IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA _____

RIKKI HELD; LANDER B., by and through his guardian Sara Busse; BADGE B., by and through his guardian Sara Busse; SARIEL SANDOVAL; KIAN T., by and through his guardian Todd Tanner; GEORGIANNA FISCHER; KATHRYN GRACE GIBSON-SNYDER; EVA L., by and through her guardian Mark Lighthiser; MIKA K., by and through his guardian Rachel Kantor; OLIVIA VESOVICH; JEFFREY K., by and through his guardian Laura King; NATHANIEL K., by and through his guardian Laura King; CLAIRE VLASES; RUBY D., by and through her guardian Shane Doyle; LILIAN D., by and through her guardian Shane Doyle; TALEAH HERNÁNDEZ,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, GOVERNOR GREG GIANFORTE, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA DEPARTMENT OF TRANSPORTATION,

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. CDV 2020–307, the Honorable Kathy Seeley, Presiding

STATE OF MONTANA'S NOTICE OF APPEAL

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Notice is given that State of Montana, a Defendant in Cause No. DV 20–307, First Judicial District, Lewis and Clark County, hereby files this appeal to the Montana Supreme Court from the following Orders:

1. Order dated August 4, 2021 (Doc. 46) on Defendants' Motion to Dismiss;

2. Order dated June 30, 2022 (Doc. 158), denying Defendants' Rule 60(a) Motion for Clarification of Order on State's Motion to Dismiss;

3. Order dated September 22, 2022 (Doc. 217), denying Defendants' Second Rule 60(a) Motion for Clarification of Order on State's Motion to Dismiss;

4. Order dated October 14, 2022 (Doc. 225), denying Defendants' Rule 35(a) Motion for Independent Medical Examination;

5. Order dated May 23, 2023 (Doc. 379) on Defendants' Motion for Summary Judgment;

6. Order dated June 1, 2023 (Doc. 381), ruling on Motions *in Limine*;

7. Order dated June 7, 2023 (Doc. 384), denying Defendants' Motion to Dismiss MEPA Claims; and

8. Order dated August 14, 2023 (Doc. 405), finding in favor of Plaintiffs on all remaining claims.

THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is not subject to the mediation process required by Mont. R. App. P. 7.

2. That this appeal is an appeal from an order certified as final under Mont. R. Civ. P. 54(b). A true and correct copy of the Order certifying the above orders as final for purposes of appeal (Doc. 417) is attached.

3. That all available transcripts of the proceedings in this case have been ordered from the court reporter contemporaneously with the filing of this notice of appeal.

4. That the Appellant is exempt from filing fee requirements.

5. That pursuant to Mont. R. App. P. 4(4)(d) a copy of the Notice of Appeal will be served by mail to the Clerk of the First District Court and counsel of record, as well as via electronic filing.

DATED this 28th day of September, 2023.

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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 **ORDER ON MOTION TO DISMISS**

BACKGROUND

I. Procedure

Rikki Held and 15 other Youth Plaintiffs (collectively "Youth Plaintiffs") filed a complaint for declaratory and injunctive relief on March 13, 2020. Youth Plaintiffs consist of youth citizens of Montana between the ages of two and eighteen. Plaintiffs engage in a variety of outdoor pursuits including ranching, fishing, hunting, foraging, cultural and familial practices, and recreating.

Youth Plaintiffs filed a Complaint against the State of Montana, Governor Steve Bullock, Montana Department of Environmental Quality,

Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission (collectively "Defendants"). The Complaint alleges that Youth Plaintiffs were and are harmed by Defendants' extraction and utilization of fossil fuels, the release of greenhouse gas (GHG) emissions, and ultimately the rising climate change caused therefrom. Youth Plaintiffs allege physical, mental, emotional, aesthetic, cultural and economic injuries. According to Youth Plaintiffs, Defendants caused this harm through Montana's fossil-fuel focused State Energy Policy and the Climate Change Exception to the Montana Environmental Policy Act (MEPA).

Specifically, Youth Plaintiffs allege that the State Energy Policy and the MEPA Climate Change Exception are unconstitutional under the Montana Constitution. According to the Complaint, Defendants' actions pursuant to these statutory provisions violate several sections of Montana's Constitution, including Article II § 3, Article II § 4, Article II § 15, Article II § 17, Article IX § 1, and Article IX § 3. Stated generally, these sections declare that current and future citizens of Montana, regardless of age, possess an inalienable right to a clean and healthful environment. In addition to their constitutional arguments, Youth Plaintiffs allege that Defendants' actions violate the Public Trust Doctrine.

Defendants moved to dismiss the Complaint pursuant to Montana Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(h)(3) arguing Plaintiffs lack case-or-controversy standing, present a claim barred by a prudential limitation, and failed to exhaust administrative remedies.

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II. Montana State Energy Policy

The State Energy Policy of Montana is codified at Montana Code Annotated § 90-4-1001. The purpose of the State Energy Policy is to "promote energy efficiency, conservation, production, and consumption of a reliable and efficient mix of energy sources that represent the least social, environmental, and economic costs and the greatest long-term benefits to Montana citizens." Mont. Code Ann. § 90-4-1001(1)(a).

Despite this stated policy requiring Montana to utilize energy sources that cause the least harm to people, the environment, and the economy, five provisions of the State Energy Policy promote fossil fuel energy, as follows:

> (c) promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;
> (d) increase utilization of Montana's vast coal reserves in an environmentally sound manner that includes the mitigation of greenhouse gas and other emissions;
> (e) increase local oil and gas exploration and development to provide high-paying jobs and to strengthen Montana's economy;
> (f) expand exploration and technological innovation, including using carbon dioxide for enhanced oil recovery in declining oil fields to increase output;
> (g) expand Montana's petroleum refining industry as a significant contributor to Montana's manufacturing sector in supplying the transportation energy needs of Montana and the region;

Mont. Code Ann. § 90-4-1001(c)-(g).

The State Energy Policy also includes various other provisions that promote development of other sources of alternative energy including renewable energy sources. Mont Code Ann. § 90-4-1001.

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III. MEPA's Climate Change Exception

The Montana Legislature passed MEPA to (1) ensure that environmental impacts of state actions are fully considered and (2) ensure the public is informed of anticipated impacts of state actions. Mont. Code Ann. § 75-1-102. Under MEPA, the relevant agency engaged in the state action must conduct an environmental review. Mont. Code Ann. § 75-1-208. Environmental review results in the relevant agency producing either an Environmental Impact Statement or an Environmental Assessment.

MEPA includes an exception to this environmental review procedure referred to by Youth Plaintiffs as the Climate Change Exception. The exception provides that except in limited circumstances, "an environmental review . . . 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." Mont. Code Ann. § 75-1-201(2)(a). Defendants characterize this exception differently, stating the exception's purpose is merely to streamline the environmental review process by preventing agencies from considering activities and impacts outside of the state. Defs.' Br. in Supp. of Mot. to Dismiss 5 (Apr. 24, 2020).

IV. *Juliana v. United States*

The case at bar is similar to the Ninth Circuit case *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). While a federal appellate court reviewed *Juliana*, the Ninth Circuit's review is instructive.

In *Juliana*, the plaintiffs included 21 youths. 947 F.3d at 1165. The plaintiffs claimed that the federal government violated their Fifth Amendment due process rights to a life-sustaining climate system. *Id.* at 1164. Defendants

sought summary judgment arguing that the plaintiffs presented a non-justiciable claim. *Id.*

At the outset, the Ninth Circuit acknowledged the expansive evidence presented by the plaintiffs and concluded "the record leaves little basis for denying that climate change is occurring at an increasingly rapid pace." *Id.* at 1166. Nonetheless, the court ultimately held that plaintiffs' claim was not reviewable. *Id.*

In its analysis, the Ninth Circuit first found that plaintiffs alleged constitutional violations. As such, the plaintiffs needed not exhaust their administrative remedies and properly decided not to bring their claim pursuant to the Administrative Procedure Act. *Id.* at 1667. Because the *Juliana* plaintiffs were not challenging a discrete action, federal court was the proper avenue for plaintiffs to pursue their constitutional claims. *Id.*

Second, the Ninth Circuit reviewed whether the plaintiffs possessed Article III standing to pursue their claim in federal court. *Id.* at 1168. The Ninth Circuit found that the plaintiffs possessed the first two requirements of standing: injury and causation. *Id.* at 1168-69. The court, however, found that plaintiffs could not establish redressability, the final element of standing. *Id.* at 1169. For this reason, the Ninth Circuit granted summary judgment for the government.

LEGAL STANDARD

Under Montana Rule of Civil Procedure 8(a)(1)-(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." In reviewing a complaint, the court "must accept as true the complaint's factual allegations, considering

them in the light most favorable to the plaintiff." *Cossitt v. Flathead Industries, Inc.*, 2018 MT 82, ¶ 8, 391 Mont. 156, 415 P.3d 486 (citation omitted).

A defendant may seek to dismiss a complaint in several ways. Under Montana Rule of Civil Procedure 12(b)(1) and 12(h)(3), a defendant may seek dismissal where the court lacks subject-matter jurisdiction. Subject-matter jurisdiction refers to the court's "fundamental authority . . . to hear and adjudicate particular class of cases or proceedings." *Lorang v. Fortis, Ins. Co.*, 2008 MT 252, ¶ 57, 345 Mont. 12, 192 P.3d 186 (citations omitted). District courts derive their subject-matter jurisdiction from the Montana Constitution which states "district courts have original jurisdiction in . . . all civil matters and cases at law and equity." Mont. Const. Art. VII § 4.

A defendant may also seek dismissal of a complaint where the plaintiff fails to "state a claim upon which relief can be grated." Mont. R. Civ. P. 12(b)(6). A motion to dismiss filed pursuant to 12(b)(6) should not be granted unless the plaintiffs can show no set of facts to support a claim entitling them to relief. *City of Cut Bank v. Tom Patrick Constr., Inc.*, 1998 MT 219, ¶ 6, 290 Mont. 470, 963 P.2d 1283 (citation omitted).

DISCUSSION

Like the defendants in *Juliana*, Defendants here contend that Youth Plaintiffs lack standing. Standing requires that a plaintiff demonstrate that they are entitled to have the merits of their claim reviewed by a Montana court. The plaintiff must demonstrate case-or-controversy standing.

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Second, Defendants argue a prudential limitation applies to Youth Plaintiffs' requested relief. Defendants argue that Plaintiffs' request for a court-order remedial plan to be created by Montana's executive and/or legislative branches poses a political question and is therefore nonjusticiable.

Finally, Defendants argue that the court must dismiss the Complaint because Plaintiffs failed to exhaust their administrative remedies. Without exhaustion of administrative remedies, this court is an improper forum to review Youth Plaintiffs' claims.

I. Case-or-Controversy Standing

A plaintiff must demonstrate case-or-controversy standing by "clearly alleg[ing] a past, present, or threatened injury to a property or civil right." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (citation omitted). The plaintiff's injury must also be "alleviated by successfully maintaining the action." *Id.* Simply put, the plaintiff must demonstrate: (1) an injury and (2) the court's ability to redress that injury through favorable outcome.

The parties do not dispute that Youth Plaintiffs allege a variety of past, present, and threatened injuries. *See Heffernan*, ¶ 33. Instead, Defendants argue that Youth Plaintiffs lack standing because Plaintiffs cannot establish causation or redressability.

A. Causation

Standing in federal court expressly requires plaintiffs to demonstrate three elements: (1) injury, (2) causation, and (3) redressability. *Heffernan*, ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). First, the plaintiff must suffer an injury in fact meaning "a concrete

harm that is actual or imminent, not conjectural or hypothetical." *Id.* Second, the plaintiff must demonstrate causation meaning "a fairly traceable connection between the injury and the conduct complained of." *Id.* Finally, the plaintiff must demonstrate redressability meaning "a likelihood that the requested relief will redress the alleged injury." *Id.*

Although Montana's standing requirements do not expressly direct plaintiffs to prove causation, causation is nonetheless implicit in establishing standing. This is because "[c]ase-or-controversy standing derives from Article VII, Section 4(1), of the Montana Constitution, and Article III, Section 2 of the United States Constitution." *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187. As such, the Montana Supreme Court emphasized that federal precedent interpreting the federal requirements for standing under the U.S. Constitution is "persuasive authority" for interpreting Montana's constitutional requirements for standing. *Id.* (citations omitted).

A plaintiff demonstrates causation by showing her injury is "fairly traceable" to the defendant's injurious conduct. *Heffernan*, ¶ 32. But a plaintiff may establish causation "even if there are multiple links in the chain . . . as long as the chain is not hypothetical or tenuous." *Juliana*, 947 F.3d at 1169 (internal quotations and citations omitted).

Further, a plaintiff may establish causation even if the defendant was one of multiple sources of injury. *WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[s]o long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009)

(finding (1) that "fairly traceable" does not require a plaintiff to allege that one injurious act alone caused the her injury and (2) that causation is an issue best left to "the rigors of evidentiary proof at a future stage of the proceedings") *rev'd. on other grounds*, 564 U.S. 410 (2011).

