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FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	No. CDV-2020-307 Hon. Kathy Seeley (Email) **YOUTH PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS** **(ORAL ARGUMENT REQUESTED)**

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INTRODUCTION

To protect their fundamental and inalienable rights, sixteen Montana youth, ages two to eighteen (Youth Plaintiffs), have brought this constitutional case against government conduct that endangers them. Youth Plaintiffs allege that Defendants have created and implemented a fossil-fuel based energy system that results in dangerous levels of greenhouse gas (GHG) pollution, contributes to the climate crisis, and violates their fundamental constitutional rights to a clean and healthful environment; to seek safety, health, and happiness; to individual dignity and equal protection; and to public trust resources. Montana's State Energy Policy directs energy production and utilization in the State and results in a fossil-fuel based energy system comprised of a multiplicity of actions that, in the aggregate, violate Youth Plaintiffs' Constitutional rights. Mont. Code Ann., § 90-4-1001(c)-(g) ("State Energy Policy"). Youth Plaintiffs challenge the constitutionality of the provisions of the State Energy Policy that explicitly promote increasing development and utilization of coal, oil, and gas (and how the Policy is being implemented through Defendants' aggregate acts) notwithstanding the worsening climate injuries to these young Montanans. *Id.* Youth Plaintiffs also challenge the constitutionality of the section of Montana's Environmental Policy Act (MEPA) that Defendants have interpreted to exclude from the MEPA analysis contributions of Defendant agencies' decisions to the climate crisis because it facilitates Defendants' willful blindness to their contributions to the climate crisis and contributes to Youth Plaintiffs' injuries. Mont. Code Ann. § 75-1-201(2)(a) ("Climate Change Exception").

Youth Plaintiffs are already experiencing direct injuries as a result of Defendants' conduct. Defendants do not dispute these injuries, which include injuries to Youth Plaintiffs' physical and psychological health and safety, harm to property, economic deprivations, interference with family and cultural foundations, and reduced access to Montana's constitutionally protected natural

resources. Compl. ¶¶ 14-81. As children, Youth Plaintiffs cannot vote or rely on the political process to protect their rights—they are uniquely vulnerable and politically powerless. Appropriately, they are turning to the judiciary, as "one of the bulwarks of American liberty," to protect their constitutional rights. *State ex rel. Middlemas v. Dist. Court of Lewis & Clark Cty.*, 130 Mont. 73, 84, 295 P.2d 233, 239 (1956) (quoting *Cotulla State Bank v. Herron*, Tex. Civ. App., 202 S.W. 797, 798 (1918)). The judiciary's duty to correct the unconstitutional conduct here is especially important because Defendants have known of the dangers of GHG pollution and climate disruption for over 50 years, yet continue to act affirmatively to exacerbate the climate crisis and conceal their contributions to it. Compl. ¶¶ 8, 185-200. Absent judicial intervention, Defendants' unconstitutional conduct will not only persist but will become more severe in the future and Youth Plaintiffs will experience irreparable harm and lifelong hardships. Compl. ¶¶ 2, 120, 177-84.

Defendants argue that Youth Plaintiffs lack standing (only causation and redressability) to pursue their constitutional claims, and that they failed to exhaust administrative remedies under the Montana Administrative Procedure Act (MAPA). Significantly, Defendants do not dispute that Youth Plaintiffs are experiencing justiciable injuries. Nor do Defendants dispute they control and implement the state's fossil-fuel based energy system and affirmatively promote the extraction, transportation, and combustion of fossil fuels. Instead, and contrary to the Youth Plaintiffs' well-pled complaint, Defendants argue that the challenged statutes do not cause Youth Plaintiffs' injuries and that the Youth Plaintiffs should be required to challenge each individual state project—one by one—that implements the State's Energy Policy, in order to protect their constitutional rights. Although Youth Plaintiffs are being injured, Defendants take the untenable position that this Court is without any authority to remedy their injuries and prevent ongoing

constitutional deprivations. On the contrary, when fundamental constitutional rights are violated, Montana's courts serve as "the final guardian and protector" of those rights and must "assure that the system[s] enacted by the Legislature enforce[], protect[] and fulfill[] th[ose] right[s]." *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 19, 326 Mont. 304, 109 P.3d 257. Youth Plaintiffs have presented this Court with a justiciable case-or-controversy and have stated claims for relief under Montana's Constitution. Accordingly, Defendants' motion to dismiss should be denied.

