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; ACTING SECRETARY ERIN TAYLOR, in her official capacity; ENVIRONMENTAL IMPROVEMENT BOARD; 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' REPLY BRIEF

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

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I. INTRODUCTION

This case calls upon the court to determine if New Mexico is fulfilling its constitutional obligation to control oil and gas pollution. Plaintiffs ask the court to perform its age-old duty to interpret the Constitution and hold other branches of government accountable to their constitutional duties. The court has the authority to declare that Defendants are violating Article XX, Section 21 and Article II, Sections 4 and 18 of the New Mexico Constitution, and to enjoin Defendants to come into compliance with their constitutional mandates. This most basic judicial authority does not intrude on the authority of the Legislature or the Executive.

Plaintiffs' complaint demonstrates that Defendants have authorized over 70,000 permits to extract oil and gas – a process that is inherently polluting – with no consideration of public health or the environment. and that Defendants continue to authorize thousands of new permits for fracking wells while allowing air quality to remain out of compliance with basic health standards, millions of gallons of toxic fracking waste spills onto our lands and water every year, and thousands of inactive production sites left unplugged and unremediated, continuing to cause grave damage. Defendants' authorization of oil and gas production without consideration of public health and the environment and without controlling pollution inherent in the extraction process results in grave harm to Plaintiffs' health, the environment, biodiversity, and Indigenous cultural resources.

Contrary to Defendants' alarmist arguments, Plaintiffs' requested relief would not shut down the industry. Plaintiffs simply seek basic pollution control measures, as required by the New Mexico Constitution – measures Defendants could easily put in place with production continuing. And while Defendants want the court to shy away from this case as too complicated or too big, courts routinely tackle complex constitutional problems that involve grappling with science, economics, state government processes, and harm to human health and the environment.

Plaintiffs simply ask the Court to exercise one of its essential powers and obligations in our tripartite system of government: to ensure other branches of government act constitutionally. At this stage of the litigation, having alleged facts that support valid constitutional claims, Plaintiffs seek the opportunity to develop the record and prove the devastating harm caused by Defendants' extensive failures to control pollution from oil and gas extraction.

II. THE COURT, NOT THE LEGISLATURE, HAS THE CONSTITUTIONAL DUTY TO INTERPRET AND ENFORCE THE POLLUTION CONTROL CLAUSE.

A. The Pollution Control Clause creates a duty to control pollution.

The Pollution Control Clause is a powerful command, requiring Defendants to control pollution and protect our beautiful and healthful environment. The clear language of the Clause – "the Legislature shall" – makes this a duty, not merely a

grant of authority.[1] If the PCC were merely a "confirmation" of police powers to pass environmental laws **[Exec. Ds 5]**, it would be meaningless since there is no need to confirm via constitutional amendment "the broadest power possessed by governments, to protect public health and welfare." *Amdor v. Grisham*, ___-NMSC-___, ¶ 63, 578 P.3d 971 (No. S-1-SC-40105 March 6, 2025). [2]

In 1971, when the Pollution Control Clause was added to the Constitution, the Legislature did not need confirmation of its police power to pass environmental laws since it did so both before and during the same 1971 legislative session that a Senate Resolution put the PCC on the ballot. For example, the Legislature passed the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1967) and the Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -22 (1967) years before the Pollution Control Clause became part of the Constitution. **[RP 48-49]**. And, during that 1971 session, when it passed the PCC's Senate Resolution, the Legislature used its

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[1] Indeed, Article XX, Section 21 is called the "Pollution Control Clause," not the "Dual Interest Clause" as the Legislature mislabels it. **[Leg. 5, FN2].**

[2] Defendants' argument that the PCC parallels the language of Article IV, Section 1 and thus expands or underlines the Legislature's discretion misses the mark since it ignores the full language of the PCC. *See* **[Exec. Ds 6; IPANM 13–14]**. In stating the "fundamental importance" of environmental protection to health, safety, and welfare, the PCC does not add pollution control to the Legislature's police powers; instead, it makes environmental protection a foundational issue that the legislature must consider, even in domains usually marked by discretion. To effectuate the public interests, Defendants must protect our beautiful and healthful environment. This, combined with the command to "provide for control of pollution," creates an enforceable legislative duty.

police powers and passed two environmental protection statutes, the New Mexico Environmental Quality Control Act ("NMEQCA") and the Environmental Improvement Act ("EIA"). **[RP 44]**. *See In re Rhino Envt'l Servs.*, 2005-NMSC-024, ¶ 29, 138 N.M. 133 (quotations omitted) (recognizing that the Legislature passed the EIA using the "general police power of the state.").[3]

With passage of the NMEQCA, the State was required to consider and report the environmental impacts of its actions and legislation. "[The NMEQCA] makes environmental protection a part of the mandate of every agency or department and … requires [each] to consider, to the fullest extent possible under its statutory mandate, the effect that its action might have on the environment." *Roswell v. N.M. Water Quality Control Comm'n*, 1972-NMCA-160, ¶ 8, 84 N.M. 561 (invalidating regulations passed by the Water Quality Control Commission for failure to comply with the NMEQCA).

