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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS MEPA CLAIMS**

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INTRODUCTION

For the seventh time now, Defendants seek to close the courthouse doors to Youth Plaintiffs' meritorious claims and avoid standing trial for their constitutional violations.[1] Like their previous efforts, Defendants' Motion to Dismiss Plaintiffs' Montana Environmental Policy Act ("MEPA") Claims (Doc. 377) should be denied. It is clear—in light of this Court's Order on Defendants' Motions to Dismiss for Mootness and for Summary Judgment ("Order on Summary Judgment") (Doc. 379) and for the reasons set forth below—§ 75-1-201(2)(a), MCA, was and remains unconstitutional and Defendants' unconstitutional conduct thereunder continues. The purported crux of Defendants' motion is that House Bill 971 ("HB 971") "substantively amended" the provision of MEPA at issue in this case—the "Climate Change Exception,"[2] § 75-1-201(2)(a), MCA—and therefore moots Plaintiffs' claims based on the prior (2011) version of § 75-1-201(2)(a), MCA, and deprives this Court of subject matter jurisdiction "because that statute no longer exists." *See* Def. Br. at 1, 3 (Doc. 377).[3] Defendants are wrong, and this Court's Order on Summary Judgment makes that clear. This Court retains jurisdiction to review the constitutionality of both the 2011 and 2023 versions of the MEPA Climate Change Exception.

Significantly, Defendants identify no "substance" that has been changed by the HB 971 amendment: (1) HB 971 is explicitly entitled an Act revising MEPA "**clarifying and excluding the use of greenhouse gas evaluations**";[4] (2) Plaintiffs have plead and argued that as to the 2011 version of § 75-1-201(2)(a), MCA, "[t]his has been interpreted **to mean that Defendants cannot consider the impacts of climate change in their environmental reviews**";[5] and (3) this Court

[1] *See* Doc. 12, 86, 166, 275, 339, and Defendants' June 10, 2022 Writ of Supervisory Control.
[2] In this Court's recent order, the Court referred to § 75-1-201(2)(a), MCA, as the "MEPA Limitation." *See* Order on Summary Judgment at 23 (Doc. 379). Plaintiffs refer to § 75-1-201(2)(a), MCA, as the "MEPA Climate Change Exception" throughout this brief for consistency with their Complaint and prior briefing. However, Plaintiffs' usage and understanding of the terms "MEPA Limitation" and "MEPA Climate Change Exception" are synonymous.
[3] Defendants also argue that "the new statute has not been placed at issue by the pleadings, [and] the issues predicated on the statute are not issues for trial." Def. Br. at 8 (Doc. 377). Defendants' reference to *State v. Mont. Thirteenth Jud. Dist. Ct.,* OP 22-0552, 2023 Mont. LEXIS 18 (Jan. 10, 2023) and their suggestion that it stands for the proposition that supervisory control would be warranted here if this Court were to rule on the constitutionality of the 2011 version of § 75-1-201(2)(a), MCA, is misplaced and unavailing. There, the Montana Supreme Court granted a writ for supervisory control in a circumstance where the district court found it did not have jurisdiction over an administrative rule which the plaintiffs there did not directly challenge and yet nevertheless entered an order enjoining the defendant agency from implementing that rule. That factual scenario is inapposite to the current situation, where the challenged statute still exists, has been "clarified", and where both Plaintiffs' Complaint and Proposed Pre-Trial Order directly place the language of the former now clarified version of the statute at issue.
[4] See text of HB 971, attached as Exhibit A, to Defendants' Notice of Supplemental Authority, dated May 10, 2023. (Doc. 373) (All emphasis herein is added unless otherwise indicated.)
[5] Compl. ¶ 111 (Doc. 1).

has already explicitly found that HB 971 "**is a bill to clarify the statute**." Order on Summary Judgment at 22 (Doc. 379).[6] Thus, the very title of the bill,[7] the clarifying language of the bill, and the testimony of the bill's proponents[8] confirm that HB 971 clarifies and makes manifest what Plaintiffs have argued all along—the former and current language of § 75-1-201(2)(a), MCA, were understood and implemented by Defendants as prohibiting Montana's regulatory agencies from considering greenhouse gas ("GHG") emissions or climate change when conducting environmental reviews, which in turn infringes upon Plaintiffs' constitutional and public trust rights. Nothing substantive in law or practice has changed, and the same live controversy exists among the parties as to the constitutionality of the 2011 and 2023 versions of the law, as clearly recognized by the Court at the time of oral argument on May 12, and as articulated in this Court's May 23 Order on Summary Judgment (Doc. 379) at pp. 21-24.

