IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs and Appellees,

v.

THE STATE OF MONTANA, et al.,

Defendants and Appellants.

TRIBAL AND CONSERVATION GROUPS *AMICUS CURIAE* BRIEF

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Fifty years ago, the people of Montana adopted a Constitution establishing an extraordinary set of "inalienable rights." Mont. Const. preamble; Art. II, § 3. The Constitution began with one right that is fundamental to all others: "the right to a clean and healthful environment[.]" *Id.* Art. II, § 3. To guarantee this right, the Constitution directs that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations" and further requires Montana's Legislature to "provide adequate remedies for the protection of the environmental life support system from degradation" and "to prevent unreasonable depletion and degradation of natural resources." *Id.* Art. IX, § 1(1), (3).

The Montana Environmental Policy Act ("MEPA") is an essential piece of the statutory framework the Legislature adopted to implement the Constitution's environmental protections. But Montana's legislature and its regulatory agencies have resisted their constitutional obligations. Since designating MEPA as a central component of the environmental remedial framework in 2003,[1] the Legislature has repeatedly attempted to gut MEPA, passing a series of amendments—in

[1] 2003 Mont. Laws ch. 361, §5.

2011, 2013, 2020, and 2023—each of which systematically chipped away at MEPA's ability to meet its Constitutional purpose. The MEPA Climate Limitation and Judicial Prohibition at issue here—MCA § 75-1-201(2)(a), (6)(a)(ii)—represent the latest such effort. Adding to this legislative malfeasance, Montana's agencies now take the implausible position that, even absent the unconstitutional MEPA Climate Limitation, they should be excused from evaluating the adverse impacts to Montana's environment from climate change spurred by activities they authorize. Absent correction by this Court, the State's collective efforts would exempt the most pressing environmental, social, and economic threat humanity has faced—climate change—from the Constitution's intentionally broad environmental protections.

The Tribal and Conservation Amici, representing interests of Montanans whose constitutional rights are directly impacted by this Court's interpretation of MEPA, respectfully request that this Court

reject the Legislature's and agencies' transparent attempt to skirt their constitutional obligations and nullify Amici's inalienable rights.[2]

ARGUMENT

In support of Appellees, Tribal and Conservation Amici offer the following arguments: (1) Montana agencies have a self-executing constitutional obligation to prevent the avoidable impacts of climate change in Montana; (2) state agencies have statutory authority to prevent climate impacts from their decisions; and (3) if not for the MEPA Climate Limitation, MCA § 75-1-201(2)(a), state agencies would be obligated to evaluate the climate impacts of their actions as an essential component of fulfilling their constitutional obligation to avoid climate harm in Montana.

[2] Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Alternative Energy Resources Organization, Citizens for a Better Flathead, Climate Smart Missoula, District XI Human Resource Council, Inc., Earthworks, Families for a Livable Climate, Forward Montana, Friends of 2 Rivers, Inc., Montana Audubon, Montana Environmental Information Center, Northern Plains Resource Council, NW Energy Coalition, Park County Environmental Council, Sierra Club, SustainaBillings.

I. STATE AGENCIES HAVE A CONSTITUTIONAL OBLIGATION TO PREVENT CLIMATE IMPACTS FROM THEIR ACTIONS

State agencies' constitutional obligation to "maintain and improve a clean and healthful environment in Montana for present and future generations," Mont. Const. Art. IX, § 1(1), is self-executing and applies regardless of the agencies' statutory authority.

The Attorney General's contrary position, AG Br. 21, is wrong for at least two reasons. First, the Legislature's designation of MEPA as an essential tool for implementing the state's constitutional environmental obligation, MCA § 75-1-102(1), and subsequent enactment of the MEPA Climate Limitation, *id.* § 75-1-201(2)(a), both "implicate[] individual constitutional rights," and this Court may thus "determine whether that enactment fulfills the Legislature's constitutional responsibility." *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548, 555 (citing *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257). And indeed, this Court has already exercised its fundamental review authority to invalidate prior MEPA remedial limitations on constitutional grounds in *Park County*

Environmental Council v. DEQ, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.[3]

