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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause CDV 20–307 Hon. Kathy Seeley **DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** [Oral Argument Requested]

INTRODUCTION

This case has been an expensive and time-consuming exercise in futility from the outset, with no realistic prospect of Plaintiffs obtaining the outcome they seek. That reality has become only more apparent after extensive discovery. Plaintiffs' remaining claims for relief principally consist of requests for declarations invalidating two Montana statutes—Section 90-4-1001, MCA

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(the "State Energy Policy Goal Statements") and Section 75-1-201(2)(a) (the "MEPA Limitation")—as well as a declaration that Plaintiffs' state constitutional right to a clean and healthful environment includes the right to a "stable climate system." However, as explained below, Plaintiffs' remaining claims fail as a matter of law because: 1) Plaintiffs' cannot satisfy constitutional standing requirements; 2) prudential policy considerations weigh heavily in favor of requiring Plaintiffs to engage in the proper democratic process; 3) the requested expansion of the right to a clean and healthful environment would lead to absurd results; 4) Plaintiffs failed to join necessary parties; and 5) Plaintiffs' claims are meritless. Defendants accordingly seek summary judgment on Plaintiffs' remaining claims.

APPLICABLE STANDARDS

Summary judgment is proper where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). As the Court noted in its August 4, 2021 Order on Motion to Dismiss ("8/4/21 Or."), Plaintiffs must establish injury, causation, and redressability to demonstrate the requisite "case or controversy" standing to maintain their claims herein. (*Id.* at 7–8); *see also Heffernan v. Missoula City Counsel*, 2011 MT 91, ¶¶ 32–33, 360 Mont. 207, 255 P.3d 80; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187. "Standing is a threshold requirement of justiciability applicable to all claims for relief as a matter of constitutional law and related prudential policy considerations." *Larson v. State*, 2019 MT 28, ¶ 45, 394 Mont. 167, 434 P.3d 241 (internal citations omitted). "Standing narrowly focuses on whether, at the time of assertion of a claim, a particular claimant is a proper party to assert the claim regardless of whether the claim is otherwise cognizable or justiciable." *Id.* (internal citations omitted). "Though substantively cognizable, a claim for declaratory judgment is nonetheless not justiciable if the plaintiff lacks personal standing to assert the claim." *Id.* (internal citations omitted).

Montana courts presume that enacted laws are constitutional. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a toothless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. Plaintiffs must demonstrate that "no set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). "The crux of a facial challenge is that the statute is unconstitutional in all its applications." *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. If Defendants show any constitutional applications, Plaintiffs' facial challenge fails. *Id.* at ¶ 29. In reviewing Plaintiffs' constitutional challenges to the State Energy Policy and the MEPA Limitations statutes, this Court must uphold the statutes unless they conflict with the Constitution beyond a reasonable doubt. *Satterlee*, ¶ 10. If any doubt exists, it must be resolved in favor of the statute. Plaintiffs—as the parties challenging the constitutionality of these statutes—bear the burden of proof. *Mont. Cannabis Indus. Assn.*, ¶ 12. Plaintiffs fail to prove that these statutes are facially unconstitutional.

ARGUMENT

I. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE THEY LACK "CASE OR CONTROVERSY" STANDING.

Facts obtained through discovery confirm that Plaintiffs lack standing. The Montana Supreme Court has made clear that "the 'cases at law and in equity' language of Article VII, Section 4(1) *embodies the same limitations* as are imposed on federal courts by the "case or controversy" language of Article III [of the U.S. Constitution]." *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567 (emphasis added) (internal citations omitted); *see also Advocates for Sch. Trust Lands*, ¶ 18. Plaintiffs must demonstrate case-or-controversy standing—at every stage of litigation—by distinctly showing "a past, present, or threatened injury" that can be "alleviated by successfully maintaining the action." *Heffernan*, ¶ 33. To demonstrate standing, Plaintiffs must show that (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at ¶ 32 (citing *Lujan,* 504 U.S. at 560 (1992)). Plaintiffs must support each element of the standing test "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S at 561. To survive summary judgment, "the plaintiff can no longer rest on 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'...." *Id.* (quoting Fed. Rule Civ. Proc. 56(e)). *See also* Mont. R. Civ. P. 56(e).