In *Juliana*, the Ninth Circuit agreed that the plaintiffs established the causation element of standing. 947 F.3d at 1169. The Ninth Circuit stated that "carbon emissions from fossil fuel production, extraction, and transportation" caused the plaintiffs' injuries. *Id.* And the United States is responsible for a significant amount of those carbon emissions. *Id.* Further, federal action continues to increase those emissions. *Id.* Accordingly, at the minimum, a genuine factual dispute existed "as to whether those polices were a 'substantial factor' in causing the plaintiffs' injuries." *Id.* (citation omitted).

Similar to *Juliana*, Youth Plaintiffs have met their burden to establish causation. Youth Plaintiffs cannot allege that the State Energy Policy and MEPA Climate Change Exception are the exclusive source of their injury. *See* Defs.' Bf. in Supp. of Mot. to Dismiss 9 (Apr. 24, 2020). However, demonstrating causation for standing purposes does not require such preciseness. *See Juliana*, 947 F.3d at 1169; *WildEarth Guardians*, 795 F.3d at 1157; *Connecticut*, 582 F.3d at 345-47. Rather, Youth Plaintiffs need only show that a set of facts demonstrate that the unconstitutional State Energy Policy and MEPA Climate Change Exception were a substantial factor in causing Plaintiffs' injuries. *See Juliana*, 947 F.3d at 1169; *See City of Cut Bank*, ¶ 6. Based on the facts alleged, Youth Plaintiffs have demonstrated that a genuine factual dispute exists with respect to whether Defendants' actions, taken pursuant to the two relevant statutory provisions, were a substantial factor in Plaintiffs' injuries.

While all states contribute to the nation's overall carbon emissions, Youth Plaintiffs sufficiently allege that Montana is responsible for a significant amount of those carbon emissions. *See Juliana*, 947 F.3d at 1169. In the complaint, Youth Plaintiffs offer several examples that demonstrate Montana's significant contribution to climate change. For example:

- Montana's per capita energy consumption is among the top one-third of all states, ranking 12th highest energy use per capita in 2017. Complaint ¶ 129 (Mar. 13, 2020).
- Montana is the sixth largest coal producer in the United States. *Id.*, ¶ 134.
- Montana produces 1 in every 200 barrels of U.S. oil. *Id.*, ¶ 135.
- One fifth of all U.S. natural gas imports from Canada entered the U.S. by pipelines through Montana in 2017. These pipelines were authorized by Defendants. Roughly 95% of natural gas that enters Montana passes through this state to other states *Id.*, ¶ 138.
- Between 1960 and 2017, coal, oil, and gas extracted from Montana with state-authorization resulted in 3,940 million metric tons of CO2 emissions once combusted. This number is roughly equivalent to 80% of all energy-related U.S. CO2 emissions in 2018. This amount of cumulative emissions would rank as the third largest when compared to the annual emissions of countries. *Id.*, ¶ 140.

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Plaintiffs allege that Defendants authorized much of those emissions pursuant to the State Energy Policy and MEPA's climate change exception. Paragraph 118 of the Complaint provides 23 examples of Defendants' "affirmative actions to authorize, implement, and promote projects, activities, and plans . . . that cause emissions of dangerous levels of GHG pollution into the atmosphere." Complaint ¶ 118 (Mar. 13, 2020). Youth Plaintiffs title these examples "aggregate acts." *Id.* The aggregate acts range from authorizing surface coal mining, coal-fired power plants, and pipelines to reducing contract lengths for renewable energy projects like solar. *Id.*, ¶ 118(b)-(c), (f)-(g), (i)-(m). Youth Plaintiffs allege that Defendants accomplished these aggregate acts in furtherance of the State Energy Policy which promotes fossil-fuel extraction and use. *Id.*, ¶ 118. Additionally, Defendants accomplished these acts without considering or informing Montana residents of associated climate change impacts pursuant to MEPA's Climate Change Exception. *Id.*

In their motion to dismiss, Defendants contend that the State Energy Policy is fully discretionary and seeks to promote "a reliable and efficient mix of energy" and "a balance between a sustainable environment and a viable economy." Defs.' Reply Br. in Supp. of Mot. to Dismiss 5 (June 11, 2020) (quoting Mont. Code Ann. §§ 90-4-1001(1)(a), (2)(d)). Thus, Plaintiffs cannot argue that the State Energy Policy caused the complained of injuries.

The court finds that, for the purposes of a motion to dismiss, Youth Plaintiffs have sufficiently raised a factual dispute as to whether the State Energy Policy was a substantial factor in causing Youth Plaintiffs' injuries. *See Juliana*, 947 F.3d at 1169. Like the plaintiffs in *Juliana*, Youth Plaintiffs here allege that Defendants authorized a "host of policies, from subsidies … to permits" over the

past decade pursuant to the State Energy Policy which encourages fossil-fuel development. *See id*; Complaint ¶ 118 (Mar. 13, 2020). As alleged, Defendants' aggregate acts taken pursuant to the State Energy Policy were a substantial factor in causing "dangerous levels of pollution," resulting in injury. *See Juliana*, 947 F.3d at 1169; *City of Cut Bank*, ¶ 6; Youth Pls.' Resp. to Defs.' Mot. to Dismiss 5 (May 29, 2020).

Defendants also posit that MEPA could not have caused Plaintiffs' harm because MEPA is a procedural rather than a substantive statute. Therefore, "any defect with MEPA would be procedural in nature and thus limited to a particular administrative decision." Defs.' Reply Br. in Supp. of Mot. to Dismiss 9 (Apr. 24, 2020). Because MEPA's requirements are merely "procedural" MEPA does not require an agency to reach any particular decision in the exercise of its independent authority. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712.

Youth Plaintiffs respond that their constitutional challenge circumvents this analysis because Plaintiffs do not seek judicial review of an agency procedural decisions under MEPA. Instead, Plaintiffs challenge the constitutionality of the Climate Change Exception to MEPA that grants agencies the authority to disregard climate change analyses in conducting environmental review of proposed projects.

Youth Plaintiffs cite *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality (MEIC),* 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, to support their argument. In *MEIC* the Montana Supreme Court reviewed a constitutional challenge to a statutory provision allowing discharges from water wells. *Id.,* ¶ 1. In particular, the challenged provision provided an exception to

nondegradation review for discharges from water wells. *Id.*, ¶ 50. Absent this exception, the agency could not authorize degradation unless the agency demonstrated by the preponderance of the evidence that the degradation was, for example, necessary or conferred a benefit. *Id.*, ¶ 49 (citing Mont. Code Ann. § 75-5-303(3)(a)-(b)). However, with the exception in place, the agency was exempt from reviewing the degrading effect of some categories or classes of activities. *Id.* The plaintiffs argued this exception violated Article II, § 3[1] and Article IV, § 1[2] of the Montana Constitution.

The Montana Supreme Court ultimately concluded that the plaintiffs had the ability to challenge the constitutionality of statutory provisions that allowed an agency to bypass environmental review. *Id.*, ¶¶ 77-79. The statutory provision at issue in *MEIC* prevented degrading discharges unless the agency offered evidentiary support for its conclusion. This is arguably more substantive than MEPA, which as Defendants point out, does not require the agency to reach a particular conclusion. However, in *MEIC* the Court did not distinguish between procedural and substantive statutes. Instead, the Montana Supreme Court found that a clean and healthful environment is a "fundamental right" and that "any statute . . . which implicates that right must be strictly scrutinized." *Id.*, ¶ 63. In reaching its conclusion, the Supreme Court stated:

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[1] Article II, § 3 of the Montana Constitution states that "[a]ll persons . . . have certain inalienable rights. They include the right to a clean and healthful environment."

[2] Article IV, § 1, subparagraph (1) of the Montana Constitution states that "[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Additionally under Article IV, § 1, subparagraph (3), "[t]he legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

> Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked. . . . the rights provide for in subparagraph (1) or Article IX, Section 1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.

Id., ¶ 77.

Based on the holding in *MEIC*, this court finds that Youth Plaintiffs sufficiently allege that Defendants' actions pursuant to MEPA's Climate Change Exception implicate their right to a clean and healthful environment. *See id.*, ¶ 63. Youth Plaintiffs allege that Defendants deliberately failed to consider or account for climate change in their MEPA analysis. Complaint ¶ 108 (Mar. 13, 2020). Pursuant to this exception, Defendants failed to account for or "disclose to the public the health or climate consequences" of the state-approved aggregate acts. *Id.*, ¶ 118(i), (k), (p). MEPA's Climate Change Exception allows Defendants to effectively turn a blind eye to constitutional violations. The exception allows Defendants to ignore whether state-approved projects will impede on a clean and healthful environment with respect to climate change.

As stated in *MEIC*, Youth Plaintiffs need not allege significant and physical manifestations of an infringement of their constitutional right to a clean and healthful environment to enforce their constitutional right, but Plaintiffs did so here. *See MEIC*, ¶ 77. Defendants' alleged violation of Youth Plaintiffs' constitutional rights resulted in injury. These injuries included economic, aesthetic, cultural, and physical, mental, and emotional health. *See* Complaint,

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¶¶ 15, 20, 36, 44, 53 (Mar. 13, 2020). Accordingly, the court declines to dismiss Plaintiffs' claims with respect to MEPA's Climate Change Exception.

Finally, with regard to MEPA, Defendants also argue that Plaintiffs are challenging "hypothetical future administrative decisions" and that these speculative claims will result in this court issuing an advisory opinion. Defs.' Reply Br. in Supp. of Mot. to Dismiss 10 (June 11, 2020) (citing *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364). In *MEIC*, the Montana Supreme Court seemed to address this argument by stating the Constitution's clean and healthful environment language provides "protections which are both anticipatory and preventative." *MEIC*, ¶ 77. Additionally, Youth Plaintiffs' challenge is not against hypothetical future administrative decisions. Instead, Youth Plaintiffs allege that they will continue to suffer harm if these statutes are left in place because "Defendants continue to aggressively pursue expansion of the fossil fuel industry in Montana." Complaint, ¶ 118(t) (Mar. 13, 2020); *See Id.*, ¶ 118(u), (v), (w).

B. Redressability

To establish standing in federal court, a plaintiff must demonstrate "a likelihood that the requested relief will redress the alleged injury." *Heffernan*, ¶ 32. While federal case law is persuasive authority in interpreting Montana's standing requirements, the Montana Supreme Court seems to have adopted a broader interpretation of the redressability element. In Montana, a court may only review a claim where the plaintiff alleges an injury that "available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (citation omitted). The term "alleviate" means to "make (something, such as pain or suffering) more bearable" or "to partially

remove or correct (something undesirable)." *Alleviate*, Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/alleviate* (last visited June 2021).

In *Juliana*, the Ninth Circuit found that the plaintiffs failed to establish redressability. 947 F.3d at 1170-73. The Ninth Circuit stated that plaintiffs must establish Article III redressability under a two-prong analysis. Plaintiffs must demonstrate that the relief sought is: "(1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Id.* at 1170. In asking for relief, the plaintiffs first requested the court to declare that the government was violating the Constitution. *Id.* But the Ninth Circuit found this relief was "unlikely by itself to remediate [the plaintiffs'] alleged injuries absent further court action." *Id.* (citation omitted). Thus, plaintiffs failed the first prong.

Second, the plaintiffs asked the Ninth Circuit to issue an injunction "requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions." *Id.* The court found, and the plaintiffs agreed, that an injunction alone would not remedy their injuries. *Id.* at 1171. Further, the Ninth Circuit found that a court-ordered remedial plan was beyond the court's power to award under the second prong of redressability. The plaintiffs' request for a remedial plan would require the court to tread into the authority vested in the legislative and executive branches, and this would violate the separation of powers. *Id.* at 1172.

This case is distinguishable from *Juliana*. Beginning with the second prong of *Juliana*'s redressability analysis, this court may grant Youth Plaintiffs' declaratory relief. Discussed in greater detail below, the court finds

that it lacks the authority to grant Youth Plaintiffs' injunctive relief, including Plaintiffs' request for a remedial plan like in *Juliana*. Such expansive relief presents a political question and exceeds the court's powers. *See id.*

However, importantly, Youth Plaintiffs must satisfy a different first prong to establish redressability than the *Juliana* plaintiffs. Youth Plaintiffs need not prove that the relief sought is "substantially likely to redress their injuries." *Id.* at 1170. Instead, Youth Plaintiffs' burden is to demonstrate that the redress sought will "alleviate, remedy, or prevent" harm caused by Defendants. *See* Larson, ¶ 46. Under the facts alleged and relief requested by Youth Plaintiffs, a favorable ruling will alleviate Plaintiffs' injuries.

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." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 10 (May 29, 2020). The court agrees.

The Complaint provides support for this contention. First, Youth Plaintiffs described 23 affirmative acts, or aggregate acts, taken by Defendants pursuant to the State Energy Policy and MEPA exception. Complaint ¶ 118 (Mar. 13, 2020).

