IN THE NEW MEXICO SUPREME COURT
No. S-1-SC-40980

MARIO ATENCIO; PAUL AND MARY ANN ATENCIO; DANIEL TSO; SAMUEL SAGE; CHEYENNE ANTONIO; KENDRA PINTO; JULIA BERNAL; JONATHAN ALONZO; PASTOR DAVID ROGERS; YOUTH UNITED FOR CLIMATE CRISIS ACTION (YUCCA); PUEBLO ACTION ALLIANCE; INDIGENOUS LIFEWAYS; THE CENTER FOR BIOLOGICAL DIVERSITY; AND WILDEARTH GUARDIANS,

Plaintiffs-Petitioners,

vs.

THE STATE OF NEW MEXICO; THE NEW MEXICO LEGISLATURE; GOVERNOR MICHELLE LUJAN GRISHAM; NEW MEXICO ENVIRONMENT DEPARTMENT; SECRETARY JAMES KENNEY in his official capacity; ENERGY MINERALS NATURAL RESOURCES DEPARTMENT; SECRETARY SARAH COTTRELL PROPST, in her official capacity; ENVIRONMENTAL IMPROVEMENTBOARD; and the OIL CONSERVATION COMMISSION,

Defendants-Respondents,

vs.

NEW MEXICO CHAMBER OF COMMERCE, and INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO,

Intervenors-Defendants-Respondents.

PLAINTIFFS-PETITIONERS' BRIEF IN CHIEF

ORAL ARGUMENT IS REQUESTED PURSUANT TO RULE 12-319(B) NMRA

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INTRODUCTION

New Mexico has an oil and gas pollution crisis that is causing great harm to Plaintiffs and many others. Defendants have authorized over 70,000 oil and gas production sites without consideration of human health or the environment, to devastating effect. By permitting extraction without controlling pollution, Defendants allow production sites to spew toxins into the atmosphere, resulting in unhealthy air that is dangerous to breathe. Defendants also allow these sites to spill millions of gallons of toxic liquid waste annually, contaminating land and water. Simultaneously, Defendants allow thousands of inactive, unplugged oil and gas wells to continue producing toxic pollutants, further despoiling the air, water and land.

Defendants' permitting of oil and gas extraction without controlling the concomitant pollution harms human health and destroys New Mexico's environment, biodiversity, Indigenous cultural resources and climate. Despite this harm, Defendants have authorized production to more than triple since 2018, fueling an unprecedented, ever-growing pollution crisis.

New Mexico is one of the few states where voters added an environmental protection clause to their Constitution, a "Pollution Control Clause". Yet, rather than controlling oil and gas pollution, Defendants have excluded oil and gas from New Mexico's environmental protection statutes, failed to limit and control

pollution from oil and gas production, and failed to enforce the laws and regulations that do apply to oil and gas operators. Overall, Defendants are violating their constitutional duties to control oil and gas pollution, protect New Mexico's beautiful and healthful environment, and protect the equal protection and substantive due process rights of those most impacted by that pollution – Indigenous peoples, frontline community members, and youth.

Wrongly exceeding the proper scope of a motion to dismiss, the Court of Appeals eroded the power of the judiciary and our Constitution by erroneously holding that the Pollution Control Clause is unenforceable. The appellate court also eviscerated New Mexicans' civil rights by erroneously finding that Plaintiffs cannot bring disparate impact equal protection claims or substantive due process claims based on environmental and health harms which violate their rights to life, liberty, property, and safety.

As the arbiter of New Mexico's Constitution, this Court has the duty to give meaning to the Pollution Control Clause and to ensure that New Mexicans' civil rights are protected. The relief Plaintiffs seek here is not to stop oil and gas production in New Mexico but to require the State to control the attendant pollution that is harming Plaintiffs.

SUMMARY OF PROCEEDINGS

On May 10, 2023, Plaintiffs filed their complaint, bringing claims against all

Defendants under the Pollution Control Clause ("PCC"), which mandates:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

N.M. Const. art. XX, § 21. Plaintiffs allege that Defendants violate their duties under the PCC by not controlling pollution that comes from authorizing oil and gas production, not controlling the despoilment of the air, water and other natural resources consistent with the use and development of these resources for the maximum benefit of the people, and not protecting the State's beautiful and healthful environment. Plaintiffs bring this claim under the Declaratory Judgment Act ("DJA"), NMSA 1978, §§ 44-6-1 to -15 (1975), which provides that the State and state officials can be sued to enforce the constitution. § 44-6-13 (1975). The DJA also allows the Court to order injunctive relief (§ 44-6-9), as does Article VI, Section 13 of New Mexico's Constitution.

Plaintiffs also bring claims against all Defendants for violation of Plaintiffs' rights to equal protection and substantive due process by authorizing oil and gas extraction while failing to control the attendant pollution, in violation of Plaintiffs' rights to life, liberty, property, safety, and equal protection under the law. N.M. Const. art. II, §§ 4, 18. Plaintiffs' civil rights claims are based on Defendants'

actions authorizing massive oil and gas extraction without consideration of public health or the environment, resulting in harms to Plaintiffs. Plaintiffs bring their Article II claims under the DJA, which permits lawsuits against the State and state officials for violations of constitutional rights. NMSA 1978, §§ 44-6-1 to -15 (1975). Plaintiffs also bring these claims against the State and state agencies under the New Mexico Civil Rights Act, NMSA 1978, §§ 41-4A-1 to -13 (2021), which permits lawsuits against the State and state agencies for violations of rights set forth in Article II of the Constitution.[1]

In the Fall of 2023, Defendants filed motions to dismiss and for judgment on the pleadings; industry intervened and joined Defendants' motions. The district court heard oral argument in April 2024, and denied the motions in a June 10, 2024 Order, finding that Plaintiffs' complaint sets forth facts sufficient to satisfy New Mexico's pleading requirements, and properly alleges that Defendants are not fulfilling their constitutional duties to control oil and gas pollution, nor to safeguard the equal protection and substantive due process rights of Indigenous peoples, frontline community members, and youth. **[RP 1072-73]**.

[1] As stipulated on August 31, 2023, Plaintiffs' Article II claims against individual Defendants are brought under the DJA, while Plaintiffs' Article II claims against all other Defendants are brought under both the DJA and the Civil Rights Act. Plaintiffs do not seek monetary damages. The Civil Rights Act claims against the Legislature were dismissed below and not appealed.

On June 3, 2025, on interlocutory review, the appellate court erroneously dismissed Plaintiffs' case. On November 10, 2025, this Court issued a unanimous order granting Plaintiffs' petition for review on all questions raised.

SUMMARY OF FACTS

The Complaint alleges that Plaintiffs—Indigenous people, frontline community members, and youth—face grave harms to their health, safety and longevity caused by Defendants' authorization of oil and gas production without controlling the concomitant pollution. **[RP 6-31]**.[2] Plaintiffs live, work, recreate, practice their religion, and attend school in some of the most polluted areas in the country due to heavy oil and gas production authorized by Defendants. **[RP 5]**. Plaintiffs' air, land, water, and Indigenous cultural resources and sacred sites have been contaminated by oil and gas pollution authorized by Defendants. **[RP 8]**. Plaintiffs suffer negative health effects from exposure to oil and gas pollution. **[RP 9, 12-13, 17-18]**. Plaintiffs have lost freshwater resources, plants, wildlife, and biodiversity due to Defendants' permitting of oil and gas production. **[RP 5, 7, 9, 78-84]**. Defendants' authorization of oil and gas production and failure to control the concomitant pollution also contributes to the global climate crisis, harming Plaintiffs. **[RP 84-90]**.

