Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

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 DISMISS MEPA CLAIMS**

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INTRODUCTION

For the seventh time now, Defendants seek to close the courthouse doors to Youth Plaintiffs' meritorious claims and avoid standing trial for their constitutional violations.[1] Like their previous efforts, Defendants' Motion to Dismiss Plaintiffs' Montana Environmental Policy Act ("MEPA") Claims (Doc. 377) should be denied. It is clear—in light of this Court's Order on Defendants' Motions to Dismiss for Mootness and for Summary Judgment ("Order on Summary Judgment") (Doc. 379) and for the reasons set forth below—§ 75-1-201(2)(a), MCA, was and remains unconstitutional and Defendants' unconstitutional conduct thereunder continues. The purported crux of Defendants' motion is that House Bill 971 ("HB 971") "substantively amended" the provision of MEPA at issue in this case—the "Climate Change Exception,"[2] § 75-1-201(2)(a), MCA—and therefore moots Plaintiffs' claims based on the prior (2011) version of § 75-1-201(2)(a), MCA, and deprives this Court of subject matter jurisdiction "because that statute no longer exists." *See* Def. Br. at 1, 3 (Doc. 377).[3] Defendants are wrong, and this Court's Order on Summary Judgment makes that clear. This Court retains jurisdiction to review the constitutionality of both the 2011 and 2023 versions of the MEPA Climate Change Exception.

Significantly, Defendants identify no "substance" that has been changed by the HB 971 amendment: (1) HB 971 is explicitly entitled an Act revising MEPA "**clarifying and excluding the use of greenhouse gas evaluations**";[4] (2) Plaintiffs have plead and argued that as to the 2011 version of § 75-1-201(2)(a), MCA, "[t]his has been interpreted **to mean that Defendants cannot consider the impacts of climate change in their environmental reviews**";[5] and (3) this Court

[1] *See* Doc. 12, 86, 166, 275, 339, and Defendants' June 10, 2022 Writ of Supervisory Control.
[2] In this Court's recent order, the Court referred to § 75-1-201(2)(a), MCA, as the "MEPA Limitation." *See* Order on Summary Judgment at 23 (Doc. 379). Plaintiffs refer to § 75-1-201(2)(a), MCA, as the "MEPA Climate Change Exception" throughout this brief for consistency with their Complaint and prior briefing. However, Plaintiffs' usage and understanding of the terms "MEPA Limitation" and "MEPA Climate Change Exception" are synonymous.
[3] Defendants also argue that "the new statute has not been placed at issue by the pleadings, [and] the issues predicated on the statute are not issues for trial." Def. Br. at 8 (Doc. 377). Defendants' reference to *State v. Mont. Thirteenth Jud. Dist. Ct.,* OP 22-0552, 2023 Mont. LEXIS 18 (Jan. 10, 2023) and their suggestion that it stands for the proposition that supervisory control would be warranted here if this Court were to rule on the constitutionality of the 2011 version of § 75-1-201(2)(a), MCA, is misplaced and unavailing. There, the Montana Supreme Court granted a writ for supervisory control in a circumstance where the district court found it did not have jurisdiction over an administrative rule which the plaintiffs there did not directly challenge and yet nevertheless entered an order enjoining the defendant agency from implementing that rule. That factual scenario is inapposite to the current situation, where the challenged statute still exists, has been "clarified", and where both Plaintiffs' Complaint and Proposed Pre-Trial Order directly place the language of the former now clarified version of the statute at issue.
[4] See text of HB 971, attached as Exhibit A, to Defendants' Notice of Supplemental Authority, dated May 10, 2023. (Doc. 373) (All emphasis herein is added unless otherwise indicated.)
[5] Compl. ¶ 111 (Doc. 1).

has already explicitly found that HB 971 "**is a bill to clarify the statute**." Order on Summary Judgment at 22 (Doc. 379).[6] Thus, the very title of the bill,[7] the clarifying language of the bill, and the testimony of the bill's proponents[8] confirm that HB 971 clarifies and makes manifest what Plaintiffs have argued all along—the former and current language of § 75-1-201(2)(a), MCA, were understood and implemented by Defendants as prohibiting Montana's regulatory agencies from considering greenhouse gas ("GHG") emissions or climate change when conducting environmental reviews, which in turn infringes upon Plaintiffs' constitutional and public trust rights. Nothing substantive in law or practice has changed, and the same live controversy exists among the parties as to the constitutionality of the 2011 and 2023 versions of the law, as clearly recognized by the Court at the time of oral argument on May 12, and as articulated in this Court's May 23 Order on Summary Judgment (Doc. 379) at pp. 21-24.

Further, Defendants have not met their "heavy burden" to establish that Plaintiffs' claims concerning the 2011 version of § 75-1-201(2)(a), MCA, are moot because the underlying disputed issues concerning the statute are unchanged. *See* Order on Summary Judgment at 13 (Doc. 379). Since this Court has found that Plaintiffs' claims with respect to the clarifying version of § 75-1-201(2)(a), MCA, can proceed to trial, *see id*. at 13, 25-26, Plaintiffs' claims challenging the 2011 version of § 75-1-201(2)(a), MCA, are likewise live, justiciable, and in need of resolution at trial because nothing substantive has changed to the statute.[9] Accordingly, this Court can and should

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[6] S*ee also* May 12 Oral Arg. Tr. at 24:25; *id*. 94:21-25 ("I'm not precluding anybody from trying to brief something, **but I don't find this to be nearly as substantive to the issues raised in this case as you do. The statute that they cited [75-1-201(2)(a)], it has been clarified**.") (emphasis added). Further, the Court has made clear: "I'm not intending to just stop everything so that we can spend months wrapped around that spoke." May 12 Oral Arg. Tr. at 95:5-7.

[7] An Act Generally Revising the Environmental Policy Act; Clarifying and Excluding the Use of Greenhouse Gas Evaluations; Providing an Appropriation; Amending Section 75-1-201, MCA; And Providing an Immediate Effective Date (HB 971), ch. 450, 2023 Mont. Laws (effective May 10, 2023), https://leg.mt.gov/bills/2023/billpdf/HB0971.pdf. *See also* Def. Br. at 2, nn.1-2 (Doc. 377).

[8] *See infra*, Section II(A). *See, e.g.,* Testimony of Rep. Kassmier, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (testimony approximately at 16:10:00 – "HB 971 sets the record straight. In 2011, the Legislature passed SB 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. **That meant the analysis did not include global climate change.**") (emphasis added); Testimony of Leo Berry, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (Testimony begins at 16:13:23. Mr. Berry drafted the 2011 bill, SB 233, and testified that "I thought the [2011] language was pretty clear at the time. **It excluded an evaluation of climate change or global warming**.") (emphasis added).

[9] This includes each of Plaintiffs' Counts I through IV, as each are premised in part on the MEPA Climate Change Exception, *see, e.g.,* Compl. ¶¶ 216 [Count I]; 221 [Count II]; 229, 236-37 [Count III]; 248-51 [Count IV] (Doc. 1), as well as Prayers for Relief 1, 3, 4, and 5. Plaintiffs' Complaint makes clear that Plaintiffs raise both a facial challenge

still issue effective declaratory relief concerning the 2011 version of § 75-1-201(2)(a), MCA, because it is effectively continued through the 2023 clarifying amendment—and the same harm to the Plaintiffs is caused and continued. As Judge Ann Aiken ruled today in the case of *Juliana v. United States*, a case repeatedly cited by the parties and the Court throughout this litigation:

> [A] declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief. . . .
>
> It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-8 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function because the "judicial Power" is exclusively in the hands of Article III courts. U.S. Const. Art. III, § 1.

Op. and Order at 17-18, *Juliana v. United States*, 6:15-CV-01517-AA (D. Or. June 1, 2023). (Attachment A).

