IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0575

Rikki Held, et al.,

Plaintiffs-Appellees,

v.

State of Montana, et al.,

Defendants-Appellants.

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

---

AMICUS BRIEF OF THE STATES OF NORTH DAKOTA, ALABAMA, ALASKA, ARKANSAS, IDAHO, INDIANA, IOWA, MISSISSIPPI, MISSOURI, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WYOMING, AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLANTS AND REVERSAL

ROB CAMERON
Special Assistant Attorney General
203 Ewing Street
Helena, MT 59601
Telephone: (406) 389-8244
rcameron@jmgattorneys.com

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Solicitor General
KATIE CARPENTER
Deputy Solicitor General
North Dakota Attorney General's Office
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210

Counsel for Amici States
Additional states' counsel in signature block

Dale Schowengerdt
Landmark Law PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
dale@landmarklawpllc.com

Lee M. McKenna
Montana Dept. of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Lee.mckenna@mt.gov

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

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

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

Emily Jones
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
emily@joneslawmt.com

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

Attorneys for Appellant-Defendant State of Montana

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, TM 59901
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
hornbein@westernlaw.org
chillcott@westernlaw.org

Nathan Bellinger
Andrea Rodgers
Julia Olson
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org

Philip L. Gregory
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
pgregory@gregorylawgroup.com

Attorneys for Appellees-Plaintiffs

Ryen L. Godwin
Lindsay Thane
Schwabe, Williamson & Wyatt, P.C.
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
rgodwin@schwabe.com
lthane@schwabe.com
Attorneys for Amicus Curiae
Navajo Transitional
Energy Company

Brian P. Thompson
Steven T. Wade
Hallee C. Frandsen
800 Last Chance Gulch, Suite 101
Helena, MT 59601
brian@bkbh.com
stevew@bkbh.com
hallee@bkbh.com
Attorneys for Amicus Curiae
Treasure State Resource
Association of Montana

Quentin M. Rhoades
Rhoades & Erickson PLLC
430 Ryman Street
Missoula, MT 59802
qmr@montanalawyer.com
Attorneys for Amicus Curiae
Friend of the Court

Keeley Cronin
Baker & Hostetler, LLP
1801 California Street, Suite 4400
Denver, CO 80202
kcronin@bakerlaw.com
Attorney for Amicus Curiae
The Frontier Institute

William W. Mercer
Matthew H. Dolphay
Holland & Hart, LLP
401 North 31st Street, Ste 1500
Billings, MT 59103-0639
wwmercer@hollandhart.com
mhdolphay@hollandhart.com
Attorneys for Amici Curiae
Montana Chamber of Commerce, et al

Abby J. Moscatel
Blacktail Law Group, PLLC
1205 S. Main St., Ste 334
Kalispell, MT 59901
amoscatel@blacktaillaw.com
Attorneys for Amici Curiae
Montana Senate President and
The Speaker of the Montana
House of Representatives

F. Matthew Ralph
Dorsey & Whitney LLP
Millennium Building
125 Bank Street, Ste 600
Missoula, MT 59802
Ralph.Matthew@dorsey.com
Attorneys for Amici Curiae
NorthWestern Energy

Byron L. Trackwell
7315 SW 23rd Court
Topeka, KS 66614
Self-Represented Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Other Authorities

INTEREST OF AMICI STATES

The States of North Dakota, Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Mississippi, Missouri, South Carolina, South Dakota, Utah, Wyoming and the Commonwealth of Virginia ("Amici States") respectfully submit this brief under Montana Rule of Appellate Procedure 12(7) as amici curiae in support of the Appellants and reversal.

Our constitutional republic is founded upon the separation of powers, but that principle "depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Under our shared system of government, not every dispute or grievance can or should be remedied by a court. Instead, many of the most important questions facing us as a nation or as States must be resolved in the political arena. That is a feature of our system, not a bug. But when courts remove fundamental policy decisions from the electorate because they believe the electorate is not addressing the problem fast enough or they think the problem is "too sensitive or complex to be within the grasp of the electorate," they undermine the very heart of our system of government. *See Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 312 (2014). That is all the more true when the problem involves society-wide trade-offs, risk balancing, value judgments, and "large elements of prophecy." *See Trump v. Hawaii*, 138 S.Ct. 2392, 2421 (2018).

