Andrew G. Deiss (7184)
John Robinson Jr. (15247)
Corey D. Riley (16935)
Deiss Law PC
10 West 100 South, Suite 700
Salt Lake City, Utah 84101
(801) 433-0226
deiss@deisslaw.com
jrobinson@diesslaw.com
criley@deisslaw.com

*Attorneys for Plaintiffs*

Andrew L. Welle*
Our Children's Trust
1216 Lincoln Street
Eugene, Oregon 97401
(574) 315-5565
andrew@ourchildrenstrust.org

** Counsel admitted pro hac vice*

**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; et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF UTAH; et al.,<br><br>Defendants. | **MEMORANDUM OPPOSING MOTION TO DISMISS**<br><br>Case No.: 220901658<br><br>Honorable Robert Faust<br><br>***Hearing Requested Pursuant to Utah Rule of Civil Procedure 7(h)*** |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes**



**Rules**

**Other Authorities**

This case asks whether Utah's political branches may, as a matter of codified policy, knowingly and affirmatively take years off of children's lives and substantially endanger their health and safety given the fundamental protections of life and liberty in Utah's Constitution.

## INTRODUCTION

As developing youth and children, Plaintiffs are uniquely vulnerable to and face disproportionate harms to their physical and psychological health, safety, and development from Utah's development and combustion of fossil fuels. Plaintiffs brought this case because, knowing of the profound dangers to them, their state government has codified and continues to implement express statutory policies to maximize, promote, and systematically authorize fossil fuel development, causing hazardous air quality and climate conditions in Utah that are taking years off Plaintiffs' lives and significantly endangering their health and safety. Utah Code §§ 79-6-301(1)(b)(i), 40-10-1(1), 40-10-17(2)(a), 40-6-1, 40-6-13. Plaintiffs challenge these policies and conduct as violating their rights under article I, sections 1 and 7 of Utah's Constitution to life and to be free from government policies and conduct that substantially endanger their health and safety.

Defendants do not dispute the sufficiency of the allegations demonstrating that these Youth are already experiencing these existential harms, that the State's policies and actions are causing them, that the Youth's worsening injuries will be alleviated if Defendants do not continue to maximize, promote, and systematically authorize fossil fuel development, nor that the challenged policies and actions implicate Plaintiffs' rights to life and to be free from government endangerment of their health and safety. Instead, Defendants concoct strawmen, mischaracterizing and attempting to recast Plaintiffs' factual allegations, asserted rights, and requests for relief into a case Plaintiffs have not brought, and contending that there is an exception to Utah's due process

clause for fossil fuel policy. Unlike the distinguishable cases on which Defendants rely, Plaintiffs do not ask this Court to order and oversee any *comprehensive remedial plan*. Nor do Plaintiffs' ask this Court to determine or order what the State's policies *should be*. Plaintiffs ask this Court to exercise its traditional role and duty to provide *declaratory relief* as to whether the *specific* policies the State has adopted, which Plaintiffs challenge, comport with Utah's Constitution.

This Court should deny Defendants' motion to dismiss and afford these youth their constitutional right to their day in court because: 1) this case is justiciable; 2) a declaratory judgment would provide Plaintiffs meaningful relief; and 3) Plaintiffs have plausibly alleged violations of explicit and deeply rooted rights under Utah's Constitution.

## LEGAL STANDARD

"A dismissal is a severe measure[.]" *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990). On a motion to dismiss, Utah's courts must "accept[] as true the factual allegations of the complaint and draw[] all inferences in the plaintiff's favor." *Hunter v. Sunrise Title Co.*, 2004 UT 1, ¶ 6, 84 P.3d 1163 (citation omitted). Courts may dismiss only if "it is clear that a party is not entitled to" any "relief under any state of facts which could be proved in support of its claim." *Colman*, 795 P.2d at 624. "[I]f there is any doubt about whether a claim should be dismissed" the "issue should be resolved in favor of giving the party an opportunity to present its proof." *Colman*, 795 P.2d at 624. "[A]llegations in a complaint should be construed liberally and against a motion for failure to state a claim[.]" *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995).

## ANALYSIS

### I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

The constitutionality of Utah's statutory fossil fuel policies is a justiciable question squarely within judicial cognizance. Utah's courts have a duty to review legislation and executive conduct for consistency with rights protected by Utah's Constitution. *E.g., Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) ("We cannot, however, shirk our duty to find an act of the Legislature unconstitutional when it clearly appears that it conflicts with some provision of our Constitution."); *Jensen v. Sawyers*, 2005 UT 81, ¶ 92, 130 P.3d 325 (a court is "duty bound to act in its role as the guardian of constitutional protections"). While it is "often" that exercise of "judicial characteristic roles may have significant political overtones" that "does not mean [that] our district courts can simply shirk those roles by announcing them nonjusticiable." *Matter of Childers-Gray*, 2021 UT 13, ¶ 67, 487 P.3d 96 (cleaned up). Whether Defendants' "actions pass constitutional muster is certainly a justiciable issue" for Utah's courts to resolve on the merits. *Skokos v. Corradini*, 900 P.2d 539, 542 (Utah Ct. App. 1995). Adjudicating Plaintiffs' claims presents no separation of powers problem. Rather, it is Defendants' arguments that, if adopted, would violate the separation of powers, as well as the open courts and due process protections of Utah's Constitution.

Defendants' justiciability arguments rely heavily, but mistakenly, on fundamentally distinguishable out-of-state cases, none of which is binding on this Court. Each found requests for injunctive relief directing governments to prepare and implement comprehensive remedial plans to reduce pollution at specific rates to be nonjusticiable – relief Plaintiffs *do not seek*. For instance, in *Juliana v. United States*, the Ninth Circuit explicitly stated that the "central issue before" it was "whether . . . an Article III court can provide . . . an order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2.'" 947 F.3d 1159, 1164-65 (9th Cir. 2020). The court concluded "reluctantly" that such relief was beyond its

constitutional power. *Id.* at 1165. The other cases on which Defendants rely likewise focused on requests for similar comprehensive remedial plans. *Sagoonick v. Alaska*, 503 P.3d 777, 797 (Alaska 2022) ("Plaintiffs primarily seek an injunction mandating that the State develop a 'climate recovery plan'"); *Aji P. v. Washington*, 16 Wash. App. 2d 177, 189, 480 P.3d 438 (2021) (same); *Iowa Citizens for Cmty. Improvement v. Iowa*, 962 N.W.2d 780, 797 (Iowa 2021) (same). *Clean Air Council v. United States* asked the court to legislate by preventing the government from even "considering amendments to environmental laws," "'rolling back' environmental regulations, [or] making related personnel and budget changes." 362 F. Supp. 3d 237, 242 (E.D. Pa. 2019). There was no claim that any specific statute violated the plaintiffs' rights, as there is here.

