IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1639-22-2

LAYLA H. by her next friend Maria Hussainzadah; AMAYA T. by her next friend LaKiesha Cook; CLAUDIA SACHS; CEDAR B. by his next friend Shannon Bell; AVA L. by her next friend Margaret Schaefer Lazar; CADENCE R.-H. by her next friend Rebecca Rubin; TYRIQUE B. by his next friend Kiesha Preston; GIOVANNA F. by her next friend Mary Finley-Brook; ELIZABETH M. by her next friend Barbara Monacella; MARYN O. by her next friend Emily Satterwhite; KYLA H. by their next friend Jennifer Hitchcock; and KATERINA LEEDY.

Appellants;

v.

COMMONWEALTH OF VIRGINIA; GLENN YOUNGKIN, in his official capacity as Governor; VIRGINIA DEPARTMENT OF ENERGY; WILL CLEAR, in his official capacity as Director of the VIRGINIA DEPARTMENT OF ENERGY; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, in his official capacity as Director of the VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY.

Appellees.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The single issue presented on appeal is whether Plaintiffs' constitutional and *jus publicum* claims for equitable relief are barred by sovereign immunity. Rather than address this issue head on, Defendants' arguments distract from the straightforward conclusion that Virginia's courts can declare Plaintiffs' fundamental constitutional and *jus publicum* rights and measure government conduct against those declared rights.

Importantly, Article I, Section 11 does not require evaluation of whether a "sufficient rule" exists to be self-executing and waive sovereign immunity. Br. of Appellees at 26–28. That analysis is not necessary when a constitutional provision is in the Bill of Rights or negative in character. Further, contrary to Defendants' contention, Br. of Appellees at 15, Plaintiffs do not need a statutory or constitutional waiver of sovereign immunity to bring their common law *jus publicum* claims because the *jus publicum* is an incident of sovereignty and thus inherently limits the government's power. Additionally, while beyond the scope of this appeal, Plaintiffs' Complaint adequately alleges standing with allegations that must be taken as true at this stage of the proceedings. Finally, Virginia's separation of powers doctrine is not implicated by Plaintiffs' claims or requested relief, rather separation of powers requires this Court act in its constitutionally enshrined role to ensure other branches of government abide by Virginia's laws, which is what Plaintiffs request here.

If this Court does not act in its constitutional role as a check on the other branches of government, the Commonwealth could violate Virginians' rights to life and liberty and forsake their "most solemn duty . . . to exercise its *jus publicum* for the benefit of the people." *See Commonwealth v. City of Newport News*, 158 Va. 521, 549 (1932). This is antithetical to the Bill of Rights and to the very sovereignty of Virginia, from which the *jus publicum* is derived. This Court should reject Defendants' invitation to expand the scope of sovereign immunity for the first time in Virginia's history to apply to equitable constitutional claims, and instead follow Virginia's binding Supreme Court jurisprudence that sovereign immunity does not, and never has, applied to claims under the Bill of Rights seeking equitable relief or common law *jus publicum* claims.

ARGUMENT & AUTHORITIES

I. THE VIRGINIA COURTS HAVE THE POWER TO DECLARE PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS

Plaintiffs bring two substantive due process claims—one challenging sections of the Virginia Gas and Oil Act and one challenging Defendants' policy and practice of permitting fossil fuel infrastructure. Record at 69–71 (Count II), 73–75 (Count IV). Defendants ignore that in addition to asserting violations of their unenumerated fundamental liberty rights, Plaintiffs also explicitly allege violations of their *enumerated* and *previously recognized* substantive due process rights, which include life, liberty, property, personal security, the capacity of Plaintiffs to provide for their

basic human needs, safely raise families, learn and practice their religious and spiritual beliefs, and maintain their bodily integrity. Br. of Appellees at 2, 23; Record at 70 (¶ 192), 73–74 (¶ 208). Plaintiffs' substantive due process claims are not barred by sovereign immunity.

A. Virginia's Appellate Courts Have Never Barred a Bill of Rights Claim Based on Sovereign Immunity.

Binding Supreme Court precedent is unambiguous—sovereign immunity does not apply to claims secured by the Bill of Rights seeking equitable relief—which includes Plaintiffs' due process claims under Article I, Section 11. *See, e.g.*, *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137–39 (2011); (concluding sovereign immunity did not apply to claims under Bill of Rights provisions); *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 105–06 (2008) (same). Defendants do not cite a *single* Supreme Court of Virginia case to the contrary. Instead, Defendants improperly rely on statutory and tort cases to argue sovereign immunity bars Plaintiffs' *constitutional* claims seeking *equitable* relief. Br. of Appellees at 24–25.

The dicta[1] Defendants cite in *Hinchey* and other cases, that sovereign immunity may apply to claims for equitable relief, has only ever been applied to

[1] Contrary to Defendants' framing these statements as "holdings", Br. of Appellees at 25, they are clearly dicta because the language was "not essential" to the disposition of the case. *Newman v. Newman*, 42 Va. App. 557, 565–66 (2004). Dicta is not binding. *Id.*

statutory, torts, or contracts claims and cannot be read to overturn the holdings in *DiGiacinto* and *Gray*. *See, e.g.*, *Hinchey v. Ogden,* 226 Va. 234, 239 (1983).[2] *Daniels v. Mobley* only supports Plaintiffs' position because the Court dismissed plaintiff's statutory claims as barred by sovereign immunity but held that plaintiff's constitutional "void for vagueness" due process claim was not barred by sovereign immunity. 285 Va. 402, 411–13 (2013).

It is vital to the purpose behind the Bill of Rights and separation of powers principles that courts maintain their authority to grant equitable relief in claims for violations of the rights to life and liberty. *See Currier v. Commonwealth*, 65 Va. App. 605, 613 (2015) ("The purpose of the Bill of Rights as a whole is to protect the citizenry from abusive practices by the government."); *Moore v. Sutton*, 185 Va. 481, 484 (1946) (it is the "bounden duty of the courts" to preserve constitutional rights when other branches of government breach them); Br. of Appellants §§ I(B), II(C). Consistent with upholding fundamental rights and abiding by separation of

[2] *See also Fines v. Rappahannock Area Cmty. Servs. Bd.,* 876 S.E.2d 917, 922 (Va. 2022) (sovereign immunity may apply in tort or statutory cases); *Dr. William E.S. Flory Small Bus. Dev. Ctr., Inc. v. Commonwealth*, 261 Va. 230, 237 (2001) (applying sovereign immunity to quasi-contract claim); *Afzall v. Commonwealth*, 273 Va. 226, 229 (2007) (torts claim); *All. to Save the Mattaponi v. Commonwealth, Dep't of Env't Quality*, 270 Va. 423, 439–41, 454–55 (2005) (statutory and treaty claims); *XL Specialty Ins. Co. v. Commonwealth, Dep't of Transp.*, 47 Va. App. 424, 427 (2006) (contract claim).

powers principles, Virginia appellate courts have never applied sovereign immunity to equitable constitutional claims under the Bill of Rights and should not do so here.

B. The Text of Article I, Section 11 Need Not Contain a Sufficient Rule to Be Self-Executing; Courts Analyze Article I, Section 11 Violations According to the Three Tiers of Scrutiny.

Article I, Section 11 is self-executing because—as Defendants admit—it is contained in the Bill of Rights and is negative in character. Br. of Appellees at 35; *DiGiacinto,* 281 Va. at 138. Defendants wrongly claim additional factors must be considered to determine when a constitutional provision is self-executing, arguing that the "crux" of the analysis is whether the constitutional right sets forth a rule by which "the principles it posits may be given the force of law." Br. of Appellees at 27 (quoting *Robb v. Shockoe Slip Found.*, 228 Va. 678, 682 (1985)). But as Defendants admit, *Robb* was not a sovereign immunity case. *Id.* at 20. Defendants discount the dispositive factors that, when met, have always indicated a constitutional provision is self-executing—whether the provision is in the Bill of Rights or negative in character.

In *DiGiacinto*, the Supreme Court held that Article I, Section 14 is self-executing because it is in the Bill and Rights and is negative in character. 281 Va. at 138. The presence or absence of a rule to apply played no part in the Court's holding. *Id.* Similarly, in *Gray*, the Supreme Court held that Article I, Section 5 and Article III, Section 1 are self-executing because they are in the Bill of Rights and/or are

negative in character. 276 Va. at 105. Again, the Court made no reference to a rule to apply in analyzing those provisions. *Id.* The Supreme Court only considers whether there is a sufficient rule to apply when a constitutional provision is not in the Bill of Rights or negative in character. *Id.* at 105–06 (even though not in Bill of Rights and not negative, Article IV, Section 1 is self-executing because it provides a clear rule). This matter is long settled and the Court should reject Defendants' attempt to create a new analysis for when a constitutional provision is self-executing.

