DAVID N. WOLF (6688)
JEFFREY B. TEICHERT (7000)
MICHAEL E. BEGLEY (16396)
TREVOR J. GRUWELL (18003)
Assistant Utah Attorneys General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
(801) 366-0100
dnwolf@agutah.gov
jeffteichert@agutah.gov
mbegley@agutah.gov
tgruwell@agutah.gov
Counsel for Defendants

This motion requires you to respond. Please see the Notice to Responding Party.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

NATALIE R., a minor, by and through her guardian, DANIELLE ROUSSEL; SEDONA M., a minor, by and through her guardian, CREED MURDOCK; OTIS W., a minor, by and through his guardian, PAUL WICKELSON; LYDIA M., a minor, by and through her guardian, HEATHER MAY; LOLA MALDONADO; EMI S., a minor, by and through her guardian, DAVID GARBETT; and DALLIN R., a minor, by and through his guardian, KYLE RIMA,

Plaintiffs,

v.

STATE OF UTAH; SPENCER COX, Governor of the State of Utah, in his official capacity; DEPARTMENT OF NATURAL RESOURCES, OFFICE OF ENERGY DEVELOPMENT; THOM CARTER, Energy Advisor and Executive Director of Department of Natural Resources, Office of Energy Development, in his official capacity;

MOTION TO DISMISS

Case No.: 220901658

Honorable Robert Faust

DEPARTMENT OF NATURAL RESOURCES, BOARD OF OIL, GAS, AND MINING; DEPARTMENT OF NATURAL RESOURCES, DIVISION OF OIL, GAS, AND MINING; JOHN R. BAZA, Director of Department of Natural Resources, Division of Oil, Gas, and Mining, in his official capacity, Defendants.	

This case tests whether the courts are constitutionally empowered to make fossil fuel and global climate change policy for the State of Utah.

INTRODUCTION

Plaintiffs are children appearing through their guardians and claiming the State of Utah is violating Plaintiffs' substantive due process rights protected by Utah Constitution, Article I, Sections 1 and 7, by impinging on Plaintiffs' right to life. The Court should dismiss Plaintiffs' claims because (1) the political question doctrine prevents the Court from creating climate change and fossil fuels policy; (2) Plaintiffs' requested equitable relief cannot effectively redress their alleged harms; and (3) the Court should not extend the substantive due process doctrine into areas where it has not previously been applied, such as global climate change and fossil fuels policy.

BACKGROUND

Plaintiffs are five children, appearing through their guardians, and one adult, who claim to be uniquely vulnerable to global climate change and poor air quality because of disabilities. (Complaint for Declaratory Relief ("Complaint") ¶¶ 1-4, 7.) Plaintiffs contend the State of Utah is violating Utah Constitution, Article I, Sections 1 and 7. (Complaint ¶ 9.) Section 1 provides:

> All persons have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship

> according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Section 7 provides that, "No person shall be deprived of life, liberty or property, without due process of law." Plaintiffs complain that development of fossil fuels accelerates climate change and causes air pollution, which infringes upon their right to life. (Complaint ¶¶ 3, p. 208-17.)

Plaintiffs generally allege that the past and continuing development of fossil fuels in Utah is an existential threat to Utah's youth because of poor air quality and global climate change due to the burning of fossil fuels produced in Utah. (Complaint ¶ 2.) Plaintiffs claim these conditions are a result of official state policy codified at Utah Code §§ 79-6-301(1)(b)(i), 40-10-1(1), 40-10-17(2)(a), 40-6-1, 40-6-13. (Complaint ¶¶ 2-3.)

LEGAL STANDARD

The State Defendants seek dismissal of Plaintiffs' claims pursuant to Utah R. Civ. P. 12(b)(1) and (6). Rule 12(b)(6) permits dismissal for "failure to state a claim on which relief can be granted." "A district court should grant a rule 12(b)(6) motion when, assuming the truth of the allegations that a party has made and drawing all reasonable inferences therefrom in the light most favorable to that party, it is clear that [the party] is not entitled to relief." *Calsert v. Est. of Flores*, 2020 UT App 102, ¶ 9, 470 P.3d 464, 468 (cleaned up).

While accepting the well pled facts as true, the Court does not need to accept the legal conclusions contained therein. "A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges Plaintiff's right to relief based on those facts. Accordingly, we accept Plaintiff's description of facts alleged in the complaint to be true, but we need not accept extrinsic facts not pleaded, nor need we accept legal conclusions in

contradiction of the pleaded facts." *1600 Barberry Lane 8 LLC v. Cottonwood Residential OP LP*, 2019 UT App 146, ¶ 9, 449 P.3d 949, 954, cert. denied sub nom. *1600 Barberry Lane 8 L v. Cottonwood Residential*, 456 P.3d 388 (Utah 2019)(internal citations and quotations omitted)). "Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." *Rusk v. Univ. of Utah Healthcare Risk Mgmt*., 2016 UT App 243, ¶ 5, 391 P.3d 325, 327 (internal citation and quotation marks omitted). Other than mere conclusory allegations, nothing in the Complaint claims that eliminating fossil fuels production in Utah would have any measurable impact on global climate change or on fossil fuels *use* in Utah.