Further, Defendants have not met their "heavy burden" to establish that Plaintiffs' claims concerning the 2011 version of § 75-1-201(2)(a), MCA, are moot because the underlying disputed issues concerning the statute are unchanged. *See* Order on Summary Judgment at 13 (Doc. 379). Since this Court has found that Plaintiffs' claims with respect to the clarifying version of § 75-1-201(2)(a), MCA, can proceed to trial, *see id*. at 13, 25-26, Plaintiffs' claims challenging the 2011 version of § 75-1-201(2)(a), MCA, are likewise live, justiciable, and in need of resolution at trial because nothing substantive has changed to the statute.[9] Accordingly, this Court can and should

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[6] S*ee also* May 12 Oral Arg. Tr. at 24:25; *id*. 94:21-25 ("I'm not precluding anybody from trying to brief something, **but I don't find this to be nearly as substantive to the issues raised in this case as you do. The statute that they cited [75-1-201(2)(a)], it has been clarified**.") (emphasis added). Further, the Court has made clear: "I'm not intending to just stop everything so that we can spend months wrapped around that spoke." May 12 Oral Arg. Tr. at 95:5-7.

[7] An Act Generally Revising the Environmental Policy Act; Clarifying and Excluding the Use of Greenhouse Gas Evaluations; Providing an Appropriation; Amending Section 75-1-201, MCA; And Providing an Immediate Effective Date (HB 971), ch. 450, 2023 Mont. Laws (effective May 10, 2023), https://leg.mt.gov/bills/2023/billpdf/HB0971.pdf. *See also* Def. Br. at 2, nn.1-2 (Doc. 377).

[8] *See infra*, Section II(A). *See, e.g.,* Testimony of Rep. Kassmier, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (testimony approximately at 16:10:00 – "HB 971 sets the record straight. In 2011, the Legislature passed SB 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. **That meant the analysis did not include global climate change.**") (emphasis added); Testimony of Leo Berry, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (Testimony begins at 16:13:23. Mr. Berry drafted the 2011 bill, SB 233, and testified that "I thought the [2011] language was pretty clear at the time. **It excluded an evaluation of climate change or global warming**.") (emphasis added).

[9] This includes each of Plaintiffs' Counts I through IV, as each are premised in part on the MEPA Climate Change Exception, *see, e.g.,* Compl. ¶¶ 216 [Count I]; 221 [Count II]; 229, 236-37 [Count III]; 248-51 [Count IV] (Doc. 1), as well as Prayers for Relief 1, 3, 4, and 5. Plaintiffs' Complaint makes clear that Plaintiffs raise both a facial challenge

still issue effective declaratory relief concerning the 2011 version of § 75-1-201(2)(a), MCA, because it is effectively continued through the 2023 clarifying amendment—and the same harm to the Plaintiffs is caused and continued. As Judge Ann Aiken ruled today in the case of *Juliana v. United States*, a case repeatedly cited by the parties and the Court throughout this litigation:

> [A] declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief. . . .
>
> It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-8 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function because the "judicial Power" is exclusively in the hands of Article III courts. U.S. Const. Art. III, § 1.

Op. and Order at 17-18, *Juliana v. United States*, 6:15-CV-01517-AA (D. Or. June 1, 2023). (Attachment A).

Even if the artifice of the 2023 amendment was deemed substantive, pursuant to the public interest exception to the mootness doctrine, the 2011 version could be declared unconstitutional and violative of youth Plaintiffs' constitutional rights in addition to declaring unconstitutional the amendments enacted via HB 971.

STANDARDS OF REVIEW

"[M]otions to dismiss are viewed with disfavor and a complaint should be dismissed only if the allegations in the complaint clearly demonstrate that the plaintiff does not have a claim." *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996); *accord Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. When deciding a 12(b)(1) motion to dismiss for lack of standing, courts "must construe the complaint in the light most favorable to the plaintiff . . . and take as admitted all well-pleaded factual allegations." *W. Sec. Bank v. Eide Bailly LLP,* 2010 MT 291, ¶ 55, 359 Mont. 34, 249 P.3d 35. "The effect of such a motion is admitting to all the well pleaded allegations in the complaint and it should not be dismissed 'unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts

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to the MEPA Climate Change Exception, Compl. ¶ 4; Prayer for Relief 3 (Doc. 1), but also a challenge to the "aggregate acts" carried out pursuant to the MEPA Climate Change Exception (¶¶ 118(g), (h), (i), (k), (m), (p); 125, 190; Prayer for Relief 5).

which would entitle him to relief.'" *Hoveland v. Petaja*, 252 Mont. 268, 270-71, 828 P.2d 392, 393 (1992) (quoting *Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 389, 661 P.2d 855, 858 (1983)).

