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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 TO PARTIALLY DISMISS FOR MOOTNESS**

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INTRODUCTION

For the sixth time since this action was filed over three years ago, Defendants seek to have youth Plaintiffs' constitutional case dismissed and to avoid trial. Like their previous efforts, Defendants' present motion to partially dismiss should be denied.[1] Defendants set out to repeal the codified state energy policy challenged as unconstitutional here, *not to change* the policy, practice, or on-the-ground implementation of the policy and cure the constitutional violations Plaintiffs allege, but to try to avoid a trial by tearing up the piece of paper all the while carrying out its directive. Defendants' ambassadors have conceded that the Legislature could reenact repealed laws next session if they wanted to, that Defendants still have an energy policy, and that the repeal of the statute challenged in this case will change nothing on the ground. The only thing Defendants seek to change is their duty to stand trial for constitutional violations.

Plaintiffs' Complaint and the evidence in this case makes clear that there are numerous issues of law and fact in need of resolution by this Court at trial. The need for trial has not changed since the Legislature's repeal of Section 90-4-1001, MCA. Importantly, Defendants do not argue in their motion that the repeal of Section 90-4-1001, MCA, will in any way affect Montana's policy of perpetuating a fossil fuel-based energy system, or Defendants' ongoing aggregate acts to promote and perpetuate Montana's fossil fuel-based energy system. Defendants present no evidence that their unconstitutional conduct will cease or that Plaintiffs' injuries will be alleviated. In short, Plaintiffs continue to have both justiciable claims under the Uniform Declaratory Judgments Act ("UDJA") and standing to bring such claims. Additionally, because two exceptions to the mootness doctrine apply, the voluntary cessation and the public interest exception, Plaintiffs' challenge to Section 90-4-1001, MCA, is not moot.

While presented as a motion to dismiss, this Court can convert Defendants' motion to a motion for summary judgment—which Plaintiffs believe is the appropriate course of action because there are genuine issues of material fact that must be resolved at trial,[2] and Plaintiffs present expert declarations herewith (and reference other evidence already in the record).[3] Whether treated as a motion to dismiss or motion for summary judgment, there remain live justiciable

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[1] *See* Doc. 12, 86, 166, 275, and Defendants' June 10, 2022 Writ of Supervisory Control.
[2] *See* Pls.' Opp. to Defs.' MSJ (Doc. 299).
[3] With notice, this Court can convert Defendants' motion to dismiss to a motion for summary judgment. Mont. R. Civ. P. 12(d); *Farmers Co-Op Ass'n v. Amsden, LLC*, 2007 MT 287, 339 Mont. 452, 171 P.3d 684; *see also* Doc. 299.

controversies that the Court can resolve only after trial, and therefore, this case is not moot and Defendants' motion should be denied. After over three years of extensive litigation, evidenced by over 340 docket entries on file, all of Plaintiffs' claims should be resolved at trial, scheduled to begin in less than two months, with the benefit of the fully developed factual record the parties have worked hard to compile through extensive discovery, including the completion of 36 depositions, the exchange of 22 expert reports, the exchange of over 50,000 pages of documents, and responses to dozens of interrogatories. Nothing short of an authoritative declaration from a co-equal branch of government vindicating the youth Plaintiffs' fundamental constitutional rights and delineating the constitutional bounds to which Defendants' future conduct must adhere will be sufficient to bring Defendants' conduct into constitutional compliance.

STANDARDS OF REVIEW

"[M]otions to dismiss are viewed with disfavor and a complaint should be dismissed only if the allegations in the complaint clearly demonstrate that the plaintiff does not have a claim." *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996). When deciding a motion to dismiss, courts "must construe the complaint in the light most favorable to the plaintiff . . . and take as admitted all well-pleaded factual allegations." *W. Sec. Bank v. Eide Bailly LLP,* 2010 MT 291, ¶ 55, 359 Mont. 34, 249 P.3d 35. Alternatively, if converted to a motion for summary judgment, Defendants have 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, 394 Mont. 218, 435 P.3d 634.

Mootness is the doctrine of standing set in a timeframe, wherein the requisite personal interest that exists at the commencement of the litigation must continue throughout its existence. *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881. A controversy remains justiciable when it is possible for the reviewing court to grant the party seeking relief some effectual relief. *Rimrock Chrysler, Inc. v. State*, 2016 MT 165, ¶ 39, 384 Mont. 76, 375 P.3d 392; *see also Maldonado v. District of Columbia*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) ("'[O]nly when it is ***impossible*** for a court to grant ***any*** effectual relief' is a case moot." (emphasis added)). "The '***heavy burden***' of proving

mootness falls 'with the party asserting a case is moot.'" *Maldonado*, 61 F.4th at 1006 (quoting *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (emphasis added)).

ARGUMENT

I. THERE REMAIN JUSTICIABLE CONTROVERSIES IN THIS CASE FOR WHICH THE COURT CAN GRANT EFFECTIVE EQUITABLE RELIEF

The 2023 Montana Legislature's repeal of Section 90-4-1001, MCA, through HB 170 does not affect the existence of live justiciable controversies in this case which require resolution at trial. Specifically: (1) Defendants still have a state energy policy that violates Plaintiffs' constitutional rights; and (2) Defendants have not altered their long-standing pattern and practice and aggregate acts of implementing a fossil fuel-based energy system in Montana that causes dangerous greenhouse gas ("GHG") emissions and continues to infringe upon the constitutional rights of these young Plaintiffs. Compl. ¶¶ 108, 112, Counts I-IV. Therefore, Plaintiffs' request that this Court adjudge and declare Defendants' state energy policy and the aggregate acts, policies, and conditions Defendants have taken pursuant to their long-standing state energy policy unconstitutional, Prayer for Relief 1, remains a live controversy. Additionally, Defendants do not argue the repeal of the codified state energy policy affects: (3) Plaintiffs' request that the Court adjudge and declare that Defendants are interfering with Plaintiffs' right to use and enjoy Montana's public trust resources, which include Montana's atmosphere, waters, fish and wildlife, and public lands, Count IV, Prayer for Relief 1; (4) Plaintiffs' request that this Court adjudge and declare Plaintiffs' fundamental constitutional right to a clean and healthful environment encompasses a stable climate system that sustains human lives and liberties, and that said right is being violated by Defendants' conduct, Count I, Prayer for Relief 1 and 4; or (5) Plaintiffs' request that this Court declare unconstitutional and enjoin the Climate Change Exception to MEPA, Counts I-IV, Prayer for Relief 1, 3, and 5. As explained herein all of Plaintiffs' claims for relief remain justiciable and equitable relief from this Court in youth Plaintiffs' favor on Prayers for Relief 1, 3, 4, and 5 would alleviate Plaintiffs' injuries by vindicating Plaintiffs' constitutional and public trust rights; articulating the constitutional bounds, restraints, and obligations applicable to Defendants' conduct; and constraining Defendants from engaging in further conduct repugnant to such constitutional bounds, restraints, and obligations.