Second, Youth Plaintiffs allege through these aggregate acts, "Defendants are responsible for dangerous amounts of GHG emissions from Montana – both cumulative emissions and ongoing emissions, which in turn causes and contributes to the Youth Plaintiffs' injuries." *Id.* ¶ 121

(Mar. 13, 2020). The ensuing paragraphs describe Montana's GHG emissions, as well as the State's role in contributing to the country's total GHG emissions. *Id.* ¶¶ 122-42. Youth Plaintiffs conclude that "as a result of actions taken pursuant to and in furtherance of the State Energy Policy, [Defendants are] responsible for a significant and dangerous quantity of GHG emissions that have contributed to dangerous climate change and infringed the constitutional rights of Youth Plaintiffs." *Id.* ¶ 142.

Finally, Youth Plaintiffs alleged that Montana's GHG emissions and overall contribution to national GHG emissions "harm[ ] Youth Plaintiffs' physical and psychological health and safety, interfere[ ] with family and cultural foundations and integrity, and cause[ ] economic deprivations." *Id.* ¶ 2; *See also Id.* ¶¶ 143-84 ("Anthropogenic Climate Destabilization is Already Causing Dangerous Impacts in Montana"). Further, "[b]ecause of their unique vulnerabilities and age, Youth Plaintiffs are disproportionately harmed by the climate crisis and face lifelong hardships." *Id.* Youth Plaintiffs support these statements by describing their historic and ongoing injuries caused by rising GHG emissions. *Id.* ¶¶ 14-81.

Under these alleged facts, the State Energy Policy and MEPA Climate Change Exception contribute to Youth Plaintiffs' injuries. *See City of Cut Bank*, ¶ 6. Notwithstanding Youth Plaintiffs' request for this court to order a remedial plan, Youth Plaintiffs sufficiently demonstrate that finding State Energy Policy and Climate Change Exception to MEPA unconstitutional would alleviate their injuries. *See Larson*, ¶ 46. If the court declared these statutory provisions

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unconstitutional, it would partially remove or correct the injuries suffered by Youth Plaintiffs. For these reasons, Youth Plaintiffs adequately establish redressability here.

II. Prudential Standing

Prudential Standing sets additional limits on what cases a plaintiff may bring before a court. One such prudential limitation is the political question doctrine. Under this doctrine courts recognize that they "generally should not adjudicate matters 'more appropriately in the domain of the legislative or executive branches or the reserved political power of the people.'" *Larson*, ¶ 18 n. 6. Courts may not review "controversies . . . which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government or to the people in the manner provided by law." *Id.*, ¶ 39 (citation omitted).

Defendants contend that Plaintiffs seek a remedy which the court lacks the authority to grant. Plaintiffs ask the court to order "Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana . . . to protect Youth Plaintiffs' constitutional rights from further infringement by Defendants." Complaint ¶ 7 (Mar. 13, 2020). If the court deems necessary, the court should also appoint a special master with appropriate expertise to "assist the Court in reviewing the remedial plan for efficacy." *Id.*, ¶ 8. Further, the court should order that it will "retain[ ] jurisdiction over this action until such time as Defendants have fully complied with the orders of the Court." *Id.*, ¶ 9. Defendants argue that such relief exceeds the court's authority because the ability to enact new legislation lies exclusively with the Montana Legislature. The court agrees.

In *Juliana*, the Ninth Circuit found that the plaintiffs' request for a remedial climate plan violated the political question doctrine. 947 F.3d at 1171-72. The Ninth Circuit stated that "any effective plan would necessarily require a host of complex policy decision entrusted . . . to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171 (citation omitted). As such, the court found it lacked any power to grant or enforce a remedial plan. *Id.* at 1172-73.

In response, Youth Plaintiffs first state that the Montana Supreme Court granted the plaintiffs' request for a similar plan to remedy an unconstitutional school funding system in *Columbia Falls Elem. v. State.* 2005 MT 69, 326 Mont. 304, 109 P.3d 257. Plaintiffs state that in *Columbia Falls*, "the Court declared Montana's school funding system unconstitutional and gave the legislature an opportunity to correct the unconstitutional school funding system." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 11 (May 29, 2020).

However, in *Columbia Falls*, the court did not order a remedy to the extent requested here. The court did not order the legislative or executive branches to create laws, policies, or regulations to remedy the unconstitutional school funding system. Instead, the court deemed the funding system unconstitutional under the Public School Clause which required the legislature to "provide a basic system of free quality public . . . schools." Mont. Const. Art. X § 1(3), *Columbia Falls Elem.*, ¶ 31. The court then stated, "we defer to the Legislature to provide a threshold definition of what the Public School Clause requires," however, "the current funding system . . . cannot be deemed

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constitutionally sufficient." *Id.* In deferring to the Legislature, the court did not craft a remedy "committed for resolution to other branches of government or to the people in the manner provided by law." *See Larson*, ¶ 39.

The court finds that Youth Plaintiffs' request for a remedial plan violates the political question doctrine. The Complaint asks this court to oversee Defendants' development of a remedial plan or policies that adequately reduce GHG emissions to a constitutionally permissible level. Ordering such a remedial plan, and retaining jurisdiction over the plan's development, would require the court to make or evaluate complex policy decision entrusted to the discretion of other governmental branches. *See Larson*, ¶ 39, *Juliana*, 947 F.3d at 1171.

In a similar vein, the court also finds that the requested injunctive relief seeking an accounting of GHG emissions violates the political question doctrine. Plaintiffs ask the court to order that Defendants retroactively review and "prepare a complete and accurate accounting of Montana's GHG emissions, including those emissions caused by the consumption of fossil fuels extracted in Montana and consumed out of state, and Montana's embedded emissions." Complaint ¶ 6 (Mar. 13, 2020). Such an order would require the court to exceed its authority by overseeing analysis and decision-making that should be left to "the wisdom and discretion of the legislative or executive branches." *See Juliana*, 947 F.3d at 1171.

However, Youth Plaintiffs also offer a second argument: the court may grant declaratory relief without imposing an injunctive remedy. Courts have "the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 468 (1974). Further, a district

court has "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201.

The court agrees that it may grant declaratory relief regardless of injunctive relief. The court possesses the authority to grant declaratory or injunctive relief, or both. *See Steffel*, 45 U.S. at 468-69; Mont. Code Ann. § 27-8-201. Therefore, despite dismissing Youth Plaintiffs' claims for injunctive relief, the court will allow Plaintiffs' claims for declaratory relief to move forward.

III. Administrative Exhaustion

Defendants' final argument is that Plaintiffs allege injuries from various administrative decisions but failed to exhaust administrative remedies. Moreover, the statute of limitations for filing an administrative challenge bars Plaintiffs from asserting such a challenge now.

Under the Montana Administrative Procedure Act (MAPA), plaintiffs may only seek judicial review of an agency's final written decision after they have "exhausted all administrative remedies available within the agency." Mont. Code Ann. § 2-4-702(1)(a). "The purpose of the exhaustion doctrine is to 'allow[ ] a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes.'" *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4 (citation omitted).

In their brief, Youth Plaintiffs respond that they are "not seeking review of any contested case under MAPA." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 18 (May 29, 2020). Additionally, because Plaintiffs are not challenging a discrete agency action or review of a contested case "they intentionally have not

asserted MAPA claims; their claims are brought directly under Montana's Constitution." *Id.*

Plaintiffs' argument is supported by the Montana Supreme Court's ruling in *MEIC*. In *MEIC*, the lower court held that "Article II, Section 3 of the Montana Constitution does provide a fundamental right to a clean and healthy environment, and that parties such as the Plaintiffs are entitled to bring a direct action in court to enforce that right." *MEIC*, ¶ 28. The basis for the plaintiffs' constitutional challenge in *MEIC* was a statutory provision that allowed the defendant agency to circumvent nondegradation review of discharges from water wells for certain categories or classes of activities. *Id.*, ¶ 6. In *MEIC* the district court held – and the Supreme Court did not overturn – the plaintiffs' ability to bring a direct action in district court without first seeking administrative review. *See id.*, ¶¶ 77-81.

Moreover, "exhaustion of an administrative remedy is unnecessary if the remedy would be futile as a matter of law." *Leo G.*, ¶ 11. A party need not exhaust administrative remedies where the administrative rules and statutes make agency relief futile. *Mountain Water Co. v. Mont. Dep't of Pub Serv. Regulation*, 2005 MT 84, ¶¶ 15-16, (citing *DeVoe v. Department of Revenue*, 263 Mont. 100, 866 P.2d 228 (1993)). A showing of futility requires the aggrieved party to demonstrate more than "the mere possibility or likelihood that an administrative remedy may not succeed on the merits." *Leo G.*, ¶ 11 (citing *Mountain Water Co.*, ¶¶ 16-18).

Under similar reasoning, the court in *Juliana* found that the plaintiffs needed not exhaust their administrative remedies prior to bringing their claim under the federal version of MAPA – the Administrative Procedure Act

(APA). The court stated that the plaintiffs argued "the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions . . . the plaintiffs cannot effectively pursue their constitutional claims – whatever their merits – under that statute." *Juliana*, 947 F.3d at 1167.

The court concludes that Youth Plaintiffs properly brought this action in district court rather than through the administrative review process. *See MEIC*, ¶ 28.

Additionally, had Youth Plaintiffs sought Defendants' review of the administrative decisions noted, Defendants would have found no errors to correct. *See Shoemaker*, ¶ 18. The Climate Change Exception exempts Defendants from considering climate impacts altogether. Any challenge brought by Youth Plaintiffs asking the agency to review climate-related impacts would therefore be futile. *See Leo G.*, ¶ 11. Additionally, similar to the plaintiffs in *Juliana*, no single agency action standing alone caused their injuries. *See* 947 F.3d at 1167; Complaint ¶ 118 (Mar. 13, 2020). Accordingly, contesting any one final agency decision before the agency would not provide the relief sought by Youth Plaintiffs. *See Leo G.*, ¶ 11. For these reasons, the court declines to dismiss Youth Plaintiffs' MEPA-related claims for want of administrative exhaustion.

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ORDER

Based on the foregoing, Defendants' motion to dismiss is **GRANTED** with respect to Requests for Relief 6, 7, 8, and 9. The motion to dismiss with respect to all other claims is **DENIED**.

DATED this 4 day of August 2021.

KATHY SEELEY
District Court Judge

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KS/sm/CDV-2020-307 Ord Mot Dismiss

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD; LANDER B., by and through his guardian Sara Busse; BADGE B., by and through is guardian Sara Busse; SARIEL SANDOVAL; KIAN T., by and through his guardian Todd Tanner; GEORGIANNA FISCHER; KATHRYN GRACE GIBSON-SNYDER; EVA L., by and through her guardian Mark Lighthiser; MICA K., by and through his guardian Rachel Kanton; OLIVIA VESOVICH; JEFFREY K., by and through his guardian Lara King; NATHANIEL K., by and through his guardian Laura King; CLAIRE VLASES; RUBGY D., by and through her guardian Shane Doyle; and TALEAH HERNANDEZ, Plaintiffs, v. STATE OF MONTANA, GOVERNOR GREG GIANFORTE, MONTANA	Cause No. CDV-2020-307 **ORDER ON RULE 60(a) MOTION FOR CLARIFICATION**

DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA DEPARTMENT OF TRANSPORTATION, and MONTANA PUBLIC SERVICE COMMISSION, Defendants.	

Defendants State of Montana, et al., filed a motion for clarification on May 6, 2022. The motion, filed under Montana Rule of Civil Procedure 60(a), asks the Court to correct a clerical error in the August 4, 2021, Order on Motion to Dismiss. The State's motion asks the Court to confirm that it intended to dismiss Request for Relief 5 from Plaintiffs' Complaint for Declaratory and Injunctive Relief. Youth Plaintiffs oppose the motion in a response filed May 20, 2022, arguing the Court purposefully did not dismiss Request for Relief 5. Defendants replied on May 24, 2022.

Under Montana Rule of Civil Procedure 60(a), "The court may correct a clerical mistake or mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice." Pursuant to Rule 60(a), a court may correct a clerical error, but may not correct a "judicial error" affecting the "substantive rights of the parties as pronounced in the judgment." *Thomas v. Thomas*, 189 Mont. 547, 550, 617 P.2d 133, 135 (1980).

Defendants, in this case, seek clarification on the Order on Motion to Dismiss that expressly dismissed Youth Plaintiffs' Requests for Relief 6, 7, 8,

and 9. The dismissal made no mention of Request for Relief 5. However, the body of the Order on Motion to Dismiss states that the Court dismisses requests for injunctive relief while allowing Plaintiffs' "claims for declaratory relief to move forward." Order on Mot. to Dismiss 22, Aug. 4, 2021.

Plaintiffs' Request for Relief 5 seeks an injunctive remedy. Request for Relief 5 asks the Court to "[p]ermanently enjoin Defendants . . . from subjecting Youth Plaintiffs to the State's Energy Policy, Mont. Code Ann. § 90-4-1001(c)-(g), the aggregate acts, policies, and conditions described herein, and the Climate Change Exception to the [Montana Environmental Policy Act], Mont. Code Ann. § 75-1-201(2)(a)." Defendants argue that because Request for Relief 5 seeks injunctive relief, the Court inadvertently omitted it from its list of dismissed claims.