Plaintiffs have petitioned Defendants, including the Legislature, for redress,

[2] "Frontline" means living near sources of oil and gas pollution.

seeking pollution control measures, but have been ignored. **[RP 9, 10-11, 15-16, 21]**. Because New Mexico has no laws requiring environmental review before oil and gas production is approved, New Mexicans have no mechanism, other than asserting constitutional protection through the courts, to challenge oil and gas extraction that detrimentally impacts their environment, public health, cultural resources and sacred sites. **[RP 54]**. Effectively, Plaintiffs are unable to challenge Defendants' authorization of new oil and gas development based on public health or environmental concerns in any other forum. **[RP 10-11, 39, 54]**.

Plaintiffs are disproportionately harmed by Defendants' authorization of oil and gas production without controlling pollution. Frontline Plaintiffs live with unhealthy air quality, **[RP 63-70]**, and contaminated land and water from oil and gas pollution. **[RP 73-78]**. Frontline Indigenous Plaintiffs are particularly vulnerable to health harms from air pollution. **[RP 70-73]**, and have suffered the destruction of their freshwater resources, ancestral landscapes, sacred places, traditional medicinal plants and other cultural resources due to Defendants' permitting of oil and gas production. **[RP 17-20, 22-23, 26-28]**. Youth Plaintiffs are more vulnerable to health harms and climate damage caused by oil and gas production and pollution permitted by Defendants. **[RP 22, 25-26, 29, 70]**.

New Mexicans voted to amend the New Mexico Constitution in 1971 to add a Pollution Control Clause. **[RP 37-38]**. Since its adoption, the Legislature has not

passed laws to protect the air, land, water or beautiful and healthful environment from oil and gas pollution. **[RP 37-38, 43-54]**. Since passage of the PCC, the Legislature has not authorized, let alone required, the control of oil and gas pollution in New Mexico. **[RP 52-54]**. Instead, in 1974, the Legislature repealed a law that required an environmental review before approving new projects. **[RP 44-45]**. The Legislature exempts the oil and gas industry from foundational environmental protection statutes and regulations. **[RP 43-48]**. The Legislature has not appropriated sufficient money to regulatory agencies to prevent and control oil and gas pollution. **[RP 57-60]**. The Legislature has not established a financial assurance system that requires operators to clean up their mess, including plugging inactive wells that continue to pollute. **[RP 60-63]**. Defendants have not controlled, or required penalties for, toxic liquid waste spills from oil and gas production that contaminate land and water. **[RP 73-78]**. Defendants have permitted the depletion of New Mexico's freshwater resources by oil and gas production, without setting preservation standards or requiring operators to reuse wastewater for drilling. **[RP 78-82**].

While the New Mexico Air Quality Control Act requires the State to prevent or abate air pollution and comply with health-based air quality standards, Defendants are not upholding this statutory duty, and the State's air quality in areas of heavy oil and gas production is unhealthy and poor. **[RP 38-39]**. Defendants

continue to allow additional oil and gas extraction and pollution even in counties where air quality fails to meet basic health standards. **[RP 51]**. Defendants do not measure toxic air emissions in places where Plaintiffs live, work, play and attend school. **[*Id.*]**. The Legislature has not provided the Environment Department with sufficient resources to control air pollution from oil and gas production. **[RP 54-57]**.

The Oil and Gas Act mandates that the Oil Conservation Division ("the Division") prevent the waste of oil and gas but does not mandate protection of the environment or public health. **[RP 52-54]**. Under the Act and its implementing regulations, the Division grants permits for every well drilled in New Mexico, on private, state and federal land. **[*Id.*]**. The Act requires that drilling permits be granted based only on efficiency of extraction, and does not allow consideration of public health or environmental impacts. **[*Id.*]**. Consequently, the Division does not consider the environment or public health when granting permits to drill. **[*Id.*]**.

Oil and gas production in New Mexico has risen dramatically in the past decade, and continues to increase. **[RP 41]**. Each stage of oil and gas production results in pollution. The State's authorization of oil and gas production and pollution, while failing to protect New Mexico's environment and natural resources, has resulted in extremely poor air quality, **[RP 49-50, 64]**, thousands of unmonitored spills of toxic liquid waste and oil, **[RP 73-78]**, thousands of leaking

abandoned wells across the state, **[RP 60, 63-64]**, the contamination and depletion of precious freshwater resources, **[RP 78-82]**, the destruction of ecosystems that sustain plants and wildlife, **[RP 82-84]** and the devastation of Indigenous ancestral landscapes, sacred places and traditional cultural resources. **[RP 90-95]**. New Mexico's authorization of oil and gas production also produces massive greenhouse gas emissions, contributing to the climate crisis. **[RP 84-90]**.

Taking these facts as true, and drawing all favorable inferences therefrom, the district court properly denied Defendants' motions to dismiss. On interlocutory appeal, the Court of Appeals issued an erroneous decision, eviscerating the PCC, and summarily dismissing all of Plaintiffs' constitutional claims, denying Plaintiffs the opportunity to prove the extensive, disproportionate harm they suffer from Defendants' failure to control massive oil and gas pollution. The appellate court fundamentally misunderstood the nature of positive constitutional rights, the strength of state civil rights under the New Mexico Constitution, and the power of declaratory relief. This Court can now define the scope and enforceability of the Pollution Control Clause, the power of the Declaratory Judgment Act to provide relief in cases of systemic constitutional violations, and the validity of Plaintiffs' civil rights claims.

ARGUMENT

I. STANDARD OF REVIEW

This Court conducts a *de novo* review of legal questions. *See Delfino v. Griffo,* 2011-NMSC-015, ¶ 9, 150 N.M. 97; *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 11 ("We review questions of statutory and constitutional interpretation *de novo*."). When considering the legal sufficiency of Plaintiffs' complaint, the Court must construe the complaint "in a light most favorable to [Plaintiffs] and with all doubts resolved in favor of its sufficiency," *Pillsbury v. Blumenthal*, 1954-NMSC-066, ¶ 6, 58 N.M. 422, and must take the allegations therein as true. *See Envtl. Improvement Div. v. Aguayo,* 1983-NMSC-027, ¶ 10, 99 N.M. 497. General allegations are sufficient where they provide plausible grounds for relief and give the parties and court a "fair idea" of the factual basis. *See Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386. Even if the chance of prevailing appears "very remote," *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), dismissal is inappropriate unless Plaintiffs cannot prevail "under any theory of the facts alleged in their complaint." *Delfino*, 2011-NMSC-015, ¶ 12.

II. THE COURT HAS THE POWER AND DUTY TO ENFORCE THE POLLUTION CONTROL CLAUSE WITH JUDICIALLY MANAGEABLE STANDARDS.

A. The Pollution Control Clause Creates an Affirmative Constitutional Duty.

In 1971, New Mexicans voted to amend their Constitution to include the PCC, establishing an affirmative constitutional duty that requires the Legislature—and its statutory delegates, the executive agencies—to "control… pollution and… despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people." N.M. Const. art. XX, § 21. Before this amendment, the State already had "supreme" police powers to regulate industry pollution pursuant to Article XI, Section 14 of New Mexico's Constitution. By adding the PCC, New Mexicans elevated pollution control to the level of a constitutional duty "to protect the atmosphere and other natural resources" and "delegate[d] the implementation of that specific duty to the Legislature." *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 16.[3]

The establishment of this affirmative constitutional duty is unequivocal. Not

[3] "In 1971, the voters of New Mexico passed a constitutional amendment which proclaimed the fundamental importance of New Mexico's natural environment and charged the legislature with the duty to provide appropriate pollution controls." Craig T. Othmer & Henry M. Rivera, *On Building Better Laws for New Mexico's Environment*, 4 N.M. L. REV. 105 (1973).

only does the PCC state that the Legislature "shall provide" for its effectuation, the first sentence of the PCC explains its necessity: "the protection of the State's beautiful and healthful environment is … of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const. art. XX, § 21. The Legislature is entrusted by the Constitution with safeguarding these common goods. N.M. Const. art. IV, § 1. The PCC declares environmental protection to be a fundamentally important pillar of this fiduciary responsibility and specifies how the State must uphold that pillar.

