STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action No. AP-24-22

CONSERVATION LAW FOUNDATION, SIERRA CLUB, and MAINE YOUTH ACTION, Plaintiffs, v. MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAINE BOARD OF ENVIRONMENTAL PROTECTION, Defendants.	)	**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT WITH INCORPORATED MEMORANDUM OF LAW (M.R. Civ. P. 12(b)(1), (b)(6))**

The Maine Department of Environmental Protection (Department) and Maine Board of Environmental Protection (Board), (collectively, "Defendants")[1] move to dismiss in its entirety the "Amended Petition for Judicial Review of Agency Action and Failure or Refusal of Agency to Act and Amended Complaint for Declaratory Judgment and Other Relief" ("Amended Complaint") filed by Conservation Law Foundation (CLF), Sierra Club, and Maine Youth Action (collectively, "Plaintiffs") for lack of subject matter jurisdiction and for failure to state a claim. *See* M.R. Civ. P. 12(b)(1), (b)(6).

Plaintiffs filed their Amended Complaint on May 16, 2024, setting forth seven counts pursuant to the Maine Administrative Procedure Act (MAPA). As a threshold matter, each of the seven counts should be dismissed for lack of standing and ripeness. Justiciability issues aside, the Amended Complaint centers around allegations that the Department has failed to promulgate enough rules to reduce greenhouse gas (GHG) emissions in time to meet future

[1] The Department of Environmental Protection is comprised of the Board of Environmental Protection and the Commissioner of Environmental Protection. 38 M.R.S. § 361-A(1-E), (1-G), (1-H).

GHG reduction goals set forth in statute. The Plaintiffs have styled this same idea multiple ways. The Plaintiffs' counts can be divided into two buckets. One bucket includes Counts II, IV, VI, and VII, which are brought pursuant to 5 M.R.S. § 8058 of MAPA and challenge the Department's alleged failure or refusal to make rules. The other bucket includes Counts I, III, and V, which are styled as challenges to agency failure-to-act (Counts I & III) or agency action (Count V), but which merely restate the challenge to the agency's alleged failure or refusal to adopt rules. Because MAPA section 8058, not section 11001, is the exclusive mechanism to challenge agency rulemaking or the failure or refusal to adopt rules, Counts I, III, and V are easily disposed of for failure to state a claim. The Plaintiffs' challenge to agency action (Count V) must also be dismissed for lack of subject matter jurisdiction for two independent reasons: the action alleged was not a final agency action, and the claim is untimely.

Having cleared the deck of the non-section 8058 counts, the four counts that remain can be further divided into two categories. Counts VI and VII are specific to a particular vehicle-emissions-related rulemaking proposal that the Department considered in response to a citizen petition for rulemaking, 5 M.R.S. § 8055, and ultimately declined to adopt. The Department was not required by law to adopt this Chapter 127-A "Advanced Clean Cars II Program" (ACC II) proposal and, therefore, the Department's alleged failure or refusal to adopt ACC II is discretionary and not subject to judicial review. The remaining section 8058 claims, Counts II and IV, allege more broadly that the Department has failed to adopt rules required by Maine's statute regarding GHG emission reductions, 38 M.R.S. § 576-A ("576-A"). These two counts and requested relief associated with them should be dismissed because the Department has not failed to comply with climate change legislation, and because the requested relief would actually controvert the intent behind Maine's comprehensive

statutory scheme addressing climate change and asks the Court to breach Maine's constitutional separation of powers.

BACKGROUND

Maine first enacted legislation to address climate change in 2003. Among other things, the "Act to Provide Leadership in Addressing the Threat of Climate Change" established goals to reduce GHG emissions to 1990 levels by January 1, 2010, and to 10% below 1990 levels by January 1, 2020, and tasked the Department with developing the first "climate action plan" to meet those goals. *See* P.L. 2003, ch. 237, § 1 (codified at 38 M.R.S. §§ 574-78). The Department completed this first climate action plan in 2004.[2] The act also established a reporting requirement whereby the Department would biennially evaluate the State's progress toward its GHG goals and amend the climate action plan as necessary to achieve the goals. The State met the emissions reduction goals in both 2010 and 2020.[3]

In 2019, the Legislature enacted "An Act to Promote Clean Energy Jobs and to Establish the Maine Climate Council." P.L. 2019, ch. 476, §§ 5-10 (emergency) (codified at 38 M.R.S. §§ 574-78) ("2019 Act").[4] In doing so, it repealed section 576 and instituted 576-A, which set new GHG reduction goals: 45% below 1990 levels by January 1, 2030, and 80% below 1990 levels by January 1, 2050. 38 M.R.S. § 576-A(1), (3). The 2019 Act authorized the Department to promulgate rules to "ensure compliance" with the goals set forth in 576-A(1)

[2] *See* Maine Department of Environmental Protection Bureau of Air Quality, Tenth Biennial Report on Progress toward Greenhouse Gas Reduction Goals at 3 (June 2024) (attached as Ex. A); *see* Am. Compl. ¶¶ 28, 54 (citing to the 2022 Ninth Biennial Report); *see*, *e.g.*, *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶¶ 9-11, 843 A.2d 43 (documents referred to in the complaint and those central to the Plaintiffs' claims are properly considered on a motion to dismiss).

[3] *Supra* n.2 Tenth Biennial Report (Ex. A) at 2, 26.

[4] *See* L.D. 1679 (129th Legis. 2019); Comm. Amend. A to L.D. 1679, No. S-221 (129th Legis. 2019).

and (3). *Id.* § 576-A(4). The Plaintiffs name two rules that the Department has since promulgated citing 576-A: Chapter 180, Appliance Efficiency Standards, and Chapter 147, Hydrofluorocarbon Prohibitions. Am. Compl. ¶ 53. In addition, the Department has promulgated Chapter 167, Tracking and Reporting Gross and Net Annual Greenhouse Gas Emissions, and Chapter 168, Statewide Greenhouse Gas Emissions Regulation, which established statewide, mass-based GHG emission reductions that must be met by 2030 and 2050. 06-096 C.M.R. chs. 147, 167, 168, 180.

The 2019 Act also established the 39-member Maine Climate Council, whose purpose is to "advise the Governor and Legislature on ways to mitigate the causes of, prepare for and adapt to the consequences of climate change," 38 M.R.S. § 577-A, and enabled the Council to establish working groups, *id.* § 577-A(7). The Council's membership consists of 19 members from government, including from the Legislature, Governor's Office, a broad array of executive agencies, and quasi-independent state entities, and 20 members appointed by the Governor representing a variety of interests. *Id.* § 577-A(1). The 2019 Act shifted the task of generating the State's "climate action plan" from the Department to the Maine Climate Council, requiring that the Council, "with input from stakeholders," update the state "climate action plan" every four years beginning with a plan "[b]y December 1, 2020." *Id*. § 577(1); Am. Compl. ¶ 21. The Maine Climate Council issued its inaugural climate action plan, *Maine Won't Wait: A Four-Year Plan for Climate Action*, on December 1, 2020. Am. Compl. ¶ 24. The Climate Council's updated climate action plan is due December 1, 2024, and work toward it is well underway.[5] The 2019 Act also maintained the Department's existing requirement to

[5] Am. Compl. ¶ 21; 38 M.R.S. § 577(1); *see*, *e.g.*, Maine Climate Council meeting agenda (June 18, 2024) (attached as Ex. B), also available through the Maine Governor's Office of Policy Innovation and the Future website at https://www.maine.gov/future/meetings/maine-climate-council-

issue biennial progress reports to the Legislature, adding language that such reports be made "in consultation with the Climate Council." 38 M.R.S. § 578; Comm. Amend. A to L.D. 1679, No. S-221 (129th Legis. 2019).