A. PLAINTIFFS' CLAIMED INJURIES FAIL TO SATISFY STANDING REQUIREMENTS AT THE SUMMARY JUDGMENT STAGE.

While Plaintiffs' alleged injuries need not be exclusive to them for standing purposes, the injuries "must be distinguishable from the injury to the public generally[.]" *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶ 41, 296 Mont. 207, 988 P.2d 1236. *See also Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 406 P.3d 427 (a plaintiff "must show that he has sustained, or is in immediate danger of sustaining some direct injury. . . and not merely that he suffers in some indefinite way in common with people generally"). Plaintiffs have alleged a wide range of injuries—including physical, mental, emotional, aesthetic, cultural, and economic injuries—which they claim are attributable to climate change caused by the challenged statutes. (*See* 8/4/21 Or. at 2). However, if Plaintiffs' claims are true, every single member of the general public suffers those very same injuries. (*See* Expert Report of Kevin Trenberth at 12 (opining that "continued production of fossil fuels...constitutes... harm to the citizens of Montana as well as the rest of the world."), attached as **Exhibit A**; Depo. Kevin Trenberth, 12:11–13 (Jan. 11, 2023), relevant excerpts attached as **Exhibit B** (describing climate change as a "potentially existential threat to humanity"); Depo. Steven Running, 39:2–40:9 (Oct. 25, 2022), relevant excerpts attached as **Exhibit C** (acknowledging the difficulty of realistically distinguishing the impacts of climate change on Plaintiffs from those impacts on the rest of the public)). Plaintiffs' pleadings allege specific and personalized injuries (*see* Compl. at 5–26), but discovery is replete with examples of the alleged individual injuries being inaccurate, mischaracterized, or not otherwise demonstrating standing;[1] including the alleged harms to hunting, fishing, and recreation opportunities;[2] alleged

[1] E.g.: Montana law limits the size of solar panel arrays (cf. Compl. at 23:10–16 to Depo. Claire V., 53:24–55:21 (Dec. 20, 2022), relevant excerpts attached as **Exhibit D**); extreme heat and melting of asphalt in Montana (cf. Compl. At 22:18–23 to Ex. D at 69:21–70:24); oral tradition of storytelling could not take place (cf. Compl. at 11:1–4 to Depo. Sariel S., 41:18–25 (Jan. 5, 2023), relevant excerpts attached as **Exhibit E**); bison hunting on the reservation (cf. Compl. at 11:10, 17–19 to Ex. E at 45:7–14, 52:16–20); Plaintiff's "annual Mother's Day" bike ride (cf. Compl. at 26:3–4 to Depo. Taleah H., 48:10–24 (Jan. 5, 2023), relevant excerpts attached as **Exhibit F**); "closing of fisheries" (cf. Compl. at 8:12–16 to Depo. Lander B., 48:10–49:6 (Dec. 29, 2022), relevant excerpts attached as **Exhibit G**, Depo. Badge B., 54:3–55:20, 57:4–59:16 (Dec. 29, 2022), relevant excerpts attached as **Exhibit H**, and Depo. Kian T., 53:15–24, 55:19–25, 57:23–58:3 (Dec. 28, 2022), relevant excerpts attached as **Exhibit I**); hunting season in the summer (cf. Compl. at 8:18–20 to Ex. G at 65:6–25); canceled camping trip in Montana (cf. Compl. at 13:11–12 to Ex I at 67:15–68:9); Plaintiffs depend on fish as an important food source (cf. Compl. at 8:3–8 to Ex. H at 46:12–47:4).

[2] E.g.: catching and harvesting animals (cf. Compl. at 8:9–16 to Ex. G at 35:18–36:23, 53:4–56:21, Ex. H at 59:23–61:7; cf. Compl. at 12:20–13:2 to Ex I at 53:15–24, 55:19–25, 57:23–59:9); access to game as food source impaired when plaintiffs testify that they usually do not need to eat store-bought meat (cf. Compl. at 8:3–8 to Ex H at 45:14–48:8, 49:17–50:7, 51:4-11, Ex. G at 35:18–36:23); ability to ice skate on Flathead Lake when plaintiff quit trying to (cf. Compl. at 25:17–20 to Ex. F at 33:25–36:9).

economic injury;[3] and alleged psychological injuries,[4] just to name a few. Such mischaracterizations debunked through discovery do not suffice to establish the required injury element of constitutional standing at the summary judgment stage.

B. PLAINTIFFS FAIL TO ESTABLISH THE REQUISITE CAUSATION TO MAINTAIN STANDING.

Plaintiffs also fail to establish that their claimed injuries were caused by the statutes challenged here. Plaintiffs must demonstrate causation by showing "a fairly traceable connection" between their alleged injuries and the challenged statutes. *Heffernan*, ¶ 32; *see also*; *Lujan*, 504 U.S. at 560 (the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.")[5]. The chain of causation must not be "hypothetical or tenuous." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020); *see also Larson* at ¶ 46 ("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 specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff.") (emphasis added). Plaintiffs must also prove that the challenged statutes were a "substantial factor" in causing their alleged injuries. *Juliana*, 947 F.3d at 1169.

Plaintiffs' alleged injuries hinge on attenuated inferences, not provable facts. Even if Plaintiffs could prove that greenhouse gas ("GHG") emissions caused their alleged injuries, Plaintiffs must still demonstrate a direct causal link to 1) GHG emissions from Montana, and 2) each challenged statute. But they can't. *Cf.* Plaintiffs' causation allegations *with Williamson v. Mont. Pub. Serv. Commn.*, 2012 MT 32, ¶ 37, 364 Mont. 128, 272 P.3d 71 ("[t]he climate-related consequences alleged by Complainants ... do not even bear a *close* logical, causal, or consequential relationship to the use of HPS lights rather than LED lights...."). Plaintiffs cannot prove that the abstract State Energy Policy Goal Statements directly caused their alleged injuries—

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[3] Plaintiff working at Big Sky while attending high school and private college in California (cf. Compl. at 22:13–17 to Ex. D at 6:3–5, 11:1–12:22, 16:2–23, 26:7–28:19, 31:18–32:25, 66:6–14, 97:15–98:12).

