IN THE SUPREME COURT OF MONTANA

DA 23-0575

RIKKI HELD, *et al.*,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, *et al.*,

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Kathy Seeley, Presiding

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MONTANA AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEES

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NOTICE AND CONSENT PURSUANT TO RULE 12(7)

Counsel for the parties received timely notice. All parties consented to the filing of this amicus brief.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Montana ("ACLU of Montana") is a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Montanans. The American Civil Liberties Union ("ACLU"), with approximately 1.6 million members, is among the oldest, largest, and most active civil rights organizations in America. For decades, the ACLU of Montana and the ACLU have litigated questions involving civil liberties in the state and federal courts.

Among the liberty interests crucial to the amici and their members is access to the judicial system. Preserving the justiciability of legal issues—thus ensuring that provisions in the Montana Constitution are not just words on paper but meaningful guarantees for the people of Montana—is essential to our democracy. It is in defense of justiciability, and of access to justice, that amici write in this case, as they have also done in other cases throughout the country. *See, e.g.*, *See* Brief for ACLU of Utah and ACLU as Amici Curae Supporting Appellants, *Natalie R. v. State of Utah* (Utah Nov. 9, 2022) (No. 20230022-SC).

INTRODUCTION

The Montana Constitution confers upon the State's courts a robust and vital role in adjudicating constitutional claims advanced by Montana's people. Recognizing this important role, the District Court correctly relied on the Montana

Constitution and Montana state law in adjudicating provisions of the Montana Environmental Policy Act, § 75-1-201(2)(a), MCA and § 75-1-201(6)(a)(ii), MCA.

Both in the proceedings before the District Court and in this appeal, the State and various amici supporting the State have suggested that the political question doctrine should have prevented the lower court from issuing its decision. This argument is contrary to Montana precedent applying the political question doctrine, which is clearly not implicated in the adjudication of laws that impact individual rights. To reach the State's conclusion, this Court would need to significantly expand the political question doctrine. The State's appellate brief notably does not explain how the Court should do this, though it does invoke federal precedent. *See* Appellant State Agencies' and Governor's Opening Br. 37, Feb. 12, 2024 ("Appellant Br.").

But the federal political question doctrine has never formed the basis of non-justiciability in Montana. The federal doctrine addresses considerations unique and inherent to the federal Constitution, federal judiciary, and federal legislative process. While federal precedent may provide useful guidance in certain areas of constitutional law, placing Montana's justiciability doctrine in lockstep with the federal doctrine for courts established by Article III of the U.S. Constitution would conflict with the text and original public meaning of the Montana Constitution,

principles of federalism, the practices of neighboring states, and landmark precedents of this Court.

The Montana Constitution dictates the justiciability of claims in Montana courts. Any "political question" limitations on that justiciability ought to follow the framework developed in those same courts, which have referenced the federal doctrine only as a guide and not as a rule. *See Columbia Falls Elem. Sch. Dist. No. 6 v. State,* 2005 MT 69, ¶ 11, 326 Mont. 304, 109 P.3d 257 (holding that constitutional issues are justiciable controversies which are to be decided by the court). As recognized by similarly situated state courts examining their own states' constitutions, adopting the federal political question doctrine as a matter of state constitutional law would jeopardize the delicate balance between the branches of state government, and unduly limit the state courts in their fulfilment of crucial adjudicatory responsibilities.

The District Court acted squarely within its authority in its order that the State has violated Plaintiffs' fundamental rights. Because this claim was justiciable and the court did not overstep legislative authority, this Court should affirm the District Court ruling and uphold the balance of powers that the Montana Constitution guarantees.

ARGUMENT

I. The Political Question Doctrine, as This Court Has Articulated It, Does Not Compel Reversing the District Court's Opinion

The political question doctrine has rarely been invoked in Montana decisions, and the few decisions utilizing it are narrow. They do not compel the application of the political question doctrine in this case.

