STATE OF MAINE

CUMBERLAND, SS. **SUPERIOR COURT**

CONSERVATION LAW FOUNDATION,
SIERRA CLUB, and
MAINE YOUTH ACTION,

Plaintiffs,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, and
MAINE BOARD OF ENVIRONMENTAL PROTECTION

Defendants.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Civil Action No. AP-24-22

Plaintiffs Conservation Law Foundation, Sierra Club, and Maine Youth Action oppose Defendants Maine Department of Environmental Protection and Maine Board of Environmental Protection's Motion to Dismiss on the following grounds.

I. INTRODUCTION

> "More ticks; less cod, fewer herring and scallops. Lobsters moving north. Sap houses facing shorter seasons. Doctors and nurses warning about growing asthma rates in children. Seniors are warned to stay indoors as ozone rates climb . . . . The challenge from our warming climate is real. We must do our part to stem the worst impacts for the future of our state and our children, who will be left having to deal with the consequences of our inaction.
>
> So the time to act is now."[1]

So testified Governor Janet Mills as she and Maine's Legislature, confronted with these and other worsening impacts of climate change, enacted a comprehensive statutory framework for reducing greenhouse gas (GHG) emissions. Propelled by urgency, the Legislature fast-tracked the

[1] Testimony of Governor Janet T. Mills in Support of L.D. 1679, "An Act to Establish the Maine Climate Change Council to Assist Maine To Mitigate, Prepare for and Adapt to Climate Change," Before the Joint Standing Committee on Environment and Natural Resources (May 17, 2019).

legislation to "commence work on those issues as soon as is possible," "as immediately necessary for the preservation of the public peace, health, and safety." P.L. 2019, ch. 476 (emergency, effective June 26, 2019); Plaintiff's Amended Complaint ("Am. Compl.") ¶ 19. Enacted in 2019, Maine's "Climate Law" imposed mandatory cuts on statewide GHG emissions, requiring reductions of 45% below 1990 levels by 2030, achievement of net zero emissions by 2045, and reductions of 80% below 1990 levels by 2050 (collectively, the "Climate Requirements"). This landmark legislation also created a Climate Council to develop "climate actions plans" with policy recommendations to achieve the state's Climate Requirements.

But the lynchpin of the Climate Law was the responsibility the Legislature assigned to Defendants, the Maine Department of Environmental Protection ("Department") and the Maine Board of Environmental Protection ("Board"), for implementation. The Climate Council has little authority on its own and the climate action plan is just a set of recommendations absent Defendants' nondiscretionary duty to "ensure compliance" with the Climate Requirements, setting this legislative framework apart from many others establishing unenforceable plans and reports. Instead, the Legislature carefully prescribed Defendants' legal obligation, directing Defendants to fulfill their role by "adopt[ing] rules," and specifying that those rules "must be consistent" with the climate action plan as updated and that they "must prioritize" emissions reductions from the most contributing sectors. Moreover, to ensure Defendants did so "as immediately necessary for the preservation of the public peace, health and safety," P.L. 2019, ch. 476 (emergency, effective June 26, 2019), the Legislature imposed a deadline of September 1, 2021 to first adopt such rules.

Plaintiffs brought this action because Defendants have not complied with this legal mandate—not by the September 1, 2021 deadline set by statute, and not almost three years later. Although Defendants' conduct has suggested they were laying the groundwork to act—for example, by contributing to a state clean transportation plan released in December 2021 and overseeing a

nearly year-long stakeholder process focused on clean heavy-duty vehicles—each process concluded without the promulgation of any rule. Even after new data was released in November 2022 showing Maine's progress was not "consistent" with the climate action plan, Defendants *still* did not act to fulfill their rulemaking duty. As a result, in May of 2023, Plaintiffs and others petitioned for the adoption of two rules to address transportation emissions—the Advanced Clean Trucks (ACT) and Advanced Clean Cars II (ACC II).[2] During the rulemaking processes initiated by those petitions in July 2023, Department staff touted the ACC II and the ACT's many benefits and refuted oppositional arguments. But both rules were ultimately rejected by the Board: the ACT in December 2023 and the ACC II in March 2024. With no other option, Plaintiffs initiated this action to enforce the Defendants' clear obligation under the law.

Plaintiffs now bring five claims[3] with one common purpose: to hold Defendants accountable to their unambiguous legislative charge. Defendants' Motion to Dismiss attempts to obscure this straightforward demand—they mischaracterize it as hinging on the 2030 Climate Requirement, argue Defendants' ongoing duty releases them from their initial rulemaking obligation, contend that Defendants have discretion about when to adopt rules, and try to color the cause of this lawsuit as Plaintiffs' impatience with the pace of rulemaking. But the Climate Law's simple directive to adopt rules by a date certain undercuts each of these arguments.

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[2] The ACT and the ACC II are rules promulgated by the California Air Resources Board for reducing emissions from transportation by requiring, among other things, manufacturers to sell more zero-emission vehicles. Am. Compl. ¶ 36. Under the federal Clean Air Act, states may deviate from the federal standards and avoid the Clean Air Act's prohibition against adopting their own vehicle emission regulations by adopting standards identical to California's for any given model year, as Defendants have historically done. *See* Clean Air Act, 42 U.S.C. §§ 7401 et seq. (1970); *see also* Am. Compl. ¶¶ 40-50.

[3] No challenge under Maine's Climate Law has previously come before the court. As such, out of an abundance of caution, Plaintiffs brought Counts I and III in the alternative to Counts II and IV in case the Court found Section 8058 to be the incorrect vehicle to bring Counts II and IV. Defendants' Motion to Dismiss concedes that section 8058 is the proper vehicle for these claims. *See* Mot. to Dismiss at 2 ("[S]ection 8058, not section 11001, is the exclusive mechanism to challenge agency rulemaking or the failure or refusal to adopt rules[.]"); *id.* at 15 ("the only counts that merit further analysis are those brought under section 8058."). If the Court agrees with both Plaintiffs and Defendants that these claims are properly brought under Section 8058 as opposed to Section 11001, then Plaintiffs will withdraw Counts I and III.

In this Opposition, Plaintiffs demonstrate first that they have standing because their members have suffered and will continue to suffer harms to their property, pecuniary and personal interests due to Defendants' noncompliance with the Climate Law. Next, Plaintiffs demonstrate their claims are ripe because Defendants' unfulfilled statutory mandate poses an immediate legal problem that harms Plaintiffs.

With respect to the individual counts, Plaintiffs establish they have properly challenged Defendants' failure to adopt rules ensuring compliance with the Climate Requirements (Count II), and failure to adopt transportation emissions rules despite the legislative directive to "prioritize" the most contributing sectors (Count IV) under 5 M.R.S. § 8058 ("Section 8058") because the prospect of a future climate action plan cannot excuse Defendants' noncompliance with their statutory mandate and missed deadline. Count VII withstands the motion to dismiss because Defendants' nondiscretionary duty to adopt rules prioritizing emissions reductions from transportation compels them to adopt the ACC II (i.e., the ACC II is "required by law" under Section 8058). Plaintiffs properly bring Count VI because Section 8058 allows for arbitrary and capricious review of Defendants' failure to adopt the ACC II because there is a complete rulemaking record; in the alternative, Count V allows the Court to review the ACC II rulemaking record under 5 M.R.S. § 11001 ("Section 11001").