A. A Live Controversy Exists Under the Uniform Declaratory Judgments Act as to the Constitutionality of Defendants' State Energy Policy and Defendants' Aggregate Acts That Result in Dangerous GHG Emissions and Harm Plaintiffs

A live controversy between the parties still exists, and resolution through trial remains necessary as to Plaintiffs' claims that Defendants' state energy policy violates their rights guaranteed under Montana's Constitution. Plaintiffs have presented specific facts and evidence to show that a justiciable controversy under the UDJA exists as to the constitutionality of Defendants' now implicit (*de facto*) and formerly explicit (*de jure*) state energy policy to systematically and affirmatively authorize fossil fuel production, consumption, transport, and combustion which result in dangerous levels of GHG emissions and contribute to climate destabilization.[4] Plaintiffs' Complaint alleges that the challenged energy policy is both implicit and explicit, and that Section 90-4-1001, MCA, codified a policy that had existed for decades. Compl. ¶¶ 108, 112. Defendants' energy policy continues to exist, notwithstanding the repeal of Section 90-4-1001, MCA—a fact Defendants readily admit. As Michael Freeman, the Natural Resources Policy Advisor for Governor Gianforte stated in urging passage of HB 170, "we do have an energy policy. It is an all-of-the- above energy policy." Dec. of Anne Hedges in Support of Pls.' Opp. to Defs.' MSJ, ¶¶ 12-14, 18-19 (Doc. 300) (hereinafter "Hedges MSJ Dec."); *see also* Dec. of Anne Hedges in Support of Pls' Opp. to Defs.' Mot. to Partially Dismiss, ¶ 7 (hereinafter "Hedges MTD Dec."). Plaintiffs have presented substantial and compelling evidence that Defendants cannot simultaneously continue to affirmatively implement a fossil fuel-based energy policy and satisfy, among other constitutional obligations, their obligation to maintain and improve a clean and healthful environment for present and future generations of Montanans.[5]

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[4] *See, e.g.*, Compl. ¶ 3 (Defendants have created and implemented a long-standing fossil-fuel based state energy system that contributes to dangerous climate disruption in violation of Plaintiffs' constitutional rights); Ans. ¶ 3 (denying allegations); Compl. ¶ 105 (Defendants have taken affirmative actions to authorize, permit, and encourage fossil fuel extraction, transportation, and combustion resulting in dangerous levels of GHG emissions and contributing to climate destabilization); Ans. ¶ 105 (denying allegations); Compl. ¶ 108 (Defendants have developed and implemented a state energy policy in Montana for decades, which involves systemic authorization, permitting, encouragement, and facilitation of activities promoting fossil fuels and resulting in dangerous levels of GHG emissions, without regard to climate change impacts or the fundamental rights of Plaintiffs and future generations of Montanans); Ans. ¶ 108 (denying allegations).

[5] *See, e.g.*, Running & Whitlock Expert Report at 39 (Doc. 222 Ex. 1) ("It is our expert opinion, that the degradation to Montana's environment, and the harm to the Plaintiffs will get worse if

As Plaintiffs will demonstrate at trial, Defendants' long-standing and ongoing energy policy to pursue and perpetuate a fossil fuel-based energy system existed before the 2011 amendments to Montana's state energy policy law made the policy of fossil fuel promotion and utilization explicit, and continues now, even following the Legislature's repeal of Section 90-4-1001, MCA. Defendants admit Montana has had an energy policy for decades, even before it was codified in law. *See* Compl. ¶ 112; Ans. ¶ 112; *see also* Compl. ¶ 115 (Montana's state energy policy had implicitly promoted fossil fuels for decades and in 2011 was amended to explicitly promote fossil fuels); Hedges MSJ Dec. ¶¶ 12-14, 18-19, 24-25; Hedges MTD Dec. ¶ 7.[6]

Plaintiffs have proffered evidence, which Defendants now dispute, that the manner in which Defendants exercise their regulatory authority in systematically promoting fossil fuels as a manner of state energy policy—whether official *de jure* policy or implicit *de facto* policy—is unconstitutional. Compl. ¶¶ 108, 112; *see also*, Jacobson Expert Report at 2 (Doc. 222 Ex. 7) ("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."); Erickson Expert Report at 18 ("[A]verting the worst impacts of climate change will require changes to [Montana's] energy policy of promoting fossil fuels, as well as steep reductions in Montana's fossil fuel extraction, transport, and burning."). Importantly, Plaintiffs' experts have made it clear that the repeal of Section 90-4-1001, MCA, does not alter any of the conclusions in their expert reports, as those conclusions were premised upon Defendants' conduct causing GHG emissions, not the legal vehicle by which that conduct occurs.[7] In sum, there remains a justiciable controversy

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fossil fuels remain our primary energy source."); Running & Whitlock Rebuttal Expert Report at 9 (Doc. 240 Ex. A) ("Considering the current Earth energy imbalance and the IPCC's clear warning that additional CO_2 emissions will exacerbate the frequency and severity of climate impacts . . . . [e]very ton of fossil fuel that Montana extracts or consumes makes it harder to return to 350 ppm of CO_2 in the atmosphere. When you are already in a dangerous hole, you stop digging."); Erickson Expert Report at 18 (Doc. 222 Ex. 5) ("Put another way, averting the worst impacts of climate change will require changes to its energy policy of promoting fossil fuels, as well as steep reductions in Montana's fossil fuel extraction, transport, and burning.").

[6] *See also* Hedges Expert Report at 6-8 (Doc. 222 Ex. 4) (explaining the history surrounding the 1993 enactment of Mont. Code Ann. § 90-4-1001); *id.* at 13-22 (explaining context surrounding enactment of 2011 amendments to Mont. Code Ann. § 90-4-1001).

[7] *See, e.g.*, Running Dec. ¶¶ 9-11; Jacobson Dec. ¶¶ 7-9; Whitlock Dec. ¶ 9-11; Fagre Dec. ¶¶ 9-10; Stanford Dec. ¶¶ 6-8; Van Susteren Dec. ¶¶ 7-8; L. Byron Dec. ¶¶ 6-7; Hedges MTD Dec. ¶ 6; Erickson Dec. ¶¶ 7-9.

over Defendants' ongoing implementation of a state energy policy that continues to promote fossil fuels. Once this Court declares the scope of Plaintiffs' constitutional rights and the lawful bounds of Defendants' energy policy, that controversy would be resolved.

Separately, there is a justiciable controversy over Defendants' aggregate acts to perpetuate a fossil fuel-based energy system. In their Complaint, Plaintiffs provide examples of how Defendants utilize their authority to implement a fossil fuel-based energy system in a manner that injures Plaintiffs and infringes on their constitutional rights. *See, e.g.,* Compl. ¶ 120 (Defendants have persisted in, and continue to persist in, a systemic course of conduct affirmatively authorizing, permitting, and promoting fossil fuels and dangerous GHG emissions); *id.* ¶ 118 (describing Defendants' aggregate acts); *see also* Hedges Expert Report at 24-28. Plaintiffs' Complaint and evidence makes clear that the source of their injuries is Defendants' implementation of a fossil fuel-based energy system, by and through their aggregate acts authorizing and licensing the extraction, transport, and use of fossil fuels. *See, e.g.,* Compl. ¶ 234 ("youth are disproportionately vulnerable to the irreversible impacts of the climate crisis and the worst impacts of climate disruption caused by Defendants' aggregate acts"); *id.* ¶¶ 248-49 ("Defendants' affirmative aggregate and systemic actions" give rise to constitutional violations alleged). Similarly, Plaintiffs' Prayer for Relief ***separately*** asks the Court to adjudge and declare "the aggregate affirmative acts, policies, and conditions" that result in a fossil fuel-based energy system unconstitutional. Prayer for Relief 1.[8] *See also* Defs.' Mot. to Dismiss at 3 (Doc. 12) (recognizing that Plaintiffs asked Court to enjoin the state energy policy "***and*** the State's aggregate acts . . . ." (emphasis added)).

