MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON DEFENDANTS' MOTIONS TO DISMISS FOR MOOTNESS AND FOR SUMMARY JUDGMENT**

BACKGROUND

The relevant background of this case is sufficiently described in the Court's Order on Motion to Dismiss at 1-5, apart from four new developments: (1) the Court denied Defendants' Motion to Dismiss on August 4, 2021; (2) on March 16, 2023, the Governor signed HB 170 which repealed the State Energy Policy, Mont. Code Ann. § 90-4-1001; (3) District Court Judge Michael Moses held in *MEIC v. DEQ* that the State has been misinterpreting the MEPA Limitation and is, in fact, required to consider how greenhouse gas

/////

(GHG) emissions will affect Montana's environment, DV-56-2021-0001307 (13th District, April 6, 2023) (Order on Summary Judgment) at 29:3-9; and (4) in response to Judge Moses' ruling, the Legislature expeditiously passed HB 971, which amended the MEPA Limitation to explicitly prohibit the State from considering greenhouse gases in MEPA decisions. HB 971 was signed into law by the Governor on May 10, 2023. The repeal of the State Energy Policy led to the State's Motion to Partially Dismiss for Mootness, filed April 3, 2023, which will be discussed before moving to Defendants' Motion for Summary Judgment, filed Feb. 1, 2023. Defendants' previously filed a motion to stay the proceedings but withdrew that motion at oral argument held on May 12, 2023.

1. Mootness/Redressability and Prudential Standing Issues

The State[1] argues that Plaintiffs' challenge to the State Energy Policy is moot due to the repeal of that statute on March 16, 2023. Defs.' Br. Supp. Mootness at 2 (citing *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 7, 494 P.3d 892 (quoting *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 16, 276 P.3d 867); *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start Inc.*, 2009 MT 362, ¶ 22, 219 P.3d 881.

Plaintiffs argue that "the State has failed to establish that they no longer have a state energy policy, or that they have ceased systematically authorizing, permitting, encouraging, and facilitating activities promoting fossil fuels and resulting in dangerous GHG emissions." Pls.' Br. Opp. Mootness at 16.

Plaintiffs also argue that the voluntary cessation and public interest exceptions apply. Pls.' Br. Opp. Mootness at 14 (citing *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 14, 523 P.3d 519 (citing

[1] For simplicity, the Court will refer to Defendants as "the State" or "State" throughout the remainder of the opinion.

In re Big Foot Dumpsters & Containers, LLC, 2022 MT 67, ¶ 15, 507 P.3d 169)). *See also Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 38-39, 142 P.3d 864 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *Ramon v. Short*, 2020 MT 69, ¶¶ 21-26. 460 P.3d 867.

The Court will not analyze mootness per se because, after the repeal of Mont. Code Ann § 90-4-1001, other redressability and prudential issues are dispositive. In the Order on Motion to Dismiss, the Court held that declaring "these statutory provisions unconstitutional" would partially redress Plaintiffs' claimed injuries. Order on MTD at 18-19. Plaintiffs cite *Columbia Falls Elem. v. State* to support their contention that the Court can declare a *de facto* policy and the "aggregate acts" unconstitutional, but that suit challenged a legislative act. Pls.' Br. Opp. Mootness at 13; *But see* 2005 MT 69, ¶¶ 23-25, 109 P.3d 257. In this sense, the State's reading of *Donaldson* is correct: "the broad injunction and declaration not specifically directed at any particular statute would lead to confusion and further litigation." Defs.' Reply Br. Supp. MSJ at 11 (citing *Donaldson*, 2012 MT 288, ¶ 9, 292 P.3d 364).

Plaintiffs' contention that a ruling from this Court on the constitutionality of the State's "longstanding and ongoing course of conduct . . . would change the legal status of such conduct and would steer Defendants' future conduct into constitutional compliance" is not persuasive. Pls.' Br. Opp. Mootness at 13. Notwithstanding the fact that Plaintiffs pled the aggregate acts as an unconstitutional course of conduct, Compl. at 38, the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of the "statutory provisions" and an injunction on the

enforcement of those provisions. Order on MTD at 18-19; Order on Second Rule 60 Clarification at 7:10-12.

Plaintiffs' claims involving the *de facto* State Energy Policy are **DISMISSED** without prejudice for redressability and prudential standing issues.

