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

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

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

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

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION AND FOR STAY OF JUDGMENT PENDING APPEAL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

On August 14, 2023, this Court adjudged Defendants are violating the constitutional rights of the sixteen youth Plaintiffs, declared unconstitutional the Montana Environmental Policy Act Limitation ("MEPA Limitation"), Mont. Code Ann. § 75-1-201(2)(a), and Mont. Code Ann. § 75-l-201(6)(a)(ii), and enjoined Defendants from enforcing or acting in accordance with the unconstitutional statutes. Doc. 405 at 102 (Findings of Fact, Conclusions of Law, and Order) ("August 14 Order"). Now, Defendants come to this Court seeking to "maintain the status quo" of environmental reviews and fossil fuel permitting. Doc. 423 at 3. The *status quo* Defendants want to maintain is one where there are already "catastrophic harms to the natural environment of Montana and Plaintiffs," harms that "will worsen if the State continues ignoring GHG emissions and climate change." Doc. 405 at 46. *At minimum*, youth Plaintiffs should not suffer any exacerbation of their current injuries pending appeal. But what Plaintiffs are constitutionally entitled to is full enjoyment of their constitutionally protected right to a "clean and healthful environment," which Defendants have an affirmative obligation to secure, by improving the significant degradation that has already occurred to Montana's environment and natural resources, and preventing further harm. *Id.* at 96; Mont. Const. art. II, § 3; art. IX, §§ 1, 3.[1]

Defendants' request to stay this Court's judgment and maintain a *status quo* of constitutional infringement pending appeal should be denied because Defendants do not satisfy any of the stay factors. Defendants are unable to identify a single error with this Court's August 14 Order and, therefore, are not likely to succeed on the merits of their appeal. Moreover, given the grave constitutional injuries the undisputed evidence shows Plaintiffs are *currently*

[1] Defendants' motion and brief never reference § 75-1-201(6)(a)(ii), MCA, or ask this Court to stay the August 14 Order declaring that provision unconstitutional and enjoining Defendants from implementing it. Doc. 405 at 102. Therefore, Defendants' stay request, which should be fully denied, does not pertain to that statute.

experiencing, and the failure of Defendants to identify *any* irreparable harms if a stay is not granted, the balance of equities overwhelming weighs in favor of not granting a stay. Defendants cannot be permitted to continue their unconstitutional conduct and cause further harm to Montana's children pending their appeal.

Moreover, because this case is now pending before the Montana Supreme Court, the District Court does not have jurisdiction to decide Defendants' motion for clarification and, consequently, it must be denied. This Court's jurisdiction extends only to Defendants' motion to stay pursuant to Montana Rule of Appellate Procedure 22.

RELEVANT PROCEDURAL HISTORY

Following a seven-day trial from June 12 to June 20, 2023, this Court issued its August 14 Order. Doc. 405. The August 14 Order contains 289 findings of fact based on the testimony and evidence presented at trial, including testimony from twenty-four witnesses for Plaintiffs and three witnesses for Defendants, 168 of Plaintiffs' exhibits, and four of Defendants' exhibits. Doc. 405 at 9. Defendants did not contest any of the testimony from the youth Plaintiffs, which was determined to be credible. Doc. 405 at 64. Prior to trial, Defendants disclosed several expert witnesses and lay witnesses, Docs. 227, 235, 242, but Defendants called only one expert and two lay witnesses to testify at trial. The testimony of Defendants' sole testifying expert witness, an economist, contained errors, was unsupported, and was not given weight. Doc. 405 at 66. Sonja Nowakowski, who authored the declaration in support of Defendants' motion to stay, testified at trial, as did DEQ Director Chris Dorrington. Tr. 1274; Tr. 1332.

This Court's August 14 Order held in part:

> (1) Plaintiffs have standing to bring the claims addressed; (2) Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system; (3) the MEPA Limitation, § 75- 1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, infringe

> Plaintiffs' fundamental right to a clean and healthful environment (as well as their fundamental rights to equal protection, dignity, liberty, health and safety, and public trust resource rights stemming from harm to Montana's environment) and are facially unconstitutional; (4) § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, do not pass strict scrutiny; and (5) Plaintiffs are entitled to injunctive relief barring Defendants from enforcing or acting in accordance with the statutes declared unconstitutional. (Doc. 405 at 101-03).

Doc. 417 at 6 (Order Granting Certification for Interlocutory Appeal).

