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IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs/Appellees,

v.

STATE OF MONTANA, et al.,

Defendants/Appellants.

BRIEF OF CHILDREN'S RIGHTS ADVOCATES IN SUPPORT OF APPELLEES

On appeal from the Montana First Judicial Court, Lewis and Clark County
Cause No. CDV 2020-307, the Honorable Kathy Seely, Presiding

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are members of the Consortium for the Advancement of Children's Constitutional Rights and Healthy Mothers, Heathy Babies: The Montana Coalition who are children's rights advocate and legal scholars. *Amici* submit this brief to: (1) highlight Montana's Constitution as a leader in advancing children's constitutional rights; (2) draw this Court's attention to the Montana Constitution's text and history recognizing children's right to a clean and healthful environment; and (3) explain that a decision not to safeguard children's right to a clean and healthful environment in reliance on adult-centric analytical missteps advanced by Appellants (and supporting *Amici*) would deny Montana's children access to justice.

SUMMARY OF THE ARGUMENT

Montana's transformative Constitution guarantees young Montanans a fundamental right to a clean and healthful environment. This Court plays an indispensable role in ensuring that these children "have the same protections from governmental and majoritarian abuses as do adults"[1] and will fulfill that role by affirming the District Court's Order. In doing so, this Court will safeguard

[1] 5 Mont. Const. Convention, Verbatim Tr. 1750 (March 8, 1972).

children's fundamental rights while avoiding two adult-centered analytical traps that deny children access to justice.

Historically, this Court has vindicated children's rights guaranteed in Montana's Article II Declaration of Rights. The District Court correctly determined that the statutes at issue violated the youth Plaintiff's fundamental constitutional rights to a clean and healthful environment. A decision by this Court affirming the trial court will fall squarely within this Court's constitutional jurisprudence.

ARGUMENT

I. The Montana Constitution is a leader in securing children's rights and this Court plays an indispensable part in safeguarding their right to a clean and healthful environment.

In 1972, Montana adopted a transformative Constitution that sought to lead the nation in protecting fundamental rights. The Montana Constitutional Framers (Framers) identified fundamental rights found in the United States Constitution, like freedom of religion, and went beyond federal protections to reflect Montana's values, recognizing both children's constitutional rights and every Montana citizen's right to a clean and healthful environment. This collection of innovative constitutional provisions was one of the first of its kind in the nation and is still a standard-bearer today.

A. Montana's children have a fundamental right to a clean and healthful environment.

Young Montanans posess the fundamental right to a clean and healthful environment pursuant to two forward-thinking constitutional frameworks: children's fundamental rights under Article II, Section 15 and the right of all Montanans to a clean and healthful environment under Article II, Section 3, and Article IX, Section 1, which must be read and interpreted together.

During the Constitutional Convention, the Framers' in-depth deliberation made clear their intent to make Montana "the leader among states in recognizing the rights of people under the age of majority." 5 Mont. Const. Convention, Verbatim Tr. 1750 (March 8, 1972). Article II, Section 15, enumerated as "Rights of Persons Not Adults," guarantees that "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Mont. Const. art. II, § 15. As one delegate explained, Section 15 "makes . . .sure that this Constitution and this Bill of Rights does apply to all citizens regardless of age." 5 Mont. Const. Convention, Verbatim Tr. at 1752.

The "crux" of Section 15, as the Framers put it, is "to recognize that [children] have the same protections []from governmental and majoritarian abuses as do adults." *Id.* at 1750. After hearing testimony from youth-centered

organizations, the Framers concluded that the "rights of children and youth" at that time were treated as "just nonexistent, really." *Id.* at 1751. They explained that, although children were recognized as "persons under the due process clause of the 14th Amendment" of the federal Constitution, the Supreme Court of the United States had not yet "ruled in [children's] favor under the equal protection clause of that same amendment." *Id.* at 1750. Section 15 sought to fill the children's rights void the Framers observed in federal Constitutional doctrine. *Id.*