[3] Executive Defendants' unsupported speculation that *State v. Dennis*, 1969-NMCA-036, 80 N.M. 262, spurred New Mexicans to add the Pollution Control Clause to our constitution is nothing short of bizarre. *Dennis* is a criminal case about the constitutionality of an arson statute without an intent element. *Id.* ¶¶ 3-5. The *Dennis* court held the statute unconstitutional because the Legislature cannot use its police powers to criminalize innocent activity such as burning down a shed on your own property with no malintent. *Id.* ¶ 10-13. *Dennis* never mentions pollution or environmental protection, and has no bearing here. Moreover, the legislature passed the EIA and the NMEQCA after *Dennis*—evidence that it needed no clarification that it had police powers to pass environmental laws.

A few years later, after the Pollution Control Clause was adopted, the State repealed the NMEQCA. **[RP 45]**. Repealing the only law that required an assessment of the environmental impact of state action is evidence of a step away from Defendants' duty to control pollution, not evidence that they do not have a duty, as Executive Defendants argue. **[Exec. Ds 9]**.[4]

This history makes it clear that if the Pollution Control Clause were only a statement of the Legislature's authority to pass environmental protection laws, and not a constitutionally enforceable duty, it would be rendered a nullity, merely restating the Legislature's existing authority. However, New Mexico courts presume that amendments to the Constitution "change the law as it previously existed." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 50, 149 N.M. 330 (internal citations and quotations omitted). Given the mandatory language of the

[4] Though generally free to adopt and repeal statutes, the Legislature must comply with its constitutional duties and cannot pass and repeal legislation without consideration of those duties. *See, e.g. Bartlett v. Cameron*, 2014-NMSC-002, ¶ 19 (constitutional provision providing retirement benefit did not include a vested property right in a COLA increase; therefore, the Legislature was free to repeal the COLA increase.); *Pierce v. State*, 1996-NMSC-001, 121 N.M. 212 (state employees do not have a vested property right in a tax exemption related to their retirement benefit; thus the legislature was free to repeal related statute). Here, where Defendants have a duty to protect our environment, repealing the only state law requiring environmental or public health assessments of new projects is evidence of Defendants shirking their new constitutional duty under "heavy pressure from industry," rather than taking action to fulfill it. Charles R. McCash, *The Rise and Demise of the New Mexico Environmental Quality Act, Little NEPA*, 14 Nat. Res. J. 401, 409 (1974). Industry pressure and the Legislature's neglect of this duty have not abated in the intervening years.

Pollution Control Clause, combined with the fact that the legislature already had broad police powers to control pollution, the PCC confers a duty – a constitutional mandate – to control pollution.

Contrary to the decision below, and to Defendants' arguments, Plaintiffs do not assert an individual right to be free from a certain amount of pollution. Plaintiffs seek enforcement of Defendants' constitutional duty to control pollution. When the State has a constitutional duty, Plaintiffs – harmed by the violation of that duty – can bring claims to require compliance with the Constitution. This Court has the opportunity to clarify this basic premise—that state constitutions, unlike the federal constitution, can and do create positive constitutional rights (or affirmative duties) enforceable in court. *See*, *e.g. Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977) (N.Y. Const. art. XVII, § 1 "imposes upon the State an affirmative duty to aid the needy."); *Aliessa v. Novello*, 754 N.E.2d 1085, 1093 (N.Y. 2001) (provision establishes constitutional limits on legislature's discretion; statutory scheme that ignores plaintiffs' "need" in allocating benefits "violates the letter and spirit of [provision]"); *Martinez-Yazzie v. State,* No. D-101-CV-2014-02224, Final Judgment and Order (1st Jud. Dist. Ct. February 14, 2019) ("Defendants have violated the rights of at-risk students [under Article XII, Sec. 1] by failing to provide them with a uniform statewide system of free public schools

sufficient for their education.").[5] The court has an obligation to ensure the PCC's constitutional mandate is fulfilled. *See Constitutional Law Scholars Amicus Brief*, pages 3 - 26.

