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SUPREME COURT
STATE OF WASHINGTON
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NO. 99564-8

**THE SUPREME COURT
OF THE STATE OF WASHINGTON**

AJI P., et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.

Respondents.

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITY

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Pursuant to RAP 10.8, Appellants respectfully submit as additional authority *Held v. State of Montana*, No. CVD-2020-307 (Montana First Judicial District Court for Lewis and Clark County, Aug. 4, 2021), a copy of which is attached to this statement as **Appendix A**. This authority is pertinent to the issue of the justiciability and sufficiency of declaratory relief alone to remedy Petitioners' asserted constitutional violations.

Respectfully submitted this 9th day of August, 2021

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APPENDIX A

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ANGIE SPARKS, Clerk of District Court
By TABITHA GEE Deputy Clerk

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 **ORDER ON MOTION TO DISMISS**

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BACKGROUND

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I. Procedure

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Rikki Held and 15 other Youth Plaintiffs (collectively "Youth Plaintiffs") filed a complaint for declaratory and injunctive relief on March 13, 2020. Youth Plaintiffs consist of youth citizens of Montana between the ages of two and eighteen. Plaintiffs engage in a variety of outdoor pursuits including ranching, fishing, hunting, foraging, cultural and familial practices, and recreating.

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Youth Plaintiffs filed a Complaint against the State of Montana, Governor Steve Bullock, Montana Department of Environmental Quality,

Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission (collectively "Defendants"). The Complaint alleges that Youth Plaintiffs were and are harmed by Defendants' extraction and utilization of fossil fuels, the release of greenhouse gas (GHG) emissions, and ultimately the rising climate change caused therefrom. Youth Plaintiffs allege physical, mental, emotional, aesthetic, cultural and economic injuries. According to Youth Plaintiffs, Defendants caused this harm through Montana's fossil-fuel focused State Energy Policy and the Climate Change Exception to the Montana Environmental Policy Act (MEPA).

Specifically, Youth Plaintiffs allege that the State Energy Policy and the MEPA Climate Change Exception are unconstitutional under the Montana Constitution. According to the Complaint, Defendants' actions pursuant to these statutory provisions violate several sections of Montana's Constitution, including Article II § 3, Article II § 4, Article II § 15, Article II § 17, Article IX § 1, and Article IX § 3. Stated generally, these sections declare that current and future citizens of Montana, regardless of age, possess an inalienable right to a clean and healthful environment. In addition to their constitutional arguments, Youth Plaintiffs allege that Defendants' actions violate the Public Trust Doctrine.

Defendants moved to dismiss the Complaint pursuant to Montana Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(h)(3) arguing Plaintiffs lack case-or-controversy standing, present a claim barred by a prudential limitation, and failed to exhaust administrative remedies.

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II. Montana State Energy Policy

The State Energy Policy of Montana is codified at Montana Code Annotated § 90-4-1001. The purpose of the State Energy Policy is to "promote energy efficiency, conservation, production, and consumption of a reliable and efficient mix of energy sources that represent the least social, environmental, and economic costs and the greatest long-term benefits to Montana citizens." Mont. Code Ann. § 90-4-1001(1)(a).

Despite this stated policy requiring Montana to utilize energy sources that cause the least harm to people, the environment, and the economy, five provisions of the State Energy Policy promote fossil fuel energy, as follows:

> (c) promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;
> (d) increase utilization of Montana's vast coal reserves in an environmentally sound manner that includes the mitigation of greenhouse gas and other emissions;
> (e) increase local oil and gas exploration and development to provide high-paying jobs and to strengthen Montana's economy;
> (f) expand exploration and technological innovation, including using carbon dioxide for enhanced oil recovery in declining oil fields to increase output;
> (g) expand Montana's petroleum refining industry as a significant contributor to Montana's manufacturing sector in supplying the transportation energy needs of Montana and the region;

Mont. Code Ann. § 90-4-1001(c)-(g).

The State Energy Policy also includes various other provisions that promote development of other sources of alternative energy including renewable energy sources. Mont Code Ann. § 90-4-1001.

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III. MEPA's Climate Change Exception

The Montana Legislature passed MEPA to (1) ensure that environmental impacts of state actions are fully considered and (2) ensure the public is informed of anticipated impacts of state actions. Mont. Code Ann. § 75-1-102. Under MEPA, the relevant agency engaged in the state action must conduct an environmental review. Mont. Code Ann. § 75-1-208. Environmental review results in the relevant agency producing either an Environmental Impact Statement or an Environmental Assessment.