The trial court in this action appears to have lost sight of that and became part of a growing trend of jurists who feel empowered to set climate change polices by judicial fiat because they believe climate change "is *the* great emergency of our time," "compels urgent action," or "requires an all-hands-on-deck approach." *See Juliana v. United States*, 2023 WL 9023339, *1-3 & n.13 (D. Or. Dec. 29, 2023) (disregarding mandate from the Ninth Circuit to dismiss for lack of redressability, acknowledging the appellate court "may balk at the Court's approach as errant or unmeasured," denying a motion for interlocutory appeal, and justifying its actions by stating "future generations may look back to this hour and say that the judiciary failed to measure up…"). Amici States have a strong interest in ensuring that the foundation of our shared constitutional republic does not continue to be eroded by judicial usurpations of power over policy questions of profound consequence.

Amici States also have "quasi-sovereign interests in the health and well-being—both physical and economic—of [their] residents." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). The trial court's order appears premised on a belief that it will have the effect of compelling the State of Montana to take governmental actions that will reduce greenhouse gas emissions. But Montana does not exist in a bubble. To the extent any such actions further undermine the reliability of our country's already-precarious power grids or interfere

with the energy policy decisions made by other states, Amici States have a strong interest in protecting the well-being and policy choices of their own citizens.

SUMMARY OF ARGUMENT

1. Addressing Climate Change is a Political Question. The plaintiffs in this case, as well as the trial court, deploy plenty of rhetoric about the dangers of climate change. Notably absent from that rhetoric, however, is any mention of the fact that the crusade against reliable, dispatchable energy has put our national power grid in a very dangerous position. While it gets surprisingly little attention from much of the media, the outlook for our national power grids is bleak. If current trends continue, large swaths of our country are projected to be without reliable power under normal conditions as soon as 2028. Much of the rest of the country will not have reliable power during severe weather events, when it's needed the most. As a nation, we are careening rapidly towards a cliff of pervasive, recurrent power failures. If alarm bells need to be ringing for climate change, they also need to be ringing for grid reliability. Addressing both of those looming threats—not to mention the myriad other ways plaintiffs' preferred environmental policies could risk public safety, disrupt the economy, and upend modern life as we know it—requires balancing a wide host of choices and making value judgments about what is in the best interests for the people of Montana (or any State). But these are

fundamentally policy choices. And in our constitutional republic, policy choices are made by the people through their elected legislatures, not by the courts.

2. Plaintiffs' Alleged Injuries Are Not Redressable by the Courts. Even if addressing climate change wasn't a non-justiciable political question, the injuries claimed by the plaintiffs in this case are not redressed by the trial court's order. Climate change is a global issue with global causes. A ton of CO2 produced in China will affect Montana's residents just as much as a ton of CO2 produced in-State, and to the extent a decline in emissions in Montana results in increased CO2 emissions in places like China (by increasing battery production, as just one example), the relief sought by plaintiffs in this case may exacerbate the very injuries they're seeking to remedy. These are complicated issues, and state judiciaries are not capable of redressing the injuries that plaintiffs have attributed to global climate change in any meaningful way. On this issue, redressability and the political question doctrine overlap, and both weigh against judicial entanglement.

3. The Trial Court's Order Threatens to Impermissibly Regulate Interstate Commerce. Even if plaintiffs presented a question that was justiciable and could be redressed by a state judiciary, the U.S. Constitution forbids any state from regulating or discriminating against commerce in the others. Consequently, to the extent compliance with the trial court's order would require or encourage

Montana to regulate power generation or energy transactions that occur outside of the State, it risks unconstitutionally infringing upon the rights of other States.

ARGUMENT

I. Addressing Climate Change is a Political Question.

The trial court made many findings of fact that climate change is a concern for both the public at-large and the individual plaintiffs in this case. *E.g*., Doc.405 at 34, ¶ 138 ("climate change is a critical threat to public health"); 29, ¶ 109 ("Climate change can cause increased stress and distress which can impact physical health."); 31, ¶ 115 ("As climate disruption transforms communities, some Plaintiffs are experiencing feelings that they are losing a place that is important to them."); 33, ¶ 129 ("Plaintiffs [] are distressed by feeling forced to consider foregoing a family because they fear the world that their children will grow up in."); 54, ¶ 198(h) ("[Plaintiff]'s fears about impacts to the climate take an emotional toll on him and he feels a heavy burden to carry the mantel of a generation that must address climate change."); 57, ¶ 201(e) ("For [plaintiff], climate anxiety is like an elephant sitting on her chest and it feels like a crushing weight. This climate anxiety makes it hard for her to breathe."). The trial court also found Montana's current policy choices contribute to those concerns. *E.g.*, Doc.405 at 46, ¶ 193 ("The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG missions and climate change.").