The parties agreed that the August 14 Order should be certified for interlocutory appeal and moved for certification pursuant to Montana Rule of Civil Procedure 54(b). Docs. 411, 415. On September 18, 2023, this Court certified its August 14 Order, as well as several ancillary orders, as final for purposes of interlocutory appeal. Doc. 417. On September 29, 2023, Defendant State of Montana filed its notice of appeal to the Montana Supreme Court. Docs. 418, 420. On October 2, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed a separate notice of appeal to the Montana Supreme Court. *Held v. State of Montana*, DA 23-0575, Notice of Appeal (Mont. Sup. Ct. Oct. 2, 2023). On October 16, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed their Motion for Clarification and for Stay of Judgment Pending Appeal. Doc. 422. Defendant State of Montana did not join in these motions. On October 17, 2023, the Supreme Court accepted this Court's certification order and "ordered that this appeal may proceed." *Held v. State of Montana*, DA 23-0575, Order, *2 (Mont. Sup. Ct. Oct. 17, 2023). This case is now on appeal to the Montana Supreme Court.

RELEVANT FACTUAL BACKGROUND

The factual record before this Court illustrates how dangerous the "*status quo*" Defendants want to preserve for another year of appeal would be to youth Plaintiffs. That "*status quo*" is one

where Defendants approve every permit it receives for fossil fuel activities while ignoring greenhouse gas ("GHG") emissions and the resulting climate harms. Doc. 405 at 74-75. The resulting GHG emissions from Defendants' conduct is causing grave harms *today* to Plaintiffs' health and well-being, and to Montana's environment and natural resources, harms that are undisputed in the trial record. *Id.* at 46-64. Plaintiffs, as youth, are "uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations." *Id.* at 28. According to this Court's uncontroverted Findings and Conclusions:

> FF #89. "Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana."
>
> FF #193. "The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
>
> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."
>
> CL #6. "Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries."
>
> CL #50. "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change."

Id. at 24, 46, 87, 98 (citations omitted).

Importantly, this Court also found that it is technically and economically feasible for Montana to "replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035." *Id.* at 81. Transitioning to renewable energy, "in addition to direct climate benefits, will create jobs, reduce air pollution, and save lives and costs associated with air

pollution." *Id*. It would also reduce energy costs for Montanans by $6.3 billion per year. *Id.* at 82. Not only did Defendants fail to present any evidence refuting the copiously detailed harms to the Plaintiffs caused by Defendants' conduct, Defendants did not present any evidence at trial to dispute the benefits or feasibility of a renewable energy transition in Montana.

This Court also found that Defendants have the ability to do a MEPA analysis that evaluates GHG emissions and climate impacts, as Defendants conducted such analyses in the past. *Id.* at 73-74, 101; *see also* Tr. 1437:4-8 (Ms. Nowakowski's trial testimony explaining DEQ could do climate analyses if it had authority). Defendants' minimal allegations of harm, incomparable to the findings of Plaintiffs' harm in the August 14 Order, in the Nowakowski declaration were never presented for cross-examination by qualified witnesses at trial. The record before this Court makes clear that the unconstitutional "*status quo*" conduct Defendants want to preserve cannot lawfully continue without exacerbating the *status quo* injuries of the youth Plaintiffs.

Defendants reference two post-trial letters Plaintiffs' counsel sent to Defendant DEQ related to draft environmental assessments for air quality permits; those letters are irrelevant to the stay factors this Court must consider in determining whether a stay is warranted. *See infra,* Section II. Nevertheless, Defendants neglect to explain the underlying DEQ conduct that prompted the letters. Doc. 423 at 2. For example, on September 14, 2023, DEQ posted a preliminary determination on a Montana Air Quality Permit ("MAQP") application for a fossil fuel refinery, including an Environmental Assessment ("EA"),[2] disobeying this Court's August 14 Order, stating: "This environmental review under MEPA does not contain an analysis of potential impacts of greenhouse gases or climate change," with citation to § 75-1-201(2)(a), MCA, *the very provision this Court enjoined DEQ from implementing*. DEQ, EA for MAQP #5263-02, at 17. Also on

[2] Montana DEQ, *Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC* (Sept. 14, 2023), https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/5263-02_PD.pdf.

September 14, 2023, DEQ posted a preliminary determination and EA on another MAQP application to burn fossil fuels.[3] Again, the EA included an emissions inventory for many pollutants, but explicitly excludes GHGs on the emissions inventory table, instead listing GHGs as "N/A." DEQ, Draft EA for MAQP #2930-07, at 24.