MEPA includes an exception to this environmental review procedure referred to by Youth Plaintiffs as the Climate Change Exception. The exception provides that except in limited circumstances, "an environmental review . . . 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." Mont. Code Ann. § 75-1-201(2)(a). Defendants characterize this exception differently, stating the exception's purpose is merely to streamline the environmental review process by preventing agencies from considering activities and impacts outside of the state. Defs.' Br. in Supp. of Mot. to Dismiss 5 (Apr. 24, 2020).

IV. *Juliana v. United States*

The case at bar is similar to the Ninth Circuit case *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). While a federal appellate court reviewed *Juliana*, the Ninth Circuit's review is instructive.

In *Juliana*, the plaintiffs included 21 youths. 947 F.3d at 1165. The plaintiffs claimed that the federal government violated their Fifth Amendment due process rights to a life-sustaining climate system. *Id.* at 1164. Defendants

sought summary judgment arguing that the plaintiffs presented a non-justiciable claim. *Id.*

At the outset, the Ninth Circuit acknowledged the expansive evidence presented by the plaintiffs and concluded "the record leaves little basis for denying that climate change is occurring at an increasingly rapid pace." *Id.* at 1166. Nonetheless, the court ultimately held that plaintiffs' claim was not reviewable. *Id.*

In its analysis, the Ninth Circuit first found that plaintiffs alleged constitutional violations. As such, the plaintiffs needed not exhaust their administrative remedies and properly decided not to bring their claim pursuant to the Administrative Procedure Act. *Id.* at 1667. Because the *Juliana* plaintiffs were not challenging a discrete action, federal court was the proper avenue for plaintiffs to pursue their constitutional claims. *Id.*

Second, the Ninth Circuit reviewed whether the plaintiffs possessed Article III standing to pursue their claim in federal court. *Id.* at 1168. The Ninth Circuit found that the plaintiffs possessed the first two requirements of standing: injury and causation. *Id.* at 1168-69. The court, however, found that plaintiffs could not establish redressability, the final element of standing. *Id.* at 1169. For this reason, the Ninth Circuit granted summary judgment for the government.

LEGAL STANDARD

Under Montana Rule of Civil Procedure 8(a)(1)-(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." In reviewing a complaint, the court "must accept as true the complaint's factual allegations, considering

them in the light most favorable to the plaintiff." *Cossitt v. Flathead Industries, Inc.*, 2018 MT 82, ¶ 8, 391 Mont. 156, 415 P.3d 486 (citation omitted).

A defendant may seek to dismiss a complaint in several ways. Under Montana Rule of Civil Procedure 12(b)(1) and 12(h)(3), a defendant may seek dismissal where the court lacks subject-matter jurisdiction. Subject-matter jurisdiction refers to the court's "fundamental authority . . . to hear and adjudicate particular class of cases or proceedings." *Lorang v. Fortis, Ins. Co.*, 2008 MT 252, ¶ 57, 345 Mont. 12, 192 P.3d 186 (citations omitted). District courts derive their subject-matter jurisdiction from the Montana Constitution which states "district courts have original jurisdiction in . . . all civil matters and cases at law and equity." Mont. Const. Art. VII § 4.

A defendant may also seek dismissal of a complaint where the plaintiff fails to "state a claim upon which relief can be grated." Mont. R. Civ. P. 12(b)(6). A motion to dismiss filed pursuant to 12(b)(6) should not be granted unless the plaintiffs can show no set of facts to support a claim entitling them to relief. *City of Cut Bank v. Tom Patrick Constr., Inc.*, 1998 MT 219, ¶ 6, 290 Mont. 470, 963 P.2d 1283 (citation omitted).

DISCUSSION

Like the defendants in *Juliana*, Defendants here contend that Youth Plaintiffs lack standing. Standing requires that a plaintiff demonstrate that they are entitled to have the merits of their claim reviewed by a Montana court. The plaintiff must demonstrate case-or-controversy standing.

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Second, Defendants argue a prudential limitation applies to Youth Plaintiffs' requested relief. Defendants argue that Plaintiffs' request for a court-order remedial plan to be created by Montana's executive and/or legislative branches poses a political question and is therefore nonjusticiable.

Finally, Defendants argue that the court must dismiss the Complaint because Plaintiffs failed to exhaust their administrative remedies. Without exhaustion of administrative remedies, this court is an improper forum to review Youth Plaintiffs' claims.

I. Case-or-Controversy Standing

A plaintiff must demonstrate case-or-controversy standing by "clearly alleg[ing] a past, present, or threatened injury to a property or civil right." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (citation omitted). The plaintiff's injury must also be "alleviated by successfully maintaining the action." *Id.* Simply put, the plaintiff must demonstrate: (1) an injury and (2) the court's ability to redress that injury through favorable outcome.

The parties do not dispute that Youth Plaintiffs allege a variety of past, present, and threatened injuries. *See Heffernan*, ¶ 33. Instead, Defendants argue that Youth Plaintiffs lack standing because Plaintiffs cannot establish causation or redressability.

