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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 **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO PARTIALLY DISMISS FOR MOOTNESS**

INTRODUCTION

Defendants' current Motion presents a straightforward issue: Plaintiffs' claims based on Section 90-4-1001, MCA are moot and therefore nonjusticiable following the March 16, 2023 repeal of that statute. (*See* Defendant's Brief in Support of Defendants' Motion to Partially Dismiss

for Mootness ("Brief"), at 2-3). In their Response Brief in Opposition to Defendants' Motion ("Response"), Plaintiffs attempt to evade partial dismissal by advancing a newfangled theory premised on a so-called de facto energy policy, raising immaterial issues of fact, and asserting inapplicable exceptions to the mootness doctrine. Plaintiffs also predicably resort to emotional appeals, essentially arguing that the massive amount of time and effort this case has consumed entitles them to their moment in the spotlight at trial, regardless of whether their claims are moot or meritless. However, the simple fact remains that the Court cannot invalidate or enjoin the implementation of a statute that no longer exists, and Plaintiffs are not entitled to special treatment under the law. As explained further below, the Court should dismiss with prejudice as moot all claims relating to or premised on the now-repealed Section 90-4-1001, MCA.

ARGUMENT

I. THE COURT SHOULD NOT CONVERT DEFENDANTS' PARTIAL MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

Plaintiffs urge the court to 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, and Plaintiffs present expert declarations herewith (and reference other evidence already in the record)." (Response at 1.) Defendants do not acquiesce to this request. Further, Defendants object to the multitude of affidavits attached and referenced in the Response as inappropriate and not germane to the pure legal question of mootness of a facial constitutional challenge.

A motion to dismiss under Rule 12(b)(6) allows the district court to examine only whether "a claim has been adequately stated in the complaint." *Meager v. Butte-Silver Bow City-Cnty.*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552 (citing *Gebhardt v. D.A. Davidson & Co.,* 203 Mont. 384, 389, 661 P.2d 855, 857 (1983)). An otherwise justiciable case becomes moot if the

issue brought in the complaint has ceased to exist or is no longer live. *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 8, 405 Mont. 259, 494 P.3d 892 (internal quotations omitted). "Any further ruling in such a case would constitute an impermissible advisory opinion, 'i.e., one advising what the law would be upon a hypothetical state of facts or upon an abstract proposition, not one resolving an actual case or controversy.'" *Id*. (*quoting Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 12, 355 Mont. 142, 226 P.3d 567).

The Court should exclude Plaintiffs' "extra-record evidence" and instead focus on the actual issue at hand. *Meagher*, ¶ 16 (explaining that "the court has the discretion to include or exclude matters presented to it that are outside of the pleadings when considering a motion to dismiss."). Namely, Plaintiffs raised a facial challenge to the constitutionality of Section 90-4-l00l(c)-(g), MCA, a statute that the Montana Legislature has repealed in its entirety. Accordingly, that statute is no longer law, and the Court now lacks subject matter jurisdiction to declare that statute unconstitutional. The Court likewise cannot enjoin the enforcement of a statute that no longer exists, both as a matter of law and logic. (*See* Doc. 1 and Prayer for Relief 1, 2, and 5.)

Plaintiffs' refusal to acknowledge the correct legal standard for bringing a facial constitutional challenge is also noteworthy. Plaintiffs would of course prefer to focus on creating factual disputes to reach trial, but the reality is that their facial challenge to Section 90-4-1001, MCA, like any facial challenge under Montana law, is not dependent on the particular facts of this case. *Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Reg., Pub. Serv. Commn.*, 2022 MT 227, ¶ 11, 410 Mont. 450, 520 P.3d 301. *See also Wilkie*, ¶ 6 (citing *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, ¶ 13, 404 Mont. 89, 485 P.3d 731; *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455). This completely undercuts Plaintiffs' attempt to muddle the

proper analysis, and their invocation of their experts' unchanged opinions (Response, at 5)[1] is a futile endeavor. The reality is that the mootness of Plaintiffs' claims, like their facial challenges, presents purely legal questions, and the Court should ignore Plaintiffs' efforts to distract from the proper legal analysis.