The leading decision, *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, together with its progeny, illustrates that "non-justiciable political questions include issues in the exclusive legal domain of the legislative branch, executive branch, or the will of the electorate at the polls." *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241. This Court has further explained that non-justiciable political questions can arise from "non-self-executing clauses of constitutions," namely, provisions addressed explicitly to the Legislature. *Mitchell v. Glacier County*, 2017 MT 258, ¶ 23, 389 Mont. 122, 406 P.3d 427 (quoting *Columbia Falls*, ¶ 15). But this kind of nonjusticiability has two important limitations. First, a constitutional provision is addressed to the Legislature, and thus not self-executing, only when the provision is styled as "a directive to the Legislature." *Columbia Falls*, ¶ 17. In contrast, provisions that are not styled as directives to the Legislature, and instead "directly implicate rights guaranteed to individuals under [Montana's] Constitution," are fully justiciable. *Id.* ¶ 18. Second, even when a provision is styled as a directive to the Legislature—and thus a political question "in the first

instance"—once the Legislature has acted to execute a provision that execution "implicates individual constitutional rights, [and] courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Id.* ¶ 17. In either instance, then, a case is justiciable and does not implicate the political question doctrine.

In *Columbia Falls*, the plaintiffs claimed that Montana's administration and funding of the public schools violated the Public Schools Clause of the Montana Constitution, *see id.* ¶ 10, and this Court rejected the State's argument that the claim presented a nonjusticiable political question. *Id.* ¶ 19. First, the Court determined that the Public Schools Clause contains a directive to the Legislature—specifically, the command that the Legislature "shall provide" a certain kind of public school system—and thus, in the first instance, is "non-self-executing." *Id.* ¶ 14. Second, because "the Legislature ha[d] addressed the threshold political question" by "creating a basic system of free schools," *id.* ¶ 19, the Court proceeded to analyze whether the Legislature's execution of the non-self-executing Public Schools Clause implicates individual constitutional rights. And the Court determined that it does. Specifically, "the requirement that the Legislature shall provide a basic system of free quality public schools, must be read in conjunction with Section 1 of Article X, which guarantees a right to education." *Id.* Thus, once the Legislature executed the Public Schools Clause by creating a public school system, it became "incumbent

upon the court," as the "guardian and protector" of the right to education, "to assure that the system enacted by the Legislature enforces, protects and fulfills the right." *Id.*

Under that analysis, the claims here are fully justiciable. Plaintiffs challenge the constitutionality of a provision of the Montana Environmental Policy Act, § 75-1-201(2)(a), MCA ("MEPA"), which prohibits the State from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews (the "MEPA Limitation") and § 75-1-201(6)(a)(ii), MCA, which eliminates certain remedies available to litigants challenging the MEPA. To do so, Plaintiffs invoke Article II, Section 3, of the Montana Constitution, which provides that all persons have certain "inalienable rights," including "the right to a clean and healthful environment." They also rely on Article IX, Section 1(1), of the Montana Constitution, which provides that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." *See Held, et al. v. State of Montana, et al.*, No. CDV-2020-307, Doc. 405, Findings of Fact, Conclusions of Law, and Order (the "Order") at 2. The inalienable right to a clean and healthful environment is an individual right, not a directive to the Legislature, and is therefore fully self-executing under *Columbia Falls*. It is hard to imagine how that individual right could become less secure, rather than more secure, because it is *reiterated,* in part, in Article IX, Section 1. If

anything, this reiteration confirms the need for this Court to interpret and enforce the right, rather than allow it to become an empty promise.

But regardless, even if certain constitutional provisions invoked by the Plaintiffs were non-self-executing—on the theory that they direct that the Legislature "shall maintain and improve," and "shall direct," certain environmental conditions—the Legislature has executed those provisions by enacting, among other things, the Montana Environmental Policy Act. As with *Columbia Falls*, once the Legislature has acted, courts can determine whether the enactment fulfills the Legislature's responsibility if the constitutional provision "implicates individual constitutional rights." *Id.* ¶ 17. Here, individual constitutional rights are squarely implicated. Each Montanan has an individual right to "a clean and healthful environment" under Article II, Section 3. Far from being articulated as a directive to the Legislature, this right appears in the Montana Declaration of Rights, within a provision entitled "Inalienable Rights." And each Montanan alive today, as well as each member of every "future generation[,]" also has a right to a clean and healthful environment under Article IX, Section 1(1). Thus, Montana courts have authority to "determine whether [the Legislature's] enactment fulfills the Legislature's constitutional responsibility." *Columbia Falls*, ¶ 17.