LEGAL STANDARDS

"[M]otions to dismiss are viewed with disfavor and a complaint should be dismissed only if the allegations in the complaint clearly demonstrate that the plaintiff does not have a claim." *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996); *accord Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250 ("A motion to dismiss is viewed with disfavor and rarely granted."). When deciding a 12(b)(1) motion to dismiss for lack of standing, courts "must construe the complaint in the light most favorable to the plaintiff ... and take as admitted all well-pleaded factual allegations." *W. Sec. Bank v. Eide Bailly LLP,* 2010 MT 291, ¶ 55, 359 Mont. 34, 249 P.3d 35. When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), courts are limited to examining the facts alleged in the complaint, which are accepted as admitted and true and considered in the light most favorable to the plaintiff. *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323, ¶ 3, 377 Mont. 244, 339 P.3d 602. A complaint can only be dismissed for failing to state a claim when "it appears *beyond doubt* that the plaintiff could prove no set of facts that would entitle him to relief." *Id.* ¶ 18 (emphasis added).

ARGUMENT

I. YOUTH PLAINTIFFS HAVE ESTABLISHED CASE-OR-CONTROVERSY STANDING

In order to establish case-or-controversy standing, plaintiffs must allege a past, present, *or* threatened injury, and the injury must be one that would be alleviated by successfully maintaining the action. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80; *see also MEIC v. DEQ*, 1999 MT 248, ¶ 41, 296 Mont. 207, 220, 988 P.2d 1236, 1243. Plaintiffs must have a "personal stake" in the outcome of the controversy. *Heffernan*, ¶ 30. Here, Youth Plaintiffs allege past, present, *and* threatened injuries as a result of the Defendants' conduct, including injuries to their property,[1] their physical and psychological health,[2] their recreational and aesthetic interests,[3] and economic injuries.[4] Compl. ¶¶ 14-81. Importantly, Defendants *do not dispute* Youth Plaintiffs' allegations that they have already been injured by climate disruptions or that their injuries will become more severe in the future. Instead, Defendants mistakenly argue that Youth Plaintiffs' injuries are not caused by either Montana's State Energy Policy or the Climate Change Exception to MEPA and that this Court lacks equitable authority to remedy their grave and ongoing injuries if they prove Defendants' actions are unconstitutional. Defs.' Br. 7, 11.

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[1] *See, e.g., Maya v. Centex*, 658 F.3d 1060, 1070-71 (9th Cir. 2011); *Heffernan*, ¶ 33.
[2] *See, e.g., Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997); *see also, In re S.L.M.*, 287 Mont. 23, 34-35, 951 P.2d 1365, 1372-73 (1997) (noting the import of Mont. Const. art. II, section 15 "Rights of Persons Not Adults" and relying on *Gryczan* in rejecting the State's argument that there was no standing when a statute on the books is not being actively applied).
[3] *See, e.g., MEIC v. DEQ*, 1999 MT 248, ¶ 45, 296 Mont. 207, 988 P.2d 1236; *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶¶27-33, 361 Mont. 77, 255 P.3d 179 (2011).
[4] *See, e.g., Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 372, 922 P.2d 1140, 1143 (1996).

A. Youth Plaintiffs' Injuries are a Result of Defendants' Conduct.

Defendants do not dispute that they control and implement Montana's energy system or that they permit the extraction, transportation, and combustion of fossil fuels that contribute to dangerous climate change and injure Youth Plaintiffs. Defendants' argument is much narrower; they argue other laws also contribute to the Youth Plaintiffs' injuries. Defs.' Br. 9. However, that is a mixed question of law and fact to be decided on the merits, not a motion to dismiss.

Montana's standing test does not require plaintiffs to show that their injuries are fairly traceable to defendants' conduct, Defs.' Br. 7, and the Montana Supreme Court does its own independent analysis of standing that does not strictly follow *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Heffernan*, ¶ 33; *MEIC*, ¶ 41.[5] Consistent with Montana jurisprudence, Youth Plaintiffs need to establish that the government conduct they challenge injures them. *MEIC*, ¶ 45 (plaintiffs established standing to challenge government conduct that adversely impacted areas where they recreate).

i. Youth Plaintiffs are Injured by Defendants' State Energy Policy.

Youth Plaintiffs allege that the State Energy Policy controls Montana's energy system and "involves systemic authorization, permitting, encouragement, and facilitation of activities promoting fossil fuels and resulting in dangerous levels of GHG emissions." Compl. ¶¶ 108, 112, 116-17. Youth Plaintiffs provide examples of affirmative actions that Defendants have taken "pursuant to and in furtherance of the State Energy Policy ... that cause emissions of dangerous levels of pollution."[6] *Id.* ¶ 118. Youth Plaintiffs have also provided detailed allegations about the

[5] While *Heffernan* cites to *Lujan*, the Montana Supreme Court articulates a Montana-specific standing test that is "similar[]" to the *Lujan* test but does not import the fairly traceable requirement. *Heffernan*, ¶ 33.