To remedy Counts II and IV, Plaintiffs seek declaratory judgment that Defendants are under an existing and ongoing statutory obligation to adopt rules under the Climate Law to meet what Governor Mills and the Legislature have declared "immediately necessary for the preservation of the public peace, health, and safety," P.L. 2019, ch. 476, including rules prioritizing emissions from the greatest contributing sectors (Am. Compl. Prayer for Relief ¶¶ a and b). Additionally, Plaintiffs seek an order simply directing Defendants to comply with their statutory duty (*id.* ¶ e). To remedy counts V, VI, and VII, Plaintiffs seek declaratory judgments that Defendants' failure to adopt the ACC II

was arbitrary and capricious and an abuse of discretion (*id.* ¶ c) and that Defendants' failure to adopt any rule reducing emissions from transportation violates Maine's Climate Law (*id.* ¶ d). Plaintiffs also seek an order directing Defendants to regulate in compliance with the mandate to address transportation emissions (*id.* ¶¶ e and f). Plaintiffs ask the court to impose a new deadline for these directives because the deadline set by statute has long since passed. *Id.*

II. BACKGROUND

Maine's Climate Law, enacted by emergency legislation in 2019, establishes mandatory GHG emission reduction levels, or "Climate Requirements." The law states:

> 1. 2030 annual emissions level. By January 1, 2030, the State shall reduce gross annual greenhouse gas emissions to at least 45% below the 1990 gross annual greenhouse gas emissions level.
> 2. Interim emissions level. By January 1, 2040, the gross annual greenhouse gas emissions level must, at a minimum, be on an annual trajectory sufficient to achieve the 2050 annual emissions level in accordance with subsection 3.
> 2-A. Carbon neutrality. Beginning January 1, 2045, net annual greenhouse gas emissions may not exceed zero metric tons.
> 3. 2050 annual emissions level. By January 1, 2050, the State shall reduce gross annual greenhouse gas emissions to at least 80% below the 1990 gross annual greenhouse gas emissions level.

38 M.R.S. § 576-A; *see also* Am. Compl. ¶¶ 18-20. To achieve these Climate Requirements, the Climate Law established a Climate Council and charged it with updating Maine's climate action plan every four years with recommended strategies. 38 M.R.S. §§ 577, 577-A; Am. Compl. ¶ 21. But Defendants bear ultimate responsibility for achievement of the Climate Requirements, both by the September 1, 2021 deadline set by the Climate Law and on an ongoing basis in concert with updates to the climate action plan:

> 4. . . ***by September 1, 2021, the board shall adopt rules to ensure compliance*** with the levels established by subsections 1 to 3 which:
> A. ***Must be consistent with the climate action plan***, as updated pursuant to section 577, subsection 1; [and]
> B. ***Must prioritize greenhouse gas emissions reductions by sectors that are the most significant sources*** of greenhouse gas emissions, as identified by the United States Energy Information Administration and in the department's biennial reports submitted under section 578, taking into account gross greenhouse gas emissions reductions achieved by each sector since 1990 measured as a percentage of statewide gross greenhouse gas emissions and

> taking into account the cost-effectiveness of future gross greenhouse gas emissions reductions by each sector . . .

38 M.R.S. § 576-A (emphasis added); *see also* Am. Compl. ¶ 22-23.

Under this statutory regime, the Climate Council released Maine's climate action plan, "*Maine Won't Wait*," in December 2020. Maine Climate Council, *Maine Won't Wait*, A Four-Year Plan for Climate Action, (Dec. 2020); Am. Comp. ¶ 24. *Maine Won't Wait* identified transportation as the leading cause of GHG emissions in the state. *Maine Won't Wait* at 39; Am. Compl. ¶ 28. Based on modeling showing the need for rapid transportation and building electrification to comply with the Climate Requirements, *Maine Won't Wait* set ambitious goals for 2025, for instance calling for 41,000 light-duty electric vehicles on the road, 12% zero-emission share of new heavy-duty vehicle sales, and 17,000 newly weatherized households. *Maine Won't Wait* at 107; Am. Compl. ¶¶ 25-27, 29. Rather than delve into specific transportation electrification strategies, *Maine Won't Wait* recommended the state develop a follow-up plan exclusively focused on transportation. *Maine Won't Wait* at 41; Am. Compl. ¶ 30.

Accordingly, Maine's "EV Roadmap" was released a year later. Governor's Energy Office, Governor's Office of Policy Innovation and the Future, Cadmus, Maine Clean Transportation Roadmap (Dec. 2021); Am. Compl. ¶¶ 31-34. Based on extensive analysis overseen by a steering committee consisting of representatives from the Department and several other state agencies and executive offices, the EV Roadmap uplifts two "critically important" rules to meet *Maine Won't Wait's* transportation electrification goals, and therefore, the statutory Climate Requirements: the ACC II and the ACT rules. EV Roadmap at ii, 2, 53; Am. Compl. ¶¶ 35-36. The EV Roadmap makes clear that without these rules, Maine won't achieve *Maine Won't Wait's* transportation electrification goals and will consequently miss the Climate Requirements. EV Roadmap at 29-31; Am. Compl. ¶¶ 37-39.

Defendants did not adopt those rules—nor any others reducing emissions from transportation, the most significant contributor of GHG emissions in Maine—by the statutory deadline of September 1, 2021 or since. Am. Compl. ¶¶ 55-59. In fact, despite recognizing "the need to reduce transportation emissions" and that the EV Roadmap recommended, "most notably, the adoption of regulatory programs such as ACC II," Department Basis Statement and Response to Comments, 06-096 C.M.R. Ch. 127-A Advanced Clean Cars II Program (Mar. 13, 2024) ("ACC II Basis Statement") (Exhibit A) at 60, Defendants have rejected rules that would have cut tailpipe climate pollution three times since then, Am. Compl. ¶¶ 60-92, deviating from their historic pattern of adopting the ACC II and ACT's regulatory predecessors, Am. Compl. ¶¶ 40-47. In this time period, Defendants have only adopted two rules citing their authority in Maine's Climate Law, yet neither one purports to, nor does, "ensure compliance" with the Climate Requirements. Am. Compl. ¶ 53. Defendants are therefore in violation of the Climate Law's nondiscretionary directives, and the court has authority and jurisdiction to remedy these failures.

III. STANDARD OF REVIEW

In reviewing a motion to dismiss under M.R. Civ. P. 12(b)(6), "the material allegations of the complaint must be taken as admitted," and courts will "examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *In re Wage Payment Litig.*, 2000 ME 162 ¶ 3, 759 A.2d 217; *Doe v. Graham*, 2009 ME 88, ¶ 2, 977 A.2d 391, 394.

The standard of review for motions to dismiss for lack of subject matter jurisdiction is discussed in the next section.

IV. ARGUMENT

A. Plaintiffs Have Standing to Bring Their Claims

An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *Black v. Bureau of Parks and Lands*, 2022 ME 58, ¶ 29, 288 A.3d 346.

Defendants assert Plaintiffs have not met the requirements for associational standing. Mot. to Dismiss at 6-10.[4] Defendants have not disputed that Plaintiffs CLF, Sierra Club, and MYA meet the second and third prongs of this test. *See* Mot. to Dismiss at 8. Climate change is central to each of their organizational purposes of protecting the environment. *See* Am. Compl. ¶¶ 4-6; *see also* Affidavits attached hereto in Exhibit B: Aff. of Kate Sinding Daly, ¶¶ 3, 6; Aff. of Cole Cochran, ¶ 5; Aff. of Katherine Garcia, ¶¶ 3-6. Neither do the claims asserted nor relief sought require the participation of individual members in this lawsuit.

