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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 **BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS MEPA CLAIMS**

INTRODUCTION

Under Mont. R. Civ. P. 12(b)(1) and (h)(2)(3), Defendants move to dismiss all claims based on former Mont. Code Ann. § 75-1-201(2)(a)(2011) because this statute has been substantively

amended by the enactment of House Bill ("HB") 971 on May 10, 2023. The substantive amendment to § 75-1-201(2)(a) requires all of Plaintiffs claims based on the previous version to be dismissed for four reasons: 1) as a threshold issue that the Court must consider, the substantive amendment renders the previous version non-justiciable; 2) this Court may not exercise subject matter jurisdiction to determine and issue a judgment on a law that no longer exists; 3) the "existing case or controversy" requirement for standing requires the Plaintiffs to challenge a current law, not a previous version; and 4) the redressability requirements of standing are clear that this Court does not have the authority to provide relief from a statute that no longer exists.

On May 10, 2023, HB 971 became law with Governor Gianforte's signature, effective immediately.[1] Critically, HB 971 rewrote § 75-1-201(2)(a), which previously read:

> Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.[2]

With the passage of HB 971, § 75-1-201(2)(a), MCA now reads:

> Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) ***may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.***

(Emphasis added). Thus, during the 2023 Legislative Session, the Legislature clearly and unambiguously sought to replace the 2011 previous language with new language in HB 971. As of May 10, 2023, everyone—state agencies, courts, and these Plaintiffs must come under the new law.

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[1] *See* the Montana Legislature Detailed Bill Information for H.B. 971 available at LAWS Detailed Bill Information Page (mt.gov)

[2] This previous language of § 75-1-201(2)(a) in MEPA was enacted 2011 by Senate Bill 233. *See https://tinyurl.com/4kah97ay*.

Plaintiffs' facial constitutional challenge to former § 75-1-201(2)(a), and all other claims based on the former statute—including their request for the Court to enjoin Defendants from subjecting them to so-called "aggregate acts" allegedly taken pursuant to that former statute, among other related relief (*see* Compl. at 102–103)—are therefore moot because that statute no longer exists. And because any challenge to the newly rewritten Mont. Code Ann. § 75-1-201(2)(a) (2023) is clearly outside of the issues presented in Plaintiff's Complaint, this Court lacks subject matter jurisdiction over any such challenge. The statute over which the Court previously had subject matter jurisdiction no longer exists. When HB 971 became law, the Plaintiff's challenge to the former version of § 75-1-201(2)(a) became moot and, concurrently, the Court lost subject matter jurisdiction. Dismissal is required.

ARGUMENT

"Subject matter jurisdiction is the threshold power of a court to consider and adjudicate particular types of cases and controversies." *Larson v. State*, 2019 MT 28, ¶ 17, 394 Mont. 167, 434 P.3d 241 (citing *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 62, 345 Mont. 12, 192 P.3d 186; *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299 ¶ 14, 340 Mont. 56, 172 P.3d 1232; *In re B.F.*, 2004 MT 61, ¶ 18, 320 Mont. 261, 87 P.3d 427). "The subject matter jurisdiction of Montana district courts derives exclusively from Article VII, Section 4, of the Montana Constitution (district court subject matter jurisdiction over 'all civil matters and cases' arising at law or in equity) and conforming statutes." *Id.* (citing *Harrington v. Energy W. Inc.*, 2015 MT 233, ¶ 13, 380 Mont. 298, 356 P.3d 441; *LaPlante v. Town Pump, Inc.*, 2012 MT 63, ¶ 15, 364 Mont. 323, 274 P.3d 724); *see also* Mont. Code Ann. §§ 3-5-301(1), -302 (general statutory jurisdiction of district courts).

"Justiciability is a related, multi-faceted question of whether the exercise of preexisting subject matter jurisdiction is appropriate under the circumstances in a given case based on the constitutional 'case' and separation of powers provisions of Article III, Section 1, and Article VII, Section 4, of the Montana Constitution and related prudential policy limits." *Id.* at ¶ 18 (citing *Baker v. Carr*, 369 U.S. 186, 217–36; *Reichert v. State*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455; *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 31–34, 360 Mont. 207, 255 P.3d 80, *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶¶ 6–8, 355 Mont. 142, 266 P.3d 567). An issue is justiciable if it is within the constitutional power of a court to decide—meaning the asserting party has an actual, non-theoretical interest on which a judgment can "effectively operate" and provide meaningful relief. *Id.* (citing *Clark v. Roosevelt Cnty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48; *Seubert v. Seubert*, 2000 MT 241, ¶ 0, 301 Mont. 382, 13 P.3d 235). Justiciability includes distinct considerations of legal standing, mootness, ripeness, and whether a claim or issue involves a political or legal question. *Id.* (citing *Reichert*, ¶¶ 20, 54; *Plan Helena*, ¶ 8; *Greater Missoula Area Fedn. of Early Childhood Ed. v. Child Start, Inc.*, 2009 MT 362, ¶¶ 22–23, 353 Mont. 201, 219 P.3d 881).