II. MOST OF PLAINTIFFS' CLAIMES HAVE BEEN RENDERED MOOT BY THE REPEAL OF SECTION 90-4-l00l(c)-(g), MCA.

A. A Live Controversy No Longer Exists as to the Constitutionality of the Now-Repealed State Energy Policy.

Under the Uniform Declaratory Judgment Act ("UDJA"), declaratory judgment is "proper when a justiciable controversy exists; genuine and existing rights are affected by a statute; a judgment of the court can effectively operate on the controversy; and a judicial determination will have the effect of a final judgment upon the rights, status, or legal relations of the real parties in interest." § 27-8-202, MCA; *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997). While the Court is not necessarily limited to specific instances of use, the general powers conferred by the UDJA do require that "the judgement or decree terminate the controversy or remove an uncertainty." § 27-8-205, MCA. The UDJA was tailored to address formal and explicit written items that are currently affecting a plaintiff, mainly contracts and statutes. *See* § 27-8-202—204, MCA.

A declaration that the now-repealed Section 90-4-1001(c)-(g), MCA is unconstitutional cannot effectively operate on a controversy that is no longer live, and will not clarify the rights, status, or legal relations of the real parties in interest. Instead, it will have the entirely opposite effect of muddying the issues and leaving both parties confused as to their rights, status, and legal

[1] Whether experts' opinions remain unchanged despite the repeal and their opinions regarding any particular "legal vehicle" of Defendants' conduct are of no consequence to the Court's analysis here.

relations. Montana courts have "refused to entertain a declaratory judgment action on the ground that no controversy is pending which the judgment would affect." *Broad Reach Power , LLC*, ¶ 10 (quoting *Hardy v. Krutzfeldt*, 206 Mont. 521, 524, 672 P.2d 274, 275 (1983)).

B. Plaintiffs Did Not Plead That An Implicit State Energy Policy Exists.

In response to the Legislature's repeal of Section 90-4-1001, Plaintiffs now claim that the State has another, unwritten, implicit energy policy that should be declared unconstitutional. Neither the Complaint nor this Court's Orders support Plaintiffs' attempt to create such a moving target. Paragraph 4 of the Complaint states that "Youth Plaintiffs bring this case to challenge the constitutionality of Montana's fossil-fuel based State Energy Policy, which is codified in law, Mont. Code Ann.§ 90-4-l00l(c)-(g) ("State Energy Policy")." (Compl. at 2:12-18.) Throughout the entire Complaint, the capitalized term "State Energy Policy" references Section 90-4-l00l(c)-(g), MCA, an explicit policy written into law.

For example, while Plaintiffs referenced paragraphs 108 and 112 of their Complaint to support their argument that Defendants developed and implemented a State Energy Policy in Montana for decades (Response at 3), both of these paragraphs cite directly to "Mont. Code Ann. § 90-4-1001 (c)-(g), State Energy Policy," enacted in 2011. (Compl. at 34:15-23, 112.) Further, at Paragraph 110 of the Complaint, Plaintiffs explicitly state that "[t]he provisions of the State Energy Policy that promote fossil fuels and that Youth Plaintiffs challenge the constitutionality of in this action state that it is the policy of Montana to:…," then the Complaint lists out the challenged Section 90-4-1001 subparts (c)-(g), MCA. (Compl. at 35:6-21.)

The Complaint's first prayer for relief requests the Court to "[a]djudge and declare that the State Energy Policy, Mont. Code Ann.§ 90-4-100l(c)-(g), the aggregate affirmative acts, policies, and conditions taken thereunder….," violated several portions of the Constitution." (Compl. at

102:13-14.) This language makes evident that the "aggregate affirmative acts, policies, and conditions are all taken "thereunder," or in accordance with, the statue identified within the Complaint as the "State Energy Policy, Mont. Code Ann.§ 90-4-100l(c)-(g)." The Complaint's second prayer for relief requests the Court to specifically "[a]djudge and declare that the State Energy Policy, Mont. Code Ann.§ 90-4-100l(c)-(g), is facially unconstitutional." (Compl. at 102:19-20.) Finally, most of the fifth prayer for relief is directly tied to Section 90-4-100l(c)-(g), MCA, as well. (Compl. at 103:7-10.)

Within the Complaint, the aggregate acts are described in Paragraph 118 and are also directly linked to Section 90-4-100l(c)-(g), MCA. The Complaint states "Defendants, pursuant to and in furtherance of the State Energy Policy, have taken, and continue to take, affirmative actions to authorize, implement, and promote projects, activities, and plans (hereinafter, "aggregate acts")…." (Compl. at 38:3-8; *see* 38-43.) These examples unequivocally demonstrate that the Complaint pleads claims challenging a specific, codified, statutory energy policy, not an unwritten, implicit, "de facto" policy that Plaintiffs now argue.