[6] Youth Plaintiffs do not challenge the constitutionality of individual agency actions taken in isolation as Defendants suggest they should under the MAPA. Defs.' Br. 18; *see infra* Section III.

dangerous GHG emissions resulting from the implementation of Montana's State Energy Policy, *id.* ¶¶ 121-42, and how Youth Plaintiffs are injured by those emissions, *id.* ¶¶ 14-81, 143-84. These allegations, which must be accepted as true and considered in the light most favorable to Youth Plaintiffs, establish that the State Energy Policy is being executed in a way that contributes to Youth Plaintiffs' injuries.

Defendants' reliance on legislative history to minimize the influence of the State Energy Policy is unavailing. Defs.' Br. 4-5, 10. The statutory language unambiguously promotes dangerous fossil fuels. Its effect on Defendants' conduct, and the constitutionality thereof, is a question of fact not appropriate for resolution on a motion to dismiss. On the merits, should the legislative history become relevant to the constitutional claims, it too confirms the State Energy Policy was developed to provide a comprehensive energy policy and give the state more control over energy production.[7] *Crist v. Segna*, 191 Mont. 210, 212-13, 622 P.2d 1028, 1029 (1981) (courts presume "that the legislature would not pass meaningless legislation" and new statutory provisions are "intended to make some change").

The other policies and authorities that Defendants argue "*could* apply," Defs.' Br. 8-9, do not set the comprehensive state-wide energy policy promoting fossil fuels and leave Defendants with significant discretion over what individual projects to approve or deny.[8] Additionally, in

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[7] *See, e.g.,* HJR 31, 52nd Leg. (1991), *reprinted in* HJR 31 Energy Study Summary Report 24-25 (1992), https://leg.mt.gov/content/publications/environmental/1992energysummary.pdf ("[E]nergy production, consumption and conservation ... can be *significantly influenced by state policies* and programs." (emphasis added); Compl. ¶ 113 (Senator Jackson stated in 2011 that the "State Energy Policy will guide Montana's energy production.").

[8] *See, e.g.,* Mont. Code Ann. §§ 75-2-203 to -204 (discretion under Clean Air Act of Montana to prohibit equipment and facilities that cause air pollution); 77-3-301 (state lands "may" be leased for coal if "in the best interests of the state"); 77-3-401 (state lands "may" be leased for oil and gas if consistent with the Constitution); 82-4-227 (Department of Environmental Quality has wide discretion to refuse mining permits).

contrast to the State Energy Policy not one of the statutes Defendants cite mandates the State of Montana to increase the development and utilization of coal, oil, or gas resources.[9] Simply because multiple statutes "*could* apply" does not defeat any causation requirement because the State Energy Policy remains the moving force behind Montana's fossil-fuel based energy system, as intended by the Legislature. Compl. ¶¶ 112-16. While the statutes Defendants cite may not guide state energy policy development, the actions taken thereunder are part of the overall energy system that is being implemented in an unconstitutional manner in furtherance of the State Energy Policy. However, the fact that these other statutes would remain if the State Energy Policy was declared unconstitutional is consistent with the remedy that Youth Plaintiffs seek because these other statutes leave agencies with significant discretion and could, without legislative revision, be implemented in a manner consistent with the Court's declaration of Youth Plaintiffs' constitutional rights.

The Montana Supreme Court has rejected the causation argument that Defendants advance here. In *Columbia Falls*, the Montana Supreme Court found that plaintiffs' challenge to a state-wide education system was justiciable, even when injuries resulted from multiple statutory schemes. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257.[10] Just as in *Columbia Falls*, ¶ 21, where the "school funding system" was causing plaintiffs' injuries, here, Defendants' "fossil-fuel based state energy system" is causing Youth Plaintiffs' injuries. Compl. ¶¶ 3, 8, 10, 81; *see also Weems v. State,* 2019 MT 98, ¶ 13, 395 Mont. 350, 440 P.3d 4 (finding standing and stating that whether a statute or administrative decision caused the

[9] Many of the cited statutes actually promote renewable energy and energy conservation. *See, e.g.,* Mont. Code Ann. §§ 15-32-101; 15-32-401; 50-60-801; 69-3-2002; 69-8-601; 90-4-1010; 90-4-1011; 90-4-1101.

[10] *See also Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52-56 769 P.2d 684, 689-91 (1989) (allowing constitutional challenge to "Montana's system of funding public schools").

alleged injury "will be front and center as the litigation proceeds toward resolution on the merits.").[11] Here, simply because specific agency actions implement the directive of the State Energy Policy does not mean that the State Energy Policy does not contribute to Youth Plaintiffs' injuries. Whether the State Energy Policy, and its implementation, is causing the Youth Plaintiffs' constitutional injuries, as they have alleged, is a question of fact for the merits.[12]

ii. The Climate Change Exception to MEPA Further Exacerbates Youth Plaintiffs' Constitutional Injuries.