Rule 12(b)(1) directs dismissal of a case where there is, "lack of jurisdiction over the subject matter." "[I]n Utah, as in the federal system, standing is a jurisdictional requirement." *Brown v. Div. of Water Rights of the Dep't of Natural Res*., 2010 UT 14, ¶ 12, 228 P.3d 747. To establish standing, the plaintiff must "show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute." *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983).

In reviewing a motion to dismiss, the Court need not rely only on the facts as alleged in the Complaint but may also rely on all documents adopted by reference in the complaint, documents attached to the complaint, or facts that may be judicially noticed. *See* Utah R. Civ. P. 10(c). "[A] document that is referred to in the complaint and is central to the plaintiff's claim is not considered to be a matter outside the pleadings. If a defendant submits an indisputably authentic copy of such a document, the court may consider it without converting the Rule 12(b)(6) motion into a motion for summary judgment." *Young*

Res. Ltd. P'ship v. Promontory Landfill LLC, 2018 UT App 99, ¶ 25, 427 P.3d 457, 464–65 (internal citations and quotation marks omitted).

ANALYSIS

I. UNDER THE POLITICAL QUESTION DOCTRINE, THE COURT LACKS CONSTITUTIONAL AUTHORITY TO CREATE ENVIRONMENTAL POLICY

The political question doctrine allows a court to exercise its inherent authority to refrain from wading into a political question that is properly resolved by the political branches of government. This is just such a case. Designing environmental policy involves subjective judgments regarding how to balance priorities and methods of creating clean air, physical health, economic prosperity, and personal freedom.

"The Utah Constitution explicitly establishes separation of powers between the legislative, judicial, and executive branches at the state level." *Skokos v. Corradini*, 900 P.2d 539, 542 (Utah Ct. App. 1995). Indeed, the Constitution provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, § 1. This provision demands that no branch of government exercise another branch's powers unless the Constitution "expressly" permits it. The language of Article 5, Section 1 identifies vigorously protective barriers between the three branches of government. "Courts must hold 'strictly to an exercise and expression of [their] delegated or innate power to interpret and adjudicate.'" *Skokos*, 900 P.2d at 541–42.

Utah courts rely extensively on federal case law when interpreting and applying the political question doctrine. *Id*. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court outlined a six-prong test for determining when the doctrine applies:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

These determining factors are separated by the word "or." Thus, "[t]o find a political question, [courts] need only conclude that one [of these] factor[s] is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

The *Baker* criteria is informed by "prudential concerns calling for mutual respect among the three branches of Government." *Corrie*, 503 F.3d at 981; *see also Nixon v. United States*, 506 U.S. 224, 252–53 (1992) (Souter, J., concurring)(noting that applying the political question doctrine requires case-by-case attention to "prudential concerns"). "The prudential doctrine is generally reserved for self-imposed restraints that arise at the judiciary's discretion rather than by the command of the Constitution." *Corrie*, 503 F.3d at 981.

A. There is a Textually Demonstrable Constitutional Commitment of Environmental Legislation to a Coordinate Political Department

Just last year, the Washington Court of Appeals considered a case similar to the present case in all important respects:

> The appellants are ***13 youths (the Youths)*** between the ages of 8 and 18 who sued the State of Washington, Governor Jay Inslee, and various state agencies and their secretaries or directors (collectively the State) seeking declaratory and injunctive relief. The Youths alleged that the State "injured and continue[s] to ***injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that [the State] knew would result in greenhouse gas ("GHG") emissions, dangerous climate change, and resulting widespread harm."*** To this end, the Youths asserted ***substantive due process***, equal protection, and public trust doctrine claims, among others. They asked the trial court to declare that they have "fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty."

Aji P. by & through Piper v. State, 16 Wash. App. 2d 177, 183, 480 P.3d 438, 444–45 (emphasis added), *review denied sub nom. Aji P. v. State*, 198 Wash. 2d 1025, 497 P.3d 350 (2021). The court's central holding is clear and unequivocal that the issues raised by Plaintiffs are non-justiciable political questions:

> We firmly believe that the right to a stable environment should be fundamental. In addition, we recognize the extreme harm that greenhouse gas emissions inflict on the environment and its future stability. However, it would be a violation of the separation of powers doctrine for the court to resolve the Youths' claims. Therefore, we affirm the superior court's order dismissing the complaint.

Id. at 445. An important basis of this ruling is that "the resolution of the Youths' claims is constitutionally committed to the legislative and executive branches. 'Article 2, section 1, of the Washington State Constitution vests all legislative authority in the legislature and in the people,' through the power of initiative and referendum." *Id.* at 477. Utah's Constitution is not materially different:

> The Legislative power of the State shall be vested in:
> (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and
> (b) the people of the State of Utah as provided in Subsection (2).

Utah Const. art. VI, § 1. As in Washington, power to create and repeal environmental legislation is constitutionally committed to the political branches or the people directly in Utah.

The Ninth Circuit similarly considered a case where minor children, through their guardians, also asked for a court order declaring the federal government's fossil fuels policy unconstitutional and ordering the government to address global climate change:

> The plaintiffs claim that the government has violated their constitutional rights, ***including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life."*** The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, ***we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government***.

Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020) (emphasis added). Though sympathetic to the plaintiff's concerns, the Ninth Circuit concluded that fossil fuels and climate change policy is a political matter, and not enshrined in the Constitution's Due Process Clause.