[4] E.g.: fears about the future (cf. Compl. at 16:1–3 to Depo Grace. S., 58:24–60:1 (Jan. 6, 2023), relevant excerpts attached as **Exhibit J** (plaintiff is anxious about "her future and fearful that her generation may not survive the climate crisis," while admitting that she is "fortunate to be in a place that has not been impacted in any sort of life-threatening way" and that "it's quite unlikely that every person of my generation dies."); cf. Compl. at 10:15–16 to Ex. E at 31:12–33:20 (Plaintiff worries that her tribe's activities, practices, and beliefs of cultural significance will be entirely lost, but could not provide concrete examples)).

[5] GHG emissions resulting from fossil fuel extraction and combustion implicate the actions of private actors not parties to this suit. *See* Section IV, *infra.*

particularly considering that other, specific, substantive statutes directly regulate fossil fuel development, transportation, storage, and use, etc. *See e.g.* MCA §§ 82-4-201 et seq. (permitting for coal mines); § 82-15-105 (licensing for petroleum dealers); §§ 82-10-301 et seq. (underground gas storage reservoirs).[6] Plaintiffs don't challenge any of those substantive statutes. Plaintiffs simply ignore and bypass these numerous intervening steps and actions—many of which are independently taken by third parties not present in this litigation[7] (*see Lujan*, 504 U.S. at 560), in their broad assertion of causation. This only highlights the absence of this necessary element of standing.

Plaintiffs also attempt to link their alleged injuries to the MEPA Limitation by generally asserting that it prevents state agencies from considering a permitting action's resulting GHG emissions, but this is likewise insufficient to establish causation. Plaintiffs cannot point to even one agency action that directly caused the harms they allege. Plaintiffs instead fill in the gap in logic between unspecified or theoretical agency actions and their claimed injuries with the unsupported assumption that GHG emissions would not have occurred but for the MEPA Limitation. This likewise ignores the many substantive laws scattered throughout Montana's statutes that affirmatively authorize agencies to take particular actions. Plaintiffs also fail to acknowledge the exceptions to the MEPA Limitation that explicitly allow for the consideration of actual or potential impacts beyond Montana's borders when that review is required by a specific law, rule, regulation, or federal agency. *See* § 75-1-201(2)(b)(ii), (iii).[8] Perhaps they think the true cause of their alleged injuries is the absence of any such statutory requirement—relief the Court has already agreed it cannot grant. (*See* 8/4/21 Or. at 19.) Plaintiffs fail to establish a nexus between the challenged statutes and their claimed injuries sufficient to confer standing.

C. THE COURT CANNOT FASHION ANY RELIEF THAT WOULD REDRESS PLAINTIFFS' CLAIMED INJURIES.

To meet the redressability requirement for standing, Plaintiffs must show that the invalidation of the State Energy Policy Goal Statements and the MEPA Limitation would alleviate those injuries. *Larson*, ¶ 46. This Court previously found that a favorable ruling could sufficiently

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[6] *See* Defendants' 4/24/20 Brief in Support of Motion to Dismiss, at 9, for more examples.
[7] *See* Section IV, *infra.*
[8] *See also* MCA § 75-1-104 (stating that Section 75-1-201 does not "affect the specific statutory obligations of any agency of the state to: (1) comply with criteria or standards of environmental quality; (2) coordinate or consult with any local government, other state agency, or federal agency; or (3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.").

alleviate Plaintiffs' claimed injuries under the facts alleged and relief requested by Plaintiffs (*see* 8/4/21 Or. at 17), but information obtained in discovery has only confirmed the opposite for the same reasons that Plaintiffs cannot establish causation.

First, as explained above, the challenged statutes do not contain any substantive provisions that authorize or facilitate the production or consumption of fossil fuels. This means that this Court's invalidation of those statutes would not achieve the effect that Plaintiffs seek: drastic reduction of Montana's GHG emissions. Indeed, Section 90-4-1001 is merely an aspirational statement of goals and factors. None of the substantive statutes identified above are predicated or dependent on the existence or validity of that challenged statute. In other words, removing subsections (1)(c)—(g) from the policy statement would not render any substantive statute, related rule, or regulation unenforceable or inoperative.

The introduction of HB 170 in the 2023 Montana Legislature is further evidence of this fact. If successfully passed, the State Energy Policy Goal Statements set forth in Section 90-4-1001 would be repealed in their entirety.[9] One would reasonably expect that representatives from the fossil fuel industries with interests in Montana would be stumbling over themselves to testify in opposition to HB 170 if it actually threatened those interests. But no such opposition was raised during the hearings on that bill before the House Energy, Technology, and Federal Relations Committee and the Senate Energy and Telecommunications Committee.[10] Notably, however, representatives from environmental interest groups did oppose the repeal of Section 90-4-1001.[11] Paradoxically, environmental interest groups apparently want the State Energy Policy Goal Statements declared unconstitutional by this Court, but not repealed by the Legislature.