Mootness is the doctrine of standing set in a timeframe, wherein the requisite personal interest that exists at the commencement of the litigation must continue throughout its existence. *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881. "The central issue in resolving a mootness question is whether a change in the circumstances that prevailed at the beginning of litigation has forestalled the prospect for meaningful relief." *Awareness Grp. v. Bd. of Trustees of Sch. Dist. No. 4*, 243 Mont. 469, 475, 795 P.2d 447, 451 (1990) (internal quotation marks omitted). A controversy remains justiciable when it is possible for the reviewing court to grant the party seeking relief some effectual relief. *Rimrock Chrysler, Inc. v. State*, 2016 MT 165, ¶ 39, 384 Mont. 76, 375 P.3d 392. "The '***heavy burden***' of proving mootness falls 'with the party asserting a case is moot.'" *Maldonado v. District of Columbia*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) (emphasis added) (quoting *Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010)). "'[O]nly when it is ***impossible*** for a court to grant ***any*** effectual relief' is a case moot." *Maldonado*, 61 F.4th at 1006 (emphasis added); *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 8, 405 Mont. 259, 494 P.3d 892.

ARGUMENT

I. THIS COURT HAS ALREADY RULED THE CURRENT VERSION OF § 75-1-201(2)(a), MCA, AS AMENDED BY HB 971, IS BEING ADJUDICATED AT TRIAL

In its Order on Summary Judgment, this Court confirmed it possesses subject matter jurisdiction to hear and adjudicate Plaintiffs' claims with respect to the recently-clarified version of § 75-1-201(2)(a), MCA, because the amendment enacted by HB 971 clarifies the intent of the MEPA Climate Change Exception and tracks Plaintiffs' allegations that gave rise to the constitutional violations at issue herein. *See* Order on Summary Judgment at 13-14 ("Notwithstanding the State's failure to meet its own burden, Plaintiffs have sufficiently supported their allegations with specific facts to survive summary judgment.") (Doc. 379); *id*. at 14 (no prudential standing concerns preventing Court from adjudging whether MEPA Climate Change Exception is constitutional); *id*. at 22 (HB 971 "is a bill to clarify the statute," § 75-1-201(2)(a), MCA); *id*. at 25-26 (whether Plaintiffs can prove standing and whether the State can withstand

strict scrutiny will be determined after trial). This is now law of the case and is dispositive as to Defendants' motion here.

The Court's Order on Summary Judgment makes clear that "[b]ased 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," Doc. 379 at 12, and that the disputed issues of law and fact concerning the amended version of § 75-1-201(2)(a), MCA, will be determined after trial. *Id*. at 25-26. As Leo Berry, the drafter of the 2011 "climate exception" to MEPA, testified in support of the 2023 clarification, "I thought the [2011] language was pretty clear at the time. **It excluded an evaluation of climate change or global warming**." See fn. 13 below. Based on this law of the case alone, Defendants' motion must be denied. Nevertheless, if the Court prefers, Plaintiffs stand prepared to supplement their pleadings (most logically through explicit contentions in the Proposed Pretrial Order) to reiterate what is already manifest to the parties and the Court: the clarification to § 75-1-201(2)(a), MCA, enacted by HB 971 is squarely at issue.[10]

To provide further support for this Court's ruling on HB 971 in its Order on Summary Judgment, if needed, Plaintiffs provide additional legal bases for denying Defendants' Motion to Dismiss the MEPA claim.

II. THIS COURT RETAINS SUBJECT MATTER JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF § 75-1-201(2)(a), MCA, AS AMENDED

In addition to the reasons set forth above and the Court's controlling Order on Summary Judgment, which disposes of Defendants' motion, Plaintiffs set forth the additional bases for denying the motion in full below.

A. HB 971 Corroborates Plaintiffs' Longstanding Position Concerning § 75-1-201(2)(a), MCA.

As if the bill's own title and plain language were not enough to drive this point home, the testimony provided by supporters and proponents of HB 971 during recent legislative committee hearings and floor debates confirms that HB 971 sought to clarify and make manifest what the 2011 amendment to § 75-1-201(2)(a), MCA (SB 233),[11] intended, what the defendant agencies understood and acted in accordance with, and what Plaintiffs have alleged all along—the exception

[10] *See* Mont. R. Civ. P. 15(d). Given the same underlying facts are in dispute, no additional discovery is needed on HB 971 and the parties are ready for trial on this issue.
[11] *See* Def. Br. at 2, n.2. (Doc. 377).