A. Causation

Standing in federal court expressly requires plaintiffs to demonstrate three elements: (1) injury, (2) causation, and (3) redressability. *Heffernan*, ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). First, the plaintiff must suffer an injury in fact meaning "a concrete

1 harm that is actual or imminent, not conjectural or hypothetical." *Id.* Second, the
2 plaintiff must demonstrate causation meaning "a fairly traceable connection
3 between the injury and the conduct complained of." *Id.* Finally, the plaintiff must
4 demonstrate redressability meaning "a likelihood that the requested relief will
5 redress the alleged injury." *Id.*

6 Although Montana's standing requirements do not expressly direct
7 plaintiffs to prove causation, causation is nonetheless implicit in establishing
8 standing. This is because "[c]ase-or-controversy standing derives from Article
9 VII, Section 4(1), of the Montana Constitution, and Article III, Section 2 of the
10 United States Constitution." *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35,
11 435 P.3d 1187. As such, the Montana Supreme Court emphasized that federal
12 precedent interpreting the federal requirements for standing under the U.S.
13 Constitution is "persuasive authority" for interpreting Montana's constitutional
14 requirements for standing. *Id.* (citations omitted).

15 A plaintiff demonstrates causation by showing her injury is "fairly
16 traceable" to the defendant's injurious conduct. *Heffernan*, ¶ 32. But a plaintiff
17 may establish causation "even if there are multiple links in the chain . . . as long
18 as the chain is not hypothetical or tenuous." *Juliana*, 947 F.3d at 1169 (internal
19 quotations and citations omitted).

20 Further, a plaintiff may establish causation even if the defendant
21 was one of multiple sources of injury. *WildEarth Guardians v. United States*
22 *Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[s]o long as a defendant is
23 at least partially causing the alleged injury, a plaintiff may sue that defendant,
24 even if the defendant is just one of multiple causes of the plaintiff's injury.");
25 *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009)

1 (finding (1) that "fairly traceable" does not require a plaintiff to allege that one
2 injurious act alone caused the her injury and (2) that causation is an issue best left
3 to "the rigors of evidentiary proof at a future stage of the proceedings") *rev'd. on*
4 *other grounds*, 564 U.S. 410 (2011).

5 In *Juliana*, the Ninth Circuit agreed that the plaintiffs established
6 the causation element of standing. 947 F.3d at 1169. The Ninth Circuit stated that
7 "carbon emissions from fossil fuel production, extraction, and transportation"
8 caused the plaintiffs' injuries. *Id.* And the United States is responsible for a
9 significant amount of those carbon emissions. *Id.* Further, federal action
10 continues to increase those emissions. *Id.* Accordingly, at the minimum, a
11 genuine factual dispute existed "as to whether those polices were a 'substantial
12 factor' in causing the plaintiffs' injuries." *Id.* (citation omitted).

13 Similar to *Juliana*, Youth Plaintiffs have met their burden to
14 establish causation. Youth Plaintiffs cannot allege that the State Energy Policy
15 and MEPA Climate Change Exception are the exclusive source of their injury.
16 *See* Defs.' Bf. in Supp. of Mot. to Dismiss 9 (Apr. 24, 2020). However,
17 demonstrating causation for standing purposes does not require such preciseness.
18 *See Juliana*, 947 F.3d at 1169; *WildEarth Guardians*, 795 F.3d at 1157;
19 *Connecticut*, 582 F.3d at 345-47. Rather, Youth Plaintiffs need only show that a
20 set of facts demonstrate that the unconstitutional State Energy Policy and MEPA
21 Climate Change Exception were a substantial factor in causing Plaintiffs'
22 injuries. *See Juliana*, 947 F.3d at 1169; *See City of Cut Bank*, ¶ 6. Based on the
23 facts alleged, Youth Plaintiffs have demonstrated that a genuine factual dispute
24 exists with respect to whether Defendants' actions, taken pursuant to the two
25 relevant statutory provisions, were a substantial factor in Plaintiffs' injuries.

While all states contribute to the nation's overall carbon emissions, Youth Plaintiffs sufficiently allege that Montana is responsible for a significant amount of those carbon emissions. *See Juliana*, 947 F.3d at 1169. In the complaint, Youth Plaintiffs offer several examples that demonstrate Montana's significant contribution to climate change. For example:

- Montana's per capita energy consumption is among the top one-third of all states, ranking 12th highest energy use per capita in 2017. Complaint ¶ 129 (Mar. 13, 2020).
- Montana is the sixth largest coal producer in the United States. *Id.*, ¶ 134.
- Montana produces 1 in every 200 barrels of U.S. oil. *Id.*, ¶ 135.
- One fifth of all U.S. natural gas imports from Canada entered the U.S. by pipelines through Montana in 2017. These pipelines were authorized by Defendants. Roughly 95% of natural gas that enters Montana passes through this state to other states *Id.*, ¶ 138.
- Between 1960 and 2017, coal, oil, and gas extracted from Montana with state-authorization resulted in 3,940 million metric tons of CO2 emissions once combusted. This number is roughly equivalent to 80% of all energy-related U.S. CO2 emissions in 2018. This amount of cumulative emissions would rank as the third largest when compared to the annual emissions of countries. *Id.*, ¶ 140.