The Court has recognized that Plaintiffs challenge not just the constitutionality of the formerly codified state energy policy and MEPA Climate Change Exception (Prayers for Relief 2 and 3), but also Defendants' ongoing and systemic aggregate acts taken pursuant to and in furtherance of the formerly codified state energy policy, and MEPA Climate Change Exception. *See* MTD Order at 9, 11-12, 15-18 (Doc. 46); Second Rule 60(a) Motion Order at 3 (Doc. 217) ("Youth Plaintiffs' requests for relief 1-4 simply ask this court to determine whether the State Energy Policy . . . and the Climate Change Exception to the Montana Environmental Policy Act . . . ***with their appurtenant acts and policies*** . . . violate the Montana Constitution . . .") (emphasis added).

[8] Plaintiffs' Prayer for Relief 2 independently asks the Court to adjudge and declare the state energy policy, former Section 90-4-1001(1)(c)-(g), MCA, facially unconstitutional.

Notably, Defendants' new position that the repeal of Section 90-4-1001, MCA, should partially moot some of Plaintiffs' claims directly contradicts the position they originally took in seeking to have this case dismissed where they claimed their aggregate acts in implementing a fossil fuel-based energy system were not tied to the formerly codified state energy policy, which they argued "is largely symbolic and aspirational." Defs.' Mot. to Dismiss at 1, 10.[9] Now, Defendants completely change course and contend the repeal of Section 90-4-1001, MCA, somehow vitiates the actual controversies in this case. Defs.' Partial MTD Br. at 3. Whether the state energy policy, codified or not, is a cause of Plaintiffs' injuries is a question of fact Plaintiffs will prove up at trial. Similarly whether Defendants' ongoing aggregate acts pursuant to that policy are a substantial factor in causing their climate injuries, is for proof at trial and remains a live controversy.

In sum, a live, justiciable controversy exists here—youth Plaintiffs and Defendants have existing and genuine adverse rights and interests with respect both to Defendants' state energy policy (in either *de facto* or *de jure* form) and, separately, to Defendants' historic and ongoing aggregate acts to implement a fossil fuel-based energy system. Whether Defendants' state energy policy and historic and ongoing aggregate acts to implement a fossil fuel-based energy system comport with Montana's Constitution is a controversy on which the judgment of this Court can effectively operate. This Court's determination as to whether Defendants' state energy policy and historic and ongoing aggregate acts to implement a fossil fuel-based energy system comport with Montana's Constitution will have the effect of a final judgment in law or decree in equity concerning the rights, status, or legal relationships of one or more of the real parties in interest. *See Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997) (citing *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284-85 (1981)).

B. There Remain Justiciable Controversies Regarding Plaintiffs' Claims That Defendants' Conduct Violates the Public Trust Doctrine, Their Right to a Stable Climate System, and the Constitutionality of the Climate Change Exception to MEPA

Plaintiffs' claim that Defendants' conduct violates their right to use and enjoy Montana's public trust resources remains justiciable. Montana's Public Trust Doctrine is a common law doctrine dating back to statehood and is expressly incorporated into the Constitution. Mont. Const.

[9] Defendants made similar arguments in their Motion for Summary Judgment. *See* Defs.' MSJ Br. at 7 (Doc. 290).

art. IX, §§ 1, 3; *Mont. Coal. for Stream Access, Inc. v. Curran*, 210 Mont. 38, 52, 682 P.2d 163, 170 (1984). Pursuant to the Constitution and Public Trust Doctrine, Defendants have an affirmative duty to protect, preserve, and prevent substantial impairment to public trust resources for the benefit of all Montanans, including Plaintiffs and future generations. *Iverson v. Rehal*, 132 Mont. 295, 300, 317 P.2d 869, 872 (1957); Gregory Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 Mont. L. Rev. 123, 136 (2012); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); Ruling Re Motion to Dismiss at 3, *Navahine F. v. Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. Apr. 6, 2023) ("[T]he law requires that as trustee, [Hawai'i] must take steps to maintain their assets to keep them from falling into disrepair.") (attached as Exhibit 1).

Here, Plaintiffs allege that Montana's public trust resources include essential natural resources, including the state's atmosphere, waters, fish and wildlife, and public lands. Compl. ¶ 245. Plaintiffs have presented substantial evidence that Defendants are allowing dangerous levels of GHG emissions that substantially impairs and interferes with Plaintiffs' right to use and enjoy Montana's public trust resources. *See, e.g.,* Stanford Expert Report at 10-15 (Doc. 222 Ex. 2) (describing impairment to Montana's freshwater ecosystems and fisheries as a result of anthropogenic climate change); Running & Whitlock Expert Report at 8-10, 28-39 (describing degradation of Montana's waters, forests, wildlife, atmosphere, and public lands). Because Defendants have an ***affirmative duty*** to protect Montana's public trust resources, the resolution of Plaintiffs' public trust claims remains justiciable so long as Montana's public trust resources are substantially impaired in a manner that infringes on Plaintiffs' rights—which is the case here. *Id.* Whether Defendants' actions resulting in GHG emissions infringes on Plaintiffs' public trust rights is a question of fact that should be resolved at trial, as other courts have found.[10] *See, e.g., Navahine F.*, at 2 (rejecting state's motion to dismiss, and finding that whether Hawai'i's transportation system is operated in a way that contributes to greenhouse gas emissions so as to violate the public trust doctrine and right to a clean and healthful environment, should be decided at trial).

Separately, Plaintiffs' request that this Court adjudge and declare Plaintiffs' fundamental constitutional right to a clean and healthful environment encompasses a stable climate system that sustains their lives and liberties, and that Defendants are violating said right, also remains

[10] Notably, Defendants' Motion for Summary Judgment did not seek dismissal of Plaintiffs' public trust claims. Doc. 299 at 20.

justiciable. Defendants admit that there is "uncertainty and controversy" over whether the right to a clean and healthful environment includes a stable climate system and the characteristics of a stable climate system, or climate instability. Defs.' MSJ at 11 (Doc. 290). Those controversies can be resolved at trial, with the benefit of a fully developed factual record, which will provide evidence on what constitutes a stable climate system and climate stability (or instability). *See, e.g.,* Running & Whitlock Expert Report at 9 (describing that a stable climate requires Earth's Energy Imbalance to be reduced to approximately zero through reductions in atmospheric carbon dioxide concentrations); *see also In re Hawai'i Elec. Light Co., Inc.*, No. SCOT-22-0000418, 2023 WL 2471890, at *6 (Haw. Mar. 13, 2023) ("[R]ight to a clean and healthful environment . . . encompasses the right to a life-sustaining climate system."). The resolution of this controversy would be meaningful because it would limit Montana's ability to engage in conduct that exacerbates climate instability. *Id.* at *13 (Wilson, J., concurring) ("The remedy for violation of the right to a stable climate capable of supporting human life is discreet: to reduce greenhouse gas emissions."); *id.* at *10-11 ("Limiting atmospheric CO_2 levels to below 350 ppm is essential to . . . restore a viable climate system on which the life, liberty, and property of all people depend." Last time CO_2 levels were at 419 ppm, the current level, "sea levels were 78 feet higher than today." (internal quotation marks and citations omitted)).

Finally, Plaintiffs' request that this Court declare unconstitutional the Climate Change Exception to MEPA remains justiciable and Defendants do not argue that this claim is moot.[11] There remain numerous factual disputes implicated in Plaintiffs' claims regarding the constitutionality of Section 75-1-201(2)(a), MCA, which must be resolved at trial. *See* Doc. 299 at 16-19.