More fundamentally, the right to a clean and healthful environment in Article II, section 3 and corresponding direction in Article IX, section 1(1) that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations" *are* self-executing. "To determine whether the provision is self-executing, we ask whether the Constitution addresses the language to the courts or to the Legislature.... If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, it is self-executing." *Columbia Falls Elem. Sch. Dist. No. 6*, ¶ 16 (citation omitted). Although additional provisions found in Article IX, section 1(2)–(3) are directed at the Legislature,[4] these provisions

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[3] Amici endorse, and do not repeat, the youth plaintiffs' argument that the MEPA Climate Limitation, MCA § 75-1-201(2)(a), and Judicial Prohibition, MCA § 75-1-201(6)(a)(ii), are "legislative acts" subject to judicial review. Plaintiffs/Appellees' Answer Br. 54–60.

[4] Mont. Const. Art. IX, § 1(2) ("The legislature shall provide for the administration and enforcement of this duty."); *id.* § 1(3) ("The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.").

requiring legislative remedies do not limit the fundamental environmental rights of every Montanan found in Article II. *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 53, 769 P.2d 684, 689–90 (1989), amended, 236 Mont. 44, 784 P.2d 412 (1990) (constitutional direction to legislature to "provide a basic system of free quality education" was not "intended to be a limitation on the guarantee of equal educational opportunity contained in [a different] subsection"). Nor do they diminish the separate, clear obligation of "[t]he State and each person," Mont. Const. Art IX, §1(1), which is not solely directed at the Legislature. *See Helena Elementary*, 236 Mont. at 53, 769 P.2d at 689–90 (finding constitutional "guarantee of equal educational opportunity is binding upon all three branches of government" because it is not directed solely at the legislature).

Accepting the Attorney General's position that the Constitution's environmental provisions are not self-executing would turn decades of this Court's unbroken precedent on its head. Consistently the Court has affirmed that constitutional rights appearing in Article II, the Declaration of Rights, "are absolute and self-executing in so far as they limit the power of the legislature to restrict these rights of the people."

State v. Rathbone, 110 Mont. 225, 100 P.2d 86, 90 (1940); *see also, e.g.*, *Associated Press v. Usher*, 2022 MT 24, ¶ 12, 407 Mont. 290, 503 P.3d 1086 (right to know, Art. II, § 9, "is self-executing"); *Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, ¶ 16, 391 Mont. 298, 417 P.3d 313 (right to the administration of justice, Art. II, § 16, "is self-executing"); *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 36, 410 Mont. 114, 136, 518 P.3d 58 ("although the Legislature has the discretionary power to provide for [election day registration], it may not exercise this power in a manner that unconstitutionally burdens the fundamental right to vote," Art. II, § 13).

This Court has already affirmed the self-executing nature of the Constitution's environmental provisions, holding "that the text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well." *Cape-France Enter. v. Est. of Peed*, 2001 MT 139, ¶ 32, 305 Mont. 513, 29 P.3d 1011 (citing *Mont. Env't Info. Center. v. DEQ* ("*MEIC*"), 1999 MT 248, ¶ 64, 296 Mont. 207, 988 P.2d 1236). In *Cape-France Enterprises*, the Court concluded it would violate the Constitution's environmental provisions for a private party to drill a well that could contaminate

aquifers. *Id.* ¶ 33. Further, the Court determined that any *judicial* enforcement of the contract's well-drilling provision "would involve the state itself in violating the public's Article II, Section 3 fundamental rights to a clean and healthful environment, and in failing to maintain and improve a clean and healthful environment as required by Article IX, Section 1." *Id.* ¶ 34. Accordingly, in addition to being evident from the Constitution's plain language that the Constitution's environmental rights and obligations are directed at all branches of government and each person, this Court has also so held.

The state agencies' affirmative obligation to prevent environmental harm encompasses harm experienced in Montana from climate change. In crafting the Constitution's environmental provisions, the delegates "intentionally avoided definitions, to preclude being restrictive." *MEIC*, ¶ 67 (quoting Mont. Const. Convention, Vol. IV at 1201, March 1, 1972). Instead, "the term 'environmental life support system' is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded." *Id.* (emphasis omitted). Such deliberately expansive language certainly

includes climate change—the gravest environmental threat that Montanans have faced.