B. The Legislature is not beyond the reach of the Court's duty to interpret and enforce the Constitution.

Because the Constitution explicitly places the duty to control pollution on the Legislature, the court must ensure the Legislature's compliance. Thus, far from having unchecked discretion, as Defendants argue, the Legislature's actions—or inaction—regarding pollution control fall squarely within the court's authority to interpret and enforce the Constitution

Relying on this Court's recent decision in *Amdor v. Grisham,* for the basic proposition that the Legislature makes law and public policy **[Leg. 7],** the Legislature fails to mention that the *Amdor* court rejected the legislative petitioners' argument that the Executive Branch was unconstitutionally making law

[5] While admitting that the PCC contains "duty-imposing language directed at a government institution" **[IPANM 11],** IPANM makes a contorted argument that unlike the Education Clause, the PCC is unenforceable because the PCC does not contain rights-creating language, is not in Article II, and does not declare who must be protected. **[*Id.* 11–14]**. However, the Education Clause does not contain rights-creating language, is not in Article II, and broadly protects "all children of school age." Similarly, the PCC protects the "public interest, health, safety and general welfare" of all New Mexicans. (Further, while IPANM implies the *Yazzie* decision is of no value because it was wrongly decided and not appealed, it was the State—represented by the very same attorney who now represents IPANM—that chose not to appeal *Yazzie*.)

by issuing emergency executive orders. 578 P.3d 971, ¶ 63. This Court disagreed with Petitioners' "meaning of lawmaking," *id.* ¶ 104, finding that since "the legislative responsibility [was not] totally abandoned [and] the power to reduce, nullify or change priorities [was not] given over to the total discretion of another branch of government," the Legislature's lawmaking authority was intact. *Id.* (citations omitted). Likewise, the court will not be "lawmaking" when determining whether Defendants have fulfilled their constitutional duties under the PCC.[6]

Since adoption of the Pollution Control Clause in 1971, the Legislature has not enacted an oil and gas pollution control scheme to comply with the constitutionally imposed duties. Instead, the Legislature repealed the only law that required an environmental impact assessment before authorizing new development **[RP 44-45]** and has exempted oil and gas from pollution control statutes **[RP 45–48]**. The Oil and Gas Act continues to have no mandatory environmental protections and the statutory delegate, the Oil Conservation Division, has no mandate to control pollution **[RP 52]**. The Legislature has not allowed OCD to consider pollution when authorizing new permits for oil and gas extraction, let alone consider the cumulative impacts of that pollution throughout the various

[6] Additionally, the Legislature provides a misleading quote from *State v. Maestas*, 2007-NMSC-001, ¶ 25, 140 N.M. 836, omitting the first two words. *See* **[Leg. 9]**. The *Maestas* court actually said: "*Unless unconstitutional*, it is not the role of this Court to question the wisdom, policy or justness of legislation enacted by our legislature." *Id.* (emphasis added).

phases of the project. **[*Id.*]**. Likewise, Plaintiffs have no means to challenge new development on environmental or public health grounds. **[RP 54]**. And, because the Legislature has not given the Oil Conservation Commission appropriate pollution control authority, Plaintiffs have no basis to petition for rules for environmental and public health protections from new drilling. **[RP 52–54]**. Additionally, the Environment Department continues to grant new emissions permits for oil and gas extraction despite very unhealthy air quality, in violation of state law, as well as federal health-based legal standards. **[RP 50-51]**. The Legislature has not provided executive agencies with sufficient resources to inspect or control pollution. **[RP 54-60]**. The Legislature has not put in place a pollution control scheme that mandates even minimal environmental review, let alone a "hard look" or a "balancing" of the environmental consequences, before permitting oil and gas production, as other states require. *See, Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022), *reh'g denied* (Feb. 25, 2022) (the court's role "is ensuring 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 internal quotations omitted); *Sullivan v. REDOIL*, 311 P.3d 625, 635 (Alaska 2013) (Court has supervisory duty to ensure Legislature's statutory scheme complies with natural resources article of state constitution, which requires the state to "take a 'hard look' at all factors material and relevant to

the public interest: this 'hard look' necessarily includes considering the cumulative impacts of a project."); *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152, 1153 (La. 1984) (citations omitted) (remanding to determine whether agency abided by its constitutional duty to protect the environment insofar as possible and consistent with the health, safety, and welfare of the people).[7]

While Defendants have declared for themselves that the Legislature has complied with the Pollution Control Clause, the New Mexico Constitution is not "a code of ethics under an honor system." *State v. Gutierrez*, 1993-NMSC-062, ¶ 55, 116 N.M. 431. Indeed, it is a basic principle of our governmental structure that the judiciary determines the constitutionality of government action. *Marbury v. Madison*, 5 U.S. 137, 176-178 (1803). "It is the role of the judiciary, and not the legislature, to interpret the constitution." *State v. Nunez*, 2000-NMSC-013, ¶ 48, 129 N.M. 63 (quotations and citations omitted). This remains true even where, as here, the Legislature is explicitly named in the Constitution to carry out a duty, or where consideration of multiple interests is required.