C. Plaintiffs' Injuries Are Worsening as a Results of Defendants' Ongoing Conduct to Permit Fossil Fuel Activities

In their motion Defendants do not contend the repeal of Section 90-4-1001, MCA, will alleviate any of Plaintiffs' injuries. Plaintiffs have proffered ample evidence of their ongoing and worsening injuries resulting from Defendants' conduct, allegations which Defendants dispute, and which therefore must be resolved at trial. Compl. ¶¶ 14-81; Doc. 299 at 1-3 (detailing Plaintiffs' injuries as set forth in affidavits submitted with Plaintiffs' Response Brief); Dec. of Roger Sullivan

[11] For reasons explained in Plaintiffs' Response Brief in Opposition to Defendants' Motion to Stay Proceedings (Apr. 12, 2023), Plaintiffs' challenge to MEPA should not be stayed.

in Support of Pls.' Opp. to Defs.' MSJ ¶ 23 (Doc. 315) (detailing injury facts); *see also* Docs. 301-314 (Plaintiffs' Declarations).

Plaintiffs' injuries will persist and worsen after the repeal of Section 90-4-1001, MCA, so long as Defendants continue to implement a fossil fuel-based energy system that causes dangerous levels of GHG emissions.[12] This is confirmed by Plaintiffs' experts and the newest report from the Intergovernmental Panel on Climate Change ("IPCC").[13] The findings in the Synthesis Report of the IPCC's Sixth Assessment Report bolster and underscore the key conclusions and opinions stated in Plaintiffs' expert and rebuttal reports—namely, that climate change is unequivocally occurring as a result of human activity;[14] that continued emissions of GHGs into the atmosphere as a result of fossil fuel extraction and combustion will drive further planetary warming;[15] that the current warming observed in the climate system poses serious near-term hazards and risks to human life and well-being;[16] that further warming will only amplify the dangerous climate impacts already being experienced across the globe;[17] and that there is a quickly-closing window of

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[12] *See, e.g.*, 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."); 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[.]"); Running & Whitlock Expert Report at 9 ("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.'").

[13] Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in* Synthesis Report of the IPCC Sixth Assessment Report (AR6) (2023), available at https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf.

[14] *See* Running Dec. ¶ 12; Whitlock Dec. ¶ 12; Fagre Dec. ¶ 11.

[15] *See* Running Dec. ¶¶ 13, 15; Whitlock Dec. ¶ 12.

[16] *See* Running Dec. ¶ 13; Stanford Dec. ¶ 9; Van Susteren Dec. ¶ 9.

[17] *See* Running Dec. ¶ 15 ("With respect to our conclusions that every ton of GHG emissions makes the climate crisis worse and that there is a need to urgently and drastically reduce GHG emissions, the IPCC agreed and said: 'Continued emissions will further affect all major climate system components, and many changes will be irreversible on centennial to millennial time scales and become larger with increasing global warming. Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and wellbeing of current and future generations. (*high confidence*).'"); Whitlock Dec. ¶ 12 ("Risks and projected adverse impacts and related losses and damages from climate change will escalate with every increment of global warming (*very high confidence*).") (internal quotation marks omitted); *id.* ¶ 13; Fagre Dec. ¶ 11.

opportunity to urgently and drastically reduce human GHG emissions in order to avert locking in warming and associated climate impacts that are irreversible on timescales relevant to humans.[18] The IPCC Sixth Assessment Report also underscores there are available tools to mitigate and reduce future climate change-related losses and damages—primarily the widescale deployment of renewable energy systems and the phase-out of fossil fuels.[19]

This new information from the IPCC only serves to confirm the voluminous evidence that Plaintiffs have proffered, and which Defendants largely contest, *see* Defs.' MSJ Br. at 4, demonstrating that Plaintiffs are being injured in concrete and particularized ways unique to them and that these injuries will only worsen with each increment of additional planetary warming resulting from continued GHG emissions due to Defendants' conduct. *See* Doc. 299 at 2-3. The repeal of Section 90-4-1001, MCA, will not alleviate Plaintiffs' injuries, which are justiciable.

D. Plaintiffs' Injuries Remain Traceable to Defendants' Conduct

The second motion to dismiss does not assert Defendants have, following the repeal of Section 90-4-1001, MCA, altered or ceased their allegedly unconstitutional conduct, which Plaintiffs have identified as a substantial factor in causing their injuries. Compl. ¶¶ 120-121, 142. Nor do Defendants argue their historic and ongoing actions to promote fossil fuels that cause dangerous GHG emissions will change in any way. On the contrary, the record demonstrates continuous and ongoing actions by Defendants to permit, authorize, and perpetuate fossil fuel extraction and use—actions which continue to harm Plaintiffs. Erickson Dec. ¶ 7; Hedges MSJ Dec. ¶ 25 (the State of Montana will continue to pursue its long-standing fossil fuel-based energy policy of approving every permit for fossil fuel exploration, extraction, burning, and transportation even without policy goal statements in Section 90-4-1001, MCA); Hedges MTD Dec. ¶ 8. Defendants continue to take actions to permit fossil fuel activities in the face of overwhelming evidence that Plaintiffs are experiencing concrete and particularized current injuries along with even worse threatened future harm, *see supra* Section I.C., and that fossil fuel extraction and use

[18] *See* Running Dec. ¶ 14 ("There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).") (internal quotation marks omitted); *id.* ¶ 17; Jacobson Dec. ¶ 10 ("Delayed mitigation action will further increase global warming and losses and damages will rise and additional human and natural systems will reach adaptation limits (*high confidence*).") (internal quotation marks omitted).
[19] *See* Jacobson Dec. ¶ 10; Stanford Dec. ¶ 9; L. Byron Dec. ¶ 8.

must be significantly and immediately curtailed to prevent serious harm to the climate system and future generations.[20] The evidence further demonstrates the amount of GHG emissions resulting from the fossil fuel activities for which Montana is responsible is not *de minimis*—another material fact which Defendants dispute and needs resolution at trial. Compl. ¶¶ 139-142; Doc. 299 at 4. Notably, other courts have rejected the argument that a state's purportedly *de minimis* GHG emissions absolve it of its constitutional obligations with respect to addressing and mitigating climate change, including obligations to preserve and protect public trust resources. *See, e.g., Navahine F.*, at 3-4 (denying state's motion to dismiss and stating Hawai'i cannot "turn a blind eye to imminent damage" caused by a fossil-fuel based transportation system simply "because GHG emissions are just 'too big a problem'" (citation omitted). Trial is set to begin in fall 2023.); *In re Hawai'i Elec. Light Co., Inc.*, at *2, 6 (GHG emissions from a single bioenergy plant "would produce massive carbon emissions" and violate right to a clean and healthful environment).

As previously noted, Plaintiffs' experts confirmed that their opinions, as set forth in their expert and/or rebuttal reports, remain unchanged following the repeal of Section 90-4-1001, MCA—as their opinions are grounded in Montana's systemic and ongoing course of conduct to promote the utilization and development of fossil fuels.[21] Ultimately, and notwithstanding the repeal of Section 90-4-1001, MCA, whether Defendants' ongoing state energy policy and aggregate acts result in dangerous levels of GHG emissions, that cause and contribute to Plaintiffs' injuries, remain disputed questions of fact that must be resolved at trial. Doc. 299 at 4-5.