Even if the artifice of the 2023 amendment was deemed substantive, pursuant to the public interest exception to the mootness doctrine, the 2011 version could be declared unconstitutional and violative of youth Plaintiffs' constitutional rights in addition to declaring unconstitutional the amendments enacted via HB 971.

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); *accord Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. When deciding a 12(b)(1) motion to dismiss for lack of standing, courts "must construe the complaint in the light most favorable to the plaintiff . . . and take as admitted all well-pleaded factual allegations." *W. Sec. Bank v. Eide Bailly LLP,* 2010 MT 291, ¶ 55, 359 Mont. 34, 249 P.3d 35. "The effect of such a motion is admitting to all the well pleaded allegations in the complaint and it should not be dismissed 'unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts

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to the MEPA Climate Change Exception, Compl. ¶ 4; Prayer for Relief 3 (Doc. 1), but also a challenge to the "aggregate acts" carried out pursuant to the MEPA Climate Change Exception (¶¶ 118(g), (h), (i), (k), (m), (p); 125, 190; Prayer for Relief 5).

which would entitle him to relief.'" *Hoveland v. Petaja*, 252 Mont. 268, 270-71, 828 P.2d 392, 393 (1992) (quoting *Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 389, 661 P.2d 855, 858 (1983)).

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. "The central issue in resolving a mootness question is whether a change in the circumstances that prevailed at the beginning of litigation has forestalled the prospect for meaningful relief." *Awareness Grp. v. Bd. of Trustees of Sch. Dist. No. 4*, 243 Mont. 469, 475, 795 P.2d 447, 451 (1990) (internal quotation marks omitted). 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. "The '***heavy burden***' of proving mootness falls 'with the party asserting a case is moot.'" *Maldonado v. District of Columbia*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) (emphasis added) (quoting *Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010)). "'[O]nly when it is ***impossible*** for a court to grant ***any*** effectual relief' is a case moot." *Maldonado*, 61 F.4th at 1006 (emphasis added); *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 8, 405 Mont. 259, 494 P.3d 892.

ARGUMENT

I. THIS COURT HAS ALREADY RULED THE CURRENT VERSION OF § 75-1-201(2)(a), MCA, AS AMENDED BY HB 971, IS BEING ADJUDICATED AT TRIAL

In its Order on Summary Judgment, this Court confirmed it possesses subject matter jurisdiction to hear and adjudicate Plaintiffs' claims with respect to the recently-clarified version of § 75-1-201(2)(a), MCA, because the amendment enacted by HB 971 clarifies the intent of the MEPA Climate Change Exception and tracks Plaintiffs' allegations that gave rise to the constitutional violations at issue herein. *See* Order on Summary Judgment at 13-14 ("Notwithstanding the State's failure to meet its own burden, Plaintiffs have sufficiently supported their allegations with specific facts to survive summary judgment.") (Doc. 379); *id*. at 14 (no prudential standing concerns preventing Court from adjudging whether MEPA Climate Change Exception is constitutional); *id*. at 22 (HB 971 "is a bill to clarify the statute," § 75-1-201(2)(a), MCA); *id*. at 25-26 (whether Plaintiffs can prove standing and whether the State can withstand

strict scrutiny will be determined after trial). This is now law of the case and is dispositive as to Defendants' motion here.

The Court's Order on Summary Judgment makes clear that "[b]ased on the pleadings and discovery, there appears to be a reasonably close causal relationship between the State's permitting of fossil fuel activities under MEPA, GHG emissions, climate change, and Plaintiffs' alleged injuries," Doc. 379 at 12, and that the disputed issues of law and fact concerning the amended version of § 75-1-201(2)(a), MCA, will be determined after trial. *Id*. at 25-26. As Leo Berry, the drafter of the 2011 "climate exception" to MEPA, testified in support of the 2023 clarification, "I thought the [2011] language was pretty clear at the time. **It excluded an evaluation of climate change or global warming**." See fn. 13 below. Based on this law of the case alone, Defendants' motion must be denied. Nevertheless, if the Court prefers, Plaintiffs stand prepared to supplement their pleadings (most logically through explicit contentions in the Proposed Pretrial Order) to reiterate what is already manifest to the parties and the Court: the clarification to § 75-1-201(2)(a), MCA, enacted by HB 971 is squarely at issue.[10]

To provide further support for this Court's ruling on HB 971 in its Order on Summary Judgment, if needed, Plaintiffs provide additional legal bases for denying Defendants' Motion to Dismiss the MEPA claim.

II. THIS COURT RETAINS SUBJECT MATTER JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF § 75-1-201(2)(a), MCA, AS AMENDED

In addition to the reasons set forth above and the Court's controlling Order on Summary Judgment, which disposes of Defendants' motion, Plaintiffs set forth the additional bases for denying the motion in full below.

A. HB 971 Corroborates Plaintiffs' Longstanding Position Concerning § 75-1-201(2)(a), MCA.

As if the bill's own title and plain language were not enough to drive this point home, the testimony provided by supporters and proponents of HB 971 during recent legislative committee hearings and floor debates confirms that HB 971 sought to clarify and make manifest what the 2011 amendment to § 75-1-201(2)(a), MCA (SB 233),[11] intended, what the defendant agencies understood and acted in accordance with, and what Plaintiffs have alleged all along—the exception

[10] *See* Mont. R. Civ. P. 15(d). Given the same underlying facts are in dispute, no additional discovery is needed on HB 971 and the parties are ready for trial on this issue.
[11] *See* Def. Br. at 2, n.2. (Doc. 377).

constrains and prohibits Montana's regulatory agencies from considering greenhouse emissions and climate change during environmental reviews under MEPA. The bill's sponsor, Rep. Kassmier, testified that "HB 971 sets the record straight. In 2011, the Legislature passed SB 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. **That meant the analysis did not include global climate change.**"[12] Further, at least two individuals who were involved in the drafting and ratification of the 2011 MEPA Climate Change Exception explicitly testified that HB 971 merely accomplishes and clarifies what the legislature sought to do in 2011.[13] Similar statements from industry supporters of HB 971 make abundantly clear that the effect of the bill was to "**send[] a clear message that the legislature is again reinforcing what was said in 2011 [via SB 233]**."[14]

These statements underscore precisely what Plaintiffs argued at the May 12, 2023 oral argument—HB 971 "does nothing more than corroborate plaintiffs' position," May 12 Oral Arg. Tr. at 92:1-2, and thus this Court retains jurisdiction to decide based on the evidence presented at trial whether Plaintiffs' position is correct. *See* Order on Summary Judgment at 25 (Doc. 379) ("Whether Plaintiffs can prove standing and whether the statute can withstand strict scrutiny will be determined after trial."). HB 971 has changed nothing substantively, and if the unconstitutional

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[12] Testimony of Rep. Kassmier, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (beginning approximately at 16:10:00 – "HB 971 sets the record straight. In 2011, the Legislature passed SB 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. **That meant the analysis did not include global climate change.**") (emphasis added).

[13] *See, e.g.,* Testimony of Leo Berry, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (Testimony begins at 16:13:23. Mr. Berry drafted the 2011 bill, SB 233, and testified that "I thought the [2011] language was pretty clear at the time. **It excluded an evaluation of climate change or global warming**.") (emphasis added); Testimony of Jim Keane, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490 (Testimony begins at 16:14:41. "I'm the guy who passed the bill in 2011. **We did it with broad language so that we weren't going to be going greenhouse gas and those things.**") (emphasis added).

