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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 No. CDV-2020-307 Hon. Kathy Seeley **PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **[HEARING REQUESTED]**

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INTRODUCTION

The evidence of record in this case, founded on the testimony of the youth Plaintiffs, government witnesses, and the compelling analysis by Montana's finest scientists and other experts, demonstrates that Plaintiffs are suffering concrete and particularized injuries, traceable to the unconstitutional laws and conduct of Defendants, which are redressable by this Court. The record before the Court demonstrates that Defendants' connived and mandated implementation of a fossil-fuel based energy system produces dangerous levels of greenhouse gas (GHG) pollution, causes and contributes to the climate crisis, and violates Plaintiffs' fundamental constitutional rights, including their right to a clean and healthful environment. Absent from Defendants' summary judgment brief is the required statement of uncontested facts. *See* Modified Scheduling Order ¶ 5(c) (Doc. 145).[1] This is simply not a case that can be decided purely as a matter of law, without factual evidence and expert testimony.[2] Plaintiffs' opposition is supported by declarations submitted herewith, as well as the expert disclosures,[3] and discovery of record, all demonstrating that Defendants' motion must be denied and this case should proceed to trial on June 12, 2023.

STANDARDS OF REVIEW

Pursuant to M. R. Civ. P. 56(c)(3), the party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Hagen v. Dow Chem. Co.*, 261 Mont. 487, 491, 863 P.2d 413, 416 (1993). The Court must view the evidence "in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the party opposing summary judgment." *Letica Land Co., LLC v. Anaconda-Deer Lodge Cnty.*, 2019 MT 30, ¶ 8. "Government actions that interfere with the exercise of a fundamental right are subject to strict scrutiny review." *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 18; Order on Second Rule 60(a) Motion at 4 (Doc. 217).

ARGUMENT

I. PLAINTIFFS PRESENT SPECIFIC FACTS TO ESTABLISH STANDING AND CREATE ISSUES OF FACT TO BE RESOLVED AT TRIAL

A. Plaintiffs are Experiencing Concrete Injuries, Which Defendants Dispute

[1] Consistent with M. R. Civ. P. 56(e)(2) and this Court's Scheduling Order, Plaintiffs file herewith the Declaration of Roger Sullivan "set[ing] out specific facts showing a genuine issue for trial," which are cited throughout this brief.
[2] *See Barhaugh v. State*, No. OP 11-0258, slip op. at 2 (Mont. June 15, 2011) (there are numerous factual disputes, not "purely legal questions," about Montana's actions that contribute to climate change).
[3] Plaintiffs' expert reports were filed with the Court on September 30, 2022 (Doc. 222) and Plaintiffs' rebuttal expert reports were filed with the Court on November 30, 2022 (Doc. 240). The Court can look to Plaintiffs' expert reports and rebuttal expert reports as discovery materials on file. M. R. Civ. P. 56(c)(3).

To establish standing, Plaintiffs must show that they have experienced past, present, or threatened injuries. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33. The key inquiry is whether Plaintiffs' injuries are "concrete," not how many people are injured. *Schoof v. Nesbit*, 2014 MT 6, ¶ 21. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 374, 922 P.2d 1140, 1144 (1996) (citation omitted). Here, as substantiated below with extensive citations to the record, Plaintiffs' injuries are concrete and particularized to them. Defendants' dispute of Plaintiffs' injuries must be resolved at trial.

Defendants concede "Plaintiffs' pleadings allege specific and personalized injuries," but then dispute the veracity of their injuries by cherry-picking excerpts from deposition transcripts. MSJ Br. at 4 (Doc. 290). Defendants' efforts to downplay Plaintiffs' injuries with their string cites in footnotes 1-4 are unavailing,[4] and demonstrate the presence of disputed facts that make resolution of these injuries inappropriate for summary judgment. In the declarations submitted herewith by twelve Plaintiffs and two guardians (on behalf of the four youngest Plaintiffs), Plaintiffs present specific facts showing the concrete and particularized ways in which they are experiencing past, present, *and* threatened injuries because of the Defendants' conduct. Plaintiffs have experienced, and continue to experience, significant injuries to their physical health, safety, and well-being—injuries that worsen as Defendants continue to promote fossil fuel development. Substantiation of these injuries is documented in the declarations submitted herewith, in Plaintiffs' expert reports, and summarized as follows: 1) Wildfire smoke and other injuries to Plaintiffs' physical health and well-being;[5] 2) Plaintiffs' psychological injuries;[6] 3) Plaintiffs' homes

[4] For example, Sariel need not show the culture of the Confederated Salish and Kootenai Tribes will be "entirely lost" to have suffered cognizable injuries to her cultural practices and tribal traditions. MSJ Br. at 5 n.4; *compare* Sariel Dec. ¶¶ 7, 9-10. While Grace stated at her deposition that she has not experienced "life-threatening" injuries, this does not mean she is not experiencing injuries due to Defendants' conduct. MSJ Br. at 5 n.4; *compare* Grace Dec. ¶¶ 12-13. Lander, Badge, and Kian confirmed during depositions that fishing trips were cancelled due to climate impacts such as smoke, low water levels, and stressed fish. Lander B. Dep. 53:4-19, 55:5-14, 56:22-57:4; Badge B. Dep. 58:20-59:9; Kian T. Dep. 53:16-24; *compare* MSJ Br. at 4 nn.1-2.

[5] *See, e.g.*, Olivia Dec. ¶¶ 11, 13; Rikki Dec. ¶ 15; Laura King Dec. ¶¶ 3-5; Shane Doyle Dec. ¶ 11; Georgianna Dec. ¶ 7; Lander Dec. ¶ 11; Badge Dec. ¶ 4; Eva Dec. ¶ 5; Kian Dec. ¶ 12; Grace Dec. ¶ 9; Byron Expert Report at 3-10; Running & Whitlock Expert Report at 28-31; *see also* Sullivan Dec. ¶ 23 nos. 1-13.

[6] *See, e.g.*, Olivia Dec. ¶ 5; Rikki Dec. ¶¶ 31-32; Mica Dec. ¶ 17; Georgianna Dec. ¶¶ 8, 13; Badge Dec. ¶¶ 9-10; Eva Dec. ¶ 19; Grace Dec. ¶¶ 13, 15. The psychological injuries Plaintiffs are experiencing are affirmed by the Expert Report of Dr. Lise Van Susteren. *See* Confidential Attachment 3 at 3-3 to 3-22; *see also* Sullivan Dec. ¶ 23 nos. 14-24. Defendants completely ignore the abundant evidence of Plaintiffs' grave physical and mental health injuries,

threatened by wildfires or flooding;[7] 4) Economic injuries to Plaintiffs;[8] 5) Recreational and aesthetic injuries to Plaintiffs;[9] 6) Injuries to Plaintiffs' tribal culture and traditions;[10] and 7) Injuries to Plaintiffs' property.[11]

Defendants' denials in their Answer, expert reports, and summary judgment brief confirm genuine issues of material fact exist regarding injury. *See* Def. Answer ¶¶ 14-80 (Doc. 54), MSJ Br. at 4-5. Plaintiffs present evidence sufficient to defeat Defendants' summary judgment motion, and, after hearing from Plaintiffs at trial, the Court can conclusively determine Plaintiffs have experienced, and continue to experience, concrete injuries, unique to them,[12] and, therefore, have standing.