E. A Favorable Ruling Declaring Defendants' Conduct Unconstitutional, and Enjoining It from Continuing, Remains Effective Relief

Defendants' contention that "no judgment from this Court would affect the controversy surrounding the constitutionality of the State Energy Policy Goal Statements and Plaintiffs' related claims because that statute no longer exists," Defs.' Partial MTD Br. at 3-4, ignores the fact that Plaintiffs' claims and prayers for relief premised on Defendants' ongoing energy policy and aggregate acts exist independently of Plaintiffs' claims related to Section 90-4-1001, MCA.[22] A

[20] *See, e.g.*, Running Dec. ¶¶ 14-15; Whitlock Dec. ¶¶ 12-13; Jacobson Dec. ¶ 10.
[21] *See* Running Dec. ¶¶ 9-11; Jacobson Dec. ¶¶ 7-9; Whitlock Dec. ¶ 9-11; Fagre Dec. ¶¶ 9-10; Stanford Dec. ¶¶ 6-8; Van Susteren Dec. ¶¶ 7-8; L. Byron Dec. ¶¶ 6-7; Hedges MTD Dec. ¶ 6; Erickson Dec. ¶¶ 7-9.
[22] Each of Plaintiffs' Claims (I through IV) and Prayers for Relief (1) and (5) are explicitly premised upon and encompass Defendants' aggregate acts. *See, e.g.*, Compl. ¶¶ 216 (Count I); 221, 223 (Count II); 236 (Count III); 248-50 (Count IV).

court order declaring Defendants' *de facto* and *de jure* state energy policy and historic and continuing implementation of a fossil fuel-based energy system unconstitutional would redress Plaintiffs' injuries. At trial, Plaintiffs will proffer evidence of Defendants' ongoing unconstitutional conduct to promote and perpetuate a fossil fuel-based energy system in Montana. It is this conduct that the Court can adjudge and declare unconstitutional and, if necessary, enjoin. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶¶ 20, 31, 326 Mont. 304, 109 P.3d 257 (declaring Montana's "school funding system" unconstitutional). A declaration that Defendants' *de facto* state energy policy and aggregate acts taken to implement a fossil fuel-based energy system, as sought in Prayer for Relief 1, are unconstitutional would alleviate Plaintiffs' injuries because such a declaration would tell Defendants that, at the very least, their current course of conduct in, for example, *never denying a permit or license for fossil fuel activities,* is unconstitutional and must be changed. *See* Hedges Expert Report at 28; Hedges MSJ Dec., ¶ 26; *see also* Thomas 30(b)(6) Dep. 110:7-13 (DNRC admits that, since 2003, it has never denied a permit for a coal lease).

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) (future government conduct must be consistent with court ruling declaring conduct unconstitutional); *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). Indeed, Defendants' witnesses have acknowledged that their agencies are obligated to follow court rulings. *See, e.g.*, Rosquist 30(b)(6) Dep. 123:10-21; *see also* Dorrington 30(b)(6) Dep. 27:14-23 (admitting DEQ has a duty to comply with the law); *id.* 38:3-12 (if Climate Change Exception to MEPA were declared unconstitutional, DEQ would follow the law). A determinative ruling from this Court as to the unconstitutionality of Defendants' longstanding and ongoing course of conduct to perpetuate a fossil fuel-based energy system would change the legal status of such conduct and would steer Defendants' future conduct into constitutional compliance. *See, e.g.*, 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 MSJ Dec. ¶¶ 25-28. Of course,

the Court has significant discretion to craft a remedy commensurate with the scope of the constitutional violations proven at trial pursuant to the UDJA Section 27-8-101, MCA *et seq.*, Section 27-19-101, MCA *et seq.*, as well as the general equitable powers of this Court. *See also Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 86, 402 Mont. 168, 477 P.3d 288; Prayer for Relief 11 (seeking "[s]uch further or alternative relief as the Court deems just and equitable"). In short, the Court can still grant Plaintiffs effective relief to alleviate their injuries, as Plaintiffs will prove at trial.

II. PLAINTIFFS' CHALLENGE TO MONTANA'S STATE ENERGY POLICY IS NOT MOOT

As discussed above, Plaintiffs' claims for relief not involving Section 90-4-1001, MCA, must proceed to trial. However, even Plaintiffs' challenge to Section 90-4-1001, MCA, as unconstitutional is not moot because two exceptions to the mootness doctrine apply here: (1) voluntary cessation and (2) public interest. *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 14, 411 Mont. 201, 523 P.3d 519 (citing *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 15, 408 Mont. 187, 507 P.3d 169).

A. Defendants Have Voluntarily Repealed Their Unconstitutional Statute to Avoid Judgment on the Merits

The voluntary cessation exception to the mootness doctrine applies in circumstances where the defendant's challenged conduct "is of indefinite duration, but is voluntarily terminated by the defendant prior to completion of appellate [or trial court] review . . . ." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 34, 333 Mont. 331, 142 P.3d 864. This exception is designed to "address[] situations where ***a defendant attempts to moot a plaintiff's meritorious claims in order to avoid a judgment on the merits.***" *In re Big Foot Dumpsters & Containers, LLC*, ¶ 15 (citing *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 9, 405 Mont. 259, 494 P.3d 892) (emphasis added). The voluntary cessation exception allows Montana's courts to "rule on non-extant controversies in order to provide guidance concerning the legality of expected future conduct." *Montanans Against Assisted Suicide v. Bd. of Med. Examiners, Mont. Dep't of Lab. & Indus.*, 2015 MT 112, ¶ 15, 379 Mont. 11, 347 P.3d 1244 (quoting *Havre Daily News*, ¶ 38).

Importantly, a defendant's voluntary cessation of the challenged conduct cannot moot a case unless it is "***absolutely clear*** that the allegedly wrongful behavior ***could not reasonably be expected to recur***." *Wilkie*, ¶ 10 (emphasis added); *see also Johnson v. City of Grants Pass*, 50 F.4th 787, 799 (9th Cir. 2022) ("It is well settled that a 'defendant's voluntary cessation of a

challenged practice does not deprive a federal court of its power to determine the legality of the practice.'") (citation omitted). Given the "concern that a defendant may utilize voluntary cessation to manipulate the litigation process," the "***heavy burden*** of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again ***lies with the party asserting mootness***." *Havre Daily News*, ¶ 34 (quotation omitted, emphasis added). The voluntary cessation exception to mootness squarely applies here.

First, Montana's challenged state energy policy, codified in 2011 in Section 90-4-1001, MCA, and its implementation through aggregate acts, have been ongoing for an "indefinite duration." Defendants admit Montana has had a state energy policy for decades, even before it was codified in law. *See* Compl. ¶ 112; Ans. ¶ 112; *see also* Hedges Expert Report at 4-8, 21-22. Plaintiffs' Complaint sets forth detailed allegations, and the evidence of record demonstrates, that for decades, Defendants have exercised their permitting, licensing, and other relevant regulatory authority to implement and perpetuate a fossil fuel-based energy system in Montana. Compl. ¶¶ 112, 118-120; Hedges Expert Report at 4-8 (development of state energy policy), 19-22 (2011 amendments to state energy policy and MEPA), 29 ("Defendants' long-standing and ongoing practice of approving all permits for fossil fuel projects and is reflected in the current state energy policy . . . ."); Hedges MSJ Dec., ¶¶ 24-28. Section 90-4-1001, MCA was voluntarily repealed by Defendants *less than three months before trial is set to begin,* for the purpose of seeking to avoid judgment on the merits as to its constitutionality. Hedges MTD Dec. ¶ 9 ("[T]he reason Defendants repealed MCA § 90-4-1001 this legislative session was to try and undermine this case so that Defendants can continue their conduct without any constitutional oversight.").