This Court has previously reflected the Framers' majoritarian concerns and fulfilled its indispensable role in protecting young people from constitutional injuries. *See generally In re S.L.M.*, 287 Mont. 23, 951 P.2d 1365 (1997); *see also State v. Keefe*, 2021 MT 8, ¶38–¶55, 403 Mont. 1, 18–23, 478 P.3d 830, 841–844 (McGrath, J., concurring). In *In re S.L.M.*, this Court exercised its authority to protect children's rights and declare the Extended Jurisdiction Prosecution Act (EJPA) unconstitutional under Article II, Section 15 and Section 4, which guarantees the equal protection of laws. 287 Mont. at 35, 951 P.2d 1372. There, youth defendants argued that the EJPA was inconsistent with several constitutional protections, including their fundamental rights guaranteed under Section 15. *Id*. at 26, 951 P.2d at 1367. The Act allowed for the "imposition of an adult sentence in addition to a juvenile disposition" for children. *Id.* at 29, 951 P.2d at 1369. Under the Act, children convicted of a crime could face serving an adult sentence in

addition to their juvenile sentence. In striking down the law, this Court emphasized its duty to read Article II, Section 15 "in conjunction with the guarantee of equal protection found in Article II, Section 4." *Id.* at 34, 951 P.2d at 1372. Just as this Court has recognized that, "[children] are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II[,]" so must this Court consistently recognize that youth Plaintiffs should be protected from state laws and actions that disproportionately injures children and infringes upon their constitutional right to a clean and healthful environment. *Id.* at 35, 951 P.2d at 1373. The District Court's did just that, and its Order should be affirmed by this Court.[2]

B. This Court has an indispensable role in protecting Montana's children from the harms of climate change.

In addition to Montana's ground-breaking protection of children's rights in Section 15, in an enlightened move, the Framers extended a fundamental environmental right to all Montana citizens and Montana's future generations through two "interrelated and interdependent" provisions. *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 64, 296 Mont. 207, 225, 988 P.2d 1236,

[2] *See generally* Findings of Fact, Conclusions of Law, and Order (Doc. 405) ("District Court Order").

1246.[3] Article II, Section 3, "Inalienable Rights," recognized all Montanans' "right to a clean and healthful environment" and Article IX, Section 1 required that, "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[4] Mont. Const. art. IX, § 1. In *MEIC v. DEQ*, this Court concluded that Article II, Section 3 and Article IX, Section 1 "must be read together" to honor the Framers' goal that the Constitution "provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources." *MEIC v. DEQ*, ¶ 77 (quoting Mont. Const. art. IX, § 1).[5] It was clear to this Court then, as it should be now, that "[t]he delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *Id.* Thus, this Court recognized the special role courts

[3] Moreover, it was some Framers' intentions "through the addition of [the right to a clean and healthful environment] to the Bill of Rights to give force to the language of the preamble to the constitution." *MEIC v. DEQ,* at ¶ 76.

[4] Article IX, Section 1 also required that "(2) The legislature shall provide for the administration and enforcement of this duty. (3) The 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." Mont. Const. art. IX, § 1.

[5] While the *MEIC v. DEQ* opinion identified concern and debate among the delegates over the use of the word "healthful," the decision nevertheless identified that "clean and healthful" "was necessary in order to assure the [Framer's] objectives" and "it was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language." *MEIC v. DEQ,* at ¶ 75.

play in preventing future environmental harm.

The District Court properly exercised its authority to protect the youth Plaintiffs from the harms of climate change and ensure their right to a clean and healthful environment by striking down the 2023 version of the MEPA Limitation, codified at Mont. Code Ann. § 75-1-201(2)(a), and Mont. Code Ann. § 75-1-201(6)(a)(ii). Climate change has a magnified and disproportionate effect on children. They are at risk of heightened physical and mental health harm from the effects of climate change due to their physiology and the proportion of their lives in which they are subject to the climate crisis. At trial, the District Court heard detailed testimony as to the impacts of climate change on humans and specifically children including the individual Plaintiffs.[6]

Children are especially susceptible to the detrimental effects of climate change because they "experience greater proportionate exposure" than adults, as they "breathe more air, drink more water, and eat more food per unit of body weight."[7] Additionally, "their smaller and less-developed bodies and minds are

[6] *Amici* have included this brief discussion of the harms children face from climate change not to duplicate the District Court's findings but to provide context as to how these harms are particularly concerning in light of Montana's constitutional guarantees for children. *See also* District Court Order, pp. 9–86.