That is precisely what the District Court's Order does. The District Court concluded that the MEPA Limitation and § 75-1-201(6)(a)(ii), MCA prevented the

State from meeting its constitutional obligation to protect Plaintiffs' right to a clean and healthful environment and to protect Montana's natural resources from unreasonable depletion. Order at 99. Notwithstanding appellant's claims, the District Court's order is outside the bounds of a non-justiciable "political question," as this Court has articulated it. There is no basis for reversal under this doctrine. To the contrary, "[a]s the final guardian and protector of the right" to a clean and healthful environment, "it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects, and fulfills the right." *Columbia Falls,* ¶ 19.[1]

II. The Use of the Doctrine in Montana Courts Should Not be Expanded

Relying principally on the federal political question doctrine, as articulated in federal court, Appellants and several state amici curiae ask this Court to endorse a broader construction and application of the political question doctrine than is found in the decisions of this Court. *See* Appellant Br. 34–39; *see generally* Amicus Brief

[1] In a footnote, the State also takes issue with the District Court's "findings about the economic feasibility and technological availability of achieving a 100% renewable portfolio standard by 2050." Appellant Br. 38 n.7. The State suggests that "[t]he District Court's determination—through factual findings—of what Montana's electric supply portfolio can and should look like in the future" somehow runs afoul of the political question doctrine. Tellingly, the State cites no law for this (from Montana or anywhere else). The State's argument also makes no sense, as it is indisputably within the district courts' authority to make factual findings. *See In re Est. of Kuralt*, 2000 MT 359, ¶ 14, 303 Mont. 335, 15 P.3d 931 ("The standard of review of a district court's findings of fact is whether they are clearly erroneous.").

of the States of North Dakota, Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Utah, Wyoming, and the Commonwealth of Virginia, filed February 22, 2024 ("State Amicus Br."). But this Court has never fully adopted the federal political question doctrine, nor has it instructed Montana courts to apply its own political question doctrine in lockstep with the federal courts. The Court should decline the invitation to do so today. As explained below, the federal political question doctrine arises from concerns specific to federal courts and governs only federal courts. As demonstrated by Montana's sister states, state courts interpreting state constitution have ample reason to narrow—or abandon—the federal doctrine. But even if the federal political question doctrine were fully applicable here, it would still not warrant a reversal of the District Court's decision.

A. By its own terms, the federal political question doctrine expressly applies only to federal courts

The political question doctrine developed in federal courts is premised on limitations placed on the federal judiciary by the federal Constitution. By design, our system of federalism means that limitations on judicial review and considerations of judicial deference inherent to the federal courts are wholly inapplicable to the states. Considering the vast "differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations

among state and federal constitutional rules ought to be both expected and welcomed." Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 976 (1985). That is the situation here: federal courts have never urged state supreme courts to adopt the federal political question doctrine.

To the contrary, the U.S. Supreme Court has acknowledged that "state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Indeed, even Justice William Brennan—the author of *Baker v. Carr*—admonished state courts that they "need not apply federal principles . . . of justiciability that deny litigants access to the courts." William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489, 490–92 (1977). As with all federal justiciability rules, the federal political question doctrine is premised on the text of Article III of the U.S. Constitution, which limits the "judicial power of the United States"—not state courts—to adjudicate only cases and controversies of a judicial nature. U.S. Const. art. III. Consistent with Article III, the federal political question doctrine cases ask only "whether there is an 'appropriate role for *the Federal Judiciary*' in remedying the problem" asserted by the plaintiff. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2484 (2019) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018)) (emphasis added). Thus, nothing in federal precedent suggests, let alone

commands, that state courts develop political question doctrines under which they would refuse to address constitutional questions arising under their own state constitutions.