While Request for Relief 5 does seek an injunctive remedy, the Court nonetheless finds Request for Relief 5 would be a logical extension and result if Montana Code Annotated § 90-4-1001(c)-(g) or § 75-1-201(2)(a) were declared unconstitutional. The language contained in the Order on Motion to Dismiss indicating dismissal of all injunctive relief was a clerical error. *See* Mont. R. Civ. P. 60(a). This Order clarifies that requests for injunctive relief contained in the complaint were dismissed, except for Request for Relief 5.

DATED this 30 day of June 2022.

KATHY SEELEY
District Court Judge

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MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON SECOND RULE 60(a) MOTION FOR CLARIFICATION**

Defendants State of Montana, et al., filed a second motion for clarification on July 22, 2022. The motion, filed under Montana Rules of Civil Procedure 60(a) and 52(a)(3), asks this court to explain why Youth Plaintiffs' requests for relief #1-5 are in fact justiciable and not political questions for the other two branches of government. While the State's motions are clearly an attempt to relitigate the motion to dismiss, this court will fully address the issues because they are critically important to the separation of powers and role of the judiciary in Montana. Professor Anthony Johnstone, recently nominated to the

Ninth Circuit, perhaps best articulated the difference between federal justiciability standards and the standards in Montana: "[t]he open-textured vesting of 'judicial power' and broad terms of state jurisdictional statutes leaves state courts ample space to depart from lockstep federal notions of standing, ripeness, mootness, advisory opinions, and political questions . . . the courthouse doors open a little wider to litigants in Montana." Anthony Johnstone, *The Montana Constitution in the State Constitutional Tradition*, 190, 223 (2021).

The State has presented the following two points of clarification:

I. Why don't requests for relief #1-4 (declaratory relief) violate the political question doctrine?

II. Why doesn't request for relief #5 violate the political question doctrine?

DISCUSSION

I. Do Youth Plaintiffs' claims for declaratory relief (requests for relief 1-4) violate the political question doctrine?

"It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . It is emphatically the province and the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Constitutional and statutory interpretation are still squarely within the purview of the judicial branch, but the courts have self-imposed limits of justiciability known as prudential standing. The Court recently articulated one limit of prudential standing, the political question doctrine, in *Brown v. Gianforte*, stating: "[a]n issue is not properly before the judiciary when 'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and

manageable standards for resolving' the issue. However, 'not every matter touching on politics is a political question.'" *Brown v. Gianforte*, 2021 MT 149, ¶ 21, 404 Mont. 269, 280, 488 P.3d 548, 555 (citations omitted). Countervailing factors that weigh against prudential standing limitations are "the importance of the question to the public," and "whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (citations omitted).

While Justice Marshall thought it "a proposition too plain to be contested," the State is apparently unsure whether the judiciary has the power to declare statutes unconstitutional. This court assures the State that it can. Youth Plaintiffs' requests for relief 1-4 simply ask this court to determine whether the State Energy Policy, Mont. Code Ann. 90-4-1001(c)-(g), and the Climate Change Exception to the Montana Environmental Policy Act (MEPA), Mont. Code Ann. 75-1-201(2)(a), with their appurtenant acts and policies, violate the Montana Constitution — particularly the "clean and healthful environment" clause of Art. II, Sec. 3, and the "non-degradation" provision under Art. IX, Sec. 1.

The State mischaracterizes subsections two and three of Art. IX, Sec. 1 as committing the interpretation of Art. IX to the legislature, what would otherwise be known as a non-self-executing provision, but this is incorrect. Like the old constitutional guarantee of state assistance benefits under *Butte Community Union*, and guaranteed public education under *Columbia Falls*,

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"[o]nce the legislature has acted, or 'executed,' a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the legislature's constitutional responsibility." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257; see also *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (Court upheld district court's determination that the legislature's act eliminating general assistance payments to "able-bodied persons" was unconstitutional because the legislature was failing to meet its obligations under Art. XII, Sec. 3 (Amd. Const. Amend. No. 18, approved Nov. 8, 1988)). The provisions of Art. IX, Sec. 1 similarly direct the legislature to provide the administration, enforcement, and remedies for the protection of the environment, and therefore the judiciary's role is to ensure they are fulfilling those duties.

This court agrees with the State that it is difficult to determine what exactly constitutes a clean and healthful environment, but Montana courts have undertaken it before. The seminal case, as the State knows, is *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality (MEIC)*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. In *MEIC*, the Court ultimately concluded that the plaintiffs had the ability to challenge the constitutionality of statutory provisions that allowed an agency to bypass environmental review. *MEIC*, ¶¶ 77-79. The Court famously stated the Montana Constitution "does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *Id.*, ¶ 77. The same is true, here: Youth Plaintiffs sufficiently invoked their fundamental constitutional rights, and they made a

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showing that the statutes at issue implicate those rights. The applicable legal standard for review of statutes infringing fundamental rights is strict scrutiny. *Id.*, ¶ 63. Youth Plaintiffs are challenging the constitutionality of statutes that allow the State to bypass environmental review, on all fours with *MEIC*.

The State points to *Juliana v. United States*, 947 F.3d 1159 (2019) as authority for dismissing Youth Plaintiffs' remaining claims as non-justiciable political questions, but the State's reliance on *Juliana* is misguided. First of all,

> "[t]his Court need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution . . . We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution."

Butte Community Union at 433.

Plaintiffs in *Juliana* were bringing a substantive due process claim, not challenging the constitutionality of a statute. Furthermore, the United States Constitution does not include the right to a clean and healthful environment. *Juliana* was instructive as to case-in-controversy standing and causation, but the parallels end there.

In *Juliana*, the Ninth Circuit found that the request for a remedial plan violated the political question doctrine, exactly how this court ruled on Youth Plaintiffs' identical request. Importantly, however, the declaratory relief sought by plaintiffs in *Juliana* was found to be likely non-justiciable due to the perceived lack of redressability, not the political question doctrine. *Juliana* at 1171. As this court explained in the order on the State's motion to dismiss, unlike federal courts Montana courts may review claims that can "alleviate" an injury,

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even if they do not completely redress it. Order on Motion to Dismiss, 15:19–16:3; *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241; *Heffernan*, ¶ 33. While declaratory relief in this case may not reverse global climate change in its entirety, it certainly could alleviate it.

This court agrees that climate change is a politically-charged issue, but whether the State's energy statutes violate the Montana constitution is a question for the courts, not the other branches of government. Constitutional and statutory interpretation are "the very essence of judicial duty." *Marbury* at 177. Furthermore, climate change is of paramount public importance, and if the State's position on so-called political questions were adopted, no controversial legislation would be reviewable by the courts. At the most basic level, the judiciary is not subservient to the legislature. To hold this controversy as non-justiciable due to the political question doctrine would completely upset the separation of powers.

II. Does request for relief #5 violate the political question doctrine?

At the outset of this analysis, it is worth noting the Court's recent decision in *Bd. of Regents of Higher Educ. of Mont. V. State*, 2022 MT 128, 409 Mont. 96, 512 P.3d 748. In that case, the Court affirmed the district court's ruling that a statute was unconstitutional as applied to the Board of Regents and enjoined the State from enforcing the statutes. *Bd. of Regents of Higher Educ. of Mont.*, ¶ 2, ¶ 8.

In its first order on clarification, this court explained that request for relief #5 "would be a logical extension and result" if the State Energy Policy and Climate Change Exception are declared unconstitutional. The State, unwilling to accept that reasoning, has asked for more. Again, the State points to

Juliana as a deus ex machina that will rescue it from judicial review. It won't.

The injunctive relief rejected by the Ninth Circuit as a political question was the remedial plan. *Juliana* at 1171-1173. This court has already rejected Youth Plaintiffs' similar prayer for a remedial plan, their request for an accurate accounting of greenhouse gas emissions, the request for a special master to oversee the remedial plan, and the request for an order retaining the court's jurisdiction over the remedial plan. Request for Relief #5 has no relation, no bearing on the remedial plan. Request for Relief #5 simply asks the court to enjoin the State from subjecting Youth Plaintiffs to allegedly unconstitutional statutes. Once again, it is well within the purview of the judiciary to: a) declare statutes unconstitutional, and b) prevent the State from enforcing unconstitutional statutes.

If request for relief #5 was related to the remedial plan, then the State would have a point. However, a plain reading of request #5 leaves no doubt that it is unrelated to the remedial plan or any other injunctive relief that this court already found beyond the judiciary's power. As it was in *Bd. of Regents*, it is perfectly within this court's authority to enjoin the State from enforcing statutes that are declared unconstitutional.

To avoid any further confusion:

I. Requests for relief #1-4 do not violate the political question doctrine because they simply call for constitutional and statutory interpretation — "the very essence of judicial duty."

II. Request for relief #5 does not violate the political question doctrine because it asks the court to enjoin the State from enforcing allegedly unconstitutional statutes.

This order clarifies that the surviving requests for relief do not violate the political question doctrine and are justiciable controversies.

DATED this 22 day of September, 2022.

KATHY SEELEY
District Court Judge

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KS/sm/CDV-2020-307 Ord Sec Rule 60(a) Mot Clarification

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON MOTION UNDER RULE 35(a) FOR INDEPENDENT MEDICAL EXAMINATIONS**

Defendants State of Montana, et al. (State) have moved under Montana Rule of Civil Procedure 35(a) for Independent Medical Examinations (IMEs) of eight of the named Plaintiffs in this case. The State argues that Plaintiffs have placed their mental health in controversy, and that the State has good cause for requesting the IMEs. Plaintiffs oppose the motion, both parties have submitted briefs, and the matter is ready for decision.

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BACKGROUND

The background pertinent to this motion follows:

In their complaint challenging the constitutionality of the State Energy Policy and Climate Change Exception to the Montana Environmental Policy Act, Plaintiffs allege, among other injuries, types of emotional distress such as anxiety and despair, caused by climate change, environmental degradation, and government action/inaction they argue is making climate change worse. Plaintiffs have also submitted an expert disclosure and report from Dr. Lise Van Susteren, M.D., a psychiatrist who has studied the relationship between climate change and mental health. Van Susteren's report sets forth her qualifications, lays out the academic basis for the relationship between climate change, government action/inaction, and mental health, describes her methodology for interviewing five of the Plaintiffs, and includes profiles of each of the five she interviewed. The State argues it is "entitled to test whether the two laws Plaintiffs challenge have caused their allegedly severe psychological injuries, or whether other causes are responsible," and demands IMEs not only for the five Plaintiffs interviewed by Van Susteren, but for three additional Plaintiffs as well. Defs.' Reply Supp. Mot. For IMEs at 7.

LEGAL STANDARD

Unlike other rules of discovery, Rule 35 has "a high standard" that must be met before a court may order an IME. *Lewis v. Mont. Eighth Jud. Dist. Ct.*, 2012 MT 200, ¶ 7, 366 Mont. 217, 286 P.3d 577. Montana courts apply the following test before ordering an IME: 1) a party's mental or physical condition

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must really and genuinely be in controversy, and 2) the movant must show good cause. *Id.*, ¶ 6; *In re Marriage of Binsfield,* 269 Mont. 336, 341, 888 P.2d 889 (1995). See also, *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964).

IMEs are "an extraordinary form of discovery," "the most intrusive and, therefore, the most limited discovery tool," and "must be balanced against Plaintiffs' constitutional right to privacy under Montana Constitution Article II, Section 10." *State ex rel. Mapes v. Dist. Ct. of the Eighth Jud. Dist.*, 250 Mont. 524, 529, 532, 822 P.2d 91 (1991); *Simms v. Mont. Eighteenth Jud. Dist. Ct.*, 2003 MT 89, ¶ 30, 315 Mont. 135, 68 P.3d 678; *Lewis,* ¶ 6.

> "The language of the rule is discretionary. It authorizes, but does not require, a district court to order a party to submit to a psychological examination" even when the high standard has been met. *Binsfield,* 269 Mont. at 340. "[I]t is well accepted that a party does not possess an absolute right to obtain an independent medical examination."

Simms, ¶ 28.

DISCUSSION

I. Is Plaintiffs' mental health "really and genuinely in controversy?"

Defendants argue Plaintiffs have made an "unfortunate choice to place their mental health at the center of this case," and that "[t]he issue of standing very well may turn on" the psychological component of Plaintiffs' alleged injuries. Defs.' Br. Supp. Mot. For IMEs at 2; Defs.' Reply Supp. Mot. For IMEs at 4-5. Plaintiffs maintain that the emotional and psychological harms they allege are not part of an independent tort claim or a claim for damages, but merely bolster their standing to challenge the constitutionality of the statutes at issue. Pl.'s Br. Opp. Mot. For IMEs at 2. Plaintiffs argue that the "undisputed

nature of the constitutional claims and relief at issue do not include damages based on proving (or defending against) emotional injury." Pl.'s Br. Opp. Mot. For IMEs at 13.

