

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0575

RIKKI HELD, ET AL.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, ET AL.,

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. CDV 2020–307, the Honorable Kathy Seeley, Presiding

**BRIEF OF AMICI CURIAE
OUTDOOR RECREATION INDUSTRY MEMBERS**

Rebecca Davis (*pro hac vice*)
Brian B. Flynn (*pro hac vice*)
LOZEAU | DRURY LLP
1939 Harrison Street, Suite 150
Oakland, CA 94612
Telephone: (510) 836-4200
rebecca@lozeaudrury.com
brian@lozeaudrury.com

Paul J. Lawrence (MSB No. 7235)
PACIFICA LAW GROUP
1191 2nd Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 245-1700
Paul.Lawrence@pacificallawgroup.com

Attorneys for Amici Curiae Outdoor Recreation Industry Members

Additional Counsel Information on Following Pages

Attorneys for Plaintiffs/Appellees:

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olsen (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Barbara Chillcott
Melissa Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
chillcott@westernlaw.org
hornbein@westernlaw.org

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

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

Dale Schowengerdt
Landmark Law PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
(406) 457-5496
dale@landmarklawpllc.com

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

Attorneys for Defendant/ Appellant State of Montana:

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
Montana Department of Justice
PO Box 201401
Helena, MT 59620-1401
(406) 444-2026
michael.russell@mt.gov
thane.johnson@mt.gov

Emily Jones
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
(406) 384-7990
emily@joneslawmt.com

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

Selena Z. Sauer
Crowley Fleck, PLLP
PO Box 759
Kalispell, MT 59903-0759
(406) 752-6644
ssauer@crowleyfleck.com

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SUMMARY OF ARGUMENT

In the face of a global climate crisis that is threatening ecosystems, businesses, and ways of life known for generations in Montana and beyond, the State of Montana ignored its constitutional mandate to protect its citizens' inalienable right to a clean and healthful environment. After extensive fact finding and testimony documenting the injuries inflicted by climate change on the Youth Plaintiffs, the District Court struck down section 75-1-201(2)(a) of the Montana Environmental Policy Act (the "MEPA Limitation") as unconstitutional under Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. This Court should deny the appeal and affirm that the MEPA Limitation is unconstitutional.

"All persons are born free and have certain inalienable rights."¹ The very first inalienable right enshrined in the Montana Constitution is the right to a "clean and healthful environment."² Changing temperatures and weather patterns are already wreaking havoc on the planet and Montana, its citizens, and local economies.

Amici curiae are members of the outdoor recreation industry and file this brief to highlight the negative impacts that state inaction, which encourages fossil

¹ Mont. Const. Art. II, § 2.

² *Id.*

fuel use and exacerbates climate change, is having on the outdoor recreation economy in Montana. A clean and healthful environment cannot be insured if Appellants continue to approve projects without considering their impacts on climate change.

The U.S. Global Change Research Program (“USGCRP”)—a federal program mandated by Congress to coordinate climate-change research across 13 member agencies—warned in its most recent National Climate Assessment,

Climate change poses risks to seasonal and outdoor economies in communities across the United States, including impacts on economies centered around . . . winter recreation[] and inland water-based recreation.

Projected increases in wildfire smoke events are expected to impair outdoor recreational activities and visibility in wilderness areas. Declines in snow and ice cover caused by warmer winter temperatures are expected to negatively impact the winter recreation industry in the Northwest, Northern Great Plains, and the Northeast. Some fish, birds, and mammals are expected to shift where they live as a result of climate change, with implications for hunting, fishing, and other wildlife-related activities.³

The outdoor recreation industry, which is an \$800 billion industry in the United States, supports tens of millions of jobs nationally. In Montana, the outdoor recreation economy represents 4.3% of total state GDP and employs more than

³ USGCRP, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* (rev. Mar. 2021), 31-32 [hereinafter *Fourth National Climate Assessment*], https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf (admitted into evidence as P23, *see* Doc. 399).