B. Plaintiffs' Injuries are Traceable to Defendants' Conduct

Defendants' Answer, the parties' expert reports, and deposition testimony reveal that there are many triable questions regarding causation in this case. Notably, Defendants identify *no* undisputed facts to support their theory of causation.[13] As the Court previously explained, "[a] plaintiff demonstrates causation by showing her injury is 'fairly traceable' to the defendant's injurious conduct," "'even if there are multiple links in the chain,'" that are "'not hypothetical or tenuous,'" and even if there are "multiple sources of injury." MTD Order at 8 (Doc. 46) (internal citations omitted). At the summary judgment stage, the causal connection between Plaintiffs' injuries and Defendants' conduct cannot be speculative or rely on conjecture, "but need not be so

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despite its relevance. *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).

[7] *See, e.g.,* Taleah Dec. ¶ 5; Lander Dec. ¶ 10; Mica Dec. ¶ 12; Eva Dec. ¶¶ 10-15; Running & Whitlock Expert Report at 18, 28-31; Sullivan Dec. ¶ 23 nos. 25-28.

[8] *See, e.g.,* Rikki Dec. ¶¶ 7- 8, 21, 24-25; Olivia Dec. ¶ 12; Barrett Expert Report at 4-5; Sullivan Dec. ¶ 23 nos. 29-30.

[9] *See, e.g.,* Mica Dec. ¶¶ 13, 16; Claire Dec. ¶¶ 4-6; Georgianna Dec. ¶ 9; Taleah Dec. ¶¶ 4, 7-9; Badge Dec. ¶ 5; Lander Dec. ¶¶ 5-7, 12-13; Eva Dec. ¶¶ 6-9; Kian Dec. ¶¶ 10-12; Grace Dec. ¶ 8; Fagre Expert Report at 7, 11, 14; Stanford Expert Report at 12-15; Running & Whitlock Expert Report at 23-26, 37-39; Sullivan Dec. ¶ 23 nos. 31-44. Recreational and aesthetic injuries infringe on their right to a clean and healthful environment. *See, e.g., Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 45; *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶¶ 27-33.

[10] *See, e.g.,* Sariel Dec. ¶¶ 7, 9-10; Shane Doyle Dec. ¶¶ 8, 12, 15; Durglo Expert Report at 2-3; Sullivan Dec. ¶ 23 nos. 45-49.

[11] *See, e.g.,* Rikki Dec. ¶¶ 8, 19-20; Badge Dec. ¶ 6; Kian Dec. ¶¶ 6, 8; Running & Whitlock Expert Report at 28-34; Sullivan Dec. ¶ 23 nos. 50-52; *Maya v. Centex Corp.*, 658 F.3d 1060, 1070-71 (9th Cir. 2011); *Heffernan*, ¶ 33.

[12] Dr. Van Susteren also will explain why Plaintiffs' psychological injuries are unique to them, and different than the population in general. *See, e.g.,* Van Susteren Dep. 25:8-12, 47:18-48:1, 50:9-15, 96:15-19.

[13] At this stage, it is not Plaintiffs' job to prove Defendants' challenged conduct "directly caused their alleged injuries . . . ." MSJ Br. at 5. Under Rule 56, the *party moving* has the initial burden of establishing the complete absence of any genuine issue of material fact, which Defendants failed to fulfill. *Mustang Beverage Co., Inc. v. Jos. Schlitz Brewing Co.*, 162 Mont. 243, 511 P.2d 1 (1973).

airtight at this stage of litigation as to demonstrate that the plaintiffs would succeed on the merits." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005).

Defendants claim Plaintiffs have not demonstrated a "direct causal link" to GHG emissions from Defendants' challenged conduct. MSJ Br. at 5. However, whether Defendants' laws and aggregate acts result in GHG emissions from Montana, that in turn cause and contribute to Plaintiffs' injuries, is a disputed question of fact that must be resolved at trial. The evidence will show that Defendants have long prioritized fossil fuels. *See, e.g.*, Hedges Expert Report at 29 (Defendants' "long-standing and ongoing practice of approving all permits for fossil fuel projects . . . is a substantial factor in perpetuating Montana's fossil fuel energy system, which produces harmful GHGs and contributes to the climate crisis."); Thomas 30(b)(6) Dep. 110:9-10[14] (DNRC has not denied a permit for a coal lease in last twenty years); Erickson Expert Report at 5 ("Montana has substantial quantities of the fossil fuels coal, oil, and gas, and Montana state government has authorized them to be extracted in significant and increasing quantities . . . ."); *id.* at 13 ("Montana authoriz[es] the use of its land and infrastructure (which it permits the construction of) and regulates operation of, acting as a thoroughfare for fossil fuels . . . ").

The evidence will also show that the amount of emissions for which Montana is responsible is not "*de minimis*"—another material fact in dispute. MSJ Br. at 8; *compare* Erickson Expert Report at 17 (Montana's total emissions profile "is a nationally and globally significant quantity of CO_2 emissions, particularly given the already-elevated levels of human-caused GHGs in the atmosphere.") *with* Anderson Expert Report at 6 ("Montana's GHG contribution to the global total is trivial."); *see also* Sullivan Dec. ¶ 23 nos. 53-63. Defendants' motion simply ignores this factual dispute and instead relies upon inapposite case law,[15] not facts in evidence.

Plaintiffs have adduced comprehensive factual evidence showing their injuries are attributable to Defendants' conduct challenged herein. *See, e.g.*, Byron Expert Report at 15 ("the health and well-being of the Plaintiffs, both now and in the future, is being put at risk by Montana's fossil fuel energy system . . ."); Stanford Expert Report at 10 ("At a time when Montana is already experiencing significant harms due to anthropogenic climate change, the state should be moving away from climate-damaging fossil fuel energy resources, not promoting fossil fuels as energy

[14] Attached as Exhibit 17 to the Sullivan Declaration.

[15] Defendants' reliance on *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, is misplaced. *Williamson* was resolved on a motion to dismiss and involved the standing requirements of § 69-3-321(1), MCA, which the *Williamson* court explicitly held are different than the constitutional standards applicable here. *Id.* at ¶¶ 29-32.

resources if it wants to protect the aquatic ecosystems of the state and the natural and cultural ecosystem services they provide."); Van Susteren Expert Report at 22 ("In promoting fossil fuel based energy policies, the state of Montana is directly at fault for harming Plaintiffs' mental health.").