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Plaintiffs allege that Defendants authorized much of those emissions pursuant to the State Energy Policy and MEPA's climate change exception. Paragraph 118 of the Complaint provides 23 examples of Defendants' "affirmative actions to authorize, implement, and promote projects, activities, and plans . . . that cause emissions of dangerous levels of GHG pollution into the atmosphere." Complaint ¶ 118 (Mar. 13, 2020). Youth Plaintiffs title these examples "aggregate acts." *Id.* The aggregate acts range from authorizing surface coal mining, coal-fired power plants, and pipelines to reducing contract lengths for renewable energy projects like solar. *Id.*, ¶ 118(b)-(c), (f)-(g), (i)-(m). Youth Plaintiffs allege that Defendants accomplished these aggregate acts in furtherance of the State Energy Policy which promotes fossil-fuel extraction and use. *Id.*, ¶ 118. Additionally, Defendants accomplished these acts without considering or informing Montana residents of associated climate change impacts pursuant to MEPA's Climate Change Exception. *Id.*

In their motion to dismiss, Defendants contend that the State Energy Policy is fully discretionary and seeks to promote "a reliable and efficient mix of energy" and "a balance between a sustainable environment and a viable economy." Defs.' Reply Br. in Supp. of Mot. to Dismiss 5 (June 11, 2020) (quoting Mont. Code Ann. §§ 90-4-1001(1)(a), (2)(d)). Thus, Plaintiffs cannot argue that the State Energy Policy caused the complained of injuries.

The court finds that, for the purposes of a motion to dismiss, Youth Plaintiffs have sufficiently raised a factual dispute as to whether the State Energy Policy was a substantial factor in causing Youth Plaintiffs' injuries. *See Juliana*, 947 F.3d at 1169. Like the plaintiffs in *Juliana*, Youth Plaintiffs here allege that Defendants authorized a "host of policies, from subsidies ... to permits" over the

1 past decade pursuant to the State Energy Policy which encourages fossil-fuel
2 development. *See id*; Complaint ¶ 118 (Mar. 13, 2020). As alleged, Defendants'
3 aggregate acts taken pursuant to the State Energy Policy were a substantial factor
4 in causing "dangerous levels of pollution," resulting in injury. *See Juliana*, 947
5 F.3d at 1169; *City of Cut Bank*, ¶ 6; Youth Pls.' Resp. to Defs.' Mot. to Dismiss 5
6 (May 29, 2020).

7 Defendants also posit that MEPA could not have caused Plaintiffs'
8 harm because MEPA is a procedural rather than a substantive statute. Therefore,
9 "any defect with MEPA would be procedural in nature and thus limited to a
10 particular administrative decision." Defs.' Reply Br. in Supp. of Mot. to Dismiss
11 9 (Apr. 24, 2020). Because MEPA's requirements are merely "procedural"
12 MEPA does not require an agency to reach any particular decision in the exercise
13 of its independent authority. *Bitterrooters for Planning, Inc. v. Mont. Dep't of*
14 *Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712.

15 Youth Plaintiffs respond that their constitutional challenge
16 circumvents this analysis because Plaintiffs do not seek judicial review of an
17 agency procedural decisions under MEPA. Instead, Plaintiffs challenge the
18 constitutionality of the Climate Change Exception to MEPA that grants agencies
19 the authority to disregard climate change analyses in conducting environmental
20 review of proposed projects.

21 Youth Plaintiffs cite *Montana Envtl. Info. Ctr. v. Dep't of Envtl.*
22 *Quality (MEIC),* 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, to support their
23 argument. In *MEIC* the Montana Supreme Court reviewed a constitutional
24 challenge to a statutory provision allowing discharges from water wells. *Id.,*
25 ¶ 1. In particular, the challenged provision provided an exception to

nondegradation review for discharges from water wells. *Id.*, ¶ 50. Absent this exception, the agency could not authorize degradation unless the agency demonstrated by the preponderance of the evidence that the degradation was, for example, necessary or conferred a benefit. *Id.*, ¶ 49 (citing Mont. Code Ann. § 75-5-303(3)(a)-(b)). However, with the exception in place, the agency was exempt from reviewing the degrading effect of some categories or classes of activities. *Id.* The plaintiffs argued this exception violated Article II, § 3[1] and Article IV, § 1[2] of the Montana Constitution.

