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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

RIKKI HELD, ET AL., Plaintiffs, v. STATE OF MONTANA, ET AL., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley (Email) **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER M. R. Civ. P. 12(b)(1), 12(b)(6) & 12(h)(3)**

INTRODUCTION

Plaintiffs allege the State has not done enough to limit greenhouse gas ("GHG") emissions. Outside the confines of any specific regulatory decision, they request this Court declare two statutory provisions unconstitutional: the State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)–(g), and the Montana Environmental Policy Act ("MEPA") provision prohibiting consideration of potential impacts beyond Montana's borders ("Montana limitation"), § 75-1-201(2)(a). They also request sweeping injunctive relief, which would require the State "to develop a remedial plan or policies to effectuate

reductions of GHG emissions" under the supervision of this Court, potentially with the assistance of a special master. (Doc. 1, Prayer for Relief ¶¶ 7–9.) Because this overly broad claim lacks sufficient definiteness to be justiciable and poses a political question, this Court should dismiss Plaintiffs' Complaint in its entirety.

First, the State, in its opening brief, demonstrated that the "aggregate acts" complained of are not the result of the challenged statutes, but are instead the result of the specific direction of numerous other statutes. (Doc. 12 at 7–11.) Plaintiffs respond that the State Energy Policy reduces the discretion of state agencies, (Doc. 15 at 6–7), but nothing in the text of the State Energy Policy supports this interpretation. To the contrary, the State Energy Policy promotes a "mix of energy sources that represent the least social, *environmental*, and economic costs." Mont. Code Ann. § 90-4-1001(1)(a) (emphasis added). Further, legislative history demonstrates that the State Energy Policy was "not intended to dictate any outcome at all" let alone hamper agency discretion. *Hearing on SB 225 Before the Mont. S. Comm. on Nat. Resources*, 53rd Reg. Sess. 4–5 (Feb. 1, 1993) ("*Hearing on SB 225*").[1]

Recognizing the weakness of their proposed statutory interpretation, Plaintiffs claim this legal question is instead a question of fact reserved for the merits and that Montana courts have not required causation in standing analysis. (Doc. 15 at 7–8.) But this Court is not bound by Plaintiffs' erroneous legal conclusions, even in the preliminary stages of litigation, *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6, and

[1] *Available at* <https://courts.mt.gov/Portals/189/leg/1993/02-01-snr.pdf>.

the Montana Supreme Court has made clear that federal cases on standing requirements (*i.e.*, injury in fact, causation, and redressability) are "persuasive authority" for Montana's standing requirements, *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187.

Second, Plaintiffs' request for a remedial plan—impacting countless other statutes[2]—is beyond the scope of a declaratory judgment. *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (1992) ("[I]t is not the true purpose of the declaratory judgment to provide a substitute for other regular actions."); *Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364 ("Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions."). Plaintiffs' remedial plan is also contrary to the purpose of providing injunctive relief as a supplement to, not replacement for, declaratory judgments. *Larson v. State*, 2019 MT 28, ¶ 33, 394 Mont. 167, 434 P.3d 241 ("[I]njunctive relief is a supplemental remedy available to further or effect a declaratory judgment.").

Third, Plaintiffs' reliance on the constitutional right to a clean and healthful environment does not save their case. (Doc. 15 at 13–15.) Because the right to a clean and healthful environment is not self-executing, this Court may only review existing

[2] Plaintiffs acknowledge that at this stage of the litigation they cannot even estimate how many statutes may be impacted by this request for relief. (Doc. 15 at 12 ("Youth Plaintiffs have requested certain remedies at the complaint stage but the appropriate remedies will depend on the nature of the wrongs").)

legislative acts and may not require the Legislature to act in the first instance. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257 ("*Columbia Falls Elementary*"). Requiring the State to adopt a remedial plan would force it to act in the first instance—rather than determining whether an existing "enactment fulfills the Legislature's constitutional responsibility"—in violation of the political question doctrine. *Id.*

Finally, the Complaint is subject to the general requirement to exhaust administrative remedies because it does not present a pure legal question. *Shoemaker v. Denke*, 2004 MT 11, ¶¶ 25–26, 319 Mont. 238, 84 P.3d 4. Indeed, the Montana Supreme Court has already determined that Plaintiffs' claims present mixed questions of fact and law. *Barhaugh v. State*, 2011 Mont. LEXIS 477, *2–3, 361 Mont. 537, 264 P.3d 518 (2011) ("We conclude this case does not involve purely legal questions. This Court is ill-equipped to resolve the factual assertions presented by Petitioners."); (Doc. 1 ¶ 26, n.2). This Court should allow state agencies to first interpret these challenged statutes, in the context of an administrative record, instead of relying on Plaintiffs' presumptions.