STANDARD OF REVIEW

Dismissal pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim is "proper when the complaint fails 'to state a claim upon which relief can be granted.'" *Shaw v. S. Aroostook Cmty. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting M.R. Civ. P. 12(b)(6)). The motion to dismiss "tests the legal sufficiency of the complaint," which is a question of law. *Id.* In considering a 12(b)(6) motion, all well-pleaded "material allegations of the complaint must be taken as admitted." *Id.* In reviewing a dismissal, the court "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." *Livonia v. Town of Rome*, 1998 ME 39, ¶ 5, 707 A.2d 83. "A dismissal should occur when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that [it] might prove in support of [its] claims." *Id.* With respect to M.R. Civ. P. 12(b)(1), whether subject matter jurisdiction exists is a matter of law and differs from a typical Rule 12(b)(6) motion because courts "make no favorable inferences in favor of the plaintiff." *Tomer v. Me. Human Rights Comm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335; *accord Francis v. Dana-Cummings*, 2004 ME 4, ¶ 17, 840 A.2d 708 ("Courts are not required to deem allegations in a complaint as admitted when determining whether subject matter jurisdiction exists.").

2?q=meetings/maine-climate-council-2; excerpt of Maine Climate Council Meeting slides (Sept. 29, 2023) (attached as Ex. C), also available through the Maine Governor's Office of Policy Innovation and the Future website at https://www.maine.gov/future/sites/maine.gov.future/files/2023-12/Slides%20for%20MCC%209.29.23_FINAL.pdf.

ARGUMENT

I. The Amended Complaint should be dismissed because Plaintiffs have failed to allege sufficient facts to demonstrate their standing or that their claims are ripe.

A. The Court should dismiss all counts for lack of standing because Plaintiffs have failed to demonstrate that they are aggrieved or that they satisfy the requirements of associational standing.

Under the Law Court's standing doctrine, a plaintiff must show a requisite "minimum interest or injury suffered" to be eligible for judicial relief. *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700; *Brunswick Citizens for Collaborative Gov't v. Town of Brunswick*, 2018 ME 95, ¶ 7, 189 A.3d 248 (the Declaratory Judgments Act is not an exception to justiciability requirements). "[T]o have standing to seek injunctive and declaratory relief, a party must show that the challenged action constitutes 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Madore v. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 13, 715 A.2d 157 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The standing doctrine in Maine is prudential, but it is not optional: "Every plaintiff seeking to file a lawsuit in the courts *must* establish its standing to sue, no matter the causes of action asserted." *Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 (emphasis added). "Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction." *Id*.

A person is "aggrieved" under MAPA if the person has suffered a "particularized injury." *Lindemann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 14, 961 A.2d 538. "[T]hat is, the agency action or inaction must operate prejudicially and directly upon the party's property, pecuniary or personal rights," and the injury must "be distinct from any injury experienced by the public at large." *Id.* The injury must also be "more than an abstract injury." *Nelson v. Bayroot, LLC,* 2008 ME 91, ¶ 10, 953 A.2d 378.

Plaintiffs allege that the Defendants' failure to adopt rules has caused, and will cause, their individual members to suffer injuries related to climate change including rising sea levels, worsened allergies, reduced winter recreational activities, and exposure to vehicular air pollution. Am. Compl. ¶¶ 11, 14, 17. None of these purported injuries is "distinct from any injury experienced by the public at large." *Lindemann*, 2008 ME 187, ¶ 14, 961 A.2d 538. The Amended Complaint also fails to establish that any of Plaintiffs' individual members have actually experienced or are likely to experience any of these injuries. *See Conservation Law Found., Inc. v. Acad. Express, LLC*, No. CV 20-10032-WGY, 2023 WL 5984517, at *5 (D. Mass. Sept. 14, 2023) ("This Court holds . . . that the requirement of an actual injury—one that is concrete and particularized—necessitates more than just breathing in polluted air . . . . Without any associated physical side effects, recreational or aesthetic harm, or well-grounded fear of health effects, this Court is not satisfied that breathing may constitute an Article III injury."). Plaintiffs have failed to "point[] to a single member who . . . can allege a potential for particularized injury or who will suffer some injury to a pecuniary interest or personal right." *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 15, 2 A.3d 284 (affirming dismissal for lack of standing).

Plaintiffs also allege their members have been harmed by lack of choice of zero emission vehicles in Maine and businesses have been harmed that are dependent upon availability of electric vehicles in Maine. Am. Compl. ¶¶ 11, 14, 17. Plaintiffs do not credibly allege that any actions or failures to act by Defendants have had a direct effect on the availability of zero emission or electric vehicles in Maine—availability which necessarily depends on a complicated web of manufacturing capabilities and market forces, among other factors. The Department adopted the ACC I rule, which applies to vehicle model years 2001

through 2025. *See* Am. Compl. ¶¶ 45, 50. Further, even if the BEP had adopted the ACC II rule when it voted on March 20, 2024, the rule would have first applied to model year 2028 vehicles due to the Clean Air Act's requirement that California standards[6] be adopted at least two model years in advance of the first applicable model year. Am. Compl. ¶ 86; 42 U.S.C. § 7507(2). There is also no guarantee that vehicle manufacturers would have responded by significantly expanding the availability of zero emission or electric vehicles in Maine promptly, despite regulatory efforts to "enhance deployment of electric vehicles." Am. Compl. ¶¶ 11, 14, 17. The ACC II rule affords manufacturers many compliance flexibilities, which can result in fewer vehicles being delivered to an adopting state than the rule's sales percentages would otherwise require for a given model year. *See* Cal. Code Regs. tit. 13, § 1962.4(e)-(g). And again, Plaintiffs have failed to "point[] to a single member who . . . can allege a potential for particularized injury or who will suffer some injury to a pecuniary interest or personal right" because they have not identified any of their members who are individuals or businesses in Maine that have been harmed by an inability to purchase zero emission vehicles in Maine. *Friends of Lincoln Lakes*, 2010 ME 78, ¶ 15, 2 A.3d 284.

Plaintiffs also cannot satisfy the requirements for associational or organizational standing. For an association to be an aggrieved person under MAPA, "its members [must] otherwise have standing to sue in their own right." *Black v. Bureau of Parks & Lands*, 2022 ME 58, ¶ 29, 288 A.3d 346 (outlining the three elements of associational standing); *see also Friends of Lincoln Lakes*, 2010 ME 78, ¶ 15, 2 A.3d 284. As noted above, Plaintiffs make no

[6] The ACC I and ACC II standards are California vehicle standards that other states may adopt pursuant to the Clean Air Act. 42 U.S.C. § 7507. The Department adopted the California ACC I standards in its rule Chapter 127: New Motor Vehicle Emission Standards, which applies to vehicle model years 2001 through 2025. 06-096 C.M.R. ch. 127.

allegations specific to any particular member's injury. Instead, they plead only generalized harms that would be shared by the public at large.