29,000 Montana citizens. Climate change is negatively impacting the outdoor industry in Montana, as people lose accessible habitat and species to enjoy and available days to go outside – whether because of extreme heat, toxic air from wildfires, floods, or dwindling ice and snow.

Because the MEPA Limitation allows Montana to avoid its constitutional responsibility to protect a clean and healthy environment, and because that derogation of constitutional duty is already having profound negative impacts on the outdoor industry in Montana, this Court should uphold the District Court’s order and strike down the MEPA Limitation.

INTEREST OF AMICI CURIAE

Amici curiae Patagonia, Inc., The Orvis Company, Inc., Trail Head Inc., School of Trout, LLC, Conservation Hawks, Inc., Yaak Valley Forest Council, The Montana Project, Big Hole Lodge, Brant Oswald Fly Fishing LLC, and R.L. Winston Rod Company (collectively “Outdoor Recreation Industry Members”) are businesses and nonprofits with direct interests in how the State of Montana and its agencies respond to the climate crisis through the Montana Environmental Policy Act and the Constitution. The Outdoor Recreation Industry Members support the passions of their customers and members to explore, recreate in, and preserve the natural world. Climate change is increasingly causing soaring temperatures, extreme weather events, reduced winter snowpack, smoke-filled skies from

wildfires, degraded rivers and lakes, and diminished wildlife populations in Montana. All of these consequences negatively impact the outdoor industry, which is built to facilitate engagement in outdoor activities like fishing, hunting, climbing, skiing, running, and mountain biking among many others.

Patagonia, Inc. plays a leading role in the outdoor recreation economy.

Patagonia was founded in 1973 and has a 50-year history of environmental advocacy. It is now a California benefit corporation, with its purpose of being in business to save our home planet enshrined in its articles of incorporation.

Patagonia employs 38 people in Montana, including 23 people as staff at its retail store in Dillon.

The Orvis Company, Inc. (“Orvis”) is an international, multi-channel retailer with approximately 1,500 employees in the United States. Orvis is primarily a fly-fishing and wingshooting brand, inspired by nature, driven by curiosity, and fulfilled by adventure. As the world leader in fly fishing, Orvis is proud to share offerings in a wide assortment of men’s and women’s sportswear, fine gifts and home furnishings, luggage, and travel accessories. Orvis is committed to leading the sustainable future of fly fishing, wingshooting and the natural world through protecting and restoring habitats, creating sustainable products and enabling next generation participation. In Montana, Orvis has 48 endorsed outfitters and lodges through the Orvis Endorsed Partner network, and 40,000 customers.

Trail Head Inc. operates The Trail Head, a specialty outdoor gear and clothing store based in Missoula for 50 years offering gear for camping, hiking, backpacking, climbing and skiing, and Trail Head River Sports in Missoula, which offers boating gear.

School of Trout, LLC is headquartered in Bigfork and is one of the world's finest and most comprehensive fly-fishing schools. The School of Trout brings together some of the planet's most respected fly-fishing instructors to share their experiences, their knowledge, their passion, and their accumulated wisdom with students during the school's week-long classes.

Conservation Hawks is a Montana-based 501(c)(3) nonprofit whose mission is to defend our sporting heritage and pass on a healthy natural world to future generations of Americans. Conservation Hawks works to educate and engage both hunters and anglers on the single largest threat we face: anthropogenic climate change.

Yaak Valley Forest Council ("YVFC") works for a wild Yaak through science, education, and bold action. YVFC seeks to help recover the state's endangered grizzly bears—particularly in the Yaak—and to designate the country's first Climate Refuge. YVFC envisions a "Curtain of Green" spreading around the world in a series of protected old and mature forests absorbing up to 12% of the world's annual carbon emissions.

The Montana Project preserves, promotes, and connects Montana's craft, artisan, and nature communities so as to nurture and protect the natural resources, open spaces, clear skies, clean water, and wildlife that foster and inspire them.

Big Hole Lodge, established in 1984, is one of the classic fly-fishing lodge experiences in the American West. Big Hole Lodge offers world-renowned wild trout fishing and comfortable accommodations in a secluded mountain setting in Wise River.