Defendants erroneously contend that Plaintiffs are only challenging "abstract State Energy Policy Goal Statements," disregarding the copiously detailed aggregate acts Defendants have taken, and continue to take, to implement a state energy policy that contributes to Plaintiffs' injuries. *Compare* Compl. ¶ 118 (Doc. 1) (examples of aggregate acts Defendants take that cause climate change); Hedges Expert Report at 24-28; Hedges Dec. ¶¶ 25, 28 *with* Def. Answer ¶ 118 (Doc. 54) (admitting Defendants have implemented many of these actions, but denying such actions result in dangerous levels of GHG emissions that injure the Plaintiffs, creating a factual dispute); *see also* Thomas 30(b)(6) Dep. 56:20-57:9 (agreeing DNRC issues licenses for production and extraction of oil and gas in Montana, and permits for drilling in Montana, but denying these activities result in dangerous levels of GHG emissions and contribute to the climate crisis); Dorrington 30(b)(6) Dep. 57:1-3, 65:2-19, 77:6-9[16] (denying DEQ's actions result in dangerous levels of GHG emissions). Defendants' argument that other statutes "directly regulate fossil fuel development, transportation, storage, and use," MSJ Br. at 6, does not break the chain of causation here because how those statutes are implemented is discretionary and they do not avoid Defendants' constitutional duties or constraints.[17] In sum, disputes of fact remain as to the causal connection between Defendants' conduct in implementing a fossil-fuel driven state energy policy, by and through their aggregate acts that result in dangerous GHG emissions, and Plaintiffs' injuries.[18]

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[16] Attached as Exhibit 18 to the Sullivan Declaration.

[17] *See, e.g.*, §§ 75-2-203 to -204, MCA (discretion under Clean Air Act of Montana to prohibit facilities that cause air pollution); § 75-2-218(2), MCA (DEQ has discretion to deny air quality permits); § 75-20-301, MCA (DEQ can only approve permits for facilities after considering numerous discretionary factors, including environmental impacts and public health, welfare, and safety); § 77-3-301, MCA (state lands "may" be leased for coal if "in the best interests of the state"); § 77-3-401, MCA (state lands "may" be leased for oil and gas if consistent with the Constitution); § 82-4-227, MCA (DEQ has wide discretion to refuse mining permits).

[18] Contrary to Defendants' assertion, MSJ Br. at 5 n.5, the fact that private actors are involved in fossil fuel extraction and combustion does ***not*** defeat causation. *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975) (fact that alleged injuries "may have resulted indirectly does not in itself preclude standing"). Plaintiffs' evidence shows any "indirect harm" resulting from GHG emissions of third parties is directly attributable to Defendants' conduct that authorizes third parties to engage in emission-causing activities, and implements the state's energy system intentionally dependent on fossil fuels. *See, e.g.*, Klemp 30(b)(6) Dep. 96:13-17 (Exhibit 19 to Sullivan Declaration) (DEQ permits are essential for Colstrip to operate); Klemp Hybrid Dep. 84:24-85:1 (DEQ permits activities that allow for the combustion of fossil

As to Plaintiffs' MEPA claim, Defendants again fail to identify a single uncontested fact on causation that entitles them to summary judgment. Defendants' odd contention that "Plaintiffs cannot point to even one agency action that directly caused the harms they allege," MSJ Br. at 6, is directly contradicted by the allegations in ¶ 118 of the Complaint, which Defendants substantively deny in their Answer, and which is supported by Plaintiffs' evidence contained in expert reports and deposition testimony identifying agency actions that cause climate change. *See, e.g.*, Erickson Expert Report Attachment 2 (examples of permits issued by Defendants illustrating how Montana controls and authorizes fossil fuel exploration, development, extraction, and infrastructure); Hedges Expert Report at 24-28 (describing Defendants' "clear pattern and practice of granting permits for new fossil fuel projects and renewing permits to allow already built fossil fuel projects to continue to operate in Montana" without considering climate impacts); Thomas 30(b)(6) Dep. 129:4-18 (DNRC Land Board enacted policy extending term of easements for pipelines that carry fossil fuels across state lands from ten to thirty years). There is simply no factual support for Defendants' suggestion that Defendants could, or do, use the exceptions to the Climate Change Exception to MEPA (§ 75-1-201(2)(b)(ii), (iii), MCA) to consider climate impacts beyond Montana's borders. MSJ Br. at 6; *compare*, Hedges Dec. ¶¶ 29-31 (DEQ does not consider climate change in MEPA reviews); Thomas 30(b)(6) Dep. 61:3-9 (MEPA is the exclusive means by which DNRC analyzes the environmental and human health consequences of its actions). The ultimate question of whether the Climate Change Exception to MEPA precludes Defendants from making fully informed decisions and unconstitutionally puts a thumb on the scale in favor of authorizing harmful fossil fuel activities is a mixed question of fact and law and should be decided upon the evidence presented at trial.

C. Plaintiffs Submit Sufficient Evidence Showing Their Injuries Can Be Redressed

Defendants misconstrue the relief that could be awarded by the Court and misstate Plaintiffs' burden as requiring a demonstration that any relief granted must solve global climate change as opposed to alleviate Plaintiffs' injuries and prevent their worsening from Defendants' conduct. This Court made clear in its Order on Defendants' Second Rule 60(a) Motion for Clarification (Doc. 217) that Plaintiffs' requests for relief 1-5 remain viable. Any of these requests

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fuels resulting in emissions of GHGs); Nowakowski Hybrid Dep. 58:14-59:9, 64:2-6 (DEQ issues air quality permits for coal mining, oil and gas refineries, and power plants; and third parties could not lawfully operate these facilities without a DEQ permit); Dorrington 30(b)(6) Dep. 110:1-8 (coal mine could not operate without DEQ approval).

for relief, if granted, would alleviate Plaintiffs' injuries. MTD Order at 15 (Doc. 46) (stating Montana courts adopted a "broader interpretation of the redressability element" than federal courts, holding redressability requires relief that can alleviate Plaintiffs' injuries, including partial relief).

*i. **Declaratory Relief is Meaningful Relief for Constitutional Injuries***

Montana case law is clear that declarations of the unconstitutionality of challenged policies and conduct provide tangible and concrete redress sufficient to terminate and settle constitutional controversies. *Gryczan*, 283 Mont. 433, 942 P.2d 112 (declaratory judgment finding statute criminalizing same-sex conduct unconstitutional); *Lee v. State*, 195 Mont. 1, 8-9, 635 P.2d 1282, 1286 (1981) (declaratory judgment finding statute granting attorney general power to proclaim speed limit unconstitutional). In Montana, "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations ***whether or not further relief is or could be claimed.***" § 27-8-201, MCA (emphasis added). As the Montana Supreme Court ruled in *Larson v. State*, 2019 MT 28, ¶ 33, "injunctive relief is a ***supplemental*** remedy available to further or effect a declaratory judgment." (citing § 27-8-313, MCA) (emphasis added). "[T]hat right to have statutes construed is not dependent on whether further relief is or could be claimed. In other words, it is not a basis for denying declaratory relief that all of the rights, status, or other legal relations of the parties cannot be decided in the same proceeding." *Ridley v. Guar. Nat. Ins. Co.*, 286 Mont. 325, 331, 951 P.2d 987, 990 (1997), *as modified on denial of reh'g* (Jan. 30, 1998) (quotations omitted) (citing § 27-8-201, MCA). Further, the U.S. Supreme Court has specifically held nominal damages, "'a form of declaratory relief in a legal system with no general declaratory judgment act,'" provides redress for purposes of Article III standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021) (quoting D. Laycock & R. Hasen, *Modern American Remedies* 636 (5th ed. 2019)).