[7] Perry E. Sheffield & Philip J. Landrigan, *Global Climate Change and Children's Health: Threats and Strategies for Prevention*, 119 Env't. Health Perspectives 291, 291 (2011).

uniquely vulnerable to pollution, deadly diseases and extreme weather."[8] For example, children are more sensitive to extreme heat and heatwaves because they "are less able to regulate their body temperature and more prone to dehydration."[9] This inability to regulate body temperature can also contribute to renal disorders and heat-related morbidity.[10]

Children also face long-lasting harm from their exposure to the physical effects of climate change. Children's developing immune systems and organs make it difficult for their bodies to adapt to shifting climate patterns.[11] Warmer temperatures leading to disrupted seasonal cycles increase airborne particulates like pollen and other plant allergens that "exacerbate[] respiratory disease and asthma in children."[12] This is particularly concerning for children exposed to greater amounts of particulates—both from plants and fossil fuel related activities—during critical phases of development.[13] Low-income children, children

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[8] UNITED NATIONS CHILDREN'S FUND, THE CLIMATE-CHANGED CHILD: A CHILDREN'S CLIMATE RISK INDEX SUPPLEMENT 6, Nov 2023.

[9] *Id.* at 7.

[10] Sheffield & Landrigan, *supra* note 7, at 293.

[11] Neal Fann *et al.*, *Ch: 3. Air Quality Impacts. The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*, U.S. GLOBAL CHANGE RESEARCH PROGRAM 69, 77 (2016); *see also* Sheffield & Landrigan, *supra* note 10, at 291, 293.

[12] Crimins, A.J., et al., *Executive Summary. The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*, U.S. Global Change Research Program, Washington, DC (2016).

[13] Sheffield & Landrigan, *supra* note 7, at 292.

of color, and "children with asthma and other respiratory conditions have suffered even worse breathing problems caused by inhaling the particles produced by wildfire smoke into their young lungs."[14]

Finally, children are distinctly vulnerable to psychological and mental health harms resulting from the effects of climate change. These mental health harms can stem from physiological responses to heat exposure, but children also struggle to cope with stressors associated with experiencing climate-related displacement and other climate-related events. Studies have shown that even before birth, maternal stress associated with climate disasters interferes with prenatal development.[15] For example, children born to climate refugees were more likely to have neurodevelopmental impairment.[16] Other studies have shown associations between higher mean temperature and increased mood and behavioral disorders.[17] Other mental health harms result from children experiencing climate disasters, including post-traumatic stress disorder and depression as a result of being displaced by

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[14] UNITED NATIONS CHILDREN'S FUND, SUPRA NOTE 8.

[15] Sean A. Kidd *et al.*, *Climate change and its implications for developing brains−In utero to youth: A scoping review*, J. OF CLIMATE CHANGE & HEALTH, July 2023, at 2.

[16] *Id.*

[17] Cisse, G. et al., *2022: Chapter 7 Health, Wellbeing, and the Changing Structure of Communities*, in: CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1076 (H.-O. Pörtner, *et al.* eds., Cambridge University Press) (2022).

wildfires, floods, or other climate-related disasters.[18] Additionally, children's mental health suffers from the thought or reality of losing a family member in an extreme weather event.[19] However, children do not need to experience a climate-related natural disaster to suffer psychologically. "[C]ontemporary young people are more aware of the results of climate change and the dearth of answers surrounding how this will impact their futures…more than half (59%) [of young people aged 16–25] reported being very or extremely worried about climate change."[20]

The Montana Constitution not only protects young people's right to a clean and healthful environment, it also provides protections that are "both anticipatory and preventative." *MEIC v. DEQ*, at ¶77. In other words, this Court need not wait for the gravest consequences of environmental harm to occur before requiring preventative measures. As this Court has previously explained, "[o]ur constitution does not require that dead fish float on the surface of our state's rivers and streams

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[18] Janis Whitlock, *Climate change anxiety in young people*, 1 NATURE MENTAL HEALTH 297, 297 (2023). Up to "45% of children suffer depression after a natural disaster." AM. PUB. HEALTH ASS'N ET AL., CLIMATE CHANGES MENTAL HEALTH, 1, 1 https://wwwwww.apha.org/-/media/Files/PDF/topics/climate/Climate_Changes_Mental_Health.ashx#:~:text=Climate%20change%20can%20cause%20and,not%20everyone%20is%20affected%20equally.

[19] *See* AM. PUB. HEALTH ASS'N, CLIMATE CHANGES MENTAL HEALTH at 1.

[20] Whitlock, *supra* note *18*.

before its farsighted environmental protections can be invoked." *Id.*

The frequency and magnitude of these kinds of climate-related harms are increasing and will continue to rise as climate change worsens.[21] For these reasons, the challenged MEPA provisions promoting continued extraction and consumption of fossil fuels while prohibiting consideration of the special threat that climate change presents to children and future generations, imperil and infringe upon children's fundamental rights.

