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IN THE MUNICIPAL COURT OF THE CITY OF HELENA
COUNTY OF LEWIS & CLARK
BEFORE THE HONORABLE BOB WOOD, JUDGE

City of Helena Plaintiff, Vs. Bonnie McKinlay, et. al. Defendants	Case No: 2012-NT-4385, et. seq. Defendants' Response to Plaintiff's Motion in Limine

I. INTRODUCTION

Plaintiff City of Helena filed a motion in limine seeking an order prohibiting Defendants from presenting affirmative defenses in this action. Plaintiff contends that any exculpatory evidence related to a defense of necessity/compulsion is irrelevant and thus inadmissible based on the unavailability of the defense under Montana law. Plaintiff also contends that exculpatory evidence regarding Defendants' Constitutional First Amendment rights is irrelevant and thus inadmissible in this action. Defendants

respectfully submit that Plaintiff's contention is incorrect and that the evidence related to the compulsion/necessity and First Amendment defenses as set forth in Defendants' Notice of Intended Defenses is allowed under Montana law and relevant to a determination of the culpability of Defendants for their civilly disobedient acts resulting in their arrests during the week of August, 2012.

II. LEGAL BACKGROUND AND ARGUMENT: THE COMPULSION/NECESSITY DEFENSE

A. Montana law does not prohibit defendants from asserting the affirmative defense of compulsion/necessity due to their "protest" activities.

Plaintiff broadly asserts that the Montana Supreme Court's rulings in Lewis and Asbury should be construed to make unavailable the defense of necessity to charges of criminal trespass "arising out of 'protest' activities." [Plaintiff's Brief at 4]. Neither of those cases goes so far.

In Helena v. Lewis, 260 Mont. 421, 860 P.2d 698 (MT 1993), the defense of compulsion/necessity was unavailable to the Lewis defendants based on the fact that the defendants did not allege "that they reasonably believed that death or serious bodily injury would be inflicted upon them if they did not trespass on the clinic's property." Lewis, 860 P.2d at 701. The fact that the defendants were engaged in protest activity is nowhere mentioned as a basis for denying their request to assert an affirmative defense. In further point of fact, the Lewis defendants sought to physically prohibit persons from seeking treatment at a health clinic, their justification being the protection of fertilized eggs, which are not legally cognizable lives in being, before a Court incapable of overruling the applicable US Supreme Court precedent. Id. at 702. In the case at bar there is little dispute that human-accelerated climate change and global warming is an actual harm and, as is clear from the fire season of 2012 and many other recent climate-related events, that it is detrimentally affecting the health and well-being of living persons, including the Defendants.

In Missoula v. Asbury, 265 Mont. 14, 873 P.2d 936 (MT 1994), the court *did not* consider whether evidence that could have been offered in support of a statutory compulsion or necessity defense was improperly excluded by the trial court. This is so

because the Asbury defendants did not "specifically argue that any of the evidence excluded by the grant of the City's motion in limine is relevant to [the compulsion/necessity defense]." Id. at 938. The Court further noted that an inquiry into the compulsion/necessity defense was unwarranted because the defendants "appear[ed] to concede that, under Lewis, the compulsion defense is not available here because it does not excuse criminal conduct in response to imminent threat of harm to a third party." Id. Again, the fact that the defendants were engaged in protest activity is nowhere mentioned as a basis for denying a request to assert an affirmative defense.

In the case at bar, there is no legal support for Plaintiff's contention that either Lewis or Asbury stand for the proposition that a compulsion or necessity defense is unavailable to a person simply because they are engaging in what Plaintiff calls a "protest" activity. It would be a questionable public policy to allow a defense only for those acting purely out of self-interest while not allowing it for those whose self-interest was leavened with concern for others and who therefore may have acted out of conscience. Defendants' activities at the Helena Capitol during which they were arrested is not, therefore, a basis upon which this Court should grant Plaintiff's motion in limine.

B. Because they have alleged the elements of §45-2-12, Defendants should be allowed to present evidence in support of the affirmative defense of compulsion at trial.

