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**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY**

RIKKI HELD, et al., Plaintiffs, vs. STATE OF MONTANA, et al., Defendants.	Cause No.: CDV-2020-307 **STATE OF MONTANA'S BRIEF IN SUPPORT OF MOTION *IN LIMINE* NO. 2 (PRECLUDE IRRELEVANT EXPERT WITNESS TESTIMONY)**

Defendant State of Montana submits this Brief in Support of its Motion *in Limine* No. 2 (Preclude Irrelevant Expert Witness Testimony):

A. Background

Plaintiffs have disclosed expert witnesses who plan to testify about matters that are irrelevant to the constitutionality of the statutes at issue in this case. One such witness is Mark Z. Jacobson, Ph.D. Plaintiffs' expert witness disclosure describes his testimony: "Dr. Jacobson will provide expert testimony on the feasibility of transitioning the State of Montana to 100% clean,

renewable energy in all energy sectors by mid-century, including the energy sectors of electricity, transportation, heating/cooling, and industry." For purposes of this argument – and decidedly for no other purpose – the State of Montana will assume Dr. Jacobson's opinion is accurate, and that it is feasible for Montana to eliminate all use of fossil fuels by 2050. The question remains: How does that make Montana's energy policy and MEPA any more or less constitutional?

B. Argument

It is well settled that "[t]he purpose of the motion *in limine* is to prevent the introduction of evidence which is irrelevant, immaterial or unfairly prejudicial." *State v. Krause,* 44 P.3d 493, 497 (Mont. 2002), *citing Hulse v. State, Dept of Justice,* 961 P.2d 75 (quoting *City of Helena v. Lewis,* (1993), 260 Mont. 421, 425-26, 860 P.2d 698, 700). "The authority to grant or deny a motion *in limine* 'rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.'" *Id.; see also Jacobs v. Laurel Volunteer Fire Dept.,* 26 P.3d 730, 732 (Mont. 2001), citing *Kissock v. Butte Convalescent Ctr.,* 992 P.2d 1271, 1273 (Mont. 1999)("The authority to grant or deny a motion *in limine* is part of the inherent power of a court to admit or exclude evidence in order to assure a fair trial.")

Relevance governs the admissibility of evidence at trial. For evidence to be relevant it must be *both* probative and material. Rule 401 of the Montana Rules of Evidence defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This is somewhat of a commonsense determination: "The test of relevancy is whether an item of evidence will have any value, as determined by logic and

experience in proving the proposition for which it is offered." *Phil-Co Feeds, Inc., v. First National Bank in Havre,* 777 P.2d 1306, 1312 (Mont. 1989). Rule 401 contains two requirements in determining the relevancy of evidence: "(1) that the *evidence* tends to make more or less probable the existence of a fact, and (2) that the *fact* be of consequence to the determination of the action." 29 Am. Jur. 2d, *Evidence,* § 307 (1994), *construing* the identical provision of Rule 401 Fed. R. Evid. *See also State v. Buckingham,* 783 P.2d 1331, 1336 (Mont. 1989). If the proffered evidence is not relevant it is inadmissible. Rule 402, Mont. R. Evid.

In denying Defendants' motion to dismiss, the Court found (for purposes of that motion):

> According to Youth Plaintiffs, their Complaint establishes that the State Energy Policy and Climate Change Exception to MEPA contributed to their injuries. Therefore, if the court declares that the State Energy Policy and Climate Change Exception to MEPA are unconstitutional, this "by itself, [would] suffice to establish redressability, regardless of whether additional injunctive relief was issued. The court agrees."

Order on Motion to Dismiss, p. 17 (Doc. 46)(citation omitted).

Based on such contentions, Plaintiffs had requested a remedy in part consisting of a remedial plan, which the Court found would exceed its role, and injunctive relief, which the Court also denied. It follows therefore, that the Court would not find within the scope of a legitimate exercise of its powers that it could order the State of Montana to eliminate all use of fossil fuels by 2050. Furthermore, there is no logical connection between that theoretical future possibility and either Montana's energy policy or MEPA exception. Therefore, Dr. Jacobson's testimony may be interesting in a theoretical sense, but it is not relevant.[1] These provisions are either constitutional or they are not as they currently stand, but the politically, socially,

[1] Dr. Jacobson has developed similar fossil fuel free plans for all 50 states.

economically and legally fraught concept of eliminating all fossil fuel use in the next approximately 25 years has nothing to do with the interpretation of these statutes.

Plaintiffs intend to call Dr. Lise Van Susteren as a witness, as the Court saw in ruling on Defendants' motion for a Rule 35(a) independent medical exam. Plaintiffs' expert disclosure states: "Dr. Van Susteren will provide expert testimony on the psychological and mental health impacts of climate change on children and young people." Dr. Van Susteren's report and her deposition show that this description is the tip of the iceberg in her testimony about her observations of some of the Plaintiffs.[2]

The Court has determined that "Plaintiffs' mental health is not really and genuinely in controversy." Order on Motion to Dismiss, p. 6. If Plaintiffs' mental health is not in controversy, then a witness opining about her observations of their mental health is simply irrelevant. Plaintiffs should not be allowed to avoid the consequences on their legal theories of bedrock concepts of standing and justiciability by offering irrelevant psychological evidence creatively styled as something else.

C. Conclusion

For the reasons set forth above, the Court should grant this motion *in limine* and exclude from trial the testimony of Dr. Mark Z. Jacobson and Dr. Lise Van Susteren.

DATED the 1st day of February, 2023.

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[2] Dr. Van Susteren has been careful to say that the Plaintiffs are not her patients, and her statements are not diagnoses. This is obviously an attempt to skirt motions like this one while still taking advantage of her testimony.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2023, a copy of the foregoing document was served on the following persons by the following means:

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