Brant Oswald Fly Fishing LLC is based in Livingston and has served clients with guided fly fishing on waters around the area, principally on the Yellowstone River and the Paradise Valley spring creeks since 1988.

R.L. Winston Rod Company, based in Twin Bridges, has been a leading manufacturer of fly rods since 1929. Its customers are avid users of Montana's many blue-ribbon trout streams.

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ARGUMENT

I. Outdoor Recreation Is a Vital Part of Montana’s Economy, Which Faces Increasing Threats From Climate Change.

A. Outdoor recreation plays a critical role in the economic health of the United States and Montana.

Each year Americans spend \$862 billion in the outdoor recreation economy.⁴

This spending includes purchasing products such as apparel, footwear, and equipment to fish, ski, climb, bike, hunt, and more at world-renowned locations all across Montana.⁵ In 2022, the value added from the outdoor recreation industry amounted to 2.2% of the nation’s GDP, which is more than motor vehicle manufacturing, oil/gas/coal, and air transportation *combined*.⁶ In Montana, the outdoor recreation industry is even more significant, accounting for 4.3% of Montana’s GDP, which is the third highest in the nation behind Hawaii and Vermont⁷ and more than the 4.1% contributed to Montana’s GDP by mining,

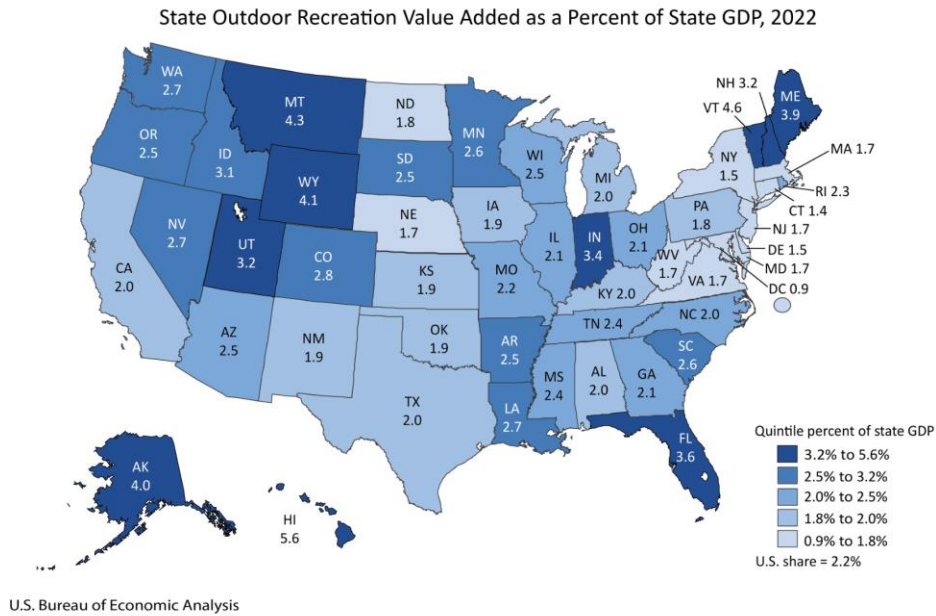
⁴ Outdoor Industry Association, *State of the Outdoor Market Fall 2022* (2022), 1, <https://outdoorindustry.org/wp-content/uploads/2022/12/OIA-State-of-the-Outdoor-Market-Report-Fall-2022.pdf>.

⁵ Outdoor Industry Association, *The Outdoor Recreation Economy* (2017), 5, https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.

⁶ Headwater Economics, *The Outdoor Recreation Economy by State* (updated November 2023), <https://headwaterseconomics.org/economic-development/trends-performance/outdoor-recreation-economy-by-state>.