In *Lewis v. Mont. Eighth Jud. Dist. Ct.*, the Montana Supreme Court cited *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995), and set forth a list of factors helpful to past courts in determining whether a party's mental health is in controversy. *Lewis*, ¶ 8. Defendants cite *Turner* and assert that applying the *Turner* factors will lead this court to hold that Plaintiffs have put their mental health in controversy. However, in *Lewis*, the Court quoted *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 554 (N.D. Ga. 2001), which lists the factors as follows:

> The majority of federal courts "recognize that a mental exam is warranted when one or more of the following factors are present: (1) a tort claim is asserted for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder is made; (3) a claim of unusually severe emotional distress is made; (4) plaintiff intends to offer expert testimony in support of [a] claim for emotional distress damages; and/or (5) plaintiff concedes that her mental condition is in controversy within the meaning of Rule 35."

Lewis, ¶ 8.

Applying these factors to the instant case, factors two, three, and four are potentially applicable. Regarding the fourth factor, expert testimony to support a claim for emotional distress damages, Defendants are correct that the original *Turner* list did not include the word "damages". However, that factor has evolved. The *Lewis* court quoted the factors as set forth in *Stevenson*, and, since *Lewis* is binding precedent, this court will use the same language. Van Susteren's testimony is not being offered to support an independent claim for emotional

distress damages, but as part of standing to challenge the constitutionality of statutes. Therefore, Van Susteren's report does not, on its own, bring Plaintiffs' mental health into controversy under factor four.

As to factors two and three, Defendants argue that Van Susteren's use of the terms "pre-traumatic stress disorder," "abuse," and "profound psychological damage" in her report bring the alleged distress into controversy. Defs.' Br. Supp. Mot. For IMEs at 6, 8. However, Plaintiffs have not alleged any diagnoses of specific psychiatric injuries, which are typically present when courts order IMEs. In *Turner* itself, which Defendants repeatedly cite, the United States District Court for the Southern District of California ultimately held:

> This court concludes that "emotional distress" is not synonymous with the term "mental injury" as used by the Supreme Court in *Schlagenhauf v. Holder* for purposes of ordering a mental examination of a party under Rule 35(a), and specifically disagrees with those few cases holding that a claim for damages for emotional distress, without more, is sufficient to put mental condition "in controversy" within the meaning of the Rule. If this were the law, then mental examinations could be ordered whenever a plaintiff claimed emotional distress or mental anguish. Rule 35(a) was not meant to be applied in so broad a fashion.

Turner at 97.

Notably, the plaintiff in *Turner* was seeking more than one million dollars in damages for mental anguish and emotional distress. The *Turner* court still held that her mental health was not in controversy. *Id.*

Even when there is a tort claim for emotional distress or psychological damages, courts are cautious about ordering IMEs. In *Lewis*, the Montana Supreme Court stated, "[w]e have never ruled that a plaintiff's claim for general emotional distress damages is, in and of itself, a sufficient basis for

ordering a Rule 35 mental examination." *Lewis*, ¶ 8. Defendants correctly assert that independent tort claims or emotional distress damages are not required to order an IME, but their absence in this case leads the court to take a cautious approach before ordering "the most intrusive and, therefore, the most limited discovery tool." *Simms*, ¶ 30.

Plaintiffs have not placed their mental health at the center of this case, nor is it really and genuinely in controversy. First, the court disagrees with Defendants' assertion that Plaintiffs' standing "very well may turn" on the issue of psychological harm. Plaintiffs have also alleged economic, physical health, aesthetic, and recreational injuries. The emotional harm issue is not a core issue in the case. Second, the types of mental anguish and emotional distress alleged by Plaintiffs and supported by Van Susteren's testimony are not the specific or unusually severe psychiatric injuries or disorders contemplated in the factors articulated in *Stevenson* and *Lewis*. Van Susteren's report uses novel terminology, which may be grounds for an evidentiary challenge, but not for ordering a swath of IMEs for eight Plaintiffs. Defendants have failed to show that Plaintiffs' mental health is really and genuinely in controversy.

II. Has the State shown good cause for their requested IMEs?

"A psychiatric examination is particularly invasive of an individual's right to privacy." *State ex rel. Mapes,* at 532. The Rules of Civil Procedure "should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf* at 121. "[B]y adding the words '. . . good cause . . .,' the Rules indicate that there must be greater showing of need under Rules 34 and 35 than under the other discovery rules."

Id. at 118. "Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant." *Id.*

Even if Plaintiffs' mental health were in controversy, Defendants have not established good cause for the requested examinations, which they say, "may also include, but is not limited to," probing into Plaintiffs' "psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma." Defs.' Br. Supp. Mot. For IMEs at 5. The scope is too broad.

To meet the threshold requirement of standing, Plaintiffs alleged economic, physical health, aesthetic, and recreational injuries. Some of their alleged injuries are mental and emotional in nature, including fear, anxiety, and despair caused by climate change and the government action/inaction that is allegedly making it worse. In response, Defendants propose a fishing expedition to find some other cause for that distress. For example, the State cites Plaintiff Rikki Held's feelings of "stress and despair when thinking about how the State of Montana has known about climate disruption for decades." Compl., ¶ 20. Defendants' proposed method of defending against the allegations of mental anguish is to subject Rikki Held to an invasive interrogation about her school performance, past trauma, and psychological history. The State characterizes the proposed IMEs as "ask[ing] the Youth Plaintiffs *questions* . . . [t]hat's it." Defs.' Reply Supp. Mot. For IMEs at 6 (emphasis in original). What Defendants gloss over is that those *questions* could be about anything as innocuous as their grades, which are still protected by their right to privacy, all the way to deeply private and upsetting matters as childhood abuse. Allowing this intrusion would be an unnecessary violation of Plaintiffs' right to privacy. *Simms*, ¶ 32; *State ex rel. Mapes* at 532.

The State is not, as it asserts, "flying blind." Defs.' Br. Supp. Mot. For IMEs at 9. It was provided Van Susteren's full report, including confidential information, through discovery. Furthermore, as Plaintiffs observe, the State has ample alternatives to mount an informed defense. To start, the State is currently deposing Plaintiffs. The State may also depose and cross-examine Van Susteren. Furthermore, the State may call their own expert to dispute Van Susteren's conclusions and methodology without subjecting Plaintiffs to invasive IMEs. These are just a few of the options available to the State to defend itself on this issue. The State has not met its burden to show good cause for the requested psychological examinations because the scope is too broad, and it has ample alternatives to defend against the claims of mental anguish and emotional distress.

III. Should this court strike Plaintiffs' allegations of psychological distress and Van Susteren as an expert witness?

As an alternative to the IMEs, the State asks the court to strike all allegations of psychological harm and disallow any opinions or testimony by Van Susteren. Plaintiffs' allegations in the complaint are within the bounds of general emotional distress and the court will not strike them. As to Van Susteren's report, Plaintiffs correctly assert that "Montana law regarding Rule 35 discovery does not control the separate standards that might apply if the State wishes to challenge Dr. Van Susteren's future expert testimony. Those standards—by contrast—fall under the Montana Rules of Evidence." Pl.'s Br. Opp. Mot. For IMEs at 17. Tacking this request on the end of a Rule 35 motion without citing an applicable Rule providing the basis to strike does not properly place the issue before the court.

CONCLUSION

The court views the mini trial emerging over the psychological components of Plaintiffs' standing as a distraction. Even if the psychological aspects of Plaintiffs' injuries were excluded, Plaintiffs have standing based on alleged economic, physical health, aesthetic, and recreational injuries. The State has not met its high burden to show Plaintiffs' mental health is really and genuinely in controversy, nor that there is good cause to order IMEs for eight of the Plaintiffs.

The Rule 35(a) motion for IMEs of eight Plaintiffs by Dr. Stratford is **DENIED**.

DATED this 14 day of October, 2022.

KATHY SEELEY
District Court Judge

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KS/sm/CDV-2020-307 Ord Mot Under Rule 35(a) for IME

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON DEFENDANTS' MOTIONS TO DISMISS FOR MOOTNESS AND FOR SUMMARY JUDGMENT**

BACKGROUND

The relevant background of this case is sufficiently described in the Court's Order on Motion to Dismiss at 1-5, apart from four new developments: (1) the Court denied Defendants' Motion to Dismiss on August 4, 2021; (2) on March 16, 2023, the Governor signed HB 170 which repealed the State Energy Policy, Mont. Code Ann. § 90-4-1001; (3) District Court Judge Michael Moses held in *MEIC v. DEQ* that the State has been misinterpreting the MEPA Limitation and is, in fact, required to consider how greenhouse gas

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(GHG) emissions will affect Montana's environment, DV-56-2021-0001307 (13th District, April 6, 2023) (Order on Summary Judgment) at 29:3-9; and (4) in response to Judge Moses' ruling, the Legislature expeditiously passed HB 971, which amended the MEPA Limitation to explicitly prohibit the State from considering greenhouse gases in MEPA decisions. HB 971 was signed into law by the Governor on May 10, 2023. The repeal of the State Energy Policy led to the State's Motion to Partially Dismiss for Mootness, filed April 3, 2023, which will be discussed before moving to Defendants' Motion for Summary Judgment, filed Feb. 1, 2023. Defendants' previously filed a motion to stay the proceedings but withdrew that motion at oral argument held on May 12, 2023.

1. Mootness/Redressability and Prudential Standing Issues

The State[1] argues that Plaintiffs' challenge to the State Energy Policy is moot due to the repeal of that statute on March 16, 2023. Defs.' Br. Supp. Mootness at 2 (citing *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 7, 494 P.3d 892 (quoting *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 16, 276 P.3d 867); *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start Inc.*, 2009 MT 362, ¶ 22, 219 P.3d 881.

Plaintiffs argue that "the State has failed to establish that they no longer have a state energy policy, or that they have ceased systematically authorizing, permitting, encouraging, and facilitating activities promoting fossil fuels and resulting in dangerous GHG emissions." Pls.' Br. Opp. Mootness at 16.

Plaintiffs also argue that the voluntary cessation and public interest exceptions apply. Pls.' Br. Opp. Mootness at 14 (citing *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 14, 523 P.3d 519 (citing

[1] For simplicity, the Court will refer to Defendants as "the State" or "State" throughout the remainder of the opinion.

In re Big Foot Dumpsters & Containers, LLC, 2022 MT 67, ¶ 15, 507 P.3d 169)). *See also Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 38-39, 142 P.3d 864 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *Ramon v. Short*, 2020 MT 69, ¶¶ 21-26. 460 P.3d 867.

The Court will not analyze mootness per se because, after the repeal of Mont. Code Ann § 90-4-1001, other redressability and prudential issues are dispositive. In the Order on Motion to Dismiss, the Court held that declaring "these statutory provisions unconstitutional" would partially redress Plaintiffs' claimed injuries. Order on MTD at 18-19. Plaintiffs cite *Columbia Falls Elem. v. State* to support their contention that the Court can declare a *de facto* policy and the "aggregate acts" unconstitutional, but that suit challenged a legislative act. Pls.' Br. Opp. Mootness at 13; *But see* 2005 MT 69, ¶¶ 23-25, 109 P.3d 257. In this sense, the State's reading of *Donaldson* is correct: "the broad injunction and declaration not specifically directed at any particular statute would lead to confusion and further litigation." Defs.' Reply Br. Supp. MSJ at 11 (citing *Donaldson*, 2012 MT 288, ¶ 9, 292 P.3d 364).

Plaintiffs' contention that a ruling from this Court on the constitutionality of the State's "longstanding and ongoing course of conduct . . . would change the legal status of such conduct and would steer Defendants' future conduct into constitutional compliance" is not persuasive. Pls.' Br. Opp. Mootness at 13. Notwithstanding the fact that Plaintiffs pled the aggregate acts as an unconstitutional course of conduct, Compl. at 38, the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of the "statutory provisions" and an injunction on the

enforcement of those provisions. Order on MTD at 18-19; Order on Second Rule 60 Clarification at 7:10-12.

Plaintiffs' claims involving the *de facto* State Energy Policy are **DISMISSED** without prejudice for redressability and prudential standing issues.

2. Summary Judgment

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *State v. Avista Corp.*, 2023 MT 6, ¶ 11, 411 Mont. 192, 523 P.3d 44 (quoting Mont. R. Civ. P. 56(c)(3)). "To determine whether a genuine issue of material fact exists, [courts] view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party." *Brishka v. State*, 2021 MT 129, ¶ 9, 487 P.3d 771 (citing *McLeod v. State ex rel. Dep't. of Transp.*, 2009 MT 130, ¶ 12, 206 P.3d 956). The initial burden is on the movant to demonstrate that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. *Id.* If the movant satisfies this burden, it shifts to the nonmovant "to prove, by more than mere denial or speculation, that a genuine issue does exist." *Id.* (citing *Valley Bank v. Hughes*, 2006 MT 285, ¶ 14, 147 P.3d 185). "On summary judgment, trial courts do not apply a standard of proof or issue findings of fact," and "need not weigh evidence, choose one disputed fact over another, or assess the credibility of the witnesses." *Barrett, Inc. v. City of Red Lodge*, 2020 MT 26, ¶ 8, 457 P.3d 233.