Even if this Court considers whether there is a rule to apply to Plaintiffs' substantive due process claims[3]—there clearly is. Substantive due process cases have been heard and decided on the merits in this country for decades. Plaintiffs allege that their previously recognized due process rights are being violated by the government's conduct. Record at 70 (¶ 192), 73–74 (¶ 208). Courts in Virginia know how to analyze a constitutional challenge to government action and there is ample Virginia precedent analyzing whether Article I, Section 11 rights have been infringed. *See, e.g., King v. Va. Birth-Related Neurological Inj. Comp. Program*, 242 Va. 404, 411–12 (1991) (reviewing on merits whether statute violated doctors'

[3] Defendants' assertion that Virginia's due process clause does not have a substantive component is at odds with decades of controlling Supreme Court precedent recognizing substantive due process rights under Article I, § 11. Br. of Appellees at 11; *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005); *Willis v. Mullett*, 263 Va. 653, 657 (2002); *Walton v. Commonwealth*, 255 Va. 422, 427 (1998); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 97 (1989).

substantive due process rights under Article I, § 11). Courts also follow the rule that substantive due process rights are protected by the three tiers of scrutiny—rational basis, intermediate scrutiny, and strict scrutiny. *See Etheridge*, 237 Va. at 97.

The cases Defendants cite for their argument that Article I, Section 11 is not self-executing are non-precedential circuit court cases that seek *damages*, and are thus inapposite to this case, which seeks *equitable relief* only. *See, e.g.*, *Gray v. Rhoads,* 55 Va. Cir. 362, 367 (Charlottesville Cir. Ct. 2001) (analyzing only constitutional *damages* cases). Further, each circuit court case Defendants cite relies on *Gray v. Rhoads*, 55 Va. Cir. at 362[4] (or other cases that in turn rely on *Gray v. Rhoads*) which did not consider, let alone hold, that *equitable relief* was unavailable as a remedy for deprivations of life or liberty. The non-binding circuit court cases Defendants cite are not persuasive and should not be relied upon here.

Whether or not Plaintiffs' unenumerated liberty rights are also being infringed, which Defendants prematurely spend time arguing, is a question for the merits and is not before this Court on appeal.[5] On remand, the circuit court can apply

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[4] *See, e.g.*, *Young v. City of Norfolk,* 62 Va. Cir. 307, 312 (Norfolk Cir. Ct. 2003) (seeking *damages*); *Quigley v. McCabe*, No. 2:17CV70, 2017 WL 3821806, at *7 (E.D. Va. 2017) (same); *K.I.D. v. Jones,* No. CL14-51, 2016 Va. Cir. LEXIS 103 (Richmond Cnty. Cir. Ct. 2016) (same); *Ellis v. Kennedy,* No. CL19-03, 2020 Va. Cir. LEXIS 244, at *24 (Loudoun Cnty. Cir. Ct. 2020) (same).

[5] Defendants' citation to out-of-state cases regarding the scope of the due process clause is irrelevant to the questions presented, but if anything, those cases support Plaintiffs' argument here because none of those cases was barred on the basis on sovereign immunity—the issue before this Court. Br. of Appellees at 32–33.

the rule Virginia courts follow when identifying previously unrecognized liberty rights in substantive due process cases: the right must be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Br. of Appellees at 33 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997)); *see also Paris v. Commonwealth*, 35 Va. App. 377, 383 (2001) (applying *Glucksberg* test).

C. The Purposes Sovereign Immunity Serves Do Not Apply to Constitutional Cases Seeking Equitable Relief.

In the face of well-settled law, Defendants present no persuasive argument as to why sovereign immunity should be extended to bar constitutional cases seeking equitable relief. Unlike cases seeking damages where monetary remedies harm the public purse, the equitable relief Plaintiffs seek—declaratory relief—is forward-looking and clarifies the parties' rights to guide future conduct. *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 99 (2013). Equitable remedies, and in particular declaratory relief, do not present the same concerns as monetary damages claims. For example, historically, Virginia's founders, including James Madison and John Marshall, believed sovereign immunity was important to protect the Commonwealth from being sued for Revolutionary War debt and were concerned with damages claims. *See* Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 47–49 (2002).

Defendants' other cited purposes of sovereign immunity, including "burdensome interference," Br. of Appellees at 14, are not applicable here where Plaintiffs are seeking declaratory judgment as to whether specific statutes and government conduct violate their rights. Such a declaration would enhance the orderly administration of government by ensuring government conduct remained within legal boundaries prescribed by the Constitution. *Bd. of Supervisors of Loudoun Cnty. v. Town of Purcellville*, 276 Va. 419, 434 (2008) (declaratory judgments "guide parties in their future conduct" reducing "the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interest"). Such "interference" to remedy constitutional violations is not "burdensome," it is an inexorable component in free and ordered societies and a *constitutional* democracy. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("A constitutional democracy like ours . . . need[s] limitations on the power of governors over the governed."). The purposes of sovereign immunity do not apply to this case in equity that seeks declaratory relief.

Consistent with binding Supreme Court of Virginia precent, the rights to life and liberty under Article 1, Section 11 are self-executing as to claims for equitable relief, *DiGiacinto,* 281 Va. at 138. Defendants have not cited a single binding decision to the contrary. This Court must reject Defendants' efforts to expand the doctrine of sovereign immunity to claims in equity for the deprivations of life and

liberty and affirm it is the judiciary's proper role to interpret the extent of inalienable rights and determine whether government conduct has infringed such rights.

II. PLAINTIFFS CAN ENFORCE DEFENDANTS' OBLIGATION TO HOLD THE *JUS PUBLICUM* FOR THE PUBLIC BENEFIT

A. The *Jus Publicum* as an Incident of Sovereignty Does Not Require a Separate Constitutional or Statutory Waiver of Immunity to Be Enforced.

Plaintiffs' *jus publicum* claims are not statutory claims nor claims brought under Article XI, Section 1 of Virginia's Constitution. Plaintiffs bring a common law *jus publicum* claim to protect rights the Constitution also defined and expanded. Record at 64, ¶ 168. While Defendants admit that the *jus publicum* is "'an essential attribute' of the Commonwealth's state sovereignty," they ignore that this feature makes the doctrine unique and entirely different from other common law concepts. Br. of Appellees at 16. Because it is an incident of sovereignty, it inherently limits the government's power and no other express waiver of immunity is necessary. *See City of Newport News,*158 Va. at 546; *see also Coastal Conservation Ass'n v. North Carolina*, 878 S.E.2d 288, 297 (N.C. Ct. App. 2022) (concluding sovereign immunity could not bar public trust claim); Br. of Appellants at 28–29. Plaintiffs are aware of no Virginia case applying sovereign immunity to a *jus publicum* or public trust claim and Defendants have cited none. *See* Br. of Appellees at 13–23. On the other hand, law professor *amici* have cited a multitude of cases where *jus publicum*

or public trust claims have been found to be justiciable. Br. of Amicus Curiae Public Trust Law Professors at 25–26.

"The people of Virginia, through their Constitution, granted sovereignty to the Commonwealth for their common benefit, protection, and security." *Wright v. Norfolk Electoral Bd.*, 223 Va. 149, 152 (1982) (citing Va. Const. art. I, §§ 2–3). The *jus publicum* is an incident of, and limitation on, that sovereignty granted to the Commonwealth and it mandates public ownership of certain common resources where the Commonwealth acts as trustee for the public benefit. *City of Newport News*, 158 Va. at 546, 549 ("In this sense it is a trustee for the people of the State[.]"). Because the Commonwealth acts as a trustee, the *jus publicum* is in turn a limitation on the Commonwealth's authority and the Commonwealth cannot "relinquish, surrender, alienate, destroy, or substantially impair the right of *jus publicum*, or the rights of the people inherent to the *jus publicum*, except as authorized by the Constitution of Virginia." *Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 383 (2014) (internal quotation marks and citation omitted). The Virginia Constitution has only served to define (and expand) the scope of the *jus publicum*, and Defendants do not point to any part of the Constitution that authorizes the Commonwealth to limit or impair the *jus publicum* because no such authorization exists. Because the *jus publicum* itself provides a limitation on government conduct, *Chincoteague Inn*, 287 Va. at 383, the Commonwealth's argument that there must

then be a separate statutory or constitutional waiver of sovereign immunity is nonsensical.

Furthermore, the Supreme Court of Virginia has recognized the inalienability of the *jus publicum*—it is not a doctrine that can be shed from the Commonwealth's protection. *City of Newport News*, 158 Va. at 547 ("The legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the *jus publicum*."); *see also Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (state cannot abdicate its trust over property in which the whole people are interests); *Coastal Conservation Ass'n*, 878 S.E.2d at 295 (same). Sovereign immunity cannot apply to the *jus publicum* right without eviscerating it entirely because it would mean that the restraint imposed upon the Commonwealth could not be enforced. This would render the *jus publicum* meaningless and allow the Commonwealth to destroy resources its citizens depend on to exercise essential fundamental rights, including the rights to life and liberty, without recourse.

B. Defendants Erroneously Apply the Court's Holding in *Robb* Regarding Article XI, Section 1 to the *Jus Publicum*.

Robb's holding that Article XI, Section 1 is not self-executing is inapplicable to the common law *jus publicum* because *Robb* was not a case about sovereign immunity or the *jus publicum* (which Defendants do not deny), and only analyzed historical building sites, which are not at issue here. Br. of Appellees at 18–19; *Robb*,

228 Va. at 680–81. Plaintiffs agree with Defendants that it is not necessary to apply the self-executing analysis in *Robb* to the *jus publicum*.[6] Br. of Appellees at 18–19.