The Montana Supreme Court has made clear that when a state statute excludes environmental review of agency activities causing degradation to the environment in ways that lead to infringement of constitutionally protected environmental rights, plaintiffs can challenge the constitutionality of the statute or its application. *MEIC*, ¶¶ 80, 85 (Leaphart, J., specially concurring). MEPA requires Defendant executive agencies to gather enough environmental impact information to ensure their decisions will satisfy the State's constitutional obligations under Article II, Section 3 and Article IX—constitutional rights to a clean and healthful environment that Youth Plaintiffs allege are being violated. Mont. Code Ann. § 75-1-102(1); *see also N. Plains Res. Council, Inc. v. Montana Bd. of Land Comm'rs*, 2012 MT 234, ¶ 14, 366 Mont. 399, 288 P.3d 169; *Montana Wildlife Fed'n v. Montana Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 43, 365

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[11] Additionally, the United States Supreme Court has rejected the notion that the challenged conduct must be the "last step in the chain of causation" and has found that causation had been satisfied even though future agency actions regarding water allocation still needed to be made. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997); *see also Skyline Wesleyan Church v. Cal. DMHC*, ___ F.3d ___, 2020 WL 2464926, *8 (9th Cir. May 13, 2020) (finding "a direct chain of causation" even when there were multiple links in causation chain).

[12] If this Court finds persuasive Defendants' argument that other statutory provisions are also causing Youth Plaintiffs' injuries, the youth respectfully request leave to amend their complaint accordingly. Youth Plaintiffs further request leave to amend should the Court find their complaint deficient on either of the two grounds argued by Defendants in their motion to dismiss. *Donaldson v. State*, 2012 MT 288, ¶ 12, 367 Mont. 228, 292 P.3d 387 ("Montana law generally favors allowing a party to amend its pleadings.").

Mont. 232, 280 P.3d 877; *Bitterrooters for Planning, Inc. v. DEQ*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712 (MEPA directs environmentally optimal decisions).

However, in complying with the MEPA Climate Change Exception statute, Defendants are making decisions deliberately indifferent to the effect of GHG emissions, which are degrading Montana's constitutionally protected environment and harming Youth Plaintiffs. Youth Plaintiffs' allegations of individualized physical, economic, and psychological harm demonstrate they have standing to challenge the constitutionality of the statute that forecloses environmental review of the climate harms they face when Defendants make decisions that implement the State Energy Policy. *See, e.g.*, Compl. ¶¶ 22-25, 34-35, 41, 118(g)-(i), (k), (m), (p); *MEIC*, ¶¶ 27, 43-44, 80; *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (In assessing standing, courts will not presume that government statements of policy are "superfluous," but must conclude that such policy "plays some, if not a critical, part in subsequent decisions."). "Whether Plaintiffs have demonstrated sufficient harm from the statute and activity complained of to implicate their constitutional rights and require strict scrutiny of the statute they have challenged, is a separate issue." *MEIC*, ¶ 45.

B. Youth Plaintiffs' Injuries Can be Alleviated by This Court.

In arguing that Youth Plaintiffs' injuries are not redressable, Defendants fundamentally misconstrue the nature of the relief that Youth Plaintiffs seek. They do not challenge "several statutory schemes"; nor do they seek a broad remedial plan to "fill in these gaps." Defs.' Br. 11. Youth Plaintiffs' requested relief would not require this Court to monitor "the State's revision of dozens of statutes (at a minimum)." Defs.' Br. 12. On the contrary, as Defendants concede, "the remedy for constitutional violations is to invalidate the offending statute," Defs.' Br. 11, which is

exactly what Youth Plaintiffs have prayed for. Compl. Prayer for Relief ¶¶ 1-3. This alone is sufficient to defeat Defendants' argument.

Plaintiffs must establish that their injuries "would be alleviated by successfully maintaining the action." *Heffernan*, ¶ 33. Plaintiffs need not show "a guarantee" that their injuries will be redressed. *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Graham v. FEMA*, 149 F.3d 997, 1003 (9th Cir. 1998)). Rather, plaintiffs must show that "it is likely, as opposed to merely speculative, that [their] injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). A plaintiff "need not show that a favorable decision will relieve his *every* injury," *Larson v. Valente*, 456 U.S. 228 (1982), but only that it "would at least partially redress" the harm, *Meese v. Keene*, 481 U.S. 465, 476 (1987).