As to whether Plaintiffs' members have standing in their own right (prong 1), standing in Maine is prudential and not constitutional so that access to the courts is limited to those best suited to assert a particular claim. *See Black,* 2022 ME 58, ¶ 27, 288 A.3d 346. "Just what particular interest or injury is required for standing purposes and the source of that requirement . . . varies based on the type of claims being alleged." *Bank of Am. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700. Persons "aggrieved" by agency action or inaction can demonstrate standing with particularized injuries that operate prejudicially and directly upon their property, pecuniary, or personal rights. *Storer v. Dept. of Envt'l Prot.*, 656 A.2d 1191, 1192 (Me. 1995) (citation omitted).

[4] Defendants also claim that CLF, Sierra Club and MYA lack organizational standing. *See* Mot. To Dismiss at 9. However, Plaintiffs do not assert standing on that basis.

Courts do not require a "high degree of proof" to establish standing, and the Amended Complaint satisfies these pleading requirements. *CLF v. State, Dept. of Envtl. Prot.,* 2000 WL 33675692, at *14 (Me. Super. Aug. 4, 2000). Plaintiffs nonetheless submit nine affidavits that unequivocally establish the standing of Plaintiffs' individual members. *See* Affidavits attached hereto in Exhibit B: Benjamin Tettlebaum, Barry Woods, Philip Coupe, Ruth Hennig, Megan Sauberlich, Jenna Butler, Philip Mathieu, Becky Bartovics, and David von Seggern. The Court can consider material outside the pleadings, such as affidavits, to aid in its determination of standing. *See Gonzalez v. United States*, 284 F.3d 281, 287-88 (1st Cir. 2002); *see also Copp v. Shane,* 2018 WL 6440878, at *4 (D. Me. Dec. 7, 2018).

1. Defendants' Failure to Comply with the Climate Law Harms Plaintiffs' Members' Pecuniary Rights

Plaintiffs have members whose "pecuniary rights" are harmed by Defendants because they are "engaged in a business directly affected" by Defendants' failure to comply with the Climate Law. *See National Hearing Aid Centers, Inc. v. Smith*, 376 A.2d 456, 458-59, 96 A.L.R.3d 1020 (Me. 1977) ("Generally speaking, those persons who are engaged in a business directly affected by a statute are considered to have a sufficient interest to create a justiciable issue when contesting that statute's validity"). Even the prospect of economic injury is sufficient to confer standing. *See Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1381 (Me. 1996).

The potential economic advantages of implementing climate solutions are well established—from the Climate Law itself, which aims for solutions that create "additional employment and economic growth," 38 M.R.S. § 577(7)(B), to *Maine Won't Wait,* seeking to "creat[e] economic opportunity as we undertake climate and energy transitions," and "detail[ing] how addressing climate change presents transformational economic opportunities." *Maine Won't Wait,* at 6, 8.

Unsurprisingly, then, the Department's analysis of the ACC II program demonstrated not only the rule's emissions savings, but significant economic benefits as well. According to the

Department, the ACC II would have "result[ed] in greater availability of a larger variety" of electric vehicles available for consumers in Maine by "provid[ing] further incentive for vehicle manufacturers to provide a variety of EV options for consumers." ACC II Basis Statement at 8. The Department explained electric vehicles are "expected to generate demand for labor" including "the installation and maintenance of charging infrastructure." *Id.* at 49. Thus, Defendants' decision *not* to adopt the ACC II rule, or any other rule to reduce transportation emissions, directly impacts the pecuniary interests of Plaintiffs' members, such as Barry Woods and Philip Coupe, who are engaged in the business of selling and installing electric vehicle charging infrastructure, which is dependent on sales of electric vehicles in the state as well as certainty within electric vehicle markets. Defendants' failure to act will "directly lead to fewer sales of electric vehicles in Maine," generating "less consumer demand" for the business's electric vehicle service equipment installation services, "materially harm[ing] [their] business interests by reducing revenues and profits." Aff. of Philip Coupe, ¶ 14. "The state's failure to take regulatory action to advance deployment of EV growth . . . will inhibit" the business's "ongoing economic growth." Aff. of Barry Woods, ¶ 16. "A slowed EV adoption curve in Maine necessarily impacts [the business's] growth and stock value because of diminished revenues, and therefore harms [Plaintiffs' members'] bottom line." *Id.*

Defendants' failure to comply with the Climate Law also harms Plaintiffs' members pecuniary interests by contributing to climate change. Maine is releasing and will release more greenhouse gas emissions than it would have if Defendants had adopted rules in compliance with the Climate Law. *See, e.g.,* ACC II Basis Statement at 5 ("adoption of the ACC II Program would reduce GHG emissions that lead to climate change"), 6 ("the ACC II Program could reduce GHG emissions from the transportation sector in Maine by approximately two million metric tons CO_2e

per year"[5]), and 55 ("the proposed [ACC II] regulation will reduce overall GHG emissions in Maine and [] would be an important part of the State's efforts to reduce anthropogenic contributions to global warming."). As a result, Defendants are contributing more to climate change and its impacts than if they had complied with the Climate Law. *See, e.g.,* ACC II Basis Statement at 59-60, 18.

Defendants' failure to adopt rules in compliance with the Climate Law directly impacts Plaintiffs' members' pecuniary interests by contributing to the worsening impacts of climate change. For instance, Becky Bartovics has had to reduce her working hours, as well as those of her employees, on her farm due to extreme heat caused by climate change. She is also concerned for the future of her produce and farm animals, which are threatened by extreme temperatures. Aff. of Becky Bartovics, ¶ 10.[6]

2. Defendants' Failure to Comply with the Climate Law Harms Plaintiffs' Members' Property Rights

Plaintiffs' members also suffer present and imminent injuries to their property interests due to Defendants' noncompliance with the Climate Law. *See Matter of Lappie*, 377 A.2d 441, 443 (Me. 1977) (finding standing "by virtue of [the] potential for particularized injury" based on anticipated future environmental issues on property).[7] As explained above, Defendants' noncompliance with the Climate Law means that GHG emissions are higher than they otherwise would have been, which contributes to climate change that is increasing the severity of storms and coastal flooding. These

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[5] "Carbon dioxide equivalent or CO_2e means the number of metric tons of CO_2 emissions with the same global warming potential as one metric ton of another greenhouse gas." ACC II Basis Statement at 6.

[6] *See* Aff. of Becky Bartovics ¶ 10 ("Extremely high temperatures limit my ability to work outside and manage my farm. . . Extreme temperatures also threaten my produce and farm animals. I have already changed the rotation of my sheep grazing to deal with recent heat waves, and I fear more intense weather will put my livelihood at greater risk.").

[7] It is well established that harms do not need to have already happened for standing purposes; they may be "actual or imminent." *Madore v. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 13. "[O]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

events have had a direct impact on the property interests of Plaintiffs' members, by impacting property values, requiring costly climate adaptation interventions, necessitating expensive repairs, and affecting the ability to utilize property for farming, gardening, and recreating.[8] Plaintiffs members expect the worsening impacts of climate change to continue to harm their property rights.[9] For example, Ruth Hennig incurred costs when her condominium association installed new roofing to withstand hurricane-force winds, following the highest storm surge in the state's history, and Becky Bartovic was forced to spend $15,000 for damage to a greenhouse on her property after a severe storm. Aff. of Ruth Hennig, ¶ 8-16; Aff. of Becky Bartovic, ¶ 7.