2. Summary Judgment

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *State v. Avista Corp.*, 2023 MT 6, ¶ 11, 411 Mont. 192, 523 P.3d 44 (quoting Mont. R. Civ. P. 56(c)(3)). "To determine whether a genuine issue of material fact exists, [courts] view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party." *Brishka v. State*, 2021 MT 129, ¶ 9, 487 P.3d 771 (citing *McLeod v. State ex rel. Dep't. of Transp.*, 2009 MT 130, ¶ 12, 206 P.3d 956). The initial burden is on the movant to demonstrate that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. *Id.* If the movant satisfies this burden, it shifts to the nonmovant "to prove, by more than mere denial or speculation, that a genuine issue does exist." *Id.* (citing *Valley Bank v. Hughes*, 2006 MT 285, ¶ 14, 147 P.3d 185). "On summary judgment, trial courts do not apply a standard of proof or issue findings of fact," and "need not weigh evidence, choose one disputed fact over another, or assess the credibility of the witnesses." *Barrett, Inc. v. City of Red Lodge*, 2020 MT 26, ¶ 8, 457 P.3d 233.

/////

/////

/////

UNDISPUTED FACTS

Movant State did not set forth undisputed facts in its motion for summary judgment or related briefing. On Reply, the State says this was an "inadvertent omission" and argues that denying summary judgment on that basis would elevate "form over substance." Defs.' Reply Br. Supp. MSJ at 2 n. 2. The State further argues that this case "can be decided on summary judgment because all of Plaintiffs' remaining claims for relief hinge on whether Plaintiffs have the right to a 'stable climate system' under the Montana Constitution—a purely legal question." *Id.* at 2. This is a confounding argument because the State has expended considerable effort challenging the factual bases for Plaintiffs' standing throughout this litigation.

The Court appreciates its duty to not elevate form over substance, but Rule 56(c)(3) clearly requires the movant to demonstrate that there are no genuine disputes over material facts—this is substance. It is unclear how the Court could award the State judgment as a matter of law when the State did not set forth any undisputed facts entitling it to that judgment, regardless of whether Plaintiffs asserted undue prejudice or whether they "submit a detailed response." *Id.* at 2 n. 2.

DISPUTED MATERIAL FACTS

In the judgment of the Court, the following material facts are in dispute:

1. Whether Plaintiffs' injuries are mischaracterized or inaccurate.

2. Whether Montana's GHG emissions can be measured incrementally.

3. Whether climate change impacts to Montana's environment can be measured incrementally.

4. Whether climate impacts and effects in Montana can be attributed to Montana's fossil fuel activities.

5. Whether a favorable judgment will influence the State's conduct and alleviate Plaintiffs' injuries or prevent further injury.

DISCUSSION

I. Case-or-Controversy Standing

The State argues that Plaintiffs have failed to "set forth by affidavit or other evidence specific facts" that establish their standing to challenge the MEPA Limitation. Defs.' Br. Supp. MSJ at 3 (internal quotation marks omitted). But the initial burden lies with the movant to demonstrate the lack of genuine disputes over material facts. *Brishka* ¶ 9.

As a preliminary note, it is unclear how the standing rules interact with the concept of implication. In *MEIC I*, the Court held that "the right to a clean and healthful environment is a fundamental right … and that any statute or rule which *implicates* that right *must be* strictly scrutinized." *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality* (*MEIC I)*, 1999 MT 248, ¶ 63, 988 P.2d 1236 (emphasis added). The *MEIC I* Court also noted that the Framers "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *Id.* ¶¶ 77. The Court highlighted this comment from Delegate Foster: "[I]f we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in

/////

/////

fact, that my health is being damaged in order to find some relief, then we've lost the battle." *Id.* ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, March 1, 1972).

a. Distinguishable Injuries

The Court ruled that Plaintiffs sufficiently alleged "significant and physical manifestations of an infringement of their constitutional right to a clean and healthful environment." Order on MTD at 14:19-22 (citing *MEIC I* ¶ 77). Plaintiffs set forth specific facts to support their allegations. Compl. ¶¶ 14-81; Pls.' Br. Opp. MSJ at 2-3 n. 5-11.

The State's position that Plaintiffs' alleged injuries are "inaccurate, mischaracterized, or not otherwise demonstrating standing" only emphasizes the factual dispute over these injuries. Defs.' Br. Supp. MSJ at 4. It is not appropriate to weigh conflicting evidence or assess the credibility of witnesses at summary judgment; those duties are for the fact finder at trial. *Barrett, Inc.* ¶ 8.