[14] Testimony of Steve Wade, Montana Chamber of Commerce, Montana Contractors Association, Billings Chamber of Commerce, April 17, 2023 House Natural Resources Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490# (testimony begins at 16:10:49) (emphasis added). *See also* Testimony of Steve Wade, April 26, 2023 Senate Judiciary Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/48000?agendaId=277045 (Testimony begins at 9:02:47. Testified that Jim Keane wants committee to know that "he wholeheartedly supports HB 971 **because it's trying to do what he did in 2011**.") (emphasis added); Testimony of Matt Vincent, Montana Mining Association, April 26, 2023 Senate Judiciary Committee, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/48000?agendaId=277045 (Testimony begins at 9:06:36. "But we believe that this bill, as amended, is an important piece of legislation, as has already been stated. **It accurately clarifies the intent of Senator Jim Keane's SB 233, which has been in statute since 2011.**") (emphasis added).

impediment of § 75-1-201(2)(a), MCA, were not in effect, Defendants would take climate change and a project's GHG emissions into account when conducting a MEPA environmental review.[15]

B. Plaintiffs' Pleadings Concerning the 2011 Version of § 75-1-201(2)(a), MCA, Apply Equally to the Current, Clarifying Version of the Same Law.

Plaintiffs have already more than satisfied the pleading standard of Rule 8, Mont. R. Civ. P., with respect to their claims against the 2011 version of § 75-1-201(2)(a), MCA, which apply equally to that same unconstitutional statute as amended by HB 971. *See* Mont. R. Civ. P. 8(a)(1) (Pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief.");[16] *see also* Order on MTD at 18 (Doc. 46) (under the facts alleged, MEPA Climate Change Exception contributes to Youth Plaintiffs' injuries and an order finding the MEPA Climate Change Exception unconstitutional would alleviate Plaintiffs' injuries). Plaintiffs' challenge to the 2011 MEPA Climate Change Exception is premised on the fact that the provision "prohibits the State from considering the impacts of climate change." Compl. ¶ 190 (Doc. 1); *see also id*. ¶ 125 ("Since 2011, the Montana legislature has barred state agencies from considering climate change under MEPA. Mont. Code Ann. § 75-1-201(2)(a).").

Plaintiffs are confident their existing Complaint and Proposed Pre-Trial Order fully encompass the necessary allegations of fact and constitutional claims against § 75-1-201(2)(a), MCA (2011) *and* as amended by HB 971—and this Court has indicated its agreement. *See* Order on Summary Judgment at 23-26 (Doc. 379). Thus, while there is no need for supplementation or amendment of the pleadings, final pleadings are always conformed to the proof presented at trial,

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[15] *See, e.g.,* Klemp 30(b)(6) Dep. 75:6-15 (DEQ admitted that, prior to the codification of the MEPA Climate Change Exception in 2011, DEQ's MEPA reviews contained an analysis of the amount of GHG emissions that would be associated with the plant or project); Dorrington 30(b)(6) Dep. 36:7-24 (DEQ admits that § 75-1-201(2)(a), MCA, applies to its permitting activities and is primarily used in the permitting of natural resource extraction and power generation); Dorrington 30(b)(6) Dep. 37:18-38:2 (DEQ admits that its MEPA review for fossil fuel extraction and combustion activities does not include a review of impacts beyond Montana's borders and potential impacts that are regional, national, or global in nature pursuant to § 75-1-201(2)(a), MCA); Dorrington 30(b)(6) Dep. 38:3-20 (If the restriction in § 75-1-201(2)(a), MCA, did not exist, DEQ would follow the law and conduct a review of actual or potential impacts beyond the state's borders as part of MEPA reviews); Dorrington 30(b)(6) Dep. 97:10-98:5; 100:19-102:2; 103:20-104:24; 114:24-115:4 (DEQ has followed the MEPA Climate Change Exception in § 75-1-201(2)(a), MCA, when conducting post-2011 MEPA analyses for fossil fuel projects); Nowakowski Dep. 48:3-49:9 (§ 75-1-201(2)(a), MCA, precludes DEQ from reviewing, during environmental impact analyses, actual or potential impacts beyond Montana's borders. DEQ relies on the prohibition in § 75-1-201(2)(a), MCA, in multiple permit decision-making processes); Thomas 30(b)(6) Dep. 74:23-75:11 (DNRC admits that it does not calculate the amount of GHG emissions that result from its leasing of coal from state trust lands, but that such a calculation is possible).

[16] Rule 8 also provides that pleadings must be construed "so as to do justice." Mont. R. Civ. P. 8(e).

as can be done here.[17] *See, e.g., Slattery v. Labbitt*, 120 Mont. 183, 185, 181 P.2d 601, 602 (1947) ("The discretion of the trial court in permitting amendments to pleadings in furtherance of justice extends to amendments during and after trial in order to make the pleadings conform to the proof.").

Defendants' claim that HB 971 sprung up on the parties at the last minute and thus necessitates delaying or postponing trial rings hollow. It is neither grounded in reality, nor respects the inherent capability of the Court to conform the pleadings and amendments to the proof adduced at trial, as well as the Court's ability in equity to make sure that the issues that remain are properly resolved at the trial. *See, e.g., Slattery*, 120 Mont. at 185; *Ward v. Vibrasonic Lab'ys, Inc.*, 236 Mont. 314, 318, 769 P.2d 1229, 1232 (1989) (holding trial court did not err in permitting buyer to amend complaint to evidence presented at trial and observing that, "the rule with regard to amendments to the pleadings is well-settled. As early as 1905, the position of this Court has been: … the court has discretionary power to permit the amendment under such terms as it deemed just and proper.") (quoting *Dorais v. Doll*, 33 Mont. 314, 316-17, 83 P. 884, 885 (1905)); *Union Interchange, Inc. v. Parker*, 138 Mont. 348, 353-54, 357 P.2d 339, 342 (1960) ("The policy of the law is to permit amendments to the pleadings in order that litigants may have their causes submitted upon every meritorious consideration that may be open to them; therefore, it is the rule to allow amendments and the exception to deny them."). Defendants would suffer no prejudice should Plaintiffs supplement their pleadings to include the clarifying amendment to § 75-1-201(2)(a), MCA, enacted by HB 971 because the factual circumstances underlying the constitutional controversy remain identical. Plaintiffs can supplement their pleadings should the Court find that necessary or advisable either before or after trial, or the Court can simply conform the judgment to the evidence.

Ultimately, the clarification to the text of § 75-1-201(2)(a), MCA, enacted by HB 971 does not alter Plaintiffs' allegations that this statutory provision permits Defendants to "deliberately ignore[] the dangerous impacts of the climate crisis." Compl. ¶ 108 (Doc. 1); *see also id.* ¶ 190 (the "Climate Change Exception in MEPA . . . prohibits the State from considering the impacts of climate change."). The assertions in Plaintiffs' Proposed Pre-Trial Order concerning § 75-1-

[17] As indicated, if the court prefers, Plaintiffs can promptly supplement Plaintiffs' Proposed Pre-Trial Order pleading pursuant to Mont. R. Civ. P. 15(d), regarding § 75-1-201(2)(a), MCA, to note that the clarification of HB 971 is part of their claims. As nothing else has changed, nothing else is needed. Pleadings are capable of being amended at any time to achieve justice, even after trial. Mont. R. Civ. P. 15(b)(1).

201(2)(a), MCA, mirror those in the Complaint.[18] Nothing has changed other than the fact that § 75-1-201(2)(a), MCA, has been clarified to corroborate Plaintiffs' longstanding position.

C. There Are No Redressability or Prudential Standing Issues Preventing This Court From Declaring the Amended Version of § 75-1-201(2)(a), MCA, Unconstitutional.