The PCC also ensures that the Legislature "provide for pollution control" discerningly: such environmental protection must be "consistent with the use and development of [natural] resources for the maximum benefit of the people." N.M. Const. art. XX, § 21. Contrary to the appellate opinion, this final stipulation does not put natural resource development above pollution control, or even require that the two be evenly balanced. **[Op. 20].** Nowhere does the PCC declare the "fundamental importance" of resource development or require that the Legislature affirmatively "provide for" such. Instead, the PCC demands protection of the state's beautiful and healthful environment in order to safeguard the public interest, health, safety and general welfare of New Mexicans, while also requiring that the scheme of pollution control is "consistent with," i.e., compatible with, use *and*

development of natural resources for New Mexicans' maximal benefit. [4]

B. This Court Can Enforce an Affirmative Constitutional Duty.

Affirmative constitutional duties, also termed positive rights (such as the state's obligation to provide an adequate education), differ from the negative rights (such as freedom from government regulation of speech) guaranteed by the U.S. Constitution, and "require the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty." *Martinez/Yazzie v. State*, No. D-101-CV-2014-02224, Decision and Order at 16 (1st Jud. Dist. Ct. July 20, 2018) (citations omitted); *see also id.* at 8–9 ("[S]tate courts should aggressively assure that state legislatures live up to their state constitutional obligations.") (quoting Kagan, 78 N.Y.U. L. Rev. 2241, 2258 (2003)).[5]

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[4] The PCC requires that pollution controls be "consistent" with use *and* development of natural resources for the maximum benefit of the people. It names only two natural resources, air and water, the most fundamental 'uses' of which are as clean, life-sustaining resources. Inadequate pollution controls, which lead to despoilment of these and other natural resources, are 'inconsistent' with these fundamental uses of air and water, and thus inconsistent with maximal benefit for New Mexicans. By contrast, pollution controls that purposefully protect clean air and water do not lead to despoilment of natural resources and are *not* inconsistent with long-term benefits to the people, even if they incidentally lead to more measured extraction of mineral resources.

[5] While the appellate court noted that *Martinez/Yazzie* is a non-precedential district court opinion, it failed to recognize that Judge Singleton relied on many opinions from higher state courts that held the political branches accountable for their positive constitutional duties. *See*, *e.g.*, *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989) ("[J]udiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the

Just as state courts have found positive educational duties enforceable, state courts have also found positive environmental duties enforceable. Alaska's constitution, for instance, contains a Natural Resource Clause that puts a duty on the Legislature to "provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." *Sullivan v. REDOIL*, 311 P.3d 625, 635 (Alaska 2013).[6] Unlike New Mexico's PCC, Alaska's clause identifies multiple, often-competing priorities and requires that the legislature provide for each, on equal footing. Nonetheless, Alaskan courts have a supervisory responsibility to ensure that legislation and state action comply with this complex duty. *Id.*; *see also Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022), *reh'g denied* (Feb. 25, 2022)

Kentucky Constitution … This duty must be exercised even when such action serves as a check on the activities of another branch of government…."); *Gannon v. State*, 319 P.3d 1196, 1226 (Kan. 2014) ("[W]hen the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances."); *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012) (citations omitted) ("The judiciary has the primary responsibility for interpreting article IX, section 1 to give it meaning and legal effect….").

[6] Article VIII, Sections 1 and 2 of the Alaska Constitution's "Natural Resources Clause" in full:
Section 1: "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."
Section 2: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."

(the court must ensure "that constitutional principles are followed, particularly the mandate that natural resources are to be made 'available for maximum use consistent with the public interest.'") (citations and quotations omitted).

Although the courts may not dictate precisely *how* the Alaskan Legislature meets this duty, the *Sullivan* court made clear it must ensure that the duty *is* met, asserting its corresponding "duty to ensure that constitutional principles are followed." 311 P.3d at 635. Alaska's clause is less forceful than New Mexico's PCC, lacking any language about controlling pollution, or about the fundamental importance of protecting a beautiful and healthful environment. Nonetheless, it requires "the State to take a 'hard look' at all factors material and relevant to the public interest [which] necessarily includes considering the cumulative impacts of a project." *Id*. Alaskan courts therefore must review legislative action for affirmative compliance with this constitutional duty to take a continuing hard look. *Id.* at 633 ("It is within the discretion of the legislature to modify [oil and gas law] so long as the principles contained in Article VIII of the Alaska Constitution are being met."); *see also Kachemak Bay Conservation Soc'y v. Dep't of Nat. Res*., 6 P.3d 270, 294 (Alaska 2000) (legislature was entitled to make a "policy choice" to expressly allow phasing of oil and gas development, but State still had constitutional duty to take a continuing hard look at future development on lease sale lands).

More recently, in *Sagoonick*, the Alaska Supreme Court found that the Alaska Constitution requires the legislature to "manage and develop the State's natural resources for the maximum common use and benefit of all Alaskans." 503 P.3d at 795. And, "[u]nder Alaska's constitutional structure of government, the judicial branch … has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." *Id.*, n.89 (internal citations omitted). *Sagoonick* upheld prior rulings which found that the court's role under Sections 1 and 2 of Alaska's Natural Resources Clause is to ensure consideration of the environmental implications of new projects so as to assess "the proper balance between development and environmental concerns." *Id.* at 795; *see also id.* at 788 ("[O]ur role is to ensure that the agency has given reasoned discretion to all the material facts and issues. The court exercises this aspect of its supervisory role with particular vigilance if it becomes aware… that the agency has not really taken a '*hard look*' at the salient problems and has not genuinely engaged in reasoned decision-making.") (citations and quotations omitted).[7]

[7] While the *Sagoonick* court ultimately dismissed the plaintiffs' claims as being non-justiciable, those claims were very different from Plaintiffs' claims here and, as discussed above, Alaska Constitution's Natural Resources Clause is very different from the PCC. The *Sagoonick* plaintiffs asserted that Alaska's Constitution provided them with the right to a climate capable of supporting human life, and requested that the court order the defendants to: (1) stop

Similarly, the Louisiana Constitution "imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to fully implement this policy." *Save Ourselves, Inc. v. La. Envt'l Control Comm'n*, 452 So. 2d 1152, 1156 (La. 1984) (citations omitted) (remanding for development of record demonstrating whether agency met its constitutional duty to protect the environment insofar as possible and consistent with the health, safety, and welfare

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implementing its statutory energy policy… (2) prepare a complete and accurate accounting of Alaska's carbon emissions…; and (3) prepare an enforceable climate recovery plan …consistent with global emissions reductions rates necessary to stabilize the climate system." *Id.* at 793. The *Sagoonick* court found that the injunctive relief plaintiffs sought would impinge on the legislature's policymaking authority, and the declaratory relief would not have brought relief because it would not reduce climate change. *Id.* at 794. Plaintiffs here do not assert that the PCC provides them with the right to a climate capable of sustaining human life; instead Plaintiffs assert that the State must control pollution and prevent the "despoilment of the air, water and other natural resources … consistent with the development of those resources for the maximum benefit of the people," as stated in New Mexico Constitution, Article XX, Section 21. Plaintiffs ask the court to order Defendants to control oil and gas pollution and protect Plaintiffs from the immediate harms of that pollution, relief that is well within the Defendants' ability to provide. While climate threats are part of Plaintiffs' case, especially for youth, those claims are made under Article II, Section 18, and only represent a part of their PCC claim, as failure to protect the environment from oil and gas pollution also results in damage to the climate.

of the people.[8] State courts have a corresponding mandate to review compliance with this duty. *Id*.

