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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 PARTIALLY DISMISS FOR MOOTNESS
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INTRODUCTION

For the sixth time since this action was filed over three years ago, Defendants seek to have youth Plaintiffs' constitutional case dismissed and to avoid trial. Like their previous efforts, Defendants' present motion to partially dismiss should be denied.¹ Defendants set out to repeal the codified state energy policy challenged as unconstitutional here, *not to change* the policy, practice, or on-the-ground implementation of the policy and cure the constitutional violations Plaintiffs allege, but to try to avoid a trial by tearing up the piece of paper all the while carrying out its directive. Defendants' ambassadors have conceded that the Legislature could reenact repealed laws next session if they wanted to, that Defendants still have an energy policy, and that the repeal of the statute challenged in this case will change nothing on the ground. The only thing Defendants seek to change is their duty to stand trial for constitutional violations.

Plaintiffs' Complaint and the evidence in this case makes clear that there are numerous issues of law and fact in need of resolution by this Court at trial. The need for trial has not changed since the Legislature's repeal of Section 90-4-1001, MCA. Importantly, Defendants do not argue in their motion that the repeal of Section 90-4-1001, MCA, will in any way affect Montana's policy of perpetuating a fossil fuel-based energy system, or Defendants' ongoing aggregate acts to promote and perpetuate Montana's fossil fuel-based energy system. Defendants present no evidence that their unconstitutional conduct will cease or that Plaintiffs' injuries will be alleviated. In short, Plaintiffs continue to have both justiciable claims under the Uniform Declaratory Judgments Act ("UDJA") and standing to bring such claims. Additionally, because two exceptions to the mootness doctrine apply, the voluntary cessation and the public interest exception, Plaintiffs' challenge to Section 90-4-1001, MCA, is not moot.

While presented as a motion to dismiss, this Court can convert Defendants' motion to a motion for summary judgment—which Plaintiffs believe is the appropriate course of action because there are genuine issues of material fact that must be resolved at trial,² and Plaintiffs present expert declarations herewith (and reference other evidence already in the record).³ Whether treated as a motion to dismiss or motion for summary judgment, there remain live justiciable

¹ See Doc. 12, 86, 166, 275, and Defendants' June 10, 2022 Writ of Supervisory Control.

² See Pls.' Opp. to Defs.' MSJ (Doc. 299).

³ With notice, this Court can convert Defendants' motion to dismiss to a motion for summary judgment. Mont. R. Civ. P. 12(d); *Farmers Co-Op Ass'n v. Amsden, LLC*, 2007 MT 287, 339 Mont. 452, 171 P.3d 684; see also Doc. 299.

controversies that the Court can resolve only after trial, and therefore, this case is not moot and Defendants' motion should be denied. After over three years of extensive litigation, evidenced by over 340 docket entries on file, all of Plaintiffs' claims should be resolved at trial, scheduled to begin in less than two months, with the benefit of the fully developed factual record the parties have worked hard to compile through extensive discovery, including the completion of 36 depositions, the exchange of 22 expert reports, the exchange of over 50,000 pages of documents, and responses to dozens of interrogatories. Nothing short of an authoritative declaration from a co-equal branch of government vindicating the youth Plaintiffs' fundamental constitutional rights and delineating the constitutional bounds to which Defendants' future conduct must adhere will be sufficient to bring Defendants' conduct into constitutional compliance.

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). When deciding a motion to dismiss, 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. Alternatively, if converted to a motion for summary judgment, Defendants have the burden of demonstrating a complete absence of any genuine factual issues. *Hagen v. Dow Chem. Co.*, 261 Mont. 487, 491, 863 P.2d 413, 416 (1993). The Court must view the evidence “in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the party opposing summary judgment.” *Letica Land Co., LLC v. Anaconda-Deer Lodge Cnty.*, 2019 MT 30, ¶ 8, 394 Mont. 218, 435 P.3d 634.

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. 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; *see also Maldonado v. District of Columbia*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) (“[O]nly when it is *impossible* for a court to grant *any* effectual relief is a case moot.” (emphasis added)). “The ‘*heavy burden*’ of proving

mootness falls ‘with the party asserting a case is moot.’” *Maldonado*, 61 F.4th at 1006 (quoting *Honeywell Int’l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (emphasis added)).

ARGUMENT

I. THERE REMAIN JUSTICIABLE CONTROVERSIES IN THIS CASE FOR WHICH THE COURT CAN GRANT EFFECTIVE EQUITABLE RELIEF

The 2023 Montana Legislature’s repeal of Section 90-4-1001, MCA, through HB 170 does not affect the existence of live justiciable controversies in this case which require resolution at trial. Specifically: (1) Defendants still have a state energy policy that violates Plaintiffs’ constitutional rights; and (2) Defendants have not altered their long-standing pattern and practice and aggregate acts of implementing a fossil fuel-based energy system in Montana that causes dangerous greenhouse gas (“GHG”) emissions and continues to infringe upon the constitutional rights of these young Plaintiffs. Compl. ¶¶ 108, 112, Counts I-IV. Therefore, Plaintiffs’ request that this Court adjudge and declare Defendants’ state energy policy and the aggregate acts, policies, and conditions Defendants have taken pursuant to their long-standing state energy policy unconstitutional, Prayer for Relief 1, remains a live controversy. Additionally, Defendants do not argue the repeal of the codified state energy policy affects: (3) Plaintiffs’ request that the Court adjudge and declare that Defendants are interfering with Plaintiffs’ right to use and enjoy Montana’s public trust resources, which include Montana’s atmosphere, waters, fish and wildlife, and public lands, Count IV, Prayer for Relief 1; (4) Plaintiffs’ request that this Court adjudge and declare Plaintiffs’ fundamental constitutional right to a clean and healthful environment encompasses a stable climate system that sustains human lives and liberties, and that said right is being violated by Defendants’ conduct, Count I, Prayer for Relief 1 and 4; or (5) Plaintiffs’ request that this Court declare unconstitutional and enjoin the Climate Change Exception to MEPA, Counts I-IV, Prayer for Relief 1, 3, and 5. As explained herein all of Plaintiffs’ claims for relief remain justiciable and equitable relief from this Court in youth Plaintiffs’ favor on Prayers for Relief 1, 3, 4, and 5 would alleviate Plaintiffs’ injuries by vindicating Plaintiffs’ constitutional and public trust rights; articulating the constitutional bounds, restraints, and obligations applicable to Defendants’ conduct; and constraining Defendants from engaging in further conduct repugnant to such constitutional bounds, restraints, and obligations.