> There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, ***any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches***. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and ***plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives***, rather than by federal judges interpreting the basic charter of Government for the entire country."

Juliana v. United States, 947 F.3d 1159, 1171-72 (9th Cir. 2020) (emphasis added; cleaned up).[1]

Juliana is not materially different from the present case. "Absent court intervention, the political branches might conclude – however inappropriately in the plaintiffs' view – ***that social, political and economic considerations called for continuation of the very programs challenged in this suit***, or a less robust approach to addressing climate change than the plaintiffs believe is necessary." *Id.* at 1172 (emphasis added). The *Juliana* Court rightly concluded that it could not substitute its judgment for the political branches on matters of fossil fuels and climate change policy and predictions. *Id*. "[I]t is axiomatic that 'the Constitution contemplates that democracy is the appropriate process for change[.]'" *Id.* at 1173 (quoting *M.S. v. Brown*, 902 F.3d 1076, 1087 (9th Cir. 2018)). The failure of political will, even in arguably existential concerns, does not justify unconstitutional remedies. *Id.* at 1175; *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J. Concurring).

The Alaska Supreme Court reached the same conclusion as the Ninth Circuit and the Washington Court of Appeals. Again, it considered a case where minor children appeared through their guardians to complain that resource development had produced and accelerated climate change and adversely affected their lives. Not surprisingly, the Alaska Supreme Court held that these were non-justiciable political questions:

[1] Prior to the Ninth Circuit's *Juliana* opinion cited herein, a district court denied the defendants' motion to dismiss. *Juliana,* 947 F.3d at 1165. The government then moved for summary judgment and judgment on the pleadings. *Id.* The district court granted the motion in part on other grounds and dismissed two defendants, but otherwise denied the motion. On the urging of the Ninth Circuit, noting the Supreme Court's justiciability concerns, the district court certified the matter for interlocutory appeal. *Id.* at 1166. The Ninth Circuit then reversed the district court on justiciability grounds and remanded the matter to the district court with instructions to dismiss the case for lack of Article III standing on grounds of justiciability. *Id.* at 1174. The plaintiffs compiled an extensive factual record that climate change was occurring at a rapid pace. *Id.* at 1166-67. However, the Ninth Circuit considered the evidence in a light most favorable to the plaintiffs and still found that, as a matter of law, the plaintiffs' claims were nonjusticiable for reasons equally applicable to the present case. Thus, the evidence did not change the *Juliana* Court's analysis that the case must be dismissed as a matter of law.

> A number of young Alaskans — including several Alaska Natives — sued the State, alleging that ***its resource development is contributing to climate change and adversely affecting their lives***. They sought declaratory and injunctive relief based on allegations that the State has, through existing policies and past actions, violated . . . their individual constitutional rights. The superior court dismissed the lawsuit, concluding that the injunctive relief claims ***presented non-justiciable political questions better left to the other branches of government*** and that the declaratory relief claims should, as a matter of judicial prudence, be left for actual controversies arising from specific actions by Alaska's legislative and executive branches. The young Alaskans appeal, raising compelling concerns about climate change, resource development, and Alaska's future. ***But we conclude that the superior court correctly dismissed their lawsuit.***

Sagoonick v. State, 503 P.3d 777, 782 (Alaska 2022) (emphasis added), *reh'g denied* (Feb. 25, 2022). The court also affirmed dismissal of the lawsuit because "Plaintiffs ask the judicial branch to establish constitutional common law controlling State policy about the appropriate balancing of resource development against environmental protection." *Id.* at 796.

The Alaska Supreme Court applied the political question doctrine to the case based on the following principles, "The underlying policy choices were legislative because they: (1) required an 'informed assessment of competing interests'; (2) largely depended on the application of 'scientific, economic, and technological resources'; and (3) would be best made with the input of various stakeholders outside of an inflexible trial court record." *Id.* at 797 (*quoting Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.,* 335 P.3d 1088, 1097 (Alaska 2014)). These principles apply precisely to the present case, where Plaintiffs are asking this Court to override legislatively established resource policy because they dislike the outcome.

A federal district court in Pennsylvania also considered a case where minor children filed an action against federal authorities claiming that the federal government had violated their due process rights to life and "personal bodily integrity" by "allowing and permitting fossil fuel

production, consumption and its associated CO_2 pollution." *Clean Air Council v. United States*, 362 F.Supp.3d 237 (2019). The court held, "[b]ecause I have neither the authority nor the inclination to assume control of the Executive Branch, I will grant Defendants' Motion" to Dismiss. *Id.* The court also made clear that the doctrine advanced by the plaintiffs was entirely new and unreasonably expansive.

> Plaintiffs seek to create an entirely new doctrine—investing the Federal Government with an affirmative duty to protect all land and resources within the United States—enforceable as a substantive due process right under the Fifth and Ninth Amendments. That doctrine applied here would empower this Court to direct any Executive Branch action related to "the environment."

Id. at 254. The same is true in the present case, as Plaintiffs seek to vastly expand due process rights based on a novel and heretofore unsupported theory.