3. Defendants' Failure to Comply with the Climate Law Harms Plaintiffs' Members' Personal Rights

Defendants' failure to implement the Climate Law also harms Plaintiffs' members' personal interests. Non-economic injuries are a well-established basis for standing. *See e.g.*, *Fitzgerald v. Baxter State Park Authority,* 385 A.2d 189, 196 (Me. 1978) (quoting *Sierra Club v. Morton*, 405 U.S. 727 (1972) at 734-35) ("[A]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and 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."). In the Law Court's words, "[a]lthough scenic and aesthetic uses are not readily susceptible to quantitative analysis, the Constitution does not demand such an analysis in order to subject those uses to legal protection." *Uliano v. Bd. of Envt'l. Prot.*, 2009 ME 89, ¶ 30, 977

[8] *See* Aff. of Megan Sauberlich, ¶ 7 (increased flooding and erosion on their coastal property has washed away the road to access the property and the stairs descending to the beach and will force installation of costly resilience structures and reduce property value); Aff. of Ruth Hennig, ¶ ¶ 8-16 (condominium association considering additional expensive climate adaptation interventions in the future, like permanently raising electrical equipment from the ground and constructing a permanent elevated walkway to allow unit owners ingress and egress from the building following future flooding events); Aff. of Benjamin Tettlebaum, ¶ ¶ 10-11 (longer tick season and overrun Browntail moth caterpillar population in Maine has decreased his time outside recreating and gardening on his property); Aff. of Philip Coupe, ¶ 6 (beach property decreasing in value due to sea level rise).

[9] *See, e.g,* Aff. of Benjamin Tettlebaum, ¶¶ 10-11.

A.2d 400. Maine Courts have taken a broad view of harm where the environment is involved. In *Black*, certain plaintiffs had standing to challenge an alleged violation of a state restraint on the sale of public lands because they recreated "in and around them" and hunted and fished "in the area." *Black*, 2022 ME 58 at ¶ 27. The Court cited *Fitzgerald v. Baxter State Park Authority,* 385 A.2d 189 (Me. 1978), which found standing in another case involving land, "because the plaintiffs in *Fitzgerald*, like those here, asserted that a state agency entrusted with management of public lands had acted in excess of its authority." *Id.* (citations omitted).

Here, too, Defendants have acted contrary to their legislative directive, to the detriment of Plaintiffs' members' "use and enjoyment" of outdoor resources. *See, e.g., Housatonic River Initiative v. U.S. EPA,* 75 F.4th 248, 265 (1st Cir. 2023) (finding "imminent injuries plainly constitute injuries in fact" where Petitioners' members use proposed disposal area for recreation and fear the facility will negatively impact their use and enjoyment of the area); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, (1972))). Defendants' failure to comply with the Climate Law will impact the property and outdoor enjoyment of Plaintiffs' members by jeopardizing their health, for instance, by increasingly exposing them to pests that cause diseases[10] and increasing their exposure to allergens.[11] Further, climate change impacts reduce Plaintiffs' members outdoor enjoyment by

[10] *See, e.g.,* Aff. of Benjamin Tettlebaum, ¶¶ 10-11 (unable to enjoy property due to extended tick season in Maine; the expanding tick population caused him to spend less time outside in the spring and early summer; unable to harvest apples from apple trees on property due to infestation of Browntail moth caterpillars); Aff. of Megan Sauberlich, ¶¶ 11-12 (increasing tick population due to lack of deep winter freeze increasing probability of exposure to Lyme disease); Aff. of David Von Seggern, ¶ 7 (increase in ticks and the fatal diseases they carry limiting ability to comfortably spend time outdoors; certain trees subject to an increase in diseases and pest infestation as a result of rising temperatures).

[11] *See, e.g.,* Aff. of Ruth Hennig ¶ 17 (curtails outdoor activities on days with high pollen counts, exacerbated by climate change, because it makes it uncomfortable for her to walk outside).

reducing opportunities for recreation due to extreme heat,[12] lack of snowfall,[13] and trails damaged by severe weather.[14] Further, Defendants' failure to regulate Maine transportation emissions has led to higher levels of air pollution in Maine than there would have been if Defendants had complied with the Climate Law, also causing health impacts and directly interfering with Plaintiffs' members' ability to recreate outdoors.[15] *See, e.g., Maine People's All. and Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 284 (1st Cir. 2006) (environmental organization's members met injury-in-fact criterion for individual Article III standing with allegations of diminished enjoyment of river from fear of mercury contamination in suit against former chemical manufacturing facility).

Courts have also recognized that "mental health injuries stemming from the effects of climate change on [the] environment, feelings like loss, despair, and anxiety, are cognizable injuries." Findings of Fact, Conclusions of Law, & Order, *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Aug. 14, 2023), https://westernlaw.org/wp-content/uploads/2023/08/2023.08.14-Held-v.-Montana-victory-order.pdf. Plaintiffs' members allege these cognizable injuries due to climate change, in particular climate change exacerbated by Defendants' failures to act under the Climate Law.[16]

Finally, Defendants' failure to comply with the Climate Law harms Plaintiffs' members as consumers desiring to buy zero-emission vehicles in Maine. Despite Defendants' contentions,

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[12] *See, e.g.,* Aff. of David Von Seggern, ¶ 7 (unable to lead walks due to extreme temperatures and humidity).
[13] *See, e.g.,* Aff. of Philip Mathieu, ¶ 7 (unable to ski to the extent desired due to Maine's decrease in snowfall).
[14] *See, e.g.,* Aff. of David Von Seggern, ¶ 7 (unable to enjoy trails because of trail damage and attributed to severe storms); Aff. of Megan Sauberlich, ¶ 9 (inability to walk, hike, and bike due to heavy precipitation damaging trails); and Aff. of Benjamin Tettlebaum, ¶ 9 (climate change harming ability to enjoy outdoor activities such as walking, hiking, swimming, camping and backpacking in Maine).
[15] *See e.g.*, Aff. of Phillip Mathieu ¶¶ 4-5 (describing ozone and noise pollution from gas-powered vehicles that cause him to avoid walking or biking in his neighborhood.); Aff. of Ruth Hennig, ¶ 18 (curtailing her outdoor activities to avoid breathing air pollution); Aff. of Jenna Butler ¶¶ 9-10 (asthma exacerbated by frequent commuting of work vehicles; concern exposure to tailpipe emissions will worsen asthma); Aff. of Megan Sauberlich, ¶ 11 (exposure to road pollution can make it hard to breathe; less electric vehicles in Maine mean more more air pollution).
[16] *See, e.g,* Aff. of Philip Coupe, ¶¶ 6, 8-9; Aff. of Barry Woods, ¶¶ 4, 7; Aff. of Benjamin Tettlebaum, ¶ 5; Aff. of Ruth Hennig, ¶¶ 19-21.