The *Save Ourselves* court held that the Legislature and executive agencies had a constitutional duty of "reasonableness" and that the constitution requires,

> an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution … requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.

Id. at 1157. That balancing process, however, is not immune from judicial review. "The regulatory scheme provided by constitution and statute mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." *Id.* at 1159. If a decision was reached "without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts' responsibility to reverse." *Id.*

Since *Save Ourselves*, Louisiana courts have developed and applied this standard, finding that their constitution requires the agency to conduct "a cost-benefit analysis [in which] the environmental impact costs balanced against the

[8] The relevant language of the Louisiana Constitution is: "The natural resources of the state, including air and water, and the healthful, scenic, historic and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. IX, § 1.

social and economic impact benefits of the project demonstrate that the latter outweighs the former." *In re Gen. Permit for Discharges from Oil & Gas Expl., Dev., & Prod. Facilities,* 70 So. 3d 101, 104 (La. Ct. App. 2011). Another court required determination of whether "the potential and real adverse environmental effects of the proposed facility [have] been avoided to the maximum extent possible[.]" *In re Am. Waste & Pollution Control Co.*, 633 So. 2d 188, 194 (La. Ct. App. 1993), *aff'd and remanded*, 642 So. 2d 1258 (La. 1994).[9]

Similarly, in New Mexico, the *Yazzie* court rejected the State's argument that positive constitutional duties cannot be enforced, and instead examined "whether a preponderance of the evidence shows the administrative or legislative actions at issue achieve or are reasonably related to achieving the constitutional requirement of providing all school children with an adequate education." *Martinez/Yazzie*, No. D-101-CV-2014-02224, Decision and Order at 17 (July 20, 2018). After a trial on the merits, Judge Singleton concluded that the State was not fulfilling its duties under the Education Clause. *Id.* at 59. Here, the court can

[9] Both Michigan's and Pennsylvania's Supreme Courts have held that constitutional environmental provisions create a duty for the State, and require, at a minimum, environmental analysis before proceeding with agency actions affecting the environment. *State Hwy. Comm'n v. Vanderkloot*, 220 N.W.2d 416, 425 (Mich. 1974); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013).

conduct a similar analysis and, after full factual development, determine that Defendants are not fulfilling their duties under the PCC.[10]

Ignoring this jurisprudence, the Court of Appeals fundamentally misunderstood the nature of positive constitutional duties, and mistakenly reasoned that because the PCC does not create an individual right, it cannot be enforced. In so doing, the appellate court also ignored key sections of the Declaratory Judgment Act, which provides authority to issue a declaratory judgment against "the state of New Mexico, or any official thereof, … when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico." NMSA 1978, § 44-6-13 (1975). "The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." § 44-6-14 (1975). Positive constitutional duties or rights are "rights, status or other legal relations of the parties" covered by the DJA. § 44-6-2 (1975). Where positive constitutional duties are at stake, plaintiffs who have been harmed can assert a

[10] The appellate court erroneously rejected Plaintiffs' comparison of positive educational duties with positive pollution control duties because the PCC does not contain the word "sufficient" or "adequate." **[Op. 21, 24]**. However, the word "control" is in the title and text of the Pollution *Control* Clause, and the declaration that "protection of a beautiful and healthful environment is of fundamental importance" to the public good provide substantive textual bases on which a judicial standard can rest—a firmer foundation than either "sufficient" or "adequate." *See* N.M. Const. art. XX, § 21.

right of action under the DJA to have the state fulfill its duty, especially in cases of great public importance like this one.

C. The Court Can Establish and Enforce Judicially Manageable Standards to Ensure that Pollution Control Clause Duties Are Met.

"The very backbone of [the judiciary's] role in a tripartite system of government is to give vitality to the organic laws of this state by construing constitutional guarantees in the context of the exigencies and the needs of everyday life." *State v. Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431. "[I]t is the duty of the court to search out and declare the true meaning and intent of any constitutional amendment adopted by the people." *State ex rel. Chavez v. Evans*, 1968-NMSC-167, ¶ 29, 79 N.M. 578 (citations omitted). Courts "operate from a working assumption that the Legislature … is well informed about the law and … intend[s] to change the law as it previously existed," and presume that legislative action is intended to have "real and substantial effect," especially when amending "the State Constitution and the Enabling Act—our most fundamental law." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 50, 149 N.M. 330 (internal citations and quotations omitted). "[C]onstitutions must be construed so that no part is rendered surplusage or superfluous." *Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392.

When called upon to interpret and enforce New Mexico's education clause, N.M. Const. art. XII, § 1, the court wrote:

> [The Court's duty to interpret the constitution] is particularly true in a case where the standards by which the Court may judge the State's conduct may well be gleaned from statutes or legislative enactments or pronouncements that the State has already made, so that the Court is not inserting itself into educational policy as much as it is looking at what the Legislature has already established as educational policy. Therefore, there may be ways to afford relief in this case without usurping the Legislature's appropriation function. Accordingly, the Court rejects the defense claims on justiciability and standing… Plaintiffs will have the opportunity to present proof of their claims and the opportunity to address whether the schoolchildren are receiving what the Constitution says they should receive.

Martinez/Yazzie v. State, No. D-101-CV-2014-00793, Order Den. Defs. Mot. to Dismiss at 4 (1st Jud. Dist. Ct. Nov. 14, 2014).[11]

"[A]ny uncertainty as to the legislative intent behind the constitutional provision is removed by the implementing legislation, enacted … immediately following the adoption of the constitutional provision." *Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 10, 135 N.M. 24. Language from the Environmental Improvement Act, passed in 1971, the same year as the Joint Resolution to put the PCC Amendment on the ballot, is particularly persuasive. **[RP 44]**. The Act's purpose is to "ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its

[11] The *Yazzie* court established a judicially manageable standard after trial, holding that a sufficient system of education is one that "prepares [students] for college and career." *Martinez/Yazzie*, No. D-101-CV-2014-02224, Decision and Order at 74 (July 20, 2018).

inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people." NMSA 1978, § 74-1-2 (1971). **[RP44.]**.

In the same 1971 session, the Legislature also passed New Mexico's Environmental Quality Act requiring the State to consider the environmental impacts of state agency action. **[*Id.*]**. The Act's purpose was to make it state policy to "encourage productive and enjoyable harmony between man and his environment, promote efforts to prevent or eliminate damage to and improve the environment and biosphere and stimulate the health and welfare of man[.]" N.M. Stat. Ann. § 12-20-1(A) (1971, repealed). Rather than fulfilling this purpose, the Legislature repealed the Act in 1974. **[RP 45]**.

Other laws, while excluding oil and gas pollution, have purpose statements which show the goal of protecting the environment for the optimum health, safety and public welfare. *See* NMSA 1978, § 74-4-2 (1977) (Hazardous Waste Act's purpose "is to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort and economic and social well-being on its inhabitants; and to protect the proper utilization of its lands."); NMSA 1978, § 74-4A-3 (1979, as amended through 1991) (Hazardous and Radioactive Materials Act's purpose is to address "much public and state concern in the area of public health and safety" relating to hazardous materials); NMSA

1978, § 74-9-2 (1990) (Solid Waste Act's purpose is to "enhance the beauty and quality of the environment; conserve, recover and recycle resources; and protect the public health, safety and welfare[.]"[12]

Given the plain language of the PCC, and numerous legislative pronouncements concerning the importance of environmental and health protections alongside economic development, the court can impose a judicially manageable standard that, at the very least, requires consideration of harms to public health and the environment before authorizing development.[13] This standard must require more than consideration of the money made from extracting

[12] Currently, the State fulfills none of these purposes by excluding oil and gas pollution from these Acts. **[R. 45-46]**.