constrains and prohibits Montana's regulatory agencies from considering greenhouse emissions and climate change during environmental reviews under MEPA. The bill's sponsor, Rep. Kassmier, testified that "HB 971 sets the record straight. In 2011, the Legislature passed SB 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. **That meant the analysis did not include global climate change.**"[12] Further, at least two individuals who were involved in the drafting and ratification of the 2011 MEPA Climate Change Exception explicitly testified that HB 971 merely accomplishes and clarifies what the legislature sought to do in 2011.[13] Similar statements from industry supporters of HB 971 make abundantly clear that the effect of the bill was to "**send[] a clear message that the legislature is again reinforcing what was said in 2011 [via SB 233]**."[14]

These statements underscore precisely what Plaintiffs argued at the May 12, 2023 oral argument—HB 971 "does nothing more than corroborate plaintiffs' position," May 12 Oral Arg. Tr. at 92:1-2, and thus this Court retains jurisdiction to decide based on the evidence presented at trial whether Plaintiffs' position is correct. *See* Order on Summary Judgment at 25 (Doc. 379) ("Whether Plaintiffs can prove standing and whether the statute can withstand strict scrutiny will be determined after trial."). HB 971 has changed nothing substantively, and if the unconstitutional

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[12] Testimony of Rep. Kassmier, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (beginning approximately at 16:10:00 – "HB 971 sets the record straight. In 2011, the Legislature passed SB 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. **That meant the analysis did not include global climate change.**") (emphasis added).

[13] *See, e.g.,* Testimony of Leo Berry, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (Testimony begins at 16:13:23. Mr. Berry drafted the 2011 bill, SB 233, and testified that "I thought the [2011] language was pretty clear at the time. **It excluded an evaluation of climate change or global warming**.") (emphasis added); Testimony of Jim Keane, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (Testimony begins at 16:14:41. "I'm the guy who passed the bill in 2011. **We did it with broad language so that we weren't going to be going greenhouse gas and those things.**") (emphasis added).

[14] Testimony of Steve Wade, Montana Chamber of Commerce, Montana Contractors Association, Billings Chamber of Commerce, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490# (testimony begins at 16:10:49) (emphasis added). *See also* Testimony of Steve Wade, April 26, 2023 Senate Judiciary Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/48000?agendaId=277045 (Testimony begins at 9:02:47. Testified that Jim Keane wants committee to know that "he wholeheartedly supports HB 971 **because it's trying to do what he did in 2011**.") (emphasis added); Testimony of Matt Vincent, Montana Mining Association, April 26, 2023 Senate Judiciary Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/48000?agendaId=277045 (Testimony begins at 9:06:36. "But we believe that this bill, as amended, is an important piece of legislation, as has already been stated. **It accurately clarifies the intent of Senator Jim Keane's SB 233, which has been in statute since 2011.**") (emphasis added).

impediment of § 75-1-201(2)(a), MCA, were not in effect, Defendants would take climate change and a project's GHG emissions into account when conducting a MEPA environmental review.[15]

B. Plaintiffs' Pleadings Concerning the 2011 Version of § 75-1-201(2)(a), MCA, Apply Equally to the Current, Clarifying Version of the Same Law.

Plaintiffs have already more than satisfied the pleading standard of Rule 8, Mont. R. Civ. P., with respect to their claims against the 2011 version of § 75-1-201(2)(a), MCA, which apply equally to that same unconstitutional statute as amended by HB 971. *See* Mont. R. Civ. P. 8(a)(1) (Pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief.");[16] *see also* Order on MTD at 18 (Doc. 46) (under the facts alleged, MEPA Climate Change Exception contributes to Youth Plaintiffs' injuries and an order finding the MEPA Climate Change Exception unconstitutional would alleviate Plaintiffs' injuries). Plaintiffs' challenge to the 2011 MEPA Climate Change Exception is premised on the fact that the provision "prohibits the State from considering the impacts of climate change." Compl. ¶ 190 (Doc. 1); *see also id*. ¶ 125 ("Since 2011, the Montana legislature has barred state agencies from considering climate change under MEPA. Mont. Code Ann. § 75-1-201(2)(a).").

Plaintiffs are confident their existing Complaint and Proposed Pre-Trial Order fully encompass the necessary allegations of fact and constitutional claims against § 75-1-201(2)(a), MCA (2011) *and* as amended by HB 971—and this Court has indicated its agreement. *See* Order on Summary Judgment at 23-26 (Doc. 379). Thus, while there is no need for supplementation or amendment of the pleadings, final pleadings are always conformed to the proof presented at trial,