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UNDISPUTED FACTS

Movant State did not set forth undisputed facts in its motion for summary judgment or related briefing. On Reply, the State says this was an "inadvertent omission" and argues that denying summary judgment on that basis would elevate "form over substance." Defs.' Reply Br. Supp. MSJ at 2 n. 2. The State further argues that this case "can be decided on summary judgment because all of Plaintiffs' remaining claims for relief hinge on whether Plaintiffs have the right to a 'stable climate system' under the Montana Constitution—a purely legal question." *Id.* at 2. This is a confounding argument because the State has expended considerable effort challenging the factual bases for Plaintiffs' standing throughout this litigation.

The Court appreciates its duty to not elevate form over substance, but Rule 56(c)(3) clearly requires the movant to demonstrate that there are no genuine disputes over material facts—this is substance. It is unclear how the Court could award the State judgment as a matter of law when the State did not set forth any undisputed facts entitling it to that judgment, regardless of whether Plaintiffs asserted undue prejudice or whether they "submit a detailed response." *Id.* at 2 n. 2.

DISPUTED MATERIAL FACTS

In the judgment of the Court, the following material facts are in dispute:

1. Whether Plaintiffs' injuries are mischaracterized or inaccurate.

2. Whether Montana's GHG emissions can be measured incrementally.

3. Whether climate change impacts to Montana's environment can be measured incrementally.

4. Whether climate impacts and effects in Montana can be attributed to Montana's fossil fuel activities.

5. Whether a favorable judgment will influence the State's conduct and alleviate Plaintiffs' injuries or prevent further injury.

DISCUSSION

I. Case-or-Controversy Standing

The State argues that Plaintiffs have failed to "set forth by affidavit or other evidence specific facts" that establish their standing to challenge the MEPA Limitation. Defs.' Br. Supp. MSJ at 3 (internal quotation marks omitted). But the initial burden lies with the movant to demonstrate the lack of genuine disputes over material facts. *Brishka* ¶ 9.

As a preliminary note, it is unclear how the standing rules interact with the concept of implication. In *MEIC I*, the Court held that "the right to a clean and healthful environment is a fundamental right … and that any statute or rule which *implicates* that right *must be* strictly scrutinized." *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality* (*MEIC I)*, 1999 MT 248, ¶ 63, 988 P.2d 1236 (emphasis added). The *MEIC I* Court also noted that the Framers "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *Id.* ¶¶ 77. The Court highlighted this comment from Delegate Foster: "[I]f we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in

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fact, that my health is being damaged in order to find some relief, then we've lost the battle." *Id.* ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, March 1, 1972).

a. Distinguishable Injuries

The Court ruled that Plaintiffs sufficiently alleged "significant and physical manifestations of an infringement of their constitutional right to a clean and healthful environment." Order on MTD at 14:19-22 (citing *MEIC I* ¶ 77). Plaintiffs set forth specific facts to support their allegations. Compl. ¶¶ 14-81; Pls.' Br. Opp. MSJ at 2-3 n. 5-11.

The State's position that Plaintiffs' alleged injuries are "inaccurate, mischaracterized, or not otherwise demonstrating standing" only emphasizes the factual dispute over these injuries. Defs.' Br. Supp. MSJ at 4. It is not appropriate to weigh conflicting evidence or assess the credibility of witnesses at summary judgment; those duties are for the fact finder at trial. *Barrett, Inc.* ¶ 8.

The State asserts that Plaintiffs' claims are not "distinguishable from the injury to the public generally." Defs.' Br. Supp. MSJ at 4 (quoting *MEIC I* ¶ 41). However, "to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 374, 922 P.2d 1140 (1996) (quoting *US v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973); *see also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process").

The State points to *Mitchell v. Glacier Cnty.* for the proposition that Plaintiffs' may not merely allege they "suffer[] in some indefinite way in common with people generally." 2017 MT 258, ¶ 10, 406 P.3d 427; Defs.' Br. Supp. MSJ at 4. But that case was not about distinguishable injuries. *Id.* ¶ 36 (citing *Helena Parents Comm'n* at 372-74) ("This case differs significantly from *Helena Parents Comm'n*. First, the contested issue—and the focus of our analysis in that case—was on the second requirement for standing: whether the alleged injury was distinguishable from the injury to the public generally.")

Unlike *Mitchell*, *Helena Parents Comm'n* is instructive. In that case, plaintiffs were able to establish a kind of taxpayer standing by showing that the government would "impose tax burdens on them as it seeks to recoup losses and that the investments will result in a lessening of governmental services." 277 Mont. at 372. The Court went on to determine whether the taxpayers' injury was distinguishable from the public generally. It held the district court "failed to consider that 'the injury need not be exclusive to the complaining party,' and failed to consider *Lee v. State*." *Id.* (quoting *Sanders v. Yellowstone County*, 53 Mont. St. Rep. 305, 306, 915 P.2d 196 (1996) (internal citation omitted)) (citing *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981)).

In *Lee*, which involved a constitutional challenge to a statewide 55 mile-per-hour speed limit, the State claimed that the plaintiff lacked standing because all members of the driving public had an affected interest in the statute and attempted to dismiss the case. The Court found Lee had standing based on the threat of prosecution, stating: "[t]he acts of the legislature which directly

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concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless." *Lee*, 195 Mont. at 7.

Fifteen years later, in *Helena Parents Comm'n*, the Court elaborated on *Lee*'s reasoning: "[n]ot everyone who claims they will be injured claims to have been injured in the same way, and while each plaintiff claims a form of harm in common with other members of a larger class of people, the harm each claims is not common to all members of the general public." 277 Mont. at 373-74.

It is true, as the State argues, that climate change is a global problem and affects everyone. Had Plaintiffs merely alleged climate change was the injury, the State's rule from *Mitchell* would apply. 2017 MT 258, ¶ 10. Here, Plaintiffs' have set forth specific facts that show their claimed injuries are concrete, particularized, and distinguishable from the public generally. Pls.' Br. Opp. MSJ at 2-3 n. 4-12; Compl. ¶¶ 14-81. The fact that many other Montanans are likely experiencing similar injuries is not dispositive.

b. Traceability and Redressability

The Court has already ruled on whether Plaintiffs' injuries are fairly traceable to State actions performed pursuant to MEPA and the MEPA Limitation, and whether Plaintiffs' injuries could be alleviated by an order declaring the MEPA Limitation unconstitutional. Order on MTD at 7-19. The State argues that discovery has resolved the factual disputes around causation and reiterates its position that Plaintiffs have failed to establish the "direct causal connection" articulated in *Larson v. State*, 2019 MT 28, ¶ 46, 434 P.3d 241, 262. The Court disagrees.

The State appears to be conflating the fairly traceable standard for standing with some kind of tort-like causation standard. As the Court already stated, "causation is an issue best left 'to the rigors of evidentiary proof …'" Order on MTD at 8-9 (quoting *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd on non-material grounds by Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 411, 131 S. Ct. 2527, 2530 (2011) (US Supreme Court affirmed Second Circuit's exercise of jurisdiction; reversed on displacement)). Furthermore, "the 'fairly traceable' standard is not equivalent to a requirement of tort causation." *Connecticut,* 582 F.3d at 346 (citing *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992) ("for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause" (citation and internal quotation marks omitted)); *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006)).

In its briefing, the State quotes the "direct causal connection" language from *Larson* but omits how it was prefaced: "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 the injury. *Larson* ¶ 46 (emphasis added). A plain reading suggests a "direct causal connection" is only required when plaintiffs have "a general or abstract interest" in the controversy, but that would violate the standing rules for concrete and particularized injury. Furthermore, *Larson* did not involve the constitutionality of statutes. It is unclear how this Court should interpret and apply this phrase from *Larson* to this case.

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This "direct causal connection" language has only been used to describe standing in *Larson* itself. *Id.* To learn where that language came from, the Court performed a Lexis search for "direct causal connection" and found this language in thirteen other Montana cases: eleven workers' compensation cases and two negligence cases. In all those other cases, the courts were describing tort causation, not standing. *See e.g., Andree v. Anaconda Copper Mining Co.*, 47 Mont. 554, 568, 133 P. 1090 (1913); *Landeen v. Toole Cnty. Ref. Co.*, 85 Mont. 41, 54, 277 P. 615 (1929); *Birdwell v. Three Forks Portland Cement Co.*, 98 Mont. 483, 497, 40 P.2d 43 (1935); *Young v. Liberty Nat'l Ins. Co.*, 138 Mont. 458, 463, 357 P.2d 886 (1960); *Hines v. Indus. Accident Bd.*, 138 Mont. 588, 601, 358 P.2d 447 (1960) (Castles dissenting); *Greger v. United Prestress*, 180 Mont. 348, 352, 590 P.2d 1121 (1979); *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 477, 665 P.2d 783 (1983); *Whittington v. Ramsey Constr. & Fabrication*, 229 Mont. 115, 122, 744 P.2d 1251 (1987); *Polk v. Planet Ins. Co.*, 287 Mont. 79, 83, 951 P.2d 1015 (1997); *Hanks v. Liberty Nw. Ins. Corp.*, 2002 MT 334, ¶ 33, 62 P.3d 710 (Trieweiler dissenting); *Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 57, 67 P.3d 229 (Rice dissenting); *Pittman v. Horton*, 2004 ML 1654, 18, 2004 Mont. Dist. LEXIS 1771, *14; *Kratovil v. Liberty Nw. Ins. Corp.*, 2008 MT 443, ¶ 19, 200 P.3d 71.

Furthermore, federal courts have held bench trials "where the plaintiffs' standing allegations were put to the proof based on the facts elicited," and even in that context, "courts have pointed out that 'tort-like causation is not required by Article III.'" *Connecticut* at 346 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996); *Nat. Res. Def.*

Council v. Watkins, 954 F.2d 974, 976 (4th Cir. 1992); *Pub. Interest Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990) ("A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment")). And Montana courts have recognized, even in tort law, that causation is a factual issue to be *proven* at trial, not summary judgment. *Prindel v. Ravalli Cnty*., 2006 MT 62, ¶ 46, 133 P.3d 165 ("[C]ausation should not be decided on summary judgment, but should be resolved by the trier of fact").

The State also argues that MEPA "requires a reasonably close causal relationship between the triggering state action and the subject environmental effect," and that "an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise" of its authority. Defs.' Reply Br. Supp. MSJ at 6 (quoting *Bitterrooters for Planning, Inc. v. Mont. Dept. of Envtl. Quality*, 2017 MT 222, ¶ 33, 401 P.3d 712). "Thus," the State says, "because Defendants have no independent statutory authority to regulate or prevent climate change or its environmental impacts, any exclusion from environmental review of climate change or its impacts pursuant to the MEPA Limitation cannot be considered a legal cause of Plaintiffs' claimed injuries." *Id.* at 6-7.

Based on the pleadings and discovery, there appears to be a reasonably close causal relationship between the State's permitting of fossil fuel activities under MEPA, GHG emissions, climate change, and Plaintiffs' alleged injuries. Furthermore, the State has the authority to regulate GHG emissions and climate impacts by regulating fossil fuel activities that occur in Montana. Throughout this litigation, the State has pointed to the disparate statutes

governing specific activities such as the mining of coal, drilling oil and gas wells, and generating electricity from fossil fuels. *See e.g.,* Defs.' Br. Supp. MSJ at 5-6, 10. Those statutes clearly regulate fossil fuel activities, and the State's agents could alleviate the environmental effects of climate change through the lawful exercise of their authority if they were allowed to consider GHG emissions and climate impacts during MEPA review. It is a tautology to suggest that Plaintiffs cannot challenge the statute depriving the agencies of authority because the agencies lack that very authority. The State may not have the power to regulate out-of-state actors that burn Montana coal, but it could consider the effects of burning that coal before permitting a new coal mine. This Court cannot force the State to conduct that analysis, but it can strike down a statute prohibiting it.

As discussed in the Order on Motion to Dismiss, Plaintiffs only need to show their injuries will be effectively alleviated, remedied, or prevented by a favorable ruling. Order on MTD at 15:17-16:3 (citing *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241). The Court ruled that Plaintiffs had established redressability. *Id.* at 18:23.

In addition to the specific facts alleged and supported with data in the Complaint, Compl. ¶¶ 118, 122-141, 144-184, Plaintiffs have set forth specific facts by declaration and deposition that establish both causation and redressability, i.e.; Montana's contributions to GHG emissions can be measured incrementally, Dorrington 30(b)(6) Dep. 38:3-12; Montana's contributions are not *de minimis*, Erickson Expert Report at 19-20; Erickson Dep. 38:6-7.

The State disputes Plaintiffs' specific facts, and factual disputes are not appropriate for disposition at summary judgment. The Court will find facts after trial. Here and now, the State has not shown that there are no genuine issues of material fact. Notwithstanding the State's failure to meet its own burden,

Plaintiffs have sufficiently supported their allegations with specific facts to survive summary judgment.

II. Prudential Standing

Viewing the MEPA Limitation separately from the *de facto* energy policy, Plaintiffs' reading of *Donaldson* is correct. Pls.' Br. Opp. MSJ at 12 ("Plaintiffs are not asking this Court to enact new laws") (citing *Donaldson* ¶ 4). Here, like in *Donaldson*, Plaintiffs asked for remedies that went beyond the scope of the Court's power and the Court has dismissed those claims. *See supra* pp. 3-4; Order on MTD at 21:4-20. However, unlike *Donaldson*, this case now only involves declaring a statute unconstitutional. As the State concedes, declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal. Defs.' MSJ at 8 ("The Montana Legislature would have to amend MEPA to require this analysis"). There are no prudential concerns that prevent this Court from adjudging whether the MEPA Limitation is constitutional.