Many cases in New Mexico, including those cited by the Defendants, exemplify situations where the Legislature is explicitly identified in the

[7] Defendants contort the holdings of these cases and fail to mention the bedrock principle these courts have reiterated multiple times: the Legislature and Executive Branch both have court-enforceable duties under the state constitutions' natural resources and environmental clauses.

constitution with a duty or power to act, and the court determines whether the Legislature is complying. For example, in *Unite N.M. v. Oliver,* 2019-NMSC-009, ¶ 6, this Court recognized that even where the Legislature has plenary authority, that authority has constitutional limitations: "[The Constitution] vests our Legislature with plenary authority over elections, an authority limited only by the Constitution itself." Thus, even where the Constitution says "the Legislature… shall regulate the manner, time and places of voting" and "shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise," N.M. Const. art. VII, § 1(B), the court still has a role to play to ensure the Legislature acts constitutionally. *Id. See also Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 21 (this Court held that it has the 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)); *Citizen for Fair Rates v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-010, ¶ 46 (where N.M. Const. art. XI, § 2 explicitly mandates that the Legislature shall establish public utility law, the Court still found that it can review the Legislature's actions, writing "We do not mean to suggest that the Legislature's power to set rates or enact utility legislation is unbounded, as the legislation must still accord with the mandates of the Constitution."); *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 36, 107 N.M. 439 (Legislature violated N.M. Const. art. IV, §§ 16,

22 by restricting use of funds); *Thompson v. Legislative Audit Comm'n*, 1968-NMSC-184, ¶¶ 16-17, 79 N.M. 693 (Legislature violated N.M. Const. art. V, § 1 by abolishing the office of the auditor); *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶¶ 48-49, 86 N.M. 359 (Legislature violated N.M. Const. art. XII, § 13's prohibition on controlling expenditures by institutions of higher learning).

While Defendants argue that the judiciary has no role to play because the PCC requires balancing by the Legislature, almost all acts by the Legislature require a balancing of competing interests. That is the nature of policy-making, and policy-making is subject to constitutional review, *see. e.g. Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, and *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037.[8] This is especially true when the court must ensure that state actors fulfill a

[8] *Bounds,* 2013-NMSC-037, upholds the principle that courts have authority to review the Legislature's constitutionally mandated action. *Bounds* found that there could be a violation of Article XVI's prior appropriation doctrine if the Legislature failed to act to protect senior water rights holders, stating "Our courts remain available…to intervene…to ensure that 'priority of appropriation shall be given the better right'" *Id.* ¶ 46 (citing N.M. Const. art. XVI, § 2.) This Court corrected the Appeals' Court statement that "[t]he Constitution's priority doctrine establishes a broad priority principle, nothing more," stating that it would be wrong to determine that constitutionally established priority water rights "are nothing more than an aspiration, subject to legislative whim and administrative discretion." *Id.* ¶ 47. *Bounds* is a strong illustration of the Court's duty to ensure the political branches compliance with constitutional mandates.

positive constitutional duty. *See e.g. Martinez-Yazzie,* No. D-101-CV-2014-02224, Decision and Order (July 20, 2018).[9]

Defendants also misapply *Sanders-Reed v. Martinez*, 2015-NMCA-063, the only case in New Mexico to discuss the PCC, and which supports Plaintiffs. [**Chamber 16-19, IPANM 20, Exec. Ds passim, Leg. 30**]. As Plaintiffs pointed out in their BIC, *Sanders-Reed* found that "Article XX, Section 21 of our constitution recognizes the State's duty to protect the atmosphere and other natural resources, and it delegates the implementation of that specific duty to the Legislature." 2015-NMCA-063, ¶ ¶ 16, 19. The *Sanders-Reed* court was clear: "one may raise arguments concerning the duty to protect the atmosphere, but such arguments must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action." *Id.* ¶ 15. Plaintiffs here bring claims directly under the Constitution for immediate harms from uncontrolled oil and gas pollution. Additionally, the S*anders-Reed*