Second, Defendants, as the party asserting mootness, have not, and cannot, meet their "heavy burden" to demonstrate that "the challenged conduct cannot reasonably be expected to start up again." *Havre Daily News*, ¶ 34; *Johnson*, 50 F.4th at 799. It is not "absolutely clear that the allegedly wrongful behavior," Defendants' enacting and implementing an unconstitutional state energy policy, is not ongoing and "could not reasonably be expected to recur." *Havre Daily News*, ¶ 38; *Johnson*, 50 F.4th at 799. Defendants do not even attempt to hide the fact that the challenged law could easily be adopted again in the next legislative session. As Representative Gunderson, the sponsor of HB 170, stated at a Senate hearing, "if this legislature and the next legislature wants to put that [state energy policy] back in the Title 90 then so be it." *See* Hedges MSJ Dec. ¶ 16. Furthermore, Defendants have not even bothered to attempt to claim, for example, that following

HB 170's repeal of the codified state energy policy, Montana's continuing "all-of-the-above" energy policy will not simply continue the *status quo* of Defendants' condoning unabated fossil fuel extraction and use. *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (case not moot because government did not argue the challenged plan would not be reimposed if case were dismissed). Here, the evidence shows Defendants are continuing their long-standing practice of permitting fossil fuel activities. Erickson Dec. ¶ 7; Hedges MTD Dec. ¶¶ 7-8.

Notwithstanding the repeal of Section 90-4-1001, MCA, Defendants fail to establish that they no longer have a state energy policy, or that they have ceased systematically authorizing, permitting, encouraging, and facilitating activities promoting fossil fuels and resulting in dangerous levels of GHG emissions. *See* Doc. 299 at 5 ("[D]isputes 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."). Nowhere in Defendants' motion do they suggest the repeal of Section 90-4-1001, MCA, will alter their conduct that results in Montana's fossil fuel-based energy system.

To the contrary, Governor Gianforte's Natural Resources Policy Advisor, Michael Freeman, has frankly admitted that repealing the explicit state energy policy contained in Section 90-4-1001, MCA, "does not conflict with the [Governor's] energy policy and in fact it helps clarify Montana's energy policy." Hedges MSJ Dec. ¶ 12. As Mr. Freeman explained, "we have a very comprehensive energy policy in the state of Montana" and it is an "all-of-the-above" energy policy. *Id.* at ¶¶ 12, 14, 18-19. As in *Johnson v. City of Grants Pass*, the record here demonstrates a ***continuous and ongoing*** energy policy by Defendants to permit, authorize, and perpetuate fossil fuel extraction and use. Erickson Dec. ¶ 7; *see Maldonado*, 61 F.4th at 1007 ("Indeed, the case is no more moot than *Brown v. Board of Education* would have been if, in the wake of the Supreme Court's 1954 decision, the Topeka Board of Education had issued a memorandum directing its schools to desegregate and record evidence demonstrated that Black children were still attending segregated schools."). Here, the record evidence compellingly demonstrates that Montana children are still suffering from the Defendants' continuous and ongoing energy policy that is causing the harms that are copiously documented in the record before the Court.

In sum, Defendants failed to meet their heavy burden to show the challenged conduct has ceased and will not start up again. Accordingly, Plaintiffs' claims challenging the constitutionality of Section 90-4-1001, MCA are not moot and remain justiciable. *Johnson,* 50 F.4th at 798-99

("[V]oluntary cessation of challenged practices rarely suffices to moot a case and, in any event, there is evidence the challenged practices have continued . . . .").

B. The Public Interest Exception Applies Given the Significant Public Constitutional Issues in this Case

The public interest exception to the mootness doctrine applies where the issues are constitutional and involve broad public concerns. *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. In such instances, the court reserves the power to examine these issues and avoid future litigation on a point of law. *Id.* Specifically, "the public interest exception applies where: (1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties." *Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867; *In re Big Foot Dumpsters & Containers*, ¶ 18. Where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance, so the public interest exception to mootness applies. *Ramon*, ¶ 22. Here, the public interest exception to the mootness doctrine applies to Plaintiffs' claims related to the formerly codified state energy policy. As discussed below, this exception applies for several independent reasons.

First, the issues presented by Plaintiffs' constitutional challenge are of public importance because they implicate fundamental constitutional rights, including the right to a clean and healthful environment (Mont. Const. art. II, § 3, art. IX § 1); the right to seek safety, health, and happiness (Mont. Const. art. II, § 3, § 15, § 17, art. IX, § 1); the right of individual dignity and equal protection (Mont. Const. art. II, § 4, § 15); and the right to constitutionally protected public trust resources (Mont. Const. art. IX, § 1, § 3). *See Ramon*, ¶¶ 21-22; *see also Missoula City-Cnty. Air Pollution Control Bd. v. Bd. of Env't Review*, 282 Mont. 255, 263, 937 P.2d 463, 468 (1997) (air quality is "indubitably" an issue of public importance). Defendants agree "this case involves constitutional issues of statewide importance." Defs.' Pet. for Writ of Supervisory Control (June 10, 2022). This alone satisfies the public interest exception to mootness.

Second, as discussed above, the constitutional issues raised by Plaintiffs with respect to Defendants' formerly explicit, and historically and present *de facto*, state energy policy, are likely, if not certain, to recur. Compl. ¶ 120; Hedges MTD Dec. ¶ 8 ("I believe Defendants will continue their longstanding practice to permit and approve fossil fuels projects, including power plants, oil and gas pipelines, coal mines, and projects long into the future unless Montana's Constitution is

interpreted by the courts to constrain their authority in doing so."). So, while the 2023 Legislature has repealed the statutorily codified state energy policy in Section 90-4-1001, MCA, Montana still has a state energy policy and Defendants' longstanding practice of exercising their discretion to systematically approve *every* fossil fuel-related permit that comes before them shows no sign of abating. *Walker*, ¶ 43 ("[A]s long as the current [] policies are in place, the problems will repeat themselves."). Additionally, in the future, the Legislature could simply reenact the former Section 90-4-1001, MCA, as HB 170's sponsor, Representative Gunderson, plainly admitted. *See* Hedges MSJ Dec. ¶ 16.

Finally, an answer from this Court to the question of whether Defendants' codified state energy policy, as stated explicitly in Section 90-4-1001, MCA, violates the youth Plaintiffs' fundamental rights under Montana's Constitution would "guide public officers in the performance of their duties" and would "provid[e] authoritative guidance on an unsettled issue." *Ramon*, ¶¶ 21, 24. This is especially the case where, as here, "there is no Montana Supreme Court ruling addressing this issue." *Ramon*, ¶ 24. A resolution of Plaintiffs' claims "is also in the interest of Montana taxpayers." *Id.* Such a ruling would resolve live controversies between the parties concerning the scope of Plaintiffs' constitutional rights and the constitutionality of Defendants' state energy policy. Accordingly, the public interest exception applies and Plaintiffs' challenge to Montana's state energy policy is not moot and should be resolved at trial.

CONCLUSION

Defendants repealed Section 90-4-1001, MCA, in an effort to avoid being held accountable for their conduct and avoid a trial over their ongoing state energy policy and conduct that causes and contributes to the climate crisis and injures youth Plaintiffs. This Court need not accept Defendants' maneuvers to avoid trial, all while Defendants' unconstitutional conduct continues, and urgent justiciable controversies remain. Defendants do not argue, or present any evidence, that their long-standing and ongoing conduct to perpetuate a fossil fuel energy system in Montana will change following the repeal of Section 90-4-1001, MCA. Nor do Defendants argue that Plaintiffs' injuries will be alleviated. This Court can and should still grant effective, meaningful equitable relief that will redress and alleviate Plaintiffs' injuries. Each of Plaintiffs' four Counts and Prayers for Relief 1, 2, 3, 4, 5, and 11 remain alive and in need of resolution at trial.