Plaintiffs also cannot demonstrate that this Court's invalidation of the MEPA Limitation would amount to sufficient redress. In particular, Plaintiffs cannot show that, in the absence of the MEPA Limitation, state agencies would—or even could—measure and consider the incremental impact of any given project in Montana on global climate change and then determine how or to

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[9] *See* the full text and current status of HB 170 at http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=170&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=

[10] *See* the video and/or audio from those hearings at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46941?agendaId=245107 and https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230131/-1/47033, respectively.

[11] *Id.*

what extent, if any, that discrete impact on global climate would affect Montana. Even if this were possible, state agencies would not be required to perform such an analysis absent the MEPA Limitation. The Montana Legislature would have to amend MEPA to require this analysis, but this Court cannot order the Legislature to craft such an amendment. Furthermore, Plaintiffs have not alleged that, if state agencies could and would attempt to perform this speculative "butterfly effect" analysis, it would somehow lead to a reduction in Montana's GHG emissions and thereby alleviate Plaintiffs' claimed injuries in any meaningful way.

Second, it's undisputed that Montana's contribution to climate change is *de minimis*, and even if all of Montana's GHG emissions were eliminated entirely, there would be no appreciable alleviation of Plaintiffs' claimed injuries or impact on global climate change. (*See* Depo. Cathy Whitlock, 13:23–14:11, 18:25–19:6 (Nov. 29, 2022), relevant excerpts attached at **Exhibit K**); Depo. Jack Stanford, 20:12–20 (Nov. 8, 2022), relevant excerpts attached as **Exhibit L**)). This is in no small part due to the fact that Montana's GHG emissions would just be replaced by other sources. (Ex. B at 26:10–18; Ex. C at 21:12–17; Depo. Daniel Fagre, 16:23–17:9 (Oct. 27, 2022), relevant excerpts attached as **Exhibit M**). Also, Montana's contribution to global warming via GHG emissions is simply too insignificant, and both Defendants' and Plaintiffs' experts acknowledge the reality that climate change is a global problem requiring global action. (*See* Expert Report of Judith Curry, 27, attached as **Exhibit N**; Depo. Judith Curry, 139:19–140:11 (Dec. 16, 2022), relevant excerpts attached as **Exhibit O**); Ex. B at 26:2–3 ("...it becomes fruitless to take unilateral action."). This is exactly the conclusion the Washington Court of Appeals reached in determining that nearly identical claims asserted by Our Children's Trust plaintiffs were not justiciable under the Uniform Declaratory Judgments Act. *See Aji P. v. State*, 16 Wn. App. 2d 177, 197, 480 P.3d 438, 451–452 (Wash. App. 2021) ("[A] trial court order would not result in the atmospheric carbon levels required to either stabilize the future global climate or protect the Youths' asserted right because the world must act collectively in order to stabilize the climate.") (citing *Juliana*, 947 F.3d at 1173); *see also Wash. Envt. Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013) ("It is undisputed that GHG emissions is not a localized problem endemic to Washington, but a global occurrence. Because the effect of collective emissions from the Oil Refineries on global climate change is 'scientifically indiscernible,' ... Plaintiffs' injuries are likely to continue unabated even if the Oil Refineries have RACT controls."). Simply put, this Court is not able to fashion a remedy to the problem of global climate change, and granting

Plaintiffs' requested relief does nothing to reduce GHG emissions in Montana, the region, or the world.

This leads to the final point regarding redressability—the Uniform Declaratory Judgments Act ("UDJA") does not independently confer standing. *Mitchell*, ¶ 42 ("Without an independent ground for standing, [plaintiffs] cannot assert a claim under the [UDJA]."). In other words, Plaintiffs cannot establish redressability simply by arguing that their alleged injuries will be at least partially alleviated by a declaration that the challenged statutes are unconstitutional. *See Juliana*, 947 F.3d at 1170 ("A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action.") (citing *Clean Air Counsel v. United States*, 362 F.Supp.3d 237, 246 (E.D. Pa. 2019)); *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 107, (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier[, b]ut...that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.") (emphasis in original)). To conclude otherwise would be to accept the circular argument that redressability is established because declaratory relief is available, and declaratory relief is available because redressability is established. Ultimately, declaratory judgment in Plaintiffs' favor has no realistic chance of alleviating Plaintiffs' claimed injuries in any meaningful sense. "Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (Scalia, J. concurring) (emphasis in original). Plaintiffs' claims lack justiciability.

II. PRUDENTIAL CONCERNS WEIGH AGAINST GRANTING PLAINTIFFS' REQUESTED RELIEF.

Beyond the minimum "case or controversy" standing requirements, prudential limits proscribe courts from adjudicating "generalized grievances more appropriately addressed in the representative branches[.]" *Heffernan*, ¶ 32. Plaintiffs' allegations are more accurately described as a policy dispute, rather than an actual case or controversy. Prudential considerations also underly the Court's exercise of discretion under the UDJA. *See* MCA § 27-8-206 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."); *Miller v. St. Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 8, 337 Mont. 67, 155 P3d

1278 (holding that, absent a justiciable controversy, a declaratory judgment is inappropriate.). "The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). As is particularly relevant here, "[b]roadly determining the constitutionality of a 'statutory scheme' that may...involve [many] separate statutes, is contrary to established jurisprudence." *Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364.