A. A Live Controversy Exists Under the Uniform Declaratory Judgments Act as to the Constitutionality of Defendants' State Energy Policy and Defendants' Aggregate Acts That Result in Dangerous GHG Emissions and Harm Plaintiffs

A live controversy between the parties still exists, and resolution through trial remains necessary as to Plaintiffs' claims that Defendants' state energy policy violates their rights guaranteed under Montana's Constitution. Plaintiffs have presented specific facts and evidence to show that a justiciable controversy under the UDJA exists as to the constitutionality of Defendants' now implicit (*de facto*) and formerly explicit (*de jure*) state energy policy to systematically and affirmatively authorize fossil fuel production, consumption, transport, and combustion which result in dangerous levels of GHG emissions and contribute to climate destabilization.⁴ Plaintiffs' Complaint alleges that the challenged energy policy is both implicit and explicit, and that Section 90-4-1001, MCA, codified a policy that had existed for decades. Compl. ¶¶ 108, 112. Defendants' energy policy continues to exist, notwithstanding the repeal of Section 90-4-1001, MCA—a fact Defendants readily admit. As Michael Freeman, the Natural Resources Policy Advisor for Governor Gianforte stated in urging passage of HB 170, “we do have an energy policy. It is an all-of-the- above energy policy.” Dec. of Anne Hedges in Support of Pls.' Opp. to Defs.' MSJ, ¶¶ 12-14, 18-19 (Doc. 300) (hereinafter “Hedges MSJ Dec.”); *see also* Dec. of Anne Hedges in Support of Pls' Opp. to Defs.' Mot. to Partially Dismiss, ¶ 7 (hereinafter “Hedges MTD Dec.”). Plaintiffs have presented substantial and compelling evidence that Defendants cannot simultaneously continue to affirmatively implement a fossil fuel-based energy policy and satisfy, among other constitutional obligations, their obligation to maintain and improve a clean and healthful environment for present and future generations of Montanans.⁵

⁴ *See, e.g.*, Compl. ¶ 3 (Defendants have created and implemented a long-standing fossil-fuel based state energy system that contributes to dangerous climate disruption in violation of Plaintiffs' constitutional rights); Ans. ¶ 3 (denying allegations); Compl. ¶ 105 (Defendants have taken affirmative actions to authorize, permit, and encourage fossil fuel extraction, transportation, and combustion resulting in dangerous levels of GHG emissions and contributing to climate destabilization); Ans. ¶ 105 (denying allegations); Compl. ¶ 108 (Defendants have developed and implemented a state energy policy in Montana for decades, which involves systemic authorization, permitting, encouragement, and facilitation of activities promoting fossil fuels and resulting in dangerous levels of GHG emissions, without regard to climate change impacts or the fundamental rights of Plaintiffs and future generations of Montanans); Ans. ¶ 108 (denying allegations).

⁵ *See, e.g.*, Running & Whitlock Expert Report at 39 (Doc. 222 Ex. 1) (“It is our expert opinion, that the degradation to Montana's environment, and the harm to the Plaintiffs will get worse if

As Plaintiffs will demonstrate at trial, Defendants' long-standing and ongoing energy policy to pursue and perpetuate a fossil fuel-based energy system existed before the 2011 amendments to Montana's state energy policy law made the policy of fossil fuel promotion and utilization explicit, and continues now, even following the Legislature's repeal of Section 90-4-1001, MCA. Defendants admit Montana has had an energy policy for decades, even before it was codified in law. *See* Compl. ¶ 112; Ans. ¶ 112; *see also* Compl. ¶ 115 (Montana's state energy policy had implicitly promoted fossil fuels for decades and in 2011 was amended to explicitly promote fossil fuels); Hedges MSJ Dec. ¶¶ 12-14, 18-19, 24-25; Hedges MTD Dec. ¶ 7.⁶

Plaintiffs have proffered evidence, which Defendants now dispute, that the manner in which Defendants exercise their regulatory authority in systematically promoting fossil fuels as a manner of state energy policy—whether official *de jure* policy or implicit *de facto* policy—is unconstitutional. Compl. ¶¶ 108, 112; *see also*, Jacobson Expert Report at 2 (Doc. 222 Ex. 7) (“Presently, fossil fuels supply more than 85% of all-purpose energy in Montana, not out of necessity, but because of political preference and historic and ongoing government support that led to the development and maintenance of a widespread fossil-fuel infrastructure.”); Erickson Expert Report at 18 (“[A]verting the worst impacts of climate change will require changes to [Montana’s] energy policy of promoting fossil fuels, as well as steep reductions in Montana’s fossil fuel extraction, transport, and burning.”). Importantly, Plaintiffs’ experts have made it clear that the repeal of Section 90-4-1001, MCA, does not alter any of the conclusions in their expert reports, as those conclusions were premised upon Defendants’ conduct causing GHG emissions, not the legal vehicle by which that conduct occurs.⁷ In sum, there remains a justiciable controversy

fossil fuels remain our primary energy source.”); Running & Whitlock Rebuttal Expert Report at 9 (Doc. 240 Ex. A) (“Considering the current Earth energy imbalance and the IPCC’s clear warning that additional CO₂ emissions will exacerbate the frequency and severity of climate impacts . . . [e]very ton of fossil fuel that Montana extracts or consumes makes it harder to return to 350 ppm of CO₂ in the atmosphere. When you are already in a dangerous hole, you stop digging.”); Erickson Expert Report at 18 (Doc. 222 Ex. 5) (“Put another way, averting the worst impacts of climate change will require changes to its energy policy of promoting fossil fuels, as well as steep reductions in Montana’s fossil fuel extraction, transport, and burning.”).

