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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Portland General Electric Company; Avista Corporation; PacifiCorp; and Puget Sound Energy, Inc.,

Plaintiffs,

v.

NorthWestern Corporation; Talen Montana, LLC; and Austin Knudsen, in his official capacity as Attorney General for the State of Montana,

Defendants.

Case No. 1:21-cv-00047-SPW-KLD

Defendant Talen Montana, LLC's Opposition to Plaintiffs' Motion for Preliminary Injunction

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Under Rule 65 of the Federal Rules of Civil Procedure, defendant Talen Montana, LLC ("Talen Montana") opposes Portland General Electric Company's Avista Corporation's, PacifiCorp's, and Puget Sound Energy's (the "Utility Plaintiffs") Motion for Preliminary Injunction, ECF No. 37, for multiple defects in their request for extraordinary relief.

I. Basis for Opposition

The Utility Plaintiffs brought this action, and another one pending in the Eastern District of Washington, to help them force Talen Montana to shutter an electrical power plant ("Colstrip") that supports thousands of jobs and $350 million in income for the citizens of Montana. They seek the Court's help in service of mandates by the States of Washington and Oregon, respectively, to limit the importation of electricity from Colstrip Units 3 & 4 and any other plant that uses coal for fuel by 2026 and 2030. The Utility Plaintiffs now seek a preliminary injunction preventing Montana's Attorney General Austin Knudsen ("AG Knudsen") from enforcing a Montana statute relating to closure of power plants, Senate Bill 266 ("SB 266"), against them. But as Talen Montana shows below, the Utility Plaintiffs' motion fails the first two requirements for a preliminary injunction: they are not likely to succeed on the merits (because, among other reasons, their challenge to SB 266 is unripe), and they have not established that they will suffer

irreparable harm (because there is no threat of an enforcement action against them).[1] The Court should reject the Utility Plaintiffs' needless and wasteful demand for emergency relief.

II. Statement of the Case

The Utility Plaintiffs brought this action against Talen Montana and defendant NorthWestern Corporation ("NorthWestern") on May 4, 2021. They sought declaratory and injunctive relief regarding a Montana statute concerning arbitration of disputes over power plants, Senate Bill 265 ("SB 265"). On May 19, the Utility Plaintiffs amended the complaint to add AG Knudsen as a defendant and three claims against AG Knudsen for declaratory and injunctive relief regarding SB 266. Eight days later, the Utility Plaintiffs filed Plaintiffs' Motion for Preliminary Injunction, in which they asked the Court to enjoin AG Knudsen from enforcing SB 266 against them. Talen Montana now timely responds to Plaintiffs' Motion for Preliminary Injunction.

[1] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008). Although this opposition focuses on their inability to establish a likelihood of success or irreparable injury, the Utility Plaintiffs also fail to prove that the balance of equities tips in their favor or that an injunction would serve the public interest.

III. Facts Pertinent to Talen Montana's Opposition

The Utility Plaintiffs' motion for a preliminary injunction concerns SB 266. That statute permits the Montana Attorney General to bring an action against an owner of a jointly owned electrical generation facility for (1) failing or refusing to fund its share of operating costs or (2) conduct to bring about permanent closure of the facility without the consent of all co-owners. The Utility Plaintiffs do not allege that they intend to violate SB 266, nor do they assert that AG Knudsen has threatened to enforce SB 266 against them.

The Utility Plaintiffs instead say they worry that AG Knudsen could bring an enforcement action against them in the event the Colstrip co-owners become entangled in a dispute about the budget for Colstrip. Br. at 2. But there is already an approved budget for 2021. First Amended Complaint, ECF No. 32 ("FAC") ¶ 50. And Talen Montana, Colstrip's Operator, is not required to submit a proposed 2022 budget until September. Roberts Decl. Ex. A ("O&O Agreement"), ECF No. 39-2 at 31, § 10. The Utility Plaintiffs also claim they could be prosecuted for voting to retire Colstrip (Br. at 2), but they promise there is no "risk that [they] will [try to] close Colstrip in the immediate future" (Br. at 28).