Since the Montana Legislature has repealed Section 90-4-l00l, MCA, Plaintiffs pivot to claim that the "Montana energy policy," has always been an abstract and unwritten approach or strategy "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," shared by all officials of the state of Montana and that is how it was plead in the Complaint. Plaintiffs' (Response at 4.) As shown above, no such argument appears anywhere in the Complaint. Moreover, Defendants had no opportunity for discovery or motions practice on this argument, so advancing it at this late stage of litigation is patently improper.

Not only are the pleadings devoid of a theory of an implicit energy policy, but the Court's Orders also appear to reject this premise. The Court's first Order on Motion to Dismiss states that the "[t]he State Energy Policy of Montana is codified at Montana Code Annotated § 90-4-1001." (Or. on Mot. to Dismiss at 3:2-3.) The Court found that "[b]ased on the facts alleged, Youth Plaintiffs have demonstrated that a genuine factual dispute exists with respect to whether Defendants' actions, taken ***pursuant to the two relevant statutory provisions***, were a substantial factor in Plaintiffs' injuries." (Or. on Mot. to Dismiss at 9:22-25 (emphasis added).)

Similarly, the Order on Second Rule 60(a) Motion for Clarification recognized:

> The Court recently articulated one limit of prudential standing, the political question doctrine, in *Brown v. Gianforte*, stating: an issue is not properly before the judiciary when 'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving' the issue…. While Justice Marshall thought it "a proposition too plain to be contested," the State is apparently unsure whether the judiciary has the power to declare statutes unconstitutional. This court assures the State that it can. Youth Plaintiffs' requests for relief 1-4 simply ask this court to determine whether the State Energy Policy, Mont. Code Ann. 90-4-1001(c)-(g), and the Climate Change Exception to the Montana Environmental Policy Act (MEPA), Mont. Code Ann. 75-1-201(2)(a), with their appurtenant acts and policies, violate the Montana Constitution.

(Or. on Second Rule 60(a) Mot. for Clarification at 2:21-3:1, 3:9-16 (quoting *Brown v. Gianforte*, 2021 MT 149, ¶21, 404 Mont. 269, 488 P.3d 548 (citations omitted))).

The Court's prior rulings in this case make clear that, like Defendants, the Court understood Plaintiffs to be challenging a specific, written, statutory energy policy, i.e. Section 90-4-1001. Now that the Legislature has repealed that statute, all of Plaintiffs' claims predicated on it have been rendered moot. The Court should reject Plaintiffs' attempt to circumvent this reality by injecting a new legal argument they failed to plead.

C. The Question of Whether Defendants' Alleged Aggregate Acts Perpetuate an Implicit Fossil-Fuel Based Energy Policy is Not Justiciable.

Plaintiffs further argue that "there is a justiciable controversy over Defendants' aggregate acts to perpetuate a fossil fuel-based energy system." What Plaintiffs are alluding to—an entire statutory scheme that allegedly perpetuates a fossil fuel-based energy system—does not present a justiciable question. To be sure, "[b]roadly determining the constitutionality of a 'statutory scheme' that may, according to Plaintiffs, involve hundreds of separate statutes, is contrary to established jurisprudence." *Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364.

Plaintiffs also fail to define what their alleged de facto energy policy is, simply calling it an "all of the above policy." (Response at 4; Decl. Anne Hedges.) This is misleading, however, because Plaintiffs misquoted Governor Gianforte's Natural Resources Policy Advisor. The full quote during the Senate Committee hearing on House Bill ("HB") 170 (repealing the State Energy Policy) was this:

> Governor Gianforte's policy is an all of the above strategy focused on delivering affordable reliable energy to Montanans, the Governors' approach embraces innovation and the entrepreneurial creativity of the free-market system while at the same time protecting the environment and the Montana way of life with a robust and predictable regulatory system.[2]

This is quite different than the implicit policy Plaintiffs have alleged in their Response.

This begs the question of how the Court could adjudicate Plaintiffs' claim that, regardless of the subject statute's repeal, there has been for decades an implicit, de facto, unconstitutional state energy policy and the state engages in aggregate acts to perpetuate it. The Montana Supreme Court has made absolutely clear the problem with these types of declarations:

> It is the opinion of this Court that the broad injunction and declaratory judgment sought by Plaintiffs would not terminate the uncertainty or controversy giving rise to this proceeding. Instead, a broad injunction and declaration not specifically

[2] *Repeal State Energy Policy: Hearing on H.B. 170 Before the S. Comm. on Energy and Telecommunications*, 2023 Leg., 68th Cong. (statement of Michael Freeman, Chair, House Comm. on Natural Resources), January 31 2023 view at https://tinyurl.com/5f9asss2.