⁷ Bureau of Economic Analysis, *Outdoor Recreation Satellite Account, U.S. and States, 2022* (November 2023), 1, <https://www.bea.gov/sites/default/files/2023-11/orsa1123.pdf>.

quarrying, and oil and gas extraction *combined*.⁸



*Figure 1: State Outdoor Recreation Value Added as Percent of State GDP, 2022.*⁹

In tandem with its impressive economic output, the outdoor recreation industry was also responsible for providing 4.5 million U.S. jobs in 2021.¹⁰ As of 2022, the outdoor economy provided over 29,000 jobs in Montana with a total of \$1.38 billion in wages,¹¹ compared to fewer than 10,500 jobs and \$650 million in wages provided in Montana by mining, quarrying, and oil and gas extraction

⁸ U.S. Bureau of Economic Analysis, Tools, Interactive Data, Regional Data, GDP and Personal Income, Annual Gross Domestic Product (GDP) by State, GDP in current dollars, Montana, All statistics in table, 2022, <https://www.bea.gov/itable>.

⁹ Bureau of Economic Analysis, *supra* note 7, at 1.

¹⁰ Outdoor Industry Association, *supra* note 4, at 1.

¹¹ Headwater Economics, *supra* note 6.

combined.^{12, 13} These jobs expand well beyond traditional recreation jobs such as guiding, outfitting, lodging, and park service. The outdoor recreation industry employs product developers, small and large retailers and other professionals creating jobs for highly skilled workers in diverse fields such as technology, product design, manufacturing, sustainability, and global commerce.¹⁴ Tellingly, there are more American jobs in the hunting and fishing industry alone than the entire oil and gas extraction industry.¹⁵

The outdoor recreation economy plays a vital role in the economic and physical health of the United States and Montana. A clean and healthy environment is foundational to the businesses that make up the outdoor recreation economy, and the industry cannot continue to thrive unless government agencies account for the climate impacts of their decisions.

B. Climate change directly threatens the outdoor recreation economy in Montana.

Decreased snowfall and increased temperatures are melting glaciers, like

¹² U.S. Bureau of Economic Analysis, Tools, Interactive Data, Regional Data, GDP and Personal Income, Annual Personal Income and Employment by State, Total full-time and part-time employment by NAICS industry, Montana, All statistics in table, 2022, <https://www.bea.gov/itable>.

¹³ U.S. Bureau of Economic Analysis, Tools, Interactive Data, Regional Data, GDP and Personal Income, Annual Personal Income and Employment by State, Wages and salaries by NAICS industry, Montana, All statistics in table, 2022, <https://www.bea.gov/itable>.

¹⁴ Outdoor Industry Association, *supra* note 5, at 6.

¹⁵ *Id.* at 7.

those in Glacier National Park. Glacier National Park may have no glaciers left by the end of the century¹⁶ thereby threatening the estimated \$484 million in economic benefits and over 5,200 jobs supported by the park.¹⁷ In just the last 70 years, 82 percent of Glacier Park’s namesake glaciers have disappeared and the total area of the glaciers has decreased by 70 percent.¹⁸ Glacier National Park is a “major driver of the regional economy and a source of fresh water for countless communities.”¹⁹

Climate change is also impacting fishing in Montana. The direct results of climate change to Montana’s rivers include algal blooms, decreased flows, increased temperatures, fish population declines and die offs, and decreased water quality.²⁰ Montana’s rivers have experienced a 20 percent decrease in summertime flows and a 1 to 2 degree temperature increase compared to 1960 levels.²¹ For fishing, habitat for trout could decline up to 30% by 2028 with an estimated loss of

¹⁶ *Fourth National Climate Assessment*, *supra* note 3, at 1501.

¹⁷ *See Tourism to Glacier National Park Adds \$484 Million in Local Economic Benefits*, NAT’L PARK SERVICE (June 4, 2019), <https://www.nps.gov/glac/learn/news/19-28.htm>.

¹⁸ Findings of Fact, Conclusions of Law, and Order (Doc. 405) (“Order”), p. 37, ¶ 154.

¹⁹ Order, p. 37, ¶ 152.

²⁰ Order, pp. 41-42.