Unsurprisingly, therefore, the federal political question doctrine almost exclusively applies to disputes unique to the federal court system, and inapplicable to the state judiciary. Indeed, most questions deemed nonjusticiable "political questions" in the federal case law are matters not of concern in the state context, *e.g.*, foreign policy and Congressional impeachment. *See, e.g., United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (noting that questions concerning "the rights of a part of a foreign empire, which asserts, and is contending for its independence . . . are generally rather political than legal in their character"); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829) ("A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question . . . ."); *Charlton v. Kelly*, 229 U.S. 447, 474–76 (1913) (applying a treaty, despite an alleged breach by the other party, because "the political branch of the government recognizes the treaty obligation as still existing . . . ."); *Nixon v. United States*, 506 U.S. 224 (1993) (holding that a challenge to the Senate's use of a committee to receive evidence during an impeachment trial raised a political question); *see also* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 Stan. L. Rev. 1031, 1036–40.

B. This Court has never adopted the federal political question doctrine

Although this Court "look[ed] to the federal precedent for guidance in developing [Montana's] doctrine" in *Columbia Falls*, due to "the dearth of Montana precedent on the political question doctrine," *Columbia Falls*, ¶ 14, it nowhere announced that this Court had adopted that federal doctrine as its own. Thus, nothing in *Columbia Falls* endorses a broader use of the federal political question doctrine, let alone ties Montana courts to the federal courts' development of that doctrine. Instead, the Court noted in *Columbia Falls* that "in interpreting our own Constitution, this Court need not defer to the United States Supreme Court." *Id.* at 308. Since then, this Court has referenced the federal doctrine for its analysis of laws directed by the executive branch, but again, has not adopted the federal standard wholesale. *See Larson*, ¶¶ 38-43.

Notably, the few recent Montana cases concerning the political question doctrine have not addressed the Supreme Court's most recent decision on the political question doctrine, *Rucho,* 139 S. Ct. at 2484. *See generally, Larson*, ¶¶ 37-39; *Brown v. Gianforte,* 2021 MT 149, 404 Mont. 269, 488 P.3d 548; *Mitchell*, ¶¶ 23-26. Those cases have instead extensively relied on *Columbia Falls*, indicating that the framework articulated in that decision should drive the political question analysis. And under that framework, the District Court's decision should be affirmed.

C. The text and history of Montana's Constitution weigh against any political question doctrine, or, at a minimum, against its expansion

The text and history of Montana's Constitution require Montana courts to interpret and define the meaning of constitutional provisions, particularly those that implicate inalienable and fundamental rights of the citizens of Montana—such as the rights to a clean and healthful environment guaranteed by Article II, Section 3 and Article IX, Section 1(1) of the Montana Constitution. The 1972 Montana Constitutional Convention transcripts make clear that the delegates understood that Montana courts —not the legislature—would interpret these provisions.

The delegates to the 1972 Montana Constitutional Convention approved two separate provisions that enshrined the fundamental right to a safe environment: Article II, Section 3, and Article IX, Section 1(1). The delegates debated whether these provisions should include the words "clean" and "healthful." But delegates on both sides of the debate understood that Montana courts, not the legislature, would ultimately be tasked with interpreting the meaning of the provisions. *See* Const. Convention Vol. 5 at 1235 ("I can guarantee to you that the Supreme Court will certainly be able to tell you [what clean or healthful means]"); *see also* Const. Convention Vol. 4, at 1402 ("[W]e need these qualifying adjectives to enable the Supreme Court to interpret what kind of environment we want. Without these qualifying adjectives, the court is going to have a very hard time."); Const.