Like its sister states of Washington, Alaska, and Pennsylvania, the Iowa Supreme Court also considered a case where environmentally concerned plaintiffs asked the courts to amend state policies regarding water quality. The court held that these were non-justiciable policy questions:

> In our view, stating that the legislature must "broadly protect[ ] the public's use of navigable waters" provides no meaningful standard at all. Different uses matter in different degrees to different people. How does one balance farming against swimming and kayaking? How should additional costs for farming be weighed against additional costs for drinking water? Even if courts were capable of deciding the correct *outcomes*, they would then have to decide *the best ways to get there.* Should incentives be used? What about taxes? Command and-control policies? In sum, these matters are not "claims of *legal* right, resolvable according to *legal* principles, [but] political questions that must find their resolution elsewhere."

Iowa Citizens for Community Improvement v. State, 962 N.W.2d 780, 796-97 (2021). Again, this analysis is not meaningfully different from the present case in finding that balancing economic considerations with environmental protection is an inherently non-justiciable political question.

Neither Utah's Constitution nor the Federal Constitution address anything about fossil fuels or global climate change. Even the broadest interpretation of the Due Process Clause would not allow this Court to provide Plaintiffs with a judicial remedy that they struggle to achieve through the political process.

B. Plaintiffs Have Not Identified Manageable Judicial Standards.

Plaintiffs have not satisfied the second prong of the *Baker* test, which requires "judicially discoverable and manageable standards for resolving" the issues before the Court. *Baker*, 369 U.S. at 217. To adjudicate these issues, "the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. Where there are "no judicially discernible and manageable standards for adjudicating," then the question is non-justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

In the present case, as was true in Washington, Plaintiffs ask the Court to declare unconstitutional statutes governing the production of fossil fuels. Such policy decisions require scientific and technical judgments that are beyond the scope and expertise of the courts, in part because they require balancing the competing policy interests of all stakeholders, many of whom are not presently before the Court. As the Washington Court of Appeals explained:

> Youths acknowledge, scientific expertise is required to make a determination regarding appropriate GHG emission reductions, and the determination necessarily involves including all stakeholders and balancing the many implicated and varied interests affected by any GHG emission

> reduction policies. To this end, the agencies employ and retain climate scientists from the University of Washington to assist with their policy determinations. Were we to make these determinations, we would decide matters beyond the scope of our authority with resources not available to the judiciary. ***Accordingly, we cannot imagine a judicially manageable standard available to create and enforce the Youths' asserted right,*** the related claims, or the extension of the public trust doctrine to the atmosphere.

Aji P. by & through Piper, 16 Wash. App. 2d at 189–90 (emphasis added). All of the same concerns exist in the present case, and there are no judicially manageable standards dictating levels of emissions or air quality.

The Ninth Circuit similarly found that there were no judicially manageable standards for finding fossil fuels legislation unconstitutional:

> Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not confer the power of "a knighterrant, roaming at will in pursuit of his own ideal of beauty or of goodness;" rather, we are bound "to exercise a discretion informed by tradition, methodized by analogy, disciplined by system.'" Benjamin N. Cardozo, The Nature of the Judicial Process 141 (1921).

Juliana, 947 F.3d at 1174. As in our case, "a proposed standard involving a mathematical comparison . . . is too difficult for the judiciary to manage." *Id.* at 1173. Where plaintiffs assert that the state has violated their rights by enacting the state's energy policy, they must demonstrate "judicially enforceable standards" for determining when those rights are violated, "which the political question doctrine prevents [Courts] from developing[.]" *Sagoonick*, 503 P.3d at 801.

Particularly troubling, there is no limiting principle in Plaintiffs' requested ruling. One could just as easily argue the constitution requires that we eliminate the internal combustion engine entirely or that the liberty to make a living prevents the State from regulating fossil fuel

production in any way. If accepted by this Court, the principle offered by Plaintiffs necessarily means that Utah's Constitution requires the adoption of whatever policies are preferred by any group or political movement a judge might happen to favor.

In the present case, Plaintiffs ask the judiciary to fashion a remedy which holds legislative action unconstitutional, and they do so without providing any guiding or limiting principles. It would be imprudent for the Court to grant this requested relief, as doing so would require the Court to answer political questions and intrude on the legislative and executive branches' authority.

C. Plaintiffs' Demand Disrespects the Political Branches

The fourth *Baker* factor cautions against, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" *Baker*, 369 U.S. at 217. The Utah Supreme Court warned about the imprudence of the courts stepping in to reverse legislative decisions on matters of special public concern. "Public interest or importance may often cut against the propriety of the exercise of judicial power. The ***matters of greatest societal interest –*** involving a grand, ***overarching balance of important public policies*** – are beyond the capacity of the courts to resolve." *Gregory v. Shurtleff*, 2013 UT 18, 299 P.3d 1098, 1132 n.29 (emphasis added). Energy policy, fossil fuels development, and global climate change are paradigm examples of "matters of the greatest societal interest [that] involving a grand, overarching balance of important public policies [and] are beyond the capacity of courts to resolve." *Id.*

The United States Supreme Court explained that "the political question doctrine excludes from judicial review those controversies which revolve around policy choices and value

determinations[.]" *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). The issues here similarly involve "a grand, overarching balance of important public policies," *id.*, including how to balance the objectives of economic growth and environmental protection. The Washington Court of Appeals clearly explained that having the courts police the policies of the legislative and executive branches disrespects the political branches.