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[15] *See, e.g.,* Klemp 30(b)(6) Dep. 75:6-15 (DEQ admitted that, prior to the codification of the MEPA Climate Change Exception in 2011, DEQ's MEPA reviews contained an analysis of the amount of GHG emissions that would be associated with the plant or project); Dorrington 30(b)(6) Dep. 36:7-24 (DEQ admits that § 75-1-201(2)(a), MCA, applies to its permitting activities and is primarily used in the permitting of natural resource extraction and power generation); Dorrington 30(b)(6) Dep. 37:18-38:2 (DEQ admits that its MEPA review for fossil fuel extraction and combustion activities does not include a review of impacts beyond Montana's borders and potential impacts that are regional, national, or global in nature pursuant to § 75-1-201(2)(a), MCA); Dorrington 30(b)(6) Dep. 38:3-20 (If the restriction in § 75-1-201(2)(a), MCA, did not exist, DEQ would follow the law and conduct a review of actual or potential impacts beyond the state's borders as part of MEPA reviews); Dorrington 30(b)(6) Dep. 97:10-98:5; 100:19-102:2; 103:20-104:24; 114:24-115:4 (DEQ has followed the MEPA Climate Change Exception in § 75-1-201(2)(a), MCA, when conducting post-2011 MEPA analyses for fossil fuel projects); Nowakowski Dep. 48:3-49:9 (§ 75-1-201(2)(a), MCA, precludes DEQ from reviewing, during environmental impact analyses, actual or potential impacts beyond Montana's borders. DEQ relies on the prohibition in § 75-1-201(2)(a), MCA, in multiple permit decision-making processes); Thomas 30(b)(6) Dep. 74:23-75:11 (DNRC admits that it does not calculate the amount of GHG emissions that result from its leasing of coal from state trust lands, but that such a calculation is possible).

[16] Rule 8 also provides that pleadings must be construed "so as to do justice." Mont. R. Civ. P. 8(e).

as can be done here.[17] *See, e.g., Slattery v. Labbitt*, 120 Mont. 183, 185, 181 P.2d 601, 602 (1947) ("The discretion of the trial court in permitting amendments to pleadings in furtherance of justice extends to amendments during and after trial in order to make the pleadings conform to the proof.").

Defendants' claim that HB 971 sprung up on the parties at the last minute and thus necessitates delaying or postponing trial rings hollow. It is neither grounded in reality, nor respects the inherent capability of the Court to conform the pleadings and amendments to the proof adduced at trial, as well as the Court's ability in equity to make sure that the issues that remain are properly resolved at the trial. *See, e.g., Slattery*, 120 Mont. at 185; *Ward v. Vibrasonic Lab'ys, Inc.*, 236 Mont. 314, 318, 769 P.2d 1229, 1232 (1989) (holding trial court did not err in permitting buyer to amend complaint to evidence presented at trial and observing that, "the rule with regard to amendments to the pleadings is well-settled. As early as 1905, the position of this Court has been: … the court has discretionary power to permit the amendment under such terms as it deemed just and proper.") (quoting *Dorais v. Doll*, 33 Mont. 314, 316-17, 83 P. 884, 885 (1905)); *Union Interchange, Inc. v. Parker*, 138 Mont. 348, 353-54, 357 P.2d 339, 342 (1960) ("The policy of the law is to permit amendments to the pleadings in order that litigants may have their causes submitted upon every meritorious consideration that may be open to them; therefore, it is the rule to allow amendments and the exception to deny them."). Defendants would suffer no prejudice should Plaintiffs supplement their pleadings to include the clarifying amendment to § 75-1-201(2)(a), MCA, enacted by HB 971 because the factual circumstances underlying the constitutional controversy remain identical. Plaintiffs can supplement their pleadings should the Court find that necessary or advisable either before or after trial, or the Court can simply conform the judgment to the evidence.

Ultimately, the clarification to the text of § 75-1-201(2)(a), MCA, enacted by HB 971 does not alter Plaintiffs' allegations that this statutory provision permits Defendants to "deliberately ignore[] the dangerous impacts of the climate crisis." Compl. ¶ 108 (Doc. 1); *see also id.* ¶ 190 (the "Climate Change Exception in MEPA . . . prohibits the State from considering the impacts of climate change."). The assertions in Plaintiffs' Proposed Pre-Trial Order concerning § 75-1-

[17] As indicated, if the court prefers, Plaintiffs can promptly supplement Plaintiffs' Proposed Pre-Trial Order pleading pursuant to Mont. R. Civ. P. 15(d), regarding § 75-1-201(2)(a), MCA, to note that the clarification of HB 971 is part of their claims. As nothing else has changed, nothing else is needed. Pleadings are capable of being amended at any time to achieve justice, even after trial. Mont. R. Civ. P. 15(b)(1).

201(2)(a), MCA, mirror those in the Complaint.[18] Nothing has changed other than the fact that § 75-1-201(2)(a), MCA, has been clarified to corroborate Plaintiffs' longstanding position.

C. There Are No Redressability or Prudential Standing Issues Preventing This Court From Declaring the Amended Version of § 75-1-201(2)(a), MCA, Unconstitutional.