As a result of Defendant DEQ's ongoing implementation of the MEPA Limitation, which this Court declared unconstitutional and enjoined DEQ from implementing, counsel for Plaintiffs submitted letters on both projects informing DEQ that it was "defying a court order" and needed to "amend its Environmental Assessment . . . to comply with the legally binding August 14, 2023, Order in *Held v. State of Montana.*" *See* Nowakowski Decl. Ex. A at 1, 6; Ex. B at 1, 6. While Plaintiffs expect Defendants to ensure their final environmental reviews and decision-making comply with this Court's August 14 Order, that issue is separate from the motions currently before this Court, and does not support Defendants' burden on the stay factors. However, if the Court were to issue a stay, these are two fossil fuel project expansions that would proceed under the *status quo* of Defendants not considering GHG emissions, climate impacts, and resulting harms to Montana citizens and youth. As explained herein, that "*status quo*" cannot be perpetuated.

LEGAL STANDARDS

Clarification. Defendants cite no rule or legal standard for their motion for clarification. The dispositive issue, however, is this Court's lack of jurisdiction to decide Defendants' motion for clarification because an appeal is pending before the Supreme Court. *See infra*, Section I. Defendants' motion fails to address this issue.

Stay. Defendants, as the parties seeking a stay, have the burden to establish that a stay pending appeal is warranted. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA

[3] Montana DEQ, *Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard* (Sept. 15, 2023), https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/2930-07_PD.pdf.

22-0064, *5-6 (Mont. Sup. Ct. Aug. 9. 2022) ("*MEIC v. Westmoreland*"). Only in "extraordinary circumstances" should a stay be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). In evaluating a motion to stay, Montana's courts consider four factors: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *MEIC v. Westmoreland*, *5 (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotes, citations omitted).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO ENTERTAIN DEFENDANTS' MOTION FOR CLARIFICATION

As a result of the interlocutory appeal, which Defendants requested, this Court does not have jurisdiction to consider the merits of Defendants' motion for clarification. It is axiomatic that once an appeal has been filed, the District Court loses jurisdiction to rule on motions. "It is the law in Montana that once a Notice of Appeal is filed, the district court no longer has jurisdiction over the parties or the cause of action and cannot hear or rule on any pending motions." *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶ 12, 319 Mont. 105, 82 P.3d 896; *Kruckenberg v. City of Kalispell,* 2004 MT 185, ¶ 12, 322 Mont. 177, 94 P.3d 748 (district court is divested of jurisdiction after notice of appeal is filed); *see also* M. R. Civ. P. 60(a).

The Montana Rules of Appellate Procedure provide an exception and allow district courts to retain jurisdiction to rule on a motion to stay judgment pending appeal. M. R. App. P. 22(1)(c). There are, however, no exceptions in the rules for a motion for clarification and Defendants provide no authority supporting this Court's jurisdiction to rule on their motion for clarification

after their notice of appeal was filed, and after the Supreme Court ordered that the appeal may proceed. *Held v. State of Montana*, DA 23-0575, Order (Mont. Sup. Ct. Oct. 17, 2023). Should any clarification of this Court's August 14 Order be required at a later date, the appropriate time to do so would be after the Supreme Court issues a final judgment, as was the case in *Meine v. Hren Ranches, Inc.,* 2020 MT 284, 402 Mont. 92, 475 P.3d 748, the sole case cited by Defendants in support of their motion for clarification. In *Meine*, the motion for clarification was filed after the Supreme Court's final judgment and, when it was filed, there was no appeal pending before the Supreme Court. *Id.* ¶ 7. Because this Court does not now have jurisdiction to grant Defendants' motion for clarification, it must be denied.

II. DEFENDANTS HAVE NOT MET THEIR BURDEN TO ESTABLISH THAT A STAY PENDING APPEAL IS WARRANTED

This Court should deny Defendants' motion for a stay pending appeal because Defendants have failed to demonstrate a likelihood of success on the merits or a probability of their irreparable harm. On the contrary, a stay would allow Defendants to continue to violate the constitutional rights of the sixteen youth Plaintiffs, exacerbate their already significant injuries, further degrade the *status quo* of Montana's environment, and harm the public's interest.

A. Defendants Have Not Made Any Showing They Are Likely to Succeed on the Merits of Their Appeal

Defendants do not point out a single error with this Court's August 14 Order, the Order they seek to have stayed. Doc. 423 at 14-15. Instead, Defendants' sole argument regarding their likely success on the merits relates to claims for a remedial plan that this Court dismissed over two years ago, did not address in the August 14 Order, and are not the subject of the appeal. *Id*. Thus, the only issue Defendants appear to believe they will succeed on in their appeal has already been dismissed by this Court and is not implicated in the August 14 Order.