Youth Plaintiffs seek both declaratory and injunctive relief, which are "distinct forms of relief." *Donaldson v. State*, 2012 MT 288, ¶ 94, 367 Mont. 228, 292 P.3d 364 (Nelson, J., dissenting); Mont. Code Ann. § 27-8-201. Courts have "the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 468-69 (1974) (internal citations omitted). It is entirely within the District Court's "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201; *see also* § 27-8-205. Because Youth Plaintiffs have established that the State Energy Policy and Climate Change Exception to MEPA contribute to their injuries, a declaration from this Court that they are unconstitutional would, by itself, suffice to establish redressability, regardless of whether additional injunctive relief was issued. *Larson v. State*, 2019 MT 28, ¶¶ 31, 33, 394 Mont. 167, 192-93, 434 P.3d 241, 257-258 (declaratory relief alone can establish a justiciable claim); *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (declaratory relief changes the legal status of the challenged

conduct, sufficient for redressability); *see also* Compl. ¶¶ 4, 180 (declaratory relief alone would provide redress for Youth Plaintiffs' psychological injuries).

Youth Plaintiffs also seek injunctive relief—but *only after* this Court determines that constitutional violations are occurring and awards declaratory relief. *See* Compl. Prayer for Relief. Youth Plaintiffs have asked this Court to order Defendants to develop a remedial plan *of their own devising* and consistent with *existing* statutory authority to protect Youth Plaintiffs' constitutional rights from further infringement. Such a remedy is squarely within the authority of Montana's courts, which have the power "to determine the questions involved in a case and 'do complete justice,'" as well as "the power to fashion an equitable result." *Maddox v. Norman*, 206 Mont. 1, 14, 669 P.2d 230, 237 (1983) (citing *Sawyer-Adecor Int'l, Inc. v. Anglin*, 198 Mont. 440, 455, 646 P.2d 1194, 1202 (1982)). For example, in *Columbia Falls*, the Court declared Montana's school funding system unconstitutional and gave the legislature an opportunity to correct the unconstitutional school funding system. *Columbia Falls*, ¶¶ 16-31.[13] Here, as in *Columbia Falls*, Youth Plaintiffs are asking the Court to declare Montana's fossil-fuel based energy system unconstitutional and give Defendants an opportunity to rectify the unconstitutional system.

Similarly, long-standing precedent of the United States Supreme Court and numerous state supreme courts makes clear that courts have the power to order and supervise plans to remedy systemic constitutional violations, as here. *E.g., Hills v. Gautreaux*, 425 U.S. 284 (1976) (approving order for a "comprehensive plan to remedy" unconstitutional public housing system "created by HUD"); *Brown v. Plata*, 563 U.S. 493, 526 (2011) (ordering California to develop and

[13] *See also Helena Elementary School Dist. No. 1*, 236 Mont. at 59 (The Montana Supreme Court retained jurisdiction to give the legislature an opportunity to pass new legislation in an attempt to rectify the unconstitutional school system, which the legislature did. *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 60, 784 P.2d 412, 413 (1990)).

implement plan to reduce state-wide prison population to no more than 137.5% of design capacity); *Pauley v. Bailey*, 324 S.E.2d 128, 132-33 (W. Va. 1984) (court developed master plan to remedy unconstitutional public education system); *Robinson v. Cahill*, 351 A.2d 713, 722-23 (N.J. 1975) (redistributing state-wide education funding under court-devised plan to remedy unconstitutional public education system and rejecting arguments that remedy was beyond judicial power); *see also Londonderry Sch. Dist. SAU No. 12 v. New Hampshire*, 907 A.2d 988, 995-96 (2006) (staying enforcement of judicial remedy to unconstitutional education system, but noting, "the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, *a judicial remedy is not only appropriate but essential*" (emphasis added)); *Serrano v. Priest*, 487 P.2d 1241, 1266 (Cal. 1971) (noting that a systemic judicial remedy to unconstitutional school system may be proper).

Even if this Court were to find that one specific aspect of Youth Plaintiffs' Prayer for Relief was inappropriate, the proper course of action would not be to dismiss the case in its entirety but for the Court to exercise its equitable authority to craft a remedy commensurate to the constitutional violations. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the ... remedy is to be determined by the nature and scope of the constitutional violation."); James Wm. Moore, Moore's Federal Practice vol. 2, § 12.34[1][b], 12– 81 (3d ed., Matthew Bender 2012) ("Consistently with their obligation to construe plaintiffs' allegations liberally, courts will not dismiss for failure to state a claim merely because the complaint requests inappropriate relief."). Youth Plaintiffs have requested certain remedies at the complaint stage but the appropriate remedies will depend on the nature of the wrongs—what the ultimate remedy looks like is not at issue here. It would be a mistake to dismiss these youths' entire case at this stage in the proceedings because it may be hard to figure out the right remedy in future proceedings.

Defendants erroneously compare Youth Plaintiffs' challenge to specific statutory provisions to the failed challenge of an entire, undefined statutory scheme in *Donaldson*, 2012 MT 288, 367 Mont. 228, 292 P.3d 364. In *Donaldson*, the plaintiffs sought a general declaration of their rights without challenging any particular statute as unconstitutional, as well as an order that the State provide plaintiffs a "statutory structure" that protects their rights. *Id.* ¶ 8. Here, however, Youth Plaintiffs seek to invalidate *specific provisions* of the State Energy Policy and MEPA and they *do not* seek an order requiring the legislature to enact any laws. Youth Plaintiffs' case is the type of "specific suit[] directed at specific, identifiable statutes," that the *Donaldson* Court found justiciable. *Id.* at ¶¶ 4, 8.