ARGUMENT

I. The State Energy Policy is not the cause of the State's "aggregate acts."

A. Whether the State Energy Policy directs the "aggregate acts" is a question of law.

Plaintiffs do not dispute that the State's "aggregate acts" are the result of numerous statutes besides the State Energy Policy. (*See* Doc. 15 at 7 (acknowledging that "multiple statutes '*could* apply'" to the State's "aggregate acts").) Instead, Plaintiffs

argue absent the State Energy Policy, these other statutes would provide agencies more discretion in granting or denying projects and could be "implemented in a manner consistent with the Court's declaration of Youth Plaintiff's constitutional rights." (Doc. 15 at 6–7.) But Plaintiffs fail to identify any portion of the State Energy Policy that supposedly reduces agency discretion in approving projects.

In direct contradiction to Plaintiffs' inflexible (and self-serving) interpretation of the State Energy Policy, its text promotes "a reliable and efficient *mix* of energy" and "a *balance* between a sustainable environment and a viable economy." Mont. Code Ann. §§ 90-4-1001(1)(a) & (2)(d) (emphasis added). Additionally, it identifies developing wind, rooftop solar, energy efficiency, regional organization, and new technology as important energy goals for the State. *Id.* at (1)(i)–(w); *see also Hearing on SB 225* at 4–5 (In its initial enactment, the State Energy Policy was intended to lay "the groundwork for future legislation" and "guide future state energy policy development," and was "not intended to dictate any outcome at all."). If anything, the State Energy Policy provides agencies more flexibility and discretion in making decisions—not less.

Recognizing that they cannot explain the causal connection between the State's "aggregate acts" and the challenged statutes, Plaintiffs attempt to argue "[w]hether 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." (Doc. 15 at 8 (emphasis added).) This is not true. For a motion to dismiss, "the court is under no duty to take as true legal conclusions or allegations that have no factual basis or are contrary to what has already been adjudicated." *Cowan*, ¶ 14; *see also Holtz v. Babcock*,

143 Mont. 341, 353, 389 P.2d 869, 875 (1963) (holding a court's determination on a motion to dismiss "only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated").

Statutory interpretation—including giving effect to legislative intent—is a question of law. *Bates v. Neva*, 2014 MT 336, ¶ 9, 377 Mont. 350, 339 P.3d 1265 ("The correct interpretation of a statute is a question of law."); *Grenz v. Mont. Dep't of Natural Res. & Conservation*, 2011 MT 17, ¶ 28, 359 Mont. 154, 248 P.3d 785 ("Our primary goal in interpreting a statute is to give effect to the legislative intent."). That Plaintiffs have not fully developed their theory of how the State Energy Policy interacts with more substantive statutes, or that they wish to delay that analysis until later in the case, does not defeat a motion to dismiss.

B. Federal and Montana caselaw require the alleged injuries be caused by the challenged statutory policy.

Plaintiffs are wrong that "Montana's standing test does not require plaintiffs to show that their injuries are fairly traceable to defendants' conduct." (Doc. 15 at 5.) The "fairly traceable" element comes from the federal standard on standing. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 255 P.3d 80. The Montana Supreme Court has stated on multiple occasions that federal standing requirements are "persuasive authority" on Montana's standing requirements. *Id.* ¶ 30 n.3; *Bullock*, ¶ 30; *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567.

Indeed, causation permeates Montana's standing jurisprudence. *See Heffernan*, ¶ 33 (to establish standing, "the injury must be one that would be alleviated by successfully maintaining the action"); *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 406 P.3d 427 (holding 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") (emphasis added); *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 26, 389 Mont. 270, 405 P.3d 88 (asserting plaintiffs had standing because they had established injury in fact, causation, and redressability) (McKinnon, J., concurring); *Armstrong v. State*, 1999 MT 261, ¶¶ 12–13, 296 Mont. 361, 989 P.2d 364 (finding health care providers had standing to challenge statutes on behalf of their patients "by adopting the approach of the federal courts" and noting the statutes "directly interdict the normal functioning of the physician-patient relationship by criminalizing certain procedures").