⁶ *See also* Hedges Expert Report at 6-8 (Doc. 222 Ex. 4) (explaining the history surrounding the 1993 enactment of Mont. Code Ann. § 90-4-1001); *id.* at 13-22 (explaining context surrounding enactment of 2011 amendments to Mont. Code Ann. § 90-4-1001).

⁷ *See, e.g.*, Running Dec. ¶¶ 9-11; Jacobson Dec. ¶¶ 7-9; Whitlock Dec. ¶ 9-11; Fagre Dec. ¶¶ 9-10; Stanford Dec. ¶¶ 6-8; Van Susteren Dec. ¶¶ 7-8; L. Byron Dec. ¶¶ 6-7; Hedges MTD Dec. ¶ 6; Erickson Dec. ¶¶ 7-9.

over Defendants' ongoing implementation of a state energy policy that continues to promote fossil fuels. Once this Court declares the scope of Plaintiffs' constitutional rights and the lawful bounds of Defendants' energy policy, that controversy would be resolved.

Separately, there is a justiciable controversy over Defendants' aggregate acts to perpetuate a fossil fuel-based energy system. In their Complaint, Plaintiffs provide examples of how Defendants utilize their authority to implement a fossil fuel-based energy system in a manner that injures Plaintiffs and infringes on their constitutional rights. *See, e.g.*, Compl. ¶ 120 (Defendants have persisted in, and continue to persist in, a systemic course of conduct affirmatively authorizing, permitting, and promoting fossil fuels and dangerous GHG emissions); *id.* ¶ 118 (describing Defendants' aggregate acts); *see also* Hedges Expert Report at 24-28. Plaintiffs' Complaint and evidence makes clear that the source of their injuries is Defendants' implementation of a fossil fuel-based energy system, by and through their aggregate acts authorizing and licensing the extraction, transport, and use of fossil fuels. *See, e.g.*, Compl. ¶ 234 ("youth are disproportionately vulnerable to the irreversible impacts of the climate crisis and the worst impacts of climate disruption caused by Defendants' aggregate acts"); *id.* ¶¶ 248-49 ("Defendants' affirmative aggregate and systemic actions" give rise to constitutional violations alleged). Similarly, Plaintiffs' Prayer for Relief *separately* asks the Court to adjudge and declare "the aggregate affirmative acts, policies, and conditions" that result in a fossil fuel-based energy system unconstitutional. Prayer for Relief 1.⁸ *See also* Defs.' Mot. to Dismiss at 3 (Doc. 12) (recognizing that Plaintiffs asked Court to enjoin the state energy policy "*and* the State's aggregate acts" (emphasis added)).

The Court has recognized that Plaintiffs challenge not just the constitutionality of the formerly codified state energy policy and MEPA Climate Change Exception (Prayers for Relief 2 and 3), but also Defendants' ongoing and systemic aggregate acts taken pursuant to and in furtherance of the formerly codified state energy policy, and MEPA Climate Change Exception. *See* MTD Order at 9, 11-12, 15-18 (Doc. 46); Second Rule 60(a) Motion Order at 3 (Doc. 217) ("Youth Plaintiffs' requests for relief 1-4 simply ask this court to determine whether the State Energy Policy . . . and the Climate Change Exception to the Montana Environmental Policy Act . . . *with their appurtenant acts and policies* . . . violate the Montana Constitution . . .") (emphasis added).

⁸ Plaintiffs' Prayer for Relief 2 independently asks the Court to adjudge and declare the state energy policy, former Section 90-4-1001(1)(c)-(g), MCA, facially unconstitutional.

Notably, Defendants' new position that the repeal of Section 90-4-1001, MCA, should partially moot some of Plaintiffs' claims directly contradicts the position they originally took in seeking to have this case dismissed where they claimed their aggregate acts in implementing a fossil fuel-based energy system were not tied to the formerly codified state energy policy, which they argued "is largely symbolic and aspirational." Defs.' Mot. to Dismiss at 1, 10.⁹ Now, Defendants completely change course and contend the repeal of Section 90-4-1001, MCA, somehow vitiates the actual controversies in this case. Defs.' Partial MTD Br. at 3. Whether the state energy policy, codified or not, is a cause of Plaintiffs' injuries is a question of fact Plaintiffs will prove up at trial. Similarly whether Defendants' ongoing aggregate acts pursuant to that policy are a substantial factor in causing their climate injuries, is for proof at trial and remains a live controversy.

In sum, a live, justiciable controversy exists here—youth Plaintiffs and Defendants have existing and genuine adverse rights and interests with respect both to Defendants' state energy policy (in either *de facto* or *de jure* form) and, separately, to Defendants' historic and ongoing aggregate acts to implement a fossil fuel-based energy system. Whether Defendants' state energy policy and historic and ongoing aggregate acts to implement a fossil fuel-based energy system comport with Montana's Constitution is a controversy on which the judgment of this Court can effectively operate. This Court's determination as to whether Defendants' state energy policy and historic and ongoing aggregate acts to implement a fossil fuel-based energy system comport with Montana's Constitution will have the effect of a final judgment in law or decree in equity concerning the rights, status, or legal relationships of one or more of the real parties in interest. *See Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997) (citing *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284-85 (1981)).