[13] As discussed above, other state courts have set judicially manageable standards in similar situations. *See Sullivan*, 311 P.3d at 635 (Alaska's Natural Resources Clause requires State to "take a 'hard look' at all factors material and relevant to the public interest" which "necessarily includes considering the cumulative impacts of a project."); *Save Ourselves,* 452 So. 2d at 1157 (Legislature and agencies have a constitutional duty of "reasonableness," requiring a determination that adverse environmental impacts have been minimized or avoided as much as possible consistent with the public welfare); *State Highway Comm'n*, 220 N.W. at 425 (constitutional environmental provision requires, at a minimum, environmental analysis before proceeding with agency actions affecting the environment.) If this Court were to set a similar standard, Plaintiffs have pled facts to show Defendants have not met their constitutional duty because they have not established a pollution control scheme that mandates even minimal environmental review or protection concerning oil and gas extraction, let alone a "hard look" or a "balancing" of environmental consequences before permitting drilling. *See* [**RP 44–60]**.

resources, which is the standard the appellate court seemed to adopt.[14] Because "protection of the state's beautiful and healthful environment is … of fundamental importance to the public interest, health, safety and the general welfare," N.M. Const. art. XX, § 21, the Legislature cannot fulfill its role of protecting "public peace, health or safety," N.M. Const. art. IV, § 1, unless it provides pollution controls that protect our beautiful and healthful environment. In other words, because "the police power may be exercised only to protect and promote the safety, health, morals and general welfare," *City of Santa Fe v. Gamble-Skogmo, Inc.*, 1964-NMSC-016, ¶ 14, 73 N.M. 410, the Legislature is duty-bound when exercising its powers to protect our beautiful and healthful environment.

Rather than interpreting the PCC to impose a duty to protect a healthful environment through pollution control, the Court of Appeals wrongfully interpreted the PCC to put economic development over all other interests. By finding that even wholesale exemption of oil and gas activity from our pollution control statutes satisfies the Constitution and that the "use and development of the resources for the maximum benefit of the people" can be measured simply by State revenues from oil and gas development, **[Op. 26–27]**, without considering

[14] The appellate court further undercuts its own argument that the court cannot articulate a standard by creating a straw-man standard—protecting "every individual in every circumstance and geographic location in the state"—it then dismisses as impossible to satisfy. **[Op. 34]**.

resulting *harms* to the people or other beneficial uses, the appellate court rendered the PCC meaningless. On remand, and after development of the record, the court can devise a judicially manageable standard that gives full meaning and effect to every word in the PCC and determine whether Defendants have fulfilled their duties.

D. The Court Does Not Violate Separation of Powers By Fulfilling Its Duty to Enforce the Constitution Through Declaratory and Injunctive Relief.

The framers of New Mexico's Constitution "intended to create rights and duties and … made it imperative upon the judiciary to give meaning to those rights through judicial review of the conduct of the separate governmental bodies." *Gutierrez*, 1993-NMSC-062, ¶ 55. Accordingly, state courts are obliged to weigh the constitutionality of legislative acts. *See, e.g., N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 59, 126 N.M. 788 ("In requiring the Department to disburse state funds appropriated by the Legislature in a manner consistent with [the constitution], the district court did not usurp the Legislature's power to enact new laws or appropriate funds."); *Griego v. Oliver*, 2014-NMSC-003, ¶ 1 ("When government is alleged to have threatened [constitutional rights], it is the responsibility of the courts to interpret and apply the protections of the

Constitution."); *New Mexico Dept. of Health v. Compton*, 2001-NMSC-032, ¶ 11 n.2, 131 N.M. 204.[15]

The Court of Appeals incorrectly reasoned that the PCC cannot be enforced against the Legislature because the duty requires a balancing act that only the Legislature can perform. **[Op. 24-25]**.[16] However, essentially all acts of the Legislature require balancing competing interests; this does not put legislative action beyond the reach of the Court when a constitutional duty is imposed. *See, e.g. Sullivan,* 311 P.3d 625, *supra; Save Ourselves,* 452 So. 2d 1152, *supra; Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 2. (Legislature's exclusion of farmworkers from workers compensation is unconstitutional despite Legislature

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[15] New Mexico's Constitution does not impose strict separation of powers and allows some overlap in the exercise of governmental function. *See State ex rel Clark v. Johnson*, 1995-NMSC-048, ¶¶ 32, 34, 120 N.M. 562.

[16] While the appellate court purportedly "decline[d] to address Defendants' substantive arguments regarding the adequacy of the existing laws and regulations currently applicable to the oil and gas industry," **[Op.14]**, the court nevertheless held that "the Legislature *has* complied with its constitutional duty to balance pollution control policies with resource development that maximally benefits the people." **[Op. 26-27]**. This pronouncement is based on the erroneous premise that Defendants have properly balanced pollution control with economic gain, ignoring the scale of oil and gas pollution, the harms to the environment and public health, and the scope or effectiveness of any pollution controls. Even if the PCC requires a "balancing" of environmental protection with use and development of natural resources, that "balancing" is still subject to judicial review based on actual evidence. At the Motion to Dismiss phase, the court was required to accept the well-pled facts in Plaintiffs' complaint as true; instead, the appellate court wrongfully relied on "facts" not in Plaintiffs' complaint. Plaintiffs must have the opportunity to challenge with evidence the conclusion that Defendants have fulfilled their duties.

balancing competing interests between agricultural industry, the state agency's administration of the law, and laborers.)

Recently, in *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 21, this Court rejected defendants' argument that "federal standards of justiciability should override state judicial concerns regarding constitutional violations" and held it has authority to review the Legislature's redistricting plan, even though the Constitution states that "the legislature may by statute reapportion its membership." N.M. Const. art. IV, § 3(D). In *Van Soelen*, the State made the same argument made in this case: that the issue at stake – redistricting – lies within the exclusive discretion of the Legislature, and a partisan gerrymandering claim is a nonjusticiable political question that the court had no role in reviewing. 2023-NMSC-027, ¶ 5. This Court nonetheless held that "when a legislative body adopts internal procedures that ignore constitutional restraints or violate fundamental rights … a court can and must become involved." *Id.* ¶ 37 (citation and internal quotations omitted). The Court noted, "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and

our office require no less of us." *Id.* ¶ 39 (citation omitted). "We will leave no power on the table in properly fulfilling our constitutional obligations."[17]

Contrary to the Court of Appeals' decision, Plaintiffs do not seek to impede the policy-making authority of the legislative branch or the rule-making authority delegated to the executive branch. Plaintiffs do not ask the judiciary to "conduct anew the deliberative legislative process," **[Op. 31],** but instead to review the results of that process to ensure that the Legislature has complied with its constitutional duty to control oil and gas pollution consistent with use and development of natural resources for the maximum benefit for the people.[18] Ceding constitutional interpretation of the PCC to the other branches of government would erode separation of powers, because the judiciary would not fulfill its duty to

[17] Recognizing increasing state constitutional protections, the *Van Soelen* Court noted "[a] chronic underappreciation of state constitutional law has been hurtful to state *and* federal law and the proper balance between state *and* federal courts in protecting individual liberty." *Id.* ¶ 19 n.7 (internal quotes and citations omitted).
[18] The appellate court erroneously relied on *New Energy Econ., Inc. v. Shoobridge*, which simply held that courts cannot intervene to halt administrative proceedings before they are complete, since "the declaratory judgment action was not ripe and there was not an actual controversy." 2010-NMSC-049, ¶¶ 15–19, 149 N.M. 42. Based on this incorrect reliance, and again on facts outside of Plaintiffs' complaint, the appellate court wrongly concluded that Plaintiffs have not availed themselves of "exclusive statutory and regulatory remedies," **[Op. 30]**, misunderstanding a central claim of Plaintiffs' suit: the current statutory and administrative scheme provides no remedies for the extensive harms that oil and gas pollution visits upon them. *See* **[Op. 28–32]**.