In sum, this Court should affirm that Article II, section 3 and Article IX, section 1(1) are self-executing and they impose obligations on state agencies that are enforceable to vindicate Montanans' fundamental environmental rights.

II. STATE AGENCIES HAVE STATUTORY AUTHORITY TO PREVENT CLIMATE IMPACTS FROM THEIR ACTIONS

Not only do Montana agencies have an affirmative constitutional obligation to prevent environmental harm in Montana from climate change, the Appellant agencies—DEQ, the Department of Natural Resources Conservation (DNRC), and the Department of Transportation—have statutory authority to fulfill their constitutional duty.

A. DEQ Has Broad Statutory Authority

DEQ exercises regulatory authority over a wide range of polluting activities and, in that permitting role, is authorized to prevent the climate impacts of proposed activities.

- The Clean Air Act of Montana authorizes DEQ to establish emission limits "from any source necessary to prevent, abate, or control air pollution." MCA § 75-2-203(1), (4).

- The Major Facility Siting Act authorizes DEQ to approve a proposed electric transmission, pipeline, or geothermal facility only after considering environmental impacts and the public interest, including public health, welfare, and safety. *Id.* § 75-20-301.

- The Montana Water Quality Act does not limit the circumstances under which DEQ may deny a permit. *Id.* § 75-5-403.

- The Montana Strip and Underground Mine Siting Act prohibits DEQ from permitting a new coal mine that is not consistent with the policies of the Act, *id.* § 82-4-125, including the policy to "protect[] … the environmental life support system from degradation and … prevent unreasonable depletion and degradation of natural resources, *id.* § 82-4-102(2).

- The Montana Strip and Underground Mine Reclamation Act ("MSUMRA") does not limit the circumstances under which DEQ may deny a permit and affords DEQ broad discretion to deny a coal-mining permit, including when mining "would adversely affect the use, enjoyment, or fundamental character of neighboring land that has special, exceptional, critical, or unique characteristics." *Id.* § 82-4-227(2).

- The purposes of the Metal Mine Reclamation Act ("MMRA") include fulfilling the State's responsibilities under Mont. Const. Art. IX, section 1(3) and 2(1), and to "mitigate or prevent undesirable offsite environmental impacts." MCA § 82-4-302(1)(a), (g). A reclamation plan's failure to "provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands" is one reason DEQ may deny a permit. *Id.* § 82-4-336(10) (reclamation plan requirements); *id.* § 82-4-351(1)(b) (reasons for permit denial).

Most fundamentally, these laws "must be interpreted and administered in accordance with the policies set forth" in MEPA. MCA §

75-1-201(1)(a); *see also City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898 (laws be interpreted to "give effect to the[ir] purpose") (quotation omitted). The Legislature designated each of these statutes, like MEPA, as essential to meeting the State's constitutional obligations to "protect[] … the environmental life support system from degradation and … prevent unreasonable depletion and degradation of natural resources." MCA § 75-2-102(1) (Clean Air Act of Montana); *id.* § 75-5-102(1) (Montana Water Quality Act); *id.* § 82-4-202(1) (MSUMRA); *id.* § 82-4-102(1) (Strip and Underground Mine Siting Act); *id.* § 82-4-301(2)(a) (MMRA). Thus, DEQ's permitting statutes must be construed broadly to affirm DEQ's discretion to base its decisionmaking on climate-change considerations.

B. DNRC Has Broad Statutory Authority

DNRC and the Board of Land Commissioners are likewise empowered to make decisions to prevent the climate-change impacts of proposed actions.[5] "[P]ublic lands of the state that are held in trust for the people as provided in Article X, section 11, of the Montana constitution." MCA § 77-1-102(3). Thus, the Board may sell, lease, or

[5] DNRC manages the resources of the state trust lands through the Board. FOFCOL at 14.