Justiciability is a mandatory prerequisite to the initial and continued exercise of the court's jurisdiction—courts lack the power to resolve cases that are not justiciable. *Id.* (citing *Ballas*, ¶¶ 14–16 (court lost power to resolve a case brought by a party without standing); *Clark*, ¶ 11 (justiciability "is a threshold requirement" for dispute adjudication). Here, the Court now lacks the power to adjudicate Plaintiffs' § 75-1-201(2)(a) claims because they are no longer justiciable. HB 971's substantive amendment to the statute renders the claims moot; the Court lacks the powers to determine and issue a judgment on a law that no longer exists; the "case or controversy" requirement for standing requires Plaintiffs to challenge a current law, not a previous, superseded

version; and the Court does not have the authority to provide relief from a statute that no longer exists.

I. PLAINTIFFS' CLAIMS BASED ON THE PRIOR VERSION OF § 75-1-201(2)(a) ARE MOOT.

HB 971 moots § 75-1-201(2)(a), because it replaced the statute Plaintiffs challenged in their Complaint. It is axiomatic that the authority of Montana courts is limited to justiciable controversies, "upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical, or academic conclusion." *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 7, 405 Mont. 259, 263, 494 P.3d 892, 895 (quoting *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 16, 364 Mont. 390, 276 P.3d 867); *Greater Missoula Area Fedn. of Early Childhood Ed.*, ¶ 22). A justiciable controversy requires that a "case or controversy" exist throughout the entire matter for a court to retain jurisdiction. *Id*. ¶ 23 (clarifying "because the constitutional requirement of a 'case or controversy' contemplates real controversies and not abstract differences of opinion ***or moot questions***,…courts lack jurisdiction to decide moot issues insofar as an actual 'case or controversy' no longer exists") (emphasis added). A case becomes moot if the disputed issue has ceased to exist or is no longer live. *Wilkie* at ¶ 8 (internal quotations omitted). "Any further ruling in such a case would constitute an impermissible advisory opinion, 'i.e., one advising what the law would be upon a hypothetical state of facts or upon an abstract proposition, not one resolving an actual case or controversy.'" *Id*. (*quoting Plan Helena,* ¶ 12).

The doctrine of mootness is not aspirational or merely theoretical—it is a jurisdictional limitation on the authority of the Court to unnecessarily expend its resources on a hypothetical question. The Montana Supreme Court recently emphasized this point:

> [C]ourts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice. Consequently, this Court has refused to entertain a declaratory judgment action on the ground that no controversy is pending which the judgment would affect.

Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Regulation, Pub, Serv. Commn., 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301 (internal quotations and citations omitted).

Here, the enactment of HB 971 renders moot any portion of Plaintiffs' claims that implicate or rest on the former version of § 75-1-201(2)(a). This includes but is not limited to Plaintiffs' claims that § 75-1-201(2)(a) is facially unconstitutional (*see generally*, Compl., particularly Prayer for Relief, No. 3), and Plaintiffs' claims based on Defendants' "aggregate acts" allegedly taken pursuant to § 75-1-201(2)(a) (*see generally,* Compl.). In other words, because § 75-1-201(2)(a) no longer exists, this Court cannot issue any judgment determining the constitutionality of former § 75-1-201(2)(a), or any of Plaintiffs' related claims. Where, as here, a claim is moot, dismissal is required. *See Wetzel v. Mont. Dept. of Rev.*, 180 Mont. 123, 123, 589 P.2d 162, 163 (Mont. 1979) (dismissing appeal as moot following Montana Legislature's repeal of the statute forming the basis of the trial court's order).

II. THE COURT MAY NOT EXERCISE SUJBECT MATTER JURISDICTION TO ADJUDICATE A LAW THAT NO LONGER EXISTS.

A court may exercise subject matter jurisdiction only with regard to issues that a party places before it. *LaPlante v. Town Pump, Inc.,* 2012 MT 63, ¶ 16, 365 Mont. 323, 274 P.3d 724 (citing *Old Fashion Baptist Church v. Mont. Dept. of Revenue,* 206 Mont. 451, 457, 671 P.2d 625, 628 (1983)). Subject-matter jurisdiction can never be forfeited or waived. *Thompson v State,* 2007 MT 185, ¶ 28, 338 Mont. 511, 167 P.3d 867 (citations omitted).