safeguard the constitutional rights of all New Mexicans.[19] Plaintiffs ask this Court to allow them to prove at trial that the current statutory, regulatory and enforcement scheme that permits oil and gas development without consideration of harms to public health and the environment, let alone controlling the pollution that comes from oil and gas extraction, is unconstitutional. In other words, Plaintiffs' complaint asks this Court "to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution," which is "the function of the

[19] The appellate court incorrectly found that the political question doctrine of *Baker v. Carr*, 369 U.S. 186 (1962), cautions against review. **[Op. 32]**. However, by leaving the specifics of how the State will come into compliance with its constitutional duties up to the other two branches of government, this Court will fulfill its duty to give effect to the Constitution while leaving issues of policy committed to the legislative and executive branches (*Baker* Factors 1, 3, 4). Courts have long measured legislative action against constitutional standards (Factor 2). And while the court's declaration may require the political branches to develop new, constitutionally compliant policies, this does not imply multiple pronouncements by various branches on one question (Factors 5 and 6). The judiciary answers the question of what the Constitution requires; the executive and legislative branches then answer a separate question: how must the State control oil and gas pollution to comply with the constitutional requirements decided by the court. This is how constitutional litigation proceeds. *See e. g. Navahine F. v. Hawai'i Dep't of Transp.*, No. 1CCV-22-0000631, ruling ¶ 6 (Haw. Cir. Ct. April 6, 2023) ("this [political question] argument fails to recognize the two claims in this case are both based on the Hawai'i Constitution."); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951 (Pa. 2013) (political question doctrine does not preclude review of oil and gas act amendments under the Pennsylvania Constitution's environmental protection provision: "for this Court to accept the notion that legislative pronouncements of benign intent can control a constitutional inquiry… *would be tantamount to ceding our constitutional duty, and our independence, to the legislative branch*.") (emphasis added and citations omitted).

judiciary." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 1, 125 N.M. 343 (internal quotations and citations omitted).

III. PLAINTIFFS ALLEGE ENFORCEABLE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS.

A. The New Mexico Constitution Provides Greater Civil Rights Protections Than the Federal Constitution.

New Mexico has a long tradition of interpreting its Constitution to provide broader rights than those provided in the federal constitution:

> We are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."

State ex rel. Serna v. Hodges, 1976-NMSC-033, ¶ 22, 89 N.M. 351 (citation omitted), *overruled in part on other grounds by State v. Rondeau*, 1976-NMSC-044, 89 N.M. 408; *Van Soelen*, 2023-NMSC-027, ¶¶ 15, 34 (interstitial approach not appropriate as federal law was undetermined, and state Equal Protection Clause applies to claim concerning partisan gerrymandering); *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 14, 138 N.M. 331 (New Mexico's Equal Protection Clause "affords 'rights and protections' independent of the United States Constitution.") (citation omitted).

Alternatively, applying an interstitial analysis, after first determining that a right is not protected under the federal constitution, the Court must determine

whether "flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics" require a divergence from established federal precedent in determining whether the New Mexico Constitution protects the right. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777. The Inherent Rights Clause, the Pollution Control Clause, and the state Civil Rights Act constitute "distinctive state characteristics" justifying a uniquely New Mexican treatment of our constitutional provisions, independent of federal jurisprudence. *See, e.g., Gutierrez*, 1993-NMSC-062, ¶ 32 (describing this Court's "willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees.").[20]

Plaintiffs allege that with deliberate indifference, Defendants "continue to authorize oil and gas production without having established a statutory, regulatory, and enforcement scheme to protect Plaintiffs from the damages of oil and gas

[20] Even when applying the interstitial approach, New Mexico courts often find the state constitution provides greater rights than the federal constitution. *See, e.g., State v. Nunez*, 2000-NMSC-013, ¶ 15, 129 N.M. 63 (broader double jeopardy protections); *State v. Cardenas–Alvarez*, 2001-NMSC-017, ¶ 15, 130 N.M. 386 (additional protection from unreasonable searches and seizures); *N.M. Right to Choose*, 1999–NMSC–005, ¶ 27 (stronger protections against gender discrimination); *State v. Vallejos*, 1997-NMSC-040, ¶¶ 35–38, 123 N.M. 739 (broader protections against self-incrimination); *Gomez*, 1997-NMSC-006 (more protections from warrantless car searches); *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89 (broader protections in habeas corpus claims).

pollution," resulting in discriminatory harm to Plaintiffs that violates New Mexico's equal protection guarantee and substantive due process rights to life, liberty, property, and safety. **[RP 43].** Defendants' actions result in "human death, shortened life spans,… widespread damage to property, threaten[ed] human food sources and dramatically alter[ed] ecosystems," and "degrade, denigrate and eliminate Indigenous Plaintiffs' air, land, and water and harm their health, their relationship to Indigenous ancestral landscapes, sacred places, and traditional cultural resources, and impede on their ability to practice cultural ceremonies and lifeway. **[RP 100]**. Thus, with or without an interstitial analysis, Defendants' motions to dismiss should be denied because Plaintiffs have pled facts supporting enforceable civil rights claims under New Mexico's Equal Protection and Due Process Clauses.

B. Plaintiffs' Fundamental Rights to Life, Liberty, Property, and Safety Are Violated by Defendants' Authorization of Oil and Gas Extraction and Accompanying Pollution.

Plaintiffs' fundamental rights to life, liberty, property, and safety under New Mexico's Due Process and Inherent Rights Clauses are well-established and must be enforced when threatened by government action. *See Morris v. Brandenburg*, 2016-NMSC-027, ¶ 48 (Article II, Section 4 "guarantees the enjoyment of life and liberty as a natural, inherent, and inalienable right, … accords the same value to the right of seeking and obtaining safety and happiness," and provides "a more

expansive guarantee of obtaining safety" than the U.S. Constitution) (internal citations and quotations omitted).

These rights prohibit state action that despoils Plaintiffs' land, homes, sacred sites, water, air, and health. *See Whipple v. Village of N. Utica*, 79 N.E.3d 667, 675-76 (Ill. App. Ct. 3d Dist. 2017) ("plaintiffs will suffer harm to their health, water supply, and agricultural land, and they will experience a decrease in the values of their properties . . . and [they] thereby stated a constitutional substantive due process claim."). The right to be free from government action that undermines health and safety underpins every substantive due process right—and health and safety are undermined by government-sanctioned pollution. Without health and safety, life itself would cease to exist. *See Miners Oposa v. Sec'y of the Dep't of Env't & Nat. Res.*, G.R. No. 101083, 33 I.L.M. 173, 188 (July 30, 1993) (Phil.) (a healthful ecology "concerns nothing less than self-preservation and self-perpetuation… the advancement of which may even be said to predate all governments and constitutions."). Plaintiffs' fundamental rights to life, liberty, property and safety are violated by Defendants' actions permitting oil and gas extraction which results in pollution that harms their health and destroys their air, land, water, and sacred and cultural resources.