The most recent opportunity for the Montana Supreme Court to entertain the issue of the necessity defense under Montana law arose in 2009. State v. Leprowse, (2009) 2009 MT 387, 353 Mont. 312, 221 P.3d 648. In Leprowse, after conviction for DUI in municipal court, at a trial de novo in the district court defendant Leprowse asserted a necessity defense, citing Montana's statutory compulsion defense. Prior to trial, the district court agreed with the State's objection to Leprowse's compulsion/necessity defense "concluding [as a matter of law] prior to trial that compulsion was not a defense to the DUI charge." Id. at 650. Leprowse pled guilty to the DUI charge and reserved her right to appeal the District Court's ruling. Citing Nelson, on appeal the State argued that Leprowse had other options to keep her safe

and that her offer of proof, therefore, did not establish the elements of compulsion, entitling the State to a grant of its motion in limine. Id.

Citing State v. Owens, 182 Mont. 539, 597 P.2d 72 (1979), the Court described the elements of the affirmative defense of compulsion as follows:

> Under [§ 45-2-212 MCA], for a defendant to avail himself of the defense of compulsion, he must show that: (1) he was *compelled* to perform the offensive conduct (2) by the threat or menace (3) of the *imminent* infliction (4) of *death* or *serious* bodily harm, and that (5) he believed that death or serious bodily harm would be inflicted upon him if he did not perform such conduct, and (6) his belief was reasonable.

Leprowse, 221 P.3d 648, 650. Because defendant Leprowse alleged the required elements for the compulsion defense, the Court held that "the District Court incorrectly concluded prior to trial that Leprowse could not present evidence in support of the affirmative defense of compulsion." Id. at 651.

Whether defendant Leprowse was actually compelled to take the illegal action at issue (DUI) "is at its essence a question of fact based on the circumstances." Id. In its remand for a new trial, the Court ordered that Leprowse should be "given the opportunity to present evidence which, if accepted by a rational trier of fact, would show that her belief was reasonable and that she was compelled to take the actions that she did." Id.

The Court clearly described the appropriate procedure when defendants allege the required elements for the compulsion defense. After being provided an opportunity to present evidence *to the jury*, whether a defendant "is entitled to receive a jury instruction on her affirmative defense may be decided by the District Court based on the record before it." Id.

In their Notice of Intended defenses, Defendants have alleged the elements of Montana's compulsion statute. As set forth therein, Defendants felt compelled to take their actions due to the threat of imminent infliction of death or serious bodily harm upon themselves and others if they did not undertake their actions. The harm Defendants cite, catastrophic climate change and environmental destruction, is one that they can and do reasonably believe will cause them personally severe and imminent physical harm. Defendants will present evidence that they are aware of the profound

detrimental impacts on their health and the potential for death and/or great bodily harm of the climate change and community impacts of the State of Montana's coal export activities, their sincere belief of the imminent harm of continuing on the present course of action and State policy, and their awareness that they had no other way to influence a change in this catastrophic policy compelling them to take actions calculated to prevent the imminent harm to themselves and to others.

Defendants should be allowed to present evidence of the present state of harm of human-induced and accelerated climate change and coal burning for energy production, and the imminent harm of a failure to change the policies called into question by Defendants' actions. From wildfires increasing in frequency and severity, the loss of safe drinking water, the rise in catastrophic weather events, and the disastrous impacts on food production, to the ecosystem and health impacts of coal extraction and transport, Defendants should be allowed to introduce evidence of these factors which have measureable, imminent and severe impacts on their health and safety and on all the inhabitants of the planet.

The notice of intended defenses also serves notice that Defendants intend to present expert testimony regarding the imminence of the threats of concern to Defendants, the reasonableness of Defendants' beliefs, and the futility of other courses of action in trying to avert the imminent harm.

Having alleged the elements of the statute, Defendants should be allowed to present their evidence at trial. After presentation of evidence at trial, the Court may exercise its broad discretion in fashioning appropriate jury instructions, depending on whether Defendants met their legal burden of proof regarding the elements of the compulsion defense. *See* State v. Cybulski, 2009 MT 70, para. 36, 349 Mont. 429, 204 P.3d 7.