Plaintiffs *do* "credibly allege[] actions or failure to act by Defendants have had a direct effect on the availability of [EVs] in Maine," Mot. to Dismiss at 7-8, based on the Department's own assertions that "auto manufacturers are more likely to send larger inventories and their newest [zero emission vehicles] to states that have strong regulations on the books" and adoption of the ACC II "would increase market certainty" and "[p]rovid[e] long-term certainty to the industry." ACC II Basis Statement at 5, 7, 12, 14-15. Plaintiffs' members' vehicle choices are already impacted by Defendants' decision not to adopt the ACC II.[17] However, even if electric vehicle markets in Maine are not yet affected, these injuries are "certainly impending." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).[18]

4. Plaintiffs Have Standing to Seek Preventive Relief Against Defendants' Violation of their Public Duty to Enact Rules Under the Climate Law

Even if Plaintiffs had not alleged the particularized harms discussed above, they would have standing. Maine's prudential standard gives citizens standing to seek preventative relief against a state agency violating a state-wide public duty. *Common Cause v. State*, 455 A.2d 1, 10 (Me. 1983) (plaintiffs without specialized injury had standing to challenge the issuance of general obligation bonds to Bath Iron Works because they were "surely among the principal intended beneficiaries" of a constitutional provision proscribing the use of tax dollars for private purposes); *Cohen v. Ketchum,* 344 A.2d 387 (Me. 1975) (taxpayers without specialized injury had standing to seek preventive relief against asserted illegal action by a local governmental unit). In *Buck v Town of Yarmouth*, 402 A.2d 860 (Me. 1979), the Court explained,

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[17] *See, e.g.*, Aff. of Megan Sauberlich, ¶ 13 (increased severe weather events exacerbated by climate change harmed and threatened property, enjoyment of land, and ability to work from home in Maine); Aff. of Philip Mathieu, ¶ 6 (describing a lack of zero-emissions vehicles available for purchase in Maine); Aff. of Benjamin Tettlebaum, ¶ 15 (describing desire to reduce emissions from his own driving by purchasing an EV for various reasons, but harmed by Defendants' failure to adopt rules requiring delivery of more EVs to Maine).
[18] *See, e.g.,* Aff. of Jenna Butler, ¶ 11; Aff. of Megan Sauberlich, ¶ 13; Aff. of Benjamin Tettlebaum, ¶ 15.

> "this court has declared that [the] general equity jurisdiction statute, [14 MSRA 6051(13)], gives standing to any private individual, *regardless of particularized injury, to seek preventive relief against a threatened public wrong,* without limitation to the required ten taxpayers or to the particular financial acts specified in subsection (12). This standing to vindicate a common right, even though the plaintiff suffers no special injury, flowing as it does from the general equity statute, is subject to the usual restrictions upon obtaining equitable relief… [citation omitted] … the grant of standing implied in subsection (13) is restricted to an application for preventive or injunctive-type relief."

(emphasis added). *See Kaplan v. Bowker*, 131 N.E. 2d 372 (Mass. 1956) ("[W]here a public officer owes a specific duty to the public. . . to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by mandamus the performance of the duty required by law.").

These are precisely the circumstances alleged here. Plaintiffs seek to prevent state actors from abjuring their public duty to enact regulations under the Climate Law. That law is inarguably a law for statewide public benefit. *See, e.g.,* P.L. 2019, ch. 476 (emergency, effective June 26, 2019) ("Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety . . .").[19] Defendants' effort to confine *Common Cause, see* Mot. to Dismiss at 9-10, fails: the same prudential concerns that give all taxpayers a litigable interest in preventing the state from incurring debt to benefit a private enterprise, give the plaintiffs standing here. The Climate Law operates statewide for the benefit of all Mainers. Plaintiff organizations and their members live, breathe, work, and play in Maine, and are "surely among the principal intended beneficiaries," *Common Cause*, 455 A.2d at 10, of the public duty to enact emission-lowering regulations under the Climate Law.

[19] *Heald v. School Administrative Dist. No. 74*, 387 A.2d 1 (Me. 1978), which denied standing in a local government dispute, did not address case that seek preventative relief against an agency's statewide violation of a public duty.

B. Plaintiffs' Claims are Ripe for Judicial Review

Plaintiffs' claims are ripe for review because they present an immediate legal problem and Plaintiffs would experience hardship in the absence of adjudication. Ripeness is a two-part inquiry focusing on (1) the fitness of the issue for judicial review and (2) the hardship to the parties caused by withholding of adjudication. *Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 490 A.2d 1218, 1221 (Me. 1985). To be fit for review, the controversy must pose a "concrete, certain, or immediate legal problem." *Waterville Indus. v. Fin. Auth. of Me.*, 758 A.2d 986, 992 (Me. 2000). The hardship prong requires a showing of "direct, immediate and continuing impact" that will cause plaintiffs to suffer adverse effects in the absence of immediate review. *Public Utilities Comm'n.*, 490 A.2d 1218 at 1222.

Plaintiffs' claims are ripe for review because they raise the concrete and immediate legal question of whether Defendants have satisfied their obligation under 38 M.R.S. § 576-A(4) to promulgate regulations to "ensure compliance" with Maine's Climate Requirements and to "prioritize greenhouse gas emissions reductions by sectors that are the most significant sources" by September 1, 2021.

Defendants' argument that the controversy is not ripe for review mischaracterizes Plaintiffs' claims as a mere expression of concern that Defendants have not made sufficient progress via rulemaking to achieve Maine's Climate Requirement for 2030. Mot. To Dismiss at 10. This obscures the fundamental issue—Defendants were required by statute to adopt regulations by September 1, 2021, and, nearly three years later, have failed to do so.

Defendants further argue that Plaintiffs do not allege any ongoing refusal by the Department to engage in rulemaking. Mot. to Dismiss at 11. This is also mistaken, as Plaintiffs allege the Department has continuously failed to adopt the required rules through the present day. *See, e.g.,* Am. Compl. ¶ 96. For these reasons, Plaintiffs allege a concrete, specific, and immediate legal problem that is fit for review—Defendants have missed a statutory deadline and action by

Defendants is long overdue to remedy that harm. *See Public Utilities Comm'n.*, 524 A.2d 1218 at 1226 (noting that to be fit for review, the controversy must pose a "concrete and specific legal issue").

Further, Plaintiffs will also suffer an immediate burden if the Court declines to address these issues. Defendants argue that Plaintiffs' claims are "'too uncertain' as to whether future harms will occur." Mot. to Dismiss at 11. But neither the Department's recently issued biennial report nor the "shifting sands" of state plans and federal regulations, Mot. to Dismiss at 10-11, obviate the harms Plaintiffs allege—harms that have occurred and are ongoing as Defendants continue to fail to meet their September 2021 statutory deadline. Indeed, Plaintiffs do not allege speculative adverse consequences—as recognized by Governor Mills, climate harms are already underway. *See supra* at 1; *see also supra* at Part IV(A).

Defendants also assert that because their rulemaking responsibility is "ongoing," Plaintiffs' claims are not ripe. Mot. to Dismiss at 11, 15. This cannot be right. "If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *See American Petroleum Institute v. U.S. E.P.A.*, 906 F.2d 729, 739–40 (D.C. Cir. 1990) (holding that plaintiff's challenge was ripe where agency had pending rulemakings). The fact that the statute charges Defendants with an ongoing responsibility to adopt regulations does not absolve Defendants of the responsibility to adopt regulations by the clear deadline imposed in the statute.

C. Defendants' Ongoing Obligation Under the Climate Law Does Not Insulate Their Noncompliance From Review (Counts II and IV)[20]

Defendants' responsibility for implementation is the lynchpin of Maine's Climate Law. As noted earlier, the Climate Council has little authority, and the climate action plan is only a set of

[20] As explained *supra* in n 3, because no challenge under Maine's Climate Law has previously come before the court, Plaintiffs brought Counts I and III in the alternative to Counts II and IV in case the Court found Section 8058 to be the incorrect vehicle to bring Counts II and IV. However, Defendants' Motion to Dismiss concedes that section 8058 is the proper vehicle for these claims. If the Court agrees with both Plaintiffs and Defendants that these claims are properly brought under Section 8058 as opposed to Section 11001, then Plaintiffs will withdraw Counts I and III.

recommendations. The Legislature could have stopped there, as with other unenforceable plans and reports it assigns to state commissions and councils. Instead, the Legislature carefully prescribed Defendants' nondiscretionary role to "ensure compliance" with the Climate Requirements by rulemaking. 38 M.R.S. § 576-A. The compliance rules "[m]ust be consistent with the climate action plan" and "[m]ust prioritize greenhouse gas emissions reductions by sectors that are the most significant sources of greenhouse gas emissions." *Id.* § 576-A(4). That Defendants "shall" and "must" adopt rules imposes a "discretionless obligation." *Lopez v. Davis,* 531 U.S. 230, 231 (2001); *see also Fitzpatrick v. McCrary*, 2018 ME 48, ¶ 16, 182 A.3d 737 (distinguishing discretionary "may" from mandatory "shall").[21] The Legislature made Defendants' obligations ongoing, but also urgent and immediate: it adopted the Climate Law by emergency legislation, imposing an initial deadline of September 2021. P.L. 2019, ch. 476 (emergency, effective June 26, 2019).