While Defendants purport to rely on *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), to suggest that a remedial plan is beyond the court's authority, as noted above, this Court disposed of that issue two years ago. Doc. 423 at 14-15. Moreover, they neglect to note that *Juliana* is proceeding towards trial with an amended complaint. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023) (Opinion and Order granting Plaintiffs' motion to file amended Complaint). According to the *Juliana* Court:

> It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function . . . .

Id. at *8. So too here. This Court properly fulfilled its constitutional duty to determine whether the challenged laws violate the rights of the sixteen youth Plaintiffs. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 110, 765 P.2d 745, 748 (1988) ("The first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected."). Therefore, *Juliana* supports the August 14 Order, where this Court applied constitutional law, declared rights, declared laws and conduct unconstitutional, declared Defendants' responsibilities under the Montana Constitution, and enjoined unconstitutional conduct.[4]

Defendants fail to raise any errors with this Court's August 14 Order (or any prior orders) and, therefore, have not satisfied their burden to establish they are likely to succeed on the merits of the appeal. This factor weighs in favor of denying Defendants' motion for a stay of judgment.

B. Defendants Will Not Be Irreparably Injured Absent a Stay

[4] The Environmental Protection Agency, a Defendant in *Juliana*, issued a statement celebrating the August 14 Order, calling it a "landmark moment" in the youth's effort to protect the earth. https://www.epa.gov/newsreleases/epa-regional-administrator-statement-montana-court-ruling-favor-youth-and-their.

In order to justify issuance of a stay, Defendants have the burden of demonstrating that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020); *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). A stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427.

Defendants allege their irreparable injuries would result from "[r]ushing to implement a process for analyzing GHG emissions." Doc. 423 at 9. Defendants argue that their own conduct to rush the regulatory review "process" would cause regulatory confusion, and uncertainty and potential liability for DEQ. *Id.* Defendants take the untenable position that they should be allowed to continue to violate Plaintiffs' constitutional rights and worsen attendant grievous harms because they need time to assess "whether and how to implement GHG analysis," *id.*, all while they continue their long-standing practice of approving all fossil fuel project permits. Tr. 831:22-832:1 (Ms. Hedges testifying that, to her knowledge, Defendants have never denied a fossil fuel permit). However, Defendants' purported injuries are self-inflicted, and do not constitute irreparable harm or warrant a stay of this Court's August 14 Order, especially when compared to the grave, and worsening, injuries Plaintiffs are experiencing. *See infra*, Section II.C.

Defendants assert without support that, absent a stay, DEQ would be required to consider GHG emissions and corresponding impacts to the climate, and could thereby be prevented from issuing new coal mining permits or air quality permits for natural gas plants, which would "invite regulatory chaos," and increase energy prices for consumers. Doc. 423 at 10. There is no evidence, however, that considering GHG emissions and corresponding impacts to the climate, and not issuing new fossil fuels permits, would cause Defendants any harms, let alone irreparable harms. In fact, the undisputed evidence at trial shows the opposite would be true when renewable energy alternatives to fossil fuels are considered as provided in MEPA. *See* Mont. Code Ann. § 75-1-201

(1)(b)(iv)(C); Doc. 405 at 81 ("The MEPA Limitation causes the State to ignore renewable energy alternatives to fossil fuels."). As the evidence at trial established, Montana can meet its current and future energy needs by transitioning its energy systems to renewable energy and, in doing so, will clean up Montana's environment, improve the health of its citizens (especially Montana's children), and save energy consumers money. Doc. 405 at 80-84. The August 14 Order found:

> FF #272. "It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035."
>
> FF #275. "[C]onverting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings)."
>
> FF #276. "New wind and solar are the lowest cost new forms of electric power in the United States, on the order of about half the cost of natural gas and even cheaper compared to coal."
>
> FF #281. "Transitioning to WWS [wind, water, solar] will keep Montana's lights on while saving money, lives, and cleaning up the air and the environment, and ultimately using less of Montana's land resources."