²¹ Order, p. 40, ¶ 170.

\$192 million in associated spending.²² These degradations can already be seen in Flathead, Missouri, Clark Fork, Yellowstone, Powder, Madison, Blackfoot, Smith, Shields, and Bitterroot Rivers.²³

For hunting, Montana’s warmer and shorter winters allow big game to remain in the high county for longer, which increases the time and effort for hunting and dramatically threatens Montana’s hunting traditions.²⁴

Due to increased temperatures and resulting rain instead of snow, Montana’s snowpack has been in—and will continue to—decline.²⁵ Montana’s snow sports will be impacted by shorter winters, as snowpack is projected to melt 41 days earlier with 70 fewer days with snow cover in the upcoming decades.²⁶ Just last month (February 2024), Teton Pass Ski Area announced its closure after operating only four days this season due to a record low snowpack in the Sun-Teton-Marias

²² Thomas Michael Power, Ph.D. & Donovan S. Power, M.S., *The Economic Impact of Climate Change in Montana* (September 2023), 12, https://montanawildlife.org/wp-content/uploads/2023/10/Economic-Impacts-of-Climate-Change-in-MT_Power-Consulting-Inc._Clean-Version_9-27-2023.docx.pdf.

²³ Order, pp. 41-42.

²⁴ Power & Power, *supra* note 22, at 7.

²⁵ Order, pp. 35-36, ¶¶ 145-148.

²⁶ Power & Power, *supra* note 22, at 13-14.

basin “with 42% of the typical amount of snowpack for this time of the year.”^{27, 28}

Elsewhere in the state, Bridger Bowl saw skier visitation drop 40% from last December due to poor snow conditions.²⁹ Taken together, these impacts are projected to result in the loss of more than 8,800 jobs and \$263 million in earnings in Montana *annually*.³⁰

Climate change is also causing increased droughts in Montana. This trend will only continue into the future.³¹ The increased drought conditions exacerbate wildfire risks, which results in a longer fire season with more frequent and more

²⁷ Sara Chernikoff, *Lack of snow forces Montana ski resort to close halfway through season*, USA TODAY (Feb. 14, 2024), <https://www.usatoday.com/story/news/nation/2024/02/14/montana-teton-pass-closes-lack-of-snow/72588888007>.

²⁸ Jim Carlton, *Cold Weather Businesses Suffer in the Winter That Wasn't*, THE WALL STREET JOURNAL (March 8, 2024), <https://www.wsj.com/us-news/climate-environment/cold-weather-businesses-suffer-in-the-winter-that-wasnt-a59ac42b>.

²⁹ Bryanna Carroll, *Lack of snow has far-reaching impacts for Montana businesses*, NBC MONTANA (Jan. 5, 2024), <https://nbcmontana.com/news/local/lack-of-snow-has-far-reaching-impacts-for-montana-businesses>.

³⁰ Power & Power, *supra* note 22, at 38-39.

³¹ Order, pp. 42-43, ¶ 177.

severe wildfires³² and causes additional losses to the outdoor recreation industry as people avoid outdoor activities to limit smoke exposure.³³

The effects of climate change are not some far off fantasy but are *currently* “*impacting, degrading, and depleting Montana's environment and natural resources*.”³⁴ These impacts are felt by “every sector of Montana’s economy” as a result of “increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.”³⁵

The District Court provided a comprehensive chronicle of current climate science and projections based on the “informative and credible” testimony of Plaintiffs’ experts,³⁶ including the “overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels.”³⁷ The amount of CO₂ in the atmosphere has been consistently increasing since 1958, when measurements began, and has been increasing at 3 ppm per year since 2020, whereas it increased only 2 ppm per year between 1960-

³² Order, p. 43-44, ¶¶ 181-183.

³³ MTN News, *Smoke from area wildfires impacting Western Montana air quality*, KPAX.COM (August 2, 2022), <https://www.kpax.com/news/firewatch/smoke-from-area-wildfires-impacting-western-montana-air-quality>; Power & Power, *supra* note 22, at 17-19, 33-35.