C. The necessity defense, merged in MCA § 45-2-212 and the common law defenses merged therein, including the necessity defense, are not mutually exclusive, but complimentary.

Plaintiff asserts that Defendants inaccurately characterized State of Montana v. Nelson, 2001 MT 236, 307 Mont. 34, 36 P.3d 405, in their Statement of Intended Defenses and that no necessity defense exists apart from Montana's statutory defense.

While Defendants agree that Montana caselaw merged the common law defense of necessity in the statutory defense, Defendants disagree that this argument may be extended to imply the obliteration of the defense of necessity.

In Nelson, after examining the evidence presented by the defendant and the state, the trial court refused to give a jury instruction on necessity. Id. at 406. Defendant Nelson had asserted a common law necessity defense citing a state of Vermont case, State v. Shotton, (Vt. 1983), 458 A.2d 1105. Id. at 407. After listing the elements of the common law necessity defense as set forth in Shotton, the Court distinguished the facts of Nelson from the Shotton fact pattern. Id. The Court then agreed with the trial court's determination that defendant Nelson had failed to satisfy the Shotton elements, to wit:

> Judge Swandal determined, however, that there were "certainly other options available to the defendant in this matter." We agree. There was a nearby hotel in which Nelson could have sought shelter while waiting for his brother and wife. While Nelson asserted that a bad knee prevented him from walking to this establishment, the State presented evidence to show that Nelson was able to work on his house all day before going to the bar. Nelson also had a blanket in his pickup that he could have used to keep warm, instead of turning on his car.

Id.

Analysis of the facts of Nelson under the Shotton analysis to determine if defendant Nelson was entitled to a jury instruction on necessity was not inconsistent with the Court's reiteration of the merger of common law defenses into Montana's compulsion statute. After presentation of evidence at trial, the trial court concluded that defendant Nelson had failed to establish the elements of a common law necessity defense and was therefore not entitled to a jury instruction on necessity. Id. Since the defendant failed to carry the burden of proof, the Montana Supreme Court did not have to address, as a matter of law, whether the Court should "adopt the defense of necessity" in the case at bar. Id.

The merger of common law defenses of necessity, justification, compulsion, duress and "choice of two evils" in Montana's statutory compulsion defense does not equate to the obliteration of these common law defenses. As stated by the Montana Supreme Court, the compulsion statute and the common law defenses merged therein "are not mutually exclusive, but complimentary." State v. Ottwell, (1989), 240 Mont.

376, 784 P.2d 402. The Montana Supreme Court reached this conclusion in an attempt to clarify "the present state of this area of Montana law." Ottwell, at 403.

In Ottwell, the parties "apparently disagree[d] on what defense the appellant [was] raising." Id. Defendant Ottwell called it necessity and appeared to rely on the common law rather than Montana statutes. The State called the defense compulsion, as recognized in Montana law under section 45-2-212 and argued that the defense of necessity was unavailable. Id.

The common law necessity defense theory forwarded by defendant Ottwell was based in part on State v. Strandberg, (1986), 223 Mont. 132, 724 P.2d 710, the so-called "necessity-of-escape" defense. Ottwell, 784 P.2d at 403. The Court expressly recognized the validity, under Montana law, of the common law doctrine that recognized the classic statement that when a prisoner flees a fire, "he is not to be hanged because he would not stay to be burnt." Id. at 404 (citing United States v. Kirby (1868), 7 Wall. 482, 487, 19 L.Ed. 278, 280). The Court concluded that "the compulsion statute and necessity doctrine of Strandberg do not provide mutually exclusive defenses; they are complimentary. Ottwell, 784 P.2d at 405. Strandberg is merely an application of the compulsion statute tailored to the circumstances of prison escapes. When dealing with prison escapes, therefore, Strandberg provides the appropriate analysis. Id.

Although the Court in Ottwell sought to clarify this area of Montana law, some lack of clarity remained, as evidenced by the Court's statement in Lewis that "the common law elements and distinctions between the aforementioned defenses are no longer applicable in Montana," calling the Strandberg necessity-of-escape defense "one exception which is inapplicable here" and ignoring the Ottwell court's guidance that the common law doctrines merged in Montana's compulsion statute are not mutually exclusive, but complimentary. *See* Lewis, 860 P.2d 698, 701.