> Finally, resolution of any of the Youths' claims involves ***disrespecting the coordinate branches***. In particular, the Youths asked the trial court to "[r]etain jurisdiction over this action to ***approve, monitor and enforce compliance with Defendants' Climate Recovery Plan*** and all associated orders of this Court." ***Such action by the court necessarily involves policing the legislative and executive branches' policymaking decisions and, thus, inherently usurps those branches' legislative authority***. This is particularly true where, as is the case here, the political branches already made an initial policy determination. Accordingly, the relief and resolution of the Youths' claims would require the court to "bulldoze[ ] any notion of a separation of powers." *Rousso v. State*, 170 Wash.2d 70, 87, 239 P.3d 1084 (2010).

Aji P. by & through Piper, 16 Wash. App. 2d at 190–91 (emphasis added). In the present case, Plaintiffs ask the Court to declare legislative acts unconstitutional based on things that are not expressed in the constitution. They seek a different weighing of the interests involved, though the Legislature has already balanced the interests and created policy through statute.

Fundamentally, Plaintiffs' argument is that the Utah Legislature made the wrong policy decision by allowing the development of fossil fuels and not curtailing the byproducts emitted through the use of fossil fuels. The Washington Court of Appeals correctly explained, "Ultimately, by wading into the waters of what policy approach to take, what economic and technological constraints exist, and how to balance all implicated interests to achieve the most beneficial outcome, the court would not merely serve[ ] as a check on the activities of another

branch." *Aji P. by & through Piper*, 16 Wash. App. 2d at 191. "Rather, the judiciary would usurp the authority and responsibility of the other branches." *Id.*

Striking down the legislature's carefully crafted fossil fuel policies would do violence to our constitutional system and violate the separation of powers. Montesquieu, whose writings were frequently consulted by James Madison and other American founders wrote: "***[T]here is no liberty, if the judiciary power be not separated from the legislative and executive.*** Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; ***for the judge would be then the legislator***." Montesquieu, The Spirit of Laws, Loc. 2378 (Halcyon Press Ltd. Kindle Edition)(1752)(emphasis added). While one Court decision out of harmony with the constitutional separation of powers is unlikely to set Utah on a straight road to tyranny, a constitution is not just for the moment. It is for the ages. "The purpose behind the separation of powers is to preserve the independence of each of the branches of government so that no one branch becomes a depository for a concentration of governmental powers." *Matheson v. Ferry*, 641 P.2d 674, 681 (Utah 1982)(Howe, J., *concurring*). While a single case may not have an immediate impact, Courts must be vigilant to exercise appropriate restraint and defer to the legislature to prevent the erosion of liberty.

II. PLAINTIFFS LACK STANDING BECAUSE THEIR CLAIMS ARE NOT REDRESSABLE

There are three requirements for traditional standing in Utah. "First, plaintiffs must assert that they have been or will be adversely affected by the challenged actions. Second, they must allege a causal relationship between their injury and the challenged actions. And third, the relief requested must be substantially likely to redress the injury claimed." S. *Utah Wilderness All. v. Kane Cty. Comm'n,* 2021 UT 7, 123, 484 P.3d 1146 (cleaned up). *See also Carlton v. Brown,*

2014 UT 6,123, 323 P.3d 571 ("Utah's standing requirements are similar to the federal court system in that they contain the same three basic elements—injury, causation, and redressability"). To meet the redressability requirement, Plaintiff must show that the declaratory judgment requested would actually redress Plaintiffs' claimed injuries in the real world.

The U.S. District Court for the Eastern District of Pennsylvania held that the plaintiff's: "anxiety over climate change, however, is not a particularized injury. Rather, it is the kind of generalized grievance[ ] brought by concerned citizens that we have consistently held are not cognizable in the federal courts." *Clean Air Council*, 362 F.Supp.3d at 245. Accordingly, the court dismissed plaintiffs' complaint. *Id.* at 244.

Additionally, the court concluded that the plaintiffs' grievances cannot be redressed by the present action:

> As an initial matter, Nova's argument is entirely speculative. More fundamentally, it overlooks the principle that it must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly. *See Ash Creek Mining Co.,* 969 F.2d at 875 (the redressability inquiry looks to whether "the *relief requested* will redress the injury claimed")(emphasis added); *Cox v. Phelps Dodge Corp.,* 43 F.3d 1345, 1348 (10th Cir.1994)("[W]hat makes a declaratory judgment action 'a proper judicial resolution of a 'case or controversy' rather than an advisory opinion is the settling of some dispute which affects the behavior of *the defendant* toward the plaintiff.'")(superseded by statute on other grounds)(emphasis added) (quoting *Hewitt v. Helms,* 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)). "If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will always exist. Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Franklin v. Massachusetts,* 505 U.S. 788, 825, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992)(Scalia, J., concurring)(emphasis omitted).

Nova Health Sys. v. Gandy, 416 F.3d 1149, 1159 (10th Cir. 2005). In the present case, Plaintiffs ask this Court to take symbolic action by declaring policy explanations in the statute unconstitutional, without addressing the operative language of the statute.

The relief Plaintiffs request is not likely to redress their claimed injuries. Plaintiffs ask that Utah Code §§ 40-10-1(1), 40-10-17(2)(a), 40-6-1, 40-6-13, 79-6-301(1)(b)(i) be declared unconstitutional. Each of these will be discussed in turn.