Additionally, the express language of the PCC strengthens these fundamental rights, stating: "the protection of the state's beautiful and healthful

environment" is "of *fundamental importance* to the public interest, health, safety and the general welfare." N.M. Const. art. XX, § 21 (emphasis added). Thus, at least since 1971, with the addition of the PCC, the Constitution now makes explicit what was already implicitly true: that protection of a healthful environment is a fundamental foundation of the guarantees embodied in New Mexico's Due Process and Inherent Rights Clauses, and results in the inclusion of the right to a healthful environment in the Constitution's fundamental rights. *See Richardson v. Carnegie Libr. Rest., Inc.*, 1988-NMSC-084, ¶ 28, 107 N.M. 688, *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721 ("A fundamental right is that which the Constitution explicitly or implicitly guarantees."); *Marrujo v. N.M. State Hwy. Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753 (finding that voting, interstate travel, privacy, and fairness are a "fundamental personal right or civil liberty" which "the Constitution explicitly or implicitly guarantees."); *Van Soelen,* 2023-NMSC-027, ¶¶ 6-7 (voting is a fundamental personal right or civil liberty, though not explicitly mandated by the New Mexico Constitution, because the right to vote is intrinsic to the guarantees embodied in provisions of New Mexico's Bill of Rights.); *In re Hawai'i Elec. Light Co., Inc.*, 526 P.3d 329, 337 (Haw. 2023) (Wilson, J. concurring) ("I write separately to emphasize that the right to a life-sustaining climate system is also included in the due process right to life, liberty, and property . . .") (internal

citations and quotations omitted).[21]

Plaintiffs alleged that Defendants must provide pollution controls that protect Plaintiffs' fundamental rights to life, liberty, property and safety, which include a healthful environment, as well as New Mexico's equal protection guarantee. *See Morris*, 2016-NMSC-027, ¶ 51 (the Inherent Rights Clause does not serve as an exclusive source for fundamental rights, but instead "should inform our understanding of New Mexico's equal protection guarantee, and may also ultimately be a source of greater due process protections than those provided under federal law."). The PCC adds force and focus to the explicit rights protected by the Due Process, Equal Protection and Inherent Rights Clauses, mandating that a healthful environment is fundamental to, and therefore included in fundamental rights guaranteed by the Constitution.

Controlling government-sanctioned pollution that harms Plaintiffs' land, homes, sacred sites, water, air, and health is necessary to vindicating their fundamental rights to life, liberty, property, and safety, as well as their included right to a healthful environment.

C. Plaintiffs Have Alleged Valid Equal Protection Claims

Defendants' authorization of oil and gas production without adequate

[21] This understanding stands in stark contrast to the appellate court's conclusion that the PCC provides no constitutional protections whatsoever. **[Op. 17-18]**.

pollution controls has disparately impacted three classes of Plaintiffs—Indigenous, youth, and frontline community members—violating their rights under New Mexico's Equal Protection Clause. **[RP 63-94]**. Disparate impact claims apply to regulatory and statutory schemes that appear facially neutral, or do not overtly create and discriminate against a particular group, but nonetheless harm certain groups more than others.

> A disparate impact claim differs from a disparate treatment claim in that it does not involve a showing of discriminatory intent, but rather addresses those situations when an apparently neutral [] policy has a discriminatory effect. A plaintiff may establish a prima facie case of disparate impact discrimination by showing that a specific … policy caused a significant disparate impact on a protected group.

Gonzales v. N.M. Dep't of Health, 2000-NMSC-029, ¶ 30, 129 N.M. 586 (internal quotations and citations omitted). While *Gonzales* discusses disparate impact in the employment context, the Court has recognized disparate impact in other contexts. *See Hill v. Cmty. of Damien of Molokai***,** 1996-NMSC-008, ¶¶ 33–42, 121 N.M. 353 (disparate impact of a facially neutral restrictive covenant on group homes as a valid basis for an equal protection claim); *State v. Ochoa*, 2009-NMCA-0002, ¶¶ 19–20, 146 N.M. 32 (disapproving of the federal court's rejection of disparate impact analyses of pretextual traffic stops and rejecting the legality of such stops in New Mexico); *Albuquerque Commons P'ship v. City Council of City of Albuquerque,* 2008-NMSC-0025, ¶ 43, 144 N.M. 99 (disparate impact analysis

supported characterization of legislative action as quasi-judicial). As pled, Plaintiffs' disparate impact claims are cognizable in the context of the disastrous and harmful pollution permitted by Defendants.

Indigenous Plaintiffs are disproportionately negatively impacted because the State's permitting of oil and gas extraction without controlling pollution results in the destruction of Indigenous sacred sites, interference with religious practices, damage to cultural resources and ancestral landscapes, and greater health harms than for people who are not Indigenous. **[RP 70–73, 86–87, 90–95]**. Frontline Communities are disproportionately negatively impacted because they live where the State has authorized oil and gas development without adequate pollution controls, subjecting them to much greater, more harmful levels of pollution than communities who do not live close to oil and gas development. **[RP 67–70].** Youth Plaintiffs suffer a negative, discriminatory impact because they have suffered and are at risk of suffering greater physical health impacts from the pollution and greater mental health impacts created by the fear of the climate crisis than adult New Mexicans. **[RP 70]**.

The Court of Appeals completely misapprehended Plaintiffs' claims and wrongly rejected them because "facially neutral statutes that result in incidental harms based on the geographic location of individuals [have never been found to] violate the Equal Protection Clause of the New Mexico Constitution." **[Op. 43]**.

This characterization misstates Plaintiffs' claims and ignores the substantial, not incidental, harm caused by Defendants. Plaintiffs' disparate impact claims are not based on their geographic location, but on Defendants' conduct in granting oil and gas permits while failing to regulate these very dangerous activities where Plaintiffs live. Plaintiffs have not chosen to live in the midst of highly destructive pollution—this has been imposed on them by Defendants, who could have, but did not require oil and gas extraction in a manner that limited pollution and the destruction of the environment, air quality and health.

Equal protection requires the protection of classes of people who have traditionally lacked the political power to protect themselves from abusive impacts of state decision-making, or whose fundamental rights are being negatively impacted by state action. This case presents the Court with an opportunity to ensure that equal protection guarantees safeguard Indigenous, Frontline and Youth Plaintiffs who have historically lacked political power and suffer extraordinary harms to their fundamental rights from the State's lack of pollution control. In sharp contrast to the way Defendants have treated Plaintiffs, Defendants have put in place "Special Rules" to regulate drilling and pollution in areas of New Mexico where residents have more political power. *See* NMAC 19.15.39.9 and 19.15.39.10 (regarding Santa Fe and the Galisteo Basin).

Under New Mexico equal protection analysis, at summary judgment or after

trial, *but not at the motion to dismiss stage*, the Court first determines whether the State treats differently classes of people who are similarly situated. If so, the Court decides the level of scrutiny that applies before determining whether the differential treatment is constitutional. *Griego,* 2014-NMSC-003, ¶ 27. "There are three levels of equal protection review based on the New Mexico Constitution: rational basis, intermediate scrutiny and strict scrutiny." *Breen*, 2005-NMSC-028, ¶ 11. The level of scrutiny "depends on the nature and importance of the individual interests asserted and the classifications created by the statute." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734. Strict scrutiny applies to a protected/suspect class or when a fundamental right is at stake; intermediate scrutiny applies to a "sensitive class" or when an "important" right is impacted; and rational basis applies to all other groups. *Id.*

This equal protection analysis is heavily fact-driven. Here, at the motion to dismiss stage, all facts alleged by Plaintiffs and all reasonable inferences therefrom must be presumed true.

Strict scrutiny review should apply to the three groups of Plaintiffs because their *fundamental* rights to life, liberty, property, safety, and a healthful environment are at stake. In addition, strict scrutiny applies to Indigenous Plaintiffs because they are a "suspect class." Strict scrutiny places the burden on the State to prove it has a compelling interest in the conduct that caused the disparate impact

and is implementing that interest in the manner least restrictive of Plaintiffs' rights. *Wagner*, 2005 NMSC-016, ¶ 12.