[9] *Jaramillo v. City of Albuquerque*, 1958-NMSC-107, ¶ 14, 64 N.M. 427, does not support the proposition that the PCC is merely an unenforceable policy statement. **[Exec. Ds 11; IPANM 12, 20]**. In *Jaramillo*, Plaintiffs sought an order that the City's work schedule violated a constitutional right to an 8-hour work day, pursuant to Article XX, Section 19 of the New Mexico Constitution; the Court held that the constitution does not provide this unequivocal right. The *Jaramillo* plaintiffs did not ask the Court to measure the legislature's compliance with a constitutional duty; here, Plaintiffs claim that Defendants have not implemented a statutory and regulatory scheme in accordance with a constitutional duty set forth in Article XX, Section 21 which mandates that the legislature "shall" act.

court noted that "Plaintiffs do not argue that the Legislature, or its statutory delegate – the EIB – has not established appropriate regulatory procedures to comply with the constitutional mandate to protect the atmosphere." *Id.* ¶ 16. *Sanders-Reed* also noted that the plaintiffs did not contend that the administrative process is "unavailable to them." *Id.* ¶ 17. Plaintiffs here *do* allege that the State has violated its constitutional duties by not establishing appropriate statutory and regulatory procedures to comply with the constitutional mandate. And, Plaintiffs allege the administrative process does not allow regulations that consider public health or the environment when permitting oil and gas production and pollution.

While *Sanders-Reed* found that "the common law must yield to the statutory scheme," *id.* ¶ 16, the statutory scheme must yield to the New Mexico Constitution, which is the challenge that Plaintiffs here raise. Plaintiffs do not "ignore[] or supplant[] the procedures established under the Air Quality Control Act." *Id.* ¶ 18. Instead, Plaintiffs allege that the statutory and regulatory scheme is deficient because, *inter alia*, (1) the Oil and Gas Act does not allow consideration of public health or the environment when authorizing fracking, and does not mandate pollution control in the extraction of oil and gas **[RP 52–53]**; (2) Defendants violate their own law – the Air Quality Control Act – because air quality in heavy oil and gas extraction counties in New Mexico does not meet federal health standards **[RP 49–51]**; (3) oil and gas is exempted from almost all

New Mexico environmental laws **[RP 43–48]**; and (4) the regulatory procedures are not appropriate because they do not permit challenges to oil and gas extraction based on public health or environmental concerns, and they do not result in pollution control **[RP 44, 51–54, 59–60]**.[10] Overall, Plaintiffs claim that Defendants have failed to control pollution from oil and gas extraction, and this failure violates the constitutional mandate.

C. The court can issue declaratory and injunctive relief without violating principles of separation of powers.

Plaintiffs ask the Court to measure the State's actions against its constitutional duty to control pollution, a fundamental role of the judiciary in our tri-partite government system. Plaintiffs do not ask this Court to impede the rule-making authority of the executive branch or the policy-making authority of the legislative branch, but to review how those branches of government have exercised authority when it comes to oil and gas production and the concomitant pollution, and determine whether they have fulfilled their constitutional duty to control pollution and protect our beautiful and healthful environment. Petitioners ask this Court "to measure the acts of the executive and the legislative branch solely by the

[10] It is also noteworthy that *Sanders-Reed* was decided on a motion for summary judgment, after factual development, rather than at the motion to dismiss phase. While Defendants dispute the facts in Plaintiffs' complaint, at this stage, all facts in the complaint must be accepted as true, and future fact development will prove the veracity of Plaintiffs' allegations.

yardstick of the constitution," which is "the function of the judiciary." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 1, 125 N.M. 343 (internal quotations and citations omitted).[11]

Cases cited by Respondents **[Leg 16-24, Exec Ds 17-22, IPANM 26-36, Chamber 16-25]**, in which the Court held the legislative or executive branches accountable to the Constitution, support Plaintiffs' position that the judiciary has a key role to play to enforce the Constitution and ensure other branches of government act constitutionally. For example, in *Taylor*, 1998-NMSC-015, ¶ 1 (internal citations omitted), which "concern[ed] only the sanctity of the New Mexico Constitution and the judiciary's obligation to uphold the principals therein," this Court held that the executive branch violated the Constitution by establishing a public benefits program that should have been established by the Legislature. Likewise, in *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶¶ 46-50, 120 N.M. 562, this Court found that the executive branch violated the Constitution by entering into compacts with Tribes for gambling when these parameters should have been established by the Legislature and not the

[11] The New Mexico Constitution does not impose strict separation of powers principles. *See State ex rel Clark*, 1995-NMSC-048, ¶¶ 32, 34, 120 N.M. 562 ("Despite the strict language of Article III, Section 1, this Court has previously said that the constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function. This common sense approach recognizes that the absolute separation of governmental functions is neither desirable nor realistic.…").