Eight years later, in applying the Shotton analysis to determine whether Defendant Nelson was entitled to a jury instruction on the necessity defense, the Nelson Court tacitly recognized the Otwell analysis that the necessity defense of Shotton and Montana's compulsion statute do not provide mutually exclusive defenses; they are complimentary. As in Ottwell, in Nelson the Shotton analysis is clearly an application of the compulsion statute tailored to the circumstances of necessity. Because of

defendant Nelson's failure to carry the burden of proof, the Court did not have to analyze the common law necessity defense in light of Montana's compulsion statute. The Court, however, certainly left that question open by refusing to simply state that the necessity defense forwarded by Nelson is not a contemplated within Montana's compulsion statute, instead affirming the trial court's application of the Shotton. elements as a basis for denying defendant's requested jury instruction.

In the case at bar, through the Ottwell analysis this Court may utilize the Shotton elements, as did the Court in Nelson, as an application of the compulsion statute tailored to the circumstances of Defendants' activities. In this manner the Court may insure that the law applied to Defendants' case provides the best guidance possible for a just determination of Defendants' guilt or innocence consistent with Montana law. As set forth in section II.B. of this brief *supra*, however, the Defendants have alleged the elements of Montana's compulsion statute and should be allowed to present evidence at trial, whether the Court utilizes Shotton to tailor the statute to present circumstances or not.

D. Defendants' assertion of a compulsion/necessity defense is not precluded by Federal law.

Plaintiff string cites, without analysis, a number of federal cases in support of their contention that the case at bar involves "indirect civil disobedience" and, citing US v. Schoon, 971 F. 2d 193 (9th Circuit, 1991), argues that persons undertaking such activities are uniformly precluded under federal law from availing themselves of a necessity defense. Plaintiff's Brief at pp. 6-8. The acts undertaken by Defendants were not indirect, nor do the federal cases cited by Plaintiff support its contention that the compulsion/necessity defense should be unavailable to Defendants due to the nature of their demonstration. There are several reasons why Schoon is not and should not be applicable here.

First, Defendants participated in a demonstration at the Capitol Rotunda, the best public location in the building in which the five members of the Land Board conduct their official state business and in which some have their offices. Defendants' demonstration specifically focused on the planned and proposed leasing of state-owned lands, by the

State Land Board, to private entities in order to mine and sell coal. The consideration and decision-making by state officials occurs by and large in the place of the demonstration, not 2,900 miles away, as in the case of the Schoon Defendants. Here, as in the lunch counter sit-ins pointed out by the Schoon court, Defendants were attempting to symbolically interfere with precisely the injustice that was being committed by the entity they were protesting. US v. Schoon, 971 F. 2d 193,196 (9th Circuit, 1991).

Second, the Schoon opinion is not binding authority on this court, as it only discusses and applies to Federal Courts, and state courts can axiomatically allow more, though not fewer rights. There are no Montana Supreme Court opinion that favorably cite Schoon.

There are only two state court decisions (plus a dissent in Alaska) from anywhere mentioning Schoon. One of these two is State v. Roselle 1997 Montana District Lexis 774. In that case the Montana District Court specifically excluded Schoon as having any bearing whatsoever in state courts, stating:

> The Ninth Circuit's decision in United States v. Schoon, 971 F.2d 193 (9th Cir. 1991) is inapplicable as that case does not arise out of an interpretation of Montana law. Montana is entitled to define its own crimes and defenses, as long as those definitions don't conflict with the United States Constitution, and there is no suggestion that the compulsion defense is constitutionally flawed."

Roselle, at p. 3. The District Court in Roselle also repeats the requirement, under Montana law, that there must be a "threat of imminent death or serious bodily harm" for activity to fall within Montana's compulsion statute and that "acts of conscience designed to influence legislation or public opinion" are not encompassed within Montana's compulsion statute. Id.