The Court should dismiss Plaintiffs' claims on prudential standing grounds because the declaratory relief Plaintiffs seek would do anything but "terminate the uncertainty or controversy giving rise to [this] proceeding." MCA § 27-8-206. The invalidation of the State Energy Policy Goal Statements and the MEPA Limitation would have absolutely no effect on the actions of state agencies as explained above, nor would it resolve the issue at the core of Plaintiffs' claims—Montana's GHG emissions and their alleged contribution to "climate instability." State permitting for coal mines and air quality, and other State decisions regulating energy and, transportation, are separately governed by specific statutes which carefully balance the requirements of the Montana Constitution with the use of natural resources. *See, e.g.* The Montana Strip and Underground Mining Act, § 82-4-202(1) (coal permitting), §§ 75-2-201 et seq. (air quality permitting).

> The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Strip and Underground Mining Reclamation Act. It is the legislature's intent that the requirements of this part provide adequate remedies of the protection of the environmental life support system from degradation and provide adequate remedies to preen unreasonable depletion and degradation of natural resources.

MCA § 82-4-202(1). It is these specific statutes—not the aspirational State Energy Policy Goal Statements—which implement the Montana Constitution's environmental protections. These statutes are the only vehicle for challenging constitutionality through the contested case process in the Montana Administrative Procedures Act ("MAPA"). Plaintiffs seek to impermissibly end-run the required MAPA procedure by directly challenging Section 90-4-1001. But because Section 90-4-1001 has no regulatory authority, a judicial declaration voiding it will have no effect on any specific permitting statutes.

Plaintiffs' Complaint is clear that their primary motive in initiating this litigation was to implement their remedial plan via a complete restructuring of Montana's energy policy and the

elimination of fossil fuel extraction, transportation, and consumption in Montana. (*See generally* Compl. and at 102–104). However, that relief is not within reach, not only because it is practically infeasible, but also because the Court has already dismissed the vast majority of that requested relief in recognition that separation of powers deprived it of the requisite authority. (*See* 8/4/21 Or. at 19). Plaintiffs must seek the recourse they truly desire through the democratic process at the Montana Legislature. *Juliana*, 947 F.3d at 1173 ("Because it is axiomatic that the Constitution contemplates that democracy is the appropriate process for change, some questions—even those existential in nature—are the province of the political branches.").

Analyzing the same issue in a functionally identical case, the Alaska Supreme Court explained that the sought declaratory relief, alone, "would have no immediate impact on [carbon] emissions, would not compel the State to take any particular action, and would not protect the plaintiffs from the injuries they allege." *Sagoonick v. State*, 503 P.3d 777, 799 (Alaska 2022) (internal quotations omitted) (brackets in original). "It also would not tell the State how to fulfill its constitutional obligations or help plaintiffs determine when their constitutional rights have been violated." *Id.* "Without judicially enforceable standards, which the political question doctrine prevents us from developing, declaring the existence or even violation of plaintiffs' various purported constitutional rights would not settle the parties' legal relations." *Id.* The *Sagoonik* Court accordingly affirmed the trial court's dismissal of the plaintiffs' claims. *Id.* at 805. This Court should dismiss Plaintiffs' remaining claims for declaratory relief in this case based on the exact same reasoning employed in *Sagoonik.*

Moreover, the uncertainty and controversy currently present would be exacerbated by orders of magnitude if the Court were to grant Plaintiffs' request for a declaration that the Montana constitutional right to a clean and healthful environment "includes a stable climate system that sustains human lives and liberties and that said right is being violated[.]" (Compl. at 103). This is in no small part due to the wide-open question of what exactly constitutes a "stable climate system," particularly considering that climate is ever-changing by its very nature. Plaintiffs themselves do not define a "stable climate system" or "climate instability." Would this be premised on a certain acceptable rate or degree of variation in the climate? How would that be measured, and how could an intertwined fundamental right possibly be enforced? These are just a few serious questions that would stem directly from such a declaration—previously nonexistent "controversies...which revolve around policy choices and value determinations constitutionally

committed for resolution to other branches of government or to the people in the manner provided by law." *Larson*, ¶ 39. In other words, by issuing a declaration so drastically expanding Article II, Section 3, the Court would open a Pandora's box of political questions it is ill-equipped—and not constitutionally authorized—to answer. This, alone, is a compelling reason to grant summary judgment on Plaintiffs' remaining claims for declaratory relief.

III. PLAINTIFFS' SOUGHT EXPANSION OF THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT WOULD LEAD TO ABSURD RESULTS.