A. Declaring the Requested Portions of Utah's Coal Statute Unconstitutional Would Not Redress Plaintiffs' Claimed Injuries

Utah Code § 40-10-1(1) is a simple statement of legislative findings:

> Coal mining operations presently contribute significantly to the nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of Utah's coal reserves can only be extracted by underground mining methods; and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.

The foregoing language is a statement of purpose, but does not change any of the operative requirements of the law. Removing this section from the statute would not render the statute unenforceable.

Utah Code § 40-10-17(2)(a) is a portion of a general statement of policy and performance standards:

> General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operations as a minimum to:
>
> (a) Conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future through surface coal mining can be minimized.

Again, this is a statement of statutory objectives. For example, the law is designed to maximize "utilization and conservation," which are competing objectives and necessarily involve a significant amount of discretion in implementation. Invalidating Utah Code § 40-10-17(2)(a) will not prevent or curtail coal mining or the use of coal as a source of energy.

Even assuming, for the sake of discussion, that the requested declaratory judgment would render Utah's coal statute inoperative, the federal Surface Mining Reclamation Act ("SMCRA") would then apply. 30 USC §§ 1253-55. Utah is a primacy state with respect to coal[2] as the Supreme Court has explained:

> Utah is a primacy state that retains exclusive jurisdiction over nonfederal lands in the regulation of surface mining operations. Utah has been a primacy state since 1981, when OSM approved Utah's regulatory program and the Utah Coal Program has been the operative program regulating coal mining in the state. Because Utah has established primacy in coal mining regulations, state statutes and regulations thus become the direct authority for regulating coal mining and are the operative law interpreted by Utah courts. And although we are free to consider the interpretation of a federal agency, we have no obligation to defer to that interpretation.
>
> *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas, & Min.*, 2012 UT 73, ¶ 42, 289 P.3d 558, 569 (cleaned up). If the Court struck down the state laws regulating Utah's coal, primacy would be revoked, and the mining of coal would default to federal jurisdiction. Utah law may not be inconsistent with federal law and must be just as stringent. 30 USC § 1255. Thus, applicable federal law would govern in the absence of Utah law, and would be equally permissive as Utah state law, or perhaps more permissive. Congressional findings in SMCRA include findings that expansion of coal mining is necessary to meet the nation's energy needs, and that it is in the national interest to develop a robust underground mining industry. 30 USC § 1201(b), (d). These policies would govern even in the absence of Utah's statutes regulating coal. **Declaring the Requested Portions of Utah's Oil & Gas Statute Unconstitutional Would Not Redress Plaintiffs' Claimed Injuries**

[2] Conditional Approval of the Permanent Regulatory Program Submission From the State of Utah Under the Surface Mining Control and Reclamation Act of 1977, 30 CFR Part 944, 46 FR 5899-01.

Utah Code § 40-6-1 is also simply a statement of legislative purpose:

> It is declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of natural resources of oil and gas in the state of Utah in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners may be fully protected; to provide exclusive state authority over oil and gas exploration and development as regulated under the provisions of this chapter; to encourage, authorize, and provide for voluntary agreements for cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers, and the general public may realize and enjoy the greatest possible good from these vital natural resources.

The foregoing merely identifies and clarifies policy goals. The operative portions of the statute are untouched by Plaintiffs' requested declaratory relief.

Utah Code § 40-6-13 is a rule of construction:

> This act shall never be construed to require, permit or authorize the board or any court to make, enter or enforce any order, rule, regulation, or judgment requiring restriction of production of any pool or of any well (except a well drilled in violation of Section 40-6-6 hereof) to an amount less than the well or pool can produce unless such restriction is necessary to prevent waste and protect correlative rights, or the operation of a well without sufficient oil or gas production to cover current operating costs and provide a reasonable return, without regard to original drilling costs.

This rule of construction assists the courts in interpreting the operative portions of the statute. Declaring it unconstitutional would have no effect on the substantive policy of the State or the operative provisions of the statute.

Utah Code § 79-6-301(1)(b)(i) is also a statement of policy and does not include the operative portions of the statute:

> It is the policy of the state that:
> . . . .

> (b) Utah will promote the development of:
> (i) nonrenewable energy resources, including natural gas, coal, oil shale, and oil sands[.]

Once again, this is a statement of policy objectives. Declaring it unconstitutional would have no effect on the substantive policy of the State or the operative provisions of the statute.

Even assuming, for the sake of discussion, that Utah's oil and gas statutes were declared unconstitutional in total, it would not result in a cessation of fossil fuel development or in the reduction of emissions. If Plaintiffs prevail in invalidating the Act, the common law rule of capture would become the legal principle dictating oil and gas development in Utah and the unregulated production of hydrocarbons would likely increase. *See* Phillip W. Lear, Thomas A. Mitchell, & William R. Richards, *Modern Oil & Gas Conservation Practice: And you Thought the Law of Capture was Dead?* 41 Rocky Mtn. Min. Law Inst. 17-1, 17-9 at § 17.02[5](1995) (scholarly article compiling articles and cases discussing the common law rule of capture); Phillip Wm. Lear, *Utah Oil and Gas Conservation Law and Practice*, 43B RMMLF-INST 5C (1997)(article detailing oil and gas conservation practice in Utah). Prior to 1955, oil and gas development in Utah was governed by the common law rule of capture.