Id. at 81, 82, 84 (citations omitted). Defendants presented no evidence to the contrary. Moreover, the undisputed evidence in the trial record established that a 100% wind, water, and solar energy system for Montana would be reliable. Tr. 1072:24-1073:4 ("Q. I'd like to turn now to the issue of grid reliability. Would a wind, water, solar energy system developed over the next couple of decades be reliable to meet all of the energy needs of the state of Montana? A. *Yes, with a high degree of certainty*." (emphasis added)); *see also* Tr. 1073:5-1075:25; *contra* Nowakowski Decl. ¶ 44.

Simply stated, Defendants had an opportunity to dispute this evidence at trial but chose not to. While the testimony of Defendants' economist, Dr. Terry Anderson, was not given weight by this Court, he never questioned the reliability of a 100% renewable energy grid or argued that it

would increase energy costs for Montana's consumers. Doc. 405 at 66; *see also* Tr. 1082:19-1083:2 (defense counsel choosing not to call Dr. Judith Curry to testify at trial). This Court should not re-open the trial record and rely on evidence that was neither presented at trial nor subject to cross-examination from a witness who is not qualified to offer expert testimony on the technical and economic feasibility of Montana's transition to renewable energy. *See* Nowakowski Decl. ¶¶ 44-45; Tr. 1343:23-1345:7 (describing her expertise in law and policy work, *not* technical and economic feasibility of decarbonizing Montana's energy system). Regardless, there is no evidence to support Defendants' assertion that not permitting new fossil fuel projects would undermine Montana's energy system, increase costs to consumers, compromise grid reliability, or cause any other irreparable harms to Defendants or Montanans. If Defendants need more time to develop a process to evaluate permit applications, they can and should postpone the issuance of new permits pending development of that process. As this Court explained, there is also no obligation or mandate for Defendants to continue to authorize new fossil fuels projects, and they must have discretion to deny permits for fossil fuel activities. Doc. 405 at 89-90.

Moreover, there is no evidence that any *party to this case* would suffer harm, let alone irreparable harm, if Defendants could not issue new permits for fossil fuel activities. *See MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *3 (Mont. Sup. Ct. Aug. 6, 2019) (affirming district court denial of stay and finding that Defendant NorthWestern Energy would not suffer any harm because any increased costs incurred absent a stay would be passed on to consumers). Unlike the situation in *MEIC v. Westmoreland*, here there are no private defendants alleging financial injuries from having to shut down mining operations. DA 22-0064, *7-8 (Mont. Sup. Ct. Aug. 9. 2022); *accord Vote Solar v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0223, *2-3 (Mont. Sup. Ct. Aug. 6, 2019). Defendants present no evidence as to how *they* will be irreparably injured if they

could not issue new permits for fossil fuel activities after considering GHG emissions and corresponding impacts to the climate.

Defendants' concerns about "potential" liability and having to "divert DEQ resources" are pure conjecture and, even if valid, do not constitute irreparable harm. Doc. 423 at 9, 11; *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020) (administrative burdens do not constitute irreparable harm). Any additional resources required by Defendants to comply with their statutory and constitutional obligations do not constitute irreparable harm but do implicate Defendants' obligation to comply with the law, including court orders interpreting Montana's Constitution. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("even if the government faced severe logistical difficulties in implementing the order," that would merely represent the burden of complying with statutory and constitutional obligations); *see also Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017). What Defendants should be focused on is the ongoing harms to the youth Plaintiffs and their own potential liability for disregarding this Court's August 14 Order.

Defendants' conjecture that they may be subject to lawsuits under MEPA or the Montana Administrative Procedure Act ("MAPA") if they rush their process to determine whether and how to consider climate change and GHGs during MEPA review is similarly without merit and does not constitute irreparable harm. Doc. 423 at 10-11. Even actualized litigation burdens do not rise to the level of irreparable harm. *See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm). Purely conjectural litigation risk, likewise, does not constitute

irreparable harms. Moreover, Defendants present no evidence that the issuance of a stay would alleviate their purported injuries stemming from hypothetical future litigation, or that such litigation is more likely to materialize if they immediately begin complying with this Court's August 14 Order.

Importantly, DEQ's own trial testimony makes clear that the agency knows how to consider climate impacts and GHG emissions, and would do so, if the MEPA Limitation were declared unconstitutional. At trial the Court asked Ms. Nowakowski, "if you had the authority, do you believe that your agency could do this kind of [climate change impacts] analysis?" Tr. 1437:4-6. Ms. Nowakowski responded, "I do believe we could do this kind of analysis, yes." Tr. 1437:7-8. Additionally, Anne Hedges was asked at trial, "[i]f the climate change limitation to MEPA were declared unconstitutional, do you think defendant agencies would be capable of considering greenhouse gas emissions and the climate impacts of proposed fossil fuel projects?" Tr. 821:16-20. Ms. Hedges responded: "One hundred percent. State agencies absolutely have the skills and the information they need to create these types of analyses. These analyses are already conducted at the federal level and in MEPA." Tr. 821:21-25. On the basis of the trial evidence, this Court's August 14 Order found:

> FF #252. "Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station."
>
> FF #257. "If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change."
>
> CL #64. "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past."