Convention Vol. 5 at 1206 ("Now, the reason that the majority, . . . saw fit *not to put qualifying adjectives in the Constitution is that this provision is destined to be interpreted by the Montana Supreme Court . . . The Supreme Court is going to decide what this Constitution means: and if it decides wrong, if it decides something conservative that you don't like, it's locked in.*") (emphasis added). By contrast, there is nothing in the records of the 1972 Constitutional Convention to indicate that the delegates considered these rights to be outside the province of the State judiciary, let alone a "political question" that should be reserved to the legislature.[2]

The delegates' understanding is consistent with the State judiciary's historical authority. It has long been the province of the Montana judiciary to "interpret[] the Constitution," *In re Lacy* (1989), 239 Mont. 321, 325, 780 P.2d 186, 188 (citing *State v. Toomey* (1956), 135 Mont. 35, 44, 335 P.2d 1051, 1056), and precedent is clear that the Montana judiciary has broad jurisdiction over cases concerning its citizens' inalienable rights. In addition to the inalienable right to a clean and healthful environment, a Montana citizen's inalienable rights protected by Article II,

[2] As detailed above, the Montana courts are not bound to apply the federal political question doctrine. It is worth noting, however, that *Baker v. Carr*—which according to the State's amici includes "[t]he most thorough discussion" of the federal political question doctrine, *see* State Amicus Br. 8—was decided in 1962, ten years prior to the Montana Constitutional Convention. *Baker v. Carr*, 369 U.S. 186 (1962). Nevertheless, neither the political question factors articulated in *Baker* nor the political question doctrine itself were discussed at any material length during the Convention, including as a way of limiting the power of the Montana judiciary.

Section 3 include the right to liberty; the right to seek safety, health and happiness; the right to pursue life's basic necessities; and the right to possess and protect one's property. Montana courts have repeatedly acknowledged and affirmed the State judiciary's role in interpreting the meaning of these phrases that define the inalienable rights of its citizens. *See e.g.*, *Armstrong v. State*, 1999 MT 261, ¶ 71, 296 Mont. 361, 989 P.2d 364 (the right to liberty includes the "rights of personal and procreative autonomy"); *Wadsworth v. State* (1996), 275 Mont. 287, 299, 911 P.2d 1165, 1172 (the fundamental right to "life's basic necessities" includes the right to pursue employment); *State v. Rathbone* (1940), 110 Mont. 225, 100 P.2d 86, 93 (the right to protect property includes the right to kill game animals out of hunting season if the use of such force is "reasonably necessary" to protect property). That role extends to the rights at issue in this case.

D. Similarly situated state courts have declined to adopt the federal political question doctrine

Given the unique roles played by the federal and state judiciaries—and inapplicability of considerations driving the federal political question doctrine to the state government context—precedent of similarly situated states is far more compelling on this issue than that of federal courts. And, notably, when faced with questions of justiciability, the similarly situated states of Wyoming, Colorado, and Minnesota are among the long list of those to have declined to adopt the federal political question doctrine—opting instead for a more narrowly tailored doctrine

rooted in state constitutional principles.[3] Notably, the Separation of Powers provisions of these states' constitutions are almost identical to that of Montana's. *See* Montana Const. art. III, sec. 1; Wyoming Const. art. II, sec. 1; Colorado Const. art. III; Minnesota Const. art. III.

For instance, the Wyoming Supreme Court has held, in no uncertain terms, that "[t]he federal doctrine of nonjusticiable political question, as discussed and applied in *Baker* and later federal decisions, has no relevancy and application in state constitutional analysis."[4] *Wyoming v. Campbell Cnty. Sch. Dist.*, 32 P.3d 325, 334 (Wyo. 2001) Instead, in considering how to apply separation of powers principles to disputes that implicate the legislature and political process, the court explained: "When insufficient action in the legislative process occurs, judicial monitoring in the remediation phase can help check political process defects . . . . When these defects lead to continued constitutional violations, judicial action is entirely