Moreover, even assuming *arguendo* this Court were to find the repeal of Section 90-4-1001, MCA, mooted Plaintiffs' challenge to the codified state energy policy, two clear exceptions to the

mootness doctrine apply to the facts of this case. The challenged conduct has not ceased and the law could easily be readopted in the future (as Defendants admit). Additionally, the case raises significant constitutional issues (which Defendants also admit).

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion be DENIED and trial commence, as scheduled, on June 12.

DATED this 14th day of April, 2023.

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EXHIBIT 1
TO PLAINTIFFS' RESPONSE BRIEF
IN OPPOSITION TO DEFENDANTS' MOTION
TO PARTIALLY DISMISS FOR MOOTNESS

RULING

RE: First Circuit Court, State of Hawai'i

RE: N.F., a Minor v. Dept. of Transportation, *et al.*,
Civ. No. 1CCV-22-0000631 (JPC)

RE: Motion to Dismiss (motion filed 8/22/22; Dkt. 78)

- - - - - - - - - - - - -

1. The above motion was heard on 1/26/23. The court took the motion under advisement, and now issues its ruling. The motion is DENIED.

2. This is a Rule 12(b)(6) motion for failure to state a claim.

A. Such motions are viewed with disfavor and rarely granted. Marsland v. Pang, 5 Haw. App. 463, 474 (1985).

B. Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed true and must be viewed in the light most favorable to Plaintiff for purposes of the motion. Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawai'i 251, 266 (2007); Bank of Am., N.A. v. Reyes-Toledo, 143 Hawai'i 249, 257 (2018). However, the court is not required to accept conclusory allegations.

C. Hawai'i is a notice pleading jurisdiction. The federal "plausibility" pleading standard (*Twombly/Iqbal*) was expressly rejected by our Hawai'i Supreme Court in Bank of America v. Reyes-Toledo, 143 Hawai'i 249, 263 (2018). If the complaint is too general or too vague, a defendant may request a more definite statement per Rule 12(e). *Id.*, 143 Haw. at 259-260.

D. In deciding a 12(b)(6) motion, the court should dismiss only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim

that would entitle him or her to relief." *Kealoha v. Machado*, 131 Hawai'i 62, 74 (2013). This includes under any alternative theory. *Bank of Am., N.A. v. Reyes-Toledo*, 143 Hawai'i 249, 257 (2018); *In re Estate of Rogers*, 103 Haw 275, 280-281 (2003); *Malabe v. AOAO Exec. Ctr.*, 147 Hawai'i 330, 338 (2020).

3. First Claim.

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

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

B. Generally, Plaintiffs claim that Defendants establish, maintain, and operate the state's transportation system in a way that contributes to greenhouse gas emissions and continued reliance on fossil fuels. This allegedly results in harms to "public trust resources, including the climate system and all other natural resources affected by climate change." (Paragraph 180 of the Complaint.) Paragraphs 158-178 of the Complaint include a lengthy list of alleged failures. If proved -- as the court is require to assume for this motion -- Defendants are failing to preserve public trust resources by not doing enough, fast enough, to help reduce climate change by reducing GHG emissions. Paragraphs 181-183 allege that the harm of greenhouse gases ("GHG") requires "swift decarbonization" of the state's transportation system, but that Defendants have not developed any plans addressing these harms or alternatives. Paragraph 182 alleges that Defendants continue to establish, maintain, and operate traditional infrastructure that preserves and promotes fossil fuels. Paragraph 183 asserts that Defendants have not planned, funded, or implemented necessary alternatives for reducing GHG emissions, including vehicle

miles traveled, electrifying facilities, increasing alternative fuels, and expanding alternative options such as bikeways, public transit, and pedestrian pathways.

C. As a threshold issue, Defendants argue the public trust doctrine does not apply to the climate, because climate is not air, water, land, minerals, energy resource or some other "localized" natural resource. The court need not decide whether "the climate" is a trust resource or "property," because Plaintiffs argue that deteriorating climate change *impacts* our natural resources. Defendants concede this, saying "to be sure, climate change impacts Hawai'i's public trust resources" (motion at p. 13). But then Defendants argue that Plaintiffs' claim "strains the public trust doctrine too far" because HDOT/the State only controls a "small portion" of the globe's GHG emissions and "cannot control climate change's local impacts." The court understands this argument, but first, it is factual, which is generally fatal on a 12b6 motion. Second, and more importantly, reduced to its essence, Defendants' argument is that it is not required to do anything because the problem is just too big and the State's efforts will have no impact. Putting aside that negative thinking will not solve the problem, the law requires that as trustee, the State/HDOT *must* take steps to maintain their assets to keep them from falling into disrepair. It is "elementary trust law' that trust property not be permitted to "fall into ruin on [the trustee's] watch." *Ching v Case*, 145 Haw at 170-171. "To hold that the State does not have an independent trust obligation to reasonably monitor the trust property would be counter to our precedents and would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." *Id.*, *Ching*, 145 Haw at 170-171, citing *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 (2006). To hold that the State has no trust obligation to reasonably monitor and maintain our natural resources by reducing our GHG emissions and establishing and planning alternatives to a fossil-fuel heavy transportation system --

all because GHG emissions are just "too big a problem" -- "would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." *Id.*

D. Once past the threshold objection that the public trust doctrine does not require the State to do anything about climate change, the State argues that 1) Plaintiffs cannot point to a specific "statutory function" that HDOT failed to perform, and 2) statutory authorities "cabin" [contain or limit] Defendant's public trust obligations." In the strict procedural context of a 12b6 motion, the court disagrees, in part because this motion can only be granted if it is beyond doubt that Plaintiffs can prove no set of facts in support of their claim. More importantly, the court disagrees that statutory limits or requirements limit the public trust doctrine in a way that requires dismissal of this case. Again, *Ching v Case* is clear:

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

Ching v. Case, 145 Haw at 178 (2019). The motion to dismiss never cites *Ching*.[1]

[1] The court respectfully recommends that when a recent case from our Supreme Court addresses a constitutional claim at length, and a party moves to dismiss such a claim, movant should discuss that case in their motion rather than wait until their Reply brief. The Reply brief cites *Ching* seventeen times – when Plaintiffs have no opportunity to respond. Movant may offer "but we did not have to raise *Ching* until the memo in opp did." The court disagrees. *Ching* is clearly relevant to issues in the motion. Simple fairness also requires counsel to raise it as part of their initial filing. Under the rules, movants already have the advantage of the "last word" with the Reply.

4. Second Claim: Plaintiffs claim Defendants breach their public trust duties under Article XI, Section 9 of the Hawai'i Constitution. It states:

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

A. Our Supreme Court has described important particulars for Section 9 that apply to this case:

> We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 ***by providing that express consideration be given to reduction of greenhouse gas emissions*** in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.
>
> We note that this right is not a freestanding interest in general aesthetic and environmental values. See Sandy Beach Def. Fund, 70 Haw. at 376–77, 773 P.2d at 260–61. The **17 *265 challengers in Sandy Beach Defense Fund did not identify any source granting them a substantive legal right to enforcement of environmental laws. Rather, the asserted "property interests" were unilateral expectations of aesthetic value, including claims that a person who lived in close proximity to a proposed development would lose her view of the ocean and decrease the value of her property. Id. at 367, 773 P.2d at 255. In contrast, Sierra Club's right to a clean and healthful environment is provided for in article XI, section 9 of the Hawai'i Constitution and defined by HRS Chapter 269. It is not a unilateral expectation on the part of Sierra Club, but rather a right guaranteed by the Constitution and statutes of this state." (emphasis added).