At the summary judgment stage, "[t]he Court has already ruled on whether Plaintiffs' injuries are fairly traceable to State actions performed pursuant to MEPA and the MEPA Limitation, and whether Plaintiffs' injuries could be alleviated by an order declaring the MEPA Limitation unconstitutional." Order on Summary Judgment at 9 (Doc. 379) (citing Order on MTD at 7-19 (Doc. 46)). HB 971's amendment clarifying the meaning of the MEPA Climate Change Exception so that it aligns precisely with Plaintiffs' allegations of unconstitutionality does not alter this ruling. *See id*. at 13 ("Plaintiffs have set forth specific facts by declaration and deposition that establish both causation and redressability . . . . Here and now, the State has not shown that there are no genuine issues of material fact.").

Further, there remain "no prudential concerns that prevent this Court from adjudging whether the MEPA Limitation is constitutional." *Id*. at 14. The Court's recent Order on Summary Judgment states that Defendants' "essentially concede[]" the point that "declaratory relief would redress Plaintiffs' injuries, contrary to the State's redressability arguments." *Id*. at 18; *see also Juliana*, Op. and Order at 19 (declaratory relief is within the court's power to award, "would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by the federal defendants' ongoing policies and practices," and "would by itself guide the independent actions of the other branches of government . . . ."). Accordingly, as recognized in this Court's Order on Summary Judgment, all of Plaintiffs' claims with respect to the current, amended version of § 75-1-201(2)(a), MCA, are live, justiciable, and in need of resolution at trial.[19] Neither redressability nor prudential standing considerations weigh against this Court reaching the merits of Plaintiffs' claims and ruling in Plaintiffs' favor.

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[18] *See, e.g.,* Compl. ¶¶ 108, 111, 125, 190 (Doc. 1); Plaintiffs' Proposed Pre-Trial Order Plaintiffs' Contentions ¶¶ 77, 106-07, 112, 120, 131, 135, 146; Plaintiffs' Issues of Fact ¶¶ 120-21, 150, 154, 160-61; Plaintiffs' Issues of Law ¶¶ 4, 8, 12 (Doc. 367).

[19] This includes each of Plaintiffs' Counts I through IV, as each are premised in part on the MEPA Climate Change Exception, *see, e.g.,* Compl. ¶¶ 216 [Count I]; 221 [Count II]; 229, 236-37 [Count III]; 248-51 [Count IV] (Doc. 1), as well as Prayers for Relief 1, 3, 4, and 5. Plaintiffs' Complaint makes clear that Plaintiffs raise both a facial challenge to the MEPA Climate Change Exception, Compl. ¶ 4; Prayer for Relief 3 (Doc. 1), but also a challenge to the "aggregate acts" carried out pursuant to the MEPA Climate Change Exception (¶¶ 118(g), (h), (i), (k), (m), (p); 125, 190; Prayer for Relief 5).

III. PLAINTIFFS' CLAIMS CONCERNING THE 2011 VERSION OF § 75-1-201(2)(a), MCA, ARE NOT MOOT

In addition to Plaintiffs' arguments above, the amendment to the 2011 version of § 75-1-201(2)(a), MCA, does not deprive the Court of jurisdiction to adjudicate the 2011 version as well as the amendment enacted through HB 971.

Defendants not only have the burden to prove mootness (and they have failed to do so), but HB 971 does not, and cannot, moot Plaintiffs' claims concerning the 2011 MEPA Climate Change Exception because the underlying constitutional issues giving rise to Plaintiffs' challenge remain live. *See* Order on Summary Judgment at 12-13, 25-26 (Doc. 379). Accordingly, the Court should conform judgment to include the clarifying language of § 75-1-201(2)(a) enacted through HB 971, as argued above, and *also* retain jurisdiction to render declaratory judgment over the 2011 version of § 75-1-201(2)(a), MCA. The public interest exception to mootness applies to any argument of mootness over the 2011 version. *See, e.g., Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867 ("This Court reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law.") (internal quotation marks omitted) (quoting *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872). The public interest exception to mootness is, in itself, an important aspect of separation of powers that serves the interests of justice and checks and balances. *See Briese v. Montana Pub. Employees' Ret. Bd.*, 2012 MT 192, ¶ 14, 366 Mont. 148, 285 P.3d 550 ("The mootness doctrine is one of several doctrines designed to limit the judicial power of this Court to justiciable controversies—that is, controversies upon which a court's judgment will effectively operate, as distinguished from … dispute[s] invoking a purely political, administrative, philosophical, or academic conclusion. The fundamental question to be answered in any review of possible mootness is *whether it is possible to grant some form of effective relief to the appellant.*") (emphasis added) (internal quotation marks and citations omitted).

While the challenged statute's language has been "clarified" to confirm what everyone thought it meant, *see* Order on Summary Judgment at 22 (Doc. 379), the underlying controversy before the Court remains, and the Court can still grant effective relief against both the 2011 law and its recent clarification. *See id*. at 14, 18. It is important in constitutional cases that courts do not condone legislative shenanigans aimed at trying to moot cases in the absence of altering government's underlying unconstitutional conduct.

A. HB 971 Does Not Substantively Alter the Live Controversy Giving Rise to Plaintiffs' Challenge.

Defendants argue that HB 971 moots Plaintiffs' claims based on the prior version of § 75-1-201(2)(a), MCA, "because it replaced the statute Plaintiffs challenged in their Complaint." Def. Br. at 5 (Doc. 377). Defendants' argument is nonsensical: The legislature may have changed some of the words in § 75-1-201(2)(a), MCA, but it did not change the meaning or effect of the statute. In fact, HB 971's amendment to § 75-1-201(2)(a), MCA, now makes explicitly clear what Plaintiffs had alleged *all along* concerning the effect of the 2011 version of § 75-1-201(2)(a), MCA—it prohibits Montana's agencies from considering the impacts of climate change in environmental review of fossil fuel projects.[20]

The controversy over whether it is unconstitutional for Defendants to deliberately ignore the impacts of climate change in their environmental decision making, as specified in the 2011 or 2023 version of the same law, remains live and ripe for resolution by this Court after trial. *See* Order on Summary Judgment at 25-26 (Doc. 379). Thus, the controversy remains justiciable, and this Court can award some effectual relief by declaring both the 2011 and 2023 versions unconstitutional. *Rimrock Chrysler, Inc.*, ¶ 39. Defendants' willingness to repeal and amend laws to avoid litigation, without altering their unconstitutional conduct, makes it all-the-more important for this Court to judge the assortment of laws Defendants have enacted to direct the State's conduct with respect to fossil fuels, even those that have been replaced today, but could return tomorrow in slightly different form with precisely the same effect.

B. The Public Interest Exception to Mootness Applies Because the Issues Presented Are of Broad Public Importance, are Guaranteed to Recur, and Resolution Will Help Guide Defendants in Performance of Their Duties.

Plaintiffs' claims concerning the 2011 version of § 75-1-201(2)(a), MCA, are not moot for the reasons set forth above—and because the public interest exception applies to the facts here. The public interest exception to the mootness doctrine applies where the issues are constitutional and involve broad public concerns. *Walker*, ¶ 41. In such instances, the court reserves the power

[20] *See, e.g.,* Complaint ¶¶ 111, 190 (Doc. 1). Indeed, the clarification to § 75-1-201(2)(a), MCA, enacted by HB 971 fully accords with this Court's framing of Plaintiffs' challenge to the 2011 version of § 75-1-201(2)(a), MCA, in its Order on Motion to Dismiss—"Plaintiffs challenge the constitutionality of the Climate Change Exception to MEPA *that grants agencies the authority to disregard climate change analyses in conducting environmental review of proposed projects*." Order on MTD at 12 (Doc. 46) (emphasis added); *see also id*. at 14 ("Youth Plaintiffs allege that Defendants deliberately failed to consider or account for climate change in their MEPA Analysis.") (citing Compl. ¶ 108 (Doc. 1)).

to examine these issues and avoid future litigation on a point of law. *Id.* 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; *see also Walker*, ¶¶ 41-43 (reaching the merits of former detainee's challenge to Montana state prison disciplinary techniques, even though he had already been released because the questions presented implicated fundamental constitutional rights and the problems would repeat themselves so long as current policies were in place).