The State asserts that Plaintiffs' claims are not "distinguishable from the injury to the public generally." Defs.' Br. Supp. MSJ at 4 (quoting *MEIC I* ¶ 41). However, "to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 374, 922 P.2d 1140 (1996) (quoting *US v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973); *see also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process").

The State points to *Mitchell v. Glacier Cnty.* for the proposition that Plaintiffs' may not merely allege they "suffer[] in some indefinite way in common with people generally." 2017 MT 258, ¶ 10, 406 P.3d 427; Defs.' Br. Supp. MSJ at 4. But that case was not about distinguishable injuries. *Id.* ¶ 36 (citing *Helena Parents Comm'n* at 372-74) ("This case differs significantly from *Helena Parents Comm'n*. First, the contested issue—and the focus of our analysis in that case—was on the second requirement for standing: whether the alleged injury was distinguishable from the injury to the public generally.")

Unlike *Mitchell*, *Helena Parents Comm'n* is instructive. In that case, plaintiffs were able to establish a kind of taxpayer standing by showing that the government would "impose tax burdens on them as it seeks to recoup losses and that the investments will result in a lessening of governmental services." 277 Mont. at 372. The Court went on to determine whether the taxpayers' injury was distinguishable from the public generally. It held the district court "failed to consider that 'the injury need not be exclusive to the complaining party,' and failed to consider *Lee v. State*." *Id.* (quoting *Sanders v. Yellowstone County*, 53 Mont. St. Rep. 305, 306, 915 P.2d 196 (1996) (internal citation omitted)) (citing *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981)).

In *Lee*, which involved a constitutional challenge to a statewide 55 mile-per-hour speed limit, the State claimed that the plaintiff lacked standing because all members of the driving public had an affected interest in the statute and attempted to dismiss the case. The Court found Lee had standing based on the threat of prosecution, stating: "[t]he acts of the legislature which directly

/////

/////

concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless." *Lee*, 195 Mont. at 7.

Fifteen years later, in *Helena Parents Comm'n*, the Court elaborated on *Lee*'s reasoning: "[n]ot everyone who claims they will be injured claims to have been injured in the same way, and while each plaintiff claims a form of harm in common with other members of a larger class of people, the harm each claims is not common to all members of the general public." 277 Mont. at 373-74.

It is true, as the State argues, that climate change is a global problem and affects everyone. Had Plaintiffs merely alleged climate change was the injury, the State's rule from *Mitchell* would apply. 2017 MT 258, ¶ 10. Here, Plaintiffs' have set forth specific facts that show their claimed injuries are concrete, particularized, and distinguishable from the public generally. Pls.' Br. Opp. MSJ at 2-3 n. 4-12; Compl. ¶¶ 14-81. The fact that many other Montanans are likely experiencing similar injuries is not dispositive.

b. Traceability and Redressability

The 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 MTD at 7-19. The State argues that discovery has resolved the factual disputes around causation and reiterates its position that Plaintiffs have failed to establish the "direct causal connection" articulated in *Larson v. State*, 2019 MT 28, ¶ 46, 434 P.3d 241, 262. The Court disagrees.

The State appears to be conflating the fairly traceable standard for standing with some kind of tort-like causation standard. As the Court already stated, "causation is an issue best left 'to the rigors of evidentiary proof …'" Order on MTD at 8-9 (quoting *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd on non-material grounds by Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 411, 131 S. Ct. 2527, 2530 (2011) (US Supreme Court affirmed Second Circuit's exercise of jurisdiction; reversed on displacement)). Furthermore, "the 'fairly traceable' standard is not equivalent to a requirement of tort causation." *Connecticut,* 582 F.3d at 346 (citing *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992) ("for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause" (citation and internal quotation marks omitted)); *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006)).

In its briefing, the State quotes the "direct causal connection" language from *Larson* but omits how it was prefaced: "a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing *absent* a direct causal connection" between the alleged illegality and the injury. *Larson* ¶ 46 (emphasis added). A plain reading suggests a "direct causal connection" is only required when plaintiffs have "a general or abstract interest" in the controversy, but that would violate the standing rules for concrete and particularized injury. Furthermore, *Larson* did not involve the constitutionality of statutes. It is unclear how this Court should interpret and apply this phrase from *Larson* to this case.