exchange state lands to advance the "well-being of the people of this state." MCA §§ 77-1-202, -204. The duty of DNRC and the Board "to manage agricultural, grazing, and other surface leased land to protect the best interests of the state … necessarily includes considering consequences to wildlife and the environment." *Ravalli Cnty. Fish & Game Ass'n, Inc. v. Montana Dep't of State Lands*, 273 Mont. 371, 379, 903 P.2d 1362, 1368 (1995). The DNRC's and Land Board's "duty to avoid environmental harm is mandatory." *Id.*[6]

C. The Department of Transportation Has Broad Statutory Authority

The Department of Transportation also has broad discretion to condition or deny proposed actions based on environmental, including climate, impacts. In particular, the Department may authorize the use of eminent domain only if it serves the "public interest and necessity" MCA § 60-4-104(2)(a). And the Department may grant highway rights-

[6] DNRC leases for coal, oil and gas, and mineral production are generally exempt from MEPA review *only* because such activities are reviewed under MEPA in the permitting stage. MCA § 77-1-121; *see N. Plains Res. Council, Inc. v. Montana Bd. of Land Comm'rs*, 2012 MT 234, ¶ 21, 366 Mont. 399, 288 P.3d 169.

of-way only for projects that are "in the public interest." *Id.* § 60-4-601(1)(b).

In sum, contrary to the State's position, the state agencies are statutorily authorized to act on a broad range of environmental concerns—including climate change impacts in Montana—in undertaking or authorizing environmentally harmful activities.

III. MEPA REQUIRES AGENCIES TO CONSIDER ALL FORESEEABLE IMPACTS OF THEIR ACTIONS

MEPA requires state agencies to consider *all* the foreseeable impacts to Montana's environment from their actions, which allows agencies to comply with their constitutional obligations to both anticipate and prevent environmental harm. *Park Cnty.*, ¶ 70 (discussing MEPA's "anticipatory and preventative" role); MCA § 75-1-201(1)(b)(iv)(B) (requiring agencies to disclose "any adverse effects" of an action). This legislative mechanism for constitutional compliance must be applied broadly: "to the fullest extent possible," and all "policies, regulations, and laws of the state must be interpreted and administered" in accordance with MEPA's goals. MCA § 75-1-201(1)(a).

Absent the MEPA Climate Limitation, MCA § 75-1-201(2)(a), state agencies necessarily must consider the climate impacts in Montana of

greenhouse gas ("GHG") emissions in their decisionmaking, as demonstrated by precedent interpreting the scope of MEPA, *Bitterrooters for Planning, Inc. v. DEQ*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712; MEPA's structure and purposes; and cases interpreting *Bitterrooters*' federal progenitor, *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

A. *Bitterrooters* and MEPA's Purposes Affirm the State's MEPA Obligation to Make Decisions Only After Fully Considering Their Impacts in Montana

To ensure that MEPA continues to safeguard Montanans' constitutional rights, a state agency must "take a hard look at the environmental consequences of its actions." *Bitterrooters*, ¶ 17 (quotation and citation omitted). The scope of an agency's MEPA review, then, must include all foreseeable impacts of agency actions. Any attempt to limit state agencies' MEPA-review scope based on *Bitterrooters* presents an issue of statutory implementation—one that this Court need not reach in order to affirm the district court's finding of constitutional infringement. But as a matter of statutory compliance in the absence of the unconstitutional MEPA Climate Limitation,

agencies must consider all foreseeable impacts of state actions, including climate impacts.

Bitterrooters affirmed that MEPA requires agencies to evaluate any impacts that have a "reasonably close causal relationship between the triggering government action and the … environmental effect." *Bitterrooters*, ¶ 33. A contrary reading of *Bitterrooters*—such as the position advanced by NorthWestern Energy in its amicus brief, NWE Br. at 16–17, and underlying Appellants' refusal to consider climate impacts in recent MEPA reviews[7]—would undermine MEPA's constitutional role by constraining review to only *impacts* the agency has direct and express power to regulate, even if the agency's regulation

[7] In one recent example, DEQ refused to evaluate the climate-change impacts of GHGs caused by a recent coal-mine permit, notwithstanding the district court's injunction in this case. DEQ asserted: "The permitted activity and the impacts stemming therefrom concern mining coal, not its combustion, which is beyond the scope of MSUMRA [the coal-mine permitting law] and the permitted state action. … Because any effects from the ultimate burning of coal are beyond the scope of the proximate cause of the permitted activity, they are, accordingly, not included in the EA's analysis." DEQ, Written Findings for Bull Mountain Mine #1 (AM4), Att. 3 at 5 (Nov. 3, 2023), at https://deq.mt.gov/files/Land/CoalUranium/Pending%20Applications/Bull%20Mountain%20AM4/AM4_WrittenFindings.pdf.

of the *project* could ameliorate or prevent these impacts. *Bitterrooters* did not support this result.