The Montana Supreme Court ultimately concluded that the plaintiffs had the ability to challenge the constitutionality of statutory provisions that allowed an agency to bypass environmental review. *Id.*, ¶¶ 77-79. The statutory provision at issue in *MEIC* prevented degrading discharges unless the agency offered evidentiary support for its conclusion. This is arguably more substantive than MEPA, which as Defendants point out, does not require the agency to reach a particular conclusion. However, in *MEIC* the Court did not distinguish between procedural and substantive statutes. Instead, the Montana Supreme Court found that a clean and healthful environment is a "fundamental right" and that "any statute . . . which implicates that right must be strictly scrutinized." *Id.*, ¶ 63. In reaching its conclusion, the Supreme Court stated:

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[1] Article II, § 3 of the Montana Constitution states that "[a]ll persons . . . have certain inalienable rights. They include the right to a clean and healthful environment."

[2] Article IV, § 1, subparagraph (1) of the Montana Constitution states that "[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Additionally under Article IV, § 1, subparagraph (3), "[t]he legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

> Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked. . . . the rights provide for in subparagraph (1) or Article IX, Section 1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.

Id., ¶ 77.

Based on the holding in *MEIC*, this court finds that Youth Plaintiffs sufficiently allege that Defendants' actions pursuant to MEPA's Climate Change Exception implicate their right to a clean and healthful environment. *See id.*, ¶ 63. Youth Plaintiffs allege that Defendants deliberately failed to consider or account for climate change in their MEPA analysis. Complaint ¶ 108 (Mar. 13, 2020). Pursuant to this exception, Defendants failed to account for or "disclose to the public the health or climate consequences" of the state-approved aggregate acts. *Id.*, ¶ 118(i), (k), (p). MEPA's Climate Change Exception allows Defendants to effectively turn a blind eye to constitutional violations. The exception allows Defendants to ignore whether state-approved projects will impede on a clean and healthful environment with respect to climate change.

As stated in *MEIC*, Youth Plaintiffs need not allege significant and physical manifestations of an infringement of their constitutional right to a clean and healthful environment to enforce their constitutional right, but Plaintiffs did so here. *See MEIC*, ¶ 77. Defendants' alleged violation of Youth Plaintiffs' constitutional rights resulted in injury. These injuries included economic, aesthetic, cultural, and physical, mental, and emotional health. *See* Complaint,

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1 ¶¶ 15, 20, 36, 44, 53 (Mar. 13, 2020). Accordingly, the court declines to dismiss
2 Plaintiffs' claims with respect to MEPA's Climate Change Exception.
3 Finally, with regard to MEPA, Defendants also argue that
4 Plaintiffs are challenging "hypothetical future administrative decisions" and that
5 these speculative claims will result in this court issuing an advisory opinion.
6 Defs.' Reply Br. in Supp. of Mot. to Dismiss 10 (June 11, 2020) (citing
7 *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364). In *MEIC*,
8 the Montana Supreme Court seemed to address this argument by stating the
9 Constitution's clean and healthful environment language provides "protections
10 which are both anticipatory and preventative." *MEIC*, ¶ 77. Additionally, Youth
11 Plaintiffs' challenge is not against hypothetical future administrative decisions.
12 Instead, Youth Plaintiffs allege that they will continue to suffer harm if these
13 statutes are left in place because "Defendants continue to aggressively pursue
14 expansion of the fossil fuel industry in Montana." Complaint, ¶ 118(t)
15 (Mar. 13, 2020); *See Id.,* ¶ 118(u), (v), (w).
16 B. Redressability
17 To establish standing in federal court, a plaintiff must demonstrate
18 "a likelihood that the requested relief will redress the alleged injury." *Heffernan*,
19 ¶ 32. While federal case law is persuasive authority in interpreting Montana's
20 standing requirements, the Montana Supreme Court seems to have adopted a
21 broader interpretation of the redressability element. In Montana, a court may only
22 review a claim where the plaintiff alleges an injury that "available legal relief can
23 effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶ 46,
24 394 Mont. 167, 434 P.3d 241 (citation omitted). The term "alleviate" means to
25 "make (something, such as pain or suffering) more bearable" or "to partially

remove or correct (something undesirable)." *Alleviate*, Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/alleviate* (last visited June 2021).