B. There Remain Justiciable Controversies Regarding Plaintiffs' Claims That Defendants' Conduct Violates the Public Trust Doctrine, Their Right to a Stable Climate System, and the Constitutionality of the Climate Change Exception to MEPA

Plaintiffs' claim that Defendants' conduct violates their right to use and enjoy Montana's public trust resources remains justiciable. Montana's Public Trust Doctrine is a common law doctrine dating back to statehood and is expressly incorporated into the Constitution. Mont. Const.

⁹ Defendants made similar arguments in their Motion for Summary Judgment. *See* Defs.' MSJ Br. at 7 (Doc. 290).

art. IX, §§ 1, 3; *Mont. Coal. for Stream Access, Inc. v. Curran*, 210 Mont. 38, 52, 682 P.2d 163, 170 (1984). Pursuant to the Constitution and Public Trust Doctrine, Defendants have an affirmative duty to protect, preserve, and prevent substantial impairment to public trust resources for the benefit of all Montanans, including Plaintiffs and future generations. *Iverson v. Rehal*, 132 Mont. 295, 300, 317 P.2d 869, 872 (1957); Gregory Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 Mont. L. Rev. 123, 136 (2012); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); Ruling Re Motion to Dismiss at 3, *Navahine F. v. Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. Apr. 6, 2023) (“[T]he law requires that as trustee, [Hawai‘i] must take steps to maintain their assets to keep them from falling into disrepair.”) (attached as Exhibit 1).

Here, Plaintiffs allege that Montana’s public trust resources include essential natural resources, including the state’s atmosphere, waters, fish and wildlife, and public lands. Compl. ¶ 245. Plaintiffs have presented substantial evidence that Defendants are allowing dangerous levels of GHG emissions that substantially impairs and interferes with Plaintiffs’ right to use and enjoy Montana’s public trust resources. *See, e.g.*, Stanford Expert Report at 10-15 (Doc. 222 Ex. 2) (describing impairment to Montana’s freshwater ecosystems and fisheries as a result of anthropogenic climate change); Running & Whitlock Expert Report at 8-10, 28-39 (describing degradation of Montana’s waters, forests, wildlife, atmosphere, and public lands). Because Defendants have an *affirmative duty* to protect Montana’s public trust resources, the resolution of Plaintiffs’ public trust claims remains justiciable so long as Montana’s public trust resources are substantially impaired in a manner that infringes on Plaintiffs’ rights—which is the case here. *Id.* Whether Defendants’ actions resulting in GHG emissions infringes on Plaintiffs’ public trust rights is a question of fact that should be resolved at trial, as other courts have found.¹⁰ *See, e.g., Navahine F.*, at 2 (rejecting state’s motion to dismiss, and finding that whether Hawai‘i’s transportation system is operated in a way that contributes to greenhouse gas emissions so as to violate the public trust doctrine and right to a clean and healthful environment, should be decided at trial).

Separately, Plaintiffs’ request that this Court adjudge and declare Plaintiffs’ fundamental constitutional right to a clean and healthful environment encompasses a stable climate system that sustains their lives and liberties, and that Defendants are violating said right, also remains

¹⁰ Notably, Defendants’ Motion for Summary Judgment did not seek dismissal of Plaintiffs’ public trust claims. Doc. 299 at 20.

justiciable. Defendants admit that there is “uncertainty and controversy” over whether the right to a clean and healthful environment includes a stable climate system and the characteristics of a stable climate system, or climate instability. Defs.’ MSJ at 11 (Doc. 290). Those controversies can be resolved at trial, with the benefit of a fully developed factual record, which will provide evidence on what constitutes a stable climate system and climate stability (or instability). *See, e.g.*, Running & Whitlock Expert Report at 9 (describing that a stable climate requires Earth’s Energy Imbalance to be reduced to approximately zero through reductions in atmospheric carbon dioxide concentrations); *see also In re Hawai’i Elec. Light Co., Inc.*, No. SCOT-22-0000418, 2023 WL 2471890, at *6 (Haw. Mar. 13, 2023) (“[R]ight to a clean and healthful environment . . . encompasses the right to a life-sustaining climate system.”). The resolution of this controversy would be meaningful because it would limit Montana’s ability to engage in conduct that exacerbates climate instability. *Id.* at *13 (Wilson, J., concurring) (“The remedy for violation of the right to a stable climate capable of supporting human life is discreet: to reduce greenhouse gas emissions.”); *id.* at *10-11 (“Limiting atmospheric CO₂ levels to below 350 ppm is essential to . . . restore a viable climate system on which the life, liberty, and property of all people depend.” Last time CO₂ levels were at 419 ppm, the current level, “sea levels were 78 feet higher than today.” (internal quotation marks and citations omitted)).

Finally, Plaintiffs’ request that this Court declare unconstitutional the Climate Change Exception to MEPA remains justiciable and Defendants do not argue that this claim is moot.¹¹ There remain numerous factual disputes implicated in Plaintiffs’ claims regarding the constitutionality of Section 75-1-201(2)(a), MCA, which must be resolved at trial. *See* Doc. 299 at 16-19.

C. Plaintiffs’ Injuries Are Worsening as a Results of Defendants’ Ongoing Conduct to Permit Fossil Fuel Activities

In their motion Defendants do not contend the repeal of Section 90-4-1001, MCA, will alleviate any of Plaintiffs’ injuries. Plaintiffs have proffered ample evidence of their ongoing and worsening injuries resulting from Defendants’ conduct, allegations which Defendants dispute, and which therefore must be resolved at trial. Compl. ¶¶ 14-81; Doc. 299 at 1-3 (detailing Plaintiffs’ injuries as set forth in affidavits submitted with Plaintiffs’ Response Brief); Dec. of Roger Sullivan

¹¹ For reasons explained in Plaintiffs’ Response Brief in Opposition to Defendants’ Motion to Stay Proceedings (Apr. 12, 2023), Plaintiffs’ challenge to MEPA should not be stayed.

in Support of Pls.’ Opp. to Defs.’ MSJ ¶ 23 (Doc. 315) (detailing injury facts); *see also* Docs. 301-314 (Plaintiffs’ Declarations).