Even assuming that's all true—and assuming plaintiffs' personal anxieties are relevant to their standing to strike down the duly enacted laws of Montana—notably absent from the trial court's order is any discussion of the reasons that the elected representatives of Montana (or any State) may look at the same data as plaintiffs but nonetheless conclude that the adoption of plaintiffs' preferred environmental policies is not currently in the best interests of the State or its people.

As with most everything important in life, the issue of climate change involves trade-offs and uncertainties. Importantly, at present, those trade-offs include the reliability of our power grids. At the risk of fighting alarmism with alarmism, the ongoing crusade to kill fossil fuels has already put our national power grids on a path of being dangerously unreliable. And that isn't conjecture or hyperbole. The organization charged with monitoring the reliability of our nation's power grids is shouting it from the rooftops for anyone willing to listen.

In only a couple years, the demand for electricity is projected to exceed supply in two regional power grids, even under normal weather conditions. *See* North American Electric Reliability Corporation, *2023 Long-Term Reliability Assessment*, at 6-7 (Dec. 2023).[1] The MISO grid, which covers much of our nation's center (including parts of North Dakota and eastern Montana) is one of those grids. *Id*.

[1] Available at https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf.

Despite the projected addition of new renewable resources, MISO is projected to have a net energy shortfall beginning in 2028. *Id*. Alarm bells should be going off. And for much of the rest of the country, it is projected the power grids are not going to be reliable during severe weather events. *Id*. at 7. We are careening headlong into a future where recurrent power outages may soon be the new normal for much of the country, and the reason isn't a mystery. The movement to replace reliable, dispatchable energy sources with variable energy sources like wind and solar is "fundamentally changing" our power grid, and conventional sources are being forced to retire "before enough replacement resources are in service to meet rising demand forecasts." *Id.* at 6, 11. For the first time in our history, NERC recently made "Energy Policy" a primary risk to the long-term reliability of our country's power grids. *See* North American Electric Reliability Corporation, *2023 ERO Reliability Risk Report* (Jul. 2023).[2] Let that sentence sink in for a moment.

Unreliable power is more than an inconvenience. Setting aside the equity concerns about which populations will be able to afford private back-up generators and which populations will be left in the cold and in the dark, recent experience has shown that prolonged power outages are paid for in human lives. When the power grid for much of Texas went down during a winter storm in 2021, in some areas for

[2] Available at https://www.nerc.com/comm/RISC/Related%20Files%20DL/RISC_ERO_Priorities_Report_2023_Board_Approved_Aug_17_2023.pdf.

as long as four days, it is estimated that between 200 and 800 people died from causes connected to the power outage. Federal Energy Regulatory Commission, *Inquiry Into Bulk-Power System Operations During December 2022 Winter Storm Elliott*, at 6 (Nov. 7, 2023).[3] And the economic impact of that power grid failure has been estimated at somewhere between $80 billion and $130 billion. *Id*.

Maybe the deaths and inequities attributable to an unreliable power grid in the short term are worth it because the deaths and inequities attributable to climate change will be worse in the long term. Maybe not. That is a profound question involving a multitude of uncertainties and value judgments. That is also a question worthy of society-wide contemplation, discussion, and debate. What that is not, however, is a question that lies within the judicial competence.

The origins of the political question doctrine in American jurisprudence go back to *Marbury v. Madison*, where Chief Justice Marshall noted not all grievances are judicial in nature, and that some governmental actions "are only politically examinable." 5 U.S. (1 Cranch) 137, 166-67 (1803). The most thorough discussion of the doctrine under the Federal constitution then came in *Baker v. Carr*, which explained that courts should not become entangled in the resolution of disputes where, among other tests, the issue requires "an initial policy determination of a kind

[3] Available at https://www.ferc.gov/media/winter-storm-elliott-report-inquiry-bulk-power-system-operations-during-december-2022.

clearly for nonjudicial discretion." 369 U.S. 186, 217 (1962); *see also Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 326 Mont. 304, 308 (2005) (looking to Federal precedent on the political question doctrine).