Plaintiffs alleged facts showing Defendants continue to permit massive amounts of oil and gas production and pollution without putting in place, funding, or enforcing pollution control measures to protect Plaintiffs. Plaintiffs alleged that while the State may have a compelling interest in allowing oil and gas production, to do so without adequately controlling pollution is not the least restrictive manner of implementing that interest.

Additionally, Indigenous Plaintiffs alleged that the State does not have a compelling interest in permitting ever-increasing production across the Greater Chaco Landscape without putting in place sufficient pollution control measures to prevent the unnecessary contamination of the air, land and water and destruction of sacred cultural resources and Indigenous ancestral landscapes. **[RP 90–95]**. It is Defendants' burden to prove with evidence at trial that they have a compelling interest in authorizing extraction and concomitant pollution and that they are doing so in a manner that has the least impact on Indigenous Peoples' rights.

Plaintiffs also allege that either strict or intermediate scrutiny applies to Frontline Community members and Youth because they each comprise a "sensitive class"—a "discrete group [who] has been subjected to a history of discrimination and political powerlessness based on… characteristics that are relatively beyond

the individuals' control such that the discrimination warrants a degree of protection from the majoritarian political process." *Breen*, 2005-NMSC-028, ¶ 21 (people with mental disabilities constitute a sensitive class); *see also Griego*, 2014-NMSC-003 (discrimination based on sexual orientation requires intermediate scrutiny). As alleged in the Complaint, Frontline Community members and Youth are politically powerless and have been subjected to a history of discrimination, especially when it comes to oil and gas pollution. **[RP 63-94]** Moreover, their rights to life, liberty, property, and safety are more than "important" – they are "fundamental."

To withstand intermediate scrutiny, Defendants must prove that the discrimination is substantially related to an important government interest. *Marrujo*, 1994-NMSC-116, ¶ 11. Plaintiffs alleged that the harm inflicted on Frontline, Youth, and Indigenous Plaintiffs can be avoided by adequately limiting oil and gas pollution. **[RP 63–95]**. It is Defendants' burden to show at trial that their conduct regarding pollution is substantially related to an important governmental interest and is the least restrictive way to implement that interest.

Finally, Plaintiffs pled valid equal protection claims even under a rational basis analysis. Rational basis review under the New Mexico Constitution is a more exacting form of rational basis review than its federal counterpart and has been called "heightened rational basis." *Trujllo*, 1998-NMSC-031, ¶ 32 (internal quotations omitted). This Court did not adopt the version of rational basis review

characterized as a "virtual rubber stamp," "toothless," and "preordaining the results by applying no real scrutiny." *Id.* ¶ 30 (citations and quotations omitted). Rather, under New Mexico's rational basis test, "there must be either a factual foundation in the record to support the basis or a firm legal rationale to support the basis." *Corn v. N.M. Educ. Credit Union,* 1994-NMCA-161, ¶ 14, 119 N.M. 199; *Alvarez v. Chavez,* 1994-NMCA-133, ¶ 18, 118 N.M. 732 (policy decisions must be supported by a firm factual basis). *See also Rodriguez*, 2016-NMSC-029, ¶¶ 25-28.

Plaintiffs alleged that Defendants permit oil and gas production and concomitant pollution in a manner that fails to adequately prevent pollution and that this conduct is not rationally related to any legitimate governmental purpose. Plaintiffs alleged that Defendants' failure to adequately regulate oil and gas pollution has caused Plaintiffs to suffer extensive harm. Defendants do not contend, nor could they prove, that the technology to reduce current levels of pollution is not available or that requiring the oil and gas industry to take the steps necessary to reduce pollution would cause production in New Mexico to cease. Consequently, Plaintiffs will show at trial that the conduct challenged in this case is not rationally related to any legitimate governmental purpose. In fact, Defendants' exclusion of the oil and gas industry from New Mexico's key environmental protection laws **[RP 43–48]** evidences their irrationality.

Under any level of scrutiny, Plaintiffs have adequately pled that Defendants'

permitting of, and failure to limit pollution by, the oil and gas industry has deprived Indigenous, Frontline, and Youth Plaintiffs of their rights under New Mexico's Equal Protection Clause. At this stage of the litigation, the Court should not require anything more.

D. Plaintiffs Alleged Valid Substantive Due Process Claims.

In substantive due process cases, New Mexico courts determine "whether a statute or government action 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *Wagner*, 2005-NMSC-016, ¶ 30 (citations omitted). Substantive due process is also implicated when the State acts with "deliberate indifference." *Lessen v. City of Albuquerque*, 2008-NMCA-085, ¶ 30, 144 N.M. 314.[22] Plaintiffs adequately alleged that Defendants' conscience-shocking and indifferent behavior violates their fundamental rights to life, liberty, property, safety, and a healthful environment.

Specifically, Plaintiffs allege that: 1) Defendants' failure to control oil and gas pollution harms Plaintiffs' health, land, water, air, ancestral landscapes, and religious and cultural resources **[RP 43–63]**; 2) Defendants act with deliberate

[22] The appellate court wrongly restricted the application of the "deliberate indifference" standard to medical care in prisons without justification. **[Op. 39 n.9]**. While *Lessen* concerns deliberate indifference to medical needs, 2008-NMCA-085, ¶ 30, this standard has never been limited to this context and may be applied to other situations in which government actors' deliberate indifference harms plaintiffs and violates their due process rights.

indifference by permitting ever-increasing levels of pollution while knowing the extent of the harm already inflicted on Plaintiffs **[RP 63–95]**; 3) Defendants' actions rise to a conscience-shocking level due to the magnitude of the pollution crisis created and the scale of harm to Plaintiffs' health, safety, property, environment, and religious practice **[RP 43–95]**; 4) Defendants' deliberate indifference to, and continued perpetuation of, this harm is outrageous **[Id.]**; and 5) Defendants' conduct ultimately poses a danger to Plaintiffs' lives and life on earth. **[Id.]** These factual allegations, which must be accepted as true, support Plaintiffs' substantive due process claims at this stage of the litigation.[23]

Plaintiffs' claims are bolstered by Defendants' active role in creating the pollution-based danger. Under the danger creation theory, the State may be culpable for third party acts where the State "created the danger to Plaintiff[s]" or left Plaintiffs "more vulnerable to the danger." *Sugg v. Albuquerque Pub. Sch. Dist.*, 1999-NMCA-111, ¶ 18, 128 N.M. 1. Plaintiffs alleged that Defendants created the current danger to Indigenous, Youth, and Frontline Plaintiffs by affirmatively permitting oil and gas development without adequate pollution controls. **[RP 43–63]**.

Accepting all facts pled as true, Plaintiffs have adequately alleged that

[23] The appellate court did not examine these facts—or any specific facts pled by Plaintiffs—before summarily dismissing the notion that Defendants' actions are conscience shocking. **[Op. 39 n.9]**.

Defendants' actions violate their substantive due process rights and are not justified under any level of scrutiny. Plaintiffs should have the opportunity to prove at trial that Defendants' actions variously constitute a state-created danger, demonstrate deliberate indifference, are conscience-shocking, and fail no matter the level of scrutiny applied.

IV. CONCLUSION

Plaintiffs respectfully request the Court to reverse the Court of Appeals' decision and remand the case to the district court to give Plaintiffs an opportunity to develop the facts and prove their case of great public importance.

RESPECTFULLY SUBMITTED,

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STATEMENT OF COMPLIANCE WITH NMRA 12-318(F)(3)

The body of this brief uses Times New Roman, a proportionally-spaced typeface, and contains 11,000 words, as counted by Microsoft Word 365, version 2409. This brief therefore complies with NMRA 12-318 (F)(3).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2026, a true and correct copy of the foregoing document was e-filed and served through the Court's e-filing system upon counsel of record.

/s/ gail evans
Gail Evans