Nevertheless, Defendants erroneously apply *Robb*'s holding regarding historical sites in Article XI, Section 1 to Plaintiffs' common law *jus publicum* claims. Br. of Appellees at 19–20. The common law *jus publicum* doctrine does not invite the "crucial questions of both substance and procedure" that historical sites in Article XI, Section 1 did in the Court's analysis in *Robb*. 228 Va. at 682–83. The Supreme Court of Virginia has already articulated an enforceable standard for the *jus publicum* that alleviates the concerns presented by those questions: the Commonwealth cannot "'relinquish, surrender, alienate, destroy, or substantially impair' the right of *jus publicum*, or the rights of the people inherent to the *jus publicum*[.]" *Chincoteague Inn*, 287 Va. at 383 (citation omitted). Further, the *jus publicum* right is absolute because the Commonwealth must exercise "its *jus publicum* for the benefit of the people." *City of Newport News,* 158 Va. at 549. Thus, the questions of substance and procedure set forth in *Robb* regarding historical sites do not arise when enforcing the *jus publicum*.

[6] If this Court does apply the *Robb* bases for constitutional provisions to Plaintiffs' common law *jus publicum* claim because "[t]he *jus publicum* is a constitutional doctrine . . .", *Chincoteague Inn*, 287 Va. at 385 n.5, it still satisfies the *Robb* criteria and is self-executing. *See* Br. of Appellants § III(c).

C. The Purposes Sovereign Immunity Serves Do Not Apply to the *Jus Publicum.*

Defendants do not provide any reasoning why the purposes of sovereign immunity are applicable to common law *jus publicum* claims. Br. of Appellees at 14. It is not "burdensome interference" to hold the government accountable for its obligations to the people. *See City of Newport News*, 158 Va. at 549. Enforcement also does not "improperly influenc[e] . . . governmental affairs," when the law expresses a clear right and the court is asked to enforce what the Supreme Court affirmed the Commonwealth cannot do: "'relinquish, surrender, alienate, destroy, or substantially impair' the right of *jus publicum*, or the rights of the people inherent to the *jus publicum*." *Chincoteague Inn*, 287 Va. at 383. Asking the Court to enforce a right that the Commonwealth undeniably cannot take away, as Plaintiffs do here, undermines none of the purposes behind sovereign immunity.

III. DEFENDANTS' ARGUMENTS OUTSIDE THE SCOPE OF THIS APPEAL SHOULD BE DEFERRED

Defendants admit this Court need not go beyond the issue of sovereign immunity in this case. Br. of Appellees at 38. Nonetheless, they raise standing and separation of powers issues that are outside of the scope of this appeal, Br. of Appellees at 38–52, because the circuit court only ruled on Defendants' plea of sovereign immunity and not on the demurrer. Record at 215, 274 ("The Court will not address the merits of the demurrer . . . ."). Defendants did not cross-appeal the

circuit court's order nor raise any additional assignments of error. Br. of Appellees at 9. A responding party cannot unilaterally expand the scope of the assignments of error on appeal. *Dudley v. Estate Life Ins. Co. of Am.*, 220 Va. 343, 348 (1979) ("Elementary is the rule of appellate procedure that the scope of argument on appeal is limited by the assignments of error." (citing *Harlow v. Commonwealth*, 195 Va. 269, 271 (1953)). Defendants' citation that this Court can affirm a trial court's judgment on other grounds, Br. of Appellees at 38, applies only where there is a trial or evidentiary record and no further factual development is required, which is not the case here.[7] Nevertheless, Plaintiffs briefly address Defendants' standing and separation of powers and arguments.[8]

A. Plaintiffs' Allegations in the Complaint Satisfy Standing.

This Court should reject Defendants' standing arguments because at this stage, the facts in the Complaint must be taken as true and Defendants' arguments are based on assertions from outside the Complaint, which Plaintiffs dispute, making them inappropriate for resolution here. *See* Br. of Appellees at 48–49 (relying on

[7] Defendants cite to *Spencer v. Commonwealth*, which does not support their argument. 68 Va. App. 183, 190 (2017) ("On appeal, we may affirm on grounds different from those on which the trial court based its decision so long as the issue was addressed at trial, evidence exists in the record to support those alternate grounds, the trial judge's decision does not reject those grounds, and no further factual resolution is necessary to support the decision.").

[8] If this court is inclined to address these issues, Plaintiffs also incorporate by reference their briefing below. Record at 182–88.

various reports outside the record); *Fines*, 876 S.E.2d at 922 ("[W]here no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's complaint are deemed true." (citing *Lostrangio v. Laingford*, 261 Va. 495, 497 (2001) (cleaned up)).

Plaintiffs' Complaint satisfies the pleading requirements for standing on a demurrer. *Anders Larsen Tr. v. Bd. of Supervisors of Fairfax Cnty.*, 301 Va. 116, 121 (2022) (complaining party must have sufficient interest in the subject matter of the case). Standing in declaratory judgment actions requires an actual controversy such that the complainant's rights will be affected by the outcome of the case. *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38, 45 (2013).

Here, despite Defendants' claims otherwise, Plaintiffs have alleged facts that demonstrate an actual controversy and show that Plaintiffs' rights will be affected by the outcome of the case because they request the court rule on the constitutionality of Defendants' conduct directly harming them. Plaintiffs have alleged injuries caused by Defendants' conduct that contributes to climate change. Record at 10–29.[9] Specifically, Defendants' historic and ongoing permitting of fossil fuel

[9] *See, e.g.*, Record at 11, 23–25, 28 (Layla, Tyrique, Elizabeth, and Katerina experiencing heat-related illness, including heat exhaustion and heat rash, from increasing temperatures caused by climate change).

infrastructure, Record at 37–42,[10] results in dangerous greenhouse gas emissions that contribute to and exacerbate Plaintiffs' injuries. Record at 42–58;[11] *see also,* Br. of Appellants at 1–6; *see also,* Op. and Order at 1–2, 17, *Juliana v. United States*, No. 6:15-CV-01517-AA (D. Or. June 1, 2023) (holding declaratory relief for similar constitutional claims satisfies standing and "would itself be significant relief.") (Exhibit A).[12]

Defendants attempt to deflect their own responsibility for causing injury by claiming their actions have no measurable effect on global climate change, Br. of Appellees at 49–50, but that only supports that an actual controversy exists because

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[10] *See, e.g.*, Record at 39 (between April 2020 and February 2022 alone, Defendants "approved 82 new permits for fossil fuel extraction and infrastructure projects, renewed 9 permits, approved 59 permits modifications, and 8,887 supplemental permits").

[11] *See, e.g.*, Record at 43 (Virginia's CO_2 emissions from permitted fossil fuel burning was 103.2 MMT in 2018—more than 33 other states); *id.* at 42 ("Virginia's fossil fuel-based energy system results in dangerous GHG pollution."); Record at 46–58 (detailing the increasingly severe impacts of climate change).

[12] The Montana state court recognized the connection between Defendants' fossil fuel permitting and Plaintiffs' injuries:

> 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 . . . such as the mining of coal, drilling oil and gas wells, and generating electricity from fossil fuels.

Order on Mot. to Dismiss and Summ. Judgment at 12–13, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Dist. Ct. May 23, 2023) (trial to commence on June 12, 2023) (Exhibit B).

Defendants contradict Plaintiffs' allegations in the Complaint, Record at 42–46, and is a factual question on the merits that must be decided with a full factual record including expert testimony. Importantly, the Commonwealth's greenhouse gas emissions remain dangerously high at a time when greenhouse gas emissions reductions are critical—these allegations must be accepted as true here. *Id*.

The gravamen of this case is declaratory relief where Plaintiffs seek clarity on the contours of their constitutional and *jus publicum* rights as a means to guide Defendants' future conduct to ensure that it does not infringe upon their constitutional rights. Record at 69, 71–72, 74. Given Defendants' arguments on the merits of Plaintiffs' claims throughout its Brief on Appeal, a clear controversy exists making declaratory relief an appropriate remedy. *Id.* A ruling in Plaintiffs' favor would redress their injuries by declaring the existence and scope of their constitutional rights, making a judgment as to whether Defendants' statutory directives to maximize oil and gas production and issuance of fossil fuel permits is consistent with Plaintiffs' constitutional rights, and if not, declaring that conduct unconstitutional and ensuring that Defendants' future conduct is consistent with Plaintiffs' rights. Thus, Plaintiffs' rights will be affected by the outcome of the case.

B. Plaintiffs' Claims Do Not Violate Separation of Powers.

Defendants' separation of powers arguments rely on gross mischaracterizations of Plaintiffs' claims and requested relief. Plaintiffs are not

asking the Court to formulate public policy. Br. of Appellees at 39, 40. Plaintiffs request that the Court do what is undeniably within the judiciary's power: evaluate the constitutionality of statutes and government conduct that is infringing fundamental rights. Record at 71–72. The Supreme Court of Virginia has already confirmed that the type of claims Plaintiffs assert do not offend the separation of powers. *See Elizabeth River Crossings OpCo, LLC v. Meeks,* 286 Va. 286, 309–10 (2013) (role of the court to ascertain whether the political entities have acted within the constitutional boundaries that limit governmental power). Accepting Defendants' argument that the statutes and government conduct challenged here are immune from judicial review would violate Virginia's separation of powers doctrine by allowing the political branches to escape the constitutionally enshrined judicial checks and balances. Va. Const. art I, § 5; Va. Const. art. III, § 1; Va. Const. art. VI, § 1; *see Ex parte Young,* 209 U.S. 123, 143 (1908) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."). "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." Op. and Order at 18, *Juliana v. United States*, 6:15-CV-01517-AA (D. Or. June 1, 2023). Moreover,

at this stage of the case the Court should not speculate if any relief at the end of the case would implicate separation of powers concerns,[13] because Plaintiffs seek types of relief that are clearly within this Court's authority to award. *See, e.g.*, *Mahan v. Nat'l Conservative Pol. Action Comm.*, 227 Va. 330, 340 (1984) (affirming declaratory judgment holding statute unconstitutional).