Defendants' attempt to portray declaratory relief as meaningless must be rejected. MSJ Br. at 9. First, this Court has already ruled as a matter of law that declaratory relief would provide meaningful redress. *See* MTD Order at 17 (Doc. 46) ("[A] favorable ruling will alleviate Plaintiffs' injuries."); Order on Second Rule 60(a) Motion for Clarification at 6 (Doc. 217) ("While declaratory relief in this case may not reverse global climate change in its entirety, it certainly could alleviate it."). Second, the declarations sought in this case will in fact alleviate Plaintiffs' injuries, and the evidence presented at trial will prove it. *See, e.g.*, Van Susteren Expert Report at 1 ("[A] remedy to ease the psychological suffering waged on these Plaintiffs by their own

government is clear and available: a court order recognizing that Montana's energy policy betrays government's role to protect its youngest and most vulnerable citizens and is therefore unconstitutional."). Plaintiffs' declarations confirm this. Eva Dec. ¶ 19; Lander Dec. ¶ 14; Rikki Dec.¶ 34; Sariel Dec. ¶¶ 5, 10; Georgianna Dec. ¶ 13; Badge Dec. ¶ 10; Kian Dec. ¶ 5; Grace Dec. ¶ 15; *see also* Sullivan Dec. ¶ 23 nos. 64-85. To the extent Defendants dispute whether declaratory relief would provide meaningful redress, that factual dispute can be resolved at trial.

ii. Declaratory Relief will Influence Defendants' Conduct

Defendants' contention that the State Energy Policy Act lacks "substantive provisions that authorize or facilitate the production or consumption of fossil fuels" ignores Defendants' broad authority in other statutes to implement and effectuate the State Energy Policy through aggregate acts. MSJ Br. at 7; *see supra* note 17; *see also* Pls. MTD Br. at 6-7 (Doc. 15) (state agencies have significant discretion in interpreting their permitting statutes). Those enabling statutes provide Defendants with the discretion and authority to effectuate the State's Energy Policy, but do not contain the specific mandate of the challenged statute. A declaration that § 90-4-1001(1)(c)-(g), MCA, and the aggregate acts taken to implement a fossil fuel energy system as sought in Prayer for Relief #1, (Doc. 1 at 102), is unconstitutional would alleviate Plaintiffs' injuries because such a declaration would tell Defendants that their current mandate and course of conduct is unconstitutional and must be changed. *See Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)) (declaratory relief changes the legal status of the challenged conduct and carries a presumption that government officials will "'abide by an authoritative interpretation' of . . . 'the constitution[.]'"). There is ample precedent illustrating how government defendants conform their conduct to declarations of constitutional law. *See, e.g., Brown v. Jacobsen,* 590 F. Supp. 3d 1273, 1285 (D. Mont. 2022) (court has power to strike down unconstitutional laws and future government conduct must be consistent with court ruling). Defendants' witnesses acknowledged agencies are obligated to follow court rulings. *See, e.g.*, Rosquist 30(b)(6) Dep. 123:10-21;[19] *see also* Dorrington 30(b)(6) Dep. 27:14-23 (admitting DEQ has a duty to comply with State Energy Policy); *id.* 38:3-12 (if Climate Change Exception to MEPA were declared unconstitutional, DEQ would follow the law).

The redressability analysis does not change, even if Defendants are successful in their ploy to get H.B. 170 passed to eliminate § 90-4-1001, MCA. First, Plaintiffs challenge Defendants'

[19] Attached as Exhibit 16 to the Sullivan Declaration.

state energy policy that is not only codified in section § 90-4-1001, MCA, but also as it is implemented by and through Defendants' aggregate and systemic affirmative acts and policies. Compl. ¶¶ 118-142, 250; Prayer for Relief (1)-(5); Erickson Expert Report at 18 ("Defendants direct and issue energy policy, plans, and permits, and conduct[] a variety of energy planning activities that influence the direction of Montana's energy system toward, or away from, fossil fuels and the resulting CO_2 emissions."); Hedges Expert Report at 24-28; Hedges Dec. ¶¶ 25-28. Second, there is no indication Defendants' systemic pattern of conduct will change even if H.B. 170 is passed because, until a court declares Defendants' historic and ongoing policy of permitting and approving fossil fuels unconstitutional, it will remain the policy of the State. Hedges Dec. ¶¶ 25, 28.[20] In fact, when testifying in support of H.B. 170, the governor's staff confirmed Montana will still have an energy policy, which the evidence shows includes the systemic promotion of fossil fuel activities. Hedges Dec. ¶¶ 24-25. It is constitutionally important to eliminate both the legislative mandate to promote fossil fuels, as well as the ongoing practice of doing so.

The question of whether a court order declaring the MEPA Climate Change Exception unconstitutional would redress Plaintiffs' injuries is laden with questions of fact that preclude summary judgment. Although Defendants claim they cannot measure the climate change impacts of particular projects, MSJ Br. at 7-8, that assertion is contradicted by evidence in the record. Dorrington 30(b)(6) Dep. 38:3-12 (DEQ would evaluate GHG emissions for fossil fuel projects if MEPA Climate Change Exception were eliminated). Defendants' witnesses acknowledged it is possible to ascertain the GHG emissions that result from particular projects, even though they do not do so. *See, e.g.,* Thomas 30(b)(6) Dep. 72:15-19, 73:3-6 (DNRC does not know the GHG emissions that result from 1,126 oil and gas leases on state lands, even though that information could be calculated.). Both sides present quantitative evidence of Defendants' contribution to climate change. *Compare* Erickson Expert Report at 19-20 ("the total CO_2 emissions associated with Montana's fossil-fuel-based economy are on the order of 166 million tons CO_2 annually," which is "a substantial quantity of emissions, contributing to increasingly severe risks from climate change, and which is equivalent to the recent annual CO_2 emissions associated with the countries

[20] While Defendants have not raised mootness arguments, Plaintiffs are prepared to brief the issue should the Court find it useful. Mootness would not apply because, even if H.B. 170 passed, the next legislature could easily pass the same law again, making it capable of repetition but evading review. Hedges Dec. ¶ 16 (citing Representative Gunderson).

of Argentina, the Netherlands, or Pakistan") *with* Anderson Expert Report at 4 ("Montana's emissions account for only 0.07529 percent of global GHG emissions . . . .").