Similarly, in *Columbia Falls Elementary*, the Court specifically addressed causation by discussing how, over time, several factors—like the absence of a "mechanism to deal with inflation"—caused House Bill 667 to come out of constitutional compliance. *Columbia Falls Elementary*, ¶ 26. Accordingly, *Columbia Falls Elementary* did not "reject[] the causation argument that Defendants advance here" (Doc 15 at 7), but instead provided a causal account of how State funding of the public school system impacts a quality education. *Columbia Falls Elementary*, ¶ 25 ("This funding system is not correlated with any understanding of what constitutes a 'quality' education."). Additionally, *Columbia Falls Elementary* did not address "injuries result[ing] from

multiple statutory schemes" as Plaintiffs claim. (Doc 15 at 7.) Rather, the Montana Supreme Court limited its review to one legislative act—House Bill 667—which directly funded the State's school system. Thus, House Bill 667 was the direct cause of the alleged inadequate school funding.

Plaintiffs' suggestion that this Court should ignore causation belies common sense and judicial restraint. Simply stated, if the State Energy Policy is not the cause of Plaintiffs' alleged injuries, this Court should not permit this case to advance. "Courts should strive whenever possible to avoid interpreting a statute in a way that *causes* it to be unconstitutional." *Flathead Joint Bd. of Control*, ¶ 9 (emphasis added). Plaintiffs have been given ample opportunity to explain the connection between the challenged statutes and the State's "aggregate acts." Instead of providing an explanation based on the text of the statute, they incorrectly argue this Court may not reach this question yet (because the meaning of a statute is a question of fact) and that causation is irrelevant to Montana law on standing. Because Plaintiffs have failed to show that the State's "aggregate acts" are caused by the State Energy Policy, or the Montana limitation to MEPA, Plaintiffs have not established standing.

II. The Montana limitation to MEPA is not the cause of Plaintiffs' alleged injuries.

Plaintiffs have not participated in any of the administrative decisions they complain about (*see* Doc. 1 ¶ 118), and "do not challenge the constitutionality of individual agency actions taken in isolation as Defendants suggest they should under the [Montana Administrative Procedure Act ("MAPA")]" (Doc. 15 at n.6). Plaintiffs also do

not challenge a decision in which an agency allegedly interpreted the Montana limitation to MEPA "to mean that Defendants cannot consider the impacts of climate change in their environmental reviews." (Doc. 1 ¶ 111.) Plaintiffs challenge the Montana limitation to MEPA in general, not as applied to the procedure of an administrative action, and thus their claim necessarily fails under Montana law.

This is so because, as the State explained in its opening brief, MEPA is a procedural law and not a substantive law. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712. It does not "require an agency to reach any particular decision in the exercise of its independent authority." *Id.* Its constitutional purpose is to ensure the public and Legislature are properly informed. Mont. Code Ann. § 75-1-102(1)(a)–(b). In contrast, substantive environmental laws have the constitutional purpose of providing adequate remedies for the right to a clean and healthful environment. *See, e.g., id.* § 75-2-102 (providing this constitutional purpose to the Clean Air Act of Montana). Accordingly, any defect with MEPA would be procedural in nature and thus limited to a particular administrative decision.

Tellingly, Plaintiffs cite to no case reviewing a MEPA provision in isolation, untethered to a substantive agency decision. Instead, each case they cite arose in the context of a *challenged* agency decision. (Doc 15 at 8–9); *see also Montana Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (challenging DEQ's grant of an exploration license to Seven-Up Pete Joint Venture); *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234,

366 Mont. 399, 288 P.3d 169 (challenging the State Land Board's lease to Arch Coal, Inc.); *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, 365 Mont. 232, 280 P.3d 877 (challenging the Montana Board of Oil & Gas Conservation's issuance of gas well permits); *Bitterrooters for Planning, Inc.*, ¶ 2 (challenging DEQ's issuance of a wastewater discharge permit).