This case exemplifies the scenarios that concerned the Framers' and motivated them to protect children from constitutional injuries and majoritarian abuse. Unlike the adult population, many of these youth Plaintiffs and other similarly situated children can neither vote, nor can they express political discontentment in the same way in our political process. These are precisely the circumstances in which the Framers intended Montana courts to step in to protect children's rights—just as the District Court correctly did here.

II. This Court should preserve Montana's leading role in safeguarding children's rights by providing them access to justice.

Montana's role in protecting children's rights is critical. With few exceptions, the United States legal system has been built on an adult-centered legal framework based on the historical fact that children were seen as "objects of

[21] District Court Order, p. 24 ¶ 89.

lawmaking rather than participants."[22] Unlike the Montana Constitution, the United States Constitution provides no explicit reference to children. 5 Mont. Const. Convention, Verbatim Tr. 1750 (March 8, 1972). Through judicial interpretation, the federal Constitution has certainly evolved since Montana enacted its visionary Constitution in 1972. However, federal courts continue to incorrectly rely on an adults-rights framework to analyze children's claims. This results in analytical missteps and untoward results for youth. Appellants and their supportive *Amici* contend that this ill-fitting federal framework should be imposed on Montana. As the preeminent guardian of Montana's Constitutional clause extending fundamental rights to minors, this Court should reject those arguments and ensure "that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults." *In re S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1372 (citing Mont. Const. Convention, Vol. II at 635–36). To protect against these abuses, this Court must avoid two analytical traps advanced by Appellants and supporting *Amici*—treating children like adults and assuming children's parents or guardians, will vote in children's best interest.

A. This Court must avoid factually treating children like adults.

One analytical misstep is that some courts reflexively treat children as if

[22] Barbara Bennett Woodhouse, *Children's Rights*, *in* HANDBOOK OF YOUTH AND JUSTICE 377, 382–83 (Susan O. White ed. 2001).

children are adults: those courts fail to factor children's unique qualities and characteristics into their constitutional calculus. As discussed above, children are uniquely and disproportionally harmed by climate change and climate-related pollution. *See supra* I.B.. Yet, in most elections, children under the age of 18 are ineligible to vote. Despite their ineligibility, defendants, and even courts, tell youth plaintiffs to seek relief through the elected branches of government by voting or performing other actions from which children are excluded.[23] Without access to courts, this analytical misstep erects an impenetrable barrier to young people's access to justice because of their age—a youth-based characteristic over which they have no control.

Appellants and supporting *Amici* repeatedly rely on this analytical trap—that climate change should be resolved through the political process. Appellants and supporting *Amici* assert that this Court cannot grant the relief the youth Plaintiffs are seeking because it is a matter for the political branches of government. In their Opening Brief before this Court, the State Agencies and Governor Appellants state, "addressing that issue is a matter to be addressed by the policymaking branches."

[23] If children under 18 could vote, we might witness very different climate policies. A recent NPR/PBS News Hour/Marist Poll showed that a 59% majority of young voters, age 18-29, believe "climate change should be given priority even at the risk of slowing economic growth". NPR/PBS NEWSHOUR/MARIST POLL, National Adults 34 (July 2023), available at https://maristpoll.marist.edu/wp-content/uploads/2023/08/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_Trust_Climate_202307281317.pdf.

Appellant State Agencies' and Governor's Opening Br. at 39. Additionally, suggesting that all climate-change cases present nonjusticiable political questions, as several *Amici* do in this matter, would improperly constrain the judiciary from vindicating the rights of children without access to the political branches. *See* Friend of the Court Br. at 1–4; *see also* Amici States Br. at 5–11; *see also* Frontier Institute Br. at 3. They also rely on the Ninth Circuit case *Juliana v. United States*. 947 F.3d 1159 (9th Cir. 2020).

Juliana v. United States provides an example of a court stepping into this analytical snare in the climate context. In *Juliana*, the youth plaintiffs sued the federal government for continuing to approve and permit fossil fuel projects that contribute to climate change. *Id.* at 1165. Ultimately, the *Juliana* court dismissed the case for lack of standing, specifically finding that the youth plaintiff's claims were not redressable. The court found that the youth plaintiffs presented "concrete and particularize[d] injuries[,]" "that the [federal] government has had a role in causing [climate change]," and that "elected officials have a moral responsibility to seek solutions." *Id.* at 1168, 1175. But instead of taking remedial action, the *Juliana* court "reluctantly concluded . . . that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box." *Id.* Notably, the *Juliana* court did not engage with the fact that unlike adult litigants, children are

denied access to the ballot box.