Here, Plaintiffs do not ask the court to order any relief remotely resembling legislation. They do not ask this Court to determine what Utah's policy *should* be, to order the State to adopt or implement any specific policy, or to prepare or effectuate any remedial plan. They seek a *declaratory judgment* that the specific policies the State has adopted, through which Defendants are affirmatively taking years off of Plaintiffs' lives and substantially endangering their health and safety, violate Plaintiffs' constitutional rights. (Complaint pp. 87-89). Indeed, in an analogous case challenging the constitutionality of similar state statutes that promote fossil fuels and endanger the health and safety of youth, a Montana court recently ruled that, while the youth's request for the court to order a remedial plan presented a nonjusticiable political question, the youth were entitled to seek declaratory relief. *Held v. Montana*, CDV-2020-307, Order on Mot. to Dismiss, 21-22 (Mont. First Jud. Dist. Ct., Lewis & Clark Cnty., Aug. 4, 2021).[1] The same is true here, as the

[1] available at: https://tinyurl.com/mw2y6xbp

"ultimate issue of the scope and meaning of" constitutional protections "is, and must be under our Constitution, a judicial question." *DeBry*, 889 P.2d at 440.

### A. Defendants' Arguments Violate Utah's Separation of Powers, Open Courts, and Due Process Protections

Defendants argue that the general dedication of legislative authority to the legislature in article VI, section 1 of Utah's Constitution prohibits courts from reviewing and declaring the unconstitutionality of government policies that endanger the lives, health, and safety of children. (Motion to Dismiss ("MTD") 6-7). Defendants have separation of powers upside down. The very purpose of separating power is not to insulate and make the conduct of two branches unreviewable; it is to protect "individual rights and liberties" from "abuse of governmental power." *In re Young*, 1999 UT 6, ¶ 74, 976 P.2d 581. "Our constitution grants the district courts" the "authority to adjudicate matters that affect a citizen's [constitutional] rights." *Matter of Childers-Gray*, 2021 UT 13, ¶ 65 (citing Utah Const. art. VIII, §§ 1, 5). To adopt Defendants' conception of justiciability would eviscerate the judiciary's role under article VIII, violating the separation of powers, open courts, and due process protections of Utah's Constitution. Utah Const. art. V, § 1, art. I, §§ 1, 7.

The general dedication of legislative authority to the legislature is plainly insufficient to prevent this Court from its duty to review Plaintiffs' constitutional claims. It is axiomatic that "while the Legislature has the exclusive constitutional power" to legislate, its legislation "must comport with and must not offend against other applicable provisions of the Constitution." *Matheson*, 641 P.2d at 677. Even where Utah's Constitution expressly commits a *precise* issue to the legislature, courts must still determine whether resulting legislation complies with constitutional restrictions and review claims that "personal constitutional rights are being infringed upon[.]" *State v. Evans*, 735 P.2d 29, 32 (Utah 1987); *Parkinson v. Watson*, 291 P.2d 400, 403

(Utah 1955) (where article IX, section 2's "constitutional mandate" to enact apportionment laws was "addressed, not to the courts, but to the legislature" the Court reviewed legislation's constitutionality, stating courts are "required to adjudicate the limitations upon the authority of other departments of government"); *In re Young*, 1999 UT 6, ¶ 19 (same). Here, Defendants concede there is no precise constitutional dedication of the issues presented, admitting that "Utah's Constitution [does not] address anything about fossil fuels" or "climate change." (MTD 11).

Defendants' broad conception of article VI, section 1 would impermissibly prevent Utah's courts from hearing *any* constitutional challenge to legislation, giving the legislature unrestricted authority to pass *any* law, however inconsistent with Utah's Constitution, and to *itself* determine the constitutionality of its own enactments. *Gregory v. Shurtleff*, 2013 UT 18, ¶ 31, 299 P.3d 1098 (political branches are not "appropriate parties to" determine the constitutionality of their own actions). This result would plainly violate the separation of powers principles enshrined in article V, section 1 of Utah's Constitution because it would both usurp and "interfere with or dominate" the judiciary in its core function by precluding judicial exercise of constitutional review. *In re Young*, 1999 UT 6, ¶¶ 7-14 (setting out tests for violation of Utah's separation of powers provision). "The assumption of judicial power by the legislature in such a case is unconstitutional[.]" *Ellison v. Barnes*, 63 P. 899, 901 (Utah 1901). Justice Stewart wisely warned of the results of such an arrogation of power by the legislature in *Matheson v. Ferry*:

> Such a power would enable the Legislature to assert dominance over the Judiciary and effectively destroy it as an independent branch of government . . . . and it would be virtually certain that judicial review – the doctrine which has given critical vitality and efficacy to constitutional government limited by a written constitution – would be destroyed. Thus, the most basic framework of our constitutional scheme would be subject to revolutionary change by legislative enactment alone.

641 P.2d at 688-89 (Stewart, J., concurring). For the separation of powers clause to have any meaning, Utah's courts must be open to these youth and review their constitutional claims on the merits. To close the courthouse doors on them would result in the "elevation of legislation . . . over a clear constitutional limitation" "designed to protect individual rights" and would "strike[] at the heart of constitutional government." *Colman*, 795 P.2d at 634.