Amici States respectfully suggest that how the people of Montana, through their elected representatives, direct their government agencies to consider greenhouse gas emissions and climate change in conjunction with the constitutional rights to "a clean and healthful environment" and "pursuing life's basic necessities," Mont. Const. art. II, § 3, is quintessentially a political question under that test.

When it comes to remediating concerns of climate change, what it means to have a "healthful environment" is necessarily going to rest upon multifaceted policy determinations. Plaintiffs and the trial court believe the constitutional requirement to maintain a "healthful environment" means Montana must consider the impacts of greenhouse gas emissions on global climate change when taking certain governmental actions. But what if basing those governmental decisions on greenhouse gas emissions and their alleged impact on global climate change risks further grid instability in the very near future? Will the State of Montana be providing its citizens with a "healthful environment" if it deliberately enacts polices that risk causing its citizens to be without reliable power during storms? How many deaths of Montanans from predictable, preventable power outages make the environment no longer "healthful"? Perhaps there aren't easy answers. But

weighing these questions and coming up with the right answer for the State of Montana is fundamentally a policy decision, not a judicial one. *Cf., e.g., Sagoonick v. State*, 503 P.3d 777, 797 (Alaska 2022) (rejecting analogous challenge under that State's constitution because the relief "necessarily would impose a court-made policy judgment on the other political branches that no competing interest is more important than implementing the best available science").

Moreover, the people of Montana, through their elected representatives, have already made a policy decision. They have decided in the context of MEPA reviews that the putative benefits of considering the impacts of greenhouse gas emissions on global climate change do not, at this moment in time, outweigh the foreseeable risks of allowing those considerations to drive the State's governmental decision-making. Maybe that will change as renewable energy technology matures. Or maybe it will change if plaintiffs are able to convince their fellow citizens of the merits for their policy preference and win at the ballot box. That is, after all, how democracies are supposed to work. But unless and until that change occurs, the policy preferences of the people expressed by their elected representatives must govern.

In short, the plaintiffs in this case could be correct that global climate change is impacted by Montana's policy choices concerning how greenhouse gas emissions should be factored into governmental decision-making, and that may very well be causing them anxiety and mental anguish. But how the problem of climate change

should be addressed, and what sacrifices and risks the people of Montana should accept now in an attempt to address that problem, is fundamentally a policy choice. And "[b]ecause 'it is axiomatic that the Constitution contemplates that democracy is the appropriate process for change,' … some questions—even those existential in nature—are the province of the political branches." *Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020) (cleaned up, citation omitted).

II. Plaintiffs' Alleged Injuries Are Not Redressable by the Courts.

Related to the fact that the plaintiffs in this case are seeking judicial resolution of a political question, their alleged injuries are not redressable by the trial court's order. *Cf. Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017) ("Although [the redressability prong of standing and the political question doctrine] are distinct doctrines … there is significant overlap."); *Juliana*, 947 F.3d at 1174 n.9 (political question factors "often overlap with redressability concerns").

To have standing to strike down the State's duly enacted laws, plaintiffs must allege an injury that is "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Brown v. Gianforte*, 488 P.3d 548, 553, 2021 Mont. 149, ¶ 10 (2021) (citation omitted). The prospect that a plaintiff may obtain "psychic satisfaction is not an acceptable [] remedy." *Steel Co. v. Citizens for a Better Env't*,

523 U.S. 83, 107 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier.").

The trial court found that its order could "provide partial redress" for plaintiffs' alleged injuries by reasoning that if Montana and its State agencies consider the effects of greenhouse gas emissions when conducting MEPA reviews they may then consequently reduce "the amount of additional [greenhouse gas emissions] emitted into the climate" and thereby "impact the long-term severity of the heating and the severity of Plaintiffs' injuries." Doc.405 at 89, ¶ 20; *see also id*. at 88-89, ¶ 18 (postulating that if the State and its agencies "conform their decision-making to the best science" it will "give them the necessary information to deny permits for fossil fuel activities…"). That reasoning could perhaps be criticized on many grounds, and Amici States will limit their argument to two brief points.