/////

This "direct causal connection" language has only been used to describe standing in *Larson* itself. *Id.* To learn where that language came from, the Court performed a Lexis search for "direct causal connection" and found this language in thirteen other Montana cases: eleven workers' compensation cases and two negligence cases. In all those other cases, the courts were describing tort causation, not standing. *See e.g., Andree v. Anaconda Copper Mining Co.*, 47 Mont. 554, 568, 133 P. 1090 (1913); *Landeen v. Toole Cnty. Ref. Co.*, 85 Mont. 41, 54, 277 P. 615 (1929); *Birdwell v. Three Forks Portland Cement Co.*, 98 Mont. 483, 497, 40 P.2d 43 (1935); *Young v. Liberty Nat'l Ins. Co.*, 138 Mont. 458, 463, 357 P.2d 886 (1960); *Hines v. Indus. Accident Bd.*, 138 Mont. 588, 601, 358 P.2d 447 (1960) (Castles dissenting); *Greger v. United Prestress*, 180 Mont. 348, 352, 590 P.2d 1121 (1979); *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 477, 665 P.2d 783 (1983); *Whittington v. Ramsey Constr. & Fabrication*, 229 Mont. 115, 122, 744 P.2d 1251 (1987); *Polk v. Planet Ins. Co.*, 287 Mont. 79, 83, 951 P.2d 1015 (1997); *Hanks v. Liberty Nw. Ins. Corp.*, 2002 MT 334, ¶ 33, 62 P.3d 710 (Trieweiler dissenting); *Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 57, 67 P.3d 229 (Rice dissenting); *Pittman v. Horton*, 2004 ML 1654, 18, 2004 Mont. Dist. LEXIS 1771, *14; *Kratovil v. Liberty Nw. Ins. Corp.*, 2008 MT 443, ¶ 19, 200 P.3d 71.

Furthermore, federal courts have held bench trials "where the plaintiffs' standing allegations were put to the proof based on the facts elicited," and even in that context, "courts have pointed out that 'tort-like causation is not required by Article III.'" *Connecticut* at 346 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996); *Nat. Res. Def.*

Council v. Watkins, 954 F.2d 974, 976 (4th Cir. 1992); *Pub. Interest Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990) ("A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment")). And Montana courts have recognized, even in tort law, that causation is a factual issue to be *proven* at trial, not summary judgment. *Prindel v. Ravalli Cnty*., 2006 MT 62, ¶ 46, 133 P.3d 165 ("[C]ausation should not be decided on summary judgment, but should be resolved by the trier of fact").

The State also argues that MEPA "requires a reasonably close causal relationship between the triggering state action and the subject environmental effect," and that "an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise" of its authority. Defs.' Reply Br. Supp. MSJ at 6 (quoting *Bitterrooters for Planning, Inc. v. Mont. Dept. of Envtl. Quality*, 2017 MT 222, ¶ 33, 401 P.3d 712). "Thus," the State says, "because Defendants have no independent statutory authority to regulate or prevent climate change or its environmental impacts, any exclusion from environmental review of climate change or its impacts pursuant to the MEPA Limitation cannot be considered a legal cause of Plaintiffs' claimed injuries." *Id.* at 6-7.

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. Throughout this litigation, the State has pointed to the disparate statutes

governing specific activities such as the mining of coal, drilling oil and gas wells, and generating electricity from fossil fuels. *See e.g.,* Defs.' Br. Supp. MSJ at 5-6, 10. Those statutes clearly regulate fossil fuel activities, and the 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. It is a tautology to suggest that Plaintiffs cannot challenge the statute depriving the agencies of authority because the agencies lack that very authority. 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. This Court cannot force the State to conduct that analysis, but it can strike down a statute prohibiting it.

As discussed in the Order on Motion to Dismiss, Plaintiffs only need to show their injuries will be effectively alleviated, remedied, or prevented by a favorable ruling. Order on MTD at 15:17-16:3 (citing *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241). The Court ruled that Plaintiffs had established redressability. *Id.* at 18:23.

In addition to the specific facts alleged and supported with data in the Complaint, Compl. ¶¶ 118, 122-141, 144-184, Plaintiffs have set forth specific facts by declaration and deposition that establish both causation and redressability, i.e.; Montana's contributions to GHG emissions can be measured incrementally, Dorrington 30(b)(6) Dep. 38:3-12; Montana's contributions are not *de minimis*, Erickson Expert Report at 19-20; Erickson Dep. 38:6-7.

The State disputes Plaintiffs' specific facts, and factual disputes are not appropriate for disposition at summary judgment. The Court will find facts after trial. Here and now, the State has not shown that there are no genuine issues of material fact. Notwithstanding the State's failure to meet its own burden,

Plaintiffs have sufficiently supported their allegations with specific facts to survive summary judgment.