> Derived from the common law of England, the rule of capture is used to determine ownership of captured natural resources including groundwater, oil, gas, and – as originally applied – game animals. The rule of capture generally provides that the first person to "capture" a migratory natural resource that is free to roam or flow from property to property and which was never reduced to personal property is granted absolute title to that resource.

Thomas E. Kurth, Michael J. Mazzone, Mary S. Mendoza, Christopher S. Kulander, *American Law and Jurisprudence on Fracing*, 47 Rocky Mountain Min. L. Found. J. 277, 294 (2010). As applied to oil and gas, the race to "capture" as much resource as possible historically "led to

uncontrolled drilling, depletion of reservoir energies, and loss of recoverable resources." Phillip W. Lear, *Modern Oil & Gas Conservation Practice*, at § 17.02[5]. Specifically,

> Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. ***This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land***; and this is a property right. And it is ***limited only by the physical possibility of the adjoining landowner diminishing the oil and gas*** under one's land ***by the exercise of the same right of capture***.

Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935)(emphasis added). To prevent the migration of oil and gas, each landowner was "impelled to sink as may wells into the reservoir as his land [would] accommodate and to produce as rapidly as possible." Frank J. Allen, *An Argument for Enforced Unit Development of Oil and Gas Reservoirs*, 7 Utah. L. Rev. 197, 199 (1960). The Utah Supreme Court analyzed the issues surrounding applying the rule of capture to oil and gas development and concluded:

> This rule of law produced results that were unfair to many landowners and development practices that were uneconomical or wasteful for all. Thus, it encouraged the drilling of more wells than necessary to drain a field, and it permitted techniques and rates of production that augmented the profits of the property owner whose land was producing, but wasted the resources of the field as a whole.

Bennion v. Utah State Bd. Of Oil, Gas & Mining, 675 P.2d 1135, 1137 (Utah 1983). Applying the well-documented problems associated with the common law rule of capture would lead to an absurd result if Plaintiffs were granted the relief they are requesting. Rather than purportedly reducing the harm alleged by Plaintiffs, the result of Plaintiffs' victory would be the return to the "law of the jungle" – a race to produce as rapidly as possible without any concern for the resource, adjoining landowners, and ultimately the public. Plaintiffs' requested relief is thus

premised on a misconception that invalidating the very Act that prevents waste and harmful production would somehow result in shutting down oil and gas production in Utah.

To protect against waste, the Utah Oil and Conservation Act, "embraces the triad of mission of conservation practices, namely, preventing waste, protecting correlative rights, and achieving greater ultimate production." Utah Code Ann. § 40-6-1 through 4-6-23. In order to offset the rule of capture, the Act provides several important regulatory mechanisms requiring spacing, forced pooling, enhanced recovery, and compulsory pooling. *Id*. These measures would all be eliminated if the Court struck down the Act.

III. SUBSTANTIVE DUE PROCESS RIGHTS SHOULD *NOT* BE EXTENDED TO FOSSIL FUELS POLICY

A. The Court Should Not Extend Substantive Due Process into New Areas

Substantive Due Process has frequently been labeled as "treacherous," and some Justices of the United States Supreme Court have long been calling for it to be reexamined or confined. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 502 (1977)("Substantive due process has at times been a treacherous field for this Court" and "history counsels caution and restraint"); *Gamble v. United States*, 139 S.Ct. 1960, 1988-89 (2019)(Thomas, *J. concurring;* Gorsuch*, J., concurring*); *McDonald v. Chicago*, 561 U.S. 742, 811-13 (2010); *Timbs v. Indiana,* 139 S.Ct. 682, 691 (2019)(Thomas, J., concurring); *Troxel v. Granville*, 530 U.S. 57 (the facts of this case, "do not call for turning any fresh furrows in the 'treacherous field' of substantive due process")(Souter, *J., concurring*, at 76), ("I understand the plurality as well to leave the resolution of that issue [of repudiating substantive due process] for another day")(Thomas, *J., concurring*, at 80)("While I would not now overrule those earlier cases (that has not been urged),

neither would I extend the theory upon which they rested to this new context")(Scalia, *J., dissenting,* at 91)); *Thayer v. Utah*, No. 2:05-CV-1004 DB, 2009 WL 1913264, at *5 (D. Utah June 30, 2009)("The Tenth Circuit has held, however, that substantive due process analysis is disfavored if the claim can be analyzed under 'an explicit textual source of constitutional protection'")(*quoting Seegmiller v. LeVerkin City,* 528 F.3d 762, 766 (10th Cir.2008)). While it is not the province of this Court to reconsider or overrule substantive due process cases, Supreme Court opinions that suggest reconsidering or circumscribing the doctrine provide reasons for caution against extending it into new areas of law.

In the landmark United States Supreme Court case of *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) the Court explained that it has:

> always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins,* 503 U.S., at 125, 112 S.Ct., at 1068. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *ibid.,* lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, *Moore,* 431 U.S., at 502, 97 S.Ct., at 1937 (plurality opinion).

There is no precedent for extending the doctrine of substantive due process into policy decisions regarding the development of fossil fuels.

In another Supreme Court opinion where the plaintiffs complained that certain regulations of oil and gas refiners violated the Due Process Clause, the Court ruled that the clause did not apply:

> Appellants' substantive due process argument requires little discussion. The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause

> does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation[.]"

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978)(*quoting Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)); *see also Bullseye Glass Co. v. Brown,* 366 F.Supp.3d 1190 (D. Oregon).