Plaintiffs’ injuries will persist and worsen after the repeal of Section 90-4-1001, MCA, so long as Defendants continue to implement a fossil fuel-based energy system that causes dangerous levels of GHG emissions.¹² This is confirmed by Plaintiffs’ experts and the newest report from the Intergovernmental Panel on Climate Change (“IPCC”).¹³ The findings in the Synthesis Report of the IPCC’s Sixth Assessment Report bolster and underscore the key conclusions and opinions stated in Plaintiffs’ expert and rebuttal reports—namely, that climate change is unequivocally occurring as a result of human activity;¹⁴ that continued emissions of GHGs into the atmosphere as a result of fossil fuel extraction and combustion will drive further planetary warming;¹⁵ that the current warming observed in the climate system poses serious near-term hazards and risks to human life and well-being;¹⁶ that further warming will only amplify the dangerous climate impacts already being experienced across the globe;¹⁷ and that there is a quickly-closing window of

¹² *See, e.g.*, Erickson Expert Report at 17 (Montana’s total emissions profile “is a nationally and globally significant quantity of CO₂ emissions, particularly given the already-elevated levels of human-caused GHGs in the atmosphere.”); Whitlock Dep. 15:11-17 (“[W]e know the causes of global warming and the role of the burning of fossil fuels, and we know that every molecule of CO₂ that is put into the atmosphere contributes to global warming. And so every [ton] that Montana produces in terms of greenhouse gas emissions is contributing to global warming[.]”); Running & Whitlock Expert Report at 9 (“As long as Earth’s energy imbalance is positive, warming will continue,” and the scientific consensus is that “[s]tabilization of climate . . . requires that EEI be reduced to approximately zero to achieve Earth’s system quasi-equilibrium.”).

¹³ Intergovernmental Panel on Climate Change, *Summary for Policymakers, in* Synthesis Report of the IPCC Sixth Assessment Report (AR6) (2023), available at https://report.ipcc.ch/ar6syrr/pdf/IPCC_AR6_SYR_SPM.pdf.

¹⁴ *See* Running Dec. ¶ 12; Whitlock Dec. ¶ 12; Fagre Dec. ¶ 11.

¹⁵ *See* Running Dec. ¶¶ 13, 15; Whitlock Dec. ¶ 12.

¹⁶ *See* Running Dec. ¶ 13; Stanford Dec. ¶ 9; Van Susteren Dec. ¶ 9.

¹⁷ *See* Running Dec. ¶ 15 (“With respect to our conclusions that every ton of GHG emissions makes the climate crisis worse and that there is a need to urgently and drastically reduce GHG emissions, the IPCC agreed and said: ‘Continued emissions will further affect all major climate system components, and many changes will be irreversible on centennial to millennial time scales and become larger with increasing global warming. Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and wellbeing of current and future generations. (*high confidence*).’”); Whitlock Dec. ¶ 12 (“Risks and projected adverse impacts and related losses and damages from climate change will escalate with every increment of global warming (*very high confidence*).”) (internal quotation marks omitted); *id.* ¶ 13; Fagre Dec. ¶ 11.

opportunity to urgently and drastically reduce human GHG emissions in order to avert locking in warming and associated climate impacts that are irreversible on timescales relevant to humans.¹⁸ The IPCC Sixth Assessment Report also underscores there are available tools to mitigate and reduce future climate change-related losses and damages—primarily the widescale deployment of renewable energy systems and the phase-out of fossil fuels.¹⁹

This new information from the IPCC only serves to confirm the voluminous evidence that Plaintiffs have proffered, and which Defendants largely contest, *see* Defs.’ MSJ Br. at 4, demonstrating that Plaintiffs are being injured in concrete and particularized ways unique to them and that these injuries will only worsen with each increment of additional planetary warming resulting from continued GHG emissions due to Defendants’ conduct. *See* Doc. 299 at 2-3. The repeal of Section 90-4-1001, MCA, will not alleviate Plaintiffs’ injuries, which are justiciable.

D. Plaintiffs’ Injuries Remain Traceable to Defendants’ Conduct

The second motion to dismiss does not assert Defendants have, following the repeal of Section 90-4-1001, MCA, altered or ceased their allegedly unconstitutional conduct, which Plaintiffs have identified as a substantial factor in causing their injuries. Compl. ¶¶ 120-121, 142. Nor do Defendants argue their historic and ongoing actions to promote fossil fuels that cause dangerous GHG emissions will change in any way. On the contrary, the record demonstrates continuous and ongoing actions by Defendants to permit, authorize, and perpetuate fossil fuel extraction and use—actions which continue to harm Plaintiffs. Erickson Dec. ¶ 7; Hedges MSJ Dec. ¶ 25 (the State of Montana will continue to pursue its long-standing fossil fuel-based energy policy of approving every permit for fossil fuel exploration, extraction, burning, and transportation even without policy goal statements in Section 90-4-1001, MCA); Hedges MTD Dec. ¶ 8. Defendants continue to take actions to permit fossil fuel activities in the face of overwhelming evidence that Plaintiffs are experiencing concrete and particularized current injuries along with even worse threatened future harm, *see supra* Section I.C., and that fossil fuel extraction and use

¹⁸ *See* Running Dec. ¶ 14 (“There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).”) (internal quotation marks omitted); *id.* ¶ 17; Jacobson Dec. ¶ 10 (“Delayed mitigation action will further increase global warming and losses and damages will rise and additional human and natural systems will reach adaptation limits (*high confidence*).”) (internal quotation marks omitted).