Defendants' reliance on the majority opinion of the sharply divided Ninth Circuit Panel in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), awaiting an *en banc* determination, is also misplaced. Defs.' Br. 12. The redressability analysis in that decision is contrary to Montana precedent, which makes clear that: (1) declaratory relief alone is adequate to establish justiciability, *e.g., MEIC*, ¶ 80 (standing established where plaintiffs sought declaratory judgment that a statute was unconstitutional); *Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 110, 679 P.2d 1223, 1226 (1984) (same); and (2) Montana courts have authority to oversee reform of unconstitutional state systems, *e.g.*, *Columbia Falls*, ¶ 31.[14] *Juliana* also premised its ruling on concerns related to the "unelected and politically unaccountable" federal judiciary. 947 F.3d at 1173 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)). Here, by contrast, Montana's courts are democratically elected and politically accountable, Mont. Const. art. VII,

[14] It is also contrary to U.S. Supreme Court and Ninth Circuit precedent. *See Juliana*, 947 F.3d at 1189 (Staton, J., dissenting) ("Plaintiffs request for a 'plan' is neither novel nor judicially incognizable." Instead, it is "consistent with our historical practices ...."); *see also* Petition for Rehearing *En Banc*, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. Mar. 3, 2020), ECF No. 156.

§ 8, and "the right to a clean and healthful environment" is an express statement of the popular will of Montana citizens, entitled to the highest level of *judicial* protection Mont. Const. art. II, § 3; *MEIC*, ¶ 63; *see Columbia Falls*, ¶ 19 (courts are "final guardian and protector" of constitutional rights). The claims here are also distinguishable from *Juliana*. The Youth Plaintiffs here have alleged injuries stemming from specific laws, which are at least partially redressable by declaratory and/or injunctive relief.

When courts are presented with an unconstitutional statute that is causing injuries, as here, it is their duty to provide redress. *In re Clark's Estate*, 105 Mont. 401, 74 P.2d 401, 406 (1937) (if a statute is unconstitutional, "declin[ing] to so declare would be a violation of our oaths of office").[15] Youth Plaintiffs' request for declaratory relief and injunctive relief is squarely within this Court's equitable authority and such relief is likely to, at least partially, redress their injuries.

II. YOUTH PLAINTIFFS HAVE ESTABLISHED PRUDENTIAL STANDING

Youth Plaintiffs' claims implicate none of the formulations indicating the presence of a nonjusticiable political question, and Defendants' conclusory arguments to the contrary mischaracterize their claims, the law governing their justiciability, and the relief sought. Prudential considerations actually weigh *in favor* of this Court finding Youth Plaintiffs' claims justiciable.

"[C]ourts generally should not adjudicate matters 'more appropriately' in the domain of the legislative or executive branches or the reserved political power of the people." *Larson*, 2019 MT 28, ¶ 18, n.6 (quoting *Heffernan*, ¶¶ 32-33). A nonjusticiable political question is only raised when there are issues "in the exclusive legal domain" of the political branches, and "disputed issues in regard to which the exercise of judicial power would infringe upon the power of a co-

[15] *See also* Mont. Const. art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("where there is a legal right, there is also a legal remedy").

equal branch of government ...." *Id.* ¶ 39 (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Baker v. Carr*, 369 U.S. 186, 217-37 (1962)); *accord Columbia Falls*, ¶¶ 16-31. However, "not every matter touching on politics is a political question ...." *Larson*, 2019 MT 28, ¶ 39. (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)). It is the role of the judiciary to "construe and adjudicate provisions of constitutional, statutory, and the common law as applied to facts at issue in particular cases." *Id.* Moreover, there are countervailing factors that weigh against prudential restrictions, including "the importance of the question to the public" and "whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing." *Heffernan*, ¶ 33 (internal citation and quotation omitted).

While non-self-executing provisions of the Montana Constitution may raise nonjusticiable political questions, constitutional provisions that implicate fundamental rights are "in a category of their own" and the courts are the "final interpreters of the Constitution [and] have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution ....'" *Columbia Falls*, ¶¶ 15, 18 (internal citations omitted); *Merlin Myers Revocable Tr. v. Yellowstone Cnty.*, 2002 MT 201, ¶¶ 19-21, 311 Mont. 194, 53 P.3d 1268 (Montana courts have "exclusive power" to interpret right to clean and healthful environment). Just as the courts are the "final guardian and protector of the right to education" so too are the courts the "final guardian and protector" of Youth Plaintiffs' fundamental rights to a clean and healthful environment; to seek safety, health, and happiness; to individual dignity and equal protection; and to public trust resources. *Columbia Falls*, ¶ 19. Reviewing statutes and government conduct for compliance with fundamental constitutional rights is squarely within the scope of the judiciary and does not raise political question issues. *Id.* ¶¶ 16-31.