In re Application of Maui Elec. Co., Ltd., 141 Haw. 249, 264–65 (2017).

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

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

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

(*See*, Complaint, paragraph 187.)

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

C. Taking the last point first: especially after *In re Application of Maui Elec. Co., Ltd.*, the court concludes that similar to HRS Chapter 269 and the PUC in *Maui Electric*, the above-cited laws dealing with planning for and actually reducing GHG emissions, decarbonizing the transportation sector, reducing and eliminating fossil fuels in ground transportation, and promoting alternative fuels and overall energy efficiency, are laws relating to environmental quality. More specifically:

HRS 225P-5, -7:	Hawaii Climate Change Mitigation and Adaptation Initiative; Zero Emissions Target; Climate Change Mitigation. The title alone makes it clear it is a law relating to environmental quality. *See also, Hawaii Electric Light Co.*, Hawai'i Supreme Court, 3/13/23, at. p. 14.

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

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

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

court gives the Legislature a lot more credit than that. The court concludes the Legislature is requiring timely planning and action, not meaningless or purely aspirational goals. **HRS §225P-1**, titled Purpose, states:

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

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

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

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

> (a) It shall be the goal of the State to reduce emissions that cause climate change and build energy efficiencies across all sectors, including decarbonizing the transportation sector.

> (b) State agencies shall manage their fleets to achieve the clean ground transportation goals defined in section 196-9(c)(10) and decarbonization goals established pursuant to chapter 225P.

The Complaint is replete with additional allegations that Defendants' actions do not comply with the Legislature's statutory directives. See paragraphs 125-178.

E. Current and concrete harms are alleged. Plaintiffs allege -- and the court is required to accept as true for purposes of this motion -- that Defendants' actions and inactions to date *already* cause *actual* harms. See paragraph 140 of the Complaint. The Complaint alleges in multiple paragraphs that based on the lack of action to date, harms are already being baked in. Transportation emissions are increasing and will continue to increase at the rate we are going. (See Complaint, paragraphs 125-135.) In other words, the alleged harms are not hypothetical or only in the future. They are current, ongoing, and getting worse. This renders Defendants' "future goals are not actionable" argument illusory in the specific context of a 12b6 motion where the court is obligated to accept the factual allegations that Defendants failure to plan and implement actual changes fast enough is causing harms now and will cause harms in the future. The harms caused by a lack of action on GHGs and fossil fuels were highlighted at the end of the Supreme Court's opinion in *Hawaii Electric Light Co., Inc.*, Hawai'i Supreme Court, 3/13/23:

> We have said that an agency "must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations," Paeahu, 150 Hawai'i at 538, 506 P.3d at 202, and that "[a]rticle XI, section 9's 'clean and healthful environment' right as defined by HRS chapter 269 subsumes a right to a life-sustaining climate system," id. at 538 n.15, 506 P.3d at 202 n.15. The right to a life-sustaining climate system is not just affirmative; it is constantly evolving. The people of Hawai'i have declared "a climate emergency." S.C.R. 44, S.D. 1, H.D. 1, 31st Leg., Reg. Sess. (2021). Hawai'i faces immediate threats to our cultural and economic survival: sea level rise, eroding the coast and flooding the land; ocean warming and acidification, bleaching coral reefs and devastating marine life; more frequent and

> more extreme droughts and storms. Id. For the human race as a whole, the threat is no less existential. With each year, the impacts of climate change amplify and the chances to mitigate dwindle. "The Closing Window: Climate crisis calls for rapid transformation of societies," Emissions Gap Report 2022, https://www.unep.org/resources/emissions-gapreport-2022 [https://perma.cc/6JAR-RFZE]. "A stepwise approach is no longer an option." Id. at page xv. The reality is that yesterday's good enough has become today's unacceptable. The PUC was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty.

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

6. Political question. Defendants started off their oral argument saying climate change is important, Hawai'i is addressing it, it is a high priority, new bills are being

introduced and passed, and the political process is working well. Therefore, Defendants argue, the issues raised by the two claims in this case amount to a political question, and the courts cannot or should not get involved. First, again, this is partly a factual argument on a Rule 12b6 motion where the court is required to accept the factual allegations of the Complaint. More importantly, this argument fails to recognize the two claims in this case are both based on the Hawai'i Constitution. The courts unequivocally have an important and long-recognized role in interpreting and defending constitutional guarantees. *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 143 (2000); *Ching v Case*, 145 Hawai'i 148, 176 (2019) (the political question doctrine does not bar claim based on public trust duties). The State argues that three of the *Baker* factors are met. *See*, *Baker v. Carr*, 369 U.S. 186 (1962), and *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 194 (2012). To the court, the issue of a political question is not yet and likely will not be formed unless and until a specific motion for injunctive relief is filed. Then we will see if the requested relief improperly trespasses into political questions. In the meantime, the court concludes the *Baker* factors are not automatically triggered by the declaratory relief requested. Depending on where the constitutional arguments and claimed relief end up, Defendants are free to bring up the political question argument again. Currently, where the Defendants argue they have no duty to act now, invoking the political question doctrine is premature.

7. Agency review/appeal. Defendants argue an agency review and appeal under HRS 91-1 is required before bringing this case in court (*see* Motion to Dismiss, p. 7, note 2; p. 11; p. 14). Again, Hawai'i law does not require this step in the context of a breach of trust claim and declaratory relief. See *Ching v. Case*, 145 Haw 148, 174 (2019).

8. Injunctive relief. This seems to be Defendants' greatest concern – that the court will appoint a Special Master to control HDOT. Again, the court respectfully notes this is a 12b6 motion and the court is required to accept the allegations of the complaint as true. The court is making no decision on the merits of injunctive relief. We are even farther away from the court considering whether it would appoint a Special Master. The court declines to spend its limited time on what is currently a non-essential and premature issue in the context of this 12b6 motion.

9. The above ruling outlines the court's primary reasoning and analysis; however, there are arguments and cases and other legal support in the briefs which the court agrees or disagrees with. Unfortunately, the court does not have sufficient time to fully address all collateral issues and support raised by the parties.

10. The motion to dismiss is hereby DENIED.

11. Parties will submit a proposed order per the usual Rule 23 process. If the parties cannot agree on the form of an order, rather than spend time on resolving differences between the parties' respective proposed orders, the court prefers to sign a short form order that simply states the outcome and adds language such as "for reasons stated on the record during the hearing and/or in the court's written ruling dated April 6, 2023." If the parties prefer to submit opposing orders, that is acceptable as well and the court will then settle the order per Rule 23.

12. The court regrets it took so long from the time the motion was filed until this ruling (more than 7 months). The court sincerely apologizes for the inconvenience.

Dated: April 6, 2023. /s/Jeffrey.P.Crabtree.

RE: First Circuit Court, State of Hawai'i
RE: N.F., a Minor v. Dept. of Transportation, et al; Civ. No. 1CCV-22-0000631 (JPC)
RE: Motion to Dismiss (motion filed 8/22/22; Dkt. 78)