II. Prudential Standing

Viewing the MEPA Limitation separately from the *de facto* energy policy, Plaintiffs' reading of *Donaldson* is correct. Pls.' Br. Opp. MSJ at 12 ("Plaintiffs are not asking this Court to enact new laws") (citing *Donaldson* ¶ 4). Here, like in *Donaldson*, Plaintiffs asked for remedies that went beyond the scope of the Court's power and the Court has dismissed those claims. *See supra* pp. 3-4; Order on MTD at 21:4-20. However, unlike *Donaldson*, this case now only involves declaring a statute unconstitutional. As the State concedes, declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal. Defs.' MSJ at 8 ("The Montana Legislature would have to amend MEPA to require this analysis"). There are no prudential concerns that prevent this Court from adjudging whether the MEPA Limitation is constitutional.

III. Absurd Results

"The absurd results canon . . . is a rule of statutory construction that serves to help resolve . . . ambiguity pursuant to which courts should construe statutes so as to avoid results glaringly absurd." *NRDC v. United States DOI*, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020) (quoting *United States v. Venturella*, 391 F.3d 120, 126-27 (2d Cir. 2004)) (internal quotation marks removed).

The State argues that it "strains the bounds of credulity to assume that the Framers of the Montana Constitution had any intention of the right to a clean and healthful environment to be construed so broadly," Defs.' Br. Supp.

MSJ at 13. The Court interprets this argument as a rebuttal to Plaintiffs' allegations that a clean and healthful environment includes "a stable climate system that sustains human lives and liberties." Compl. at 103 (Prayer for Relief 4). The State speculates that an adverse ruling in this case will "give rise to seemingly endless litigation against all manner of public and private entities and individuals for any given emission of GHGs—from electrical generation to driving a car or using wood-burning stoves." Defs.' Br. Supp. MSJ at 13.

While the State correctly points out that Convention delegates never explicitly discussed a "stable climate system" during the debates over the environmental provisions, Defs.' Br. Supp. MSJ at 13, the Montana Supreme Court has recognized that "it was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language." *MEIC I* ¶ 75 (citing Convention Transcripts, Vol IV at 1209, March 1, 1972). In fact, the Court has repeatedly found that the Framers intended the state constitution contain "the strongest environmental protection provision found in any state constitution." *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288 (quoting *MEIC I* ¶ 66).

Furthermore, the obligations of the Legislature found in Art. IX, Sec. 1 include providing "adequate remedies for the protection of the environmental life-support system from degradation." Mont. Const. Art. IX, Sec. 1. The Court in *MEIC I* cited Delegate McNeil's comments for guidance as to what that meant: "the term 'environmental life support system' is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no

question that it cannot be degraded." *MEIC I* ¶ 67 (citing Convention Transcripts, Vol. IV at 1201, March 1, 1972) (emphasis in opinion). "[O]ur intention was to permit no degradation from the present environment and affirmatively require enhancement of what we have now." *Id.* ¶ 69 (quoting Convention Transcripts, Vol IV at 1205, March 1, 1972) (emphasis in opinion).

Accordingly, the *MEIC I* Court concluded that the Montana Constitution's environmental provisions were "both anticipatory and preventative," and that "the delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC I* ¶¶ 76-77. Delegate Foster's comment is apposite again: "[I]f we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in fact, that my health is being damaged in order to find some relief, then we've lost the battle." *MEIC I* ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, March 1, 1972). These conclusions sound in both this absurdity analysis and the standing analysis previously discussed.

The Court reaffirmed the conclusions of *MEIC I* in *Park Cnty,* which warrants quoting at length:

/////

/////

/////

/////

////

////

////

> "Our conclusions in *MEIC I* are consistent with the constitutional text's unambiguous reliance on preventative measures to ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books. Article IX, Section 1, of the Montana Constitution describes the environmental rights of 'future generations,' while requiring 'protection' of the environmental life support system 'from degradation' and 'prevent[ion of] unreasonable depletion and degradation' of the state's natural resources. This forward-looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.
>
> Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, Section 1, Subsections 1 and 2, of the Montana Constitution command that the Legislature 'shall provide for the administration and enforcement' of measures to meet the State's obligation to 'maintain and improve' the environment. Critically, Subsection 3 explicitly directs the Legislature to 'provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.' Mont. Const. art. IX, § 1(3)."

Park Cnty. ¶¶ 62-63.

Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, it would not be absurd to find that a stable climate system is included in the "clean and healthful environment" and "environmental life-support system" contemplated by the Framers. Mont. Const. Art. II, Sec. 3; Art. IX, Sec. 1.

There is also no evidence, besides the State's speculative and conclusory statements, that such a judgment would result in an opening of the

floodgates. The Southern District of New York recently dealt with a similar argument from the Department of the Interior regarding incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA), finding that "Interior's complaint that without the Jorjani Opinion the MBTA raises the specter of criminal liability any time someone allows his or her cat to go outside falls flat." *NRDC*, 478 F. Supp. 3d at 487. The State's argument that holding a clean and healthful environment to include a stable climate system would open the floodgates for private actions against Montanans for driving cars or using wood stoves similarly "falls flat." *Id.*

IV. Indispensable Parties

Next, the State argues that Plaintiffs failed to join indispensable parties. The only bases proffered in support of this argument are the speculative statements that "the declaratory relief Plaintiffs seek could and would result in the reduction of GHG emissions *through the destruction of Montana's fossil fuel industry* and the injunction of related activities," and that "Plaintiffs would surely reverse and prohibit the permitting of all manner of fossil-fuel related activities on a unilateral basis *if they had their druthers*." Defs.' Br. Supp. MSJ at 13-14 (emphasis added). The first statement essentially concedes that declaratory relief would redress Plaintiffs' injuries, contrary to the State's redressability arguments. The second demonstrates that this argument relies on speculative hyperbole.

As discussed above, declaring the MEPA Limitation unconstitutional is not commanding the State to consider climate change in every project or proposal. Furthermore, vacatur of specific permits is not an available remedy in this case. There are no indispensable parties unnamed in this suit.

/////

V. Constitutionality

"The constitutionality of a statute is presumed, 'unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.'" *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (quoting *Powell v. State Comp. Fund.*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of a statute bears the burden of proof. *Id.* (citing *Big Sky Colony, Inc. v. Mont. Dep't of Labor and Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231). To prevail on their facial challenges, Plaintiffs must show "that 'no set of circumstances exists under which the [challenged statute] would be valid, i.e., that the law is unconstitutional in all of its applications' or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen*, 2020 MT 309, ¶ 12, 402 Mont. 231, 477 P.3d 335) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

However, "the distinction" between facial and as-applied challenges "is perhaps overstated." *Park Cnty.* ¶ 85. "Courts seek to resolve the controversy at hand, not to speculate about the constitutionality of hypothetical fact patterns." *Id.* ¶ 86. As the Montana Supreme Court has previously held for other MEPA amendments: "the 2011 Amendments [to MEPA] are unconstitutional because they substantially burden a fundamental right and are not narrowly tailored to further a compelling government interest. Thus, our conclusion that [the statutes are] unconstitutional flows from the content of the statute itself, not the particular circumstances of the litigants." *Id.* The Court's reasoning in *Park Cnty.* is compelling.

/////

a. Balancing competing constitutional rights and interests is the Court's duty.

The State cites *Berman*, 348 U.S. 26, 32-33 (1954) for the proposition that it "is solely the Legislature's prerogative" to balance competing constitutional rights and interests. Defs.' Br. Supp. MSJ at 15. The State argues that "[i]t is not for Plaintiffs *or the judiciary* to strike a proper balance between Montanan's right to a clean and healthful environment" and other rights. *Id.* (emphasis added).

Berman involved a challenge to Congress' exercise of police powers in Washington D.C.—a condemnation of property pursuant to the District of Columbia Redevelopment Act of 1945. *Id.* at 31. The Supreme Court held that great judicial deference is given to a legislative determination that a use is a public use. *Id.* at 31-32. The language the State is ostensibly referencing states: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation…" *Berman* at 32. *Berman* does not present the factual or legal issues presented here, and it does not hold that the legislature is generally the arbiter of constitutional rights. *Compare, e.g., Missoulian v. Bd. of Regents*, 207 Mont. 513, 529, 675 P.2d 962 (1984) (Court required to "balance the competing constitutional interests in the context of the facts of each case"); *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 433-34 712 P.2d 1309 (1986) (Court developed the "meaningful middle-tier" scrutiny which includes a balancing of interests test); *Crites v. Lewis & Clark Cnty.*, 2019 MT 161, ¶ 27, 396 Mont. 336, 444 P.3d 1025 (quoting *In re Lacy*, 239 Mont. 321, 326, 780 P.2d 186 (1989)).