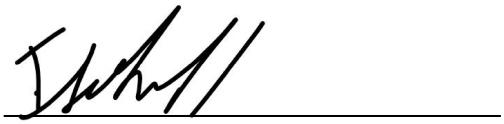
CONCLUSION

This Court should reverse the circuit court's ruling and hold sovereign immunity does not bar Plaintiffs' life and liberty claims under Article I, Section 11 and does not bar their common law *jus publicum* claims and remand for further proceedings.

[13] *Baker v. Carr*, 369 U.S. 186, 198 (1962) ("[I]t is improper now [on a motion to dismiss] to consider what remedy would be most appropriate if appellants prevail at the trial."). The out-of-state cases Defendants rely on are distinguishable because, unlike this case, they sought specific injunctive relief that is not requested here, and were wrongly decided because they speculated as to the relief that would be needed to redress the plaintiffs' claims without first hearing the evidence of the scope of the violation. Br. of Appellees at 40–41; *Sagoonick v. Alaska*, 503 P.3d 777, 793–99 (2022) (only analyzing separation of powers issues with respect to plaintiffs' request for injunctive relief); *Aji P. v. Washington*, 16 Wash. App. 2d 177, 193 (2021) (same). More recently, the Hawai'I state court correctly found that considering the merits of injunctive relief on a motion to dismiss is "non-essential and premature." Order Denying Defs.' Mot. to Dismiss at 11, *Navahine v. Haw. Dept. of Transp.*, No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. Apr. 19, 2023) (Exhibit C).

DATED: June 2, 2023

Respectfully Submitted,



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RULE 5A:22 CERTIFICATE

In accordance with Rule 5A:22 of the Rules of the Supreme Court of Virginia, I certify:

1. On June 2, 2023, an electronic version of this brief was filed electronically with this Court in compliance with Rule 5A:1(c). A copy was emailed to counsel for appellees at the addresses below.

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2. In accordance with Rule 5A:4(d), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 5,165 words.

3. Counsel for Plaintiffs-Appellants request oral argument in this case.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civ. No. 6:15-cv-01517-AA

OPINION AND ORDER

AIKEN, District Judge:

In this civil rights action, plaintiffs—a group of young people between the ages of eight and nineteen when this lawsuit was filed and "future generations" through their guardian Dr. James Hansen—allege injury from the devastation of climate change and contend that the Constitution guarantees the right to a stable climate system capable of sustaining human life. Plaintiffs maintain that federal defendants have continued to permit, authorize, and subsidize fossil fuel extraction and consumption, despite knowledge that those actions cause catastrophic global warming. This case returns to this Court on remand from the Ninth Circuit Court of Appeals, where plaintiffs demonstrated their "injury in fact" was "fairly traceable" to federal defendants' actions—two of three requirements necessary to establish

standing under Article III. However, the Ninth Circuit reversed with instructions to dismiss plaintiffs' case, holding that plaintiffs failed to demonstrate "redressability"—the third, final requirement to establish Article III standing. The Ninth Circuit determined that plaintiffs did not "surmount the remaining hurdle" to prove that the relief they seek is within the power of an Article III court to provide. *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020). After that court's decision, plaintiffs moved to amend, notifying this Court of an intervening change in controlling law, *Uzuegbunam v. Preczewski*, ___U.S.___, 141 S. Ct. 792 (2021), asserting abrogation of the Ninth Circuit's ruling on redressability. Now, plaintiffs contend that permitting amendment will allow plaintiffs to clear the hurdle the Ninth Circuit identified, so that the case may proceed to a decision on the merits. For the reasons explained, this Court grants plaintiffs' motion for leave to file a second amended complaint. (Doc. 462).

BACKGROUND

In August 2015, plaintiffs brought this action asserting that the federal government has known for decades that carbon dioxide pollution was causing catastrophic climate change and that large-scale emission reduction was necessary to protect plaintiffs' constitutional right to a climate system capable of sustaining human life. (Doc. 7 at 51). As the Ninth Circuit recognized, plaintiffs provided compelling evidence, largely undisputed by federal defendants, that "leaves little basis for denying that climate change is occurring at an increasingly rapid pace." *Juliana*, 947 F.3d at 1166. The substantial evidentiary record supports that since the dawn of the Industrial Age, atmospheric carbon dioxide has "skyrocketed to levels

not seen for almost three million years," with an astonishingly rapid increase in the last forty years. *Id*. at 1166. The Ninth Circuit summarized what plaintiffs' expert evidence establishes: that this unprecedented rise stems from fossil fuel combustion and will "wreak havoc on the Earth's climate if unchecked." *Id*. The problem is approaching "the point of no return," the court stated, finding that the record conclusively demonstrated that the federal government has long understood the risks of fossil fuel use. *See id*. (cataloguing, as early as 1965, urgent warnings and reports from government officials imploring swift nationwide action to reduce carbon emissions before it was too late).

In their first amended complaint, filed in the District Court for the District of Oregon, plaintiffs alleged violations of their substantive rights under the Due Process Clause of the Fifth Amendment; the Fifth Amendment right to equal protection of the law; the Ninth Amendment; and the public trust doctrine. (Doc. 7). Plaintiffs also sought several forms of declaratory relief and an injunction ordering federal defendants to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]." *Id*. at 94-95.

Federal defendants moved to dismiss for lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim on a public trust theory. (Doc. 27). Adopting the findings and recommendation of Federal Magistrate Judge Thomas Coffin, this Court denied federal defendants' motion, concluding that plaintiffs had standing to sue, raised justiciable questions, and had stated a claim for infringement of a Fifth Amendment due process right:

> In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation[.] To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.

Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

At that stage of litigation, this Court also determined that plaintiffs had stated a viable due process claim arising from federal defendants' failure to regulate third-party emissions and had stated a public trust claim grounded in the Fifth and the Ninth Amendments. *Id*. at 1252, 1259.

Federal defendants moved to certify to the Ninth Circuit for interlocutory appeal[1] this Court's order denying federal defendants' motion to dismiss. Doc. 120. This Court denied the motion to certify. (Doc. 172). Federal defendants petitioned the Ninth Circuit for Writ of Mandamus, contending that this Court's opinion and order denying their motion to dismiss was based on clear error. (Doc. 177). The Ninth Circuit denied the petition, concluding mandamus relief was unwarranted at that stage of litigation, when plaintiffs' claims could be "narrowed" in further proceedings. *See In re United States*, 884 F.3d 830, 833 (9th Cir. 2018).

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[1] A request for permissive interlocutory appeal is governed by 28 U.S.C. § 1292(b), which permits a district court to certify an interlocutory order for immediate appeal if the court is of the opinion that such order: (1) involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Federal defendants then filed several motions so aimed at narrowing plaintiffs' claims, including motions for judgment on the pleadings, doc. 195; a protective order barring discovery, doc. 196; and for summary judgment, doc. 207. This Court denied defendants' motion for a protective order. (Doc. 212). But this Court granted in part and denied in part federal defendants' motions for judgment on the pleadings and for summary judgment, dismissing plaintiffs' Ninth Amendment claim, dismissing the President as a defendant, and narrowing plaintiffs' equal protection claim to a fundamental rights theory. *Juliana v. United States*, 339 F. Supp. 3d 1062 1103 (D. Or. 2018), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

Federal defendants unsuccessfully petitioned for mandamus in the Ninth Circuit and twice sought, and were twice denied, a stay of proceedings by the United States Supreme Court. Ultimately, the Ninth Circuit, on November 8, 2018, issued an order inviting this Court to certify for interlocutory review its orders on federal defendants' dispositive motions. *United States v. U.S. Dist. Court for the Dist.* of Or., No. 18-73014. Shortly thereafter, the Ninth Circuit granted federal defendants' petition to appeal.

On interlocutory appeal of this Court's certified orders denying federal defendants' motions for dismissal, judgment on the pleadings, and summary judgment, the Ninth Circuit agreed with this Court's determination that plaintiffs had presented adequate evidence at the pre-trial stage to show particularized, concrete injuries to legally protected interests. That court recounted evidence that one plaintiff was "forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation[,]" and another "had to evacuate his coastal

home multiple times because of flooding." *Id*. at 1168. The Ninth Circuit also determined that this Court correctly found plaintiffs had presented sufficient evidence that their alleged injuries are fairly traceable to federal defendants' conduct, citing among its findings that plaintiffs' injuries "are caused by carbon emissions from fossil fuel production, extraction, and transportation" and that federal subsidies "have increased those emissions," with about 25% of fossil fuels extracted in the United States "coming from federal waters and lands," an activity requiring federal government authorization. *Id*. at 1169. The court held, however reluctantly, that plaintiffs failed to show their alleged injuries were substantially likely to be redressed by any order from an Article III court and that plaintiffs therefore lacked standing to bring suit. *Id*. at 1171.