Transportation is the most significant source of GHG emissions in Maine—contributing approximately 50% of carbon dioxide emissions from the combustion of fossil fuels—and has been since at least 1990. Bureau of Air Quality, Maine Department of Environmental Protection, *Tenth Biennial Report on Progress toward Greenhouse Gas Reduction Goals* (July 2024) at 2, 12. While some sectors have reduced emissions over the last three decades, transportation emissions have remained relatively steady. *Id.* at 12; *see also* EV Roadmap at 8. Accordingly, *Maine Won't Wait* (with which Defendants' rules *must* be "consistent") calls for 41,000 light-duty electric vehicles to be on the road in Maine by 2025 and 219,000 by 2030 to meet the Climate Requirements. *See* Am. Compl. ¶¶ 56-57. In turn, to achieve those numbers, the EV Roadmap emphatically calls for adoption of the ACC II and ACT. EV Roadmap at 2, 29-30, 53; Am. Compl. ¶¶ 36-39.

Defendants did not adopt rules ensuring compliance with the Climate Requirements by the

[21] 38 M.R.S. § 576-A itself distinguishes between the permissive and the mandatory, requiring that Defendants "shall" adopt compliance rules while allowing that the "Department of Transportation . . . *may* adopt rules as necessary to ensure compliance" with the Climate Requirements. 38 M.R.S. § 576-A(4)(emphasis added).

statutory deadline. In fact, Defendants have not adopted rules ensuring compliance with Maine's Climate Requirements *at all*. Am. Compl. ¶¶ 51-60. They have not adopted the specific proposals called for by the EV Roadmap (the ACT and ACC II rules). *Id.* ¶ 59. Nor have they adopted any rules consistent with the electrification goals in *Maine Won't Wait*. *Id.* Defendants have not adopted a single rule addressing GHG emissions from transportation, ignoring their mandate to prioritize emissions reductions from the most contributing sectors. *Id.* ¶ 55. Rather, on three separate occasions since the Climate Law's enactment, Defendants have considered, but rejected or failed to adopt, rules that would have had a "profound impact" on transportation emissions (EV Roadmap at 2, 53). Am. Compl. ¶¶ 61-92. These failures undergird Counts II and IV.

Defendants argue Counts II and IV do not properly account for the Climate Law's cyclical nature and that the remedy sought violates separation of powers. But the fact that another climate action plan is on the horizon cannot excuse Defendants' noncompliance with a statutory mandate and deadline nor protect its actions—or failures to act—from judicial review.

1. Allowing Defendants' Continued Noncompliance Would Render Meaningless the Climate Law's Nondiscretionary Directive and Deadline

Plaintiffs bring Counts II and IV under 5 M.R.S. § 8058 to challenge Defendants' failure to adopt rules ensuring compliance with the Climate Requirements, where adoption of those rules is required by law. Defendants argue Plaintiffs cannot show Defendants failed to comply with Maine's Climate Law. But rather than argue they *did* fulfill their nondiscretionary statutory mandate, they instead suggest they must be allowed to let the climate action plan process run its course, awaiting the next iteration before adopting any new rules. Defendants' argument that ordering them to act

now would conflict with the intent and structure of the Climate Law would insulate them from accountability and render the Legislatures' deadline meaningless.

Defendants attempt to frame Plaintiffs' claim as arguing Defendants are "not adopting rules fast enough to timely reach the statutory goals in 2030 and 2050," Mot. to Dismiss at 24, suggesting the need for some subjective assessment of adequacy and timing. Plaintiffs' claims, however, focus not on achievement of the 2030 Climate Requirements, but on Defendants' rulemaking obligation, for which the Legislature has dictated a nondiscretionary deadline—a deadline Defendants missed. Having not complied with their implementation duty by the deadline—*or at all*—Defendants now attempt to shirk their responsibility by insisting Maine *must* wait until the *next* climate action plan. Defendants are essentially asking the court to take a leap of faith that they will regulate in accordance with the new climate action plan, even though they failed to do so the last time around. It cannot be that Defendants, failing to timely regulate as the law requires, are insulated from challenge because they also have an ongoing obligation under the Climate Law.

Defendants also argue they should be free to ignore *Maine Won't Wait* because circumstances have changed since its release. *See* Mot. to Dismiss at 26-29. Defendants point to new U.S. Environmental Protection Agency (EPA) vehicle emissions rules as an example of why Defendants should not now be required to comply with *Maine Won't Wait*. Mot. to Dismiss at 27-28. But this is a poor example because the federal rules were not a surprise; Defendants were closely attuned to the rulemaking. The Department's previous analysis of the proposed federal rules—concluding that the ACC II would do a better job reducing GHG emissions in Maine[22]—undermines Defendants' current suggestion that because the federal landscape has changed, the recommendations in *Maine*

[22] "For Maine, the cumulative GHG reductions from 2025-2040 due to adoption of the EPA proposed rule was 9.2 million metric tons of CO_{2e}, versus 19.0 million metric tons of CO_{2e} in reduced GHG emissions due to adoption of the ACC II Program." ACC II Basis Statement at 35.

Won't Wait can't stand. Of course, changes may come from the federal government or other external sources at any time. That is no reason to delay regulatory action; if anything, it augers in favor of the state moving swiftly to control what it can. Defendants' argument would allow no remedy for their noncompliance with the statute because another climate action plan is *always* on the horizon, and federal actions are *always* outside of Maine's control. This illogical approach renders meaningless the right to judicial review, and the statutory deadline, and insulates the state from accountability.

2. Plaintiffs Seek Relief That Would Appropriately Remedy the Harms and That Are Consistent with Separation of Powers Principles

To remedy these claims, Plaintiffs seek declaratory judgments as well as an order from the Court "that the Board adopt rules ensuring compliance with Maine's Climate law requirements, prioritizing emissions from transportation, and consistent with *Maine Won't Wait* on or before November 1, 2024." Am. Compl. Prayer for Relief ¶ e. The order sought is nothing more than a restatement of Defendants' obligations under the Climate Law. Defendants take issue with the request for a deadline, arguing there is no statutory deadline and imposing one would "assume the role of the Legislature." Mot. to Dismiss at 25. But the relief seeks only to enforce the Constitution's edict, "that the laws be faithfully executed," Me. Const. art. V, § 12, and seeks the imposition of a reasonable deadline to remedy noncompliance with the September 2021 statutory deadline. Courts routinely order agencies to take actions, including rulemaking action, by dates certain to remedy noncompliance with statutory deadlines. *See, e.g., Maine Ass'n of Health Plans v. Dirigo Health Agency*, 2006 WL 1670277, at *2 (Me. Super. Apr. 14, 2006) (explaining the court "does have the authority to provide relief to an aggrieved party for failure of an agency to meet a statutory directive" and ordering the state agency to take action by a certain date). Section 8058 allows broad relief from the court: "the court may issue such orders as are necessary and appropriate to remedy such failure." 5 M.R.S. § 8058 (1).