Notwithstanding Montana's unambiguous precedent on the political question doctrine, *see id.*, Defendants again rely on the *Juliana* decision to argue that a single aspect of Youth Plaintiffs' remedy, the *Juliana* majority's mischaracterization of the requested remedial plan, impedes on the political branches and implicates the political question doctrine. Defs.' Br. 15. However, the *Juliana* decision explicitly stated "we do not find this to be a political question[.]" *Juliana*, 947 F.3d at 1174, n.9. Moreover, the Ninth Circuit's *redressability* analysis is inapposite to the *political question* inquiry here because redressability focuses on whether any relief is likely to provide meaningful redress for the alleged injuries. *Friends of the Earth.*, 528 U.S. at 181. In contrast, the political question analysis is not focused on the remedy but rather looks to the judiciary's ability to decide *the merits of the claims presented. See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (finding that the political question inquiry focuses on institutional authority for "deciding whether there has been a violation"); *id.* at 2502-05 (applying political question analysis to merits on a claim-by-claim basis). Defendants have not argued that Youth Plaintiffs' *claims* raise non-justiciable political questions, and the claims do not. *Columbia Falls*, ¶ 19. Montana's Constitution provides strong and unique provisions under which courts can adjudicate constitutional climate claims. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 55, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring) (Montana courts have applied broader protections than the federal Constitution in numerous contexts, including the environment).

Instead of focusing on Youth Plaintiffs' claims, Defendants again mischaracterize the request for relief as asking the Court to "require the State to adopt numerous other policies." Defs.' Br. 16. However, Youth Plaintiffs are not requesting that the Court order Defendants to adopt any specific policies but rather that they devise their own plan that will prevent further infringement of Youth Plaintiffs' constitutional rights. The contours of that plan are up to the Defendants and

would not implicate separation of powers concerns. *See* Compl. ¶ 205 ("there are multiple feasible pathways to reduce Montana's emissions in line with what is required to protect Youth Plaintiffs' constitutional rights"). It is premature at this stage to speculate if any ordered relief would implicate the separation of powers concerns underlying the political question doctrine. *Baker*, 369 U.S. at 198 ("[I]t is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.").[16]

Finally, prudential considerations actually bolster Youth Plaintiffs' justiciability arguments because the climate crisis undeniably presents questions of unprecedented import. *Heffernan*, ¶ 33. Defendant Governor Bullock has admitted that "climate change poses a serious threat to Montana's natural resources, public health, communities, and economy" and that the potentially "irreversible impacts of a changing climate require an urgent effort to reduce emissions ...." Compl. ¶¶ 85, 199; *Missoula City-Cnty. Air Pollution Control Bd. v. Bd. of Envtl. Review*, 282 Mont. 255, 263, 937 P.2d 463, 468 (1997) (air quality is "indubitably" an issue of public importance). Despite that acknowledgement, Defendants continue to exacerbate the climate crisis. Compl. ¶¶ 193-97. Additionally, if this Court were to accept Defendants' justiciability arguments, the State Energy Policy and Climate Change Exception to MEPA would be immunized from review. *Heffernan*, ¶ 33. It is a basic tenet of constitutional law that courts should not interpret constitutional rights in a way that would render them ineffective or "hollow." *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 44, 312 Mont. 257, 60 P.3d 381 (refusing to interpret right to participate in manner that would render it "hollow").[17] Given the grave injuries Youth Plaintiffs

[16] As noted, the U.S. Supreme Court and many state supreme courts have approved structural injunctions to remedy institutional constitutional violations. *See supra* Part I.B.

[17] *See also, e.g., Londonderry Sch. Dist.*, 907 A.2d at 996 ("[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.").

are already experiencing, prudential standing weighs in favor of finding their claims justiciable. *See, e.g., Gryczan*, 283 Mont. at 446, 942 P.2d at 112; *Helena Parents Comm'n,* 277 Mont. at 373, 922 P.2d at 1143 (denying standing "would render the Uniform Declaratory Judgment Act meaningless").