Defendants' arguments likewise conflict with the open courts and due process provisions of Utah's Constitution. Utah Const. art. I, §§ 7, 11; *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 38, 44 P.3d 663 ("The analysis to determine whether" a claimant is denied their "constitutional right to a day in court" is "the same under both the open courts provision and the due process clause."). These provisions "ensure[] that courts are to be accessible to all for the resolution of their disputes and make[] clear that this right to come into court is a fundamental value of our governmental compact." *Jeff v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998). Utah's courts must "resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." *Miller*, 2002 UT 6, ¶ 41. If this Court accepted Defendants' arguments that the legislature's general law-making authority requires it to "refuse to resolve" Plaintiffs' constitutional claims, "that refusal would deny this fundamental right[,]" *Jeff*, 970 P.2d at 1250, not only to these youth, but to anyone challenging unconstitutional state laws. The Utah Supreme Court has repeatedly warned that such insulation of government policies and conduct from judicial review violates basic constitutional principles. *E.g.*, *State v. Dist. Court*, 78 P.2d 502, 511 (Utah 1937) ("The right of the legislature" to "constitute itself the judge of its own case" or "in any manner to interfere with the just powers and province of the courts" in "administering right and justice, cannot for a moment be admitted or tolerated under our constitution."), *overruled on other grounds*, *Colman*, 795 P.2d 622. Here,

where the challenged policies are critically endangering the health and safety of these Youth and taking years off their lives, it is paramount that this Court fulfill its duty to hear Plaintiff's constitutional claims. "Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

### B. This Case Presents No Non-Justiciable Political Question

The Utah Supreme Court has referenced some of the factors federal courts apply in identifying political questions, *Matter of Childers-Gray*, 2021 UT 13, ¶ 64 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)), and the Court of Appeals has applied one of them. *Skokos*, 900 P.2d 539. However, the Supreme Court has not explicitly adopted, analyzed, or applied any of the *Baker* factors. Rather, the Court has stated that the presence of a political question is a matter of whether adjudication would be an "interference in matters *wholly* within the control and discretion of other branches of government[.]" *Matter of Childers-Gray*, 2021 UT 13, ¶ 62 (emphasis added) (quoting *Skokos*, 900 P.2d at 541). As discussed, it is the courts' role to determine whether government policies comply with Utah's Constitution. Even if the *Baker* analysis applies, it further illustrates the justiciability of Plaintiffs' claims. "[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (cleaned up). The political question doctrine is a "narrow exception to that rule." *Id.* at 195.

#### i. There Is No Textually Demonstrable Constitutional Commitment of Fossil Fuel Development Policy to a Coordinate Branch

The first *Baker* factor requires a "textually demonstrable constitutional commitment" to another branch of the "*particular* question posed[.]" 369 U.S. at 211, 217 (emphasis added). Courts have found such precise, exclusive textual commitments in very few cases, predominantly those involving the legislature's internal processes, *e.g., Nixon v. United States*, 506 U.S. 224, 230-31

(1993), or directly implicating issues of foreign relations, *e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). Even in the narrow arenas in which there is a precise textual commitment, "it is error to suppose that every case or controversy which touches" upon them "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Even in these areas, courts will review claims that "personal constitutional rights are being infringed upon[.]" *Evans*, 735 P.2d at 32. As discussed, the dedication of legislative authority in article VI, section 1 is insufficient to preclude review in this declaratory judgment action regarding the constitutionality of legislation itself.[2] Moreover, Defendants concede that the first *Baker* factor does not apply, acknowledging that "Utah's Constitution [does not] address anything about fossil fuels" or "climate change." (MTD 11).

**ii. Well-established Standards Govern Plaintiffs' Constitutional Claims**

Defendants' arguments under the second *Baker* factor – which asks whether there is a "lack of judicially discoverable and manageable standards[,]" 369 U.S. at 217 – likewise urge this Court to abdicate its role under Utah's separation of powers.[3] Well-established standards are readily available to resolve Plaintiffs' claims under the tiers of scrutiny framework broadly applicable to due process challenges under Utah's Constitution. *E.g.*, *Skokos*, 900 P.2d at 542 ("Whether the City's actions pass constitutional muster is certainly a justiciable issue, requiring" application of tiers of scrutiny). Determining and declaring whether the challenged statutory fossil fuel

[2] The distinction between this case and those on which Defendants rely in which claimants sought broad remedial plans is dispositive as the political question doctrine demands a "discriminating inquiry into the precise facts and posture of the particular case[.]" *Baker*, 369 U.S. at 217. Plaintiffs seek no relief resembling legislation. Further, *Clean Air Council* did not even mention the political question doctrine, 362 F. Supp. 3d 237, the *Juliana* district court found no political question doctrine after a full analysis, 217 F. Supp. 3d 1224, 1235-42 (D. Or. 2016), and the Ninth Circuit agreed. 947 F.3d at 1174 n.9 ("we do not find this to be a political question").

[3] The *Baker* factors are "listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (lead opinion of Scalia, J.). The United States Supreme Court has never found a case to implicate a nonjusticiable political question absent a precise textual commitment of an issue under the first *Baker* factor.

development provisions pass constitutional muster would not require determining what Utah's policy *should be*. It would require a traditional strict scrutiny analysis to assess whether, where economically and technologically feasible alternative means to accomplish the state's objectives are readily available without endangering Plaintiffs' lives, health, and safety, Defendants' policies are "narrowly tailored to further a compelling state interest." *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶ 37 & n.67, 472 P.3d 843; *see also Merrill v. Utah Lab. Comm'n*, 2009 UT 26, ¶23, 223 P.3d 1089 (statute fails rational basis review where it does not reasonably achieve statutory objectives) (Complaint ¶¶ 200-02, 217-18, 235-36). Analyzing Plaintiffs' claims requires the Court to apply familiar legal standards to decide whether the challenged policies are constitutionally impermissible, not what the State's policy *should be*.[4]

Defendants contend adjudicating Plaintiffs' claims is beyond judicial cognizance because the challenged statutes represent a balancing of interests by the legislature. (MTD 11). But the legislature balances interests in *every* statute, and assessing the balance struck by the legislature is involved in *every* constitutional challenge to a statute. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 677 (Utah 1985) ("The accommodation of competing. . . constitutional . . . prerogatives" is a "common and necessary one in constitutional adjudication."). In applying the tiers of scrutiny, courts are not called to determine what balance the legislature *should* have struck, they ask whether the *particular* balance struck violates constitutional rights. If Utah's courts were "free to refuse to give substance and meaning" to constitutional rights because they "stand[] in tension with the

[4] Defendants' cases support the point. *Wildgrass Oil & Gas Comm. v. Colorado*, 447 F. Supp. 3d 1051, 1060-61 (D. Colo. 2020) ("I am not asked to decide whether pooling or fracking is 'good policy' but rather whether the statute violates" the "Due Process Clause[.]" "I need not make any policy decisions[.] Therefore, I reject the argument that this case involves a nonjusticiable political question.").

power of the Legislature to adjust conflicting interests[,]" "we could as well emasculate every provision in the Declaration of Rights by the same method of analysis." *Id.* at 678-79.