In so holding, the court stated, "There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular," however, such was "beyond the power of an Article III court to order, design, supervise, or implement." *Id*. at 1171. Ultimately, based on its redressability holding alone, the Ninth Circuit reversed the certified orders of this Court and remanded the case with instructions to dismiss for lack of Article III standing. *Id*. at 1175.

After the Ninth Circuit issued its interlocutory opinion, plaintiffs notified this Court of what they identified as an intervening case in the United States Supreme Court which held that the award of nominal damages was "a form of declaratory relief in a legal system with no general declaratory judgment act" and that a "request for nominal damages alone satisfies the redressability element of standing where a

plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 798, 802. Writing for the majority, Justice Thomas explained that, even where a single dollar cannot provide full redress, the ability "to effectuate a *partial remedy*" satisfies the redressability requirement. *Id.* at 801 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) (emphasis added).

Plaintiffs contend that the Supreme Court's holding constitutes—as Chief Justice Roberts noted in his dissent—an "expansion of the judicial power" under Article III. *Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C. J. dissenting). According to plaintiffs, the Ninth Circuit was skeptical, but did not decide whether declaratory relief alone would satisfy redressability, where such relief only partially redresses injury. Plaintiffs assert that they should be granted leave to amend to replead factual allegations demonstrating that relief under the under the Declaratory Judgment Act, 28 U.S.C. § 2201, is sufficient to allege redressability, even where a declaration effectuates a partial remedy, as stated in *Uzuegbunam,* which the Ninth Circuit did not have the chance to consider.

LEGAL STANDARD

Federal Rule of Civil Procedure Rule 15 allows a party to amend its pleading "with the opposing party's written consent or the court's leave." The rule instructs that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Trial courts have discretion in deciding whether to grant leave to amend, but "[i]n exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (citing *Conley*

v. Gibson, 355 U.S. 41, 47-48 (1957)). The judicial policy of Rule 15 favoring amendments should be applied with "extreme liberality." *Id.* (citing *Rosenberg Brothers & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam). Leave to amend should be granted freely "even if a plaintiff's claims have previously been dismissed." *Hampton v. Steen*, No. 2:12-CV-00470-AA, 2017 WL 11573592, at *2 (D. Or. Nov. 13, 2017) (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002)).

Courts consider four factors when determining whether leave to amend should be granted: 1) prejudice to the opposing party; 2) bad faith; 3) futility of amendment; and 4) undue delay. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Not all factors are equal and only when prejudice or bad faith is shown should leave to amend be denied. *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973). Leave to amend should not be denied based only on delay, *id.*, particularly when that delay is not caused by the party seeking amendment.

A court may deny leave to amend if the proposed amendment is futile or would be subject to dismissal. *Carrico v. City & Cnty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir.2011). An amendment is "futile" if the complaint could not be saved by amendment. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.2011). The court must determine whether the deficiencies in the pleadings "can be cured with additional allegations that are consistent with the challenged pleading and that do not contradict the allegations in the original complaint." *Id.* (quotation marks omitted). A party should be allowed to test his claim on the merits rather than on a motion to amend unless it appears beyond doubt that the proposed amended pleading

would be subject to dismissal. *Roth v. Garcia Marquez*, 942 F.2d 617, 629 (9th Cir.1991).

DISCUSSION

I. Ninth Circuit Mandate Permits Court to Consider Motion to Amend

In its interlocutory opinion, the Ninth Circuit remanded the case to this Court with instructions to dismiss. Plaintiffs maintain that the Ninth Circuit did not state in its instructions whether dismissal was with or without leave to amend, and therefore, this Court should freely grant leave to do so. Federal defendants assert that this Court must dismiss according to the rule of mandate and because any amendment would be futile.[2]

Under the "rule of mandate," a lower court is unquestionably obligated to "execute the terms of a mandate." *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). Compliance with the rule of mandate "preserv[es] the hierarchical structure of the court system," *Thrasher*, 483 F.3d at 982, and thus constitutes a basic feature of the rule of law in an appellate scheme. But while "the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issue not expressly or impliedly

[2] There is no material dispute between the parties whether plaintiffs' amendments are in bad faith, prejudicial to defendants, or unduly delayed. Having considered those factors, this Court finds that none bar plaintiffs' request to amend.

disposed of on appeal.'" *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984)).

"Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings ...." *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting *Nguyen,* 792 F.2d at 1502; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988). When mandate in the prior appeal did not expressly address the possibility of amendment and did not indicate a clear intent to deny amendment seeking to raise new issues not decided by the prior appeal, that prior opinion did not purport "to shut the courthouse doors." *San Francisco Herring Ass'n*, 946 F.3d at 574 (citing *Nguyen*, 792 F.2d at 1503).

In *San Francisco Herring Ass'n*, the Ninth Circuit discussed its issuance of a mandate in a prior appeal, which vacated the district court's order entering summary judgment in the defendants' favor and directed the district court to dismiss the complaint. *See San Francisco Herring Ass'n v. U.S. Dep't of Interior*, 683 F. App'x 579, 581 (9th Cir. 2017) (vacating judgment and remanding case with instructions to dismiss for lack of subject matter jurisdiction). On remand, the district court allowed the plaintiff to seek leave to file a second amended complaint. The Ninth Circuit determined the district court correctly found that the mandate to dismiss did not prevent the plaintiff from seeking leave to re-plead. *San Francisco Herring Ass'n*, 946 F.3d 574. The court reasoned that in instructing to dismiss, it had been silent on whether the dismissal should be with or without leave to amend and did not preclude the plaintiff from filing new allegations. *Id.* at 572-574.

Here, this Court does not take lightly its responsibility under the rule of mandate. Rather, it considers plaintiffs' new factual allegations under the Declaratory Judgment Act, and amended request for relief in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal. Nor did the mandate expressly state that plaintiffs could not amend to replead their case—particularly where the opinion found a narrow deficiency with plaintiffs' pleadings on redressability. This Court therefore does not interpret the Ninth Circuit's instructions as mandating it "to shut the courthouse doors" on plaintiffs' case where they present newly amended allegations. *San Francisco Herring Ass'n*, 946 F.3d at 574.

II. Amendment is Not Futile

A. The Interlocutory Opinion

The Ninth Circuit recited the established rule that, to demonstrate Article III redressability, plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Juliana,* 947 F.3d at 1170. Redress need not be guaranteed, but it must be more than "merely speculative." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Here, applying the above rule, the Ninth Circuit stated that a declaration alone is not relief "substantially likely to mitigate [plaintiffs'] asserted concrete injuries." *Juliana*, 947 F.3d at 1170. The court considered whether partial redress suffices to prove the first redressability prong, concluding that it likely does not, because even

if plaintiffs obtained the sought relief and federal defendants ceased promoting fossil fuel, such would only ameliorate, rather than "solve global climate change." *Id. at* 1171.

Even so, the court did not decide that plaintiffs had failed to prove the first prong of redressability: the court stated, "[w]e are therefore skeptical that the first redressability prong is satisfied. But even *assuming that it is*, [plaintiffs] do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court." *Juliana,* 947 F.3d at 1171. (emphasis added).

In addressing whether plaintiffs had proved the second prong, the court identified the "specific relief" plaintiffs sought was an injunction requiring federal defendants not only to cease permitting, authorizing, and subsidizing fossil fuel, but also to prepare a plan, subject to judicial monitoring, to draw down harmful emissions. That specific relief, the court determined, was not within the power of an Article III court to award. *Id*. The court explained that for the district court to "order, design, supervise, or implement" plaintiffs' requested remedial plan, any effective plan would require a "host of complex policy decisions" entrusted under constitutional separation of powers to the executive and legislative branches. *Id.* In essence, the court found plaintiffs' injuries beyond redress because, in its view, plaintiffs' requested relief requires the district court to evaluate "competing policy considerations" and supervise implementation over many years. *Id*. at 1171–73

Summarizing what the court did—and did not—identify as the legal defects in plaintiffs' case, the court did not decide whether plaintiffs' requested declaratory

relief failed or satisfied the redressability requirement for standing, and did not consider that issue under *Uzuegbunam* or the Declaratory Judgment Act. Rather, the court resolved that plaintiffs failed to demonstrate redressability on grounds that plaintiffs' requested remedial and injunctive relief was beyond the power of an Article III court to provide. The court was also silent on whether dismissal was to be with or without leave to amend.

B. Plaintiffs' Proposed Amendments

Plaintiffs assert that their proposed amendments cure the defects the Ninth Circuit identified and that they should be given opportunity to amend. Plaintiffs explain that the amended allegations demonstrate that relief under the Declaratory Judgment Act alone would be substantially likely to provide partial redress of asserted and ongoing concrete injuries, and that partial redress is sufficient, even if further relief is later found unavailable.