"In the construction of constitutional provisions, [Montana courts] apply the same rules which are applicable to the construction of statutes." *Grossman v. Dept. of Natl. Resources*, 209 Mont. 427, 451, 682 P.2d 1319, 1331 (1984) (internal citation omitted); *see also* MCA § 1-2-101("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."). "In construing broad and general provisions of the constitution which tend in measure to conflict with specific ones, [Montana courts] are controlled by specific provisions, and an interpretation that achieves a reasonable result is favored." *Grossman*, 209 Mont. at 451 (internal citations omitted). "Neither statutory nor constitutional construction should lead to absurd results, if reasonable construction will avoid it." *Id.* (internal citation omitted). *See also Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 9, 389 Mont. 270, 405 P.3d 88 ("Courts should strive whenever possible to avoid interpreting a statute in a way that causes it to be unconstitutional.").

As an initial matter, Article IX, Section 1(2)–(3) charges the Montana Legislature with implementing the constitutional directive. At the time of the 1971–1972 Montana Constitutional Convention that enacted Articles II and IX, the delegates did not contemplate global climate change as an issue the new Articles were designed to address. The plain text of the Constitution directs the State and each person to "maintain and improve a clean and healthful environment *in Montana*." Const. Art. IX, § 1(1) (emphasis added). The concepts of global climate change or climate stability do not appear anywhere in the text of the Constitution or in the proceedings of the Convention. Moreover, the delegates repeatedly emphasized that the new constitutional provision was intended to protect the environment of Montana from the types of environmental deterioration that had occurred in other states—not solve global problems that might incidentally affect

Montana. *See, e.g.*, Mont. Constitutional Convention, Verbatim Tr., March 1, 1972, Vol. V, 1227, 1232, 1235–1237. Ensuring a "stable climate system" was simply not on the Convention's radar, and Plaintiffs will be hard-pressed to demonstrate otherwise.

One need not engage in wild speculation to imagine the massive and confounding implications of such a declaration considering Article IX, Section 1's mandate that "the State ***and each person*** shall maintain and improve a clean and healthful environment in Montana for present and future generations..." *Id.* (emphasis added). *See also Cape-France Enters. v. In re Estate of Peed*, 2001 MT 139, ¶ 32, 305 Mont. 513, 29 P.3d 1011 (noting the Montana Supreme Court's previous acknowledgment "that the text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well[]" and invalidating a contract between private parties on that basis). Plaintiffs' sought expansion of the existing right to a clean and healthful environment could 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. Such a scenario is further complicated when considering the inevitably conflicting rights of Montanans "pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const. Art. II, § 3. 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, and this illustrates why the Montana Supreme Court "avoids deciding constitutional issues whenever possible." *Donaldson*, ¶ 10. "[D]eclaring the parameters of constitutional rights is a serious matter[,]" indeed. *Id.* The Court should reject Plaintiffs' claims for these reasons as well.

IV. PLAINTIFFS FAILED TO JOIN INDISPENSABLE PARTIES.

Furthermore, assuming 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, Plaintiffs failed to join the necessary parties for such relief to be properly granted. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." MCA § 27-8-301; *see also* Mont. R. Civ. P. 19(a)(1) (requiring the joinder of a party if that party's absence would prevent the court from according complete relief or would prevent that party from protecting its interests). 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 (*see* Compl. at 38–43), but the Court could not properly grant this relief without first affording affected parties (e.g. energy companies, landowners/mineral interest holders, etc.) the opportunity to have their positions and interests heard and considered. Such a scenario is exactly the type that Section 27-8-301 and Mont. R. Civ. P. 19(a)(1) aim to prevent, and the Court should dismiss Plaintiffs' remaining claims accordingly.

V. PLAINTIFFS' CLAIMS FAIL ON THE MERITS.

If this Court determines it may reach the merits of Plaintiffs' constitutional challenge, that challenge still fails. Neither the State Energy Policy Goal Statements nor the MEPA Limitation offend the Montana Constitution.[12] The Constitution guarantees the right to a clean and healthful environment *in Montana*, and it directs the Legislature to administer, enforce, and provide adequate remedies for the violation of that right. Mont. Const. Art. IX, § 1. The Legislature has fulfilled those duties by considering and balancing competing rights and interests in the proper exercise of its general police powers.[13] To succeed in a facial challenge, Plaintiffs must prove beyond a reasonable doubt that "no set of circumstances exist under which the [challenged sections] would be valid." *Mont. Cannabis*, ¶ 14; *Satterlee*, ¶ 10. Plaintiffs cannot sustain their burden with respect to their facial challenge to either statute at issue.[14]

A. THE STATE ENERGY POLICY GOAL STATEMENTS DO NOT VIOLATE THE MONTANA CONSTITUTION.

To maintain their facial challenge to Sections (c)—(g) of the State Energy Policy Goal Statements, Plaintiffs must demonstrate that *all* applications of those sections are unconstitutional. *Advocates for Sch. Trust Lands*, ¶ 29. Those sections state as follows:

> (c) promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;

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[12] This likewise applies to the Public Trust Doctrine because that doctrine is derived from Article IX, Section 3 of the Montana Constitution. *See Galt v. State*, 225 Mont. 142, 144, 731 P.2d 912, 913 (1987).

[13] The Legislature—not the courts, and not these litigants—balances the competing interests to determine how best to serve the public interest. See *Berman v. Parker*, 348 U.S. 26, 32–33 (1954). "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power..." *Billings Properties v. Yellowstone Cnty.*, 144 Mont. 25, 31, 394 P.2d 182 (1964)(quoting *Berman*, 348 U.S. at 32).