Doc. 405 at 73-74, 101 (citations omitted). In sum, the trial record shows Defendants already have the tools to analyze climate impacts and GHG emissions and professed capability to do so. Their alleged irreparable harm is being manufactured by their own begrudging processes of complying with this Court's Order and erroneous assumption that they need to promptly approve every fossil fuel permit they receive without considering GHG emissions and corresponding climate impacts.

Even accepting *arguendo* DEQ's argument that it will take time to complete the agency's "process" of considering whether and how to update MEPA, requiring Defendants to immediately implement and adhere to this Court's August 14 Order, cease implementing unconstitutional statutes, and begin exercising their statutory discretion in a constitutional manner will not cause any *irreparable* harm to Defendants. Irreparable harm to Defendants is a "bedrock requirement" of a stay pending appeal, and Defendants' failure to establish irreparable harm necessitates denial of their motion to stay proceedings. *N. Plains Res. Council*, 460 F. Supp. 3d at 1045.

C. Issuance of A Stay Will Exacerbate Plaintiffs' Uncontroverted and Well-Established Constitutional Injuries, Causing Further Irreparable Harm

Conspicuously absent from Defendants' stay motion is any meaningful discussion of whether the sixteen youth Plaintiffs will be harmed if a stay is granted. Doc. 423 at 13. Defendants fail to acknowledge this Court has already found, based on the uncontested evidence presented at trial, that Plaintiffs are *currently suffering substantial injuries* under the *status quo* of climate disruptions and Defendants' disregard for the dangers of climate change and GHG pollution in their permitting decisions. Doc. 405 at 46-64.

This Court held that each Plaintiff is already experiencing grave injuries, including injuries to their physical and mental health, damage to their home and property, lost income and economic security, reduced recreational opportunities, and harm to tribal and cultural traditions as a result of "the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Id. at 46; *id.* at 46-64. For example, the Court found that, "[f]or Olivia, climate anxiety is like an elephant siting on her chest and it feels like a crushing weight . . . mak[ing] in hard for her to breathe." *Id.* at 57. The increasingly smoky summers in Montana "makes Mica feel sick," and because he has exercise-induced asthma, he is "at greater risk for respiratory hardship when the air is smoky." *Id.* at 61. For Sariel, climate impacts affect her "ability to partake in cultural and spiritual activities and traditions, which are central to her individual dignity," and disrupt "spiritual practices and longstanding rhythms of tribal life." *Id.* at 52.

Plaintiffs' substantial injuries are occurring *right now* and, as the uncontested evidence presented at trial demonstrated, will increase and compound with each passing day and with any delay in Defendants' full implementation of the August 14 Order. As this Court found:

> FF #89. "Until atmospheric GHG concentrations are reduced . . . Plaintiffs will be unable to live clean and healthy lives in Montana."
>
> FF #92. "Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future."
>
> FF #98. "According to the Intergovernmental Panel on Climate Change (IPCC) . . . 'There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).'"
>
> FF #193. "The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
>
> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."
>
> CL #7. "Plaintiffs' injuries will grow increasingly severe and irreversible without science-based actions to address climate change."

Doc. 405 at 24-25, 46, 87 (citations omitted).

Incongruously, pending final resolution of this case before the Montana Supreme Court, Defendants want permission to continue to implement the MEPA Limitation and ignore the GHG emissions from fossil fuel projects and the resulting harms to Montana's children and environment. Doc. 423 at 3 (asking this Court to "maintain the status quo" of always approving fossil fuel permits without considering GHG emissions and corresponding impacts to the climate). However, if Defendants continue to follow the *status quo* of disregarding GHG emissions and climate impacts, all applied for fossil fuel activities will continue to be permitted, increasing GHG emissions at a time when they need to be declining, and exacerbating Plaintiffs' proven injuries. Doc. 405 at 87-88 (describing causal connection between MEPA Limitation and resulting GHG emissions). The uncontested evidence of record and this Court's detailed findings of fact and conclusions of law make clear that Plaintiffs are suffering substantial injuries and constitutional rights violations *now*, and the issuance of a stay and preservation of the unconstitutional *status quo* would cause further substantial injuries to Plaintiffs, with a narrowing window to abate the harm.