What's more, the Montana Supreme Court has found that a successful MEPA challenge must follow proper procedure as dictated by the Legislature. *Pompeys Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality*, 2002 MT 352, ¶ 21; 313 Mont. 401, 61 P.3d 148 (finding plaintiffs incorrectly brought their MEPA challenge before the Board of Environmental Review instead of state or federal district court). Plaintiffs' claim here, made in a void without an anchoring challenge to an agency decision, follows no procedure, and thus does not meet this requirement.

Because Plaintiffs are challenging the application of the Montana limitation to MEPA not in the context of an existing administrative decision, but to hypothetical future administrative decisions, their claims are speculative and would result in an advisory opinion. *Donaldson*, ¶ 9. Due to this premature posture, this Court should dismiss the complaint as lacking standing.

III. Plaintiffs fail to establish redressability.

Plaintiffs hope to get the camel's nose under the tent by first having this Court declare the State Energy Policy and the Montana limitation to MEPA unconstitutional. They then request this Court provide additional injunctive relief requiring the State "to develop a remedial plan of their own devising and consistent with existing statutory

authority to protect Youth Plaintiffs' constitutional rights from further infringement." (Doc. 15 at 11.)

Plaintiffs' request for remedial relief demonstrates their lack of standing. If the State Energy Policy and the Montana limitation to MEPA were the cause of their injuries, then simply enjoining the State from enforcing these statutes would redress their alleged injuries. But because these statutes do not cause their alleged injuries, Plaintiffs also request additional, and distinct, relief far beyond enjoining the challenged statutes. Because Plaintiffs' alleged injury would not be alleviated by invalidating the offending statutes, *Heffernan*, ¶ 33, and would instead require this court to "[b]roadly determin[e] the constitutionality of a 'statutory scheme,'" Plaintiffs' claim "exceeds the bounds of a justiciable controversy." *Donaldson*, ¶ 9.

Plaintiffs argue that declaratory and injunctive relief are distinct and thus their request to have the State Energy Policy and the Montana limitation to MEPA declared unconstitutional is sufficient to establish redressability. But "injunctive relief is a supplemental remedy available to further or effect a declaratory judgment." *Larson*, ¶ 33. While it might be reasonable for a court to provide injunctive relief to prohibit the enforcement of a statute declared unconstitutional, Plaintiffs' request for injunctive relief here is altogether different. This requested injunctive relief does not further or effect their statutory challenge; indeed, it is divorced from these statutes entirely. Instead, it asks this Court to force the State to modify countless *other* statutes (or even pass new ones) that are not subject to constitutional review here.

Plaintiffs also provide no precedent for this Court retaining jurisdiction to oversee the State's undefined remedial plan. Citing *Columbia Falls Elementary*, Plaintiffs claim "Montana courts have authority to *oversee* reform of unconstitutional state systems." (Doc. 15 at 13 (emphasis added).) In *Columbia Falls Elementary*, however, the Montana Supreme Court did precisely the opposite: "we defer to the Legislature to provide a threshold definition of what the Public Schools Clause requires." *Columbia Falls Elementary*, ¶ 31; *see also Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 55, 769 P.2d 684, 691 (1989) ("Several of the parties suggested that in the event we concluded the school funding was unconstitutional, we should spell out the percentages which are required on the part of the State under the Foundation Program and for the districts under the voted levy system. We are not able to reach that type of conclusion.") ("*Helena Elementary*"). The fact that *Columbia Falls Elementary* had to be brought in addition to *Helena Elementary* demonstrates that Montana courts do not have the authority to continuously supervise the actions of the executive and legislative branches.

In evaluating the constitutional sufficiency of a statute, Courts simply declare "specific statutes unconstitutional," *Donaldson*, ¶ 8, and provide injunctive relief "to further or effect a declaratory judgment," *Larson*, ¶ 33. Plaintiffs' wide-ranging request for relief goes far beyond this and thus their claims are not redressable.

IV. Plaintiffs request to require the State to adopt new policies also violates the political question doctrine.

Plaintiffs argue "if this Court were to accept Defendants' justiciability arguments, the State Energy Policy and Climate Change Exception to MEPA would be immunized from review." (Doc. 15 at 17.) Not so. If Plaintiffs were simply challenging the constitutionality of these statutes after exhausting administrative remedies, then the political question doctrine would not be implicated. As these statutes are not the cause of their alleged injuries, though, Plaintiffs also request a generalized remedial plan implicating reform to statutory schemes across the Montana Code. It is this requested relief, which would require the executive and legislative branches to make innumerable "policy choices and value determinations," that would violate the political question doctrine. *Larson*, ¶ 39.