[3] Other such states include: New Mexico, Oklahoma, South Dakota, Virginia, West Virginia, California, Massachusetts, and New York. *See Mutz v. Mun. Boundary Comm'n*, 688 P.2d 12, 19 (N.M. 1984); *Schabarum v. California Legislature*, 70 Cal. Rptr. 2d 745 (Cal. Ct. App. 1998); *Backman v. Sec'y of the Commonwealth*, 441 N.E.2d 523, 527 (Mass. 1982); *In re N.Y. State Inspection, Sec. & L. Enf't Emps. v. Cuomo*, 475 N.E.2d 90, 93 (N.Y. 1984); *Okla. Educ. Ass'n v. State* ex rel. *Oklahoma Legislature*, 158 P.3d 1058 (Okla. 2007); *Davis v. North Dakota*, 804 N.W.2d 618, 641 (N.D. 2011); *Virginia v. Cnty. Bd.*, 232 S.E.2d 30, 44 (Va. 1977); *Jefferson Cnty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, 875 S.E.2d 162, 172 (W. Va. 2022).

[4] This Court has looked to the Wyoming Supreme Court's approach when faced with previously unresolved issues. *See State v. Harris* (1991), 247 Mont. 405, 417, 808 P.2d 453, 459–60 (quoting *Chambers v. State*, 726 P.2d 1269, 1275 (Wyo.1986)).

consistent with separation of powers principles and the judicial role." *Id.* at 332–33 (internal citation omitted).

The Wyoming Supreme Court went on to describe the widespread criticisms of the federal political question doctrine with quotes from Justice Brennan, Alexander Bickel, and Professors Erwin Chemerinsky and Robert B. Keiter. The criticisms range from the confusing nature of the doctrine (including the difficulty in applying the *Baker* factors in a uniform or principled way) to its inapplicability to state courts more generally. As the court explained, "[l]eading scholars debate whether the political question doctrine even exists, its wisdom and validity, and its scope and rationale." *Id.* at 334 (citing Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues,* 75 Harv. L. Rev. 40 (1961); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 Colum. L. Rev. 1 (1964); Louis Henkin, *Is There a "Political Question" Doctrine?* 85 Yale L.J. 597 (1976) (Henkin was a law clerk to Justice Frankfurter and a constitutional scholar of the highest stature); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031 (1985); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?* 100 Dick. L. Rev. 303 (1996); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 6–9 (1959)).

Similarly, the Colorado Supreme Court has said that it "has cited or applied the *Baker* justiciability analysis only in rare circumstances," and it "has *never* applied the political question doctrine to avoid deciding a constitutional question." *Lobato v. Colorado*, 218 P.3d 358, 363, 368 (Colo. 2009) (en banc) (emphasis added) (declining to find that the adequacy of the state's education financing system is a nonjusticiable political question).[5] The court emphasized the "[i]mportant differences [that] exist between federal and state constitutional law on judicial power and the separation of powers." *Id.* at 370. The court also expressed concern that "[a] ruling that the plaintiffs' claims are nonjusticiable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility . . . ." *Id.* at 372.

The Supreme Court of Minnesota has likewise held: "We have not adopted the [U.S.] Supreme Court's analysis in Baker v. Carr to resolve whether a case presents a political question, and we decline to do so here." *Cruz-Guzman v. Minnesota*, 916 N.W.2d 1, 8 n.4 (Minn. 2018).[6] Instead, like Wyoming and

[5] This Court has also looked to the Colorado Supreme Court for guidance. *See State v. Lawrence* (1997), 285 Mont. 140, 166, 948 P.2d 186, 201 (quoting *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952, 958 (Colo. 1979)).

[6] This Court has also looked to the Minnesota Supreme Court for guidance. *See State v. Stroud* (1984), 210 Mont. 58, 72, 683 P.2d 459, 466 (discussing *State v. Schweppe*, 306 Minn. 395, 237 N.W.2d 609 (Minn. 1975) and *Minnesota v. Forsman*, 260 N.W.2d 160 (Minn.1977)).