Namely, the exception applies when "(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*, ¶ 21; *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 18, 408 Mont. 187, 507 P.3d 169. These three prongs are plainly satisfied here. First, the issues presented by Plaintiffs' constitutional challenge to the 2011 version of § 75-1-201(2)(a), MCA, are manifestly 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* Order on Summary Judgment at 25-26 (Doc. 379). Defendants agree "this case involves constitutional issues of statewide importance." Defs.' Pet. for Writ of Supervisory Control (June 10, 2022).

Second, the underlying issues presented by Plaintiffs' challenge to the 2011 version of § 75-1-201(2)(a), MCA, are plainly likely to recur, because they are, in fact, live and ongoing since the new statutory language is functionally identical and merely clarifies and does not alter the statute's original intent or effect.[21] Both the 2011 version and the amended version of § 75-1-201(2)(a), MCA, enacted by HB 971 should be declared unconstitutional, if supported by the evidence and facts found at trial, to clarify for Defendants that they cannot continue their game of legislative chess to avoid liability through amendments and repeals while continuing the same pattern and practice of conduct. It is undisputed that Defendant agencies will continue to apply the Climate Change Exception set forth in § 75-1-201(2)(a), MCA, under either the 2011 or 2023

[21] *See supra*, Section II(A).

version, unless they are enjoined from doing so by this Court.[22] The 2011 language of § 75-1-201(2)(a), MCA, and the amended language "categorically limits what the agencies, officials, and employees tasked with protecting Montana's environment can consider—it hamstrings them," so the issue (being the same) is "likely to recur." Order on Summary Judgment at 23 (Doc. 379); *Ramon*, ¶ 21.

Third, and importantly, an answer from this Court to the question of whether the 2011 version of § 75-1-201(2)(a), MCA, and the acts taken under its imprimatur over the past twelve years of its implementation, violates 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." *Id.*, ¶ 24. This Court has already explained:

> Based on the pleadings and discovery, there appears to be a reasonably close causal relationship between the State's permitting of fossil fuel activities under MEPA, GHG emissions, climate change, and Plaintiffs' alleged injuries. Furthermore, the State has the authority to regulate GHG emissions and climate impacts by regulating fossil fuel activities that occur in Montana. . . . ***[T]he State's agents could alleviate the environmental effects of climate change through the lawful exercise of their authority if they were allowed to consider GHG emissions and climate impacts during MEPA review. . . . The State may not have the power to regulate out-of-state actors that burn Montana coal, but it could consider the effects of burning that coal before permitting a new coal mine.***

Order on Summary Judgment at 12-13 (Doc. 379) (emphasis added).

Simply put, a ruling from the Court adjudging and declaring that the 2011 version of § 75-1-201(2)(a), MCA, is unconstitutional and violates youth Plaintiffs' fundamental rights under Montana's constitution would resolve live controversies between the parties.[23] Thus, because the fundamental meaning of the 2011 version of § 75-1-201(2)(a), MCA, is unchanged and the statute continues to be enforced by Defendants, Plaintiffs' constitutional claims against the 2011 version

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[22] *See, e.g.,* Dorrington 30(b)(6) Dep. 36:7-24 (MEPA applies to DEQ permitting activities, DEQ applies § 75-1-201(2)(a), MCA, in permitting decisions, and § 75-1-201(2)(a), MCA, is primarily used in permitting of natural resource extraction and power generating permitting); *id*. 38:3-20 (if restriction in § 75-1-201(2)(a), MCA, did not exist, DEQ would follow the law and would include an analysis, as part of DEQ's MEPA reviews, of a project's actual or potential impacts beyond Montana's borders).

[23] As set forth *supra* in Section II(C), and explained in this Court's Order on Summary Judgment, a ruling from the Court adjudging and declaring that the current, as amended, version of § 75-1-201(2)(a), MCA, is unconstitutional and violates youth Plaintiffs' fundamental rights under Montana's constitution would similarly resolve live controversies between the parties. *See* Order on Summary Judgment at 12-13, 25-26 (Doc. 379).

are live and justiciable, and under the additional authority of the public interest exception to mootness should be adjudicated. *See Plains Grains Ltd. P'ship v. Bd. of Cnty. Comm'rs of Cascade Cnty.,* 2010 MT 155, ¶ 33, 357 Mont. 61, 238 P.3d 332 (finding that challengers' spot zoning claims concerning county decision to re-zone parcel of agricultural land to heavy industrial were not mooted by county's subsequent amendment of its zoning regulations because the changes "represent[ed] merely a refinement of the previous version" and so had "no effect on the land use classifications challenged by Plains Grains."); *see also id*. ¶ 34 ("The 2009 amendments to the CCZR do not preclude a court from ruling on the legality of the 2008 rezone of the Urquhart/SME property."). *In re V.K.B.*, 2022 MT 94, ¶ 18, n.3, 408 Mont. 392, 510 P.3d 66 (finding appeal challenging youth's detention to correctional facility not moot by the fact that youth turned 18 and was released from confinement because the "commitment of juvenile offenders to Pine Hills [Correctional Facility] by youth courts is an issue of public importance; which is likely to recur; and our answer to the issue presented, regarding the authority of a youth court to sentence a juvenile offender to Pine Hills under § 41-5-1513(1)(b) and (e), MCA, will guide youth courts in the performance of their duties.").

CONCLUSION

The record of this case demonstrates that Defendants will attempt every mechanism available to avoid trial and declaratory judgment against them, while continuing their climate change-causing conduct that injures these youth Plaintiffs. It is thus vital that this Court review the constitutionality of the functionally equivalent 2011 and 2023 versions of the Climate Change Exception. In this manner the full breadth of Plaintiffs' claims can be heard and their constitutional rights adjudicated and vindicated.

For all of the foregoing reasons, Defendants' motion to dismiss Plaintiffs' MEPA claims must be denied.

DATED this 1st day of June, 2023.

/s/ Barbara Chillcott
Barbara Chillcott
Melissa Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email to the following on June 1, 2023:

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549

MICHAEL RUSSELL
THANE JOHNSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
michael.russell@mt.gov
thane.johnson@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

MARK L. STERMITZ
Crowley Fleck PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801
Phone: 406-523-3600
mstermitz@crowleyfleck.com

SELENA Z. SAUER
Crowley Fleck PLLP
1667 Whitefish Stage Road
Kalispell, MT 59901
ssauer@crowleyfleck.com

/s/ Barbara Chillcott
Barbara Chillcott

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civ. No. 6:15-cv-01517-AA

OPINION AND ORDER

AIKEN, District Judge:

In this civil rights action, plaintiffs—a group of young people between the ages of eight and nineteen when this lawsuit was filed and "future generations" through their guardian Dr. James Hansen—allege injury from the devastation of climate change and contend that the Constitution guarantees the right to a stable climate system capable of sustaining human life. Plaintiffs maintain that federal defendants have continued to permit, authorize, and subsidize fossil fuel extraction and consumption, despite knowledge that those actions cause catastrophic global warming. This case returns to this Court on remand from the Ninth Circuit Court of Appeals, where plaintiffs demonstrated their "injury in fact" was "fairly traceable" to federal defendants' actions—two of three requirements necessary to establish

standing under Article III. However, the Ninth Circuit reversed with instructions to dismiss plaintiffs' case, holding that plaintiffs failed to demonstrate "redressability"—the third, final requirement to establish Article III standing. The Ninth Circuit determined that plaintiffs did not "surmount the remaining hurdle" to prove that the relief they seek is within the power of an Article III court to provide. *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020). After that court's decision, plaintiffs moved to amend, notifying this Court of an intervening change in controlling law, *Uzuegbunam v. Preczewski*, ___U.S.___, 141 S. Ct. 792 (2021), asserting abrogation of the Ninth Circuit's ruling on redressability. Now, plaintiffs contend that permitting amendment will allow plaintiffs to clear the hurdle the Ninth Circuit identified, so that the case may proceed to a decision on the merits. For the reasons explained, this Court grants plaintiffs' motion for leave to file a second amended complaint. (Doc. 462).