Plaintiffs also amended their factual allegations directly linking how a declaratory judgment alone will redress of plaintiffs' individual ongoing injuries. (*See* doc. 514-2 ¶¶ 19-A, 22-A, 30-A, 34-A, 39-A, 43-A, 46-A, 49-A, 52-A, 56-A, 59-A, 62-A, 64-A, 67-A, 70-A, 72-A, 76-A, 80-A, 85-A, 88-A, 90-A.). Plaintiffs assert that declaratory relief is within a court's Article III power to provide. Plaintiffs also omitted the "specific relief" the Ninth Circuit majority found to be outside Article III authority to award. Among other deletions, plaintiffs eliminated their requests for this Court to order federal defendants to prepare and implement a remedial plan and prepare a list of U.S. CO_2 emissions. Plaintiffs also omitted their request for this Court to monitor and enforce the remedial plan.

Plaintiffs' Second Amended Complaint thus requests this Court to: (1) declare that the United States' national energy system violates and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law; (2) enter a judgment declaring the United States' national energy system has violated and continues to violate the public trust doctrine; and (3) enter a judgment declaring that § 201 of the Energy Policy Act has violated and continues to violate the Fifth Amendment of the U.S. Constitution and plaintiffs' constitutional rights to substantive due process and equal protection of the law.

While declaratory relief was part of plaintiffs' prayer in the operative complaint, plaintiffs did not cite *Uzuegbunam*—recent authority affirming that partial declaratory relief satisfies redressability for purposes of Article III standing. Plaintiffs contend that they should be granted leave to amend based on the Supreme Court's holding that a request for nominal damages alone (a form of declaratory relief) satisfies the redressability element necessary for Article III standing, where the plaintiff's claim is based on a completed violation of a legal right, and the plaintiff establishes the first two elements of standing. *Uzuegbunam*, 141 S. Ct. at 801–02.

C. ***Plaintiffs' Amended Pleadings Satisfy Redressability***

This Court adamantly agrees with the Ninth Circuit that its ability to provide redress is animated by two inquiries, one of efficacy and one of power. *Juliana*, 947 F.3d at 1169. Plaintiffs' proposed amendments allege that a declaration under the Declaratory Judgment Act is substantially likely to remediate their ongoing injuries, and that such relief is within this Court's power to award.

1. Declaratory Relief Alone is Substantially Likely to Redress Injury

The court can grant declaratory relief in the first instance and later consider further necessary or proper relief, if warranted, under the Declaratory Judgment Act. 28 U.S.C. §§ 2201, *et seq*. "In a case of actual controversy within its jurisdiction, [ ] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201. "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

The Supreme Court has long recognized that declaratory judgment actions can provide redressability, even where relief obtained is a declaratory judgment alone. Well-known cases involve the census, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), and *Utah v. Evans,* 536 U.S. 452 (2002).

In each of the census cases, a state objected to the way the Census Bureau counted people and sued government officials. In *Franklin v. Massachusetts*, the Supreme Court stated, "For purposes of establishing standing," it did not need to decide whether injunctive relief against was appropriate where "the injury alleged is likely to be redressed by declaratory relief" and the court could "assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and

constitutional provision by the District Court." 505 U.S. at 803.

In *Utah v. Evans*, the Supreme Court referenced *Franklin*, explaining that, in terms of its "standing" precedent, declaratory relief affects a change in legal status, and the practical consequence of that change would "amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." 536 U.S. 452 (2002).

Similarly, the Supreme Court has determined that a plaintiff had standing to sue the Nuclear Regulatory Commission for a declaration that the Price-Anderson Act, which limited the liability of nuclear power companies, was unconstitutional. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978).

Other cases recognized the role of declaratory relief in resolving constitutional cases. *See, e.g.*, *Evers v. Dwyer*, 358 U.S. 202, 202-04 (1958) (ongoing governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus.").

Finally, the Supreme Court held that, for the purpose of Article III standing, nominal damages—a form of declaratory relief—provide the necessary redress for a completed violation of a legal right, even where the underlying unlawful conduct had ceased. *Uzuegbunam*, 141 S. Ct. 792, 802. *Uzuegbunam* illustrates that when a plaintiff shows a completed violation of a legal right, as plaintiffs have shown here, standing survives, even when relief is nominal or trivial.

Here, this Court notes that, in its determination of standing, the Ninth Circuit was "skeptical" that declaratory relief alone would remediate plaintiffs' injuries,

Juliana, 947 F.3d at 1171. The court noted that even if all plaintiffs' requests for relief were granted against federal defendants, such would not solve the problem of climate change entirely. But for redressability under Article III standing, plaintiffs need not allege that a declaration alone would solve their every ill. To plead a justiciable case, a court need only evaluate "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). There is nothing in § 2201 preventing a court from granting declaratory relief even if it is the only relief awarded.

In light of that determination, by pleading a claim under § 2201, plaintiffs establish that the text of the statute itself resolves the uncertainty posed by the Ninth Circuit, given that plaintiffs have established an active case and controversy showing injury and causation. Section 2201 also provides that declaratory relief may be granted "whether or not further relief is or could be sought." *Id.* Under the statute, the relief plaintiffs seek fits like a glove, where plaintiffs request consideration of declaratory relief independently of other forms of relief, such as an injunction. *See Steffel v. Thompson*, 415 U.S. 452, 475, (1974) (stating in a different context that "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded."). This Court finds that plaintiffs' proposed amendments are not futile: a declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief.

2. Redress is Within Power of Article III Courts

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, 176–78 (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. The issue before this Court now is not to determine what relief, specifically, is in its power to provide. This Court need only decide whether plaintiffs' amendments—alleging that declaratory relief is within an Article III court's power to award— "would be subject to dismissal." *Carrico,* 656 F.3d 1002.

The Declaratory Judgment Act authorizes this Court's determination in its embrace of both constitutional and prudential concerns where the text is "deliberately cast in terms of permissive, rather than mandatory, authority." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 250 (1952) (J. Reed, concurring). The Act gives "federal courts competence to make a declaration of rights." *Pub. Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962). The Supreme Court has found it "consistent with the statute . . . to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 136 (2007).

Here, plaintiffs seek declaratory relief that "the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law." (Doc. 514-1 ¶ 1). This relief is squarely within the constitutional and statutory power of Article III courts to grant. Such relief would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by federal defendants' ongoing policies and practices. Last, but not least, the declaration that plaintiffs seek would by itself guide the independent actions of the other branches of our government and cures the standing deficiencies identified by the Ninth Circuit. This Court finds that the complaint can be saved by amendment. *See Corinthian Colleges*, 655 F.3d at 995.

CONCLUSION

For the reasons stated above, plaintiffs' Motion to File a Second Amended Complaint, doc. 462, is GRANTED.

IT IS SO ORDERED.

Dated this 1st day of June 2023.

/s/Ann Aiken

Ann Aiken
United States District Judge

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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

BACKGROUND

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

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

1. Mootness/Redressability and Prudential Standing Issues

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

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

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

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

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

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

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

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

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

2. Summary Judgment

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

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UNDISPUTED FACTS

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

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

DISPUTED MATERIAL FACTS

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

1. Whether Plaintiffs' injuries are mischaracterized or inaccurate.

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

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

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

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

DISCUSSION

I. Case-or-Controversy Standing

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

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

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

a. Distinguishable Injuries

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

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

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

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

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

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

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

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

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

b. Traceability and Redressability

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Prudential Standing

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

III. Absurd Results

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

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

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

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

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

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

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

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

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

Park Cnty. ¶¶ 62-63.

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

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

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

IV. Indispensable Parties

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

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

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V. Constitutionality

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

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

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

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

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

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

b. The MEPA Limitation

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

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

The MEPA Limitation provided:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.
> (b) An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:

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

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

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

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

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

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

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> "(2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.
> (b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:
> (i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant."

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

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

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

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

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

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

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

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

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

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

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

VI. Plaintiffs' other claims.

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

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

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

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

ELECTRONICALLY SIGNED BELOW

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

NAVAHINE F., a Minor, by and through her natural guardian; et al., Plaintiffs, v. DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI‘I, et al., Defendants.	CIVIL NO. 1CCV-22-0000631 (JPC) (Environmental Court) ORDER DENYING DEFENDANTS' MOTION TO DISMISS (Dkt. 78) Judge: The Honorable Jeffrey P. Crabtree Trial Date: September 26, 2023

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

On August 22, 2022, Defendants Department of Transportation, State of Hawai‘i ("HDOT"); Jade Butay, in his official capacity as Director of the Department of Transportation; Governor Ige; and State of Hawai‘i filed their Motion to Dismiss (Dkt. 78). The motion was heard by the Honorable Jeffrey P. Crabtree on January 26, 2023, at 10:30 a.m. Leinā‘ala L. Ley and Isaac Moriwake from Earthjustice and Andrea Rodgers and Joanna Zeigler from Our Children's Trust appeared on behalf of Plaintiffs. Lauren K. Chun, Charlene S. Shimada, and Bryan M. Killian appeared on behalf of Defendants.[1] The court took the motion under advisement and, having considered the memoranda filed by the parties, the arguments of counsel, and the record and files in this action, DENIES Defendants' motion for the following reasons.

I. STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

This is a Rule 12(b)(6) motion for failure to state a claim. Such motions are viewed with disfavor and rarely granted. *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed to be true and must be viewed in the light most favorable to the Plaintiff for purposes of the motion. *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai‘i 251, 266 (2007); *Bank of Am. v. Reyes-Toledo*, 143 Hawai‘i 249, 257 (2018). However, the court is not required to accept conclusory allegations.