At the summary judgment stage, "[t]he 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 Summary Judgment at 9 (Doc. 379) (citing Order on MTD at 7-19 (Doc. 46)). HB 971's amendment clarifying the meaning of the MEPA Climate Change Exception so that it aligns precisely with Plaintiffs' allegations of unconstitutionality does not alter this ruling. *See id*. at 13 ("Plaintiffs have set forth specific facts by declaration and deposition that establish both causation and redressability . . . . Here and now, the State has not shown that there are no genuine issues of material fact.").

Further, there remain "no prudential concerns that prevent this Court from adjudging whether the MEPA Limitation is constitutional." *Id*. at 14. The Court's recent Order on Summary Judgment states that Defendants' "essentially concede[]" the point that "declaratory relief would redress Plaintiffs' injuries, contrary to the State's redressability arguments." *Id*. at 18; *see also Juliana*, Op. and Order at 19 (declaratory relief is within the court's power to award, "would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by the federal defendants' ongoing policies and practices," and "would by itself guide the independent actions of the other branches of government . . . ."). Accordingly, as recognized in this Court's Order on Summary Judgment, all of Plaintiffs' claims with respect to the current, amended version of § 75-1-201(2)(a), MCA, are live, justiciable, and in need of resolution at trial.[19] Neither redressability nor prudential standing considerations weigh against this Court reaching the merits of Plaintiffs' claims and ruling in Plaintiffs' favor.

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[18] *See, e.g.,* Compl. ¶¶ 108, 111, 125, 190 (Doc. 1); Plaintiffs' Proposed Pre-Trial Order Plaintiffs' Contentions ¶¶ 77, 106-07, 112, 120, 131, 135, 146; Plaintiffs' Issues of Fact ¶¶ 120-21, 150, 154, 160-61; Plaintiffs' Issues of Law ¶¶ 4, 8, 12 (Doc. 367).

[19] This includes each of Plaintiffs' Counts I through IV, as each are premised in part on the MEPA Climate Change Exception, *see, e.g.,* Compl. ¶¶ 216 [Count I]; 221 [Count II]; 229, 236-37 [Count III]; 248-51 [Count IV] (Doc. 1), as well as Prayers for Relief 1, 3, 4, and 5. Plaintiffs' Complaint makes clear that Plaintiffs raise both a facial challenge to the MEPA Climate Change Exception, Compl. ¶ 4; Prayer for Relief 3 (Doc. 1), but also a challenge to the "aggregate acts" carried out pursuant to the MEPA Climate Change Exception (¶¶ 118(g), (h), (i), (k), (m), (p); 125, 190; Prayer for Relief 5).

III. PLAINTIFFS' CLAIMS CONCERNING THE 2011 VERSION OF § 75-1-201(2)(a), MCA, ARE NOT MOOT

In addition to Plaintiffs' arguments above, the amendment to the 2011 version of § 75-1-201(2)(a), MCA, does not deprive the Court of jurisdiction to adjudicate the 2011 version as well as the amendment enacted through HB 971.

Defendants not only have the burden to prove mootness (and they have failed to do so), but HB 971 does not, and cannot, moot Plaintiffs' claims concerning the 2011 MEPA Climate Change Exception because the underlying constitutional issues giving rise to Plaintiffs' challenge remain live. *See* Order on Summary Judgment at 12-13, 25-26 (Doc. 379). Accordingly, the Court should conform judgment to include the clarifying language of § 75-1-201(2)(a) enacted through HB 971, as argued above, and *also* retain jurisdiction to render declaratory judgment over the 2011 version of § 75-1-201(2)(a), MCA. The public interest exception to mootness applies to any argument of mootness over the 2011 version. *See, e.g., Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867 ("This Court reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law.") (internal quotation marks omitted) (quoting *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872). The public interest exception to mootness is, in itself, an important aspect of separation of powers that serves the interests of justice and checks and balances. *See Briese v. Montana Pub. Employees' Ret. Bd.*, 2012 MT 192, ¶ 14, 366 Mont. 148, 285 P.3d 550 ("The mootness doctrine is one of several doctrines designed to limit the judicial power of this Court to justiciable controversies—that is, controversies upon which a court's judgment will effectively operate, as distinguished from … dispute[s] invoking a purely political, administrative, philosophical, or academic conclusion. The fundamental question to be answered in any review of possible mootness is *whether it is possible to grant some form of effective relief to the appellant.*") (emphasis added) (internal quotation marks and citations omitted).

While the challenged statute's language has been "clarified" to confirm what everyone thought it meant, *see* Order on Summary Judgment at 22 (Doc. 379), the underlying controversy before the Court remains, and the Court can still grant effective relief against both the 2011 law and its recent clarification. *See id*. at 14, 18. It is important in constitutional cases that courts do not condone legislative shenanigans aimed at trying to moot cases in the absence of altering government's underlying unconstitutional conduct.