> directed at any particular statute would lead to confusion and further litigation. As the District Court aptly stated: "For this Court to direct the legislature to enact a law that would impact an unknown number of statutes would launch this Court into a roiling maelstrom of policy issues without a constitutional compass." A district court may refuse to enter a declaratory judgment if it would not terminate the uncertainty or controversy giving rise to the proceedings.

Donaldson, ¶ 9 (citing § 27-8-205, MCA; *Miller v. State Farm*, 2007 MT 85, ¶ 7, 337 Mont. 67, 155 P.3d 1278). Again, more recently in *In re Big Foot Dumpsters & Containers, LLC*, the Supreme Court confirmed that, "[b]y delving into hypotheticals, courts risk issuing opinions that are overly narrow or broad, or missing the relevant facts, in addition to being advisory in nature." 2022 MT 67, ¶ 19, 408 Mont. 187, 507 P.3d 169.

Similarly, a declaration that an implicit, undefined, and intangible energy policy and aggregate acts perpetuating fossil fuel use are unconstitutional will do nothing to resolve the controversy at hand and will instead increase uncertainty as to what conduct would or would not be unconstitutional. It would leave the Defendants with no clear path forward to proceed without some type of clarification or instruction as to how Defendants should conduct themselves. The Court has already dismissed that type of request for relief as inappropriate in this situation. (Or. on Mot. to Dismiss at 21:4-20.) Plaintiffs' overly broad and theoretical arguments do not present justiciable questions. "Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Broad Reach Power, LLC* at ¶ 10.

Finally, any injury that may have been redressed through a declaration that the subject statute is unconstitutional has already been redressed by that statute's repeal. Plaintiffs conclude that such a declaration, but not the repeal, amounts to sufficient redress of their alleged injury, but

they advance no reasonable explanation for such a distinction. This defies common sense and Montana law.

III. NO EXCEPTIONS TO THE MOOTNESS DOCTRINE APPLY.

Any exception to or deviation from the mootness doctrine "applies only in exceptional situations." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). In most situations, a case is moot when an event or the passage of time changes circumstances so that there is no longer a current controversy. *Van Troba v. Montana State University*, 1998 MT 292, ¶ 35, 291 Mont. 522, 970 P.2d 1029. That undoubtedly is the case here, and the circumstances do not justify any deviation from the mootness doctrine.

A. The Voluntary Cessation Exception Does Not Apply.

The voluntary cessation exception to the mootness doctrine allows a "case to proceed that would otherwise have been rendered moot by a defendant's voluntary cessation of the challenged action." *Montanans Against Assisted Suicide (MAAS) v. Bd. of Med. Exam'rs*, 2015 MT 112, ¶ 15, 379 Mont. 11, 347 P.3d 1244 (citing *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 38-40 , 333 Mont. 331, 142 P.3d 864.). A defendant's voluntary cessation of conduct can moot a case "only if there is no 'reasonable expectation' that the challenged practice will resume after the lawsuit is dismissed." *Havre Daily News* at ¶ 34 (quoting *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.,* 162 F.3d 627, 629 (11th Cir.1998)).

The first prong of the voluntary cessation exception of mootness has not been met because the named Defendants were not involved bringing HB 170 to the legislature, nor did they vote to pass HB 170. Montana state legislators were responsible for the repeal of the subject statute. Moreover, as discussed in detail in briefing on Defendants' Motion for Summary Judgment, the "aggregate acts" of which Plaintiffs complain were not undertaken pursuant to the now-repealed

statute, but instead pursuant to specific permitting laws that Plaintiffs have not challenged. HB 170 had no effect on those actions. This seems to be precisely why Plaintiffs now advance a new, unpled theory that the State has an implied, de facto energy policy. But, as stated above, this does not save their now moot claims. Defendants have not voluntarily ceased any actions as a result of HB 170, so the voluntary cessation exception does not apply.

In *Wilkie*, the court notes that "the concern over the recurrence of conduct is particularly acute in situations when one would expect the same defendant to encounter substantially identical future controversies." 2021 MT 221, ¶ 9 (citing *Havre Daily News*, ¶ 34 n.7 (internal citations omitted); *Montanans Against Assisted Suicide*, ¶ 15.) The case involved an insurance company withholding policy information prior to litigation. The Court's detailed analysis of the voluntary cessation exception explains if, "a plaintiff could show that the same agency has repeatedly withheld documents … from public disclosure and then fully disclosed those same documents upon the plaintiff's filing suit to enforce its right to know, the agency would shoulder a very heavy burden in attempting to persuade this Court that the "challenged conduct cannot reasonably be expected to recur." *Id.* ¶ 16.