BACKGROUND

In August 2015, plaintiffs brought this action asserting that the federal government has known for decades that carbon dioxide pollution was causing catastrophic climate change and that large-scale emission reduction was necessary to protect plaintiffs' constitutional right to a climate system capable of sustaining human life. (Doc. 7 at 51). As the Ninth Circuit recognized, plaintiffs provided compelling evidence, largely undisputed by federal defendants, that "leaves little basis for denying that climate change is occurring at an increasingly rapid pace." *Juliana*, 947 F.3d at 1166. The substantial evidentiary record supports that since the dawn of the Industrial Age, atmospheric carbon dioxide has "skyrocketed to levels

not seen for almost three million years," with an astonishingly rapid increase in the last forty years. *Id*. at 1166. The Ninth Circuit summarized what plaintiffs' expert evidence establishes: that this unprecedented rise stems from fossil fuel combustion and will "wreak havoc on the Earth's climate if unchecked." *Id*. The problem is approaching "the point of no return," the court stated, finding that the record conclusively demonstrated that the federal government has long understood the risks of fossil fuel use. *See id*. (cataloguing, as early as 1965, urgent warnings and reports from government officials imploring swift nationwide action to reduce carbon emissions before it was too late).

In their first amended complaint, filed in the District Court for the District of Oregon, plaintiffs alleged violations of their substantive rights under the Due Process Clause of the Fifth Amendment; the Fifth Amendment right to equal protection of the law; the Ninth Amendment; and the public trust doctrine. (Doc. 7). Plaintiffs also sought several forms of declaratory relief and an injunction ordering federal defendants to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]." *Id*. at 94-95.

Federal defendants moved to dismiss for lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim on a public trust theory. (Doc. 27). Adopting the findings and recommendation of Federal Magistrate Judge Thomas Coffin, this Court denied federal defendants' motion, concluding that plaintiffs had standing to sue, raised justiciable questions, and had stated a claim for infringement of a Fifth Amendment due process right:

> In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation[.] To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.

Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

At that stage of litigation, this Court also determined that plaintiffs had stated a viable due process claim arising from federal defendants' failure to regulate third-party emissions and had stated a public trust claim grounded in the Fifth and the Ninth Amendments. *Id*. at 1252, 1259.

Federal defendants moved to certify to the Ninth Circuit for interlocutory appeal[1] this Court's order denying federal defendants' motion to dismiss. Doc. 120. This Court denied the motion to certify. (Doc. 172). Federal defendants petitioned the Ninth Circuit for Writ of Mandamus, contending that this Court's opinion and order denying their motion to dismiss was based on clear error. (Doc. 177). The Ninth Circuit denied the petition, concluding mandamus relief was unwarranted at that stage of litigation, when plaintiffs' claims could be "narrowed" in further proceedings. *See In re United States*, 884 F.3d 830, 833 (9th Cir. 2018).

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[1] A request for permissive interlocutory appeal is governed by 28 U.S.C. § 1292(b), which permits a district court to certify an interlocutory order for immediate appeal if the court is of the opinion that such order: (1) involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Federal defendants then filed several motions so aimed at narrowing plaintiffs' claims, including motions for judgment on the pleadings, doc. 195; a protective order barring discovery, doc. 196; and for summary judgment, doc. 207. This Court denied defendants' motion for a protective order. (Doc. 212). But this Court granted in part and denied in part federal defendants' motions for judgment on the pleadings and for summary judgment, dismissing plaintiffs' Ninth Amendment claim, dismissing the President as a defendant, and narrowing plaintiffs' equal protection claim to a fundamental rights theory. *Juliana v. United States*, 339 F. Supp. 3d 1062 1103 (D. Or. 2018), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

Federal defendants unsuccessfully petitioned for mandamus in the Ninth Circuit and twice sought, and were twice denied, a stay of proceedings by the United States Supreme Court. Ultimately, the Ninth Circuit, on November 8, 2018, issued an order inviting this Court to certify for interlocutory review its orders on federal defendants' dispositive motions. *United States v. U.S. Dist. Court for the Dist.* of Or., No. 18-73014. Shortly thereafter, the Ninth Circuit granted federal defendants' petition to appeal.

On interlocutory appeal of this Court's certified orders denying federal defendants' motions for dismissal, judgment on the pleadings, and summary judgment, the Ninth Circuit agreed with this Court's determination that plaintiffs had presented adequate evidence at the pre-trial stage to show particularized, concrete injuries to legally protected interests. That court recounted evidence that one plaintiff was "forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation[,]" and another "had to evacuate his coastal

home multiple times because of flooding." *Id*. at 1168. The Ninth Circuit also determined that this Court correctly found plaintiffs had presented sufficient evidence that their alleged injuries are fairly traceable to federal defendants' conduct, citing among its findings that plaintiffs' injuries "are caused by carbon emissions from fossil fuel production, extraction, and transportation" and that federal subsidies "have increased those emissions," with about 25% of fossil fuels extracted in the United States "coming from federal waters and lands," an activity requiring federal government authorization. *Id*. at 1169. The court held, however reluctantly, that plaintiffs failed to show their alleged injuries were substantially likely to be redressed by any order from an Article III court and that plaintiffs therefore lacked standing to bring suit. *Id*. at 1171.

In so holding, the court stated, "There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular," however, such was "beyond the power of an Article III court to order, design, supervise, or implement." *Id*. at 1171. Ultimately, based on its redressability holding alone, the Ninth Circuit reversed the certified orders of this Court and remanded the case with instructions to dismiss for lack of Article III standing. *Id*. at 1175.

After the Ninth Circuit issued its interlocutory opinion, plaintiffs notified this Court of what they identified as an intervening case in the United States Supreme Court which held that the award of nominal damages was "a form of declaratory relief in a legal system with no general declaratory judgment act" and that a "request for nominal damages alone satisfies the redressability element of standing where a

plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 798, 802. Writing for the majority, Justice Thomas explained that, even where a single dollar cannot provide full redress, the ability "to effectuate a *partial remedy*" satisfies the redressability requirement. *Id.* at 801 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) (emphasis added).

Plaintiffs contend that the Supreme Court's holding constitutes—as Chief Justice Roberts noted in his dissent—an "expansion of the judicial power" under Article III. *Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C. J. dissenting). According to plaintiffs, the Ninth Circuit was skeptical, but did not decide whether declaratory relief alone would satisfy redressability, where such relief only partially redresses injury. Plaintiffs assert that they should be granted leave to amend to replead factual allegations demonstrating that relief under the under the Declaratory Judgment Act, 28 U.S.C. § 2201, is sufficient to allege redressability, even where a declaration effectuates a partial remedy, as stated in *Uzuegbunam,* which the Ninth Circuit did not have the chance to consider.

LEGAL STANDARD

Federal Rule of Civil Procedure Rule 15 allows a party to amend its pleading "with the opposing party's written consent or the court's leave." The rule instructs that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Trial courts have discretion in deciding whether to grant leave to amend, but "[i]n exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (citing *Conley*

v. Gibson, 355 U.S. 41, 47-48 (1957)). The judicial policy of Rule 15 favoring amendments should be applied with "extreme liberality." *Id.* (citing *Rosenberg Brothers & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam). Leave to amend should be granted freely "even if a plaintiff's claims have previously been dismissed." *Hampton v. Steen*, No. 2:12-CV-00470-AA, 2017 WL 11573592, at *2 (D. Or. Nov. 13, 2017) (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002)).