Hawai‘i is a notice pleading jurisdiction. The federal "plausibility" pleading standard (*Twombly/Iqbal*) was expressly rejected by our Hawai‘i Supreme Court in *Bank of America v.*

[1] Rule 25(d) of the Hawai‘i Rules of Civil Procedure provides that parties named in an official capacity will be automatically substituted by their successor once they leave office. Accordingly, due to the change in administration between August 22, 2022, and the date of this Order, Governor Green has replaced Governor Ige as a defendant. Ed Sniffen, nominee for Director of Transportation, will automatically replace Jade Butay as a defendant, subject to his confirmation by the Senate.

Reyes-Toledo, 143 Hawai‘i at 263. If the complaint is too general or too vague, a defendant may request a more definite statement per Rule 12(e). *Id.* at 259-60.

In deciding a 12(b)(6) motion, the court should dismiss only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Kealoha v. Machado*, 131 Hawai‘i 62, 74 (2013). This includes under any alternative theory. *Bank of Am.*, 143 Hawai‘i at 257; *In re Estate of Rogers*, 103 Hawai‘i 275, 280-81 (2003); *Malabe v. AOAO Exec. Ctr.*, 147 Hawai‘i 330, 338 (2020).

II. PLAINTIFFS' FIRST CLAIM

Plaintiffs' claim Defendants breached their public trust duties under Article XI, section 1 of the Hawai‘i Constitution. Section 1 provides:

> **Section 1.** For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Generally, Plaintiffs claim that Defendants establish, maintain, and operate the state's transportation system in a way that contributes to greenhouse gas emissions and continued reliance on fossil fuels. This allegedly results in harms to "public trust resources . . . including the climate system and all other natural resources affected by climate change." Compl. ¶ 180. Paragraphs 158-78 of the Complaint include a lengthy list of alleged failures. If proved—as the court is required to assume for this motion—Defendants are failing to preserve public trust resources by not doing enough, fast enough, to help reduce climate change by reducing GHG emissions. Paragraphs 181-83 allege that the harm of greenhouse gases ("GHG") requires "swift decarbonization" of the state's transportation system, but that Defendants have not developed any plans addressing these harms or alternatives. Paragraph 182 alleges that Defendants continue to establish, maintain, and

operate traditional infrastructure that preserves and promotes fossil fuels. Paragraph 183 asserts that Defendants have not planned, funded, or implemented necessary alternatives for reducing GHG emissions, including vehicle miles traveled, electrifying facilities, increasing alternative fuels, and expanding alternative options such as bikeways, public transit, and pedestrian pathways.

As a threshold issue, Defendants argue the public trust doctrine does not apply to the climate, because climate is not air, water, land, minerals, energy resource or some other "localized" natural resource. The court need not decide whether "the climate" is a trust resource or "property," because Plaintiffs argue that deteriorating climate change *impacts* our natural resources. Defendants concede this, saying "to be sure, climate change impacts Hawaii's public trust resources." Mot. at 13. But then Defendants argue that Plaintiffs' claim "strains the public trust doctrine too far" because HDOT/the State only controls a "small portion" of the globe's GHG emissions and "cannot control climate change's local impacts." *Id.* The court understands this argument, but first, it is factual, which is generally fatal on a 12(b)(6) motion. Second, and more importantly, reduced to its essence, Defendants' argument is that it is not required to do anything because the problem is just too big and the State's efforts will have no impact. Putting aside that negative thinking will not solve the problem, the law requires that as trustee, the State/HDOT *must* take steps to maintain their assets to keep them from falling into disrepair. It is "elementary trust law" that trust property not be permitted to "fall into ruin on [the trustee's] watch." *Ching v. Case*, 145 Hawai'i 148, 170 (2019). "To hold that the State does not have an independent trust obligation to reasonably monitor the trust property would be counter to our precedents and would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." *Id.* (citing *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 (2006)). To hold that the State has no trust obligation to reasonably monitor and maintain our natural resources

by reducing our GHG emissions and establishing and planning alternatives to a fossil-fuel heavy transportation system—all because GHG emissions are just "too big a problem" -- "would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." *Id*.

Once past the threshold objection that the public trust doctrine does not require the State to do anything about climate change, the State argues that 1) Plaintiffs cannot point to a specific "statutory function" that HDOT failed to perform, and 2) statutory authorities "cabin" [contain or limit] Defendant's public trust obligations." Mot. at 12. In the strict procedural context of a 12(b)(6) motion, the court disagrees, in part because this motion can only be granted if it is beyond doubt that Plaintiffs can prove no set of facts in support of their claim. More importantly, the court disagrees that statutory limits or requirements limit the public trust doctrine in a way that requires dismissal of this case. Again, *Ching* is clear:

> Moreover, this court has made clear that while overlap may occur, the State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty. *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) ("As the public trust arises out of a constitutional mandate, the duty and authority of the state and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature."); *see also In re TMT*, 143 Hawai'i 379, 416, 431 P.3d 752, 789 (2018) (Pollack, J., concurring) ("Thus, although some congruence exists, BLNR's and the University of Hawai'i at Hilo's public trust obligations are distinct from their obligations under [Hawai'i Administrative Rules] § 13-5-30(c).").

145 Hawai'i at 178. The motion to dismiss never cites *Ching*.[2]

[2] The court respectfully recommends that when a recent case from our Supreme Court addresses a constitutional claim at length, and a party moves to dismiss such a claim, movant should discusss that case in their motion rather than wait until their Reply brief. The Reply brief cites *Ching* seventeen times—when Plaintiffs have no opportunity to respond. Movant may offer "but we did not have to raise *Ching* until the memo in opp did." The court disagrees. *Ching* is

III. PLAINTIFFS' SECOND CLAIM

Plaintiffs claim Defendants breached their duties under Article XI, section 9 of the Hawai'i Constitution. It states:

> **Section 9.** Each person has the right to a clean and healthful environment, as defined by the laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

Our Supreme Court has described important particulars for section 9 that apply to this case:

> We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 ***by providing that express consideration be given to reduction of greenhouse gas emissions*** in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.
>
> We note that this right is not a freestanding interest in general aesthetic and environmental values. *See Sandy Beach Def. Fund*, 70 Haw. at 376–77, 773 P.2d at 260–61. The challengers in *Sandy Beach Defense Fund* did not identify any source granting them a substantive legal right to enforcement of environmental laws. Rather, the asserted "property interests" were unilateral expectations of aesthetic value, including claims that a person who lived in close proximity to a proposed development would lose her view of the ocean and decrease the value of her property. *Id.* at 367, 773 P.2d at 255. In contrast, Sierra Club's right to a clean and healthful environment is provided for in article XI, section 9 of the Hawai'i Constitution and defined by HRS Chapter 269. It is not a unilateral expectation on the part of Sierra Club, but rather a right guaranteed by the Constitution and statutes of this state.

In re Maui Elec. Co., 141 Haw. 249, 264–65 (2017) (emphasis added) ("*MECO*").

Plaintiffs claim that Defendants' actions and inactions result in high levels of GHG emissions and continued reliance on fossil fuels. The Complaint claims this is at odds with

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clearly relevant to issues in the motion. Simple fairness also requires counsel to raise it as part of their initial filing. Under the rules, movants already have the advantage of the "last word" with the Reply.

Hawai‘i’s Zero Emissions Target, HRS section 225P-5 and other laws requiring reduction of GHG and carbon from the transportation system. The laws cited include:

HRS §§ 196-9(c)(6), (10):	Energy Efficiency and Environmental Standards for State Facilities, Motor Vehicles, and Transportation Fuel;
HRS §§ 225P-5 and -7:	Hawai‘i Climate Change Mitigation and Adaptation Initiative; Zero Emissions Target; Climate Change Mitigation, “decarbonizing the transportation sector”;
HRS §§ 226-4, -17,-18:	Hawai‘i State Planning Act;
HRS § 264-142:	Ground Transportation Facilities;
HRS § 264 -143:	Ground Transportation; Project Goals; Reporting;

S*ee* Compl. ¶ 187.

Defendants argue that 1) some of these laws do not apply to HDOT, 2) Plaintiffs do not allege any of them were violated, and 3) these laws are merely “aspirational” and Plaintiffs “cannot show HDOT violated” the laws. Mot. at 7. Defendants at times seem to argue that some of the laws cited are not laws relating to environmental quality, but it is not clear to the court.

Laws Relating to Environmental Quality. Taking the last point first: especially after *MECO,* the court concludes that similar to HRS chapter 269 and the PUC in *MECO*, the above-cited laws dealing with planning for and actually reducing GHG emissions, decarbonizing the transportation sector, reducing and eliminating fossil fuels in ground transportation, and promoting alternative fuels and overall energy efficiency, are laws relating to environmental quality. More specifically:

HRS §§ 225P-5, -7:	Hawai‘i Climate Change Mitigation and Adaptation Initiative; Zero Emissions Target; Climate Change Mitigation. The title alone makes it clear it is a law relating to environmental quality. *See also In re Haw. Elec. Light Co*., No. SCOT-22-0000418, slip op. at 14 (Haw. Sup. Ct. Mar. 13, 2023) (“*HELCO*”).