A. HB 971 Does Not Substantively Alter the Live Controversy Giving Rise to Plaintiffs' Challenge.

Defendants argue that HB 971 moots Plaintiffs' claims based on the prior version of § 75-1-201(2)(a), MCA, "because it replaced the statute Plaintiffs challenged in their Complaint." Def. Br. at 5 (Doc. 377). Defendants' argument is nonsensical: The legislature may have changed some of the words in § 75-1-201(2)(a), MCA, but it did not change the meaning or effect of the statute. In fact, HB 971's amendment to § 75-1-201(2)(a), MCA, now makes explicitly clear what Plaintiffs had alleged *all along* concerning the effect of the 2011 version of § 75-1-201(2)(a), MCA—it prohibits Montana's agencies from considering the impacts of climate change in environmental review of fossil fuel projects.[20]

The controversy over whether it is unconstitutional for Defendants to deliberately ignore the impacts of climate change in their environmental decision making, as specified in the 2011 or 2023 version of the same law, remains live and ripe for resolution by this Court after trial. *See* Order on Summary Judgment at 25-26 (Doc. 379). Thus, the controversy remains justiciable, and this Court can award some effectual relief by declaring both the 2011 and 2023 versions unconstitutional. *Rimrock Chrysler, Inc.*, ¶ 39. Defendants' willingness to repeal and amend laws to avoid litigation, without altering their unconstitutional conduct, makes it all-the-more important for this Court to judge the assortment of laws Defendants have enacted to direct the State's conduct with respect to fossil fuels, even those that have been replaced today, but could return tomorrow in slightly different form with precisely the same effect.

B. The Public Interest Exception to Mootness Applies Because the Issues Presented Are of Broad Public Importance, are Guaranteed to Recur, and Resolution Will Help Guide Defendants in Performance of Their Duties.

Plaintiffs' claims concerning the 2011 version of § 75-1-201(2)(a), MCA, are not moot for the reasons set forth above—and because the public interest exception applies to the facts here. The public interest exception to the mootness doctrine applies where the issues are constitutional and involve broad public concerns. *Walker*, ¶ 41. In such instances, the court reserves the power

[20] *See, e.g.,* Complaint ¶¶ 111, 190 (Doc. 1). Indeed, the clarification to § 75-1-201(2)(a), MCA, enacted by HB 971 fully accords with this Court's framing of Plaintiffs' challenge to the 2011 version of § 75-1-201(2)(a), MCA, in its Order on Motion to Dismiss—"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*." Order on MTD at 12 (Doc. 46) (emphasis added); *see also id*. at 14 ("Youth Plaintiffs allege that Defendants deliberately failed to consider or account for climate change in their MEPA Analysis.") (citing Compl. ¶ 108 (Doc. 1)).

to examine these issues and avoid future litigation on a point of law. *Id.* Where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance, so the public interest exception to mootness applies. *Ramon*, ¶ 22; *see also Walker*, ¶¶ 41-43 (reaching the merits of former detainee's challenge to Montana state prison disciplinary techniques, even though he had already been released because the questions presented implicated fundamental constitutional rights and the problems would repeat themselves so long as current policies were in place).

Namely, the exception applies when "(1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties." *Ramon*, ¶ 21; *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 18, 408 Mont. 187, 507 P.3d 169. These three prongs are plainly satisfied here. First, the issues presented by Plaintiffs' constitutional challenge to the 2011 version of § 75-1-201(2)(a), MCA, are manifestly of public importance because they implicate fundamental constitutional rights including the right to a clean and healthful environment (Mont. Const. art. II, § 3, art. IX § 1); the right to seek safety, health, and happiness (Mont. Const. art. II, § 3, § 15, § 17, art. IX, § 1); the right of individual dignity and equal protection (Mont. Const. art. II, § 4, § 15); and the right to constitutionally protected public trust resources (Mont. Const. art. IX, § 1, § 3). *See* Order on Summary Judgment at 25-26 (Doc. 379). Defendants agree "this case involves constitutional issues of statewide importance." Defs.' Pet. for Writ of Supervisory Control (June 10, 2022).