Bitterrooters established a causal-nexus limitation on MEPA review. *Bitterrooters* involved a challenge to the Department of Environmental Quality's (DEQ) environmental assessment for a wastewater treatment plant. The plaintiffs argued the scope of that assessment should have included the impacts of the associated large retail facility—a project DEQ had no authority to prevent or regulate. *Id.* ¶¶ 25–35. The Court noted that requiring DEQ to examine the impacts related to the broader retail facility would result in an impermissible "tail wagging the dog" scenario because the wastewater plant was not the cause-in-fact of the construction and operation of the retail store. Rather, the construction and operation of the retail store were the causes-in-fact of the wastewater plant and its impacts. *Id.* ¶ 25. Thus, relying on the U.S. Supreme Court's decision in *Public Citizen*, the Court held that DEQ was not required to examine the broader impacts of the construction and operation of that facility because the agency could not "prevent [those impacts] … through the

lawful exercise of its independent authority." *Id.* ¶33 (citing *Public Citizen,* 541 U.S. at 770).

Under these circumstances, *Bitterrooters* confirmed that MEPA does not obligate an agency to evaluate impacts of *projects* outside of the agency's regulatory reach. But where an agency has regulatory authority over the project, the Court did not limit the scope of an agency's analysis of the *impacts* that project causes. Affirming that a permitting action is the "*legal* cause" of environmental impacts in these circumstances, *Bitterrooters*, ¶ 33 (emphasis added), does not require any judicial fact-finding in most cases. But the District Court here did make findings that, "[p]ursuant to its statutory authority, DEQ has discretion to deny and revoke permits," FOFCOL at 13, and other agencies have extensive statutory authority to regulate, permit, and license all fossil fuel activities, which result in GHG emissions, *id.* at 13–15, 89–90. Thus, both as a matter of law and based on the District Court's findings, state agencies *do* have authority to regulate activities that cause climate harm in Montana regardless of whether agency permitting statutes expressly reference GHGs or climate change.

MEPA's structure and purposes further confirm that direct regulatory authority does not define MEPA's review scope. Interpretating *Bitterrooters* to preserve agencies' duties to review foreseeable impacts of their actions—including both climate and non-climate environmental harm in Montana—is necessary to meet the overarching purposes and structure of MEPA in *all* cases.

First, if MEPA's scope was coextensive with the agency's express regulatory authority under permitting statutes, as Appellants suggest, then MEPA review would serve no purpose beyond that already served by the technical analysis performed under the permitting statutes. But "MEPA's environmental review process is complementary to—rather than duplicative of—other environmental provisions," and, while important, the "cumulative efforts [of substantive environmental statutes] to meet the Legislature's constitutional obligations … fail to show that MEPA is redundant within Montana's ecosystem of environmental protections." *Park Cnty.*, ¶ 76.

Second, if agencies could not evaluate all foreseeable impacts in MEPA reviews, the statute's mechanism for voluntary mitigation of impacts that fall outside the agency's direct regulatory control would be

undermined. Yet, MEPA contemplates this exact process of mitigation, as it allows an agency to either: (a) exercise its authority to impose conditions on a project, or (b) where the agency lacks that direct authority, it can work cooperatively with a project sponsor to identify voluntary measures to ameliorate harmful effects. MCA § 75-1-201(1)(b)(v), (4)(b). Such soft regulation is an essential part of MEPA's framework for "avert[ing] potential environmental harms through informed decision making." *Park Cnty.*, ¶ 76.[8]