IV. Argument

A. The Utility Plaintiffs Have Not Shown They Are Likely to Succeed on the Merits Because Their Claims Are Unripe

Even if they had an open and shut case regarding the constitutionality of SB 266–and they do not[2]—the Utility Plaintiffs are unlikely to succeed on the merits of

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[2] The Attorney General has strong counterarguments. The Utility Plaintiffs' Contract Clause arguments are grounded on supposed contractual rights that do not exist. Even if the Project Committee has the authority to close Colstrip, the Operator (Talen Montana) would need to vote in favor of any retirement proposal. *See* O&O § 17(f). The Utility Plaintiffs ignore this point. Br. at 4, 11. Similarly, the Utility Plaintiffs claim that SB 266 will impair their contractual right to not unreasonably withhold their approval of a budget proposal. Br. at 12. But the Utility Plaintiffs at the same time suggest that the "plain language" of SB 266 would not even permit prosecution in that circumstance. Br. at 13. The Utility Plaintiffs' attacks on SB 266 are therefore based on a straw man. Furthermore, the Utility Plaintiffs ignore that "the parties are operating in a heavily regulated industry" and that the O&O Agreement "expressly recognize[s] the existence of extensive regulation." *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413, 416 (1983); O&O § 1(r); 3(b). These facts undercut the argument that their reasonable expectations have been impaired. *Kansas Power*, 459 U.S. at 416. Finally, SB 266 advances significant and legitimate public purposes, including employee safety and the reliable supply of electricity for Montana consumers. "Unless the State itself is a contracting party, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 412-13. The Utility Plaintiffs rely on inapposite cases, including *Association of Equipment Manufacturers v. Burgum*, where the challenged law "nowhere mention[ed]" how it would benefit the public. 932 F.3d 727, 733 (8th Cir. 2019).

The Utility Plaintiffs' Commerce Clause arguments also fail. SB 266 "treats out-of-state [co-owners], such as [the Utility Plaintiffs], the same as in-state [co-owners.]" *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). Moreover, "[a] critical requirement for proving a violation of the dormant Commerce Clause is that there must be a substantial burden on interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). The Utility Plaintiffs do not identify any "burden" here and instead

their claims because they have not alleged a ripe case or controversy. Pre-enforcement challenges to statutes are not justiciable where, as here, plaintiffs disclaim any intent to violate the law, and no enforcement action is imminent. Alternatively, this Court should decline to exercise jurisdiction under the prudential considerations of the ripeness doctrine because the claimed injury is speculative.

1. There is no Article III case or controversy

"Article III of the Constitution empowers [courts] to adjudicate only 'live cases or controversies,' not 'to issue advisory opinions [or] to declare rights in hypothetical cases.'" *Clark v. City of Seattle*, 899 F.3d 802, 808 (9th Cir. 2018) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). "Ripeness is one of the justiciability doctrines that [courts] use to determine whether a case presents a live case or controversy." *Id.* "The ripeness doctrine seeks to identify those matters that are premature for judicial review because the injury at issue is speculative, or may never occur." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014).

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admit that they plan to remain part of Colstrip—thus acknowledging that operating Colstrip is prudent. Finally, the Utility Plaintiffs' vagueness challenge fails. As a threshold matter, this challenge applies only to the closure provision within SB 266. And once again, the Utility Plaintiffs attack a straw man, inserting the word "might" into their analysis when the statute does not say "might." Br. at 24-25. The meaning of SB 266 is clear: the test is whether conduct "bring[s] about permanent closure." The Utility Plaintiffs' discussion of hypothetical scenarios that may never arise underscores why their challenge is unripe and why this Court should wait for an as-applied challenge. Br. at 24.

The Utility Plaintiffs' claims are grounded on the supposed invalidity of SB 266, and their fear that it "could be interpreted to punish" them for exercising purported contractual rights. Br. at 2; *see also* FAC ¶¶ 120, 130, 138, 150. But "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas*, 220 F.3d at 1139. Instead, plaintiffs must establish a "genuine threat of imminent prosecution." *Clark*, 899 F.3d at 813. Three factors are relevant: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *Thomas*, 220 F.3d at 1139. None support ripeness here.

a. Plaintiffs do not articulate a concrete plan to violate the law

The Utility Plaintiffs fail to articulate a concrete plan to violate SB 266. They provide just two examples of how their actions will supposedly do so, but neither rises above "something more than a hypothetical intent to violate the law." *Thomas*, 220 F.3d at 1139.