Courts consider four factors when determining whether leave to amend should be granted: 1) prejudice to the opposing party; 2) bad faith; 3) futility of amendment; and 4) undue delay. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Not all factors are equal and only when prejudice or bad faith is shown should leave to amend be denied. *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973). Leave to amend should not be denied based only on delay, *id.*, particularly when that delay is not caused by the party seeking amendment.

A court may deny leave to amend if the proposed amendment is futile or would be subject to dismissal. *Carrico v. City & Cnty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir.2011). An amendment is "futile" if the complaint could not be saved by amendment. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.2011). The court must determine whether the deficiencies in the pleadings "can be cured with additional allegations that are consistent with the challenged pleading and that do not contradict the allegations in the original complaint." *Id.* (quotation marks omitted). A party should be allowed to test his claim on the merits rather than on a motion to amend unless it appears beyond doubt that the proposed amended pleading

would be subject to dismissal. *Roth v. Garcia Marquez*, 942 F.2d 617, 629 (9th Cir.1991).

DISCUSSION

I. Ninth Circuit Mandate Permits Court to Consider Motion to Amend

In its interlocutory opinion, the Ninth Circuit remanded the case to this Court with instructions to dismiss. Plaintiffs maintain that the Ninth Circuit did not state in its instructions whether dismissal was with or without leave to amend, and therefore, this Court should freely grant leave to do so. Federal defendants assert that this Court must dismiss according to the rule of mandate and because any amendment would be futile.[2]

Under the "rule of mandate," a lower court is unquestionably obligated to "execute the terms of a mandate." *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). Compliance with the rule of mandate "preserv[es] the hierarchical structure of the court system," *Thrasher*, 483 F.3d at 982, and thus constitutes a basic feature of the rule of law in an appellate scheme. But while "the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issue not expressly or impliedly

[2] There is no material dispute between the parties whether plaintiffs' amendments are in bad faith, prejudicial to defendants, or unduly delayed. Having considered those factors, this Court finds that none bar plaintiffs' request to amend.

disposed of on appeal.'" *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984)).

"Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings ...." *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting *Nguyen,* 792 F.2d at 1502; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988). When mandate in the prior appeal did not expressly address the possibility of amendment and did not indicate a clear intent to deny amendment seeking to raise new issues not decided by the prior appeal, that prior opinion did not purport "to shut the courthouse doors." *San Francisco Herring Ass'n*, 946 F.3d at 574 (citing *Nguyen*, 792 F.2d at 1503).

In *San Francisco Herring Ass'n*, the Ninth Circuit discussed its issuance of a mandate in a prior appeal, which vacated the district court's order entering summary judgment in the defendants' favor and directed the district court to dismiss the complaint. *See San Francisco Herring Ass'n v. U.S. Dep't of Interior*, 683 F. App'x 579, 581 (9th Cir. 2017) (vacating judgment and remanding case with instructions to dismiss for lack of subject matter jurisdiction). On remand, the district court allowed the plaintiff to seek leave to file a second amended complaint. The Ninth Circuit determined the district court correctly found that the mandate to dismiss did not prevent the plaintiff from seeking leave to re-plead. *San Francisco Herring Ass'n*, 946 F.3d 574. The court reasoned that in instructing to dismiss, it had been silent on whether the dismissal should be with or without leave to amend and did not preclude the plaintiff from filing new allegations. *Id.* at 572-574.

Here, this Court does not take lightly its responsibility under the rule of mandate. Rather, it considers plaintiffs' new factual allegations under the Declaratory Judgment Act, and amended request for relief in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal. Nor did the mandate expressly state that plaintiffs could not amend to replead their case—particularly where the opinion found a narrow deficiency with plaintiffs' pleadings on redressability. This Court therefore does not interpret the Ninth Circuit's instructions as mandating it "to shut the courthouse doors" on plaintiffs' case where they present newly amended allegations. *San Francisco Herring Ass'n*, 946 F.3d at 574.

II. Amendment is Not Futile

A. The Interlocutory Opinion

The Ninth Circuit recited the established rule that, to demonstrate Article III redressability, plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Juliana,* 947 F.3d at 1170. Redress need not be guaranteed, but it must be more than "merely speculative." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Here, applying the above rule, the Ninth Circuit stated that a declaration alone is not relief "substantially likely to mitigate [plaintiffs'] asserted concrete injuries." *Juliana*, 947 F.3d at 1170. The court considered whether partial redress suffices to prove the first redressability prong, concluding that it likely does not, because even

if plaintiffs obtained the sought relief and federal defendants ceased promoting fossil fuel, such would only ameliorate, rather than "solve global climate change." *Id. at* 1171.

Even so, the court did not decide that plaintiffs had failed to prove the first prong of redressability: the court stated, "[w]e are therefore skeptical that the first redressability prong is satisfied. But even *assuming that it is*, [plaintiffs] do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court." *Juliana,* 947 F.3d at 1171. (emphasis added).

In addressing whether plaintiffs had proved the second prong, the court identified the "specific relief" plaintiffs sought was an injunction requiring federal defendants not only to cease permitting, authorizing, and subsidizing fossil fuel, but also to prepare a plan, subject to judicial monitoring, to draw down harmful emissions. That specific relief, the court determined, was not within the power of an Article III court to award. *Id*. The court explained that for the district court to "order, design, supervise, or implement" plaintiffs' requested remedial plan, any effective plan would require a "host of complex policy decisions" entrusted under constitutional separation of powers to the executive and legislative branches. *Id.* In essence, the court found plaintiffs' injuries beyond redress because, in its view, plaintiffs' requested relief requires the district court to evaluate "competing policy considerations" and supervise implementation over many years. *Id*. at 1171–73

Summarizing what the court did—and did not—identify as the legal defects in plaintiffs' case, the court did not decide whether plaintiffs' requested declaratory

relief failed or satisfied the redressability requirement for standing, and did not consider that issue under *Uzuegbunam* or the Declaratory Judgment Act. Rather, the court resolved that plaintiffs failed to demonstrate redressability on grounds that plaintiffs' requested remedial and injunctive relief was beyond the power of an Article III court to provide. The court was also silent on whether dismissal was to be with or without leave to amend.

B. Plaintiffs' Proposed Amendments

Plaintiffs assert that their proposed amendments cure the defects the Ninth Circuit identified and that they should be given opportunity to amend. Plaintiffs explain that the amended allegations demonstrate that relief under the Declaratory Judgment Act alone would be substantially likely to provide partial redress of asserted and ongoing concrete injuries, and that partial redress is sufficient, even if further relief is later found unavailable.

Plaintiffs also amended their factual allegations directly linking how a declaratory judgment alone will redress of plaintiffs' individual ongoing injuries. (*See* doc. 514-2 ¶¶ 19-A, 22-A, 30-A, 34-A, 39-A, 43-A, 46-A, 49-A, 52-A, 56-A, 59-A, 62-A, 64-A, 67-A, 70-A, 72-A, 76-A, 80-A, 85-A, 88-A, 90-A.). Plaintiffs assert that declaratory relief is within a court's Article III power to provide. Plaintiffs also omitted the "specific relief" the Ninth Circuit majority found to be outside Article III authority to award. Among other deletions, plaintiffs eliminated their requests for this Court to order federal defendants to prepare and implement a remedial plan and prepare a list of U.S. CO_2 emissions. Plaintiffs also omitted their request for this Court to monitor and enforce the remedial plan.