A stay of this Court's August 14 Order would result in MEPA reviews conducted pursuant to the MEPA Limitation that ignore GHG emissions and climate harms and the continued approval of all new fossil fuel projects, thereby prolonging and exacerbating the dangerous conditions which cause and contribute to Plaintiffs' injuries and violate their fundamental constitutional rights.[5] Under such trial-proven facts and circumstances, there is no justification to grant a stay and allow Defendants to continue the *status quo* of violating Plaintiffs' constitutional rights. As Montana's

[5] For example, the two fossil fuel projects previously referenced, *supra,* p. 5-6. Additionally, because MEPA provides timelines ranging between 60 and 180 days to conduct scoping and environmental reviews, § 75-1-208, MCA, and because DEQ conducts dozens of environmental reviews every year, Nowakowski Decl. ¶¶ 26-28, if a stay is granted there is a high likelihood that dozens of environmental reviews would be conducted pursuant to the MEPA Limitation this Court declared unconstitutional while this appeal is resolved, thereby greatly exacerbating the already substantial harms to Plaintiffs.

courts have consistently recognized, infringement of constitutional rights constitutes irreparable injury. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("the loss of a constitutional right constitutes an irreparable injury"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (same); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (environmental injury is irreparable).

Because the *status quo* Defendants seek to perpetuate through a stay of this Court's August 14 Order is one in which Plaintiffs *have already suffered* constitutional and environmental harms, and because Plaintiffs will suffer substantial additional harms if a stay is granted, the balance of harms clearly disfavors a stay and necessitates prompt and full compliance with this Court's August 14 Order and denial of Defendants' request for a stay.

D. The Public Interest Overwhelmingly Weighs Against a Stay

The public interest also weighs against issuance of a stay because it is always in the public's interest for Defendants to comply with their Constitutional obligations. *See MTSUN,* DA 19-0363, *3 (it is in the public's interest for defendants to follow the law); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) (same). As with the third stay factor, Defendants' arguments that the public interest lies in favor of a stay is built entirely on conjecture and speculation and is contrary to the trial record and the findings in this Court's August 14 Order.

As described in Section II.B *supra*, there is no benefit to the public from Defendants' ongoing failure to consider climate impacts and GHG emissions in permitting decisions and continued issuance of all fossil fuel permits. The undisputed trial evidence makes clear that a transition away from fossil fuels towards renewable energy is not only feasible, but will save Montana energy consumers billions of dollars, eliminate dangerous air pollution, and ensure grid reliability. Doc. 405 at 80-84. Unlike the situations in *MEIC v. Westmoreland* and *Vote Solar,* there

is no evidence here that private corporations, or Montana energy consumers, will suffer irreparable financial harms; on the contrary, the evidence shows that the public will *benefit* as Montana stops blindly permitting all fossil fuel activities without considering GHG emissions and corresponding impacts to the climate. *MTSUN,* DA 19-0363, *3; Doc. 405 at 80-84.

Regarding the purported harms stemming from limited public input, Doc. 423 at 9, Defendants fail to explain why the public cannot continue to provide input during a MEPA review process that complies with this Court's August 14 Order. Additionally, there is no evidence that such a "harm" would cause irreparable injury to the public or justify the exacerbation of Plaintiffs' already substantial injuries. Further, Defendants gloss over the overwhelming outpouring of public support at DEQ's MEPA "public listening sessions" in favor of swift and comprehensive compliance with this Court's August 14 Order and inclusion of GHG emissions and climate change impacts analyses in MEPA reviews. Indeed, practically every public comment submitted on DEQ's "MEPA Conversation" webpage implores the agency to begin conducting GHG and climate analyses in MEPA reviews.[6] Through DEQ's public listening sessions, the public is making abundantly clear that its interests lie against a stay and in favor of prompt adherence to this Court's August 14 Order. The public interest lies squarely with having Defendants comply with the law and ceasing their unconstitutional conduct. Defendants' motion should be denied.