Lastly, Defendants argue that "there is no limiting principle in Plaintiffs' requested ruling[,]" suggesting that it would somehow open the floodgates to questions not presented and mean that "Utah's Constitution requires the adoption of whatever policies are preferred by any group or political group a judge might happen to favor." (MTD 12-13). But Plaintiffs do not ask the Court to determine what Utah's policy *should be* and Utah's courts "generally frown upon unsupported slippery-slope arguments." *Matter of Childers-Gray*, 2021 UT 13, ¶ 117. Moreover, limiting principles are inherent in the bedrock constitutional protections afforded to individuals' life, health, and safety; in the tiers of scrutiny; and in Plaintiffs' claims themselves. Declarations of unconstitutionality are not arrived at in a theoretical vacuum; they are developed after careful assessment of the factual record developed in a particular case. Declaring that Defendants' policy of *maximizing, promoting, and systematically authorizing* fossil fuel development is affirmatively and unconstitutionally taking years off children's lives and substantially endangering their health and safety would hardly open the floodgates to Defendants' hypothetical concerns.

#### iii. Plaintiffs' Claims Involve No Lack of Respect Due the Other Branches Under the Separation of Powers

Defendants' contention that resolving Plaintiffs' claims would necessarily involve a "lack of the respect due coordinate branches of government" under the fourth *Baker* factor, 369 U.S. at 217, similarly upends the separation of powers on which the political question doctrine rests. If declaring statutes unconstitutional were precluded under the fourth *Baker* factor, courts could never exercise their "duty to find an act of the Legislature unconstitutional when it clearly appears that it conflicts with some provision of our Constitution." *Matheson*, 641 P.2d at 680. "Since the

separation of powers exists for the protection of individual liberty, its vitality does not depend on 'whether the encroached-upon branch approves the encroachment.'" *N.L.R.B. v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (cleaned up); *In re Young*, 1999 UT 6, ¶ 74.

To the extent that prudential considerations factor into the political question analysis at all, (MTD 5), they should not be employed here to abdicate the judicial duty to check the State's endangerment of politically-powerless children. According to the alleged facts, which must be taken as true, without declaratory relief, Defendants' ongoing implementation of the policies challenged herein will continue to profoundly endanger the health and safety of these youth and take years off of their lives. (Complaint ¶¶ 203-05, 70, 132-33, 144, 151, 168, 177, 189-90, 194). "Prudence"[5] therefore counsels to "resolve doubts in favor of permitting" the Youth "to have their day in court on the merits[.]" *Miller*, 2002 UT 6, ¶ 41.[6]

### C. Plaintiffs Have Standing and Declaratory Relief Would Provide Meaningful Redress

Utah's traditional standing test is "similar to" but "not identical" to and is more lenient than the one used in federal courts. *S. Utah Wilderness All. v. Kane Cnty. Comm'n*, 2021 UT 7, ¶ 17, 484 P.3d 1146. Under this test, plaintiffs first must assert an "'actual or *potential*' injury[.]" *Brown*

[5] Prudence is the "careful good judgment that allows someone to avoid danger or risks." https://merriam-webster.com/dictionary/prudence.

[6] In their fourth *Baker* factor arguments, Defendants' misleadingly quote from cases that *support* justiciability. Contrary to Defendants' truncated quotation, (MTD 13-14), in *Japan Whaling Ass'n v. American Cetacean Society*, the Court stated that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations *constitutionally committed*" to the other branches. 478 U.S. 221, 230 (1986) (emphasis added). There is no textual commitment of Plaintiffs' claims to the other branches. Defendants also misleadingly quote Justice Lee's dissenting opinion in *Gregory* to argue that Utah's courts may not decide constitutional claims involving matters of public importance. (MTD 13). Defendants' fail to identify the excerpt as from a *dissenting* opinion. The *Gregory* majority roundly rejected Justice Lee's position, affirming that Utah's Courts are empowered to decide disputes raising "matters of great constitutional or public importance" even where a claimant has no individual injury. 2013 UT 18, ¶ 11. Here, Defendants do not dispute the sufficiency of the allegations demonstrating that Plaintiffs' individual injuries are caused by the Defendants' policies and actions.

*v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶ 18, 228 P.3d 747.[7] "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.*, 2021 UT 7, ¶ 23 (cleaned up).[8] "At the pleading stage of litigation, plaintiffs may satisfy our standing requirements merely by alleging . . . adequate factual context to satisfy our notice pleading requirements. For purposes of a motion to dismiss," allegations "will be assumed to embrace those specific facts that are necessary to support the claim." *Brown*, 2010 UT 14, ¶ 21 (cleaned up).[9]

Defendants do not dispute the sufficiency of the allegations demonstrating that these Youth are being individually injured, (Complaint ¶¶ 14-70), and that Defendants' policies and conduct cause and contribute to their injuries. (Complaint ¶¶ 78-180).[10] Rather, Defendants challenge Plaintiffs' standing solely on redressability grounds, relying on inapposite cases, overstating Plaintiffs' burden, and ignoring Plaintiffs' factual allegations as to how declaratory relief would alleviate their injuries. Contrary to Defendants' suggestions, Plaintiffs are not required to show that a favorable ruling would "eliminat[e] fossil fuels production in Utah" or *completely* redress their injuries. (MTD 3, 20). Rather, their modest redressability burden at this stage, assuming the

[7] "[A] plaintiff need not necessarily show that the alleged future injury is imminent, certainly impending, or even that its occurrence is more likely than not. Instead, a plaintiff" must "set forth allegations establishing that a reasonable probability" of "future injury exists." *Brown*, 2010 UT 14, ¶ 19.

[8] Under Utah's alternative public interest standing test, parties have standing if they are "an appropriate party raising issues of" "great constitutional" or "significant public importance." *Gregory*, 2013 UT 18, ¶¶ 12, 18.

[9] That the *Juliana* court denied redressability on summary judgment for relief not requested here does not affect this standard. *Contra* MTD 8 n.1. Whether declaring Defendants' policies and conduct unconstitutional will ameliorate Plaintiffs' injuries is a question of fact for which, at this stage, Plaintiffs' factual allegations are to be taken as true.