³⁴ Order, p. 35, ¶ 140 (emphasis added).

³⁵ Order, p. 35, ¶¶ 140-141.

³⁶ Order, pp.19-26.

³⁷ Order, p. 19, ¶ 67.

2000.³⁸ The rise in atmospheric CO₂ has resulted in increased global temperatures, with Montana heating faster than the global average due to its high latitude.³⁹

Without a reduction of GHGs, “extreme weather events and other climactic events such as droughts and heatwaves will occur more frequently and in greater magnitude.”⁴⁰ These events negatively impact Montana’s economy.

II. Plaintiffs’ Injuries from Montana’s Unchecked Contribution to Climate Change are Redressable.

Appellants do not refute the seriousness of the climate crisis or its impacts on the citizens and children of Montana.⁴¹ Rather, Appellants take a nihilistic approach, arguing that because rescission of the MEPA Limitation would not solve the climate crisis *entirely*, then the State should not be required to take *any* steps to reduce the State’s contribution to that crisis.⁴² Such pessimism is not a valid basis for avoiding a constitutional mandate. And inaction will not—and cannot—meet the global challenge posed by climate change and the hard truth that governments, including Montana, will need to do their part to meet that challenge.

³⁸ Order, p. 20, ¶ 76.

³⁹ Order, p. 21, ¶¶ 78-79.

⁴⁰ Order, p. 24, ¶ 89.

⁴¹ State Agencies’ Opening Brief (State Agencies Brief’), p. 6 (conceding that Defendants did not dispute “the science and impacts of climate change”); State of Montana Opening Brief (“Montana Brief”), p. 3 (adopting State Agencies’ statement of facts).

⁴² See Montana Brief, pp. 15-17, State Agencies Brief, pp. 30-33.

Instead, Appellants insist that the Youth Plaintiffs lack standing because, in Appellants' view, striking down the MEPA Limitation as unconstitutional would not redress Plaintiffs' injuries.⁴³ Appellants' argument is based on an erroneous assumption that only a ruling that entirely eliminates GHG emissions or reverses climate change would satisfy the redressability prong for standing. That is not so.

Appellants' argument relies on strict application of the *federal* standard for redressability rather than the broader Montana standard.⁴⁴ Under the Montana standard, an injury is redressable where "available legal relief can effectively alleviate, remedy, or prevent" the injury.⁴⁵ As the District Court explained, "The term 'alleviate' means to 'make (something, such as pain or suffering) more bearable' or '*to partially remove or correct* (something undesirable).'"⁴⁶

Accordingly, there is no requirement that striking down the MEPA Limitation must eliminate every injury to the Youth Plaintiffs caused by climate change. Instead, redressability is established where, as here, the remedy would partially relieve the Youths' injuries.

⁴³ State Agencies Brief, pp. 30-34; Montana Brief, pp. 15-17.

⁴⁴ See Order on Motion to Dismiss (Doc. 46) (August 4, 2021) ("Motion to Dismiss Order"), pp. 15-16.

⁴⁵ *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (citation omitted).

⁴⁶ Motion to Dismiss Order, pp. 15-16 (citing Merriam-Webster Dictionary) (emphasis added).

Moreover, the State ignores the benefits of more informed government decision-making in light of climate impacts. The MEPA Limitation prevents Appellants from obtaining the information needed to make decisions protective of the Youth Plaintiffs' inalienable rights to a clean and healthful environment. Declaring the MEPA Limitation unconstitutional will give Appellants the tool that is needed to approve or deny projects based on the standards imposed by the Montana Constitution. To hold otherwise would render the State's Constitutional mandate toothless and deny the Youth Plaintiffs and other Montana citizens the benefit of its unique protections. The injuries to the Youth Plaintiffs caused by the MEPA Limitation are therefore redressable under Montana's standing requirements. As a result, the Youth Plaintiffs have standing to bring their claim.