("Because the judiciary has authority over the interpretation of the Constitution, it is the courts' duty to balance the competing rights at issue"). It is the judiciary's duty to determine a statute's constitutionality and balance competing constitutional rights and interests.

b. The MEPA Limitation

When interpreting a statute, the courts "look first to the plain meaning of the words [the statute] contains." *State v. Kelm*, 2013 MT 115, ¶ 22, 300 P.3d 387 (quoting *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 55, 293 P.3d 817). Courts must endeavor to give "harmonious effect" to its various provisions, *Crist v. Segna*, 191 Mont. 210, 213, 622 P.2d 1028 (1981), and may not construe a statute in a manner that would "defeat its evident object or purpose." *Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568 (1994).

"The essential purpose of MEPA is to aid in the agency decision-making process otherwise provided by law by informing the agency and the interested public of environmental impacts that will likely result from agency actions or decisions." *Bitterrooters*, 2017 MT 222, ¶ 18. **"**MEPA is an essential aspect of the State's efforts to meet its constitutional obligations." *Park Cnty.* ¶ 89.

The MEPA Limitation provided:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.
> (b) An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:

> (i) the department of fish, wildlife, and parks for the management of wildlife and fish;
> (ii) an agency reviewing an application for a project that is not a state-sponsored project to the extent that the review is required by law, rule, or regulation; or
> (iii) a state agency and a federal agency to the extent the review is required by the federal agency.

Mont. Code Ann. 75-1-201(2) (Amended by HB 971 on May 10, 2023).

While this case has been pending, Judge Moses' held in *MEIC v. DEQ*:

> Here, the plain language of MCA 75-1-201(2)(a) precludes agency MEPA review of environmental impacts that are 'beyond Montana's borders,' but it does not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana. DEQ misinterprets the statute. They must take a hard look at the greenhouse gas effects of this project as it relates to the impacts within the Montana borders.

MEIC v. DEQ, DV-56-2021-0001307 (13th District, April 6, 2023) (Order on Summary Judgment) at 29:3-9.

The substance of HB 971 had been requested on December 3, 2022, but the draft was not provided until April 11, 2023. The bill was introduced on April 14, 2023, eight days after Judge Moses' ruling. The bill was sent to enrolling on May 1 and signed by the Governor on May 10. It is a bill to clarify the statute and amends Mont. Code Ann. § 75-1-201(2) to say:

/////

/////

/////

> "(2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.
> (b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:
> (i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant."

Mont. Code Ann. § 75-1-201(2) (enacted May 10, 2023) (new language underlined).

Throughout this litigation, the parties and the Court have used varying terminology to describe this statute: exclusion, exception, limitation, etc. This statute is aptly described as the MEPA Limitation because it categorically limits what the agencies, officials, and employees tasked with protecting Montana's environment can consider—it hamstrings them. On its face, the MEPA Limitation appears to conflict with the purpose of MEPA, which is to aid the State in meeting its constitutional obligation to prevent degradation by "informing the agency and the interested public of environmental impacts that will likely result" from State actions. *Bitterrooters* ¶ 18.

The State argues that since not all State actions taken pursuant to MEPA would implicate effects beyond Montana's borders, the statute is patently constitutional because Plaintiffs failed to prove "beyond a reasonable doubt that 'no set of circumstances exist under which the [challenged sections] would be valid." Defs.' Br. Supp. MSJ at 14 (quoting *Mont. Cannabis* ¶ 14; *Satterlee* ¶ 10). The State conveniently omits the second half of that rule, which states: "or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen*, 2020 MT 309,

¶ 12, 402 Mont. 231, 477 P.3d 335 (emphasis added) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

Plaintiffs need not prove the unconstitutionality of the statute on summary judgment, and the State's attempt to cherry-pick situations when the MEPA Limitation has no real bearing on the decision-making process is unavailing. The MEPA Limitation bars the agencies from considering GHG emissions and climate impacts for any project or proposal, unless compelled by Federal law, whether the project would lead to any of those effects or not. But even if an analysis of GHGs and climate impacts is unnecessary given the nature and scope of a particular project, the statute still imposes a blanket prohibition. The Montana Supreme Court dealt with this argument in *Park Cnty.* and approvingly quoted Justice Leaphart's concurrence in *MEIC I:*

> "The fact that there may be water discharges from well tests, say for agricultural purposes, that do not in fact create harm to the environment, does not alter the fact that such discharges are exempted from nondegradation review and that such review is the tool by which the State implements and enforces the constitutional right to a clean and healthy environment."