Lack of jurisdiction over the subject matter can be raised at any time and a court which in fact lacks such jurisdiction cannot acquire it even by consent of the parties. *Id.*; *Stanley v. Lemire,* 2006 MT 304, ¶ 31, 334 Mont. 489, 148 P.3d 643 (quoting *Corban v. Corban,* 161 Mont. 93, 96, 504 P.2d 985, 987 (1972)). Once a court determines it lacks subject matter jurisdiction, "it can take no further action in the case other than to dismiss it." *Id.* (citing Mont. R. Civ. P. 12(h)(3)).

Over three years ago, in their Complaint, Plaintiffs challenged former § 75-1-201(2)(a), but that statute can no longer be considered by this Court. HB 971 substantively amended and replaced it. It is therefore a wholly new statute, not addressed in Plaintiffs' pleadings. If Plaintiffs wanted to challenge HB 971—and if this Court were to consider such a challenge—Plaintiffs would need to file a pleading challenging the new law. Defendants likewise would need a Scheduling Order affording them the opportunity for discovery and motions on the new challenge to the new law. Now that HB 971 has replaced the subject of Plaintiff's challenge—former § 75-1-201(2)(a), MCA—this Court cannot adjudicate Plaintiff's claims based on the former statute. Plaintiffs' claims premised on the former version of the statute must be dismissed and the trial scheduled to hear these issues must be vacated.

III. THRESHOLD "CASE OR CONTROVERSY" STANDING PRINCIPLES MANDATE DISMISSAL OF THE § 75-1-201(2)(a) CLAIMS.

The Montana Supreme Court has made clear that "the 'cases at law and in equity' language of Article VII, Section 4(1) embodies the same limitations as are imposed on federal courts by the "case or controversy" language of Article III [of the U.S. Constitution]." *Plan Helena*, ¶ 6 (internal citations omitted); see also *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 18, 408 Mont. 29, 505 P.3d 825. Plaintiffs must demonstrate case or controversy standing—at every stage of litigation—by distinctly showing "a past, present, or threatened injury" that can be "alleviated by successfully maintaining the action." *Heffernan*, ¶ 33. To demonstrate standing, Plaintiffs must

show that (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

A. PLAINTIFFS' CAN'T ESTABLISH TRACEABILITY UNDER THE NEW STATUTE BECAUSE THEY HAVE NOT PLEADED A CHALLENGE TO THE NEW STATUTE.

Plaintiffs must demonstrate causation by showing "a fairly traceable connection" between their alleged injuries and the challenged statutes. *Heffernan*, ¶ 32; *see also Lujan*, 504 U.S. at 560 (the injury must be fairly traceable to the challenged action of the defendant[.] (cleaned up). The chain of causation must not be "hypothetical or tenuous." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020); see also *Larson* at ¶ 46 ("a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally. But because Plaintiffs did not plead the new statute, Plaintiffs cannot make any showings regarding the new statute. They can't introduce any evidence regarding the new statute, including evidence which shows that they have standing to pursue the claim. Because the new statute has not been placed at issue by the pleadings, the issues predicated on the statute are not issues for trial. And, as discussed below, the Court cannot grant them relief on a prior version of the statute. Plaintiffs no longer have standing under those claims, and the Court must dismiss them.

B. THE COURT HAS NO AUTHORITY TO PROVIDE RELIEF FROM A STATUTE THAT NO LONGER EXISTS.

To meet the redressability requirement for standing, Plaintiffs must show that a decision in their favor would alleviate those injuries. *Larson*, ¶ 46. But the Court has no authority to provide

relief from a statute that no longer exists. *Cf. State v. Mont. Thirteenth Jud. Dist. Ct.*, 2023 Mont. LEXIS 18, **11–12 (writ of supervisory control granted over district court for purporting to enjoin an agency from engaging in rulemaking because the plaintiffs did not properly challenge the administrative rule and its implementation in their pleadings). Here, where Plaintiffs have not placed the current version of the rule at issue in this case, the Court does not have the power to adjudicate the new version of the statute, and adjudicating a statute that no longer exists would provide Plaintiffs no relief. Dismissal of Plaintiffs' claims based on the former version of § 75-1-201(2)(a) is therefore warranted.

CONCLUSION

This Court must dismiss, with prejudice, Plaintiffs' claims related to the previous version of § 75-1-201(2)(a) because they are no longer justiciable. The enactment of HB 971 has rendered the version of the statute on which Plaintiffs' claims are based moot. The subject of Plaintiff's challenge no longer exists, and this Court may not adjudicate an issue outside of the pleadings. Nor can the Court provide relief from a version of the statute that no longer exists. For the reasons stated in this Brief, Defendants' Brief in Support of their Motion to Partially Dismiss, and at oral argument on May 12, 2023, Defendants respectfully request that this Court dismiss Plaintiffs' claims in their entirety.

DATED this 18th day of May, 2023.

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