E. MAPA Cases Applying § 2-4-711, MCA, to Stay Agency Actions Pending Appeal are Inapposite

Defendants advocate for a new rule that anytime a district court declares unconstitutional statutory text that implicates state agencies, a stay is warranted pending appeal. Doc. 423 at 13-14. But the cases Defendants cite in support of their argument concern judicial review of a specific

[6] Montana DEQ, *DEQ MEPA Conversation*, https://storymaps.arcgis.com/stories/4e14fb535c034e08bcf87c6c2a113c9d.

agency action under MAPA, not cases where courts have enjoined the implementation of unconstitutional statutes. None of the cases cited by Defendants stands for the proposition that state agencies should be allowed to implement unconstitutional statutes or violate constitutional rights while an appeal is pending – which is what Defendants are asking to do here. Notably, a specific MAPA provision, § 2-4-711, MCA, provides for the stay of the district court orders reversing agency decisions in the cases cited by Defendants. *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n*, 2010 MT 2, ¶18, 355 Mont. 15, 223 P.3d 907; *Grenz v. Mont. Dep't of Nat. Res. & Conservation*, 2011 MT 17, ¶ 20, 359 Mont. 154, 248 P.3d 785.[7] The instant case is not a MAPA case and there is no statute automatically authorizing a stay here. Doc. 46 at 22-24 (finding Plaintiffs need not bring a MAPA case). This Court should apply the four stay factors outlined above and, in so doing, will find that Defendants' motion must be denied.

CONCLUSION

Defendants' motion for clarification must be denied because this Court does not have jurisdiction to consider such a motion while this case is on appeal to the Montana Supreme Court. Defendants' motion for stay must be denied because granting such a motion would allow Defendants to continue their unconstitutional conduct, exacerbate the grave constitutional injuries Plaintiffs are currently experiencing, and risk locking in irreversible harms to Plaintiffs and the public. Defendants have demonstrated no likelihood of their success on the merits, no irreparable injury to them, and no public benefit to a stay. The Court should take this opportunity to remind Defendants they must fully comply with this Court's August 14 Order and begin working to fulfill their affirmative constitutional obligations to Montana's youth.

[7] *Matter of Mays* was also a MAPA case but does not consider the issue of a stay and is, therefore, irrelevant to Defendants' argument. 2019 MT 219, ¶ 7, 397 Mont. 248, 448 P.3d 1096. *Vote Solar* was also a MAPA case challenging a specific agency decision.

DATED this 6th day of November, 2023.

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

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

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Melissa Anne Hornbein, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 11-06-2023:

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: eService

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Montana Department of Environmental Quality, Greg Gianforte, Montana Public Service Commission
Service Method: eService

Thane P. Johnson (Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401

Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Montana Department of Environmental Quality, Greg Gianforte, Montana Public Service Commission
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Montana Department of Environmental Quality, Greg Gianforte, Montana Public Service Commission
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Greg Gianforte, Montana Public Service Commission
Service Method: eService

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, Montana Department of Environmental Quality, Greg Gianforte
Service Method: eService

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

Nathan Bellinger (Attorney)
1216 Lincoln St
Eugene OR 97401
Representing: Rikki Held
Service Method: eService

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

Michael D. Russell (Govt Attorney)

215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Philip L. Gregory (Attorney)
1250 Godetia Drive
Redwood City 94062
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: Other Means by Consent

Mathew dos Santos (Attorney)
1216 Lincoln St.
Eugene 97401
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: Other Means by Consent

Andrea K. Rodgers (Attorney)
1216 Lincoln St.
Eugene 97401
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: Other Means by Consent

Julia A Olson (Attorney)
1216 Lincoln St
Eugene 97401
Representing: Badge B, Eva L, Lander B, Olivia V, Georgianna F, Kian T, Kathryn Grace S, Sariel S, Mika K, Jeffrey K, Rikki Held, Nathaniel K
Service Method: Other Means by Consent

Austin Miles Knudsen (Attorney)
PO BOX 201401
Helena 59620-1401
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Montana Department of Environmental Quality, Greg Gianforte, Montana Public Service Commission
Service Method: Other Means by Consent

Selena Z. Sauer (Attorney)
P. O. Box 759
Kalispell 59903-0759
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Montana Department of Environmental Quality, Greg Gianforte, Montana Public Service Commission
Service Method: Other Means by Consent

Michael Russell (Attorney)
P O Box 201401
Helena 59620-1401
Representing: Mt Dept. Of Natural Resources And Conservation, Montana Department of Transportation, State of Montana, Steve Bullock, Montana Department of Environmental Quality, Greg Gianforte, Montana Public Service Commission
Service Method: Other Means by Consent

Electronically Signed By: Melissa Anne Hornbein
Dated: 11-06-2023