[10] The only aspect of Plaintiffs' injuries that Defendants even appear to challenge is the harms to their mental health, pointing to *Clean Air Council*'s statement that "anxiety over climate change, however, is not a particularized injury." 362 F.Supp.3d at 246. However, Plaintiffs' mental health harms are not a mere "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). They are a result of exposure to the dangerous air and climate conditions, and their reasonable apprehension of the further mounting dangers to their lives, health, and safety, already resulting from Defendants' policies. *See Doe v. Chao*, 540 U.S. 614, 641 (2004) (standing for emotional distress caused by government conduct); (Complaint ¶¶ 122, 169, 19, 27, 36, 43, 51, 59, 67).

truth of the alleged facts and drawing all inferences in their favor, is merely to allege that their present or threatened injuries would be at least somewhat reduced. *Jenkins v. Swan*, 675 P.2d 1145, 1153 (Utah 1983) (redressability satisfied at pleading stage where "if the governmental action is declared unconstitutional" the "increased" "adverse impact" on plaintiff, the extent of which is to be determined at trial, would "likely" "be relieved").[11]

Plaintiffs' detailed allegations satisfy this standard,[12] demonstrating that emissions from the development and combustion of fossil fuels developed pursuant to Defendants' polices are a substantial cause of Utah's air and climate crises, (Complaint ¶¶ 92-101), which are taking years off Plaintiffs' lives and endangering their health and safety. (Complaint ¶¶ 14-70, 102-180). Declaring Defendants' statutory policies and affirmative conduct in *maximizing, promoting, and systematically authorizing* fossil fuel development unconstitutional would at least partially relieve Plaintiffs' injuries because "[a]ny reduction in fossil fuel development in Utah is meaningful in addressing Youth Plaintiffs' injuries and reducing the risk of future harm. With atmospheric levels of [greenhouse gases] . . . and air quality already at dangerous levels in Utah, every molecule of fossil fuel air pollution emissions prevented is meaningful in preventing worsening air quality and climate change harms to Youth Plaintiffs." (Complaint ¶ 100).

Defendants argue that invalidating the challenged statutory provisions would provide no redress. However, Defendants do not dispute the sufficiency of the allegations demonstrating that

[11] *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (plaintiff must show that "a favorable decision will relieve a discrete injury" though it need not "relieve his *every* injury."); *Meese v. Keene*, 481 U.S. 465, 476 (1987) ("partial[] redress" of injury suffices); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 903 (10th Cir. 2012) ("alleviate the injury to some extent"); *Pub. Int. Rsch. Grp. of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3d Cir. 1990) (need not show "waterway will be returned to pristine condition" only that "pollution" will "decrease").

[12] If this Court finds Plaintiffs' allegations deficient in any respect or that they fail to state a claim, Plaintiffs respectfully request leave to amend. Utah R. Civ. P. 15(a)(2).

their ongoing pattern and practice of maximizing, promoting, and systematically authorizing fossil fuel development is causing and contributing to Plaintiffs' injuries. In essence, Defendants argue that the challenged provisions have no effect, and that they are therefore free to continue in a course of conduct, consistent with the challenged provisions, that is causing existential harm to the lives, health, and safety of children. Defendants' premise and conclusion are both incorrect. First, the allegations regarding Defendants' conduct demonstrate their implementation of the challenged policies, showing their effect – a question of fact for which Plaintiffs' allegations are to be taken as true. (Complaint ¶¶ 80-91) (detailing Defendants' maximization, promotion, and systematic authorization of fossil fuel development through state planning, programs, and permitting practices). Second, Plaintiffs separately requested that Defendants' conduct be declared unconstitutional. (Complaint 89, ¶¶ k, l). Thus, Plaintiffs adequately alleged that declaratory relief would provide meaningful redress whether directed at any of the challenged policies, Defendants' actions, or both. Declaratory relief changes the "legal status" of the challenged conduct, sufficient for redressability, *Utah v. Evans*, 536 U.S. 452, 463-64 (2002), and carries a presumption that governmental officials will "abide by an authoritative interpretation" of "the constitution[.]" *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)).[13]

Defendants cite no authority that *any* of the challenged provisions lack effect, and their arguments contravene clear precedent. The Utah Supreme Court has already established that legislative statements of policy and purpose, including one of the specific provisions challenged here, are "statutory directive[s]" with actionable legal effect. *Bennion v. ANR Prod. Co.*, 819 P.2d

[13] *Nova Health Systems v. Gandy*, 416 F.3d 1149 (10th Cir. 2005), found that declaratory relief would not provide redress because there were no parties included that were implementing the challenged statute or causing harm. Here, Defendants are carrying out the policies Plaintiffs challenge.

343, 346-47 & n.5 (Utah 1991) (adjudicating claim that agency action was inconsistent with declaration of public interest in Utah Code § 40-6-1). Further, it is well-established that such "policy statement[s]" are subject to challenge where, as here, they are the "moving force" behind a constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 694-95 (1978).

Each of the challenged provisions guide Defendants' construction and interpretation of their statutory authority and "mandates or directs Defendants to administer state programs in a manner to maximize, promote, and systematically authorize fossil fuel development." (Complaint ¶ 78-79); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045 (Utah 1991) (statutes are interpreted in light of express purposes). For instance, Utah Code § 40-10-1 directs Defendants in their conduct with respect to coal operations to "insure the existence of an expanding and economically healthy underground coal mining industry." (Complaint ¶ 78a). Likewise, Utah Code § 40-6-1 directs Defendants in their conduct with respect to oil and gas operations "to foster, encourage, and promote the development, production, and utilization" of "oil and gas" and 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[.]" (Complaint ¶ 78c). Similarly, Utah Code § 79-6-301(1)(b)(i) directs Defendants in their conduct with respect to all fossil fuels to "promote the development" of "natural gas, coal, oil, oil shale, and oil sands[."] (Complaint ¶ 78e). The argument that the challenged provisions have no effect, if accepted, would render each meaningless, contrary to the canon of construction that "every word and every provision of a statute is to be given effect." *Croft v. Morgan Cnty.*, 2021 UT 46, ¶ 32, 496 P.3d 83.[14]

[14] Defendants' argument also contradicts the *mandatory* language of many of the challenged provisions. Utah Code §§ 40-6-13 (Defendants "shall never" restrict "production of any pool or of any well"), 79-6-301(1)(b)(i) ("Utah will promote the development of" fossil fuels); *see also,* §§ 79-6-301(2) (State agencies "encouraged to conduct agency activities consistent with" 79-6-301(1)(b)(i)), 79-6-401 (Office of Energy Development to "implement the state energy