III. Absurd Results

"The absurd results canon . . . is a rule of statutory construction that serves to help resolve . . . ambiguity pursuant to which courts should construe statutes so as to avoid results glaringly absurd." *NRDC v. United States DOI*, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020) (quoting *United States v. Venturella*, 391 F.3d 120, 126-27 (2d Cir. 2004)) (internal quotation marks removed).

The State argues that it "strains the bounds of credulity to assume that the Framers of the Montana Constitution had any intention of the right to a clean and healthful environment to be construed so broadly," Defs.' Br. Supp.

MSJ at 13. The Court interprets this argument as a rebuttal to Plaintiffs' allegations that a clean and healthful environment includes "a stable climate system that sustains human lives and liberties." Compl. at 103 (Prayer for Relief 4). The State speculates that an adverse ruling in this case will "give rise to seemingly endless litigation against all manner of public and private entities and individuals for any given emission of GHGs—from electrical generation to driving a car or using wood-burning stoves." Defs.' Br. Supp. MSJ at 13.

While the State correctly points out that Convention delegates never explicitly discussed a "stable climate system" during the debates over the environmental provisions, Defs.' Br. Supp. MSJ at 13, the Montana Supreme Court has recognized that "it was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language." *MEIC I* ¶ 75 (citing Convention Transcripts, Vol IV at 1209, March 1, 1972). In fact, the Court has repeatedly found that the Framers intended the state constitution contain "the strongest environmental protection provision found in any state constitution." *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288 (quoting *MEIC I* ¶ 66).

Furthermore, the obligations of the Legislature found in Art. IX, Sec. 1 include providing "adequate remedies for the protection of the environmental life-support system from degradation." Mont. Const. Art. IX, Sec. 1. The Court in *MEIC I* cited Delegate McNeil's comments for guidance as to what that meant: "the term 'environmental life support system' is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no

question that it cannot be degraded." *MEIC I* ¶ 67 (citing Convention Transcripts, Vol. IV at 1201, March 1, 1972) (emphasis in opinion). "[O]ur intention was to permit no degradation from the present environment and affirmatively require enhancement of what we have now." *Id.* ¶ 69 (quoting Convention Transcripts, Vol IV at 1205, March 1, 1972) (emphasis in opinion).

Accordingly, the *MEIC I* Court concluded that the Montana Constitution's environmental provisions were "both anticipatory and preventative," and that "the delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC I* ¶¶ 76-77. Delegate Foster's comment is apposite again: "[I]f we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in fact, that my health is being damaged in order to find some relief, then we've lost the battle." *MEIC I* ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, March 1, 1972). These conclusions sound in both this absurdity analysis and the standing analysis previously discussed.

The Court reaffirmed the conclusions of *MEIC I* in *Park Cnty,* which warrants quoting at length:

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> "Our conclusions in *MEIC I* are consistent with the constitutional text's unambiguous reliance on preventative measures to ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books. Article IX, Section 1, of the Montana Constitution describes the environmental rights of 'future generations,' while requiring 'protection' of the environmental life support system 'from degradation' and 'prevent[ion of] unreasonable depletion and degradation' of the state's natural resources. This forward-looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.
>
> Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, Section 1, Subsections 1 and 2, of the Montana Constitution command that the Legislature 'shall provide for the administration and enforcement' of measures to meet the State's obligation to 'maintain and improve' the environment. Critically, Subsection 3 explicitly directs the Legislature to 'provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.' Mont. Const. art. IX, § 1(3)."

Park Cnty. ¶¶ 62-63.

Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, it would not be absurd to find that a stable climate system is included in the "clean and healthful environment" and "environmental life-support system" contemplated by the Framers. Mont. Const. Art. II, Sec. 3; Art. IX, Sec. 1.

There is also no evidence, besides the State's speculative and conclusory statements, that such a judgment would result in an opening of the

floodgates. The Southern District of New York recently dealt with a similar argument from the Department of the Interior regarding incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA), finding that "Interior's complaint that without the Jorjani Opinion the MBTA raises the specter of criminal liability any time someone allows his or her cat to go outside falls flat." *NRDC*, 478 F. Supp. 3d at 487. The State's argument that holding a clean and healthful environment to include a stable climate system would open the floodgates for private actions against Montanans for driving cars or using wood stoves similarly "falls flat." *Id.*

IV. Indispensable Parties

Next, the State argues that Plaintiffs failed to join indispensable parties. The only bases proffered in support of this argument are the speculative statements that "the declaratory relief Plaintiffs seek could and would result in the reduction of GHG emissions *through the destruction of Montana's fossil fuel industry* and the injunction of related activities," and that "Plaintiffs would surely reverse and prohibit the permitting of all manner of fossil-fuel related activities on a unilateral basis *if they had their druthers*." Defs.' Br. Supp. MSJ at 13-14 (emphasis added). The first statement essentially concedes that declaratory relief would redress Plaintiffs' injuries, contrary to the State's redressability arguments. The second demonstrates that this argument relies on speculative hyperbole.

As discussed above, declaring the MEPA Limitation unconstitutional is not commanding the State to consider climate change in every project or proposal. Furthermore, vacatur of specific permits is not an available remedy in this case. There are no indispensable parties unnamed in this suit.

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V. Constitutionality

"The constitutionality of a statute is presumed, 'unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.'" *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (quoting *Powell v. State Comp. Fund.*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of a statute bears the burden of proof. *Id.* (citing *Big Sky Colony, Inc. v. Mont. Dep't of Labor and Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231). To prevail on their facial challenges, Plaintiffs must show "that 'no set of circumstances exists under which the [challenged statute] would be valid, i.e., that the law is unconstitutional in all of its applications' or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen*, 2020 MT 309, ¶ 12, 402 Mont. 231, 477 P.3d 335) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

However, "the distinction" between facial and as-applied challenges "is perhaps overstated." *Park Cnty.* ¶ 85. "Courts seek to resolve the controversy at hand, not to speculate about the constitutionality of hypothetical fact patterns." *Id.* ¶ 86. As the Montana Supreme Court has previously held for other MEPA amendments: "the 2011 Amendments [to MEPA] are unconstitutional because they substantially burden a fundamental right and are not narrowly tailored to further a compelling government interest. Thus, our conclusion that [the statutes are] unconstitutional flows from the content of the statute itself, not the particular circumstances of the litigants." *Id.* The Court's reasoning in *Park Cnty.* is compelling.

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a. Balancing competing constitutional rights and interests is the Court's duty.

The State cites *Berman*, 348 U.S. 26, 32-33 (1954) for the proposition that it "is solely the Legislature's prerogative" to balance competing constitutional rights and interests. Defs.' Br. Supp. MSJ at 15. The State argues that "[i]t is not for Plaintiffs *or the judiciary* to strike a proper balance between Montanan's right to a clean and healthful environment" and other rights. *Id.* (emphasis added).

Berman involved a challenge to Congress' exercise of police powers in Washington D.C.—a condemnation of property pursuant to the District of Columbia Redevelopment Act of 1945. *Id.* at 31. The Supreme Court held that great judicial deference is given to a legislative determination that a use is a public use. *Id.* at 31-32. The language the State is ostensibly referencing states: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation…" *Berman* at 32. *Berman* does not present the factual or legal issues presented here, and it does not hold that the legislature is generally the arbiter of constitutional rights. *Compare, e.g., Missoulian v. Bd. of Regents*, 207 Mont. 513, 529, 675 P.2d 962 (1984) (Court required to "balance the competing constitutional interests in the context of the facts of each case"); *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 433-34 712 P.2d 1309 (1986) (Court developed the "meaningful middle-tier" scrutiny which includes a balancing of interests test); *Crites v. Lewis & Clark Cnty.*, 2019 MT 161, ¶ 27, 396 Mont. 336, 444 P.3d 1025 (quoting *In re Lacy*, 239 Mont. 321, 326, 780 P.2d 186 (1989)).

("Because the judiciary has authority over the interpretation of the Constitution, it is the courts' duty to balance the competing rights at issue"). It is the judiciary's duty to determine a statute's constitutionality and balance competing constitutional rights and interests.

b. The MEPA Limitation

When interpreting a statute, the courts "look first to the plain meaning of the words [the statute] contains." *State v. Kelm*, 2013 MT 115, ¶ 22, 300 P.3d 387 (quoting *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 55, 293 P.3d 817). Courts must endeavor to give "harmonious effect" to its various provisions, *Crist v. Segna*, 191 Mont. 210, 213, 622 P.2d 1028 (1981), and may not construe a statute in a manner that would "defeat its evident object or purpose." *Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568 (1994).

"The essential purpose of MEPA is to aid in the agency decision-making process otherwise provided by law by informing the agency and the interested public of environmental impacts that will likely result from agency actions or decisions." *Bitterrooters*, 2017 MT 222, ¶ 18. **"**MEPA is an essential aspect of the State's efforts to meet its constitutional obligations." *Park Cnty.* ¶ 89.

The MEPA Limitation provided:

> (2)(a) 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.
> (b) An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:

> (i) the department of fish, wildlife, and parks for the management of wildlife and fish;
> (ii) an agency reviewing an application for a project that is not a state-sponsored project to the extent that the review is required by law, rule, or regulation; or
> (iii) a state agency and a federal agency to the extent the review is required by the federal agency.

Mont. Code Ann. 75-1-201(2) (Amended by HB 971 on May 10, 2023).

While this case has been pending, Judge Moses' held in *MEIC v. DEQ*:

> Here, the plain language of MCA 75-1-201(2)(a) precludes agency MEPA review of environmental impacts that are 'beyond Montana's borders,' but it does not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana. DEQ misinterprets the statute. They must take a hard look at the greenhouse gas effects of this project as it relates to the impacts within the Montana borders.

MEIC v. DEQ, DV-56-2021-0001307 (13th District, April 6, 2023) (Order on Summary Judgment) at 29:3-9.

The substance of HB 971 had been requested on December 3, 2022, but the draft was not provided until April 11, 2023. The bill was introduced on April 14, 2023, eight days after Judge Moses' ruling. The bill was sent to enrolling on May 1 and signed by the Governor on May 10. It is a bill to clarify the statute and amends Mont. Code Ann. § 75-1-201(2) to say:

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> "(2)(a) 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.
> (b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:
> (i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant."

Mont. Code Ann. § 75-1-201(2) (enacted May 10, 2023) (new language underlined).

Throughout this litigation, the parties and the Court have used varying terminology to describe this statute: exclusion, exception, limitation, etc. This statute is aptly described as the MEPA Limitation because it categorically limits what the agencies, officials, and employees tasked with protecting Montana's environment can consider—it hamstrings them. On its face, the MEPA Limitation appears to conflict with the purpose of MEPA, which is to aid the State in meeting its constitutional obligation to prevent degradation by "informing the agency and the interested public of environmental impacts that will likely result" from State actions. *Bitterrooters* ¶ 18.

The State argues that since not all State actions taken pursuant to MEPA would implicate effects beyond Montana's borders, the statute is patently constitutional because Plaintiffs failed to prove "beyond a reasonable doubt that 'no set of circumstances exist under which the [challenged sections] would be valid." Defs.' Br. Supp. MSJ at 14 (quoting *Mont. Cannabis* ¶ 14; *Satterlee* ¶ 10). The State conveniently omits the second half of that rule, which states: "or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen*, 2020 MT 309,

¶ 12, 402 Mont. 231, 477 P.3d 335 (emphasis added) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

Plaintiffs need not prove the unconstitutionality of the statute on summary judgment, and the State's attempt to cherry-pick situations when the MEPA Limitation has no real bearing on the decision-making process is unavailing. The MEPA Limitation bars the agencies from considering GHG emissions and climate impacts for any project or proposal, unless compelled by Federal law, whether the project would lead to any of those effects or not. But even if an analysis of GHGs and climate impacts is unnecessary given the nature and scope of a particular project, the statute still imposes a blanket prohibition. The Montana Supreme Court dealt with this argument in *Park Cnty.* and approvingly quoted Justice Leaphart's concurrence in *MEIC I:*

> "The fact that there may be water discharges from well tests, say for agricultural purposes, that do not in fact create harm to the environment, does not alter the fact that such discharges are exempted from nondegradation review and that such review is the tool by which the State implements and enforces the constitutional right to a clean and healthy environment."

Park Cnty. ¶ 87 (quoting *MEIC I*, ¶ 85 (Leaphart, J., specially concurring)). The Court found "Justice Leaphart's reasoning persuasive and adopt[ed] it" in that case. *Id.* ¶ 88.

Similarly, the fact there may be projects that do not implicate GHGs and climate impacts does not alter the fact that the statute prohibits considering those factors. The State vigorously contends that MEPA is procedural, and the Court agrees, but "[p]rocedural, of course, does not mean unimportant." *Park Cnty.* ¶ 70 (internal quotation marks omitted). The MEPA

Limitation affects MEPA procedure the same way every time—it blocks an entire line of inquiry.