Appellants' position also underscores the inertia of those in power that has fueled the current climate crisis. Pointing to the fact that other states and countries such as China will continue to emit GHGs if the MEPA Limitation is removed, Appellants take the position that, unless *everybody* does *everything* to stop climate change, then the State of Montana should do *nothing*. This position is untenable given the environmental, economic, and psychological impacts that climate change is causing and will continue to cause unabated without government action. That other government actors are not doing what they should does not mean that Montana is excused from doing what it is constitutionally required to do. While

averting the climate crisis will require action from local, state, and national governments across the globe, the State of Montana must do its part to reduce *its* contribution to the climate crisis as mandated by the State's constitution.

CONCLUSION

Amici Curiae Outdoor Recreation Industry Members respectfully request that this Court affirm in full the District Court's August 14 Order and hold that Plaintiffs have standing and the MEPA Limitation violates the Montana Constitution's guarantee of a clean and healthful environment.

Respectfully submitted this 14th day of March, 2024.

/s/ Rebecca L. Davis

Rebecca L. Davis (*pro hac vice*)

rebecca@lozeaudrury.com

Brian B. Flynn (*pro hac vice*)

brian@lozeaudrury.com

LOZEAU DRURY LLP

1939 Harrison St., Suite 150

Oakland, CA 94612

Telephone: (510) 836-4200

/s/ Paul J. Lawrence

Paul J. Lawrence

PACIFICA LAW GROUP

1191 2nd Avenue, Suite 2000

Seattle, WA 98101

Telephone: (206) 245-1700

Paul.Lawrence@pacificallawgroup.com

Attorneys for Amici Curiae

Outdoor Recreation Industry Members

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 3,298, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

Date: March 14, 2024

/s/ Rebecca L. Davis

Rebecca L. Davis

CERTIFICATE OF SERVICE

I, Paul J. Lawrence, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 03-14-2024:

Nathan Bellinger (Attorney)

1216 Lincoln St

Eugene OR 97401

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

Service Method: eService

Andrea K. Rodgers (Attorney)

3026 NW Esplanade

Seattle WA 98117

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

Service Method: eService

Roger M. Sullivan (Attorney)

345 1st Avenue E

MT

Kalispell MT 59901

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

Service Method: eService

Melissa Anne Hornbein (Attorney)

103 Reeder's Alley

Helena MT 59601

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

Service Method: eService

Philip L. Gregory (Attorney)

1250 Godetia Drive

Woodside CA 94062

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

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601

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

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901

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

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

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

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

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

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

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources,
Billings Regional Office, MT Dept of Transportation
Service Method: eService

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

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

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

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

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

Keeley Cronin (Attorney)
c/o Baker & Hostetler LLP
1801 California Street, Suite 4400

Denver CO 80202
Representing: The Frontier Institute
Service Method: eService

Lindsay Marie Thane (Attorney)
1211 SW 5th Ave
#1900
Portland OR 97204
Representing: Navajo Transitional Energy Company, LLC
Service Method: eService

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

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

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

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

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

Timothy M. Bechtold (Attorney)
PO Box 7051
317 East Spruce Street

Missoula MT 59807
Representing: Public Health Experts and Doctors
Service Method: eService

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: Environmental and Constitutional Law Professors'
Service Method: eService

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

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

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

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

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

Juan Carlos Rodriguez (Interested Observer)
Service Method: Conventional

Byron L. Trackwell (Amicus Curiae)
7315 SW 23rd Court
Topeka KS 66614
Service Method: Conventional

Alex Guillen (Interested Observer)
Service Method: Conventional

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

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

Robert Cameron (Attorney)
203 N. Ewing Street
Helena MT 59601
Representing: State of Alabama, State of Alaska, State of Arkansas, State of Idaho, State of North Dakota, State of Indiana, State of Mississippi, State of Missouri, State of Nebraska, State of South Carolina, State of South Dakota, State of Utah, State of Wyoming, Commonwealth of Virginia, State of Iowa
Service Method: Conventional

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

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

Electronically Signed By: Paul J. Lawrence
Dated: 03-14-2024