To the extent Plaintiffs claim they have been directly injured as organizations, this basis for standing should also be rejected. Plaintiffs allege they are organizations whose mission and work includes reducing the effects of climate change and air pollution. Am. Compl. ¶¶ 4-6, 9-17. They allege they have advocated for various bills relating to climate change and have commented during the ACC II and Advanced Clean Trucks (ACT) rulemaking proceedings. Am. Compl. ¶¶ 9, 12, 15. They also allege that CLF and Sierra Club submitted the petition for adoption of the ACT rule. Am. Compl. ¶¶ 9, 15. Federal law from this Circuit establishes that neither an organization's general interest in a topic nor its need to use its resources to advocate for a position constitutes a particularized injury supporting standing. *See Equal Means Equal v. Ferriero*, 478 F. Supp. 3d 105, 120-23 (D. Mass. 2020), *aff'd*, 3 F.4th 24, 30 (1st Cir. 2021). Here, Plaintiffs merely allege their organizational interest in, and advocacy for, combatting climate change and air pollution. These are not cognizable grounds for organizational standing. *See* 3 F.4th at 30. "An organization lacks standing when it asserts no injury other than an injury to its advocacy." *Nat'l Ass'n of Consumer Advocates. v. Uejio*, 521 F. Supp. 3d 130, 142 (D. Mass. 2021) (citing *Ctr. For Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005)).

Plaintiffs do not help their cause by claiming that their members are Maine taxpayers. Am. Compl. ¶¶ 11, 14, 17. Any reliance on *Common Cause v. State*, 455 A.2d 1 (Me. 1983), by Plaintiffs is misplaced. *Common Cause* authorized so-called "taxpayer standing" in narrow circumstances. In that case, the Court held that taxpayers had standing to sue the State to enjoin it from spending tax dollars in a manner that the plaintiff-taxpayers contended was

barred by the Maine Constitution. *Id.* at 7-13. *Common Cause* is inapplicable here because Plaintiffs do not seek to prevent the spending of state funds.

A. All counts of the Amended Complaint are unripe.

Even if Plaintiffs had standing, their claims are not ripe. Ripeness "prevents 'judicial entanglement in abstract disputes, avoids premature adjudication, and protects agencies from judicial interference until a decision with concrete effects has been made." *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 17, 221 A.3d 554 (quoting *Johnson v. City of Augusta*, 2006 ME 92, ¶ 7, 902 A.2d 855). "Ripeness is a two-prong analysis: (1) the issues must be fit for judicial review, and (2) hardship to the parties will result if the court withholds review." *Id.* ¶ 20. Ripeness applies to challenges to agency rulemaking, *see Maine AFL-CIO v. Superintendent of Ins.*, 1998 ME 257, ¶ 7, 721 A.2d 633, and to actions for declaratory judgment more broadly, *see Utsch v. Dep't of Envtl. Prot.*, 2024 ME 10, ¶ 24, 314 A.3d 125.

Plaintiffs' claims fail each ripeness prong. First, an issue is fit for review only if the action "presents a concrete and specific legal issue that has a direct, immediate and continuing impact on the" complaining party. *Me. AFL-CIO*, 1998 ME 257, ¶ 8, 721 A.2d 633. Plaintiffs' allegations do not show that any of the issues raised in their Amended Complaint have affected their specific members' personal, property, or pecuniary rights, or that they are having "a direct, immediate and continuing impact." They simply claim that Defendants have not made enough progress with rulemaking to achieve the next statutory goal in 2030, nearly six years away. In fact, the Department's recently issued biennial report on progress toward meeting the State's GHG reduction goals shows that in 2021 Maine's GHG emissions were 30% lower than in 1990 and states that Maine is on track to meet the 2019 Act's goals

for 2030 and 2050.[7] Moreover, Plaintiffs accept that agency rulemaking authority pursuant to 576-A is "existing and ongoing," Am. Compl. ¶¶ 94, 96, 99, and they do not allege any ongoing refusal by the Department to engage in rulemaking pursuant to this authority. The Plaintiffs' allegations are simply "too uncertain" as to whether future harms will occur that will "directly and continuously impact" any of Plaintiffs' members. *See Utsch*, 2024 ME 10, ¶ 25, 314 A.3d 125.

Second, the hardship prong requires that Plaintiffs show that an immediate burden will result from the Court declining to address the issue now. *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 302-03 (Me. 1982). Speculative future adverse consequences do not satisfy the hardship prong. *Blanchard*, 2019 ME 168, ¶ 22, 221 A.3d 554. Plaintiffs acknowledge that the next date by which the 2019 Act sets forth a measurable goal for reducing annual GHG emissions is 2030. Am. Compl. ¶ 20. Needless to say, 2030 has not arrived yet. And Plaintiffs' requests for more rulemaking to be ordered completed by November 1, 2024, overlooks the import of the anticipated issuance of an updated climate action plan in December 2024. Am. Compl. Prayer for Relief (e)-(f); 38 M.R.S. § 577(1). Plaintiffs also fail to acknowledge that the 2019 Act's planning process is playing out against the backdrop of revised federal rulemaking across sectors, including recently published EPA rules governing vehicle GHG emissions standards.[8] Given the shifting sands of the planning efforts at the State level, the federal regulations, and the numerous factors that may affect

[7] *Supra* n.2 Tenth Biennial Report (Ex. A) at 2-3, 26.

[8] *See Multi-Pollutant Emissions Standards for Model years 2027 and Later Light-Duty and Medium-Duty Vehicles*, 89 Fed. Reg. 27842 (published Apr. 18, 2024; effective June 17, 2024); *Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles-Phase 3*, 89 Fed. Reg. 29440 (published Apr. 22, 2024; effective June 21, 2024).

how the 576-A emissions reduction goal of 2030 will be met, the "alleged harm is too speculative and concerns a future adverse consequence that may or may not occur." *Utsch*, 2024 ME 10, ¶ 26, 314 A.3d 125. The 2030 emission reduction goal being nearly six years away, there is also the potential for further legislative amendments. This possibility underscores the purpose of the ripeness doctrine to prevent "judicial entanglement" in premature, abstract disputes. *Blanchard*, 2019 ME 168, ¶ 17, 221 A.3d 554.

II. Counts I and III should be dismissed pursuant to M.R. Civ. P. 12(b)(6) because they are improperly brought as challenges to an agency's failure to act.

In Counts I and III, Plaintiffs allege pursuant to section 5 M.R.S. § 11001(2) of MAPA that Defendants failed or refused to adopt rules that they were required by law to adopt, specifically by 576-A. Am. Compl. ¶¶ 93-97, 103-107. Count I focuses on 576-A(4)'s "compliance" language, which states that the Board shall "adopt rules to ensure compliance" with the GHG reduction goals in subsections (1) and (3) of 576-A. Count III concentrates on other language in 576-A, which states that rules the Board adopts must "be consistent with the climate action plan" and "prioritize greenhouse gas emissions reductions by sectors that are the most significant sources of greenhouse gas emissions." 38 M.R.S. § 576-A(4)(A), (B).