In the case at bar, Defendants certainly admit that their actions were taken in order to influence acts of a government body, specifically in order to avert a threat of imminent death or serious bodily harm to themselves and others. While Defendants do not agree with the Roselle court's denial of the defense under the circumstances of that case, Defendants' actions in the case at bar may clearly be distinguished from the acts of the defendants in Roselle, who offered no statement that their acts were undertaken to avert a threat of imminent death or serious bodily harm.

Plaintiff presents no caselaw that makes the narrow Schoon decision about Federal Court standards and doctrine applicable in the state courts of Montana or any other state, and state courts even within the 9th Circuit have not felt so bound. For example, the defense has been granted in Washington State Courts, since Schoon, in the Counties of Pierce (State of WA v. Imani, et al., Pierce County District Court 2010, Nos. 8YC002926, 8YC002928) and Jefferson (State of WA v. Goldstein and Prescott, Case No. CR 6440 JC, CR 6490 JC), 2007, with a case pending in Whatcom County. Schoon is not on point, and is not binding or even persuasive authority for the case at bar. Furthermore Plaintiff has offered no Montana case that makes a distinction between direct and indirect civil disobedience.

The Schoon case cites heavily and exclusively to Federal Jurisprudence and the US Constitution, whereas the Montana Constitution allows significantly greater rights in criminal defense, political expression and participation in government. Therefore, the Schoon standard is not applicable here, and so applying it would be an error of law.

Third, there are fundamental flaws in Schoon that render it bad law to use in any case where not bound to do so. The distinction between direct and indirect protest is a specious one, including the examples of direct civil disobedience given by the Schoon Court. And as previously mentioned, the actual facts of the Schoon case are far different from the instant case. The Schoon Defendants engaged in a sit-in at an IRS office in Tucson, AZ to protest the use of tax money in general to protest US government policies carried out by the State and Defense Departments and the White House against the people and governments of Central America. Schoon at 195. If there is such a thing as indirect civil disobedience, that may be it, involving neither the specific policy nor the policy-makers. This stands in marked contrast to Thoreau refusing to pay a specific war tax and these Defendants' protesting actions and policies directly devised and/or implemented by the Land Board of the State of Montana in the seat of government of the State of Montana. For these reasons and others, the Schoon decision has been widely criticized by other courts and by many legal commentators, and should not be applied here.

E. The history of the necessity defense informs application of Montana's compulsion/necessity law to the case at bar.

Defendants have already argued how adoption of Plaintiff's arguments in support the motion in limine is not supported by or compelled by Montana law and that even a strict and limited application of Montana's compulsion statute to the case at bar augers for denial of Plaintiff's motion in limine. As set forth previously, Defendants also cite authority that common law theories inform and tailor Montana statutory provisions, in particular the compulsion statute at issue in this case.

Defendants further offer, briefly, a few comments on the history of the necessity defense as it relates to the case at bar in order to argue this point in the historical context it deserves. Defendants borrow these excerpts from a comprehensive and well-informed history of the necessity defense as a cornerstone of English Common law dating back to at least the 1500s authored by Professor Bill Quigley, the Janet Mary Riley Distinguished Professor of Law, Loyola University New Orleans. William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NESL 1 (2003). For the convenience of the Court, Defendants have included a copy of this article and internal citations have been omitted. As stated by Professor Quigley:

> Understandably, the law of the necessity defense in civil disobedience cases is unclear, given the overall state of the necessity defense in general. Necessity has been a defense at common law for centuries, but commentators underscore that the law "is poorly developed in Anglo-American jurisprudence." The crux of the problem of vagueness in the necessity defense is that the defense is purposefully defined loosely in order to allow it to be applicable to all the myriad of situations where injustice would result from a too literal reading of the law. As pointed out by the American Law Institute's Model Penal Code, the necessity defense clearly gives a developed legal system the opportunity to expand the evaluation of otherwise criminal conduct beyond the "letter of particular prohibitions." The historical development of the necessity defense suggests as much.
>
> Consider an early discussion of the defense in the English case of Reniger v. Fogossa, involving a ship master who threw valued cargo overboard in the face of a storm:
>
> > [F]or in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself;. . . . And therefore the words of the law of nature, of the law of this realm, and of other realms, and of the law of God also will yield and give way to some

> acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion, or involuntary ignorance."
>
> This decision illustrates another problem—one not confined to the 1500s—the problem of considering, and often confusing, the necessity defense with other defenses like compulsion and duress. Courts, including the Supreme Court, and commentators noted that necessity is different than, but often confused with, the defense of duress. This confusion results in some courts wrongfully concluding that the necessity defense includes some element of compulsion.
>
> From the beginning, the rules for the necessity defense always were purposefully flexible and included an overriding call for reasonableness in application, so that justice might be served. Sir Walter Scott, in another ship-in-a-storm case, underscored this need for reasonableness when he wrote about the application of the defense in an 1801 judgment: "In the first place, it is not improper to observe, that the law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise *legal*."
>
> Other older English cases allowed necessity defense for breaking the law in order to save a life (of another), put out a fire, escape from a burning jail, bring an infected person through the streets to a doctor, or even fail to repair a road.

Id., at pp. 6-7.

The English common law cited by Professor Quigley in these short excerpts has been adopted, in whole or in part by the courts and legislatures of many states, including Montana. Mont. Code Ann. §§ 1-1-109. It is undisputed by Plaintiff that Defendants are people of conscience who acted upon deeply held and compelling beliefs to hazard their individual liberty in an attempt to forestall what they reasonably believe to be imminent harms to this planet and its inhabitants, including themselves, out of necessity. Defendants respectfully request that this Court carefully consider their argument that their actions should appropriately be judged with full presentation of evidence pursuant to Montana's compulsion statute and that the Court's inquiry and instructions to a jury may be further and appropriately informed under Montana law by the principles of common law discussed herein, in the interest of justice.

III. LEGAL BACKGROUND AND ARGUMENT: THE FIRST AMENDMENT DEFENSE

A. Defendants should be allowed to present evidence at trial in support of a First Amendment defense

In the case at bar, Plaintiff's argument that Defendants are not entitled to present a Constitutional First Amendment defense based in part on a case that restricts protest activity within the curtilage of a jail, an area with inherent security issues that a is not a traditional public forum. Plaintiff's Brief at 9-10, citing Adderly v. Florida, 385 U.S. 39, 47-48 (1966). Plaintiff also narrows Cannon v. City of Denver, 998 F.2d 867 (10th Cir. 1993), to an issue over the content of signs, arguing that by these cases Defendants must be precluded from presenting as a defense that Defendants' activity was protected by the First Amendment. Id.

These arguments misapply law to Defendants' situation and fail to acknowledge Defendants' First Amendment argument. Defendants are not, by asserting this defense, challenging the constitutionality of Montana's criminal trespass law. Nor are they challenging the applicability of the trespass law to State of Montana property in all situations. The Defendants are, however, expressly challenging the application of the criminal trespass law to their activities at the State Capitol which resulted in their arrests.

Remaining in the Capitol rotunda was a continuation of their week-long acts of First Amendment expression. Having exhausted all other means of communicating with members of the Montana State Land Board, they chose to remain in the Capitol until officials of government responded to their concerns. The nature of Defendants' peaceable assembly in the Capitol as First Amendment protected speech should have been weighed against the interests protected by enforcement of the criminal trespass statute against them. It was not and the Defendants were summarily arrested.

Defendants should be allowed to present evidence in support of their contention that application of the Montana criminal trespass statute violated their First Amendment rights, including: 1) that their assembly in the Capitol Rotunda was peaceable and was an activity that falls within the protections of the First Amendment; 2) the Capitol Rotunda is a "traditional public forum" and First Amendment activities occurring therein

are entitled to the highest protections under law; and 3) whether Plaintiff's justification for restricting their speech through application of the criminal trespass law satisfies the requisite standard.