HRS §§ 226-17, -18:	Hawai‘i State Planning Act. The purpose of this law is to manage our energy resources to protect health and safety and welfare, and preserve our limited natural resources for future generations.
HRS § 196-9(c)(6), (10):	Energy Efficiency and Environmental Standards for State Facilities, Motor Vehicles, and Transportation Fuel. This statute speaks to electric vehicles in the State's fleet to reduce fossil fuels and GHG emissions.
HRS §§ 264-142, -143:	Ground Transportation Facilities. Develop bikeways and pedestrian walkways to help reduce fossil fuel use and GHGs.

Further, see paragraphs 78-84 of the Complaint for multiple allegations regarding these laws and how they relate to environmental quality.

No actual harm or controversy. Defendants next argue that Plaintiffs cite laws which "contain broad, aspirational objectives that Plaintiffs have not and cannot show HDOT violated." Mot. at 7. Defendants argue that since the Zero Emissions Target law (HRS ch. 225P) goal is to reduce GHG and carbon by 2045, "it is not possible to argue that HDOT has violated a 20-years-from-now deadline." Mot. at 8. Similarly, movant argues HRS § 196-9(c)(6) is aspirational, instructing agencies to "promote" energy efficiencies, and implement goals "to the extent possible." Mot. at 8. In the same vein, Defendants argue HRS § 264-143 merely instructs HDOT to "endeavor" to meet "goals," such as reducing carbon emissions, vehicle miles travelled, and reducing urban temperatures with tree canopies. Mot. at 8-9. HRS chapter 226 is also merely "aspirational" per Defendants, by only "encouraging" or "promoting" alternative rules and fuel efficiency measures. Mot. at 9. What are Defendants really arguing here? That a "target" or "goal" passed by the Legislature has no legal force or effect? That the Legislature did not intend to drive action by state agencies to plan for and respond meaningfully to the threats of climate change? The court gives the Legislature a lot more credit than that. The court concludes the Legislature is requiring timely planning and action, not meaningless or purely aspirational goals.

HRS § 225P-1, titled Purpose, states:

> The purpose of this chapter is to address the effects of climate change to protect the State's economy, environment, health, and way of life. This chapter establishes the framework for the State to:
>
> (1) Adapt to the inevitable impacts of global warming and climate change, including rising sea levels, temperatures, and other risk factors; and
>
> (2) Mitigate its greenhouse gas emissions by sequestering more atmospheric carbon and greenhouse gases than the State produces as quickly as practicable, but no later than 2045.

HRS § 225P-5, titled Zero Emissions Clean Economy Target, states:

> (a) Considering both atmospheric carbon and greenhouse gas emissions as well as offsets from the local sequestration of atmospheric carbon and greenhouse gases through long-term sinks and reservoirs, a statewide target is hereby established to sequester more atmospheric carbon and greenhouse gases than emitted within the State as quickly as practicable, but no later than 2045; provided that the statewide target includes a greenhouse gas emissions limit, to be achieved no later than 2030, of at least fifty per cent below the level of the statewide greenhouse gas emissions in 2005.
>
> (b) The Hawaii climate change mitigation and adaptation commission shall endeavor to achieve the goals of this section. After January 1, 2020, agency plans, decisions, and strategies shall give consideration to the impact of those plans, decisions, and strategies on the State's ability to achieve the goals in this section, weighed appropriately against their primary purpose.

HRS § 225P-7, titled Climate Change Mitigation, states:

> (a) It shall be the goal of the State to reduce emissions that cause climate change and build energy efficiencies across all sectors, including decarbonizing the transportation sector.
>
> (b) State agencies shall manage their fleets to achieve the clean ground transportation goals defined in section 196-9(c)(10) and decarbonization goals established pursuant to chapter 225P.

The Complaint is replete with additional allegations that Defendants' actions do not comply with the Legislature's statutory directives. *See* Compl. ¶¶ 125-78.

Current and Concrete Harms are Alleged. Plaintiffs allege—and the court is required to accept as true for purposes of this motion—that Defendants' actions and inactions to date *already* cause *actual* harms. *See* Compl. ¶ 140. The Complaint alleges in multiple paragraphs that based on the lack of action to date, harms are already being baked in. Transportation emissions are increasing and will continue to increase at the rate we are going. *See* Compl. ¶¶ 125-35. In other words, the alleged harms are not hypothetical or only in the future. They are current, ongoing, and getting worse. This renders Defendants' "future goals are not actionable" argument illusory in the specific context of a 12(b)(6) motion where the court is obligated to accept the factual allegations that Defendants failure to plan and implement actual changes fast enough is causing harms now and will cause harms in the future. The harms caused by a lack of action on GHGs and fossil fuels were highlighted at the end of the Supreme Court's opinion in *HELCO,* slip op. at 18-19:

> We have said that an agency "must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations," *Paeahu*, 150 Hawai'i at 538, 506 P.3d at 202, and that "[a]rticle XI, section 9's 'clean and healthful environment' right as defined by HRS chapter 269 subsumes a right to a life-sustaining climate system," *id*. at 538 n.15, 506 P.3d at 202 n.15. The right to a life-sustaining climate system is not just affirmative; it is constantly evolving.
>
> The people of Hawai'i have declared "a climate emergency." S.C.R. 44, S.D. 1, H.D. 1, 31st Leg., Reg. Sess. (2021). Hawai'i faces immediate threats to our cultural and economic survival: sea level rise, eroding the coast and flooding the land; ocean warming and acidification, bleaching coral reefs and devastating marine life; more frequent and more extreme droughts and storms. *Id.* For the human race as a whole, the threat is no less existential.
>
> With each year, the impacts of climate change amplify and the chances to mitigate dwindle. "The Closing Window: Climate crisis calls for rapid transformation of societies," Emissions Gap Report 2022, https://www.unep.org/resources /emissions-gapreport-2022 [https://perma.cc/6JAR-RFZE]. "A stepwise approach is no longer an option." *Id.* at page xv.
>
> The reality is that yesterday's good enough has become today's unacceptable. The PUC was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty.

IV. LACK OF STANDING

This argument is made in most environmental cases, and is rarely viable. There is a reason many environmental cases are styled as declaratory judgment actions under HRS § 632-1. Our declaratory judgment statute is broad. The statute requires antagonistic claims that indicate imminent litigation, and the party seeking declaratory relief has a concrete interest that is denied by the other party, and a declaratory judgment will serve to terminate the controversy. *Tax Found. v. State*, 144 Hawai‘i 175, 189 (2019). The injury-in-fact test used by Article III federal courts does not apply. *Id*. Plaintiffs are minors. Article XI, section 1 is "For the benefit of present and future generations." Plaintiffs allege nothing less than that they stand to inherit a world with severe climate change and the resulting damage to our natural resources. This includes rising temperatures, sea level rise, coastal erosion, flooding, ocean warming and acidification with severe impacts on marine life, and more frequent and extreme droughts and storms. Destruction of the environment is a concrete interest. Since Defendants essentially argue Hawai‘i law does not *require* them to take action *now*, it appears a declaratory judgment action will help resolve the parties' different views of what the Legislature and the Constitution require.

V. POLITICAL QUESTION

Defendants started off their oral argument saying climate change is important, Hawai‘i is addressing it, it is a high priority, new bills are being introduced and passed, and the political process is working well. Therefore, Defendants argue, the issues raised by the two claims in this case amount to a political question, and the courts cannot or should not get involved. First, again, this is partly a factual argument on a Rule 12(b)(6) motion where the court is required to accept the factual allegations of the Complaint. More importantly, this argument fails to recognize the two claims in this case are both based on the Hawai‘i Constitution. The courts unequivocally have

an important and long-recognized role in interpreting and defending constitutional guarantees. *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 143 (2000); *Ching*, 145 Hawai'i at 176 (the political question doctrine does not bar a claim based on public trust duties). The State argues that three of the *Baker* factors are met. *See Baker v. Carr*, 369 U.S. 186 (1962), and *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 194 (2012). To the court, the issue of a political question is not yet and likely will not be formed unless and until a specific motion for injunctive relief is filed. Then we will see if the requested relief improperly trespasses into political questions. In the meantime, the court concludes the *Baker* factors are not automatically triggered by the declaratory relief requested. Depending on where the constitutional arguments and claimed relief end up, Defendants are free to bring up the political question argument again. Currently, where the Defendants argue they have no duty to act now, invoking the political question doctrine is premature.

VI. AGENCY REVIEW/APPEAL

Defendants argue an agency review and appeal under HRS § 91-1 is required before bringing this case in court. *See* Mot. at 7 n.2, 11, 14. Again, Hawai'i law does not require this step in the context of a breach of trust claim and declaratory relief. *See Ching*, 145 Haw at 174.

VII. INJUNCTIVE RELIEF

This seems to be Defendants' greatest concern—that the court will appoint a Special Master to control HDOT. Again, the court respectfully notes this is a 12(b)(6) motion and the court is required to accept the allegations of the complaint as true. The court is making no decision on the merits of injunctive relief. We are even farther away from the court considering whether it would appoint a Special Master. The court declines to spend its limited time on what is currently a non-essential and premature issue in the context of this 12(b)(6) motion.

Accordingly, for the reasons outlined above, and based on the court's overall consideration of the arguments and legal authorities presented to the court, it is hereby ORDERED that the Defendants' Motion to Dismiss is DENIED.

DATED: Honolulu, Hawai'i: April 19, 2023

/s/ Jeffrey P. Crabtree

JEFFREY P. CRABTREE
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM

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