Though Counts I and III focus on different language in 576-A(4), both counts fail for the same reason. Plaintiffs bring Counts I and III pursuant to 5 M.R.S. § 11001(2), which enables aggrieved persons to seek judicial review of a "failure or refusal of an agency to act." MAPA's clear intent is that challenges regarding rulemaking, whether to a final agency rule or an agency's "refusal or failure to adopt a rule where the adoption of a rule is required by law" be brought exclusively pursuant to 5 M.R.S. § 8058. Counts I and III are thus improperly alleged under section 11001(2) and should be dismissed for failure to state a claim.

Section 8058 of MAPA is the exclusive provision governing judicial review of agency rulemaking. 5 M.R.S. § 8058; *Cumberland Farms N., Inc. v. Me. Milk Comm'n*, 428 A.2d 869, 873 (Me. 1981); *see also Calnan v. Hurley*, 2024 ME 30, ¶ 9, 314 A.3d 267. As the Law Court explained in *Cumberland Farms*, "[s]ection 8058 is the provision of [MAPA] addressing the judicial review of rules and the rulemaking process under subchapter II of the act," whereas "section 11007 provides generally for the manner and scope of judicial review of 'final agency action.'" *Cumberland Farms*, 428 A.2d at 873. The Court concluded that although the order under review could have been considered a "final agency action" under MAPA section 11007, which sets forth the manner and scope of review for challenges to agency action brought pursuant to section 11001, "the general provisions of [section 11007] must yield to the more specific provisions of section 8058 by application of the normal constructional preference that gives controlling force to specific statutory provisions over general ones." *Id*.

The legislative history of section 8058 supports the Law Court's conclusion.[9] When the Legislature enacted MAPA in 1977, the Statement of Fact concerning section 8058 stated in relevant part, "The purpose of this section is to provide a *uniform method* for review of agency rule-making." L.D. 1768, Statement of Fact (108th Legis. 1977) (emphasis added). In addition, the 1983 advisory committee notes to then-new rule M.R. Civ. P. 80C, state:

> Note that judicial review of agency rulemaking is not governed by either Rule 80B or Rule 80C. The APA, in 5 M.R.S.A. § 8058, specifically provides that review of agency rules shall be instituted by an action for declaratory judgment pursuant to 14 M.R.S.A. § 5951 et seq., which is incorporated by Rule 57, or by collateral attack in an enforcement proceeding.

[9] Consideration of legislative history materials in determining a statute's intent does not implicate judicial notice or evidentiary rules, and the Court's ability to review of "any and all" legislative history information is unlimited. *See Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 13 & n.7, 187 A.3d 609.

In sum, aggrieved persons seeking judicial review of either an agency's rule or its refusal or failure to adopt a rule where adoption of a rule is required by law must bring their claims under section 8058.[10]

In contrast, a claim is appropriate under section 11001(2) for failure or refusal to act where an applicant applies to an agency for an approval or permit and the agency takes no action on the application. *Lingley v. Me. Workers' Comp. Bd.*, 2003 ME 32, ¶ 9 & n.7, 819 A.2d 327 (citing *E. Me. Med. Ctr. v. Me. Health Care Fin. Comm'n*, 601 A.2d 99 (Me. 1992) (concluding that a challenge alleging a failure of a Commission to meet a statutory timeframe to render an order on an application was proper to consider under 11001(2)). For a claim brought under section 11001(2), the only relief available in the Superior Court is "an order requiring the agency to *make a decision* within a time certain." 5 M.R.S. § 11001(2) (emphasis added); *see Doe v. Bd. of Osteopathic Licensure*, 2020 ME 134, ¶ 22, 242 A.3d 182. The relief specific to failure to adopt a rule is instead found in section 8058: "the court may issue such orders as are necessary and appropriate to remedy such failure."

Lastly, even if Plaintiffs' allegation stated a claim under section 11001(2), they were required to file that claim "within 6 months of the expiration of the time within which the actions should reasonably have occurred." 5 M.R.S. § 11002(3). Counts I and III offer no suggestion of a date by which the Department should have adopted more rules pursuant to 576-A. Plaintiffs do not mention the September 1, 2021, date included in 576-A(4), which served as the target date for Department rulemaking following the first updated climate

[10] Although *Cumberland Farms* involved a challenge to an adopted rule, rather than, as here, allegations regarding an agency failure or refusal to adopt a rule, the principle applies equally to a challenge to an agency's alleged failure or refusal to adopt rules. By its own terms, section 8058 expressly applies to "[j]udicial 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(1).

action plan issued in December 2020; any challenge alleging failure to adhere to that date would be untimely, and the Court would lack jurisdiction. *See, e.g.*, *Brown v. State Dep't of Manpower Affairs*, 426 A.2d 880, 887-88 (Me. 1981). Plaintiffs concede that the Department's rulemaking obligation is "ongoing," which means their claims are not ripe. *See, e.g.*, Am. Compl. ¶¶ 94, 96, 99. The absence of a point from which to measure the six-month period highlights the impropriety of bringing this type of claim under section 11001(2), whereas section 8058 authorizes review without a time limit. *Lingley*, 2003 ME 32, ¶ 6, 819 A.2d 327.

In sum, the only counts that merit further analysis are those brought under section 8058. Later in this motion, Defendants assess the Plaintiffs' section 8058 Counts II and IV, which are otherwise virtually identical to Counts I and III. Counts I and III should therefore be dismissed for failure to state a claim. *See D & J Assocs. v. Bd. of Envtl. Prot.*, 560 A.2d 4 (Me. 1989) (dismissal for failure to state a claim appropriate where there is "no legal rationale in accordance with which the plaintiff might prove a set of facts entitling him to relief").

III. Count V of the Amended Complaint should be dismissed pursuant to M.R. Civ. P. 12(b)(6) because it is improperly brought as a challenge to agency action; and dismissed pursuant to M.R. Civ. P. 12(b)(1) because (A) the Board's decision not to adopt the ACC II proposal was not "final agency action" and (B) Count V is untimely.

Count V, which is brought pursuant to MAPA section 11001(1) (agency action), cannot survive because it challenges the Board's failure or refusal to adopt a rule, for which section 8058 offers the exclusive vehicle for review. Defendants articulated this argument with respect to Counts I and III above, and it applies equally as to Count V. For this reason alone, Count V must be dismissed pursuant to Rule 12(b)(6). In addition, two more independent grounds for dismissal of Count V exist pursuant to Rule 12(b)(1).

A. This Court lacks jurisdiction over Count V because no final agency action exists.

Count V misconstrues the Board's decision not to adopt the ACC II rule as a "denial of the citizen petition for adoption" of that rule. Am. Compl. ¶ 116; *see also, e.g.*, *id.* ¶¶ 10-11 & 13-14 & 16-17 (characterizing the Department's failure or refusal to adopt the ACC II rule as a "final action denying the underlying petition for adoption of the rule"), 92 (stating that "the Board voted not to adopt [the ACC II] Program rule . . . denying the underlying petition for adoption of the rule."). The Board's decision not to adopt the citizen-petitioned ACC II rule was not a *denial* of the petition; therefore, it is not a "final agency action" reviewable pursuant to section 11001(1).