By ignoring this youth-based characteristic and not distinguishing children from adults, the *Juliana* court failed to vindicate the *Juliana* plaintiffs' fundamental rights and left them with no other venue to plead their case.[24] The plaintiffs in *Juliana*, of course, did not have the benefit of an express constitutional provision protecting the right to a clean and healthful environment. Despite this, and despite the well-established doctrine of independent state grounds,[25] Appellants and supporting *Amici* invite this Court to make the same analytical missteps as the *Juliana* court. Instead, this Court should uphold the District Court's Order, supported by an extensive trial record, finding the statutes at issue "deprive[] Plaintiffs of their constitutionally guaranteed rights under Mont. Const. Art. II, Sec. 3 and Art. IX, Sec. 1."[26]

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[24] The *Juliana* case is back in the U.S. District Court on an amended complaint that cured the redressability deficiency of the first complaint identified by the Ninth Circuit. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023) (granting leave to amend). It has now overcome another round of motion to dismiss and is slated to be set for trial. *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339 (D. Or. Dec. 29, 2023) (denying motion to dismiss); Transcript of Status Conference at 16:11, *Juliana v. United States*, No. 6:15-CV-01517-AA (D. Or. Jan. 19, 2024) (No. 572) (discussing preparation for trial).

[25] *Butte Cmty Union v. Lewis*, 219 Mont. 426, 433, 712 P.2d 1309, 1313 (1986), (citing, *Pfost v. State*, 219 Mont. 206, 713 P.2d 495, (1985)).

[26] District Court Order, p. 100 ¶ 58.

B. This Court must not rely on adults' rights as a proxy for children's rights.

A second common misstep is for courts to assume that parents have the political power or will to protect their children from constitutional harm. There are times when this assumption fails. Then, courts must be the saving grace to ensure children's voices are not subordinated to the louder voices of the adult majority because young people cannot turn to the ballot box or exert economic power to influence the political process.

This Court cannot rely on adults voting by proxy to vindicate children's rights. This idea "[r]est[s] on a faulty, and perhaps privileged, assumption that all children and parents are similarly situated, [however] the parent-as-proxy rationale obscures the importance and necessity of children's rights."[27] By contrast, a robust check on state action through children's rights and intergenerational equity is necessary to eliminate systemic harm to young people and guarantee their access to justice. Where parents lack the political power to protect their children, children's rights serve an important role as a constitutional backstop ensuring fidelity to our democratic ideals. For example, during the Civil Rights Movement, while Black adults fought relentlessly to secure the equal protection of the laws "it was Black

[27] Catherine E. Smith, *Children's Equality Law in the Age of Parents' Rights*, 71 KAN. L. REV. 539, 545 (2023).

children—and their rights—that delivered the coup-de-grâce to the 'separate but equal' doctrine in *Brown v. Board of Education*."[28] This Court must not fall for the "parent-as-proxy" trap, as it contradicts the Montana Framers' visionary constitutional clause and leaves children and their rights vulnerable.[29]

To avoid subordinating children's rights to those of adults, this Court must steer clear of the flawed reasoning that treats children as adults and assume that adults will vote in children's best interests. Once past these analytical missteps, this Court can fulfill its indispensable role in upholding the constitutional protection of children disproportionately harmed by climate change.

CONCLUSION

For these reasons, we urge this honorable Court to uphold the District Court's Findings of Fact, Conclusions of Law, and Order.[*]

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[28] *Id.* at 547. (quoting *Brown v. Board of Education*, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U.S. 483, 495 (1954)).

[29] The United States is one of the few countries that has failed to ratify the U.N. Convention on the Rights of the Child in deference to parents' rights. Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 4:12 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/ [https://perma.cc/6SXP-2VNL]. See *supra*, Section I of this brief.

[*] Counsel recognizes the contributions of students Anita Voskovykh, Mikayla Lee, and Kashayla Unis (University of Denver Sturm College of Law) who participated substantially in the drafting and researching of this brief.

Respectfully submitted this 21st day of March, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure Rule 11(4)(e), I certify that this Brief of Children's Rights Advocates in Support of Appellees is printed with proportionately spaced Times New Roman typeface size 14-point font; is double spaced; and contains 3,987 words according to Microsoft Word, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

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Dated: 03-21-2024