In *Juliana*, the Ninth Circuit found that the plaintiffs failed to establish redressability. 947 F.3d at 1170-73. The Ninth Circuit stated that plaintiffs must establish Article III redressability under a two-prong analysis. Plaintiffs must demonstrate that the relief sought is: "(1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Id.* at 1170. In asking for relief, the plaintiffs first requested the court to declare that the government was violating the Constitution. *Id.* But the Ninth Circuit found this relief was "unlikely by itself to remediate [the plaintiffs'] alleged injuries absent further court action." *Id.* (citation omitted). Thus, plaintiffs failed the first prong.

Second, the plaintiffs asked the Ninth Circuit to issue an injunction "requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions." *Id.* The court found, and the plaintiffs agreed, that an injunction alone would not remedy their injuries. *Id.* at 1171. Further, the Ninth Circuit found that a court-ordered remedial plan was beyond the court's power to award under the second prong of redressability. The plaintiffs' request for a remedial plan would require the court to tread into the authority vested in the legislative and executive branches, and this would violate the separation of powers. *Id.* at 1172.

This case is distinguishable from *Juliana*. Beginning with the second prong of *Juliana*'s redressability analysis, this court may grant Youth Plaintiffs' declaratory relief. Discussed in greater detail below, the court finds

1 that it lacks the authority to grant Youth Plaintiffs' injunctive relief, including
2 Plaintiffs' request for a remedial plan like in *Juliana*. Such expansive relief
3 presents a political question and exceeds the court's powers. *See id.*

4 However, importantly, Youth Plaintiffs must satisfy a different
5 first prong to establish redressability than the *Juliana* plaintiffs. Youth Plaintiffs
6 need not prove that the relief sought is "substantially likely to redress their
7 injuries." *Id.* at 1170. Instead, Youth Plaintiffs' burden is to demonstrate that the
8 redress sought will "alleviate, remedy, or prevent" harm caused by Defendants.
9 *See* Larson, ¶ 46. Under the facts alleged and relief requested by Youth Plaintiffs,
10 a favorable ruling will alleviate Plaintiffs' injuries.

11 According to Youth Plaintiffs, their Complaint establishes that the
12 State Energy Policy and Climate Change Exception to MEPA contributed to their
13 injuries. Therefore, if the court declares that the State Energy Policy and Climate
14 Change Exception to MEPA are unconstitutional, this "by itself, [would] suffice
15 to establish redressability, regardless of whether additional injunctive relief was
16 issued." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 10 (May 29, 2020). The
17 court agrees.

18 The Complaint provides support for this contention. First, Youth
19 Plaintiffs described 23 affirmative acts, or aggregate acts, taken by Defendants
20 pursuant to the State Energy Policy and MEPA exception. Complaint ¶ 118
21 (Mar. 13, 2020).

22 Second, Youth Plaintiffs allege through these aggregate acts,
23 "Defendants are responsible for dangerous amounts of GHG emissions from
24 Montana – both cumulative emissions and ongoing emissions, which in turn
25 causes and contributes to the Youth Plaintiffs' injuries." *Id.* ¶ 121

(Mar. 13, 2020). The ensuing paragraphs describe Montana's GHG emissions, as well as the State's role in contributing to the country's total GHG emissions. *Id.* ¶¶ 122-42. Youth Plaintiffs conclude that "as a result of actions taken pursuant to and in furtherance of the State Energy Policy, [Defendants are] responsible for a significant and dangerous quantity of GHG emissions that have contributed to dangerous climate change and infringed the constitutional rights of Youth Plaintiffs." *Id.* ¶ 142.

Finally, Youth Plaintiffs alleged that Montana's GHG emissions and overall contribution to national GHG emissions "harm[ ] Youth Plaintiffs' physical and psychological health and safety, interfere[ ] with family and cultural foundations and integrity, and cause[ ] economic deprivations." *Id.* ¶ 2; *See also Id.* ¶¶ 143-84 ("Anthropogenic Climate Destabilization is Already Causing Dangerous Impacts in Montana"). Further, "[b]ecause of their unique vulnerabilities and age, Youth Plaintiffs are disproportionately harmed by the climate crisis and face lifelong hardships." *Id.* Youth Plaintiffs support these statements by describing their historic and ongoing injuries caused by rising GHG emissions. *Id.* ¶¶ 14-81.

Under these alleged facts, the State Energy Policy and MEPA Climate Change Exception contribute to Youth Plaintiffs' injuries. *See City of Cut Bank*, ¶ 6. Notwithstanding Youth Plaintiffs' request for this court to order a remedial plan, Youth Plaintiffs sufficiently demonstrate that finding State Energy Policy and Climate Change Exception to MEPA unconstitutional would alleviate their injuries. *See Larson*, ¶ 46. If the court declared these statutory provisions

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unconstitutional, it would partially remove or correct the injuries suffered by Youth Plaintiffs. For these reasons, Youth Plaintiffs adequately establish redressability here.