MAPA section 8055 allows citizens to petition an agency for the adoption or modification of a rule. 5 M.R.S. § 8055. On May 23, 2023, the Natural Resources Council of Maine (NRCM)[11] and more than 150 citizens submitted a petition to the Department requesting that the Department adopt the ACC II program. Am. Compl. ¶ 79. As a result, the agency was required to "initiate appropriate rulemaking proceedings within 60 days after receipt of the petition." 5 M.R.S. § 8055(3). The Department initiated rulemaking in satisfaction of this section 8055(3) requirement when it presented the rulemaking proposal to the Board and the Board voted during its July 20, 2023, meeting to post the rule for a public hearing. Am. Compl. ¶ 80. In doing so, the Department effectively *granted* the petition for rulemaking. Under no circumstance does MAPA section 8055 require an agency to ultimately adopt a citizen-petitioned rulemaking proposal, no matter the number of registered voters who submit the petition. A "denial" only occurs where the agency declines to initiate

[11] NRCM is not a Plaintiff in the present legal action.

rulemaking on the petition. 5 M.R.S. § 8055(3) ("Within 60 days after receipt of a petition, the agency shall either notify the petitioner in writing of its denial, stating the reasons therefor, or initiate appropriate rule-making proceedings."). That did not happen here.

For this reason, Count V must be dismissed for lack of subject matter jurisdiction pursuant to M.R. Civ. P. 12(b)(1). *See Tomer*, 2008 ME 190, ¶¶ 7-8, 962 A.2d 335 (concluding that trial court's dismissal on the basis that there was no final agency action should be reviewed as one entered for lack of subject matter jurisdiction pursuant to M.R. Civ. P. 12(b)(1) rather than as a 12(b)(6) dismissal for failure to state a claim). Plaintiffs cannot turn the Board's decision not to adopt the ACC II rule into a final agency action reviewable under section 11001(1). *See Cumberland Farms*, 428 A.2d at 873 (concluding that where a rule could conceivably be considered a final agency action, "the general provisions of [section 11007]", which provides the criteria for reviewing an 11001(1) challenge to final agency action, "must yield to the more specific provisions of section 8058."); *Normand v. Baxter State Park Auth.*, 509 A.2d 640, 645 n.13 (Me. 1986).

B. This Court lacks jurisdiction to hear Count V because it is untimely.

Even if Count V were properly stated as a challenge to final agency action, this Court lacks jurisdiction over Count V because it is untimely. Plaintiffs' initial Complaint did not contain a count challenging agency action pursuant to MAPA section 11001(1). The section 11001(1) count appeared for the first time in Count V of the Amended Complaint, which was filed on May 16, 2024, 57 days after the Board's March 20, 2024, meeting where it decided not to adopt the ACC II rule proposal. Plaintiffs rely on M.R. Civ. P. 15(c)(2) "relation back" for the prospect that the Amended Complaint relates back to the date of the initial Complaint because the claims asserted in the Amended Complaint arose out of the occurrence set forth

in the initial Complaint. Am. Compl. ¶ 3. But MAPA's 40-day limit to appeal is *jurisdictional*, and Rule 15(c) cannot be applied to expand the court's subject matter jurisdiction.

Maine's Rule 15(c) was modeled on the counterpart federal rule 15(c). *See* M.R. Civ. P. 15 advisory committee notes. The problem that Fed. R. Civ. P. 15(c) sought to correct was where a statute of limitations would otherwise bar amendment of a pleading. Fed. R. Civ. P. 15(c) advisory committee's note to 1966 amendment ("Relation back is intimately connected with the policy of statute of limitations.").[12] Statutes of limitations differ from jurisdictional timeframes like those in MAPA section 11002(3). *See Bellegarde Custom Kitchens v. Leavitt*, 295 A.2d 909, 912 (Me. 1972). Statutes of limitations are non-jurisdictional. *Id.*[13] They are available as an affirmative defense and can be waived. *Id.*; *see* M.R. Civ. P. 8(c); *Haskell v. Bragg*, 2017 ME 154, ¶ 20, 167 A.3d 1246. Further, statutes of limitations can be equitably tolled. *See Dasha v. Me. Med. Ctr.*, 665 A.2d 993, 995 n.2 (Me. 1995).

By contrast, MAPA section 11002(3) requires an aggrieved person other than a party to the proceeding to file a petition no later than "40 days from the date the decision was rendered." 5 M.R.S. § 11002(3). This timeframe is a jurisdictional requirement, meaning that petitions filed beyond the statutory timeframe to appeal must be dismissed for lack of subject matter jurisdiction. *See, e.g.*, *Davric Me. Corp. v. Bangor Historic Track, Inc.*, 2000 ME

[12] *See TD Banknorth, N.A. v. Hawkins*, 2010 ME 104, ¶ 18 n.5, 5 A.3d 1042 (stating that Rule 15(c)(2) is "a procedural mechanism to determine the date of the filing of the initial complaint, usually employed when the complaint is amended after the expiration of the applicable statute of limitations").

[13] As the U.S. Supreme Court recently observed, most time limits are non-jurisdictional. *McIntosh v. United States*, 601 U.S. 330, 337 (2024). Where a deadline is *jurisdictional*, as with MAPA's timeframes to appeal in section 11002(3), if a jurisdictional deadline is missed the court "is completely powerless to take any relevant action, and the 'parties cannot waive' the deadline. . . Put differently, noncompliance with a jurisdictional deadline cannot be excused." *Id.* (citing *Dolan v. United States*, 560 U.S. 605, 610 (2010).

102, ¶ 11, 751 A.2d 1024; *Brown*, 426 A.2d 880, 887-88 (Me. 1981). The Law Court has long held that that "judicial enlargement" of MAPA's timeframes to appeal is "not possible," noting that MAPA "makes no provision for an extension of the time limitations on judicial review," and has expressly concluded, and subsequently repeated, that MAPA's time limitations are "jurisdictional." *Brown*, 426 A.2d at 887-88 (citing *Reed v. Halperin*, 393 A.2d 160, 162 (Me. 1978)); *accord Martin v. Dep't of Corrs.*, 2018 ME 103, ¶ 12, 190 A.3d 237.

Rule 15(c) cannot be applied to supersede MAPA's jurisdictional timeframes. Maine statute governing the Maine Supreme Judicial Court's power to prescribe the Maine Rules of Civil Procedure provides that "[s]aid rules may neither abridge, enlarge nor modify the substantive rights of any litigant." 4 M.R.S. § 8; *see also* M.R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the District Court, the Superior Court, or the Supreme Judicial Court . . ."). Federal courts have held that Fed. R. Civ. P. 15(c) "may not be used to extend federal jurisdiction," and as such Rule 15(c) may not be used to expand a jurisdictional timeframe, which is a substantive right. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002) (citing *USM Corp. v. GKN Fasteners Ltd.*, 578 F.2d 21, 22 (1st Cir. 1978) ("Rule 15 is not to be viewed as enlarging or restricting federal jurisdiction . . . . the 'relation back' doctrine of Rule 15(c) is not automatically applied in every situation . . . Where, as here, it would extend our jurisdiction, the application of the doctrine is impermissible.")), *abrogated on other grounds by Hoang v. Bank of Am.*, 910 F.3d 1096, 1100 (9th Cir. 2018).[14] To allow Plaintiffs to add Count V would expand a substantive right in