Park Cnty. ¶ 87 (quoting *MEIC I*, ¶ 85 (Leaphart, J., specially concurring)). The Court found "Justice Leaphart's reasoning persuasive and adopt[ed] it" in that case. *Id.* ¶ 88.

Similarly, the fact there may be projects that do not implicate GHGs and climate impacts does not alter the fact that the statute prohibits considering those factors. The State vigorously contends that MEPA is procedural, and the Court agrees, but "[p]rocedural, of course, does not mean unimportant." *Park Cnty.* ¶ 70 (internal quotation marks omitted). The MEPA

Limitation affects MEPA procedure the same way every time—it blocks an entire line of inquiry.

Next, the State argues that it is entitled to summary judgment because Plaintiffs have failed to establish the unconstitutionality of the exceptions to the MEPA Limitation. Defs.' Br. Supp. MSJ at 16. The State does not offer any legal authority supporting this proposition, and the Court rejects it. The *exceptions* to an allegedly unconstitutional statute could be constitutional. But that does not change the fundamental analysis of the statute itself. *See Park Cnty.* ¶ 86. Two narrow exceptions, exceptions that merely allow the agencies to conduct the analysis Plaintiffs want them to do, and only when required by Federal law, cannot shield the statute's main text from constitutional review. *Id.* The intent of the Framers was not to lag behind the Federal government in environmental protections, it was to have the strongest constitutional environmental protections in the country. *Park Cnty*. ¶ 61; *MEIC I* ¶¶ 66, 74-75. If anything, these exceptions inform the tailoring analysis under strict scrutiny, but the case has not yet proceeded to that stage.

The MEPA Limitation clearly implicates Plaintiffs' fundamental right to a clean and healthful environment. A statute may only infringe a fundamental right if it is narrowly tailored to serve a compelling state interest. *Park Cnty.* ¶¶ 84-86. Whether Plaintiffs can prove standing and whether the statute can withstand strict scrutiny will be determined after trial.

VI. Plaintiffs' other claims.

The State also seeks summary judgment on Plaintiffs' equal protection claim, arguing that the MEPA Limitation does not create classifications. Defs.' Br. Supp. MSJ at 18. However, Plaintiffs correctly point

out that "the law may contain no classification . . . and be applied evenhandedly," but still "may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons." Pls.' Br. Opp. MSJ at 20 (quoting *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 420 P.3d 528). Whether climate change and the MEPA Limitation impact youths disproportionately is a material fact to be proven at trial.

Plaintiffs also levied claims under the right to seek safety, health and happiness, Mont. Const. Art. II, Sec. 3, 15, 17, Art. IX, Sec. 1; and the public trust doctrine, Mont. Const. Art. IX, Sec. 1, 3. Compl. Counts II, III, IV. The State argues on Reply that "all of Plaintiffs' claims are subject to dismissal [not summary judgment] under Defendants' arguments regarding standing, prudential concerns, absurd results, failure to join indispensable parties, and failure to demonstrate the facial invalidity" of the challenged statutes, and that none of these claims "survive summary judgment if Defendants prevail on any one of these arguments.". Defs.' Reply Br. Supp. MSJ at 18. As discussed above, the State did not prevail on those arguments. Also, the State did not establish any undisputed facts that entitle it to summary judgment on those claims.

For the foregoing reasons, Defendants' motion for summary judgment is **DENIED**.

ELECTRONICALLY SIGNED BELOW

cc: Melissa Hornbein, via email: hornbein@westernlaw.org
Barbara Chillcott, via email: chillcott@westernlaw.org
Roger Sullivan, via email: rsullivan@mcgarveylaw.com
Dustin Leftridge, via email: dleftridge@mcgarveylaw.com

Electronically Signed By:
Hon. Judge Kathy Seeley
Tue, May 23 2023 02:25:38 PM

Nathan Bellinger, via email: nate@ourchldrenstrust.org
Mathew dos Santos, via email: mat.dossantos@ourchildrenstrust.org
Andrea Rodgers, via email: andrea@ourchildrenstrust.org
Philip L. Gregory, via email: pgregory@gregorylawgroup.com
David M.S. Dewhirst, via email: David.dewhirst@mt.gov
Derek Oestreicher, via email: derek.oestreicher@mt.gov
Timothy Longfield, via email: timothy.longfield@mt.gov
Morgan Varty, via email: morgan.varty@mt.gov
Emily Jones, via email: emily@joneslawmt.com

KS/sm/CDV-2020-307 Ord Def Motions Dismiss Mootness and Summ Judg