Next, the State argues that it is entitled to summary judgment because Plaintiffs have failed to establish the unconstitutionality of the exceptions to the MEPA Limitation. Defs.' Br. Supp. MSJ at 16. The State does not offer any legal authority supporting this proposition, and the Court rejects it. The *exceptions* to an allegedly unconstitutional statute could be constitutional. But that does not change the fundamental analysis of the statute itself. *See Park Cnty.* ¶ 86. Two narrow exceptions, exceptions that merely allow the agencies to conduct the analysis Plaintiffs want them to do, and only when required by Federal law, cannot shield the statute's main text from constitutional review. *Id.* The intent of the Framers was not to lag behind the Federal government in environmental protections, it was to have the strongest constitutional environmental protections in the country. *Park Cnty*. ¶ 61; *MEIC I* ¶¶ 66, 74-75. If anything, these exceptions inform the tailoring analysis under strict scrutiny, but the case has not yet proceeded to that stage.

The MEPA Limitation clearly implicates Plaintiffs' fundamental right to a clean and healthful environment. A statute may only infringe a fundamental right if it is narrowly tailored to serve a compelling state interest. *Park Cnty.* ¶¶ 84-86. Whether Plaintiffs can prove standing and whether the statute can withstand strict scrutiny will be determined after trial.

VI. Plaintiffs' other claims.

The State also seeks summary judgment on Plaintiffs' equal protection claim, arguing that the MEPA Limitation does not create classifications. Defs.' Br. Supp. MSJ at 18. However, Plaintiffs correctly point

out that "the law may contain no classification . . . and be applied evenhandedly," but still "may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons." Pls.' Br. Opp. MSJ at 20 (quoting *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 420 P.3d 528). Whether climate change and the MEPA Limitation impact youths disproportionately is a material fact to be proven at trial.

Plaintiffs also levied claims under the right to seek safety, health and happiness, Mont. Const. Art. II, Sec. 3, 15, 17, Art. IX, Sec. 1; and the public trust doctrine, Mont. Const. Art. IX, Sec. 1, 3. Compl. Counts II, III, IV. The State argues on Reply that "all of Plaintiffs' claims are subject to dismissal [not summary judgment] under Defendants' arguments regarding standing, prudential concerns, absurd results, failure to join indispensable parties, and failure to demonstrate the facial invalidity" of the challenged statutes, and that none of these claims "survive summary judgment if Defendants prevail on any one of these arguments.". Defs.' Reply Br. Supp. MSJ at 18. As discussed above, the State did not prevail on those arguments. Also, the State did not establish any undisputed facts that entitle it to summary judgment on those claims.

For the foregoing reasons, Defendants' motion for summary judgment is **DENIED**.

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KS/sm/CDV-2020-307 Ord Def Motions Dismiss Mootness and Summ Judg

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON MOTIONS IN LIMINE**

Before the Court are the parties' motions *in limine* (MILs). Youth Plaintiffs filed seven MILs, and the Court ruled on MIL No. 1 on Feb. 2, 2023. Plaintiffs' MIL Nos. 2-6 are opposed by the State and will be addressed in turn. Plaintiffs' MIL No. 7 is not opposed by the State, but there is a dispute over authenticating agency documents. The State presents seven MILs. The State's MILs Nos. 5 and 7 are unopposed by Plaintiffs and will therefore be granted. The State's remaining MILs will be addressed after Plaintiffs'.

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Plaintiffs' MIL No. 2: Remote Testimony of Dr. Trenberth.

The State does not oppose remote testimony for Dr. Trenberth because of his medical condition, but other witnesses will not be allowed to testify remotely unless the moving party shows good cause. This motion will be granted.

Plaintiffs' MIL No. 3: Limit Scope of Hybrid and 30(b)(6) Witness to Testimony Given in Depositions.

Plaintiffs' MIL No. 3 seeks to limit the testimony of State's Hybrid Experts Dave Klemp and Sonja Nowakowski to opinions expressed in their depositions, to eliminate surprise and promote effective cross-examination of the witnesses.

The State argues that it disclosed the identity of the hybrid witnesses and the scope of their testimony as best it could, given the broad framing of Plaintiffs' deposition notices and questioning.

The Court agrees with the State that Plaintiffs could have asked more specific questions in the depositions. The witnesses will be allowed to testify on matters regarding which they indicated, for example, that their testimony "would depend on the question that was asked." Nowakowski Dep. 28:4-12.

However, the Court also agrees with Plaintiffs that developing an opinion in preparation for trial would make a hybrid witness a retained expert witness subject to the disclosure requirements of Mont. R. Civ. P. 26(b)(4). Therefore, the hybrid witnesses will not be allowed to opine on matters regarding which they said they had no opinion or "can't answer that." Klemp Dep. 103:11-20.

Plaintiffs also move to limit the testimony of the State's agency designees to the testimony given during their depositions because the witnesses expressed varying degrees of knowledge or lack of knowledge on various deposition topics. The State argues that Plaintiffs' deposition notices were overly broad and that "it would literally take a large portion of DEQ staff to cover the topics listed." Defs.' Comb. Br. Opp. Mot. Limine at 9.

Designated representatives must testify about "information known or reasonably available" to the agency. Mont. R. Civ. P 30(b)(6). Even if a witness testifies differently than in deposition, that testimony must be based on information that was discoverable by Plaintiffs. Plaintiffs may also cross-examine witnesses as to why they were unable to offer that testimony during their depositions. This motion will be granted in part and denied in part as set forth above.

Plaintiffs' MIL No. 4: Limit rebuttal expert testimony of Dr. Sheppard.

Dr. Sheppard was retained to critique the methodology of Dr. Van Susteren. Plaintiffs argue that, because Dr. Sheppard lacks expertise concerning the mental health impacts of climate change, she should not be allowed to opine on the methodology Dr. Van Susteren used to formulate her expert opinions. The Court disagrees.

The Court ruled that Plaintiffs' mental health was not genuinely at issue in this case. Order on Motion Under Rule 35(a) for IMEs at 3-6. That ruling was made in part because Dr. Van Susteren had not formally diagnosed Plaintiffs. Dr. Van Susteren's findings were reported as case studies or profiles, and they are not so esoteric as to require specialized training to evaluate them. Dr. Sheppard has the requisite education and experience as a

neuropsychologist to comment on Dr. Van Susteren's psychological evaluations and whether Dr. Van Susteren utilized a reliable methodology to reach her conclusions. This motion will therefore be denied.

Plaintiffs' MIL No. 5: Exclude expert opinions of Dr. Curry.

Plaintiffs' MIL No. 5 seeks to exclude and/or limit the scope of Dr. Curry's expert testimony to climate science—that for which she has the requisite "knowledge, skill, experience, training, or education." Mont. R. Evid. 702. Dr. Curry's report discusses scientific topics such as weather, fossil fuels, GHGs, and renewable energy sources, but it also contains commentary on media and mental health.

Dr. Curry is qualified to opine on climate science and renewable energy. But she is not qualified to "proffer[] testimony as a historian of the climate change debate," or opine about mental health. *Mann v. Nat'l Review, Inc., et al.*, 2012 CA 008263 B (DC Superior Ct.) at 12. She may offer opinions about the accuracy of media coverage of climate science, but not the mental impacts on Plaintiffs or others.

The section of Dr. Curry's report on climate change rhetoric and mental health goes beyond her "knowledge, skill, experience, training, or education." Mont. R. Evid. 702. At trial, the Court will necessarily determine the reliability of Dr. Curry's methodology in reaching her scientific opinions. This motion is granted in part and denied in part.

Plaintiffs' MIL No. 6: Stipulate to admission of expert reports unless there are objections besides hearsay.

Plaintiffs' MIL No. 6 seeks a broad ruling that expert reports of the parties will not be excluded on hearsay grounds. This is a bench trial and

Plaintiffs are correct that typical inadmissibility concerns are diminished, but the State is also correct that these experts will testify at trial and a trial-by-report will put an unnecessary burden on the Court. While many of the expert reports may be admitted into evidence, the Court will not broadly suspend the hearsay rules regarding expert reports. This motion will be denied.

Plaintiffs' MIL No. 7: Stipulate to the authenticity and foundation of select documents.

Plaintiffs' MIL No. 7 seeks an order deeming that more than 150 proposed exhibits have the proper authentication and foundation to be admissible at trial. According to Plaintiffs' Appendix A, attached to the MIL, the State has stipulated to the authenticity and foundation of about 30 of the proposed exhibits. Pls.' Mot. *In Limine* No. 7 Appendix A. Plaintiffs now state that the State has yet "to authenticate a single document listed in Appendix A." Pls.' Mot. *In Limine* No. 7: Second Notice of Submittal at 2.

In emails between the parties and during the final pre-trial conference on April 27, 2023, the State represented that it was not opposed to stipulating to authenticity and foundation for these documents but was burdened by the volume and scope of Plaintiffs' request. The State indicated it would "have those worked through" by the June 12, 2023, trial. *Id.* (quoting Transcript of Final Pre-Trial Conference at 8:1-5 (April 27, 2023)). It is now unclear what the State intends.

It may be necessary to establish at trial the authenticity or foundation of documents Plaintiffs offer as evidence. However, the Court also admonishes the State not to unreasonably contest foundation/authenticity if

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they are relatively clear. The Court declines to broadly order that the documents in Appendix A are authenticated and have proper foundation. This motion will be denied.

State's MIL No. 1: Preclude cumulative expert witness testimony.

State's MIL No. 1 seeks to preclude redundant expert testimony. The State points to portions of Plaintiffs' Expert Witness Disclosures that involve general information about GHGs, climate change, and the impacts. At the request of a party or on its own, the Court will intervene if offered testimony becomes too cumulative. See Mont. R. Evid. 403. This motion will be granted, but specific objection will be required if a party believes testimony has become unduly repetitive.

State's MIL No. 2: Preclude irrelevant expert witness testimony.

State's MIL No. 2 seeks to exclude irrelevant testimony, specifically Dr. Jacobson's anticipated testimony about renewable energy and Dr. Van Susteren's testimony about climate change and mental health. Evidence must be relevant to be admissible. Mont. R. Evid. 402. Evidence is relevant if it is probative of a material fact. Mont. R. Evid. 401.

Testimony about renewable energy and the feasibility of Montana shifting away from fossil fuels is relevant to the strict scrutiny analysis and will be allowed. Both parties have experts who will offer opinions on the feasibility of transitioning to renewables, and they may be presented.

While Dr. Van Susteren's testimony is relevant to Plaintiffs' standing and equal protection claim, the Court agrees with the State that "Plaintiffs' mental health is not really and genuinely in controversy." Order on Motion Under Rule 35(a) for IMEs at 3-6. Factors that support allowing Dr. Van

Susteren's testimony include the fact that this is a bench trial, and that Plaintiffs are not seeking damages for specific mental or emotional injuries. The Court can hear Dr. Van Susteren's testimony without risk of confusion or prejudice.

While the Court finds Plaintiffs' alleged mental and emotional distress relevant, the Court will not accept testimony from Dr. Van Susteren that goes beyond the distress contemplated in the Order on Motion Under Rule 35(a) for IMEs. This is not precisely a relevance issue, but the Court is nonetheless wary of the scope of Dr. Van Susteren's proposed testimony.

This motion is denied, but the Court recognizes Plaintiffs' need to tailor Dr. Van Susteren's testimony.

State's MIL No. 3: Preclude evidence, allegations, or testimony relating to claims or legal theories Plaintiffs did not plead in the complaint.

This motion is too vague to be meaningful whether granted or denied. Specific objection will be required. The motion is denied.

State's MIL No. 4: Preclude any witness not qualified or properly designated as an expert from offering opinions on highly technical matters.

This motion is also vague because it does not offer any testimony at issue. Non-expert witnesses will not be allowed to offer highly technical opinions. The State may choose to voir dire a witness if it believes the witness is offering an expert opinion on a "highly technical matter". This motion will be granted.

State's MIL No. 6: Lay or fact witnesses excluded until after testimony.

Mont. R. Evid. 615 provides that witnesses must be excluded at a party's request. The motion will be granted. The parties should instruct fact or lay witnesses to refrain from talking to each other or watching live streams of the proceedings.

ORDER

Based on the foregoing**, IT IS ORDERED**:

1. Plaintiffs' MIL No. 2 is **GRANTED**.

2. Plaintiffs' MILs Nos. 3 and 5 are **GRANTED IN PART, DENIED IN PART**.

3. Plaintiffs' MIL Nos. 4, 6, 7 are **DENIED**.

4. State's MILs Nos. 1, 4, 5, 6, and 7 are **GRANTED**.

5. State's MILs Nos. 2 and 3 are **DENIED**.

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KS/sm/CDV-2020-307 Ord Motions in Limine

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CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Complaint - Formal Complaint and Citation to Appear to the following on 09-28-2023:

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Electronically signed by Deborah Bungay on behalf of Michael D. Russell
Dated: 09-28-2023