not favorable to Appellees.

The District Court concluded that "[a]ny statute, policy, or rule which implicates a fundamental right must be strictly scrutinized and can only survive strict scrutiny if the State establishes a compelling interest and that the action is narrowly tailored to effectuate that interest." Doc. 405, *Order* at COL 35. The District Court in this case was explicit on this point: "The MEPA Limitation is subject to strict scrutiny because it implicates Appellees' fundamental right to a clean and healthful environment." *Id*. at COL 36. Under *Jacobsen*, those conclusions are wrong as a matter of law. Since strict scrutiny is only appropriate when a law impermissibly interferes with a fundamental right, proper application of that standard of review requires a finding that the MEPA Limitation

impermissibly interfered with the fundamental right to a clean and healthful environment. The District Court did not make that finding. Moreover, determining whether a law impermissibly interferes with a fundamental right requires an examination of the degree to which the law infringes upon said right. *Jacobsen*, ¶ 34. And again, the District Court engaged in no such analysis.

Appellees argue that the State is required to prove the existence of a compelling interest "by competent evidence." Response Br. at 67–69. Even if a compelling interest were required here, *Jacobsen* forecloses Appellees' argument. *Jacobsen*, ¶ 40 n. 8. The Court was clear that it did "not hold . . . that the state necessarily has an evidentiary burden to show its interest in a law." *Id*. The Court expressly noted that such an interest may be established by "notice, argument, or otherwise." *Id*.

Thus, even if this Court proceeds to evaluate the constitutional challenge to the MEPA Limitation, under *Jacobsen*, middle-tier scrutiny applies. The MEPA Limitation survives that constitutional review, and the District Court should be reversed.

III. The District Court Abused Its Discretion by Denying the Request for Rule 35 Examinations.

The State recognizes that the District Court possesses the discretion to deny a Rule 35 examination. However, a valid exercise of that discretion cannot possibly mean endorsing a party's obvious strategy to emphasize claims of major

physical and mental harm, including through an expert psychologist, while insulated from an independent examination by merely denying the strategy. It is not necessary to read between the lines to see that is what occurred here, because the strategy is still in play. If that tactic is approved here, it will wreak havoc with standard tort claims.

To illustrate this point, here is a small fraction of similar statements[4] about mental or physical harm in Appellees' Response Brief, substituting the phrase "defendants' negligence" for "climate" and similar terms:

- "The Plaintiffs offered deeply personal and moving testimony about [defendants' negligence] injuries they are struggling to endure." Response Br. at 3.
- "[Defendants' negligence] increases the exposure of Youth Plaintiffs to harms now and additional harms in the future." *Id*. at 9.
- "Montana's children and youth are being harmed by Defendants' [negligence]" *Id*. at 14.
- "[Defendants' negligence] also harm[s] Plaintiffs' physical health…" *Id*. at 17.

[4] Appellees referred to their "mental health" injuries roughly 20 times in their Response Brief.

- "Plaintiffs…are experiencing additional harms, including injuries to their…mental health." *Id.* at 18.

To fully capitalize on their success in preventing Appellants from obtaining their own expert opinions through independent examinations, Appellees then argued that their "detailed harms" were undisputed. *See e.g. id*. at 10.[5] The result is a lopsided playing field of substantial unfairness. Applying an ordinary negligence standard to this case in which Appellees allege intentional harmful conduct demonstrates a major deviation from well-accepted U.S. Supreme Court precedent expressly adopted by this Court: "A plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." *Winslow v. Montana Rail Link, Inc*., 2001 MT 269, ¶ 9, 307 Mont. 269, 38 P.3d 148 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S. Ct. 234, 234 (1964)). The District Court abused its discretion by not acknowledging that Appellees made their mental health the centerpiece of their case for harm at the hands of the State and denying the Rule 35 request.

[5] It is conceivable that if the State had cross examined the "Youth Plaintiffs" at trial, they would now be arguing they were harmed further by the trauma of cross examination. Unfortunately, the State's effort to contest the alleged mental health harms was handicapped by having no expert to counter the observations of Appellees' mental health expert Dr. Van Susteren.

CONCLUSION

For the reasons discussed in the State's Opening Brief and in the foregoing argument, the District Court's judgment should be reversed, and the case should be dismissed.

RESPECTFULLY SUBMITTED this 26th day of April, 2024.

CROWLEY FLECK PLLP

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman typeface size 14-point font; is double spaced; and the word count calculated by Microsoft Word is 4,577, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

/s/ Mark L. Stermitz

CERTIFICATE OF SERVICE

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

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Electronically signed by Rose Dumont on behalf of Mark L. Stermitz
Dated: 04-26-2024