Colorado, Minnesota courts consider separation of powers principles embedded in the Minnesota Constitution to determine justiciability. *See id.* at 7–8. As the court explained, "the courts are the appropriate domain" for determining "whether the Legislature has violated its constitutional duty" to Minnesota citizens. *Id.* at 9. The same should also be true for Montana.

E. Even if the Court were to adopt the federal political question doctrine, that doctrine is still unlikely to support nonjusticiability in this and similar cases

For the reasons stated above, amici respectfully submit that the Court should avoid tethering the Montana political question doctrine to its federal equivalent. But the Court's decision on that question should have no bearing on the outcome of this case, as adherence to federal precedent would not support a finding of nonjusticiability in this and similar cases.

The *Baker* Court provided the following factors for identifying a nonjusticiable political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political

decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 216.

This Court has never applied these factors, but none compels a reversal of the District Court's Order. *First*, there is no constitutional commitment of these issues to another political department; to the contrary, the text and history of the Montana Constitution illustrate that the State judiciary should resolve this dispute. *Second*, this Court has already provided discoverable and manageable standards for resolving the dispute. *Third*, there is no need for an initial policy determination in adjudicating the constitutional rights at issue. *Fourth*, the Montana courts—like all courts in this country—are well-equipped to review legislation with the requisite respect due to the other branches of government. *Fifth*, there is nothing to suggest that the dispute at issue would require the Court to adhere a particular political decision already made, much less "unquestion[ably]" adhere to it. And *sixth*, there is little or no risk of multifarious pronouncements on the questions in this case, as the State judiciary has the final word on the matter.

Additionally, the federal courts' use of this doctrine is exceptionally rare, even at the highest level. The U.S. Supreme Court has used it as a basis for dismissal only three times since its *Baker* decision in 1962. *See Gillian v. Morgan*, 413 U.S. 1, 6 (1973) (a suit seeking to "establish standards for the training, kinds of weapons and scope and kind of orders to control the actions of the National Guard" and "assume

and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved" by the court raised a nonjusticiable political question); *Nixon*, 506 U.S. at 224, 228, 238 (a challenge to the Senate's use of a committee to receive evidence during an impeachment trial raised a political question); *Rucho*, 139 S. Ct. at 2507 (a constitutional challenge to partisan gerrymandering under the federal constitution raised a political question, but recognizing that state courts "are actively addressing the issue on a number of fronts" because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply"); *see also* Bradley & Posner, *supra*¸ at 1036–40 (describing the doctrine's history and limited application).

While the lower federal courts have applied the doctrine slightly more frequently, most often it is used within the realm of foreign affairs. *See id.* at 1069; *see also Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009) (concerning the status of Taiwan)*; Republic of the Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017) (regarding negotiations about nuclear disarmament).

Meanwhile, the federal doctrine's *Baker* factors have proven to be notoriously difficult to apply in any meaningful or consistent way. As the Supreme Court of Wyoming explained in its rejection of the *Baker* factors, many constitutional scholars agree: "[I]t is impossible for a court or a commentator to apply the *Baker v.*

Carr criteria to identify what cases are political questions. As such, it hardly is surprising that the doctrine is described as confusing and unsatisfactory." *Campbell Cnty. School Dist.*, 32 P.3d at 335 (quoting Erwin Chemerinsky, *Federal Jurisdiction* 142 (Little, Brown and Co., 2d ed.1994)). Criticism is so ubiquitous, in fact, that Professor Chemerinsky and other legal scholars "conclude that it 'should play no role whatsoever in the exercise of the judicial review power.'" *Id.* (citation omitted).

Against this backdrop of confusion and uncertainty, even if the Court elects to utilize non-binding federal precedent, there is no basis to conclude that the federal doctrine would conflict with the District Court's decision.

CONCLUSION

For the foregoing reasons, amici respectfully ask this Court to affirm the District Court's Order in full and reject any invitation to expand the application of the political question doctrine.

Dated: March 20, 2024

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for indented material; and the word count is 4,830, as calculated by Microsoft Word, excluding those sections exempted under Rule 11(4)(d).

DATED this 20th day of March, 2024.

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