It is hardly "undisputed that Montana's contribution to climate change is *de minimis*," as Defendants contend.[21] MSJ Br. at 8; Erickson Dep. 38:6-7 ("I'm suggesting here that Montana's emissions in absolute are substantial."); *id.* at 39:4-12. Similarly, it is not a "fact," let alone an undisputed fact, "that Montana's GHG emissions would just be replaced by other sources." MSJ Br. at 8; *see, e.g., WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1236 (10th Cir. 2017) (rejecting same "perfect substitution" argument); Erickson Expert Report at 19 ("Considerable empirical research shows that indeed, reducing production in one region is not met with equivalent increases from another, and so net fossil fuel consumption and, in turn, CO_2 emissions, does decrease" if Montana were to move away from fossil fuels.). In short, a declaration that the MEPA Climate Change Exception is unconstitutional would alleviate Plaintiffs' injuries to some extent because it would ensure Defendants make fully informed decisions about whether to permit fossil fuel activities that cause and contribute to climate change, and thereby infringe on Plaintiffs' right to a clean and healthful environment. *See* Hedges Expert Report at 24-28 (Defendants are permitting fossil fuel projects "that cause dangerous levels of GHG emissions, all while turning a blind eye to the climate impacts of the projects."); *id.* at 19-21.[22]

In sum, under the facts of this case, the requested declarations of law satisfy redressability requirements because they would resolve live controversies between the parties concerning the scope of Plaintiffs' constitutional rights and the constitutionality of Defendants' fossil fuel energy policy. Declaratory judgment alone would help to alleviate Plaintiffs' ongoing concrete injuries,

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[21] Remarkably, in support of their "*de minimis*" contention, Defendants cite deposition testimony from two of Plaintiffs' experts, neither of whom testified that Montana's contribution to climate change is *de minimis*. Both Dr. Whitlock and Dr. Stanford actually testified that Montana's GHG emissions are significant and contribute to climate change. *See, e.g.*, Whitlock Dep. 15:11-18 ("we know the causes of global warming and the role of the burning of fossil fuels, and we know that every molecule of CO_2 that is put into the atmosphere contributes to global warming. And so every [ton] that Montana produces in terms of greenhouse gas emissions is contributing to global warming, and that's what we're trying to have stopped."); Stanford Dep. 20:16-18. ("My report . . . doesn't discount the importance of Montana's contribution to greenhouse gases.").

[22] Defendants' reliance on *Aji P. v. State*, 480 P.3d 438 (Wash. Ct. App. 2021), and *Wash. Env't Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), only highlights their misapprehension of Plaintiffs' redressability burden and the factual disputes present at this stage. *Bellon* concerned emissions from five oil refineries that made up 5.9% of state emissions and the plaintiffs did not proffer "any evidence that places this statistic in national or global perspective," while here, both parties have conflicting expert opinions as to the substantial contribution of Montana's emissions. *See Bellon*, 732 F.3d at 1145-46. *Aji P.*, decided on a motion to dismiss, did not involve the same constitutional provision or redressability standard at issue here. *See* MTD Order at 15-16 (Doc. 46).

even if further relief, e.g., injunctive relief, were unavailable because a declaratory judgment would establish the constitutional bounds of Defendants' implementation of its fossil fuel-based state energy policy. The U.S. and Montana Supreme Courts have long recognized the importance of declaratory relief in resolving constitutional controversies and Defendants present no basis for deviating from that precedent. *See, e.g., Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69; *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus.").

II. PRUDENTIAL CONCERNS WEIGH IN FAVOR OF GRANTING PLAINTIFFS' REQUESTED RELIEF

Defendants argue this 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.'" MSJ Br. at 10. Here, prudence—careful, reasoned judgment that allows one to avoid danger or risks—counsels in favor of proceeding to trial and issuing declaratory and injunctive relief in Plaintiffs' favor.

Prudential considerations cannot be employed to abdicate the fundamental judicial duty to determine the constitutional status of challenged government conduct. *See* Order on Second Rule 60(a) Motion at 6 (Doc. 217) ("Constitutional and statutory interpretation are 'the very essence of judicial duty.'") (citation omitted); *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 59 (Prudential "deference and restraint" "do not apply, however, where a challenged measure is facially [constitutionally] defective. In that event, the courts have a duty to exercise jurisdiction and declare the measure invalid."). Defendants have presented no legitimate basis for this Court to abdicate its duty to say what the law is, particularly in a case involving danger and harm to children. Prudence demands the Court *not* abdicate its vital role in democracy to check the other branches active violation of fundamental rights.

Defendants' arguments in favor of this Court exercising prudential restraint are inapposite to the weight of controlling authority.[23] Rather than "open a Pandora's box of political questions," MSJ Br. at 12, a declaration from this Court in Plaintiffs' favor would simply apply constitutional

[23] The prudential analysis under Alaska law in *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), is neither binding nor persuasive and has no bearing on whether relief is available to Plaintiffs on the facts of this case under the Montana Constitution. This Court's prior orders and Montana Supreme Court precedent are clear that declaratory relief can provide meaningful redress and the factual record demonstrates, at minimum, a material issue of disputed fact. Indeed, the dissent in *Sagoonick* is much more persuasive. *Sagoonick*, 503 P.3d at 807 (Massen and Carney, JJ, dissenting) ("Given the urgency of the issue, I would conclude that 'practicality and wise judicial administration' militate strongly in favor of limited declaratory relief . . . .").

law to the evidence before the Court. Courts determine the constitutionality of policies and conduct before them and develop and articulate the contours of affected constitutional rights, and the appropriate remedies, on a case-by-case basis.[24] So too here. This Court's task at trial, like at any trial, is to decide the constitutional claims before it. Defendants' speculation about subsequently developed energy policy is not before this Court. *See* MSJ Br. at 11-12; *Stuart v. Dep't of Soc. & Rehab. Servs.*, 247 Mont. 433, 438, 807 P.2d 710, 713 (1991) ("[w]hen such a bona fide constitutional issue is raised, a plaintiff has a right to resort to the declaratory judgment act for a determination of his rights . . .") (citation omitted). It is vital for this Court to reach the merits of Plaintiffs' claims because the conduct at issue "would effectively be immunized from [constitutional] review" and prolong the controversy and ongoing injuries raised in this case. *See Heffernan*, ¶ 33; Order on Second Rule 60(a) Motion at 6 (Doc. 217).

Defendants' reliance on *Donaldson v. State*, 2012 MT 288, ¶ 8, is unpersuasive because in that case, the plaintiffs sought an order requiring the State "to provide them a 'legal status and statutory structure' that protects their rights." Here, Plaintiffs are challenging the constitutionality of specific laws, which the Supreme Court acknowledged is judicially appropriate, *id.*, and Defendants' aggregate acts pursuant to that policy. Plaintiffs have proffered evidence, which Defendants now dispute, that the manner in which Defendants exercise their authority in systematically promoting fossil fuels as a result of the statutes is unconstitutional. *See, e.g.*, Jacobson Expert Report at 2 ("Presently, fossil fuels supply more than 85% of all-purpose energy in Montana, not out of necessity, but because of political preference and historic and ongoing government support that led to the development and maintenance of a widespread fossil-fuel infrastructure."). Once this Court declares the scope of Plaintiffs' constitutional rights and the lawful bounds of Defendants' conduct, the controversy in this case would be resolved. Plaintiffs are not asking this Court to enact new laws, as was requested in *Donaldson*. *Donaldson*, ¶ 4.

Defendants' argument that what constitutes a stable climate system is a "wide-open question" only highlights the need for trial in this case, where scientific evidence will provide a compelling answer.[25] MSJ Br. at 11; *see, e.g.*, Running & Whitlock Expert Report at 8-10. The evidence will show the concept of a stable climate system in Montana is tied to Earth's Energy

[24] *See infra* footnote 29.

[25] *See, e.g., Armstrong v. State*, 1999 MT 261, ¶ 62 ("legal standards for medical practice . . . must be grounded in the methods and procedures of science").