[14] To the extent that Plaintiffs may attempt to assert or revive an argument that any of their remaining claims for relief actually constitute as-applied challenges, those claims nonetheless fail for lack of administrative exhaustion. (*See* Defs.' 4/24/20 Br. in Support of Mot. to Dismiss at 16–19; Defs.' 6/11/20 Reply Br. in Support of Mot. to Dismiss at 15–18.) Defendants hereby incorporate the same by reference.

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

MCA § 90-4-1001(1)(c)—(g). Perhaps the most salient portion of these sections with Plaintiffs' burden in mind is section (d), which expressly advocates for action that is "environmentally sound" and includes the "mitigation of greenhouse gas and other emissions[.]" *Id.* This language is entirely consistent with Plaintiffs' aims on its face, yet Plaintiffs seek its invalidation. This alone defeats Plaintiffs' facial challenge even if Article II, Section 3 included a nebulous right to a stable climate system given the express goal of GHG reduction. Nevertheless, Plaintiffs must demonstrate that all other applications of these sections are unconstitutional beyond a reasonable doubt, but they cannot do so. The very fact that these sections merely recite goals with respect to energy policy—rather than authorize or permit any specific agency or private action—only emphasizes that Plaintiffs' disagreement is political in nature.

Furthermore, it is apparent that the policy goal statements at issue are the Legislature's balancing of the competing interests contained within Article II, Section 3. It is not for Plaintiffs or the judiciary to strike a proper balance between Montanans' right to a clean and healthful environment and their rights to "pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const. Art. II, § 3. Again, this is solely the Legislature's prerogative. *Berman*, 348 U.S. at 32—33. Plaintiffs' efforts to facially invalidate the State Energy Policy Goal Statements accordingly fail as a matter of law.

B. THE MEPA LIMITATION DOES NOT VIOLATE THE MONTANA CONSTITUTION.

Plaintiffs must also prove the unconstitutionality of the MEPA Limitation in *all* its applications to maintain their facial challenge, but they cannot sustain this burden. The MEPA Limitation states:

> 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.

§ 75-1-201(2)(a). Many of the State's environmental reviews are only for State action with strictly local actual or potential impacts. For example, in permitting opencut materials (gravel, sand, etc. under § 82-4-401 *et seq.*), DEQ's Opencut Section issues an environmental assessment. (Aff. Christopher Dorrington, ¶¶ 3—10 (Feb. 1, 2023) (attached as **Exhibit P**)). Because these opencut operations are inherently local with rarely, if ever, potential or actual impacts beyond Montana's borders, each Opencut environmental review is a constitutional application of Section 75-1-201(2)(a). *See, especially*, § 82-4-432(14) (permitting for sites which do not affect ground water or surface water). DEQ's Opencut Section issued approximately 68 environmental reviews in 2019, 66 environmental reviews in 2020, 99 environmental reviews in 2021, and 76 environmental reviews in 2022. (*Id.* at ¶ 7).

Similarly, DEQ's Solid Waste Section performs a MEPA analysis when a licensed septic pumper seeks to add a new land application disposal site to its license under Section 75-10-1211(2). For many of the decisions that DEQ makes under the Solid Waste Laws, there are no potential or actual impacts beyond Montana's borders. (*Id.* at ¶¶ 9—10). *See* MCA § 75-10-221 (solid waste management system (including composting facilities) licensing requirements). In these applications, the MEPA Limitation is patently constitutional.

Moreover, considering the explicit exception contained within the MEPA Limitation, it logically follows that Plaintiffs must also establish the unconstitutionality of *all* applications of the following exception:

> 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.

§ 75-1-201(2)(b). Rather than attempt to establish the invalidity of the MEPA Limitation in all applications—or even acknowledge or address the stated exceptions to the MEPA Limitation—Plaintiffs simply allege that Section 75-1-201(2)(a) "has been interpreted to mean that Defendants

cannot consider the impacts of climate change in their environmental reviews." (Compl. at ¶ 111). But even if this were true, it does not render the MEPA Limitation unconstitutional in all applications, as clearly demonstrated above.

Additonally, by limiting a MEPA review to "actual or potential" impacts in Montana, not impacts that are "regional, national, or global in nature[,]" the Legislature reasonably advanced Montanans' right to a clean and healthful environment. MCA § 75-1-201(2)(a). Plaintiffs have not demonstrated any scientifically trustworthy method that would allow the State to measure accurately how any discrete agency action in Montana affects the infinitely complex global climate. Montana's government, moreover, doesn't have power to regulate the environment beyond the Montana's borders. The State of Montana lacks power—in both legal and practical terms—to regulate the environment of Beijing, Mumbai, Los Angeles, or Wyoming, for example. The 1972 Constitutional Convention Delegates enacted the Constitution's environmental provisions to protect *Montana*'s unique environment, not to create a panacea that would cure all national and global climate ills. Montana simply lacks the authority to regulate the environments of other sovereign entities like other states and countries. The environmental provisions in Montana's Constitution do not—and cannot—empower state agencies to cure all perceived global environmental problems. Montana has sovereign power only within its own borders.