¹⁹ *See* Jacobson Dec. ¶ 10; Stanford Dec. ¶ 9; L. Byron Dec. ¶ 8.

must be significantly and immediately curtailed to prevent serious harm to the climate system and future generations.²⁰ The evidence further demonstrates the amount of GHG emissions resulting from the fossil fuel activities for which Montana is responsible is not *de minimis*—another material fact which Defendants dispute and needs resolution at trial. Compl. ¶¶ 139-142; Doc. 299 at 4. Notably, other courts have rejected the argument that a state’s purportedly *de minimis* GHG emissions absolve it of its constitutional obligations with respect to addressing and mitigating climate change, including obligations to preserve and protect public trust resources. *See, e.g., Navahine F.*, at 3-4 (denying state’s motion to dismiss and stating Hawai‘i cannot “turn a blind eye to imminent damage” caused by a fossil-fuel based transportation system simply “because GHG emissions are just ‘too big a problem’” (citation omitted). Trial is set to begin in fall 2023.); *In re Hawai‘i Elec. Light Co., Inc.*, at *2, 6 (GHG emissions from a single bioenergy plant “would produce massive carbon emissions” and violate right to a clean and healthful environment).

As previously noted, Plaintiffs’ experts confirmed that their opinions, as set forth in their expert and/or rebuttal reports, remain unchanged following the repeal of Section 90-4-1001, MCA—as their opinions are grounded in Montana’s systemic and ongoing course of conduct to promote the utilization and development of fossil fuels.²¹ Ultimately, and notwithstanding the repeal of Section 90-4-1001, MCA, whether Defendants’ ongoing state energy policy and aggregate acts result in dangerous levels of GHG emissions, that cause and contribute to Plaintiffs’ injuries, remain disputed questions of fact that must be resolved at trial. Doc. 299 at 4-5.

E. A Favorable Ruling Declaring Defendants’ Conduct Unconstitutional, and Enjoining It from Continuing, Remains Effective Relief

Defendants’ contention that “no judgment from this Court would affect the controversy surrounding the constitutionality of the State Energy Policy Goal Statements and Plaintiffs’ related claims because that statute no longer exists,” Defs.’ Partial MTD Br. at 3-4, ignores the fact that Plaintiffs’ claims and prayers for relief premised on Defendants’ ongoing energy policy and aggregate acts exist independently of Plaintiffs’ claims related to Section 90-4-1001, MCA.²² A

²⁰ *See, e.g.,* Running Dec. ¶¶ 14-15; Whitlock Dec. ¶¶ 12-13; Jacobson Dec. ¶ 10.

²¹ *See* Running Dec. ¶¶ 9-11; Jacobson Dec. ¶¶ 7-9; Whitlock Dec. ¶ 9-11; Fagre Dec. ¶¶ 9-10; Stanford Dec. ¶¶ 6-8; Van Susteren Dec. ¶¶ 7-8; L. Byron Dec. ¶¶ 6-7; Hedges MTD Dec. ¶ 6; Erickson Dec. ¶¶ 7-9.

²² Each of Plaintiffs’ Claims (I through IV) and Prayers for Relief (1) and (5) are explicitly premised upon and encompass Defendants’ aggregate acts. *See, e.g.,* Compl. ¶¶ 216 (Count I); 221, 223 (Count II); 236 (Count III); 248-50 (Count IV).

court order declaring Defendants' *de facto* and *de jure* state energy policy and historic and continuing implementation of a fossil fuel-based energy system unconstitutional would redress Plaintiffs' injuries. At trial, Plaintiffs will proffer evidence of Defendants' ongoing unconstitutional conduct to promote and perpetuate a fossil fuel-based energy system in Montana. It is this conduct that the Court can adjudge and declare unconstitutional and, if necessary, enjoin. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶¶ 20, 31, 326 Mont. 304, 109 P.3d 257 (declaring Montana's "school funding system" unconstitutional). A declaration that Defendants' *de facto* state energy policy and aggregate acts taken to implement a fossil fuel-based energy system, as sought in Prayer for Relief 1, are unconstitutional would alleviate Plaintiffs' injuries because such a declaration would tell Defendants that, at the very least, their current course of conduct in, for example, *never denying a permit or license for fossil fuel activities*, is unconstitutional and must be changed. See Hedges Expert Report at 28; Hedges MSJ Dec., ¶ 26; see also Thomas 30(b)(6) Dep. 110:7-13 (DNRC admits that, since 2003, it has never denied a permit for a coal lease).

There is ample precedent illustrating how government defendants conform their conduct to declarations of constitutional law. See, e.g., *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1285 (D. Mont. 2022) (future government conduct must be consistent with court ruling declaring conduct unconstitutional); *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)) (declaratory relief changes the legal status of the challenged conduct and carries a presumption that government officials will abide by an authoritative interpretation of the constitution). Indeed, Defendants' witnesses have acknowledged that their agencies are obligated to follow court rulings. See, e.g., Rosquist 30(b)(6) Dep. 123:10-21; see also Dorrington 30(b)(6) Dep. 27:14-23 (admitting DEQ has a duty to comply with the law); *id.* 38:3-12 (if Climate Change Exception to MEPA were declared unconstitutional, DEQ would follow the law). A determinative ruling from this Court as to the unconstitutionality of Defendants' longstanding and ongoing course of conduct to perpetuate a fossil fuel-based energy system would change the legal status of such conduct and would steer Defendants' future conduct into constitutional compliance. See, e.g., Erickson Expert Report at 18 ("Defendants direct and issue energy policy, plans, and permits, and conduct[] a variety of energy planning activities that influence the direction of Montana's energy system toward, or away from, fossil fuels and the resulting CO₂ emissions."); Hedges Expert Report at 24-28; Hedges MSJ Dec. ¶¶ 25-28. Of course,

the Court has significant discretion to craft a remedy commensurate with the scope of the constitutional violations proven at trial pursuant to the UDJA Section 27-8-101, MCA *et seq.*, Section 27-19-101, MCA *et seq.*, as well as the general equitable powers of this Court. *See also Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 86, 402 Mont. 168, 477 P.3d 288; Prayer for Relief 11 (seeking “[s]uch further or alternative relief as the Court deems just and equitable”). In short, the Court can still grant Plaintiffs effective relief to alleviate their injuries, as Plaintiffs will prove at trial.