Imbalance (EEI). "As long as Earth's energy imbalance is positive, warming will continue," and the scientific consensus is that "'[s]tabilization of climate . . . requires that EEI be reduced to approximately zero to achieve Earth's system quasi-equilibrium.'" Running & Whitlock Expert Report at 9. "[T]o stabilize the climate system and reduce the EEI to approximately zero, atmospheric CO_2 concentrations must be reduced to approximately 350 ppm." *Id.* While Montana on its own cannot stabilize the global climate system of which it is a part, Defendants' conduct can be adjudged as to whether it is consistent with achieving climate stability, or not. *See* Whitlock Dep. 15:11-17 ("[W]e know the causes of global warming and the role of the burning of fossil fuels, and we know that every molecule of CO_2 that is put into the atmosphere contributes to global warming. And so every [ton] that Montana produces in terms of greenhouse gas emissions is contributing to global warming."). Thus, a declaration that Plaintiffs' right to a clean and healthful environment encompasses a stable climate system would not only resolve the legal controversy over the scope of Plaintiffs' constitutional rights, it would be meaningful because it would limit Montana's ability to engage in conduct that exacerbates climate instability, and particularly the State's ability to do so without considering the consequences of its actions.[26]

III. COMPELLING AUTHORITY SUPPORTS PLAINTIFFS' ENFORCEMENT OF RIGHTS AND RESPONSIBILITIES IN MONTANA'S CONSTITUTION

Defendants assert that, "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." MSJ Br. at 12. Thus, Defendants argue, Plaintiffs seek an unwarranted expansion of the right to a clean and healthful environment which "could give rise to seemingly endless litigation against all manner of public and private entities and individuals for any given emission of GHGs . . . ." *Id.* at 13.

Notably, while the Constitution eloquently articulates the rights and responsibilities of both Montana's citizens and the State, a constitution is not intended as a crystal ball, clairvoyantly foreseeing every circumstance of application in the ensuing decades. Thus, notwithstanding the predictable "opening the floodgates" refrain from Defendants, reliance on the judiciary to interpret the contours and meaning of Montanans' fundamental constitutional rights is nothing new. As

[26] Importantly, this Court would not be alone in recognizing that the right to a stable climate system is deserving of constitutional protection, *See, e.g., In re Maui Elec. Co. Ltd.*, 150 Haw. 528, 538 n.15, 506 P.3d 192, 202 n.15 (2022) (Hawai'i Constitution "Article XI, section 9's 'clean and healthful environment' right as defined by HRS chapter 269 subsumes a right to a life-sustaining climate system").

numerous examples illustrate, Montana's courts have embraced their duty to "say what the law is"[27] and "interpret[] the Constitution"[28] in a multitude of cases involving Montanans' fundamental rights.[29] In each instance, this judicial interpretation was an *application* of the fundamental constitutional right to the facts before the court—not an *expansion* leading to "absurd results." MSJ Br. at 12. The same is true here in a case implicating the right to a clean and healthful environment. As this Court has previously recognized:

> This court agrees with the State that it is difficult to determine what exactly constitutes a clean and healthful environment, but Montana courts have undertaken it before. The seminal case, as the State knows, is *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality (MEIC)*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. In *MEIC*, the Court ultimately concluded that the plaintiffs had the ability to challenge the constitutionality of statutory provisions that allowed an agency to bypass environmental review. *MEIC*, ¶¶ 77-79. The Court famously stated the Montana Constitution "does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *Id.*, ¶77. The same is true, here: Youth Plaintiffs sufficiently invoked their fundamental constitutional rights, and they made a showing that the statutes at issue implicate those rights. The applicable legal standard for review of statutes infringing fundamental rights is strict scrutiny. *Id.*, ¶ 63.

Order on Second Rule 60(a) Motion at 4-5 (Doc. 217).[30] Thus, at this juncture, the shoe is on the other foot: whether the challenged statutes and government conduct can withstand strict scrutiny awaits trial and cannot be disposed of on summary judgment.

IV. PLAINTIFFS HAVE NOT FAILED TO JOIN INDISPENSABLE PARTIES

Defendants argue that "the declaratory relief Plaintiffs seek could and would result in the reduction of GHG emissions through the destruction of Montana's fossil fuel industry . . . ." MSJ Br. at 13. On this premise, Defendants argue that "energy companies, landowners/mineral interest holders, etc." are indispensable parties. *Id.* at 14. Under § 27-8-301, MCA, "if the statute . . . is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of

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[27] *See* Order on Second Rule 60(a) Motion at 2 (Doc. 217), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[28] *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989).

[29] *See, e.g., Gryczan*, 283 Mont. at 450, 942 P.2d at 122 (personal autonomy component of the right of privacy protects "same-gender, consensual sexual conduct"); *Armstrong*, ¶ 72 (right to liberty includes the "rights of personal and procreative autonomy"); *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) (fundamental right to "life's basic necessities" includes the right to pursue employment); *State v. Rathbone*, 110 Mont. 225, 100 P.2d 86 (1940) (right to protect property includes killing game out of season if "reasonably necessary" to protect property).

[30] *See also* Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans' Inalienable Right to a Clean and Healthful Environment*, 45 Pub. Land & Res. L. Rev. 1, 19-26 (2022).

the proceeding and be entitled to be heard." The attorney general has been served and is participating in this proceeding. The declarations of unconstitutionality that Plaintiffs seek would have an impact on Defendants' permitting of fossil fuel related projects via the injunctive relief sought in Request for Relief #5. Any impact on energy companies, landowners, or mineral holders is speculative at this stage, and Defendants provide no details on how such third parties may be impacted by a ruling in this case. MSJ Br. at 14. As this Court noted, "Request for Relief #5 simply asks the court to enjoin ***the State*** from subjecting youth Plaintiffs to allegedly unconstitutional statutes." Order on Second Rule 60(a) Motion at 7 (Doc. 217) (emphasis added). Instructive is *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 33, which rejected the claims of mining interests that they had vested rights in the issuance of future mining permits and thus passage of Initiative 137, which banned cyanide heap leaching, and did not find a compensable taking. *See also Columbia Falls Elementary Sch. Dist. No. 6* (litigation did not involve the students directly impacted by school funding decisions). Tellingly here, although actively litigated for three years with extensive media coverage, no motion to intervene has been made by members of Montana's fossil fuel industry, landowners, or other alleged indispensable parties.

V. PLAINTIFFS' CONSTITUTIONAL CLAIMS

A. Montana Energy Policy and Aggregate Acts Violate the Montana Constitution

Plaintiffs have presented detailed evidence showing Montana's State Energy Policy, and the State's aggregate acts to permit fossil fuel activities that are the manifestation of that policy, result in dangerous levels of greenhouse gas emissions, cause and contribute to the climate crisis, and violate Plaintiffs' constitutional rights. *See, e.g.*, Hedges Expert Report at 24-28 (providing examples of Defendants' aggregate actions permitting fossil fuel projects); *id.* at 29 ("[T]here has been a long-standing practice by the State of Montana to promote fossil fuels as the predominant energy source in the state."); Erickson Expert Report at 19-20 ("[T]he total CO_2 emissions associated with Montana's fossil-fuel-based economy are on the order of 166 million tons CO_2 annually. This is a substantial quantity of emissions, contributing to increasingly severe risks from climate change . . . ."); Running & Whitlock Expert Report at 39 ("Montana's environment and its natural resources have already experienced significant harm and degradation . . . . [A]ny law that calls for increasing development and utilization of fossil fuels in Montana . . . can be expected to increase degradation of Montana's environment and cause further harm to Plaintiffs . . . ."); Hedges Dec. ¶¶ 25-29; Sullivan Dec. ¶ 23 nos. 86-94.