Defendants challenge Plaintiffs' request that the Court order the Board to adopt the ACC II or an alternative rule. Defendants' placement of these arguments in the section of the brief challenging counts I, II, III and IV is incorrect; Plaintiffs seek this relief to address claims V, VI and VII. *See* Mot. to Dismiss at 29; Am. Compl. Prayer for Relief ¶ f. Nevertheless, Plaintiffs address those arguments here to align with the Motion to Dismiss. Defendants challenge the relief sought in par. f of the Amended Complaint contending the "Court cannot require the agency to adopt a particular rule . . ." Mot. to Dismiss at 29. But Plaintiffs appropriately seek an order directing adoption of the ACC II *or* "an alternative rule that reduces emissions from the transportation sector. . ." Am Compl. Prayer for Relief ¶ f. Moreover, an order requiring rule adoption is a suitable remedy for an agency's failure to adopt a rule as required by law. *See, e.g., CLF v. State of Me., Dep't of Envt'l Protection,* 2000 WL 33675692, *14 (finding Department's permit by rule void and remanding the matter to the Board, "for rulemaking as to permits for structures over tidal lands that are to be consistent with this decision and order.").

Further, the legislative amendment changing rules for vehicle emissions from routine technical to major substantive is not the problem Defendants make it out to be. *See* Mot. to Dismiss at 29-30. Seeking to remedy Defendants' failure to adopt the ACC II where required by the Climate Law (Counts V, VI and VII), Plaintiffs do not suggest that Defendants can usurp legislative authority to review provisionally adopted major substantive rules. However, under 5 M.R.S. § 8072(1), the agency process until the point of legislative review—posting notice, proposing a rule, accepting comments, conducting a hearing, issuing a basis statement, voting on the rule—is the same for a routine technical or major substantive rule. *Id.* The only difference is the agency's vote at the culmination is provisional, not final (the agency's "final" vote following legislative approval is a formality). Thus, the subsequent process at the legislature has no bearing on the court's authority to order the agency to conduct a rulemaking process culminating in (provisional) adoption.

D. The Climate Law Compels Adoption of the ACC II (Count VII)

Count VII is properly before the Court under 5 M.R.S. § 8058 because Defendants have a mandatory and non-discretionary duty under the Climate Law to adopt rules addressing emissions from the transportation sector pursuant to 38 M.R.S. § 576-A(4). The plain language of the Climate Law directs that the Board "*must* prioritize greenhouse gas emissions reductions by sectors that are the most significant sources of greenhouse gas emissions, as identified by the United States Energy Information Administration [EIA] and in the department's biennial reports submitted under section 578." 38 M.R.S. § 576-A(4) (emphasis added). Statutory language specifically prescribes the method by which Defendants must identify the highest emitting sector. It leaves no discretion to Defendants. Transportation—as identified by EIA and in Defendants' biennial reports—is the sector that is the most significant source of GHG emissions in Maine. Am. Compl. at ¶ 28 (citing Maine Department of Environmental Protection, *Ninth Biennial Report on Progress toward Greenhouse Gas Reduction Goals* at 2 (July 2022)). Indeed, according to the Ninth and Tenth Biennial Reports prepared by the Department, transportation accounts for 49 percent of state GHG emissions. *Id.; see also* ACC II Basis Statement at 55 ("Transportation is the *single largest source* of GHGs in Maine . . . and accounts for 49% of GHG emissions in Maine.") (emphasis added). Further, Maine's transportation sector has been the leading source of CO_2 emissions from the combustion of fossil fuels since at least 1990. Am. Compl. ¶ 54.

Defendants acknowledge that the ACC II is the only rule they could adopt to reduce emissions from light-and medium-duty transportation in Maine. Mot. to Dismiss at 26-27. Indeed, as recognized by Defendants in their Motion, there is no alternative rule they could adopt to set standards to reduce vehicle GHG emissions from light- and medium-duty vehicles that would be permissible under the Clean Air Act. *Id.* The federal Clean Air Act preempts states from adopting their own vehicle emissions standards except for California, which can adopt more stringent

regulations than the federal standards, and other states are permitted to adopt emissions standards identical to those promulgated by California. *Id.* at 26-28. Because the Climate Law requires Defendants to adopt rules that prioritize GHG emissions from transportation and there is only one method identified by Defendants that can fulfill that obligation, Defendants have a mandatory duty to adopt the California rules. The Climate Law is clear: Defendants are required to regulate the largest sector of GHG emissions in Maine, which is the transportation sector. But after a full and public rulemaking proceeding, Defendants declined to adopt the ACC II rule and therefore failed to adopt the only possible rule that would allow them to regulate greenhouse gas emissions from light- and medium-duty transportation in a manner that would comply with their statutory mandate.

Defendants assert that Plaintiffs rely on the outdated federal vehicle emissions standards which run through 2026 in arguing that the federal standards are less stringent for climate than the ACC II requirements and that the federal standards alone will not allow Maine to reach the emissions reduction goals of the Climate Law There is no dispute that the federal vehicle emissions standards—both the standards applicable through 2026 and the 2027-2032 standards as updated by EPA in 2024—are weaker in terms of GHG emissions reduction than ACC II. As plainly stated in the Department's Basis Statement and Response to Comments issued in 2024, "[c]urrently EPA's 2027 Light-duty/Medium-duty Multipollutant proposal is not identical to and does not have the stringency of ACC II in the following areas and will not achieve the same emission reductions as ACC II in the long term... ACC II will achieve greater GHG and [Non-Methane Organic Gases] +NOx emission reductions for light-duty vehicles due to the increased ZEV sales requirement." The Response to Comments continues:

> "[International Center for Clean Transportation] did a comparison of the GHG emission reductions attributable to the ACC II Program and the proposed EPA 2027 Light-duty/Medium duty Multipollutant rule. For Maine, the cumulative reductions from 2025-2040 due to adoption of the EPA proposed rule was 9.2 million metric tons of CO_{2e}, versus 19.0 million metric tons of CO_{2e} in reduced GHG emissions due to adoption of the ACC II Program."

ACC II Basis Statement at 35.

Moreover, because the federal vehicle emissions standards are based on a national average, if Maine were to be subject to only the federal standards and not adopt ACC II, then Maine individually might not meet even the lower targets of the federal standards, as all clean vehicles could be sold in other states and the federal standards would still be satisfied. The Department explained this in its Response to Comments: "As was seen during implementation of the first Clean Car Standards, auto manufacturers are more likely to send larger inventories and their newest ZEVs to states that mandate sale of those vehicles. Therefore, adoption of ACC II is a key strategy to ensure that Mainers who want to purchase an EV will not have to go out of state to purchase their vehicle of choice." ACC II Basis Statement, at 8. Because the federal standards will result in significantly less GHG emissions reductions than ACC II and because the federal standards are not specific to Maine, it is unlikely Maine will see the requisite levels of GHG emissions reductions from the transportation center absent adoption of ACC II.