[14] *See also, e.g.*, *De Vito v. Liquid Holdings Grp., Inc.*, No. 15-6969, 2018 WL 6891832, at *24 & n.24 (D.N.J. Dec. 31, 2018) ("To permit relation-back under Rule 15(c) would violate the Rules Enabling Act because it would abridge a party's right to be free from suit under that statu[t]e of repose, which is a substantive entitlement."); *Zakarian v. Option One Mortg. Corp.*, 642 F. Supp. 2d 1206, 1212 & n.2 (D. Haw. 2009) (statute of repose at issue deprived the court of subject matter jurisdiction when a

violation of 4 M.R.S. § 8 and M.R. Civ. P. 82 by expanding a jurisdictional timeframe to appeal for which "judicial enlargement" is "not possible." *Brown*, 426 A.2d at 887-88; *see, e.g.*, *Miguel*, 309 F.3d at 1164-65. In sum, Rule 15(c) does not apply to Count V of Plaintiffs' Amended Complaint, and Count V must be dismissed for lack of subject matter jurisdiction because it was first raised 17 days after MAPA's 40-day jurisdictional timeframe to appeal expired.[15]

IV. Count VI must be dismissed because MAPA section 8058 does not permit a challenge to an agency's failure or refusal to adopt a rule on the basis that the agency's failure or refusal was arbitrary or capricious, an abuse of discretion, or unsupported by the record.

Count VI purports to challenge the Board's failure or refusal to adopt the ACC II rule proposal on the basis that the failure or refusal was "unsupported by substantial evidence in the whole record, . . . arbitrary, capricious, and constitutes an abuse of discretion" pursuant to MAPA section 8058. Am. Compl. ¶ 119. This count muddles the standards of review that are carefully laid out in section 8058. Section 8058(1) starts by authorizing an aggrieved person to challenge either a rule that has been adopted or an agency's failure or refusal to adopt a rule. It goes on to lay out several standards for review of a rule that has been adopted, and explains when each standard applies, depending on what the petitioner is challenging

claim is brought outside the limitation period, and plaintiff could not amend her complaint to "relate back" to circumvent the expiration of the jurisdictional statutory period); *CW Capital Asset Mgmt.—Northtown Ctr. v. Cty. of Anoka*, No. 02-CV-19-2185, 2021 WL 358643, at *6-7 (Minn. Tax. Court Jan. 29, 2021) (claims asserted for the first time after expiration of a petition deadline were permanently time-barred, and as such "relation back" did not apply to allow the time-barred claims).

[15] In the event this Court finds that Count V of Plaintiffs' Amended Complaint need not be dismissed for lack of subject matter jurisdiction or failure to state a claim for the reasons Defendants have identified, then the Court should dismiss Counts VI and VII of the Amended Complaint as duplicative of the 80C Count V where MAPA section 11001 and Rule 80C provide the exclusive method of review. *See, e.g.*, *Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 2019 ME 86, ¶¶ 7-9, 209 A.3d 102 (where complaint contains claim of declaratory judgment joined to administrative appeal, dismissal of declaratory judgment claim as duplicative of administrative claim is appropriate where declaratory judgment claim relies on same facts and seeks same relief).

about the "rule" that has been adopted. Only then, in its last sentence, does section 8058(1) turn to the standard applicable when a plaintiff challenges an agency's failure or refusal to adopt a rule: "*In the event that the court finds that an agency has failed to adopt a rule as required by law*, the court may issue such orders as are necessary and appropriate to remedy such failure." 5 M.R.S. § 8058(1) (emphasis added). Each of the standards discussed before that last sentence expressly applies only to judicial review of challenges to the "rule" that an agency has adopted. Nevertheless, Plaintiffs import language from some of those standards of review into Count VI and ask the Court to apply them to the Department's refusal to adopt the ACC II rule. The last sentence of section 8058(1) allows the Court to review only whether the agency failed to adopt a rule as required by law. The Court is not authorized to review whether that alleged failure was arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence in the record, as Plaintiffs claim in Count VI. Instead, the Court's only duty under section 8058 in reviewing a failure to adopt a rule is to determine whether the agency was required by law to adopt the rule—and that is the subject of Count VII. Accordingly, the Court must dismiss Count VI for failure to state a claim.

V. Count VII must be dismissed because the Department was not required by law to adopt the ACC II rule proposal.

As established above, the only question for this Court to consider under section 8058 is whether the Board was "required by law" to adopt the ACC II rule proposal. If a rule is required by law, then "the court may issue such orders as are necessary and appropriate to remedy such failure" to adopt the rule. 5 M.R.S. § 8058(1). However, if, as here, the rule is not required by law, the Department's decision not to adopt that rule is discretionary, and judicial review is unavailable to the Plaintiffs. *Lingley*, 2003 ME 32, ¶¶ 6-7, 819 A.2d 327 (concluding "[b]ecause the Board was not required to promulgate a rule, the provisions of

section 8058(1) are not applicable" and the plaintiffs "therefore, have no right to judicial review under section 8058(1).").

As the Superior Court concluded in an order granting a motion to dismiss a section 8058(1) claim alleging agency failure to adopt a rule in *Block et al. v. Beal et al.*, the plain language of section 8058(1) is clear that only where the agency failed to adopt a rule that it was required by law to adopt—in other words, only where adoption of the rule was nondiscretionary—is a plaintiff entitled to relief. Order on Mot. to Dismiss, No. AP-23-11, at 3 (Oct. 11, 2023) (*Murphy, J.*) (attached as Ex. D). Not only is this apparent from the plain language, but MAPA's legislative history provides further support. *Id.* The Legislature's Statement of Fact concerning the enactment of section 8058 states in relevant part,

> Subsection 1 contemplates and permits suits to obtain judicial review of an agency's refusal to adopt a rule, where the agency's function is *nondiscretionary*. In the event that the reviewing court determines that the agency has wrongfully failed to exercise *nondiscretionary* power, it may issue such orders, including injunctions, to remedy such failure.

L.D. 1768, Statement of Fact (108th Legis. 1977) (emphasis added). The question is thus whether adoption of ACC II was required by law or whether it was discretionary. If the latter, then the claim must be dismissed. *Lingley*, 2003 ME 32, ¶¶ 6-7, 819 A.2d 327.

Count VII suggests the Department was required by law to adopt the ACC II rule proposal because adoption of the rule was necessary to "ensure compliance" with Maine's climate action plan pursuant to 576-A. Am. Compl. ¶¶ 123-124. In fact, the statute expressly authorizing the Department to adopt California motor vehicle emissions standards pursuant to the Clean Air Act, 38 M.R.S. § 585-D, leaves entirely to the Board's discretion whether to adopt California standards or whether to instead be subject to federal motor vehicle emissions standards. 38 M.R.S. § 585-D ("the board *may* adopt and enforce standards that

meet the requirements of the federal Clean Air Act, Section 177 [42 U.S.C. § 7507] relating to control of emissions from new motor vehicles or new motor vehicle engines." (emphasis added)). Plaintiffs' conclusory invocation of 576-A's general directive that the Board adopt rules to "ensure compliance" with the GHG reduction goals for 2030 and 2050 established in 576-A subsections 1 and 3 is facially insufficient to allege that the Board was "required by law" to adopt California's ACC II rule governing vehicle emissions and requiring zero-emission-vehicle sales percentages. *See Seacoast Hangar Condo. II Ass'n v. Martel*, 2001 ME 112, ¶ 16, 775 A.2d 1166 (the court is "not bound to accept the complaint's legal conclusions" in reviewing a 12(b)(6) motion to dismiss). The directive to the Board to adopt rules that "ensure compliance" with GHG reduction goals, *see* 576-A(4), is "broad and open-ended, affording the agency considerable discretion to decide how to discharge these functions." *Block et al.*, Order at 4 (Ex. D).