Second, the underlying issues presented by Plaintiffs' challenge to the 2011 version of § 75-1-201(2)(a), MCA, are plainly likely to recur, because they are, in fact, live and ongoing since the new statutory language is functionally identical and merely clarifies and does not alter the statute's original intent or effect.[21] Both the 2011 version and the amended version of § 75-1-201(2)(a), MCA, enacted by HB 971 should be declared unconstitutional, if supported by the evidence and facts found at trial, to clarify for Defendants that they cannot continue their game of legislative chess to avoid liability through amendments and repeals while continuing the same pattern and practice of conduct. It is undisputed that Defendant agencies will continue to apply the Climate Change Exception set forth in § 75-1-201(2)(a), MCA, under either the 2011 or 2023

[21] *See supra*, Section II(A).

version, unless they are enjoined from doing so by this Court.[22] The 2011 language of § 75-1-201(2)(a), MCA, and the amended language "categorically limits what the agencies, officials, and employees tasked with protecting Montana's environment can consider—it hamstrings them," so the issue (being the same) is "likely to recur." Order on Summary Judgment at 23 (Doc. 379); *Ramon*, ¶ 21.

Third, and importantly, an answer from this Court to the question of whether the 2011 version of § 75-1-201(2)(a), MCA, and the acts taken under its imprimatur over the past twelve years of its implementation, violates youth Plaintiffs' fundamental rights under Montana's constitution would "guide public officers in the performance of their duties" and would "provid[e] authoritative guidance on an unsettled issue." *Ramon*, ¶¶ 21, 24. This is especially the case where, as here, "there is no Montana Supreme Court ruling addressing this issue." *Id.*, ¶ 24. This Court has already explained:

> 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. . . . ***[T]he 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. . . . 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.***

Order on Summary Judgment at 12-13 (Doc. 379) (emphasis added).

Simply put, a ruling from the Court adjudging and declaring that the 2011 version of § 75-1-201(2)(a), MCA, is unconstitutional and violates youth Plaintiffs' fundamental rights under Montana's constitution would resolve live controversies between the parties.[23] Thus, because the fundamental meaning of the 2011 version of § 75-1-201(2)(a), MCA, is unchanged and the statute continues to be enforced by Defendants, Plaintiffs' constitutional claims against the 2011 version

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[22] *See, e.g.,* Dorrington 30(b)(6) Dep. 36:7-24 (MEPA applies to DEQ permitting activities, DEQ applies § 75-1-201(2)(a), MCA, in permitting decisions, and § 75-1-201(2)(a), MCA, is primarily used in permitting of natural resource extraction and power generating permitting); *id*. 38:3-20 (if restriction in § 75-1-201(2)(a), MCA, did not exist, DEQ would follow the law and would include an analysis, as part of DEQ's MEPA reviews, of a project's actual or potential impacts beyond Montana's borders).

[23] As set forth *supra* in Section II(C), and explained in this Court's Order on Summary Judgment, a ruling from the Court adjudging and declaring that the current, as amended, version of § 75-1-201(2)(a), MCA, is unconstitutional and violates youth Plaintiffs' fundamental rights under Montana's constitution would similarly resolve live controversies between the parties. *See* Order on Summary Judgment at 12-13, 25-26 (Doc. 379).

are live and justiciable, and under the additional authority of the public interest exception to mootness should be adjudicated. *See Plains Grains Ltd. P'ship v. Bd. of Cnty. Comm'rs of Cascade Cnty.,* 2010 MT 155, ¶ 33, 357 Mont. 61, 238 P.3d 332 (finding that challengers' spot zoning claims concerning county decision to re-zone parcel of agricultural land to heavy industrial were not mooted by county's subsequent amendment of its zoning regulations because the changes "represent[ed] merely a refinement of the previous version" and so had "no effect on the land use classifications challenged by Plains Grains."); *see also id*. ¶ 34 ("The 2009 amendments to the CCZR do not preclude a court from ruling on the legality of the 2008 rezone of the Urquhart/SME property."). *In re V.K.B.*, 2022 MT 94, ¶ 18, n.3, 408 Mont. 392, 510 P.3d 66 (finding appeal challenging youth's detention to correctional facility not moot by the fact that youth turned 18 and was released from confinement because the "commitment of juvenile offenders to Pine Hills [Correctional Facility] by youth courts is an issue of public importance; which is likely to recur; and our answer to the issue presented, regarding the authority of a youth court to sentence a juvenile offender to Pine Hills under § 41-5-1513(1)(b) and (e), MCA, will guide youth courts in the performance of their duties.").

CONCLUSION

The record of this case demonstrates that Defendants will attempt every mechanism available to avoid trial and declaratory judgment against them, while continuing their climate change-causing conduct that injures these youth Plaintiffs. It is thus vital that this Court review the constitutionality of the functionally equivalent 2011 and 2023 versions of the Climate Change Exception. In this manner the full breadth of Plaintiffs' claims can be heard and their constitutional rights adjudicated and vindicated.

For all of the foregoing reasons, Defendants' motion to dismiss Plaintiffs' MEPA claims must be denied.

DATED this 1st day of June, 2023.

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