Defendants argue that declaring Utah's Oil & Gas Conservation Act "unconstitutional in total" would return Utah to the rule of capture "and the unregulated production of hydrocarbons would likely increase." (MTD 20). Defendants similarly argue that rendering Utah's Coal Mining and Reclamation Act "inoperative" would return Utah to federal coal regulation under the Surface Mining Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201, *et seq.* (MTD 18).[15] However, Plaintiffs do not seek to invalidate these Acts in their entireties. They challenge only select provisions which direct Defendants to maximize, promote, and systematically authorize fossil fuel development. (Complaint ¶¶ 6, 78, pp. 87-89 ¶¶ a-j). Defendants concede that invalidating the select provisions "would not render the statute[s] unenforceable[,]" that the other "portions of the statute[s] are untouched by Plaintiffs' requested declaratory relief[,]" and that "[d]eclaring [them] unconstitutional would have no effect on" the other "provisions of the statute[s]." (MTD 17, 19, 20). Thus, declaring these provisions unconstitutional would not return Utah to federal SMCRA regulation[16] or the law of capture.[17] Defendants' authority to require permits for and regulate fossil fuel development would remain intact, absent direction to maximize, promote, and systematically

policy under Section 79-6-301"). Utah Code § 40-10-17(2)(a) mandates that Defendants "shall require" "coal mining operations" to "maximize the utilization and conservation of" coal. Defendants' contention that "utilization and conservation" are competing objectives would render the provision meaningless and is belied by the Act's purpose to "insure the existence of an expanding and economically healthy underground coal mining industry." Utah Code § 40-10-1(1). It is absurd to simultaneously "maximize" diametrically opposed objectives. In context, it is clear that "conservation" refers to the prevention of waste for the *purpose* of maximizing utilization. *Jackson v. Halls*, 2013 UT App 254, ¶ 11, 314 P.3d 1065 (court not to adopt reading to render provision meaningless).

[15] The formatting on page 18 of Defendants' motion presents the last paragraph as an excerpt from Utah Supreme Court precedent, though it is in fact, Defendants' own argument.

[16] 30 U.S.C. § 1255 explicitly permits state law to be more stringent in land use and environmental controls of coal mining than SMCRA, which would be the case if the challenged provisions of Utah's coal statute were invalidated.

[17] Even assuming, for the sake of argument, that invalidating the challenged provisions would return Utah to the law of capture or federal SMCRA regulation, the resulting effect on the level of fossil fuel development in Utah, for which Defendants offer only speculation, is a matter of fact to be determined on an evidentiary record. Moreover, Defendants' law of capture and SMCRA arguments do not address Plaintiffs' challenge to subsection (1)(b)(i) of the State Energy Policy, which is separate from Utah's Coal Mining and Reclamation and Oil & Gas Conservation Acts.

authorize development. Declaring any one of the challenged provisions unconstitutional would "change [the] legal status" of Defendants' conduct. *Utah*, 536 U.S. at 463-64.

## II. PLAINTIFFS' RIGHTS ARE EXPLICIT AND DEEPLY ROOTED UNDER UTAH'S CONSTITUTION

### A. Substantive Protections of Life and Liberty Are an Explicit and Enduring Component of Utah's Constitution Applicable to the State's Reduction of Plaintiffs' Lifespans and Endangerment of Their Health and Safety

Citing no cases involving Utah's due process clause, Defendants encourage "reconsidering or circumscribing the doctrine" of substantive due process. (MTD 23). Yet, as Defendants acknowledge, "it is not the province of this Court to reconsider or overrule substantive due process cases." (MTD 23). Both the Utah and U.S. Supreme Court have repeatedly affirmed that the Utah and federal due process clauses protect substantive rights, and Defendants' invitation to disregard controlling precedent should be rejected. *E.g., In re J.P.*, 648 P.2d 1364 (Utah 1982); *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶ 31; *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

Defendants do not dispute the basic soundness of the two causes of action asserted here – that Utah's due process clause provides a fundamental right against government policies and conduct that substantially reduce children's lifespans and endanger their health and safety. Rather, Defendants argue that these Youth cannot invoke these fundamental protections because the method of governmental violation involves fossil fuels. (MTD 23). This untenable position "misunderstand[s] the way [courts] apply constitutional guarantees. The Utah Constitution enshrines principles, not application of those principles." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092. The Utah Supreme Court has repeatedly affirmed that the protections of rights afforded under Utah's due process clause apply to new and changing circumstances:

> The fundamental interests of 'life, liberty, and property' as protected by the due process clause . . . were to be protected as societal and jurisprudential concepts of those terms evolved. For the law to freeze the meaning of those clauses as of one point in time would be to deny the essential meaning and purpose that was built into those clauses by the broad, expansive language that the Constitution uses.

*DeBry,*889 P.2d at 435; *McGrew v. Indus. Comm'n*, 85 P.2d 608, 610 (Utah 1938) (the constitutional terms "*'life,' 'liberty,' and 'property'*" "are to be taken in their broadest sense."). Plaintiffs do not ask to expand due process "into new areas of law." (MTD 23). They call for application of bedrock constitutional principles to new *facts* – under which Utah's fossil fuel development policies poses an existential threat to the lives, health, and safety of Utah's children.[18]

### B. Plaintiffs' Rights Are Explicitly Protected Under Utah's Constitution, Implicit in Ordered Liberty, and Deeply Rooted in History and Tradition

Plaintiffs do not assert that the due process clause requires the State to "protect against private actors such as oil and coal producers and drivers of automobiles." (MTD 25). Rather, Plaintiffs' claims are grounded in the principle that due process is "a limitation on the State's power to act . . . . It forbids the State itself to deprive individuals of life, liberty, or property[.]" *DeShaney v. Winnebago Cnty.*, *Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 11, 17 P.3d 1125 ("The Utah Constitution is not one of grant, but of limitation."). Consistent with this principle, Plaintiffs bring two separate claims