When interpreting constitutional provisions, this Court must "apply the same rules as those used in construing statutes." *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. This Court must determine the meaning of a constitutional provision "not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Id.* (citations omitted). In this case, the plain language of the Constitution's environmental provisions and the historical and surrounding circumstances under which the Framers drafted these provisions, all point clearly in one direction: the Montana Constitution's environmental provisions protect *Montana*'s environment. Article IX, section 1, approved by the Constitutional Convention before Article II, section 3, provides that "[t]he state and each person shall maintain and improve a clean and healthful environment *in Montana* for present and future generations." Mont. Const., art. IX, § 1(1) (emphasis added). This plain language makes clear that the Constitution's environmental provisions apply only to Montana's environment. To the extent that Plaintiffs want declaratory relief that the Legislature

should have exercised its exclusive Article IX, Section 1 authority in a different way, that presents a nonjusticiable political question as addressed above. Plaintiffs' facial challenge to the MEPA Limitation fails as a matter of law.

C. PLAINTIFFS CANNOT SHOW ANY VIOLATION OF THE EQUAL PROTECTION AND DIGNITY CLAUSE.

Plaintiffs also allege that the two challenged statutes violate the equal protection and inviolable dignity clauses of the Montana Constitution, but again, these claims fail. Article II, Section 4, of the Montana Constitution provides, in relevant part, "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws." *Id.* "The function of the equal protection clause is to measure the validity of classifications created by state laws" and "ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Gazelka v. St. Peter's Hosp.* 2018 MT 152, ¶¶ 7, 10, 392 Mont. 1, 420 P.3d 528 (citation omitted).

When analyzing an equal protection challenge, courts engage in a three-step analysis. *Id.*, ¶ 15. First, the court must "identify the classes involved and determine if they are similarly situated. *Id.* (citation omitted). Second, the court determines the appropriate level of scrutiny. *Id.* Third, the court then applies the appropriate level scrutiny to the challenged laws. *Id.* "To assert a viable equal protection claim, a plaintiff must demonstrate that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *Id.* (citation and quotations omitted). Groups are "similarly situated" for equal protection purposes only if "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.*, ¶ 16. If "the challenged statute does not create classes of similarly situated persons" the equal protection claim fails, and the court ends its analysis at step one. *Id.*, ¶ 15.

Here, Plaintiffs' equal protection claim never makes it past step one of the analysis. Neither the State Energy Policy Goal Statements nor the MEPA Limitation classify at all, much less classify in a manner that discriminates between similarly situated groups. Plaintiffs cannot adduce evidence at this stage to establish to the contrary, and their claim therefore fails as a matter of law.

CONCLUSION

Of the various substantially similar cases Our Children's Trust has brought in state and federal courts, only this case has survived a motion to dismiss.[15] As explained above, the Court

[15] *See, e.g., Chernaik v. Brown*, 367 Ore. 143, 475 P.3d 68 (Or. 2020), attached as **Exhibit Q**; *Funk v. Wolf*, 144 A.3d 228 (Pa. 2016), attached as **Exhibit R**; *Sagoonick v. State*, 503 P.3d 777, 799 (Alaska 2022), attached as **Exhibit S**;

should grant summary judgment to the Defendants on Plaintiffs' remaining claims for relief because Plaintiffs lack constitutional standing, prudential policy concerns weigh in favor of dismissal, the sought expansion of the right to a clean and healthful environment would lead to absurd results, Plaintiffs failed to join necessary parties, and Plaintiffs cannot sustain their claims on their merits. The Court allowed this litigation to proceed to discovery after paring Plaintiffs' claims down primarily to those for declaratory relief, but it has only become more apparent through discovery that Plaintiffs' remaining claims can only be meaningfully addressed by Montana's political branches. Courts do not exist to create an end-run around the democratic process, and if Plaintiffs dislike the environmental policy the Legislature has enacted, the Legislature is the forum in which they must press their disagreement. *See, e.g.*, Mont. Const. art. III, §§ 1, 4–5. They may not impose their policy views on all other Montanans via the courtroom, and this Court should rule accordingly by dismissing Plaintiffs' remaining claims. For these reasons, Defendants respectfully request that the Court grant them summary judgment on all Plaintiffs' remaining claims.

DATED this 1st day of February, 2023.

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Aji P. v. State, 16 Wn. App. 2d 177, 480 P.3d 438 (Wash. Ct. App. 2021), attached as **Exhibit T**; *Reynolds v. State of Florida*, Case No. 2018-CA-819 (Fla. Cir. Ct., Jun. 9, 2020), attached as **Exhibit U**; *Natalie R. v. State of Utah*, Case No. 220901658 (3rd Jud. Dist. Ct., Ut., Nov. 9, 2022), attached as **Exhibit V**; *Layla H. v. Commonwealth of Virginia*, Case No. CL22-0632 (Va. Cir. Ct., Sept. 29, 2022), attached as **Exhibit W**; *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), attached as **Exhibit X**.

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Dia C. Lang