The Utility Plaintiffs claim first that they "had planned to call a vote to close Colstrip Unit 3 at the Committee meeting on May 19, 2021" but "chose not to . . . due to the risk of aggressive enforcement of Senate Bill 266." ECF No. 39-2 ¶ 42; *see also* Br. at 27. This is the opposite of a concrete plan to violate the law: the

Utility Plaintiffs *do not* say that they *will* try and close Colstrip in the near future and therefore risk violating the law. They in fact claim the opposite, asserting on page 28 of their motion that there is no "risk that [Plaintiffs] will close Colstrip in the immediate future." Br. at 28.

The Utility Plaintiffs' alleged plan is also both implausible and completely absent from their amended complaint. There is no reason to believe that the Utility Plaintiffs waited years after Washington and Oregon passed laws relating to the import of coal-generated electricity (in 2019 and 2016, respectively) to seek a closure vote, only to almost do so now. These allegations are not part of the Utility Plaintiffs' amended complaint, filed on May 19, the same day they say they were planning to make the proposal. That complaint is completely devoid of *any* allegation that they intend to violate SB 266 in any way. Furthermore, the supposed May 19 vote would have been procedurally improper under the Colstrip O&O Agreement because the Utility Plaintiffs did not serve any proposal on the other co-owners in advance of the Project Committee meeting. *See* O&O § 17(i). The Utility Plaintiffs' failure to comply with the procedural requirements of the O&O Agreement undermines their suggestion that they intended to call such this vote.

Nor is there any reason to believe that a "plan to call a vote," or even calling a vote, would violate the statute. Section 2(1)(b) prohibits only actions to bring about the permanent closure of a facility "without seeking and obtaining the consent

of all co-owners." Calling for a vote is the definition of "seeking" the consent of all co-owners.

In any event, the Utility Plaintiffs' assertion that they planned to but did not call for a vote to close the plant is at best "scant information" that falls far short of the "concrete" plan necessary to create a ripe controversy. *Bowen*, 752 F.3d at 840. *Thomas* is instructive. That case addressed a pre-enforcement challenge to a law prohibiting discrimination on the basis of marital status. 220 F.3d at 1139. Citing their religious beliefs, a group of landlords claimed that they planned to violate the law by refusing to rent to unmarried couples. *Id.* The Ninth Circuit dismissed their claim as unripe, including because they did not articulate a concrete plan to violate the law: "they cannot specify when, to whom, where, or under what circumstances" they planned to do so. *Id.*

Thomas controls here. The Utility Plaintiffs provide no details about their intended closure proposal—not even a retirement date, let alone a plan for when, where, and under what circumstances that closure would occur. Yet the Colstrip O&O Agreement requires that any proposals made to the Project Committee (the governing body from which the Utility Plaintiffs apparently planned to request a vote) must "include itemized cost estimates and other detail sufficient to support a comprehensive review." O&O § 17(g)-(i). The Utility Plaintiffs have no such

proposal. They therefore cannot plausibly specify when and how they plan to attempt to close the plant with sufficient particularity to create a justiciable dispute.

Second, the Utility Plaintiffs claim they will be unable to "meaningfully engage in the Colstrip budget process . . . without subjecting themselves to significant potential liability." Br. at 27. This is the definition of "hypothetical plans and fears." *Bowen*, 752 F.3d at 840. The co-owners have already unanimously approved the budget for 2021. Br. at 5. Talen Montana's proposed 2022 budget is not due until September 2021. O&O § 10. It is impossible to know whether the Utility Plaintiffs will support or oppose the yet-to-be-proposed budget, let alone that their opposition will turn into a refusal to pay that violates SB 266.

The path from here to enforcement is built on pure speculation. Talen Montana would first need to propose a budget in September that the Utility Plaintiffs did not support. O&O § 10(a). The Utility Plaintiffs would then need to refuse to approve that budget by the O&O Agreement's November 1 deadline, and the parties would need to fail to reach a compromise by January 1. At that point, Section 10(c) of the O&O Agreement would permit Operator Talen Montana to, "on behalf of the [co-owners] . . . make all expenditures in the normal course of business or in an emergency, all as the same are necessary for the proper and safe operation and maintenance of" Colstrip. O&O § 10(c). The Utility Plaintiffs admit as much, declaring in an affidavit attached to their motion that Section 10(c) "authorizes the

Operator" to make such expenditures and charge them to the co-owners. ECF No. 39-2 ¶ 32.[3] The Utility Plaintiffs would then need to refuse to fund their share of necessary expenses, notwithstanding that the O&O Agreement requires them to do so.[4] Next, the Montana Attorney General would need to find a violation of SB 266 and exercise its discretion to enforce the statute. SB 266 § 2(2)(a). Finally, before any fines could be levied, a court would need to find that the Utility Plaintiffs "willfully" violated SB 266. *Id.* § 2(2)(b).