II. Prudential Standing

Prudential Standing sets additional limits on what cases a plaintiff may bring before a court. One such prudential limitation is the political question doctrine. Under this doctrine courts recognize that they "generally should not adjudicate matters 'more appropriately in the domain of the legislative or executive branches or the reserved political power of the people.'" *Larson*, ¶ 18 n. 6. Courts may not review "controversies . . . which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government or to the people in the manner provided by law." *Id.*, ¶ 39 (citation omitted).

Defendants contend that Plaintiffs seek a remedy which the court lacks the authority to grant. Plaintiffs ask the court to order "Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana . . . to protect Youth Plaintiffs' constitutional rights from further infringement by Defendants." Complaint ¶ 7 (Mar. 13, 2020). If the court deems necessary, the court should also appoint a special master with appropriate expertise to "assist the Court in reviewing the remedial plan for efficacy." *Id.*, ¶ 8. Further, the court should order that it will "retain[ ] jurisdiction over this action until such time as Defendants have fully complied with the orders of the Court." *Id.*, ¶ 9. Defendants argue that such relief exceeds the court's authority because the ability to enact new legislation lies exclusively with the Montana Legislature. The court agrees.

In *Juliana*, the Ninth Circuit found that the plaintiffs' request for a remedial climate plan violated the political question doctrine. 947 F.3d at 1171-72. The Ninth Circuit stated that "any effective plan would necessarily require a host of complex policy decision entrusted . . . to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171 (citation omitted). As such, the court found it lacked any power to grant or enforce a remedial plan. *Id.* at 1172-73.

In response, Youth Plaintiffs first state that the Montana Supreme Court granted the plaintiffs' request for a similar plan to remedy an unconstitutional school funding system in *Columbia Falls Elem. v. State*. 2005 MT 69, 326 Mont. 304, 109 P.3d 257. Plaintiffs state that in *Columbia Falls*, "the Court declared Montana's school funding system unconstitutional and gave the legislature an opportunity to correct the unconstitutional school funding system." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 11 (May 29, 2020).

However, in *Columbia Falls*, the court did not order a remedy to the extent requested here. The court did not order the legislative or executive branches to create laws, policies, or regulations to remedy the unconstitutional school funding system. Instead, the court deemed the funding system unconstitutional under the Public School Clause which required the legislature to "provide a basic system of free quality public . . . schools." Mont. Const. Art. X § 1(3), *Columbia Falls Elem.*, ¶ 31. The court then stated, "we defer to the Legislature to provide a threshold definition of what the Public School Clause requires," however, "the current funding system . . . cannot be deemed

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1 constitutionally sufficient." *Id.* In deferring to the Legislature, the court did not
2 craft a remedy "committed for resolution to other branches of government or to
3 the people in the manner provided by law." *See Larson*, ¶ 39.

4 The court finds that Youth Plaintiffs' request for a remedial plan
5 violates the political question doctrine. The Complaint asks this court to oversee
6 Defendants' development of a remedial plan or policies that adequately reduce
7 GHG emissions to a constitutionally permissible level. Ordering such a remedial
8 plan, and retaining jurisdiction over the plan's development, would require the
9 court to make or evaluate complex policy decision entrusted to the discretion of
10 other governmental branches. *See Larson*, ¶ 39, *Juliana*, 947 F.3d at 1171.

11 In a similar vein, the court also finds that the requested injunctive
12 relief seeking an accounting of GHG emissions violates the political question
13 doctrine. Plaintiffs ask the court to order that Defendants retroactively review and
14 "prepare a complete and accurate accounting of Montana's GHG emissions,
15 including those emissions caused by the consumption of fossil fuels extracted in
16 Montana and consumed out of state, and Montana's embedded emissions."
17 Complaint ¶ 6 (Mar. 13, 2020). Such an order would require the court to exceed
18 its authority by overseeing analysis and decision-making that should be left to
19 "the wisdom and discretion of the legislative or executive branches." *See Juliana*,
20 947 F.3d at 1171.

21 However, Youth Plaintiffs also offer a second argument: the court
22 may grant declaratory relief without imposing an injunctive remedy. Courts have
23 "the duty to decide the appropriateness and the merits of the declaratory request
24 irrespective of its conclusion as to the propriety of the issuance of the
25 injunction." *Steffel v. Thompson*, 415 U.S. 452, 468 (1974). Further, a district

court has "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201.

The court agrees that it may grant declaratory relief regardless of injunctive relief. The court possesses the authority to grant declaratory or injunctive relief, or both. *See Steffel*, 45 U.S. at 468-69; Mont. Code Ann. § 27-8-201. Therefore, despite dismissing Youth Plaintiffs' claims for injunctive relief, the court will allow Plaintiffs' claims for declaratory relief to move forward.