II. PLAINTIFFS’ CHALLENGE TO MONTANA’S STATE ENERGY POLICY IS NOT MOOT

As discussed above, Plaintiffs’ claims for relief not involving Section 90-4-1001, MCA, must proceed to trial. However, even Plaintiffs’ challenge to Section 90-4-1001, MCA, as unconstitutional is not moot because two exceptions to the mootness doctrine apply here: (1) voluntary cessation and (2) public interest. *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 14, 411 Mont. 201, 523 P.3d 519 (citing *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 15, 408 Mont. 187, 507 P.3d 169).

A. Defendants Have Voluntarily Repealed Their Unconstitutional Statute to Avoid Judgment on the Merits

The voluntary cessation exception to the mootness doctrine applies in circumstances where the defendant’s challenged conduct “is of indefinite duration, but is voluntarily terminated by the defendant prior to completion of appellate [or trial court] review” *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 34, 333 Mont. 331, 142 P.3d 864. This exception is designed to “address[] situations where *a defendant attempts to moot a plaintiff’s meritorious claims in order to avoid a judgment on the merits.*” *In re Big Foot Dumpsters & Containers, LLC*, ¶ 15 (citing *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 9, 405 Mont. 259, 494 P.3d 892) (emphasis added). The voluntary cessation exception allows Montana’s courts to “rule on non-extant controversies in order to provide guidance concerning the legality of expected future conduct.” *Montanans Against Assisted Suicide v. Bd. of Med. Examiners, Mont. Dep’t of Lab. & Indus.*, 2015 MT 112, ¶ 15, 379 Mont. 11, 347 P.3d 1244 (quoting *Havre Daily News*, ¶ 38).

Importantly, a defendant’s voluntary cessation of the challenged conduct cannot moot a case unless it is “*absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur.*” *Wilkie*, ¶ 10 (emphasis added); *see also Johnson v. City of Grants Pass*, 50 F.4th 787, 799 (9th Cir. 2022) (“It is well settled that a ‘defendant’s voluntary cessation of a

challenged practice does not deprive a federal court of its power to determine the legality of the practice.”) (citation omitted). Given the “concern that a defendant may utilize voluntary cessation to manipulate the litigation process,” the “*heavy burden* of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness.*” *Havre Daily News*, ¶ 34 (quotation omitted, emphasis added). The voluntary cessation exception to mootness squarely applies here.

First, Montana’s challenged state energy policy, codified in 2011 in Section 90-4-1001, MCA, and its implementation through aggregate acts, have been ongoing for an “indefinite duration.” Defendants admit Montana has had a state energy policy for decades, even before it was codified in law. *See* Compl. ¶ 112; Ans. ¶ 112; *see also* Hedges Expert Report at 4-8, 21-22. Plaintiffs’ Complaint sets forth detailed allegations, and the evidence of record demonstrates, that for decades, Defendants have exercised their permitting, licensing, and other relevant regulatory authority to implement and perpetuate a fossil fuel-based energy system in Montana. Compl. ¶¶ 112, 118-120; Hedges Expert Report at 4-8 (development of state energy policy), 19-22 (2011 amendments to state energy policy and MEPA), 29 (“Defendants’ long-standing and ongoing practice of approving all permits for fossil fuel projects and is reflected in the current state energy policy”); Hedges MSJ Dec., ¶¶ 24-28. Section 90-4-1001, MCA was voluntarily repealed by Defendants *less than three months before trial is set to begin*, for the purpose of seeking to avoid judgment on the merits as to its constitutionality. Hedges MTD Dec. ¶ 9 (“[T]he reason Defendants repealed MCA § 90-4-1001 this legislative session was to try and undermine this case so that Defendants can continue their conduct without any constitutional oversight.”).

Second, Defendants, as the party asserting mootness, have not, and cannot, meet their “heavy burden” to demonstrate that “the challenged conduct cannot reasonably be expected to start up again.” *Havre Daily News*, ¶ 34; *Johnson*, 50 F.4th at 799. It is not “absolutely clear that the allegedly wrongful behavior,” Defendants’ enacting and implementing an unconstitutional state energy policy, is not ongoing and “could not reasonably be expected to recur.” *Havre Daily News*, ¶ 38; *Johnson*, 50 F.4th at 799. Defendants do not even attempt to hide the fact that the challenged law could easily be adopted again in the next legislative session. As Representative Gunderson, the sponsor of HB 170, stated at a Senate hearing, “if this legislature and the next legislature wants to put that [state energy policy] back in the Title 90 then so be it.” *See* Hedges MSJ Dec. ¶ 16. Furthermore, Defendants have not even bothered to attempt to claim, for example, that following

HB 170's repeal of the codified state energy policy, Montana's continuing "all-of-the-above" energy policy will not simply continue the *status quo* of Defendants' condoning unabated fossil fuel extraction and use. *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (case not moot because government did not argue the challenged plan would not be reimposed if case were dismissed). Here, the evidence shows Defendants are continuing their long-standing practice of permitting fossil fuel activities. Erickson Dec. ¶ 7; Hedges MTD Dec. ¶¶ 7-8.

Notwithstanding the repeal of Section 90-4-1001, MCA, Defendants fail 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 levels of GHG emissions. *See* Doc. 299 at 5 ("[D]isputes of fact remain as to the causal connection between Defendants' conduct in implementing a fossil-fuel driven state energy policy, by and through their aggregate acts that result in dangerous GHG emissions, and Plaintiffs' injuries."). Nowhere in Defendants' motion do they suggest the repeal of Section 90-4-1001, MCA, will alter their conduct that results in Montana's fossil fuel-based energy system.