Executive.[12] These cases support the basic principle that the judiciary determines whether the legislative and executive branches have violated their constitutional duties.[13]

More recently, in *Amdor v. Grisham*, 578 P.3d 971, plaintiffs challenged executive orders aimed at curbing gun violence and drug abuse as executive usurpation of legislative authority. This Court found that the executive orders did not violate separation of powers because 1) the Legislature still retained all lawmaking power, 2) the orders did not "usurp[] the Legislature's role and function," and 3) the orders did not "implement long-term policy goals." *Id.* ¶ 103,

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[12] Executive Defendants cite *Clark*, 1995-NMSC-048, ¶ 40, for the proposition that "if a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue." **[Exec 18]**. Our State constitution is *not* silent regarding the State's duty to control pollution. In fact, *Clark* concerns the balance of power between the legislative and executive branches and illustrates the court's duty to interpret the constitution, and ensure other branches are acting in accordance with the constitution.

[13] Respondents misuse *Cockrell v. Bd. of Regents N.M. State Univ.*, 2002-NMSC-009, ¶ 13, 132 N.M. 156, which does not mention the New Mexico Constitution and says nothing about the courts' role in interpreting and enforcing the constitution. **[Exec Ds 18; IPANM 26, 34]**. Likewise, *State v. Druktenis*, 2004-NMCA-032, ¶¶ 105-107, 135 N.M. 223, upheld a sex-offender statute based on the Legislature's police power to protect the public and is not about the court's duty to hold the Legislature accountable to constitutionally mandated duties. **[Exec Ds 18]**. And *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 14, 120 N.M. 820, is inapplicable since it is a case in which the governor violated the mandate set by an appropriations bill by divvying out money on his own schedule, a clear abuse of executive authority, not a case in which the court was asked to interpret and enforce a constitutional duty. **[IPANM 28, 42; Exec Ds 19, 22]**.

107, 114. Here, the Court will not violate separation of powers in declaring Defendants violate their constitutional duty to control oil and gas pollution and ordering them to comply with the Pollution Control Clause. The Legislature will still retain all of its lawmaking power, perform its role and function, and implement policy, as in *Amdor*.

i. The political question doctrine does not bar relief.

This Court has recognized that federal constitutional jurisprudence has limited value in analyzing our more expansive State Constitution, especially when that federal law impinges on our Constitution. *Gutierrez,* 1993-NMSC-062, ¶ 32 (describing New Mexico's Court's "willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees."); *see also Van Soelen,* 2023-NMSC-027, ¶ 34, (rejecting the federal political question doctrine and finding partisan gerrymandering by the Legislature to be justiciable under state constitution).

Defendants ask the court to reverse this positive trend and surrender to an unquestioning embrace of federal political question doctrine as articulated in *Baker v. Carr,* 396 U.S. 186 (1962). **[IPANM 28–30; Leg. 17–20; Exec. Ds 32–36]** The Court should not abandon state constitutional rights to this doctrine.

Even if this Court does adopt Defendants' preferred federal limits on state constitutional rights, those limits do not preclude declaratory and injunctive relief

requiring constitutional compliance. *See Van Soelen,* 2023-NMSC-027, ¶ 48. This Court can leave the specifics of how the State will come into compliance with its constitutional duties, including the crafting of policy, up to the other two branches of government. (Baker factors 1, 3, 4). *See, e.g., Martinez-Yazzie,* No. D-101-CV-2014-02224, Decision and Order at 72-75 (July 20, 2018). Further, this Court can then measure those legislative and executive actions against constitutional standards (Baker factor 2). While this Court's declaration may require the political branches to develop new, constitutionally compliant policies, those policies would be developed by the legislature and implemented by the executive, without multiple pronouncements by various branches on one question (Baker factors 5, 6). The judiciary lays out the standard for constitutional compliance. The executive and legislative branches are then tasked with controlling pollution from oil and gas production in harmony with that constitutional standard. This is how all constitutional litigation proceeds. [14]

Aji P. v. State, 480 P.3d 438 (Wash. 2021), **[Leg. 17–20]** does not advance Defendants' "political question" arguments. The *Aji P.* plaintiffs brought their