III. Administrative Exhaustion

Defendants' final argument is that Plaintiffs allege injuries from various administrative decisions but failed to exhaust administrative remedies. Moreover, the statute of limitations for filing an administrative challenge bars Plaintiffs from asserting such a challenge now.

Under the Montana Administrative Procedure Act (MAPA), plaintiffs may only seek judicial review of an agency's final written decision after they have "exhausted all administrative remedies available within the agency." Mont. Code Ann. § 2-4-702(1)(a). "The purpose of the exhaustion doctrine is to 'allow[ ] a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes.'" *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4 (citation omitted).

In their brief, Youth Plaintiffs respond that they are "not seeking review of any contested case under MAPA." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 18 (May 29, 2020). Additionally, because Plaintiffs are not challenging a discrete agency action or review of a contested case "they intentionally have not

asserted MAPA claims; their claims are brought directly under Montana's Constitution." *Id.*

Plaintiffs' argument is supported by the Montana Supreme Court's ruling in *MEIC*. In *MEIC*, the lower court held that "Article II, Section 3 of the Montana Constitution does provide a fundamental right to a clean and healthy environment, and that parties such as the Plaintiffs are entitled to bring a direct action in court to enforce that right." *MEIC*, ¶ 28. The basis for the plaintiffs' constitutional challenge in *MEIC* was a statutory provision that allowed the defendant agency to circumvent nondegradation review of discharges from water wells for certain categories or classes of activities. *Id.*, ¶ 6. In *MEIC* the district court held – and the Supreme Court did not overturn – the plaintiffs' ability to bring a direct action in district court without first seeking administrative review. *See id.*, ¶¶ 77-81.

Moreover, "exhaustion of an administrative remedy is unnecessary if the remedy would be futile as a matter of law." *Leo G.*, ¶ 11. A party need not exhaust administrative remedies where the administrative rules and statutes make agency relief futile. *Mountain Water Co. v. Mont. Dep't of Pub Serv. Regulation*, 2005 MT 84, ¶¶ 15-16, (citing *DeVoe v. Department of Revenue*, 263 Mont. 100, 866 P.2d 228 (1993)). A showing of futility requires the aggrieved party to demonstrate more than "the mere possibility or likelihood that an administrative remedy may not succeed on the merits." *Leo G.*, ¶ 11 (citing *Mountain Water Co.*, ¶¶ 16-18).

Under similar reasoning, the court in *Juliana* found that the plaintiffs needed not exhaust their administrative remedies prior to bringing their claim under the federal version of MAPA – the Administrative Procedure Act

(APA). The court stated that the plaintiffs argued "the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions . . . the plaintiffs cannot effectively pursue their constitutional claims – whatever their merits – under that statute." *Juliana*, 947 F.3d at 1167.

The court concludes that Youth Plaintiffs properly brought this action in district court rather than through the administrative review process. *See MEIC*, ¶ 28.

Additionally, had Youth Plaintiffs sought Defendants' review of the administrative decisions noted, Defendants would have found no errors to correct. *See Shoemaker*, ¶ 18. The Climate Change Exception exempts Defendants from considering climate impacts altogether. Any challenge brought by Youth Plaintiffs asking the agency to review climate-related impacts would therefore be futile. *See Leo G.*, ¶ 11. Additionally, similar to the plaintiffs in *Juliana*, no single agency action standing alone caused their injuries. *See* 947 F.3d at 1167; Complaint ¶ 118 (Mar. 13, 2020). Accordingly, contesting any one final agency decision before the agency would not provide the relief sought by Youth Plaintiffs. *See Leo G.*, ¶ 11. For these reasons, the court declines to dismiss Youth Plaintiffs' MEPA-related claims for want of administrative exhaustion.

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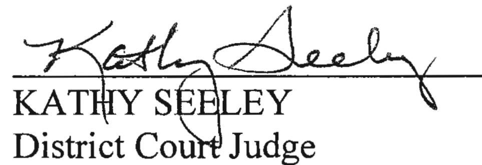
ORDER

Based on the foregoing, Defendants' motion to dismiss is **GRANTED** with respect to Requests for Relief 6, 7, 8, and 9. The motion to dismiss with respect to all other claims is **DENIED**.

DATED this 4 day of August 2021.



KATHY SEELEY
District Court Judge

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KS/sm/CDV-2020-307 Ord Mot Dismiss

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on August 9, 2021, I caused to be served this document, **Petitioners' Statement of Additional Authority**, together with **Appendix A** thereto, upon the parties per e-service agreement via Supreme@courts.wa.gov.

I certify under penalty of perjury under the state of Washington that the foregoing is true and correct.

DATED this 9th day of August, 2021, at Seattle, WA.

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OUR CHILDREN'S TRUST

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