The difference here is that the legislative process of enacting laws is not at all a simple action of one entity deciding to do or not to do something. The process of reenacting another state energy policy with the same or similar allegedly unconstitutional portions as the challenged statute would be a highly politicized and controversial uphill legislative battle, not a corporate decision to play chicken with insurance holders. It is unreasonable (and speculative) to expect that legislators at some point in the future could marshal enough support to pass another state energy policy including the same portions of the now-repealed statute, as the legislative record reflects serious

reservations about the same.[3] Given these circumstances, the chance of the same or similar energy policies recuring in the Montana Statutes at a later date is not a reasonable expectation for purposes of this Court's analysis. Further discussion on the reasonableness or likelihood of the enactment of another state energy policy containing similar text to Section 90-4-1001(c)-(g), MCA is refuted in greater detail below in Part II.B.

B. The Public Interest Exception Does Not Apply.

The public interest exception does not apply to a moot issue unless three elements are met: (1) the case presents an issue of public importance; (2) the issue is likely to recur[4]; and (3) an answer to the issue will guide public officers in the performance of their duties. *Ramon v. Short*, 2020 MT 69, ¶¶ 20-21, 399 Mont. 254, 460 P.3d 867. As to the first element, an issue is "of public importance where it implicate[s] fundamental constitutional rights or where the legal power of a public official is in question." *Polich v. Great Falls Mun. Ct.*, 2022 MT 194N, ¶ 7, 518 P.3d 480 (quoting *In re Big Foot Dumpsters & Containers, LLC*, ¶ 9 (internal citations removed). Defendants deny that the now-repealed statute was unconstitutional—it only contained aspirational goal statements without any specific authority, and it had no impact on constitutional rights. (*See* Def. Br. in Support. Mot. for S.J. at 7.)

The "issue" here is of the mootness of Plaintiffs' facial challenge to Section 90-4-1001(c)-(g), MCA, the State Energy Policy and "the aggregate affirmative acts… taken thereunder," (Compl. at 102:13-14). But Plaintiffs' premise is fundamentally flawed because the "aggregate acts" Plaintiffs challenge were never undertaken pursuant to that statute. Rather, they were

[3] *Repeal State Energy Policy: Hearing on H.B. 170 Before the S. Comm. on Energy and Telecommunications*, 2023 Leg., 68th Cong. (statement of Rep. Steve Gunderson, Chair, House Comm. on Natural Resources), January 31 2023, (H.B.170 "[r]emoves a bloated bag of air that only takes up space in MCA, it says nothing. it does nothing, and it has no teeth."), view at https://tinyurl.com/3wr275tr.

[4] "Recur," means to "occur time after time," as opposed to the term "reoccur" to "occur again" or "to happen another time." https://www.merriam-webster.com/dictionary/recur *vs.* https://www.merriam-webster.com/dictionary/reoccur.

undertaken pursuant to numerous other specific statutory permitting schemes that Plaintiffs did not challenge in this litigation. Moreover, without the statute in place as a law, no actions can now be taken under it, and it is not even likely that a law like that statute, would reoccur, not to mention repeatedly recur, as the law was toothless, and the stigma associated with the policy language is such that, as a practical matter, it is not likely to ever become law again.

Plaintiffs assert, "[t]he public interest exception to the mootness doctrine applies where the issues are constitutional and involve broad public concerns." (Response at 17) (citing *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. *Walker* is a case where the court examined the exception for "controversies that are capable of repetition, but that may evade review." *Id.* at ¶ 40. But Plaintiffs do not argue in their Response that this case presents such a controversy. *Walker* is illustrative, however, on how courts view the term "recur." In that case, a mental health patient's claims of cruel and unusual punishment and human dignity were not moot only because he was released from the facility, but because that treatment could repeatedly recur to other patients. The public interest exception was also addressed in *In re Big Foot Dumpsters & Containers, LLC*, where the appellants wanted a moot case to proceed in order to challenge the Public Service Commission's authority to call and question witnesses at hearings—an issue that recurs every time there is a hearing. 2022 MT 67, at ¶¶ 16, 18 (the public interest doctrine was not applied for other reasons). In *Ramon v. Short*, the issue was the lawfulness of a Montana law enforcement officer detaining an individual for a suspected violation of civil immigration law at the request of the federal government, a problem that could continually recur, even if a single instance became moot due to the release of the detainee. 2020 MT 69, ¶ 19, 399 Mont. 254, 460 P.3d 867.