First, the trial court's reasoning appears to rest on the premise that if it can force the State to consider the alleged impacts of greenhouse gas emissions on global climate change, the State will then be compelled to permit less emissions, thereby relieving the plaintiffs' anxieties and injuries. It's not clear how that follows, as the court cannot affirmatively command other branches how to make the decisions that have been entrusted to their discretion. *Int'l Business Machine Corp. v. Lewis & Clark Cnty*., 112 P.2d 477, Mont. 384, 480 (1941) (when another branch "is vested with discretionary power … this court cannot compel it to exercise that discretion in

any particular way") (citation omitted). So the basis for redressability in this action appears to be the trial court's belief that if the State considers the alleged impacts of greenhouse gas emissions on climate change when conducting MEPA reviews, then the State will take discretionary actions contrary to the preferences of its people as expressed by their elected representatives. Absent that happening, plaintiffs' alleged injuries will not be redressed, in whole or in part, by the trial court's order.

Second, even if the trial court's order were to be successful in compelling or encouraging the State to take discretionary actions that are contrary to the policy preferences of its people, the injuries allegedly caused to the plaintiffs by climate change are global in nature and in origin. A ton of CO2 emitted in China will affect the people of Montana the same as a ton of CO2 emitted in-State. Redressing plaintiffs' climate change injuries would require a complete overhaul of the global energy infrastructure, something that, for better or worse, is outside the power of any state's judiciary. Moreover, if the trial court's order succeeds in forcing Montana to reduce its greenhouse gas emissions, it is foreseeable that other states will have to increase their emissions to compensate for Montana putting less power on the grid. And if a reduction in emissions in Montana causes an increase in emissions from less-regulated facilities in places like China, plaintiffs' alleged climate change injuries may be exacerbated by the very relief they are seeking. *Cf., e.g.*, McKinsey & Co., *The Race to Decarbonize Electric Batteries* (Feb. 23, 2023) (noting that

"China dominates the market" for electric vehicle battery production and "emits more than seven tons of CO2" for each battery produced).[4]

In short, the injuries allegedly experienced by the plaintiffs in this case due to global climate change are themselves global in origin. State judiciaries cannot provide the solution to climate change. But what they can do is jeopardize the lives and well-being of their residents in the here-and-now. Regardless of its intentions, the trial court's order is not going to redress the climate change injuries allegedly suffered by the plaintiffs in any meaningful way, underscoring why this is an issue that is not suited for judicial review. As the Ninth Circuit has aptly stated: "Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by [] judges." *Juliana*, 947 F.3d at 1173.

III. The Trial Court's Order May Risk Causing Montana to Unconstitutionally Regulate Interstate Commerce.

Finally, to the extent the trial court's order requires or encourages Montana to make governmental decisions in a manner that restricts or regulates the energy policy decisions of other States, it risks unconstitutionally regulating extraterritorial conduct and infringing upon the rights of other States.

The Commerce Clause, which empowers Congress "[t]o regulate Commerce ... among the several States," U.S. Const. art. I, § 8, cl. 3, also "precludes the

[4] Available at https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/the-race-to-decarbonize-electric-vehicle-batteries.

application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp*., 457 U.S. 624, 642–643 (1982) (plurality opinion)); *see also Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 n.1 (2023) (*Edgar* struck down a state law "that directly regulated out-of-state transactions by those with no connection to the State").[5] A state's judiciary cannot compel the state to undertake unconstitutional actions that would be prohibited to its legislature.

When analyzing whether a state's laws or regulations are impermissibly extraterritorial, courts will "consider the practical effects of the regulatory scheme, taking into account the possibility that other states may adopt similar extraterritorial schemes and thereby impose inconsistent obligations." *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011) (citing *Healy*, 491 U.S. 336-37); *see also Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (state laws may be invalid when they result in "inconsistent regulation of activities that are inherently national or require a uniform system of regulation").

[5] In *Pork Producers*, the Supreme Court clarified that state laws don't necessarily violate the dormant Commerce Clause merely because they regulate in-state activity in a way that may have out-of-state *effects*. 598 U.S. at 371-76. However, "*Pork Producers* did not change the rule that a state may not directly regulate transactions that take place wholly outside the state and have no connection to it." *Ass'n for Accessible Medicines v. Ellison*, ---F.Supp.3d---, 2023 WL 8374586, *3 (D. Minn. Dec. 4, 2023), *appeal filed* (Jan. 3, 2024).