B. The legal standard by which the Court may assess whether Defendants' conduct deserves First Amendment protection

Freedom of speech is a civil right guaranteed under the United States (Bill of Rights, Amendment 1) and Montana (Art 2, sec. 7) Constitutions and the Universal Declaration of Human Rights (Article 19, International Covenant on Civil and Political Rights) to which the US is a signatory nation. The First Amendment to the US Constitution applies to states and municipalities through the Fourteenth Amendment. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 792 n.2, (1984) (citing Lovell v. Griffin, 303 U.S. 444,450 (1938)). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Snyder v. Phelps, 131 5. Ct. 1207, 1215 (2011) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Therefore, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick v.Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

The protection of speech and assembly under the First Amendment is admittedly not absolute and courts follow a three-step process to assess whether governmental restrictions or applications of content-neutral law and policies are valid under the First Amendment. See Mahoney v. Doe, 642 F.3d 1112, 1116 (D.C. Cir. 2011) (citing Cornelius v. NAACP Legal Def & Educ. Fund, Inc., 473 U.S. 788, 797 (1985)). First, the court determines whether the First Amendment protects the speech at issue; second, the court identifies the nature of the forum; and third, the court assesses whether the government's justifications for restricting speech satisfy the requisite standard. Id. (quoting Cornelius, 473 U.S. at 797).

1. Defendants were engaged in protected speech activities when arrested.

The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. See NAACP v. Button, 371 U. S. 415, 429-431. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were. Id.

Furthermore, as stated previously, Defendants assembly at the Capitol Rotunda constituted protected speech under the US and Montana Constitutions. Free assembly "ranks as a fundamental right equal to free speech and free press." United States v. Cruikshank, 92 U.S. 542, 552 (1876); see also Brandenburg v. Ohio, 395 U.S. 444, 449 n. 4 (1969). These rights are "'cognate,' hence interchangeable and "equally fundamental." Brandenburg, 395 U.S. at 449 n. 4. Peaceful, orderly assembly "falls well within" the First Amendment's protection. Gregory v. City of Chicago, 394 U.S. 111, 112 (1969).

Defendants should be allowed to present evidence that their actions resulting in their arrests falls within the First Amendment's protection.

2. Defendants' activities occurred within a "traditional public forum," a location afforded the highest protections under law for First Amendment activities

Unlike the jail situation of Adderly relied upon by Plaintiff, the Capitol Building of a State is very much a traditional public forum. Indeed, it is where one goes to petition the state government, as here, for redress of grievances, an essential and specific First Amendment protected right. Defendants' peaceable assembly within the traditional

public forum of the Montana Capitol rotunda was a protected exercise of their First Amendment speech rights to petition government for redress of grievances.

The "halls of government" are a "traditional public forum" in which first amendment rights are provided the highest protection. See Church on the Rock v. City of Albuquerque 84 F.3d 1273, (10th Circuit, 1996); ("The three types of forums that exist are traditional public forums (parks and streets, and halls of government set aside for the purpose), designated public forums, and non-public forums. Of these, traditional and designated public forums are entitled to the highest level of protection.") Further, as stated by the US Supreme Court:

> In traditional public forums, "places which by long tradition or by government fiat have been devoted to assembly and debate," the rights of a state to limit expressive activity are more closely scrutinized. In such forums, the government may not prohibit all communicative activity and may enforce content-based restrictions only to the extent that such regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

In the Statement of Intended Defenses, Defendants cited Cannon specifically to point out that in traditional public forums, "the government's ability to permissibly restrict expressive conduct is very limited." Cannon v. City and County of Denver, 998 F.2d 867 (10th Circuit 1993). Hague was cited by Defendants because traditional public forums, including the public park at issue in Hague:

> . . . are considered to be the pre-eminent public forum since time immemorial, and to be held in trust for the use of the public for demonstrations, and as such use for purpose of assembly, communicating thoughts between citizens, and discussing public questions is given great priority and has rights significantly great than that of public or private traffic or commerce. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515-16 (1939).

3. Defendants should be allowed to present evidence that their arrests for criminal trespass was more burdensome on their First Amendment rights than essential to promote the government interests.