Here, Plaintiffs make no showing that 1) any of the "aggregate acts" they complain of were taken pursuant to the subject statute in the first place; 2) that the Legislature will re-enact the

repealed statute even once, much less over and over; or 3) that Defendants will perpetuate future "aggregate acts" pursuant to some new, theoretical statutory energy policy. In other words, this case does not share the common aspect of all the other cases in which the public interest exception was contemplated—the enactment and repeal of a statutory energy policy will not repeatedly recur before any plaintiff can bring it to trial. Plaintiffs cannot show that enactment of subsection (c) through (g) of Section 90-4-100, MCA is likely to recur as in *In re Big Foot Dumpsters & Containers, LLC* and *Ramon*. It is highly doubtful that legislators at some point in the future could marshal enough support to pass another state energy policy including the same portions of the now repealed Section 90-4-1001, subsections (c) through (g). Indeed, the reasons for repeal discussed during the Senate Energy and Communications Committee Hearing for HB 170 clarify how undesirable and unlikely it is that the same type of energy policy could be enacted again. During the hearing, Representative Gunderson noted the State Energy Policy was "code clutter" and had no meaningful purpose or affect.[5] Representative Gunderson went on to contemplate that the policy could "realistically serve to hinder us in the future." *Id*. Representative Gunderson also spoke about the energy policy's redundancy with laws that have meaning and are enforceable. HB 170 was passed in the Senate 34 to 16, with little debate or opposition, including none from energy companies.[6]

The third prong of the public interest exception also is not satisfied because a decision from this Court on the constitutionality of the repealed statute will not guide public officers in the performance of their duties. Section 90-4-1001, MCA, was purely aspirational and did not contain

[5] *Repeal State Energy Policy: Hearing on H.B. 170 Before the S. Comm. on Energy and Telecommunications*, 2023 Leg., 68th Cong. (statement of Rep. Steve Gunderson, Chair, House Comm. on Natural Resources), January 31 2023, (H.B.170 "[r]emoves a bloated bag of air that only takes up space in MCA, it says nothing and does nothing and has no teeth."), view at https://tinyurl.com/3wr275tr..

[6] *See* , 2023 Leg., 68th Cong., Senate Floor Session, Second Reading Concurred, March 14, 2023, view at https://tinyurl.com/3efff8tf.

any substantive provisions authorizing or facilitating the production or consumption of fossil fuels. This means that this Court's invalidation of the statute would not guide public officers in the performance of their duties, because they did not perform any duties that would be directly affected by a declaration that an unactionable piece of legislation no longer on the books is unconstitutional. Again, Section 90-4-1001, MCA was merely an aspirational statement of goals and factors. None of the substantive statutes that could possibly control or affect greenhouse gas emissions are predicated or dependent on the existence or validity of the repealed statute. In other words, declaring the now-repealed Section 90-4-1001, MCA (c)—(g) unconstitutional would neither affect nor guide public officers in the performance of their duties.

CONCLUSION

Section 90-4-1001 (c)-(g), MCA, is no longer law, nor is it ever likely to be again. As such, all of Plaintiffs' claims and prayers for relief predicated on that statute, including the aggregate acts, thereunder, are moot. Plaintiffs' Complaint did not plead claims based on an allegedly implicit state energy policy, nor did it ask the Court for a declaration of the constitutionality of the same. Because Defendants had no notice that Plaintiffs intended to proceed on a theory that an implicit state energy policy existed, Defendants have not had the opportunity to conduct discovery or brief motions on this new theory.[7] Finally, neither exception to the mootness doctrine raised by Plaintiffs applies. For the reasons stated in this Reply and Defendants' Brief, all of Plaintiffs' claims and requests for relief premised on the now-repealed Section 90-4-1001 (c)-(g), MCA are moot and fail as a matter of law. The Court should accordingly enter an Order dismissing all such claim with prejudice.

[7] Should the Court decide to convert Defendants' current Motion into a motion for summary judgement, Defendants request notice and oral argument, and they reserve the right pursuant to Mont. R. Civ. Proc. 56 to produce affidavits or other evidence establishing the absence of genuine issues of material fact as to the mootness issue.

DATED this 28th day of April, 2023.

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Electronically signed by Dia Lang on behalf of Michael D. Russell
Dated: 04-28-2023