Any theoretical violation of SB 266 is "contingent upon an unpredictable set of . . . factors that may or may not arise" and is therefore "too speculative to satisfy the plaintiffs' burden of demonstrating a realistic and imminent danger of direct injury." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 660-61 (9th Cir. 2002); *see also Clark*, 899 F.3d at 813 (dismissing as unripe a First Amendment challenge

[3] Section 10(c) memorializes the co-owners' joint understanding and agreement "that it will be necessary for the continued operation of [Colstrip], or to maintain [Colstrip] in operable condition, that the Operator be in a position to meet commitments for payroll, repairs and replacements; materials and supplies, services and other expenses of a continuing nature." O&O § 10(c).

[4] Plaintiffs contend that the statute only prohibits a co-owner from refusing to fund its share of an already approved budget. Br. at 13 n7. The better interpretation is that the statute prohibits a co-owner from refusing to fund its share of expenses necessary for the proper and safe operation and maintenance of a plant regardless of whether there is an approved budget. *See* SB 266 § 2(1)(a) (prohibiting a co-owner from "fail[ing] or refus[ing] . . . to fund its share of operating costs"). That is consistent with the co-owners' obligations under Section 10(c) of the O&O Agreement.

to a city ordinance because the plaintiffs' "actual injuries hinge on a prospective chain of events that have not yet occurred, and may never occur"); *Osborne v. Billings Clinic*, No. CV 14-126-BLG-SPW, 2015 WL 13466113, at *1 (D. Mont. Dec. 16, 2015) (Watters, J.) (dismissing claim as unripe because of "the cascade of events that need to occur before this question must be answered").

An opinion by this Court on the Utility Plaintiffs' "forward-looking claims would require [the Court] to speculate about the nature of events that might take place at some unknown time in the future, and to declare the constitutionality of a state law in the context of these uncertain circumstances. Under Article III, [this Court] lack[s] the authority to issue such an opinion." *Bowen*, 752 F.3d at 840.

b. There is no warning or threat of enforcement

The Utility Plaintiffs have not articulated a concrete plan to violate SB 266, nor would it ultimately matter if they did because "the other two factors weigh strongly against finding a genuine threat of prosecution." *Collier v. Fox*, No. CV 15-83-BLG-SPW-CSO, 2015 WL 12804521, at *3 (D. Mont. Dec. 8, 2015) (dismissing pre-enforcement challenge as unripe despite plaintiffs' "concrete plan to violate the laws in question"). That is enough. *Id*.

As for the second factor, "the record is devoid of any threat—generalized or specific—directed toward" the Utility Plaintiffs. *Thomas*, 220 F.3d at 1140.

Plaintiffs instead allege a speculative risk of some possible future action by the Attorney General:

- "[T]he Montana Attorney General ***may*** wrongly construe the statute to authorize substantial daily fines for voting against a proposed operating or capital budget." FAC ¶ 130.
- "***If*** Talen as Operator proposes an unreasonably high budget for operating costs and capital costs, the Pacific Northwest Owners will be forced to accept the budget . . . or risk a $100,000 per-day fine ***if*** the Attorney General brings an action based on an expansive reading of the statute." FAC ¶ 136.
- "***If*** the Pacific Northwest Owners ***were*** to submit a proposal to the Committee and could vote to close Units 3 or 4 notwithstanding Senate Bill 266's unanimous consent requirement, Defendant Knudsen would ***presumably*** bring a civil action against the Pacific Northwest Owners and request fines." FAC ¶ 142.
- "[T]he act's vague language ***could be*** interpreted to punish the [Plaintiffs] . . . ." Br. at 2.