III. YOUTH PLAINTIFFS' CONSTITUTIONAL CHALLENGES CAN PROCEED DIRECTLY UNDER THE MONTANA CONSTITUTION, WITHOUT ADMINISTRATIVE EXHAUSTION

Defendants again misconstrue Youth Plaintiffs' claims by arguing they failed to exhaust their administrative remedies and should have sought judicial review under MAPA. Defs.' Br. 16. MAPA provides that a person aggrieved "by a final written decision in a contested case" can seek judicial review after exhausting administrative remedies. Mont. Code Ann. § 2-4-702(1)(a). However, Youth Plaintiffs are not seeking review of any contested case under MAPA. Compl. ¶¶ 4, 110, 111, Prayer for Relief ¶¶ 1-3. Because Youth Plaintiffs are not challenging specific agency actions or seeking review of a contested case, they intentionally have not asserted MAPA claims; their claims are brought directly under Montana's Constitution. As "masters of the[ir] complaint," Youth Plaintiffs have license to choose what claims to assert. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 394-95 (1987); *see also Sanborn v. Lewis & Clark Cnty.*, 113 Mont. 1, 120 P.2d 567, 571 (1941) (plaintiffs choose which claims to pursue to afford a "more full and complete remedy").

Here, Youth Plaintiffs are not required to exhaust administrative remedies before challenging the constitutionality of the State Energy Policy and the Climate Change Exception to MEPA. On this point, Montana precedent is unambiguous: "the exhaustion doctrine does not apply to constitutional issues." *Jarussi v. Bd. of Trustees of Sch. Dist. No. 28, Lake Cnty,* 204 Mont. 131, 135, 664 P.2d 316, 318 (1983). Consistent with the separation of powers doctrine, "[c]onstitutional questions are properly decided by a judicial body, not an administrative official ...." *Id.* at 135-36;

Stuart v. Dep't of Soc. & Rehab. Servs., 247 Mont. 433, 438-39, 807 P.2d 710, 713 (1991) (Administrative remedies do not need to be exhausted "before bringing a declaratory judgment action to resolve a constitutional question."); *Larson v. State*, 166 Mont. 449, 534 P.2d 854 (1975) (same). When a statute "is repugnant to the Constitution, it is the courts that 'have the power, and it is their duty, so to declare.'" *Hoffman v. State*, 2014 MT 90, ¶ 9, 374 Mont. 405, 328 P.3d 604 (quoting *In re Clark's Estate*, 105 Mont. 401, 411, 74 P.2d 401, 406 (1937)).

While Defendants argue that the separation of powers doctrine prevents this Court from hearing their case, the inverse is true. The separation of powers doctrine prevents the executive and legislative branches from reviewing the constitutionality of statutes, as requested here. *Merlin Myers Revocable Tr.*, ¶ 21. That "exclusive power" is reserved solely for the judicial branch. *Id.* Thus, attempting to exhaust administrative remedies for the constitutional violations alleged here would be futile and, therefore, is not required. *Id.*; *Schuster v. NorthWestern Energy Co.*, 2013 MT 364, ¶ 12, 373 Mont. 54, 57, 314 P.3d 650, 652 (agency does not have authority to grant the requested relief so exhaustion would be futile).[18]

Montana's courts have a history of reviewing statutes for constitutionality absent an administrative record and without requiring exhaustion of administrative remedies. *See, e.g., MEIC*, ¶¶ 46, 80 (constitutional challenge to statute); *Gryczan*, 283 Mont. at 440-41, 942 P.2d at 117 (reviewing the constitutionality of a statute despite the State's argument that such review is inappropriate absent "a concrete factual context"). All necessary factual development may be

[18] Federal precedent is similarly unambiguous that constitutional challenges need not proceed through the Administrative Procedures Act. *See, e.g., Juliana*, 947 F.3d at 1167-68; *Franklin v. Massachusetts*, 505 U.S. 788, 796-801 (1992) (reaching the merits of the constitutional claims after finding that the claim under the Administrative Procedure Act was not viable).

accomplished here via civil discovery and trial before this Court. Mont. R. Civ. P. 25-53; *Columbia Falls*, ¶ 10 (constitutionality of state public school system determined following judicial trial).

CONCLUSION

Youth Plaintiffs' factual allegations that their fundamental constitutional rights to a clean and healthful environment; to seek safety, health, and happiness; to individual dignity and equal protection; and to public trust resources are being violated as a result of Defendants' conduct must be taken as true. They are asking this Court to fulfill its duty under Montana's constitutionally-mandated separation of powers and to safeguard their fundamental rights protected by Montana's Constitution—a Constitution that was ordained to "improve the quality of life, equality of opportunity and to secure the blessings of liberty for this *and future generations*." Mont. Const. Pmbl. (emphasis added). The Montana Supreme Court has expressed, "[t]he first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected." *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 109, 765 P.2d 745, 748 (1988). To decline to hear Youth Plaintiffs' case would leave these politically powerless children without redress and the legacy of an avoidable lifetime of hardship. Accordingly, for the foregoing reasons, Youth Plaintiffs respectfully request that Defendants' motion to dismiss be denied.

Respectfully submitted this 29th day of May, 2020.

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CERTIFICATE OF SERVICE

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