Third, the Court could not reconcile a standard that requires MEPA review of only impacts expressly identified and regulated under permitting statutes with the Legislature's stated purpose of "requiring an environmental assessment and an environmental impact statement … [which] is to assist the legislature in determining whether laws are adequate to address impacts to Montana's environment … ." MCA § 75-1-102(3)(a). Agency regulations confirm this important aspect of MEPA, requiring evaluation of "cumulative and secondary impacts," which, by

[8] Additionally, the Legislature directed permitting agencies to consult with "any state agency that has jurisdiction by law … with respect to any environmental impact" of the project, MCA § 75-1-201(1)(c), affirming that MEPA's intended review scope extends beyond the direct jurisdiction of the permitting agency.

definition, are beyond agencies' express permitting authority. ARM 17.4.603(7), (18), 17.4.609(3)(d)–(e) (DEQ); ARM 18.2.239 (MDOT); ARM 36.2.525 (DNRC). And state agencies must evaluate impacts to wildlife, historical and archeological sites, aesthetics and noise, agricultural activities, tax revenue, and "social structures and mores" though they also lack direct permitting authority over these impacts. ARM 17.4.609(3); ARM 18.2.239(3); ARM 36.2.525(3). Unless the scope of MEPA includes *all* foreseeable impacts in Montana, state agencies would have no reason to evaluate any of these parameters under MEPA, leaving the Legislature uninformed of potential gaps in the substantive permitting statutes.[9]

At bottom, MEPA's framework for "avert[ing] potential environmental harms through informed decision making" supports constitutionally compliant agency decisionmaking. *Park Cnty.*, ¶76. The

[9] The Attorney General invokes *Bitterrooters* to incorrectly argue that MEPA review is not designed to assist the Legislature in identifying regulatory gaps, despite the statute's express purpose to do just that, MCA § 75-1-102(3)(a). AG Br. 23–24. The Attorney General misconstrues the Court's use of the term "environmental review gap" in *Bitterrooters,* which in context must refer to projects that fall entirely outside of the agency's control. *Bitterrooters*, ¶ 34.

legislature, through the MEPA Limitation, unconstitutionally took away the agencies' ability to do just that. This Court should reject any approach that detaches MEPA review from its statutory and constitutional purposes. *Howell v. State*, 263 Mont. 275, 286–87, 868 P.2d 568, 575 (1994) (citation omitted).

B. *Bitterrooters'* Federal Genesis—*Public Citizen*—Does Not Support the State's Position

The proper scope of MEPA review under *Bitterrooters* is further clarified by the U.S. Supreme Court's decision in *Department of Transportation v. Public Citizen* and subsequent federal appellate decisions, which affirm an interpretation of agencies' environmental review obligations as extending to all foreseeable direct and indirect effects of an action, including downstream GHG emissions.

1. Public Citizen *Is Limited to Situations Where an Agency Has No Statutory Authority to Prevent Actions Causing Environmental Impacts.*

A close look at *Public Citizen*, on which *Bitterrooters* relies, refutes the position that agencies are not obliged to evaluate the climate impacts of their actions regardless of the MEPA Climate Limitation. Under *Public Citizen*, an agency is not a legally relevant cause of environmental effects for NEPA purposes, but only if the agency lacks

authority to prevent *the action* that would cause those effects. 541 U.S. at 770.

As with *Bitterrooters*, *Public Citizen*'s facts are key to understanding that case's holding. In *Public Citizen*, the President ended a prohibition on operating Mexican trucks in the U.S., but required that the Federal Motor Carrier Safety Administration ("FMCSA") first issue new safety regulations for the trucks. *Id.* at 758–61. FMCSA's NEPA review for the regulations omitted impacts from an increase in truck traffic. *Id.* at 761. Affirming FMCSA's approach, the U.S. Supreme Court held that, "where an agency has *no ability* to prevent a certain effect due to its limited statutory authority *over the relevant actions*, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770 (emphases added). In *Public Citizen*, the "legally relevant cause of the entry of the Mexican trucks [wa]s not FMCSA's action, but instead the actions of the President in lifting the moratorium," which FMCSA could neither modify nor reject. *Id.* at 769.