In arguing that these determinations should not be left to the other branches of government, Plaintiffs argue "Montana courts have 'exclusive power' to interpret [the] right to [a] clean and healthful environment." (Doc. 15 at 15.) This is not correct. Article IX, Section 1 of the Montana Constitution states:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) *The legislature shall* provide for the administration and enforcement of this duty.
> (3) *The legislature shall* provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(Emphasis added.) Thus, the Legislature is assigned the task of enacting laws to implement the right to a clean and healthful environment. *Northern Plains Res.*

Council, Inc., ¶ 14. In other words, the right to a clean and healthful environment is not a self-executing provision of the Montana Constitution.

If a constitutional right is not self-executing, then judicial review requires a two-step process. For example, the Montana Supreme Court held in *Columbia Falls Elementary*:

> Since the Public Schools Clause is non-self-executing, it presents a political question which, in the first instance, is directed to the Legislature and is non-justiciable. That determination, however, does not end the inquiry. As here, (1) once the Legislature has acted, or "executed," a provision (2) that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility.

Columbia Falls Elementary, ¶ 17.

Here, the only legislative act challenged is the State Energy Policy and the Montana limitation to MEPA. Plaintiffs' additional requested relief, though, would require the State to "*devise their own plan* that will prevent further infringement of Youth Plaintiffs' constitutional rights." (Doc. 15 at 16 (emphasis added).) This requires the State to act in the first instance, which fits squarely within the non-justiciable first step identified in *Columbia Falls Elementary*. Thus, Plaintiffs' Complaint, as drafted, raises a non-justiciable political question.

Plaintiffs respond that "[t]he contours of the [remedial] plan are up to the Defendants and would not implicate separation of powers concerns," as if the Complaint were merely a suggestion and not a lawsuit. (Doc. 15 at 16–17.) If this were true, both the request for a remedial plan and "[a]n order retaining jurisdiction over this action until such time as Defendants have fully complied with the orders of this Court" would be

unnecessary. (Doc. 1, Prayer for Relief 9.) But Plaintiffs' Complaint instead plainly asks the Court to force the State to adopt policies, in the first instance, and then maintain jurisdiction to oversee the State's actions. For this very reason, the Ninth Circuit held this type of relief would require "transformation" of the government's policies. *Juliana v. United States*, 947 F.3d 1159, 1170–71 (9th Cir. 2020) (noting that the type of relief requested by Plaintiffs "calls for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world").

Accordingly, Plaintiffs' request to this Court to require the State to adopt a broad and undefined remedial plan runs afoul of the political question doctrine.

V. Plaintiffs failed to exhaust administrative remedies.

With little exception, when a statute allows an agency to grant relief, the petitioner must exhaust administrative remedies before turning to the courts. Mont. Code Ann. § 2-4-702(1)(a). Under MAPA, petitioners may request courts review allegations of constitutional violations. *Id.* § 2-4-704(2)(a)(i). While it is true that "purely legal, constitutional questions" are not subject to this requirement, constitutional challenges that present "both findings of fact and conclusions of law" must exhaust administrative remedies. *Shoemaker*, ¶¶ 25–26; *City of Billings Police Dep't v. Owen*, 2006 MT 16, ¶ 28, 331 Mont. 10, 127 P.3d 1044 (constitutional privacy matters were mixed questions of law and fact and subject to the requirement to exhaust administrative remedies); *see also* William L. Corbett, *Montana Administrative Law Practice: 41 Years after the*

Enactment of the Montana Administrative Procedure Act, 73 Mont. L. Rev. 339, 375 (2012) (explaining the narrow circumstances when exhaustion is not required).[3]

In this lawsuit, Plaintiffs present mixed questions of fact and law. They first argue that the State Energy Policy, as currently written, affords agencies less discretion to approve or deny a project. Agency discretion necessarily implies a question of fact and variance among agency decisions. *Cf. Evert v. Swick*, 2000 MT 191, ¶ 11, 300 Mont. 427, 8 P.3d 773 ("The fact that discretion is permitted, infers that there may be more than one permissible way to resolve an evidentiary issue . . . ."). Indeed, Plaintiffs categorize this issue as a "question of fact." (Doc. 15 at 8.) Beyond this, Plaintiffs make numerous other factual arguments about the GHG emissions that allegedly result from the State's "aggregate acts" and what policies ought to be enacted to avoid future iterations of these "aggregate acts." (Doc. 1 ¶¶ 121–142, 201–210.)[4]

In fact, the Montana Supreme Court previously held that Plaintiffs' claims implicate mixed questions of fact and law. *Barhaugh*, *2–3; (Doc. 1 ¶ 26, n.2). Under the Montana Supreme Court's determination, this case is not exempt from the exhaustion requirement available to cases that present a pure legal constitutional question.