[18] The cases on which Defendants rely do not support their claim that "courts have uniformly concluded substantive due process does not apply to fossil fuels policy." (MTD 23-24). Some of the cases *did apply* due process analysis to fossil fuel policy. *E.g.*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (rational basis review). If anything, these cases show there is no fundamental right to economic activity based on fossil fuels, dispelling Defendants' unsupported slippery slope argument. (MTD 12-13). More importantly, none of the cases say anything about the due process rights at issue here or what level of scrutiny applies to them. All but one involved harm to solely economic interests. *Exxon Corp.*, 437 U.S. at 122 n.5 (claiming irrationality); *Bullseye Glass Co. v. Brown*, 366 F. Supp. 3d 1190 (D. Or. 2019); *E. Enterprises v. Apfel*, 524 U.S. 498 (1998). The exception, *Wildgrass Oil & Gas Committee*, rejected a due process claim because the challenged statute did not force political cooperation as alleged. 447 F. Supp. 3d at 1068. None involved claimed infringements of or alleged harm to life, health, or safety. "[C]ourts will exercise stricter scrutiny over measures which encroach on civil liberties than those which affect economic situations[.]" *Allen v. Trueman*, 110 P.2d 355, 365 (Utah 1941) (Wolfe, J., concurring).

challenging codified governmental policies and conduct in *affirmatively*: (1) substantially reducing their lifespans and the number of healthy years in their lives in violation of their fundamental right to life (Complaint ¶¶ 206-21); and (2) harming them in violation of their fundamental liberty to be free from government conduct that substantially endangers their health and safety. (Complaint ¶¶ 222-39). Defendants do not dispute these historically rooted, common-sense conceptions of the fundamental rights to life and liberty. They merely contend, unavailingly, that they are somehow inapplicable to state-enacted fossil fuel policy. However, "[t]he Utah Constitution enshrines principles, not application of those principles" and it is the courts' duty to determine "what principle the constitution encapsulates and how that principle should apply." *Maese*, 2019 UT 58, ¶ 70 n.23; Utah Const. art. I, § 27 ("Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."). Here, the fundamental principles underlying Plaintiffs' claims are well-grounded in deeply-rooted and explicit protections under Utah's Constitution.[19] If Utah's Constitution does not protect the life and health of children from harm knowingly and affirmatively caused by their government as a matter of official policy, Utah's Declaration of Rights is a dead letter.

The right to life explicitly protected by article I, sections 1 and 7 is the "most fundamental" right protected under Utah's Constitution. *State v. Phillips*, 540 P.2d 936, 940 (Utah 1975), *disavowed on other grounds*, *State v. Taylor*, 664 P.2d 439 (Utah 1983). It protects against

[19] Defendants' contention that "[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" misses the mark. (MTD 24). Plaintiffs do not ask this Court to determine or order what the State's policy *should* be, only to determine whether the specific policies challenged violate bedrock constitutional principles. Defendants' "historic and ongoing" actions with respect to fossil fuels demonstrate the significant extent to which they have and continue to contribute to Plaintiffs' injuries. (*contra* MTD 24, citing Complaint ¶ 6). *Maese*, 2019 UT 58, ¶ 92 & n.35. (Lee, Durrant, JJ., concurring) (duration of policy or conduct is irrelevant to its constitutionality). Nonetheless, the evidentiary record will show that fossil fuel development is not deeply rooted in Utah's history and traditions.

government policies and conduct that affirmatively and substantially reduce a person's lifespan. *Maese*, 2019 UT 58, ¶ 18 ("When we interpret constitutional language, we start with the meaning of the text as understood when it was adopted."). As reflected in period dictionaries, the common understanding of "life" at ratification of Utah's Constitution encompassed the entirety of a person's lifespan. The Universal Dictionary of the English Language, published shortly after the adoption of Utah's Constitution, defines "life" as "the period from birth to death" of a human being, *i.e.*, a person's lifespan. (Robert Hunter & Charles Morris eds., N.Y.C., Peter Fenelon Collier 1899). Similarly, the 1895 edition of Noah Webster's An American Dictionary of the English Language defines "life" as "the tie from birth to death[,]" *i.e.*, the lifespan of an individual. (Chauncey A. Goodrich ed., 1895); *see Summit Water Dist. Co. v. Utah State Tax Comm'n*, 2011 UT 43, ¶ 14, 259 P.3d 1055 (looking to these dictionaries to interpret Utah Constitution). A common-sense understanding of the explicit textual provisions protecting the right to life demonstrates that they protect Plaintiffs against the significant diminishment of their lifespans resulting from Defendants' conduct and policies. *Salt Lake City v. Ohms*, 881 P.2d 844, 850 n.14 (Utah 1994) (Utah's Constitutional provisions "should be interpreted and applied according to the plain import of their language as it would be understood by persons of ordinary intelligence and experience.").

The right to life protected by article I, sections 1 and 7 similarly protects against government policies and conduct that affirmatively and substantially reduce the number of healthy years in a person's lifespan. *McGrew*, 85 P.2d at 610 (the "word[] *'life,* '" is a "constitutional term[] and" is "to be taken in [its] broadest sense."). When determining the meaning of a constitutional provision, other provisions dealing generally with the same topic assist in arriving at a proper interpretation. *In re Worthen*, 926 P.2d 853, 866-67 (Utah 1996). Article I, sections 1 and 7 deal

generally with protection of the right to life. The plain language of article I, section 1 provides that the right to life encompasses the right to "enjoy" life. Further, historical understanding of the term "life," reflected in period dictionary definitions at the time of ratification of Utah's Constitution, encompassed a person's "vitality," *i.e.*, health, demonstrating that protections of the right to life extend not just to the number of years in a person's lifespan, but to their health in those years. Webster, An American Dictionary of the English Language (Chauncey A. Goodrich ed., 1895). Common sense and experience dictate that substantial diminishment of health significantly reduces a person's ability to "enjoy" life. Thus, the explicit textual provisions providing for the right to life in Utah's Constitution protect against significant reduction of the number of healthy years in Plaintiffs' lives resulting from Defendants' conduct and policies. *Ohms*, 881 P.2d at 850 n.14.