A government may regulate expressive conduct in a public forum to protect public health, safety, or welfare. See Beckerman v. City of Tupelo, Miss., 664 F.2d 502, 509-10 (5th Cir. 1981). Application of content-neutral regulation of "time, place, and manner of expression" in public forums are permitted when they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry Educ. Ass 'n, 460 U.S. at 45. See also United States Postal Service v. Council of Greenburgh, 453 U.S. 114, 132(1981); Consolidated Edison Co. v. Public Service Comm 'n, 447 U.S. 530, 535-36 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State of New Jersey, 308 U.S. 147 (1939).

"Whether we call it 'narrowly tailored' or 'no more burdensome than is essential' is of no moment; the law must be 'no more restrictive than necessary to further the governmental interest, regardless of whether or not there is an easier way.'" Hodgkins ex rel. Hodgkins v. Peterson, 355 F. 3rd 1048, 1060 (7th Cir. 2004). The "government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id.; see also Bell v. Keating, No. 11-2408 (7th Cir. Sept. 10, 2012) slip op at 20-21. Thus, while content neutral regulations, or the application thereof, are presumptively valid, an important public interest must justify the regulation, and the regulation must tightly fit the interest served. ACLU v. Alvarez, 679 F.3d 583, 605 (7th Cir. 2012); ("The burden on First Amendment rights 'must not be greater than necessary' to further the important government interest."). "Speakers, 'not the government, know best both what they want to say and how to say it ....'" Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790-91, Hodgkins, 355 F. 3d at 1063.

Here, as discussed in Defendants notice of intended defense, Defendants peaceably assembled in the Capitol Rotunda. Defendants should be allowed to present evidence that the State Land Board, expressly rescheduled a hearing to avoid allowing them to speak and be heard; that the Governor spoke to the media and said that

Defendants, and other participants in the demonstrations' words would have no effect, and the decision was already being implemented; and additional evidence demonstrating that they were left with no alternative but to seek to remain until heard. Defendants should further be allowed to present and elicit evidence demonstrating that their arrests for criminal trespass was more burdensome on their First Amendment rights than essential to promote the government interests promoted by enforcement of the criminal trespass law against their activities.

IV. CONCLUSION

In the case at bar, the facts to be alleged by Defendants at trial satisfy the Montana compulsion statute without resort to exclusive reliance on the common law theories. While Defendants maintain that this Court may recognize the Shotton analysis as merely an application of the compulsion statute tailored to the circumstances of their actions resulting in their arrests, Defendants are not asking this Court to expand Montana's compulsion statute in any manner. As in Leprowse, Defendants have alleged the required elements for the compulsion defense and should be given the opportunity to present evidence which, if accepted by a rational trier of fact, would show that their beliefs were reasonable and that they were compelled to take the actions that they did. Whether Defendants are entitled to a jury instruction on their affirmative defense may be decided by this Court based on the record Defendants intend to establish at trial. Grant of Plaintiff's Motion in Limine would inappropriately deprive Defendants of their right to present evidence in support of their affirmative defense of compulsion/necessity.

As discussed above, federal law cited by Plaintiff and the Schoon case is inapplicable to this situation. Defendants were acting directly against the policy-making agency creating the harm that they were protesting, not merely one that raised the funds for it. The City's proposed reading of Necessity would fly in the face of at least 500 years of jurisprudence, and limit a defense that was intended to protect those who altruistically and out of duty take personal risk for the their own and the common good, to one that only protects those who act in their exclusive self-interest, a construction that has profound negative and harmful legal and public policy implications

As further discussed above, Defendants activity does have a protection in the First Amendment that should be reviewed and evaluated by the trier of fact based on evidence presented by Defendants in support thereof.

For all of the above reasons, Defendants have presented sufficient, accurate and viable fact and law, and have demonstrated that these are issues that should and must be presented to the jury, after which a determination may be made by that trier of fact as to whether Defendants have proved their defenses. Anything less would be a miscarriage of justice and clear error under Montana and Constitutional law.

Respectfully submitted this 23rd day of January 2013.

Lawrence A. Hildes

Lawrence A. Hildes by RM Gentry

RM Gentry

Robert M. Gentry

Counsel for Defendants

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was provided in electronic form, and mailed, postage prepaid first class, the 23rd day of January, 2013, to:

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