Plaintiffs' Second Amended Complaint thus requests this Court to: (1) declare that the United States' national energy system violates and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law; (2) enter a judgment declaring the United States' national energy system has violated and continues to violate the public trust doctrine; and (3) enter a judgment declaring that § 201 of the Energy Policy Act has violated and continues to violate the Fifth Amendment of the U.S. Constitution and plaintiffs' constitutional rights to substantive due process and equal protection of the law.

While declaratory relief was part of plaintiffs' prayer in the operative complaint, plaintiffs did not cite *Uzuegbunam*—recent authority affirming that partial declaratory relief satisfies redressability for purposes of Article III standing. Plaintiffs contend that they should be granted leave to amend based on the Supreme Court's holding that a request for nominal damages alone (a form of declaratory relief) satisfies the redressability element necessary for Article III standing, where the plaintiff's claim is based on a completed violation of a legal right, and the plaintiff establishes the first two elements of standing. *Uzuegbunam*, 141 S. Ct. at 801–02.

C. ***Plaintiffs' Amended Pleadings Satisfy Redressability***

This Court adamantly agrees with the Ninth Circuit that its ability to provide redress is animated by two inquiries, one of efficacy and one of power. *Juliana*, 947 F.3d at 1169. Plaintiffs' proposed amendments allege that a declaration under the Declaratory Judgment Act is substantially likely to remediate their ongoing injuries, and that such relief is within this Court's power to award.

1. Declaratory Relief Alone is Substantially Likely to Redress Injury

The court can grant declaratory relief in the first instance and later consider further necessary or proper relief, if warranted, under the Declaratory Judgment Act. 28 U.S.C. §§ 2201, *et seq*. "In a case of actual controversy within its jurisdiction, [ ] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201. "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

The Supreme Court has long recognized that declaratory judgment actions can provide redressability, even where relief obtained is a declaratory judgment alone. Well-known cases involve the census, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), and *Utah v. Evans,* 536 U.S. 452 (2002).

In each of the census cases, a state objected to the way the Census Bureau counted people and sued government officials. In *Franklin v. Massachusetts*, the Supreme Court stated, "For purposes of establishing standing," it did not need to decide whether injunctive relief against was appropriate where "the injury alleged is likely to be redressed by declaratory relief" and the court could "assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and

constitutional provision by the District Court." 505 U.S. at 803.

In *Utah v. Evans*, the Supreme Court referenced *Franklin*, explaining that, in terms of its "standing" precedent, declaratory relief affects a change in legal status, and the practical consequence of that change would "amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." 536 U.S. 452 (2002).

Similarly, the Supreme Court has determined that a plaintiff had standing to sue the Nuclear Regulatory Commission for a declaration that the Price-Anderson Act, which limited the liability of nuclear power companies, was unconstitutional. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978).

Other cases recognized the role of declaratory relief in resolving constitutional cases. *See, e.g.*, *Evers v. Dwyer*, 358 U.S. 202, 202-04 (1958) (ongoing governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus.").

Finally, the Supreme Court held that, for the purpose of Article III standing, nominal damages—a form of declaratory relief—provide the necessary redress for a completed violation of a legal right, even where the underlying unlawful conduct had ceased. *Uzuegbunam*, 141 S. Ct. 792, 802. *Uzuegbunam* illustrates that when a plaintiff shows a completed violation of a legal right, as plaintiffs have shown here, standing survives, even when relief is nominal or trivial.

Here, this Court notes that, in its determination of standing, the Ninth Circuit was "skeptical" that declaratory relief alone would remediate plaintiffs' injuries,

Juliana, 947 F.3d at 1171. The court noted that even if all plaintiffs' requests for relief were granted against federal defendants, such would not solve the problem of climate change entirely. But for redressability under Article III standing, plaintiffs need not allege that a declaration alone would solve their every ill. To plead a justiciable case, a court need only evaluate "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). There is nothing in § 2201 preventing a court from granting declaratory relief even if it is the only relief awarded.

In light of that determination, by pleading a claim under § 2201, plaintiffs establish that the text of the statute itself resolves the uncertainty posed by the Ninth Circuit, given that plaintiffs have established an active case and controversy showing injury and causation. Section 2201 also provides that declaratory relief may be granted "whether or not further relief is or could be sought." *Id.* Under the statute, the relief plaintiffs seek fits like a glove, where plaintiffs request consideration of declaratory relief independently of other forms of relief, such as an injunction. *See Steffel v. Thompson*, 415 U.S. 452, 475, (1974) (stating in a different context that "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded."). This Court finds that plaintiffs' proposed amendments are not futile: a declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief.

2. Redress is Within Power of Article III Courts

It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function because the "judicial Power" is exclusively in the hands of Article III courts. U.S. Const. Art. III, § 1. The issue before this Court now is not to determine what relief, specifically, is in its power to provide. This Court need only decide whether plaintiffs' amendments—alleging that declaratory relief is within an Article III court's power to award— "would be subject to dismissal." *Carrico,* 656 F.3d 1002.

The Declaratory Judgment Act authorizes this Court's determination in its embrace of both constitutional and prudential concerns where the text is "deliberately cast in terms of permissive, rather than mandatory, authority." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 250 (1952) (J. Reed, concurring). The Act gives "federal courts competence to make a declaration of rights." *Pub. Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962). The Supreme Court has found it "consistent with the statute . . . to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 136 (2007).

Here, plaintiffs seek declaratory relief that "the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law." (Doc. 514-1 ¶ 1). This relief is squarely within the constitutional and statutory power of Article III courts to grant. Such relief would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by federal defendants' ongoing policies and practices. Last, but not least, the declaration that plaintiffs seek would by itself guide the independent actions of the other branches of our government and cures the standing deficiencies identified by the Ninth Circuit. This Court finds that the complaint can be saved by amendment. *See Corinthian Colleges*, 655 F.3d at 995.

CONCLUSION

For the reasons stated above, plaintiffs' Motion to File a Second Amended Complaint, doc. 462, is GRANTED.

IT IS SO ORDERED.

Dated this 1st day of June 2023.

/s/Ann Aiken

Ann Aiken
United States District Judge

CERTIFICATE OF SERVICE

I, Melissa Anne Hornbein, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 06-01-2023:

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: eService

Thane P. Johnson (Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401

Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: eService

Lee M. McKenna (Attorney)
1520 E. Sixth Ave.
HELENA MT 59601-0908
Representing: Montana Department of Environmental Quality
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Mathew dos Santos (Attorney)
1216 Lincoln St.
Eugene 97401
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: Other Means by Consent

Andrea K. Rodgers (Attorney)

1216 Lincoln St.
Eugene 97401
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: Other Means by Consent

Philip L. Gregory (Attorney)
1250 Godetia Drive
Redwood City 94062
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: Other Means by Consent

Julia A Olson (Attorney)
1216 Lincoln St
Eugene 97401
Representing: Nathaniel K, Sariel S, Kathryn Grace S, Olivia V, Lander B, Eva L, Georgianna F, Rikki Held, Badge B, Mika K, Kian T, Jeffrey K
Service Method: Other Means by Consent

Austin Miles Knudsen (Attorney)
PO BOX 201401
Helena 59620-1401
Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: Other Means by Consent

Michael Russell (Attorney)
P O Box 201401
Helena 59620-1401
Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: Other Means by Consent

Selena Z. Sauer (Attorney)
P. O. Box 759
Kalispell 59903-0759
Representing: Steve Bullock, State of Montana, Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Public Service Commission, Mt Dept. Of Natural Resources And Conservation
Service Method: Other Means by Consent

Nathan Bellinger (Attorney)
1216 Lincln St.
Eugen 97401
Representing: Rikki Held
Service Method: Other Means by Consent

Electronically Signed By: Melissa Anne Hornbein
Dated: 06-01-2023