Pre-enforcement challenges in situations like this one are deemed unripe where there is no allegation that the "authorities ***have*** . . . voiced intent to prosecute or otherwise penalize" plaintiffs. *Clark*, 899 F.3d at 813 (emphasis added); *see also Sanchez v. City of Phoenix*, No. CV-12-1454-PHX-GMS, 2013 WL 308749, at *3 (D. Ariz. Jan. 25, 2013) (dismissing pre-enforcement challenge to a city building code provision as unripe because "Plaintiffs have not alleged that they have received any letters, calls, or visits from City authorities threatening them with prosecution").

Collier is on point. The plaintiffs there requested an order declaring Montana's bigamy statutes unconstitutional and enjoining the Montana Attorney

General from enforcing them. 2015 WL 12804521, at *1. The court dismissed the claims notwithstanding a letter from a County Attorney's office denying the plaintiffs' request for a marriage license on the ground that the marriage would violate the bigamy statutes. *Id.* at *3. The Court reasoned that the "letter does not explicitly say the State of Montana would be prosecuting [them]." *Id.* And "[a]side from the letter, the [plaintiffs] present no other examples or assertions of a specific threat or intent of Defendants to prosecute" them. *Id.*

The claims here are even less ripe. The Utility Plaintiffs have not and cannot claim that any authority has prevented them (or anyone else) from doing something, let alone that the Montana Attorney General has threatened prosecution under SB 266. These claims therefore "bear no resemblance to the prototypical pre-enforcement challenge case, in which 'the threatened enforcement of a law' against a plaintiff is imminent." *Clark*, 899 F.3d at 813 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014)).

c. There is no history of past prosecution under Senate Bill 266

The third factor also cuts against the Utility Plaintiffs: "a claim for prospective relief can be based on a history of discriminatory enforcement of the challenged governmental policy, but the absence of such a history will support a conclusion that a potential injury is not imminent." *Scott*, 306 F.3d at 661. Here, Plaintiffs cannot and do not allege any past prosecution or enforcement of SB 266.

Accordingly, all three *Thomas* factors indicate that there is no ripe Article III case or controversy.

2. Prudential considerations confirm the Utility Plaintiffs' claims are not ripe

Even if the Utility Plaintiffs had alleged an Article III case or controversy (they have not), their claims fail "based on the prudential considerations of our ripeness jurisprudence." *Scott*, 306 F.3d at 662. "[T]he ripeness inquiry contains both a constitutional and a prudential component." *Thomas*, 220 F.3d at 1139. "The prudential considerations of ripeness are amplified where constitutional issues are concerned." *Scott*, 306 F.3d at 662. This prudential analysis is "guided by two overarching considerations: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas*, 220 F.3d at 1141. The Utility Plaintiffs' claims are unfit for decision, and Plaintiffs will suffer no harm if the Court declines to consider them.

This case is like *Thomas*, where the Ninth Circuit observed that "[t]he record before us is remarkably thin and sketchy, consisting only of a few conclusory affidavits" such that the court was being asked to "declare [state] laws unconstitutional, in the absence of any . . . concrete factual scenario that demonstrates how the laws, as applied, infringe [plaintiffs'] constitutional rights." *Id.* *Thomas* was therefore a "classic" example where "the maxim that we do not decide 'constitutional questions in a vacuum'" confirmed that the dispute was not

ripe. *Id.* (quoting *American–Arab Anti–Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1992)).

The same vacuum exists here. The Utility Plaintiffs ask this Court to declare a state law unconstitutional without any example of whether (let alone how) this new Montana law will be enforced. There is no concrete scenario on which this Court could base its decision, only a hypothetical dispute about a budget that has not even been proposed and an implication that the Utility Plaintiffs might in the future call for a vote on whether or not to close Colstrip.

Furthermore, as in *Thomas*, "the absence of any real or imminent threat of enforcement . . . seriously undermines any claim of hardship." *Thomas*, 220 F.3d at 1142. "If and when an enforcement action is brought against [Plaintiffs], that will be the appropriate time to raise the constitutional arguments. Postponing judicial review to a time when the [Plaintiffs] actually face an enforcement proceeding, or at least an imminent threat of one, poses insufficient hardship to justify the exercise of jurisdiction now." *Id.*

B. <u>Plaintiffs Cannot Demonstrate Irreparable Harm</u>

Even if this Court determines that the Utility Plaintiffs are likely to succeed on the merits, their motion for a preliminary injunction should be denied because they have not and cannot show irreparable harm. Their claimed injury is speculative at best, and in any event at least months away from materializing.