The "critical feature" of *Public Citizen* was the fact that the agency had "no ability" to countermand the presidential order causing the environmental impacts at issue or otherwise prevent those impacts, *id.*

at 766, just as in *Bitterrooters*, where DEQ could not prevent construction of the retail facility that was under the local government's jurisdiction even by denying the wastewater permit at issue. However, the limitation announced in *Public Citizen* and *Bitterrooters* does not apply where, as here, state permitting statutes empower agencies to approve, disapprove, or modify projects, which could prevent or lessen their climate impacts.

2. *NEPA Caselaw Confirms that Federal Agencies Must Analyze Downstream Climate Impacts*

In the years since *Public Citizen*, no federal appellate court has precluded agency review of environmental effects due to any lack of agency authority to prevent those effects.[10] Indeed, post-*Public Citizen*, federal appellate courts have routinely recognized that NEPA requires agencies to evaluate the downstream impacts of their decisions,

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[10] *See, e.g., League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir. 2008) (citation omitted) (explaining that *Public Citizen* emphasized that its holding was "limited to the 'critical feature' of the case—*i.e.,* that FMCSA lacked authority to countermand the presidential order allowing Mexican carriers into the United States…—and subsequent Ninth Circuit cases have limited their application of *Public Citizen* on that basis").

including climate impacts, even when the agency has no direct regulatory authority over downstream actors.

For example, in *Solar Energy Industries Association v. FERC*, the Ninth Circuit held that NEPA required FERC to analyze downstream climate effects of its rule reducing incentives to independent energy producers notwithstanding the fact that it was up to states to implement the rule and FERC does not directly regulate GHGs. 80 F.4th 956, 993–95 (9th Cir. 2023). The Ninth Circuit explained that the rule could "shift[] production away from renewable production and toward fossil-fuel production." *Id.* at 995. Other Ninth Circuit cases have also required analysis of downstream climate impacts—including impacts from GHG emissions in other countries. *See 350 Mont. v. Haaland*, 50 F.4th 1254, 1265–70 (9th Cir. 2022) (requiring analysis of coal combustion abroad); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736–40 (9th Cir. 2020) (requiring analysis of GHG emissions resulting from foreign oil consumption in EIS for offshore oil drilling and production facility); *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1212–17 (9th Cir. 2008) (requiring climate analysis for rule setting motor-vehicle fuel-economy standards).

Likewise, the Tenth and D.C. Circuits have required federal agencies to consider the downstream climate impacts of their actions in NEPA analyses. *See Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1035–44 (10th Cir. 2023) (agency failed to take hard look at downstream GHG emissions indirectly caused by oil and gas drilling permits); *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1233–38 (10th Cir. 2017) (BLM irrationally analyzed combustion-related GHGs indirectly caused by coal leases); *Eagle Cnty., Colo. v. Surface Transp. Bd.*, 82 F.4th 1152, 1180 (D.C. Cir. 2023) (requiring analysis of GHG effects of increased oil drilling and Gulf Coast refining resulting from construction of Utah rail line).

Yet, Appellants advocate that this Court take an entirely different, and unjustifiable, approach. Although they do not deny that climate impacts are felt in Montana regardless of where GHGs are emitted, the state agencies argue that "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." Agencies Br. 20–21. At the same time, the agencies acknowledge that "those impacts may be analyzed" under NEPA. *Id.* The agencies fail to

justify a more limited review scope under MEPA, particularly given MEPA's express purpose of implementing the constitution's environmental protections.

Under MEPA—setting aside the unconstitutional application of the MEPA Climate Limitation—state agencies must analyze the impacts on Montana's environment due to climate change that is spurred by the actions the state authorizes and that review must inform agency decisionmaking that complies with the Constitution.

CONCLUSION

The Tribal and Conservation Amici urge the Court to reject the State's efforts to evade its constitutional and statutory obligations to anticipate and prevent the harmful impacts of climate change to Montanans spurred by the projects its agencies authorize.

Respectfully submitted this 19th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this motion is printed with proportionately spaced Century Schoolbook text typeface of 14 points and is double-spaced. The word count calculated by Microsoft Word is 4,848, excluding the certificate of compliance, and does not exceed 5,000 words.

Dated this 19th day of March, 2024.

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