Defendants rely on *Lingley v. Me. Workers' Comp. Bd.* and *Block et al. v. Beal et al.* to argue that here, adoption was not required by law. Mot. to Dismiss at 21-22. However, both cases are easily distinguishable from the present case. In *Lingley*, the substantive statute required the Board to annually compare the frequency of benefits cases in Maine to the national average and to promulgate a rule *if* the Board found that the frequency was greater than the national average. *Lingley v. Me. Workers' Comp. Bd.*, 819 A.2d 327, 330 (Me. 2003). Because the agency did *not* find the frequency was greater than the national agency, the agency had no statutory requirement to promulgate a regulation at all—a completely different scenario than in the current case. *Beal* similarly presents a statutory structure that is very different from the statute now at issue. In *Beal*, petitioners argued that the Maine Department of Agriculture, Conservation, and Forestry was required by law to adopt a rule pertaining to best management practices for animal husbandry in aquaculture. Order on Mot. to

Dismiss, No. AP-23-11, at 1-2 (Oct. 11, 2023) (*Murphy, J.*) (attached to Mot. To Dismiss as Ex. D). However, the statutes petitioners relied on were general enabling statutes with only very vague directives, including, for example, that the agency "shall adopt, amend and repeal rules, including emergency rules, necessary for the proper administration, implementation, enforcement and interpretation of any provision of law that the commissioner is charged with administering." *Id.* at 3-4. These statutes clearly left discretion to the agency, with no specific regulatory implementation contemplated and no deadlines for action required. Here, unlike in *Beal*, the Climate Law directs Defendants to take actions by a date certain to comply with specifically identified statutory Climate Requirements, and consistent with a detailed action plan. 38 M.R.S. § 576-A(4). The Climate Law clearly does not leave Defendants the same discretion left to the agency in *Beal*.

Accordingly, Defendants have a non-discretionary duty under 38 M.R.S. § 576-A(4)(B) to adopt regulations addressing emissions from transportation and, as Defendants recognize, adoption of the California vehicle standards is the sole tool available to them to regulate those emissions. Defendants are therefore required by law to adopt ACC II as this lack of any other avenue to regulate transportation leaves them no discretion.

E. The Rulemaking Record Compels Adoption of the ACC II and the Arbitrary and Capricious Standard of Review Should Apply (Count VI and Alternatively, Count V)

The Maine APA provides for review of an agency rule, or of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law. 5 M.R.S. § 8058. Plaintiffs argue in Section IV(D) supra that the adoption of the ACC II rule is required by law. However, even if the Court finds that the rule was not required by law, Defendants' actions should be reviewable under the arbitrary and capricious provision of section 8058. Defendants did not merely fail to adopt a rule; rather, Defendants compiled a rulemaking record, the Board directed the Department to prepare a rulemaking adoption package, and the Department thoroughly responded to comments

and supported adoption of the rule. *See* Am. Compl. at 21-23. Only then—despite the evidence supporting the rule before them and the Department's own recommendation—did the Board vote *not* to adopt the rule. *Id.* It is under this very set of circumstances, where there is a full rulemaking record for the Court to review, that arbitrary and capricious review is appropriate.

Moreover, as the Maine Supreme Court has noted, "[b]ecause the Maine Administrative Procedure Act roughly mirrors the Federal Administrative Procedure Act, particularly regarding judicial review of final agency action, interpretation of the federal act offers useful guidance." *Me. Sch. Admin. Dist. No. 27 v. Me. Pub. Emps. Ret. Sys.*, 983 A.2d 391, 395 (Me. 2008). Under the federal Administrative Procedure Act, courts have regularly held that an agency's failure to adopt a rule is reviewable under the arbitrary and capricious standard. *See, e.g.*, *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987) (concluding that the Department of Agriculture's failure to initiate rulemaking proceedings pursuant to the Horse Protection Act was reviewable and arbitrary and capricious under the federal APA); *Natural Resources Defense Council v. S.E.C.*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (noting that an agency's denial of a rulemaking is reviewable under the federal APA's arbitrary and capricious standard except where there is "clear and convincing legislative intent to negate review"); *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216 (D.C. Cir. 1983) (finding the Department of Transportation's failure to amend its regulations governing hours of service for over-the-road truck drivers reviewable under the federal APA's arbitrary and capricious standard); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) (reviewing the FCC's failure to adopt cable carriage requirements under the federal APA's arbitrary and capricious standard). Using the federal APA as a guide, Plaintiffs submit that this is an appropriate circumstance to engage in review of agency decision-making under Maine's APA's arbitrary and capricious standard. Here, after carefully laying out the basis for their recommendation to adopt ACC II in the administrative record, Defendants abruptly voted *not* to adopt ACC II without a

rational basis for that decision. This is precisely the sort of circumstance where arbitrary and capricious review is appropriate.

Additionally, the U.S. Supreme Court has repeatedly emphasized that the federal APA embodies a "strong presumption" of judicial review that can only be rebutted by a clear showing that judicial review would be inappropriate. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review[.]"); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 156–57 (1970) (noting the federal APA creates a presumption of reviewability unless a contrary purpose is "fairly discernable" in the statutory scheme). Given the similarities between the federal APA and Maine's APA, the court should apply this same presumption of reviewability to the present case.

If the Court should find Section 8058 is not the appropriate vehicle through which to review Defendants' refusal to adopt the ACC II rule under the arbitrary and capricious standard, then the Court should review this final agency action under 5 M.R.S. § 11001(1) and the corresponding arbitrary and capricious standard articulated in 5 M.R.S. § 11007(4)(C)(6). Count V challenges Defendants' final agency action on a petition and "no further recourse, appeal, or review is provided within the agency." 5 M.R.S. § 8002(4). Am. Compl. ¶ 116. Following the final agency action of the Board not to adopt the ACC II rule, Plaintiffs had no further recourse provided within the agency and jurisdiction was automatically removed from the administrative agency to the court system. *Eastern Maine Medical Center v. Maine Health Care Finance Com'n*, 601 A.2d 99, 101 (Me. 1992).

Further, Count V is timely. While Plaintiffs' initial Complaint did not contain Count V challenging agency action pursuant to section 11001(1), Count V as asserted in the Amended Complaint arose out of the conduct and occurrence set forth or attempted to be set forth in the initial complaint—the challenge to Defendants' decision of failing or refusing to adopt the ACC II

under APA. M.R. Civ. P. 15(c)(2); Plaintiff's Initial Complaint, ¶¶ 99-104. Thus, the addition of Count V within the Amended Complaint, which is also a challenge to the Defendants' action of failing or refusing to adopt the ACC II Program Rule under APA, relates back to the date of original complaint filed April 19, 2024, which is within APA's 40-day limit to appeal. Am. Compl. ¶ 113-117. *See Mattson v. Mattson*, 376 A.2d 473 (Me. 1977) (amendment of divorce complaint adding irreconcilable marital differences merely stated an additional basis for divorce and related back to the date of the original complaint). Finally, Plaintiffs' initial Complaint—which included a challenge to agency action under APA section 8058 under Counts III and IV and a challenge to agency action under the same section (though different subsection) of APA, Count II's APA section 11001(2)—appropriately placed the Defendants on notice of the claims against them.

V. CONCLUSION

"From our rocky coast to the western foothills, our pine tree forests, our bountiful farmland, and the people and creatures of all kinds who call these places home, the climate crisis poses a direct and immediate threat." *Maine Won't Wait* at 2 (Introductory Letter from Governor Janet T. Mills). To address this crisis, Maine's Legislature and Governor established a comprehensive statutory scheme, charging Defendants with the pivotal and nondiscretionary role of implementation by rulemaking. Defendants missed their statutory deadline, and nearly three years later, have still not fulfilled their rulemaking duty. Plaintiffs now ask this Court to hold Defendants accountable to their unambiguous legislative charge.

For the foregoing reasons, Plaintiffs Conservation Law Foundation, Sierra Club, and Maine Youth Action requests the Court deny Defendants' Maine Department of Environmental Protection and Maine Board of Environmental Protection's Motion to Dismiss.

Dated at Portland, Maine this 18th day of July, 2024.

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