Because the Board was not required by law to adopt the ACC II proposed rule, the Board's failure or refusal to adopt the rule was discretionary and is unreviewable under section 8058. The court must dismiss Count VII for failure to state a claim.

VI. The Court should dismiss Counts II and IV pursuant to M.R. Civ. P. 12(b)(6) because not only can Plaintiffs not show that the Department has failed to comply with the 2019 Act, but also, the remedies Plaintiffs seek conflict with the intent and structure of the 2019 Act and offend constitutional separation of powers principles.

Counts II and IV of the Amended Complaint[16] each allege pursuant to 5 M.R.S. § 8058 that the Department has failed to adopt rules that are required by 576-A. Count II focuses on the "ensure compliance" language in 576-A, whereas Count IV focuses on language in 576-A(4)(A) stating that rules must be "consistent with the climate action plan" and in 576-

[16] If the court considers Counts I and III to be properly stated under section 11001(2), then Counts II and IV should be dismissed as duplicative of the M.R. Civ. P. 80C claims. *See supra* n.15.

A(4)(B) that the Department must "prioritize greenhouse gas emissions reductions by sectors that are the most significant sources of greenhouse gas emissions," which they suggest means that rules must prioritize the transportation sector. *See* Am. Compl. ¶¶ 101, 109-11. Essentially, Plaintiffs complain that the Department is not adopting rules fast enough to timely reach the statutory goals in 2030 and 2050, and they ask the Court to direct and accelerate the Department's rulemaking efforts.

The 2019 Act reflects a comprehensive approach to climate change. *See* 38 M.R.S. § 577(2)-(4). The Amended Complaint targets only one piece of the 2019 Act and seeks, among other remedies, a court order requiring the Board to adopt more rules pursuant to 576-A by November 1, 2024, to ensure future compliance with emissions reduction goals. In particular, Plaintiffs ask the Court to order the Board to adopt the ACC II rule proposal or an alternative rule that reduces emissions from the transportation sector—and to do it no later than November 1, 2024. Am. Compl., Prayer for Relief(e)-(f).

To understand why Plaintiffs' allegations fail to state a section 8058 claim that the Department has failed to adopt rules as required by law, it is crucial to recognize that the Legislature contemplated any Department rulemaking to occur on a cycle informed by the updated climate action plan. The first updated climate action plan was issued on December 1, 2020, and the Legislature set a target date of September 1, 2021, nine months after the issuance of the plan, for the Department to promulgate any routine technical rules[17] as informed by the 2020 climate action plan. Updated climate action plans are due every four years under the statute, and the Climate Council's next updated climate action plan is due

[17] Section 576-A(4) states that "[r]ules adopted pursuant to this subsection are routine technical rules."

December 1 of this year. 38 M.R.S. § 577(1). Work toward this December 2024 climate action plan is well underway. *See supra* n.5. As the Commissioner of the Department explained to the Environmental and Natural Resources Committee during a work session on L.D. 1679 in the context of the date that the Legislature set for Department rulemaking in response to the first updated climate action plan, "the bill is . . . constructed to keep us in a cycle with the process so that there is enough time to come out with the plan, implement strategies, assess the effectiveness of those strategies, and then revisit it four years later."[18]

The Legislature made the choice to set only the target date for the initial routine technical rulemaking that would directly follow and be informed by the December 2020 climate action plan. It did not set statutory target dates for any subsequent Department rulemaking that might be informed by subsequent climate action plans, which follow four-year cycles. To grant Plaintiffs' request that this Court impose a mandatory deadline for the Department to complete rulemaking—November 1, 2024—when the Legislature chose not to set such a deadline, plainly asks the Court to breach the separation of powers and assume the role of the Legislature. The Maine Constitution "establishes three separate branches of government: the legislative, the executive, and the judicial." *Burr v. Dep't of Corrs.*, 2020 ME 130, ¶ 20, 240 A.3d 371 (citing Me. Const. art. III, § 1). Article III, Section 2 sets forth: "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." *Id.* (quoting Me. Const. art. III, § 2). "The Maine Constitution thus bars Maine

[18] L.D. 1679, Work Session at 11:39:30 (129th Legis. 2019), available at https://legislature.maine.gov/audio/#216?event=79060&startDate=2019-05-22T10:00:00-04:00. Courts may review "any and all legislative history" without limit. *Wawenock, LLC*, 2018 ME 83, ¶ 13 & n.7, 187 A.3d 609; *see supra* n.9.

courts' exercise of executive or legislative power," and the Maine Constitution's separation of powers is "much more rigorous than the bar imposed by the United States Constitution upon the federal courts' exercise of nonjudicial power." *Id.*

Further, the requested deadline of November 1 is especially inappropriate given that the updated climate action plan is expected the following month. As is clear from the structure of the law and the legislative history, the Department's decisions regarding the timing of proposing rules through 2030 and then 2050, and its decisions about whether proposed rules will "ensure compliance" with GHG reduction goals and should be adopted, will be informed by the climate action plans in a cyclical manner. For this Court to require the adoption of rules based on the 2020 plan just before that plan will be replaced by the 2024 updated plan is not only not required by 576-A, but would actually frustrate the Legislature's intent in drafting 576-A.

Take vehicle emissions—the focus of the Amended Complaint—as one example. The Plaintiffs in subsection (f) of their prayer for relief request that this Court order the Board to adopt the California ACC II rule "or an alternative rule that reduces emissions from the transportation sector" by November 1, 2024. As Plaintiffs admit, the federal Clean Air Act preempts states from adopting their own vehicle emissions standards, with a single exception. Am. Compl. ¶ 40; *see* 42 U.S.C. § 7543. A state has only two choices: follow the federal EPA's emission standards or adopt standards identical to California's vehicle emissions standards for a given model year. If a state chooses the latter, it must adopt such standards at least two years before commencement of such model year. Am. Compl. ¶¶ 43, 86; *see* 42 U.S.C. § 7507(2). There is no "alternative rule" to ACC II the Department could

adopt setting standards to reduce vehicle GHG emissions that would be permissible under the Clean Air Act.