The District of Colorado similarly held that a forced pooling statute did not violate the substantive due process rights of oil and gas operators, because the statute did not force political cooperation. *Wildgrass Oil & Gas Comm. v. C*olorado, 447 F. Supp. 3d 1051, 1068 (D. Colo. 2020), aff'd, 843 F. App'x 120 (10th Cir. 2021). Again and again, courts have uniformly concluded substantive due process does not apply to fossil fuels policy. Significantly, the Supreme Court also cited with approval a portion of a First Circuit case holding that the federal Coal Act did not infringe substantive due process rights because it was economic legislation and did not abridge fundamental rights. *E. Enterprises v. Apfel*, 524 U.S. 498, 517 (1998)(*citing and reversing on other grounds Eastern Enterprises v. Chater*, 110 F.3d 150 (C.A.1 1997)).

B. Banning Fossil Fuels is *Not* Deeply Rooted in American or Utah History

The Supreme Court has, "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition[.]'" *Glucksberg*, 521 U.S. at 720–21 (1997). It protects only those freedoms "implicit in the concept of ordered liberty[.]" *Id.* A new policy proposal to cease or significantly curtail fossil fuel development is not implicit in this nation's history and traditions and has nothing whatever to do with the concept of ordered liberty. Plaintiffs admit that fossil fuel development in Utah is "historic and ongoing." (Complaint ¶ 6.)

C. The Due Process Clause Does *Not* Require the State to Protect Against Private Actors Such as Oil and Coal Producers or Drivers of Automobiles

The Supreme Court has recognized that "the Due Process Clause does not require the State to provide its citizens with particular protective services[.]" *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196–97 (1989). "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors." *Id.* at 195. "The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* at 195. The "purpose [of the Due Process Clause] was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *Id.* at 196.

The United States District Court for the Eastern District of Pennsylvania specifically found that:

> Once again third parties—not the Government—are polluting the air. As I have discussed, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197, 109 S.Ct. 998. Accordingly, Plaintiffs have failed to state a claim based on a violation of their right to life or bodily integrity.

Clean Air Council, 362 F.Supp.3d at 253. The principle of limiting substantive due process to prevent policy decisions by judges is entirely consistent with the political question doctrine's limitations on the courts' authority, as explained above.

//

CONCLUSION

For the reasons set forth above, the Court should dismiss Plaintiffs' claims, with prejudice.

RESPECTFULLY SUBMITTED this 6th day of May 2022.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/Jeffrey B. Teichert
DAVID N. WOLF
JEFFREY B. TEICHERT
MICHAEL E. BEGLEY
TREVOR J. GRUWELL
Assistant Utah Attorneys General
Attorneys for Defendants

Notice to responding party
You have a limited amount of time to respond to this motion. In most cases, you must file a written response with the court and provide a copy to the other party:

- within 14 days of this motion being filed, if the motion will be decided by a judge, or
- at least 14 days before the hearing, if the motion will be decided by a commissioner.

In some situations a statute or court order may specify a different deadline.

If you do not respond to this motion or attend the hearing, the person who filed the motion may get what they requested.

See the court's Motions page for more information about the motions process, deadlines and forms: utcourts.gov/motions

Scan QR code to visit page

Finding help
The court's Finding Legal Help web page (utcourts.gov/help) provides information about the ways you can get legal help, including the Self-Help Center, reduced-fee attorneys, limited legal help and free legal clinics.

Aviso para la parte que responde
Su tiempo para responder a esta moción es limitado. En la mayoría de casos deberá presentar una respuesta escrita con el tribunal y darle una copia de la misma a la otra parte:

- dentro de 14 días del día que se presenta la moción, si la misma será resuelta por un juez, o
- por lo menos 14 días antes de la audiencia, si la misma será resuelta por un comisionado.

En algunos casos debido a un estatuto o a una orden de un juez la fecha límite podrá ser distinta.

Si usted no responde a esta moción ni se presenta a la audiencia, la persona que presentó la moción podría recibir lo que pidió.

Vea la página del tribunal sobre Mociones para encontrar más información sobre el proceso de las mociones, las fechas límites y los formularios:

Para accesar esta página escanee el código QR

utcourts.gov/motions-span

Cómo encontrar ayuda legal
La página de la internet del tribunal Cómo encontrar ayuda legal (utcourts.gov/help-span) tiene información sobre algunas maneras de encontrar ayuda legal, incluyendo el Centro de Ayuda de los Tribunales de Utah, abogados que ofrecen descuentos u ofrecen ayuda legal limitada, y talleres legales gratuitos.

Para accesar esta página escanee el código QR

ELECTRONIC FILING CERTIFICATE

I certify that on this 6th day of May, 2022, I caused to be served via electronic court filing a true and correct copy of the foregoing **MOTION TO DISMISS** to the following:

Andrew G. Deiss
John Robinson Jr.
Corey D. Riley
DEISS LAW PC
adeiss@deisslaw.com
jrobinson@deisslaw.com
criley@deisslaw.com

Andrew L. Welle
Amira Mikhail
OUR CHILDREN'S TRUST
andrew@ourchildrenstrust.org
amira@ourchildrenstrust.org

Counsel for Plaintiffs

/s/ Phoenix Gatrell
Phoenix Gatrell, Paralegal