Defendants dispute Plaintiffs' evidence, rendering summary judgment inappropriate on the constitutionality of the State Energy Policy, both codified and as manifested in Defendants' aggregate acts permitting fossil fuels. *See, e.g.*, Anderson Expert Report at 5-6 (Montana's GHG emissions are minimal); Curry Expert Report at 29 ("Elimination of the two laws challenged by the Plaintiffs would have essentially no impact on the climate of Montana . . . ."). Defendants also dispute whether Montana's State Energy Policy could be applied in a constitutional manner. MSJ Br. at 15. Plaintiffs have presented evidence that there is no need for any additional fossil fuel development for Montana to meet its current and future energy needs and, therefore, Montana's policy and practices of permitting such infrastructure is unconstitutional.[31] Jacobson Expert Report at 13 ("[N]o new permits for coal, oil, or natural gas extraction should be allowed. . . . [N]o more construction of new coal, nuclear, natural gas, oil, or biomass fired power plants should occur."); *id.* at 22. Defendants disagree. *See, e.g.*, Curry Expert Report at 16-27;[32] Def. Answer ¶¶ 206-07 (Doc. 54).

While it is indisputably the legislature's prerogative to pass legislation, it is equally indisputable that it is the judiciary's prerogative to evaluate the constitutionality of statutes and government actions.[33] *Columbia Falls Elementary Sch. Dist. No. 6*, ¶ 17 ("[O]nce the Legislature has acted . . . courts can determine whether that enactment fulfills the Legislature's constitutional responsibility."); *see also* Order on Second Rule 60(a) Motion at 2-6 (Doc. 217). Furthermore, it is the judiciary's duty, not the legislature's, to balance constitutional rights, if such balancing is ultimately necessary. MSJ Br. at 15; *Crites v. Lewis & Clark Cnty. by & through Cnty. Att'y*, 2019 MT 161, ¶ 27. Given the numerous factual disputes, the Court should withhold judgment until after trial as to the constitutionality of Montana's State Energy Policy and the attendant aggregate acts.

B. The Climate Change Exception to MEPA is Unconstitutional

Whether the Climate Change Exception to MEPA is unconstitutional is also a mixed question of law and fact. Plaintiffs argue the Climate Change Exception to MEPA increases fossil fuel permitting, thereby exacerbating the climate crisis and violating Plaintiffs' constitutional rights. *See, e.g.*, Hedges Dep. 69:4-13 (Climate Change Exception to MEPA is "contributing to

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[31] Of course, after the presentation of evidence at trial, the Court has discretion to craft an appropriate remedy commensurate with the scope of the constitutional violations. *Park County*, ¶ 86.

[32] *But see* Plaintiffs' Motion *in Limine* No. 5.

[33] Defendants' reference to *Berman v. Parker*, 348 U.S. 26, 32 (1954) only proves this point. As the U.S. Supreme Court stated: "***Subject to specific constitutional limitations***, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." (emphasis added).

the climate crisis"); *id.* 72:6-10 (it "is my opinion that that change in [MEPA] has contributed to projects being permitted that allow an increase in greenhouse gases, and that is what is causing the climate crisis"); *id.* 76:15-19 (Climate Change Exception to MEPA made it more likely that a state agency would approve a fossil fuel permit); *id.* 73:4-8; *id.* 76:20-78:16. The evidence to be introduced at trial demonstrates Defendants' failure to disclose and consider the climate impacts of their aggregate actions[34]—including health and safety impacts—has very real on-the-ground consequences for Plaintiffs and infringes on their fundamental constitutional rights. *See, e.g.,* Running & Whitlock Expert Report at 8 ("[A] *scientifically accurate assessment of impacts to Montana* from proposed actions in Montana, such as coal mining, oil and gas drilling, and the transport and combustion of fossil fuels, *must include consideration of impacts that are regional, national, or global in nature* because of the inherent interconnectedness of the atmospheric system with which Montana's atmosphere and terrestrial and aquatic ecosystems are integral and connected to.") (emphasis added); Sullivan Dec. ¶ 23 nos. 95-101.[35]

Even if the environmental protections in Montana's Constitution were narrowly intended to protect Montana's environment, MSJ Br. at 17,[36] the evidence shows it is impossible to do so unless Defendants "carefully consider how specific projects will either mitigate or exacerbate climate change before approving them . . . ." Running & Whitlock Expert Report at 4; *cf. Park County,* ¶ 70 ("[T]he Legislature cannot fulfill its constitutional obligation to prevent proscribed environmental harms without some legal framework in place that mirrors the uniquely 'anticipatory and preventative' mechanisms found in the original MEPA."). Defendants dispute that the Climate Change Exception to MEPA contributes to the degradation of Montana's natural

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[34] Defendants' argument that Plaintiffs have not demonstrated "any scientifically trustworthy method" that would allow the accurate measurement of how any discrete agency action in Montana affects climate change, MSJ Br. at 17, is another factual dispute directly contradicted by facts in the record, *see, e.g.,* Erickson Expert Report at 19-20 (quantifying GHG emissions from Defendants' aggregate acts that cause climate change), and federal case law. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("the fact that climate change is largely a global phenomenon that includes actions that are outside of [the state's] control does not release [the state] from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.") (quotation and alteration omitted; emphasis original); *350 Montana v. Haaland,* 50 F.4th 1254, 1272 (9th Cir. 2022) (rejecting agency's justification that the "incremental effects of climate change 'cannot be attributed to anyone [sic] source at a small scale'").

[35] Not only does Montana export its fossil fuels with blinders on as to climate impacts, it affirmatively attempts to force other regional entities to participate in its climate destroying scheme. *See* Complaint for Declaratory and Injunctive Relief, *Montana v. City of Portland,* No. 3:23-cv-00219 (D. Or. Feb. 14, 2023), https://www.opb.org/pdf/cityofportland_1676430256269.pdf.

[36] Significantly, Plaintiffs' ***inalienable right*** to a clean and healthful environment ***sources from Article II, § 3*** of the Constitution, which does ***not*** have the geographical limitation Defendants argue sources from Article IX, § 1.

resources and harms Plaintiffs. *See, e.g.,* Def. Answer ¶ 216 (denying that MEPA exception degrades Montana's environment and natural resources and harms Plaintiffs); *id.* ¶ 108 (denying that Defendants ignore the dangerous impacts of the climate crisis). These factual disputes must be resolved at trial after a presentation of the evidence and expert testimony.