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Brady v. Jones*, No. 2:21-CV-0489 AC P, 2021 WL 1904914, at *1 (E.D. Cal. May 12, 2021) (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). A plaintiff "must demonstrate that it meets all four of the elements of the preliminary injunction test," including "that [it] is likely to suffer irreparable harm in the absence of preliminary relief." *Drs. for a Healthy Montana v. Fox*, 460 F. Supp. 3d 1023, 1029 (D. Mont. 2020) (quoting *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011)). "The propriety of a request for injunctive relief hinges on demonstrated and immediate threatened irreparable injury that must be imminent in nature." *Brady*, 2021 WL 1904914, at *2.

The Utility Plaintiffs first argue that they will suffer irreparable harm insofar as SB 266 impairs their constitutional rights. Br. at 25. But the Utility Plaintiffs offer no reason to believe that such impairment is imminent and instead affirmatively assert that there is no "risk that [they] will [seek to] close Colstrip in the immediate future." Br. at 28. Similarly, there is no current budget dispute and there cannot be one until much later this year (at the earliest) when Talen proposes the 2022 budget. O&O § 10. The Utility Plaintiffs do not and cannot claim that their rights are being impaired *now*, "at the time relief is sought." *Google, Inc. v. Hood*, 822 F.3d 212, 227-28 (5th Cir. 2016). Their speculation about potential future harms undercut any need for preliminary relief. *Brady*, 2021 WL 1904914, at * 2.

The Utility Plaintiffs' reliance on *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), and *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013), is misplaced. Br. at 25. The plaintiffs in those cases were *already* suffering the alleged constitutional injury at the time they sought a preliminary injunction. *Hernandez* involved non-citizen detainees challenging the government's procedures for setting bond amounts, and the court concluded that they "established a likelihood of irreparable harm by virtue of the fact that they are likely to be unconstitutionally detained for an indeterminate period of time" and thus "deprived of their physical liberty unconstitutionally in the absence of the injunction." 872 F.3d at 994-95. *Rodriguez* also addressed non-citizen detainees seeking individualized determinations of whether their long-term detention was necessitated by a flight risk. The court ruled that a preliminary injunction was "necessary to ensure that individuals whom the government cannot prove constitute a flight risk or a danger to public safety . . . are not needlessly detained. Appellees have therefore clearly shown a risk of irreparable harm." 715 F.3d at 1145. Here, by contrast, the Utility Plaintiffs do not and cannot claim that they are currently being subjected to a constitutional violation.

The Utility Plaintiffs next claim that SB 266 will force them to "abandon plans to transition away from Colstrip." Br. at 26. The Utility Plaintiffs do not explain how or why. Nor could they. The Utility Plaintiffs are just as free to sell their

interests in Colstrip and transition away from it today as they were before SB 266 became law.

Thus, *Morales v. Trans World Airlines, Inc.*, does not support the Utility Plaintiffs' motion. 504 U.S. 374, 381 (1992). In that case, the Supreme Court preliminarily enjoined state attorneys general from enforcing their respective states' deceptive practices laws against the plaintiffs-airlines only after concluding that such enforcement was imminent. "[T]he attorneys general of seven States . . . had made clear that they would seek to enforce the challenged portions of the guidelines . . . through suits under their respective state laws," including by sending a memo to the airlines and a formal intent to sue notice. *Id.*

By contrast, here there is no formal intent notice of any kind, no indication that the Montana Attorney General intends to bring suit, and the Utility Plaintiffs do not explain how any transition away from Colstrip will violate SB 266, much less allege that the Montana Attorney General will imminently enforce the statute against them. As the Supreme Court explained in *Morales*, "the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury." 504 U.S. at 382. Here, because enforcement is far from imminent, there is no risk of irreparable injury. "Under the circumstances, it would be an act of judicial overreach to grant the Plaintiff the remedy it seeks." *Drs. for a Healthy Montana*, 460 F. Supp. 3d at 1030.

V. Conclusion

This Court should deny the motion for a preliminary injunction because the Utility Plaintiffs have not shown a likelihood of success on the merits nor that they will suffer irreparable harm absent preliminary relief.

Respectfully submitted,

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Pursuant to L.R. 7.1(d)(2)(E), I certify that this Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Office Word is 4,744 words.

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