To the contrary, Governor Gianforte's Natural Resources Policy Advisor, Michael Freeman, has frankly admitted that repealing the explicit state energy policy contained in Section 90-4-1001, MCA, "does not conflict with the [Governor's] energy policy and in fact it helps clarify Montana's energy policy." Hedges MSJ Dec. ¶ 12. As Mr. Freeman explained, "we have a very comprehensive energy policy in the state of Montana" and it is an "all-of-the-above" energy policy. *Id.* at ¶¶ 12, 14, 18-19. As in *Johnson v. City of Grants Pass*, the record here demonstrates a **continuous and ongoing** energy policy by Defendants to permit, authorize, and perpetuate fossil fuel extraction and use. Erickson Dec. ¶ 7; *see Maldonado*, 61 F.4th at 1007 ("Indeed, the case is no more moot than *Brown v. Board of Education* would have been if, in the wake of the Supreme Court's 1954 decision, the Topeka Board of Education had issued a memorandum directing its schools to desegregate and record evidence demonstrated that Black children were still attending segregated schools."). Here, the record evidence compellingly demonstrates that Montana children are still suffering from the Defendants' continuous and ongoing energy policy that is causing the harms that are copiously documented in the record before the Court.

In sum, Defendants failed to meet their heavy burden to show the challenged conduct has ceased and will not start up again. Accordingly, Plaintiffs' claims challenging the constitutionality of Section 90-4-1001, MCA are not moot and remain justiciable. *Johnson*, 50 F.4th at 798-99

("[V]oluntary cessation of challenged practices rarely suffices to moot a case and, in any event, there is evidence the challenged practices have continued . . .").

B. The Public Interest Exception Applies Given the Significant Public Constitutional Issues in this Case

The public interest exception to the mootness doctrine applies where the issues are constitutional and involve broad public concerns. *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. In such instances, the court reserves the power to examine these issues and avoid future litigation on a point of law. *Id.* Specifically, "the public interest exception applies where: (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 v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867; *In re Big Foot Dumpsters & Containers*, ¶ 18. 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. Here, the public interest exception to the mootness doctrine applies to Plaintiffs' claims related to the formerly codified state energy policy. As discussed below, this exception applies for several independent reasons.

First, the issues presented by Plaintiffs' constitutional challenge are 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 Ramon*, ¶¶ 21-22; *see also Missoula City-Cnty. Air Pollution Control Bd. v. Bd. of Env't Review*, 282 Mont. 255, 263, 937 P.2d 463, 468 (1997) (air quality is "indubitably" an issue of public importance). Defendants agree "this case involves constitutional issues of statewide importance." Defs.' Pet. for Writ of Supervisory Control (June 10, 2022). This alone satisfies the public interest exception to mootness.

Second, as discussed above, the constitutional issues raised by Plaintiffs with respect to Defendants' formerly explicit, and historically and present *de facto*, state energy policy, are likely, if not certain, to recur. Compl. ¶ 120; Hedges MTD Dec. ¶ 8 ("I believe Defendants will continue their longstanding practice to permit and approve fossil fuels projects, including power plants, oil and gas pipelines, coal mines, and projects long into the future unless Montana's Constitution is

interpreted by the courts to constrain their authority in doing so.”). So, while the 2023 Legislature has repealed the statutorily codified state energy policy in Section 90-4-1001, MCA, Montana still has a state energy policy and Defendants’ longstanding practice of exercising their discretion to systematically approve *every* fossil fuel-related permit that comes before them shows no sign of abating. *Walker*, ¶ 43 (“[A]s long as the current [] policies are in place, the problems will repeat themselves.”). Additionally, in the future, the Legislature could simply reenact the former Section 90-4-1001, MCA, as HB 170’s sponsor, Representative Gunderson, plainly admitted. *See Hedges MSJ Dec.* ¶ 16.

Finally, an answer from this Court to the question of whether Defendants’ codified state energy policy, as stated explicitly in Section 90-4-1001, MCA, violates the 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.” *Ramon*, ¶ 24. A resolution of Plaintiffs’ claims “is also in the interest of Montana taxpayers.” *Id.* Such a ruling would resolve live controversies between the parties concerning the scope of Plaintiffs’ constitutional rights and the constitutionality of Defendants’ state energy policy. Accordingly, the public interest exception applies and Plaintiffs’ challenge to Montana’s state energy policy is not moot and should be resolved at trial.

CONCLUSION

Defendants repealed Section 90-4-1001, MCA, in an effort to avoid being held accountable for their conduct and avoid a trial over their ongoing state energy policy and conduct that causes and contributes to the climate crisis and injures youth Plaintiffs. This Court need not accept Defendants’ maneuvers to avoid trial, all while Defendants’ unconstitutional conduct continues, and urgent justiciable controversies remain. Defendants do not argue, or present any evidence, that their long-standing and ongoing conduct to perpetuate a fossil fuel energy system in Montana will change following the repeal of Section 90-4-1001, MCA. Nor do Defendants argue that Plaintiffs’ injuries will be alleviated. This Court can and should still grant effective, meaningful equitable relief that will redress and alleviate Plaintiffs’ injuries. Each of Plaintiffs’ four Counts and Prayers for Relief 1, 2, 3, 4, 5, and 11 remain alive and in need of resolution at trial.

Moreover, even assuming *arguendo* this Court were to find the repeal of Section 90-4-1001, MCA, mooted Plaintiffs’ challenge to the codified state energy policy, two clear exceptions to the

mootness doctrine apply to the facts of this case. The challenged conduct has not ceased and the law could easily be readopted in the future (as Defendants admit). Additionally, the case raises significant constitutional issues (which Defendants also admit).

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion be DENIED and trial commence, as scheduled, on June 12.

DATED this 14th day of April, 2023.

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