[14] A Hawai'i state court recently declined to dismiss a state constitution environment provision case under the political question doctrine, stating: "this [political question] argument fails to recognize the two claims in this case are both based on the Hawai'i Constitution. The courts unequivocally have an important and long-recognized role in interpreting and defending constitutional guarantees." *Navahine F. v. Haw. Dep't of Transp.*, No. 1CCV-22-0000631, Ruling ¶ 6 (Haw. Cir. Ct. April 6, 2023).

climate case under the Washington state constitution which does not have a pollution control clause or any type of natural resources clause. Unlike New Mexico, there is no positive duty on the State of Washington to control pollution or protect the environment. *Aji P.'s* plaintiffs therefore relied solely on the substantive due process clause of the Washington constitution, asking the court to "address whether the State's current [greenhouse gas emission] statutes and regulations sufficiently address climate change." *Id.* ¶ 13. Likewise, in *Natalie R. ex rel. Roussel v. State*, 567 P.3d 550 (Utah 2025), **[Chamber 24–25]**, plaintiffs brought climate claims against the State of Utah, which also has no environmental or climate protections in its constitution. *Aji P*. and *Roussel* are irrelevant to a case involving enforcement of our Pollution Control Clause. [15]

ii. Courts enforce positive constitutional duties.

Contrary to Defendants' argument that no court has ever granted the kind of relief Plaintiffs request, New Mexico's own judiciary recently issued declaratory

[15] Similarly, neither *Kanuk v. State, Dept of Natural Res.,* 335 P.3d 1088 (Alaska 2014), nor *Sagoonick*, 503 P.3d 777, supports Defendants' argument since both cases involve climate claims under a constitution without a Pollution Control Clause. In those cases, youth plaintiffs sued the state for violating their rights to a livable future by not protecting the climate, under the Alaska Constitution's Natural Resources Clause which simply mandates that the legislature "manage and develop the State's natural resources for the maximum common use and benefit of all Alaskans collectively." *Sagoonick*, 503 P.3d at 795. It contains no language about controlling pollution, or about the fundamental importance of a beautiful and healthful environment.

and injunctive relief regarding legislative and executive failures to meet constitutional duties.

In *Martinez-Yazzie v. State of New Mexico*, after declaring the State's school system unconstitutional under the Education Clause, as well as the Equal Protection and Due Process Clauses of the New Mexico Constitution, the court issued injunctions against the State to ensure compliance with its constitutional duties to New Mexican students. No. D-101-CV-2014-02224, Decision and Order at 70-74 (July 20, 2018) (analyzing the six-factor test outlined in *Cunningham v. Gross*, 1985-NMSC-050, ¶ 11, 102 N.M. 723 for whether a court should issue an injunction). The court noted that although there was "tension between giving the Defendants and the legislature sufficient guidance to allow them to comply and usurping the policy making role that is appropriately the legislature's function," "numerous courts have entered injunctions in adequacy clause cases." *Id.* at 72.[16] To avoid separation of powers and political question issues, the *Yazzie* court did

[16] *See, e.g., Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005), *supplemented*, 112 P.3d 923 (Kan. 2005) ("We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution. It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable."); *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563-64 (Tex. 2003) ("The final authority to determine adherence to the Constitution resides with the Judiciary. Thus, the Legislature has the sole right to decide how to meet the standards set by the people in article VII, section 1, and the Judiciary has the final authority to determine whether they have been met."); *see also* **[BIC 13, FN 5]**.

not order specific remedies, but instead enjoined the political branches to make "[r]eforms to the current system of financing public education and managing schools." *Id.* at 74. In "deference" to the "legislature and the executive branches," the court gave them "an opportunity to create a funding system that will meet the constitutional requirements" and provided guidance to the State, including directing that the "new scheme … include a system of accountability to measure" whether at-risk students were getting an adequate education and to assure that the money was spent "efficiently and effectively [to comply with the constitution]." *Id.* at 74-75. The court also retained jurisdiction to ensure compliance with the constitutional mandate. *Id.* at 75.