The national energy infrastructure, and the power grids in particular, are strongly intertwined between most of the states. In its order, the trial court also appears to chastise Montana for simply allowing fossil fuels to be "transported … through" the State. Doc.405 at 67, ¶ 217. But no state can abuse the interconnectedness of our national energy infrastructure by regulating energy generation and transactions that occur outside of its own borders.

For example, several years ago, a different state tried to restrict the type of power that could be imported into that state based on the greenhouse gas emissions of out-of-state power generation facilities. *See North Dakota v. Heydinger*, 825 F.3d 912, 913, 915-16 (8th Cir. 2016) (describing the challenged statute). But the Eighth Circuit enjoined that law due to the interconnected nature of our power grids, explaining that once energy from any given generation source is put onto the grid it becomes indistinguishable from energy created by other generation sources, and it can't be steered away from states that discriminate against the generation source. *See id*. at 920. The only way power generators and distributors operating anywhere on the grid could comply with one state's generation-source-discriminating law would be to apply that state's law to all transactions on the grid. *Id*.

Consequently, one state's attempt to restrict the type of permissible energy sources on the grid would necessarily, and unlawfully, restrict what transactions can occur wholly outside that state. *Id*.; *see also id*. at 916 (providing example of how

the challenged Minnesota statute would have impermissibly regulated the transmission of coal-generated power from Wyoming to North Dakota). "[N]o State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337.

Similarly, to the extent compliance with the trial court's order would require or encourage the State of Montana to make decisions that regulate or restrict the energy policy choices made in other States under the guise of considering the alleged global climate change impacts of greenhouse gas emissions relating to Montana, Amici States will not shy away from defending their rights and the constitutional prohibition on extraterritorial regulation. *Cf.* Crane, *North Dakota prepares to sue Minnesota; no pending litigation yet*, KFYR (Feb. 6, 2023).[6]

CONCLUSION

Addressing climate change while balancing the needs of modern society is a matter of profound importance and requires making fundamental policy choices. In our constitutional republic, those fundamental policy choices are made by the people through their elected legislatures, not by the courts. The Court should reverse the trial court's judgment or, at minimum, clarify that its order does not dictate policy

[6] Available at https://www.kfyrtv.com/2023/02/07/north-dakota-prepares-sue-minnesota-no-pending-litigation-yet/.

choices that belong to the political branches or require the State to engage in extraterritorial regulation of the power grids or energy market.

Respectfully submitted on February 22, 2024,

/s/ Rob Cameron
ROB CAMERON
Special Assistant Attorney General
203 Ewing Street
Helena, MT 59601
(406) 389-8244

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Solicitor General
KATIE CARPENTER
Deputy Solicitor General
North Dakota Attorney General's Office
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210
Counsel for State of North Dakota

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

ANDREW BAILEY
Attorney General
State of Missouri

TREG TAYLOR
Attorney General
State of Alaska

MICHAEL T. HILGERS
Attorney General
State of Nebraska

TIM GRIFFIN
Attorney General
State of Arkansas

ALAN WILSON
Attorney General
State of South Carolina

RAÚL R. LABRADOR
Attorney General
State of Idaho

MARTY JACKLEY
Attorney General
State of South Dakota

THEODORE E. ROKITA
Attorney General
State of Indiana

SEAN REYES
Attorney General
State of Utah

BRENNA BIRD
Attorney General
State of Iowa

BRIDGET HILL
Attorney General
State of Wyoming

LYNN FITCH
Attorney General
State of Mississippi

JASON MIYARES
Attorney General
Commonwealth of Virginia

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,134 words, excluding certificate of service and certificate of compliance.

DATED this 22nd day of February, 2024.

/s/ Rob Cameron
Rob Cameron

CERTIFICATE OF SERVICE

I, Robert Cameron, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 02-22-2024:

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

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

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

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

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

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

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

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

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101

Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Selena Zoe Sauer (Attorney)
1667 Whitefish Stage Rd.
#101
Kalispell MT 59901-2173
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, 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, State of Montana
Service Method: eService

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

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

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

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

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

Service Method: eService

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

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

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

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

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

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

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

Service Method: eService

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

Electronically signed by Jacqueline Kessler on behalf of Robert Cameron
Dated: 02-22-2024