In *Park County*, the Court recognized "MEPA serves a role in enabling the Legislature to fulfill its constitutional obligation to prevent environmental harms infringing upon Montanans' right to a clean and healthful environment." ¶ 67. The *Park County* Court found the MEPA amendment at issue was facially unconstitutional because it "undercut the State's ability to determine in advance whether a given activity will cause environmental harm and thereby take actions to 'prevent unreasonable depletion and degradation of natural resources' as required by Article IX, Section 1(3) of the Montana Constitution." *Id.*, ¶ 88. The Climate Change Exception to MEPA functions in precisely the same manner, preventing state agencies from carrying out an "essential aspect of the State's efforts to meet its constitutional obligations." *Id.*, ¶ 89. Notably, the Climate Change Exception to MEPA creates a blanket exception that inhibits a core function of MEPA – to "avert potential environmental harms through informed decision making" – by requiring agencies to turn a blind eye to the severe environmental consequences of projects which exacerbate climate change. *Id.*, ¶ 76. The Climate Change Exception to MEPA prevents informed decision making and precludes protection of Montana's environment because state agencies interpret it to preclude ***any*** analysis of actual or potential impacts that extend beyond Montana's borders—which is inherent in any climate change analysis—even if impacts manifest within Montana.[37] However, Defendants' dispute this. *Compare* Dorrington 30(b)(6) Dep. 66:1-2 (DEQ analyzes climate impacts within the borders of Montana), *with* Hedges Dec. ¶¶ 29-31 (DEQ does not consider any impacts that result from climate change).

Park County is particularly relevant to the present case because of its factual similarity (the challenge to a 2011 MEPA amendment imposing a blanket exception to a certain category of analysis), and because of its adoption of the concurrence in *MEIC v. DEQ*, 1999 MT 248, which recognized the challenged statute was properly characterized as facially unconstitutional. In *MEIC*, the Court invalidated a MEPA amendment that exempted from nondegradation review certain types of discharges into state waters. In concurring with the Court's order invalidating that provision as applied, Justice Leaphart explained why the provision should also be held facially

[37] *See* Nowakowski Hybrid Dep. 29:1–30:9.

invalid: "The possibility that some water discharges will not harm the environment does not justify their exemption from careful review by the State to protect Montana's fundamental rights to a clean and healthy environment." *Park County*, ¶ 87 (*quoting and adopting reasoning of MEIC*, ¶ 85). Instructive here, *Park County* explicated the "hallmark of facial unconstitutionality," "the 2011 Amendments are unconstitutional because they substantially burden a fundamental right and are not narrowly tailored to further a compelling government interest." *Id.* ¶ 86. So too here. The fact that some "inherently local" DEQ permitting activities may not implicate out-of-state impacts does not justify the wholesale exemption of projects that do have regional, national, or global impacts from all such consideration. MSJ Br. at 16.[38]

Plaintiffs have presented evidence, which Defendants' dispute, that the Climate Change Exception thwarts the purpose of MEPA and undermines the environmental protections enshrined in Montana's Constitution. "MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment." *Park County*, ¶ 70. Defendants have not provided any undisputed facts to support their argument that the Climate Change Exception to MEPA is constitutional, and therefore, the constitutionality of the statute should be decided after trial.

C. Plaintiffs' Equal Protection and Individual Dignity Claims Should Be Resolved After Trial

Plaintiffs' have alleged that Defendants' conduct violates their fundamental rights to the equal protection of laws and to individual dignity. Compl. ¶¶ 227-238 (Doc. 1). These are separate rights protected by Article II, Section 4 of Montana's Constitution. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 7. Defendants identify no undisputed facts entitling them to summary judgment, making Plaintiffs' claims under Article II, Section 4 inappropriate for resolution on summary judgment. *Compare* Def. Answer ¶¶ 229-238 (Doc. 54), *with* Sullivan Dec. ¶ 23 nos. 102-108.

Defendants summarily address Plaintiffs' equal protection argument but gloss over important areas of dispute. Even if there is not an explicit classification, which can be applied

[38] Defendants' argument that § 75-1-201(2)(b), MCA—which provides a limited exception to the Climate Change Exception for fish and wildlife management or when other state or federal laws require a review of impacts beyond Montana's borders—undermines Plaintiffs' constitutional claims is inapposite. This provision bolsters, rather than undermines, Plaintiffs' claims and highlights the illogical results that occur when climate change impacts are disclosed for projects in Montana subject to the National Environmental Policy Act, but not for similar projects with no federal nexus. *See* Nowakowski Hybrid Dep. 85:17-86:22.

evenly, government conduct may still be challenged for "impos[ing] different burdens on different classes of persons." *Gazelka*, ¶ 16. Here, there is a genuine factual dispute as to whether the challenged conduct disproportionately burdens Plaintiffs, as youth, in ways different from adults.[39] *Compare* Byron Expert Report at 3-4; 13-14 (youth disproportionately harmed by climate change; children's exposure to climate impacts can cause long-term cognitive, behavioral, and mental health impacts) *and* Van Susteren Expert Report at 14-18 (children are especially vulnerable to mental health injuries due to climate change in ways distinct from adults), *with* Anderson Expert Report at 7-12 (life expectancy climbing in Montana and other positive benefits of climate change).

Separate from their equal protection arguments, Plaintiffs also alleged Defendants are violating their right to individual dignity. Compl. at ¶¶ 229-230 (Doc. 1); *Walker v. State*, 2003 MT 134, ¶ 72. Defendants have not moved for summary judgment on this claim, and resolution on summary judgment is not appropriate as there remain factual disputes. *See, e.g.*, Def. Answer ¶¶ 229-230 (denying allegations) (Doc. 54); *compare* Sariel Dec. ¶¶ 7, 10, *with* MSJ Br. at 5 n.4.

D. Defendants Do Not Seek Judgment on All of Plaintiffs' Constitutional Claims

Defendants have not moved for summary judgment on Plaintiffs' public trust claims or their constitutional claims regarding their rights to safety, health, and happiness. *See* Complaint Counts II and IV. The Court has not dismissed these claims and, indeed, the Court explicitly referenced the constitutional provisions Plaintiffs rely on for Counts II and IV in their Complaint. MTD Order at 2 (Doc. 46). Although not put at issue, there are factual disputes that makes resolving these claims inappropriate on summary judgment. Sullivan Dec. ¶ 23 nos. 109-110.

CONCLUSION

Defendants' motion for summary judgment, which fails to identify a single issue of material fact to which there is no dispute, must be denied. There are no prudential policy concerns requiring dismissal and Plaintiffs have clearly brought forward evidence (disputed by Defendants) that they have constitutional standing and their rights to a clean and healthful environment, to equal protection and dignity—the only claims addressed by Defendants' motion—have been infringed. Whether the challenged State laws and actions can withstand strict scrutiny awaits trial and cannot be disposed of on summary judgment. The case should proceed promptly to trial on the merits.

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[39] For support that youth are a protected class, *see In re S.L.M.*, 287 Mont. at 34-35, 951 P.2d at 1372 ("The report of the Bill of Rights Committee of the Constitutional Convention indicates that one of the primary purposes of Article II, Section 15 was to remedy the fact that minors had not been accorded full recognition under the equal protection clause of the United States Constitution.").

DATED this 16th day of February, 2023.

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