Similarly, Plaintiffs frame the MEPA issue as a question of fact. Plaintiffs allege MEPA exists "to gather enough environmental impact *information*" and that "Defendants

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[3] *Available at*, <https://scholarship.law.umt.edu/faculty_lawreviews/16>.

[4] In contrast, the State's argument that the State Energy Policy and Montana limitation to MEPA do not cause the State's "aggregate acts" is a question of law. (Doc. 12 at 4, 7–10.) The State's argument depends exclusively on the text of the statutes and other legal authorities. *Id.; See Bates*, ¶ 9; *Grenz*, ¶ 28.

are *making decisions* deliberately indifferent to the effect of GHG emissions." (Doc. 15 at 8–9 (emphasis added).) Additionally, Plaintiffs allege their injuries are attributable to the Montana limitation to MEPA because it "has been interpreted to mean that Defendants cannot consider the impacts of climate change in their environmental reviews." (Doc. 1 at 111.)[5]

Because MEPA is a procedural law intended to inform the public in specific administrative proceedings, any Court reviewing the constitutionality of this statute would need to know what information was missing, why that information was important to the agency's decision, and why those circumstances would give rise to a constitutional violation. *See Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. 371, 383, 903 P.2d 1362, 1370 (1995) ("MEPA [requires] that agencies assess their actions so as to make an informed decision. A corollary to an informed decision is public education and input."). Plaintiffs cannot allege an injury stemming from MEPA without an underlying administrative proceeding in which a procedural harm could have occurred.

Because Plaintiffs assert the State has a clearly defined role in interpreting these challenged statutes, their reliance on *Schuster v. NorthWestern Energy Co.*, 2013 MT 364, 373 Mont. 54, 314 P.3d 650, is inapplicable and unavailing. (*See* Doc. 15 at 19.) In *Schuster*, the plaintiff sued NorthWestern Energy for negligently disconnecting his service. *Id.* ¶ 2–3. NorthWestern Energy argued the Montana Public Service Commission

[5] Plaintiffs provide no citation for an administrative or judicial decision in which this interpretation has been adopted.

("PSC") had exclusive jurisdiction over negligence claims against utilities. *Id.* ¶ 13. The Montana Supreme Court disagreed finding, the "PSC has no authority to grant damages caused by [NorthWestern Energy's] alleged negligence." *Id.*

Here, Plaintiffs argue the opposite and provide a lengthy account of the State's authority over these "aggregate acts." (Doc. 1 ¶¶ 82–105.) While agencies lack judicial authority to declare a statute unconstitutional, the correct interpretation of a statute may avoid the constitutional matter altogether. *See, e.g., Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201, ¶¶ 19, 25, 311 Mont. 194, 53 P.3d 1268 (noting a statute administered by a county commission could have been, as demonstrated by the district court's ruling, "correctly interpreted" "without addressing constitutional issues"). Unlike *Schuster*, Plaintiffs' allegations place the authority to interpret these statutes squarely within Defendants' jurisdiction.

Accordingly, Defendants have clear authority to hear the cases that give rise to these alleged constitutional harms. (Doc. 1 ¶¶ 82–105.) As argued by the Plaintiffs, these alleged constitutional harms depend on State agencies adopting a particular interpretation of the State Energy Policy and Montana limitation to MEPA. (Doc. 1 at 111; Doc. 15 at 6.) These claims implicate mixed questions of fact and law, *Barhaugh*, *2–3; (Doc. 15 at 8), and Plaintiffs are required to exhaust administrative remedies before their claims may proceed in court.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint in its entirety as lacking justiciability and for failure to state a claim.

Respectfully submitted this 11th day of June, 2020.

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CERTIFICATE OF SERVICE

I certify that on June 11, 2020, a true and correct copy of the foregoing was delivered by email to the following:

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