Plaintiffs contend that Maine was, and is, required to adopt ACC II because it cannot possibly reach 576-A's emission goals by 2030 and 2050 if it does not adopt ACC II and instead follows the federal EPA emissions standard. But in making this argument, Plaintiffs rely on an outdated federal EPA emissions standard. On March 20, 2024, the same day of the Board's meeting considering adoption of the ACC II rule proposal, the federal Environmental Protection Agency (EPA) announced its final rule *Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles*. This EPA rule, since published in the Federal Register, sets federal criteria pollutant and GHG emissions standards for certain vehicles for model years 2027 through 2032 and beyond. *See* 89 Fed. Reg. 27842 (published Apr. 18, 2024; effective June 17, 2024). EPA first issued its Notice of Proposed Rulemaking for the standards on May 5, 2023, *id.*, years after the December 2020 climate action plan and the December 2021 Maine Clean Transportation Roadmap documents that the Plaintiffs rely on in their Amended Complaint for their contention that the federal emissions standards are inadequate for Maine to meet its statutory emissions reduction goals. *See* Am. Compl. ¶¶ 24-39.

The Plaintiffs' omission of EPA's new standards is important. Given both the EPA's new rules and the issuance of Maine's updated climate action plan in December 2024, it is impossible to know what the Maine Climate Council will recommend regarding vehicle emissions regulation. There are aspects of EPA's rule that are more stringent than the ACC II

rule: notably the particulate matter and fleet average tailpipe greenhouse gas standards.[19] The Clean Air Act requires that California's standards be "at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1); Am. Compl. ¶ 41. The California Air Resources Board (CARB) is considering amendments to the ACC II rule in part to consider alignment with EPA's standards where appropriate.[20]

The Amended Complaint references only the previous federal EPA vehicle emissions standards (without naming that rule[21]) where it claims that *because* the Board did not adopt the citizen-petitioned ACC II, the state will revert to the "less stringent federal standards beginning with model year 2026." Am. Compl. ¶ 123. Plaintiffs' assertion is inaccurate. Regardless of whether the Board had adopted the citizen-petitioned ACC II rule, Maine would be subject to the prior federal vehicle emissions standards for model year 2026. *See* Am. Compl. ¶¶ 76, 86 (noting the federal Clean Air Act's two-model-year lead time and that the civil emergency in December 2023 postponed the Board's vote, which required changing the first applicable model year from 2027 to 2028). The new, more stringent federal light-and-

[19] California Air Resources Board, Comparison of Advanced Clean Cars and EPA Light-Duty/Medium-Duty Multipollutant Proposal at slides 9-10, 18-19, 27 (May 15, 2023) (attached as Ex. E), also available through the National Association of Clean Air Agencies website at https://www.4cleanair.org/wp-content/uploads/CARB_Presentation_to_NACAA-ACCII_and_Fed_LMDV_Proposal-2023-05-15.pdf. The Court can consider documents including official public documents on a motion to dismiss without converting the motion to one for summary judgment. *See Calnan v. Hurley*, 2024 ME 30, ¶ 6 n.5, 314 A.3d 267 (citing *Moody*, 2004 ME 20, ¶ 10, 843 A.2d 43).

[20] California Air Resources Board (CARB), Advanced Clean Cars II Amendments Kick-Off Workshop at slides 8-9, 11-12, 15, 27, 30, 36 (Nov. 15, 2023) (attached as Ex. F), also available through CARB's website at https://ww2.arb.ca.gov/sites/default/files/2023-12/2023_11_15%20ACC%20II%20Amends%20Workshop%20slides_ADAv2.pdf.

[21] EPA's previous light and medium-duty vehicle emissions standards rule was issued in 2021 and is entitled *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards*, 86 Fed. Reg. 74434. The rule was challenged in the D.C. Circuit (No. 22-1031). The Maine Office of the Attorney General is an intervenor in support of EPA in the litigation, which remains pending.

medium-duty vehicle standards are now in effect and cover vehicle model years 2027 through 2032 and beyond.[22]

Further, the Plaintiffs' request that this Court order the Board to adopt ACC II violates constitutional separation of powers principles. The Court cannot require the agency to adopt a particular rule to meet GHG reduction goals. Applying Maine's "rigorous separation of powers," the Law Court held in *Burr v. Department of Corrections* that "entering an injunction . . . to establish a specific policy on the number of days that a person can be held in segregation would constitute an intrusion on agency rulemaking." 2020 ME 130, ¶ 26, 240 A.3d 371. Courts may enjoin certain conduct that the court finds unconstitutional, in which case the court's injunctive relief "only defines what is prohibited and leaves it to the Department to decide how to comply." *Id.* ¶ 27. An order requiring an agency to adopt specific rules to comply with a statute would impermissibly intrude on the agency's rulemaking authority, and there is no opportunity for the court to issue the injunctive relief the Plaintiffs request. *See id.* ¶ 26; *Doe*, 2020 ME 134, ¶ 22, 242 A.3d 182 ("the unavailability of a remedy is a sufficient ground for a motion to dismiss for failure to state a claim"). The court lacks the ability to order the agency to adopt rules where the Department has discretion to decide how to implement its rulemaking authority regarding GHG emission reductions.

Finally, a legislative change during the last session makes the separation of powers problem more acute. During the Board's consideration of the ACC II proposal, which was a routine technical rulemaking, legislation was introduced to change the Department's rulemaking authority from routine technical to major substantive for any rule adopting

[22] A group of state and other petitioners filed a petition for review in the D.C. Circuit challenging EPA's new rule, which remains in effect. *See Kentucky v. Envtl. Prot. Agency*, No. 24-1087 (D.C. Cir. 2024). The Maine Office of the Attorney General is an intervenor in support of EPA in the litigation.

California vehicle emissions standards. L.D. 2261 (131st Me. Legis. Mar. 12, 2024); Comm. Amend. A To L.D. 2261, No. H-902. The Legislature passed L.D. 2261, as amended, and it was signed by the Governor on April 12, 2024. P.L. 2024, ch. 624 (effective Aug. 9, 2024), to be codified at 38 M.R.S. 585-D. Thus, if the Court were to order the Board to reinitiate rulemaking to consider the ACC II rule proposal, the earliest the rule could be finally adopted following legislative review pursuant to the major substantive rulemaking process would be in 2025.[23] If the Court were to order *adoption* of the ACC II rule proposal by Plaintiffs' requested date, it would intrude on not only the agency's rulemaking authority but also the Legislature's authority to review provisionally adopted major substantive rules. Court intervention in rulemaking is especially inadvisable here, where the Legislature has recently acted to increase the level of process and legislative review of agency rules regarding vehicle emissions.

For all of the reasons stated above, the Court should dismiss Counts II and IV for failure to state a claim.

CONCLUSION

For all of these reasons, the Court should dismiss Plaintiffs' Amended Complaint in full pursuant to M.R. Civ. P. 12(b)(1) and 12(b)(6).

[23] *See generally* 5 M.R.S. § 8072. In addition, given this adoption timeline, due to the federal Clean Air Act's lead time requirement of two model years, the ACC II standards could apply no sooner than model year 2029. *See* 42 U.S.C. § 7507(2).

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Respectfully submitted,

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NOTICE

MATTER IN OPPOSITION TO THIS MOTION MUST BE FILED NOT LATER THAN 21 DAYS AFTER THE FILING OF THIS MOTION UNLESS ANOTHER TIME IS PROVIDED BY THE MAINE RULES OF CIVIL PROCEDURE OR IS SET BY THE COURT. FAILURE TO FILE TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THE MOTION, WHICH MAY BE GRANTED WITHOUT FURTHER NOTICE OR HEARING.