Though not explicitly enumerated in Utah's due process clause, the implicit fundamental right to be free from government conduct substantially endangering one's health and safety is deeply rooted in the history underlying Utah's constitutional protection of liberty and "so fundamental to our society and so basic to our constitutional order" that it is implicit in the concept of ordered liberty. *In re J.P.*, 648 P.2d at 1375. Utah's due process protections trace their lineage to Chapter 29 of the Magna Carter, which provided that "[n]o free man shall be taken or imprisoned or dispossessed, or outlawed, or in any way destroyed . . . except . . . by the law of the land."[20] *DeBry*, 889 P.2d at 435. This delineation of rights continued its lineage through Sir Edward Coke's Institutes of the Laws of England and Blackstone's commentaries, both of which were foundational to the Framers. Citing Coke, Blackstone traced to the Magna Carta the "absolute rights" of persons, first among which is "personal security" which consists in "a person's legal and

[20] Select Documents of English Constitutional History 47 (George B. Adams & H. Morse Stephens eds., 1929)

uninterrupted enjoyment of his life, his limbs, his body, his health." 1 William Blackstone, Commentaries on the Laws of England 123, 125. John Locke, likewise influential to the Framers, wrote that "health" is included among a person's inalienable natural rights. John Locke, Second Treatise of Government 2.6 (1690).

The fundamental liberty to be free from substantial governmental endangerment of health and safety is supported in multiple lines of constitutional caselaw. The United States Supreme Court has long recognized fundamental liberty interests in bodily integrity, *e.g., Rochin v. California*, 342 U.S. 165 (1952), and personal security, *e.g.*, *Ingraham v. Wright*, 430 U.S. 651 (1977). In *Wickman v. Fisher*, the Utah Supreme Court ruled that government policies that subject a person to conditions inimical to the maintenance of their health and safety, including, as applicable here, lack of fresh air and safe temperatures, raise "serious constitutional issues" under Utah's due process clause. 629 P.2d 896 (Utah 1981). Though *Wickman* involved conditions of confinement, the principles are equally applicable here, where Defendants are causing and contributing to conditions dangerous to Plaintiffs' health and safety that require them to remain indoors for their own health and safety and from which they cannot physically escape. (Complaint ¶¶ 103, 124, 15, 16, 22-24, 26, 30, 33-34, 40, 46, 47, 54-55, 62-63).

The primacy of the liberty interest in health and safety is also evident in cases in which the government's interest in protecting health and safety overrides protected constitutional rights. For example, in *Jensen v. Cunningham*, the Utah Supreme Court ruled that even fundamentally protected constitutional interests "must yield" to the State's interest in "protecting the health" of children and that this "is especially the case where a child's life is endangered." 2011 UT 17, ¶74, 250 P.3d 465. That health and safety override other fundamentally protected rights demonstrates

that the right to be free from government endangerment of health and safety is of paramount constitutional significance.

The deep roots of due process protections of health and safety are also evident in Utah's common law and statutory history. Causes of action have long been available in Utah to vindicate individual injuries to personal health and safety through actions in nuisance, negligence, intentional torts, and product liability. Since Utah's early history, the State has similarly provided express statutory protections of health and safety. For instance, an 1899 state statute provided:

> Whatever is dangerous to human life or health, and whatever renders soil, air, water, or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, either owner, agent, or occupant, having aided in creating or contributing to the same, or who may support, continue or retain any of them, shall be deemed guilty of a misdemeanor.

Comp. Laws 1907, § 113x; Laws of Utah (1899), p.66; *Maese*, 2019 UT 58, ¶ 45 (looking to early Utah code to interpret constitutional rights).

The fundamental due process right to health and safety is also reflected in the well-established principle that its protection is the primary purpose for which government exists. *In re J.P.*, 648 P.2d at 1373 (liberty interest is fundamental where its protection is "one of the basic principles for which organized government is established.") (cleaned up). Two thousand years ago, Cicero, one of history's first legal scholars, gave us the Latin phrase "*salus populi lex esto*" which means "the safety of the community is the highest law." Gilmer, Cochran's Law Lexicon 265 (5th ed. 1973); *Keith v. Clark*, 97 U.S. 454, 460 (1878) ("Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength"); *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (citing Cicero for deep roots of fundamental right to marry); *Caetano v. Massachusetts*,

577 U.S. 411, 421 (2016) (Alito, Thomas, JJ., concurring) ("A State's most basic responsibility is to keep its people safe."). During the proceedings of the Utah Constitutional Convention, delegate Varian, a prominent lawyer, acknowledged "the principle that the public safety is the supreme law[.]" Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah 641 (1898). In *Olsen v. Hayden Holding Company*, the Utah Supreme Court recognized that it "is the universally recognized right of the community in all civilized governments" to "be protected" against "impairment or imperilment" of "health" and "safety[,]" "a protection which the government not only has a right to vouchsafe to the citizens, but which it is its duty to extend in the exercise of its police power." 70 P.2d 463, 465 (Utah 1937) (cleaned up). Sound reason dictates that when government betrays its primary purpose by *actively* endangering the health and safety of children, it violates their rights.

## CONCLUSION

Plaintiffs' claims are well-grounded in bedrock protections of life and liberty under Utah's Constitution. The factual allegations, which are to be taken as true, demonstrate that without this Court's check, Defendants' unconstitutional policies and conduct will continue to increasingly harm and endanger the lives, health, and safety of these Youth. This Court can alleviate the mounting harms to these children by declaring the State's policies and conduct in maximizing, promoting, and systematically authorizing fossil fuel development unconstitutional. While it is not this Court's province to determine what the State's policy *should* be, it is its duty to declare that, in the face of the escalating dangers to the lives, health, and safety of these Youth, state policies to *fully* develop Utah's fossil fuel resources are constitutionally impermissible. Plaintiffs respectfully request that this Court deny Defendants' Motion and afford them their right to their day in court.

RESPECTFULLY SUBMITTED this 10th day of June, 2022.

/s/ *Andrew Welle*
Andrew L. Welle, *pro hac vice*
OUR CHILDREN'S TRUST

John Robinson Jr. (15427)
Andrew G. Deiss (7184)
Corey D. Riley (16935)
DEISS LAW PC

*Attorneys for Plaintiffs*

**ELECTRONIC FILING CERTIFICATE**

I certify that on this 10th day of June, 2022, I caused to be served via electronic court filing a true and correct copy of the foregoing **MEMORANDUM OPPOSING MOTION TO DISMISS** to the following:

DAVID N. WOLF
JEFFREY B. TEICHERT
MICHAEL E. BEGLEY
TREVOR J. GRUWELL
dnwolf@agutah.gov
jeffteichert@agutah.gov
mbegley@agutah.gov
tgruwell@agutah.gov

*Counsel for Defendants*

*/s/ John Robinson Jr.*