New Mexico's judiciary has shown that it is more than capable of adjudicating legally and factually complex constitutional issues while respecting separation of powers, as it did for education in *Yazzie* and for voting rights in *Van Soelen,* 2023-NMSC-027. Our courts are equipped and, indeed, required, to hold Defendants to the constitutional duty created by the Pollution Control Clause, just as courts in Alaska and Louisiana have held their political branches to their own, unique, environmental constitutional standards. *See Sagoonick,* 503 P.3d 777*; Sullivan,* 311 P.3d 625*; Save Ourselves,* 452 So. 2d 1152, *supra* at 10-11.[17]

[17] Defendant **[Chamber 23–24]** cites *Held v. State*, 560 P.3d 1235, 1253 (Mont. 2024), wherein the Montana Supreme Court stated that the "proper way to deal

D. Plaintiffs pled a valid Pollution Control Clause claim.

The laundry list of statutes and regulations cited by Defendants does not undermine Plaintiffs' well-pled allegations. *See* **[Chamber 26–29**; **Leg. 25–30; Exec. Ds 25–26; IPANM 17–19]**. Pollution control is not an abstract legal exercise: determining whether a law or legal regime actually protects our State's environment requires facts about real-world effects, not just blackletter quotation. Defendants are free to introduce such facts if this Court returns this case to the trial court, but not before.[18] For now, the facts alleged by Plaintiffs provide plausible grounds for relief and a fair idea of the factual basis. *See Schmitz v. Smentowski,* 1990-NMSC-002, ¶ 9, 109 N.M. 386. (stating the pleading standard required to survive a motion to dismiss).

Plaintiffs' allegations, which must be taken as true, establish critical indicia of a regime that does not control pollution and is thus constitutionally deficient:

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with [plaintiffs'] concerns were with specific suits directed at specific, identifiable statutes." That is exactly what Plaintiffs do here. We have alleged constitutional violations in specific statutes, including the wholesale exemption of oil and gas pollution from almost all of New Mexico's environmental laws, the failure of the Oil and Gas Act to consider health or the environment in the granting of drilling permits, and the failure of the State to meet legal air quality standards for toxic air pollutants. **[RP 43-63]**.

[18] The Chamber not only seeks to improperly introduce facts during consideration of a 12(B)(6) motion, but cloaks those impermissible facts in Record Proper cites to the Chamber's earlier briefing. *See* **[Chamber 2–3, 36–37]**.

1) sweeping legal exemptions for oil and gas pollution, **[RP 45–48]**; [19]

2) authorization of new sources of pollution—new oil and gas infrastructure—without consideration of health or environment, **[RP 28–29]**;[20]

3) chronic underenforcement of existing constraints on oil and gas pollution, **[RP 51–60, 76–77]**;[21] and consequently,

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[19] For example, because the Legislature has excluded oil and gas waste from the Solid Waste Act **[RP 46–47]**, the protections afforded to New Mexicans seeking to challenge a new solid waste storage facility under the Solid Waste Act do not apply to Plaintiffs seeking to challenge a new oil and gas solid waste storage facility. *See In re Rhino Envtl. Servs.*, 2005-NMSC-024 (Agency must consider public's comments before granting landfill permit because public participation and hearing requirement is central to Solid Waste Act).

[20] Defendants claim that Plaintiffs neglected to mention relevant statutes and regulations. In fact, Plaintiffs acknowledged in their Complaint that the Oil and Gas Act allows the OCD to consider public health and the environment only when addressing toxic liquid waste from fracking. **[RP 52]**. This limited statutory authority and ensuing regulations do not change Plaintiffs' central concern – that each fracking site in New Mexico has been authorized by Defendants with no review of environmental or public health harms because the law doesn't allow it, **[RP 53]** and no basis exists for Plaintiffs to challenge new fracking development. **[RP 54]**. Thus, rules issued under this limited authority, *see* **[Leg. 26; Chamber 27–29]**, do not address the harm and constitutional violations raised by Plaintiffs.

[21] Defendants rarely inspect or mitigate air pollution from 66,000 active fracking wells, and allow thousands of unplugged inactive wells to continue to pollute. **[RP 60–63]**. The Legislature has failed to provide the regulatory agencies with the resources needed to control pollution from oil and gas production. **[RP 55–58]**.

4) widespread, quantifiable harms on New Mexicans' health and environment caused by oil and gas pollution. **[RP 41–42, 49–50, 64, 70–72, 75–76]**. [22]

These facts are uncontradicted—and indeed, cannot be contradicted at this stage of the case—by citing laws that have demonstrably failed to protect our environment; nor does the mere existence of those laws establish compliance with the Pollution Control Clause.[23] Likewise, Plaintiffs were not required to exhaust administrative

[22] Toxic emissions continue unabated from tens of thousands of pollution sources, with more sources permitted every year. **[RP 51–53]**. Defendants do not consider the harms of oil and gas production and pollution before issuing permits for new fracking wells – OCD does not have the statutory authority **[RP 52–53]** and NMED often does not require permits at all. *See* 20.2.72.200(A) NMAC; *see also* **[RP 48–52]**. Consequently, despite Defendants' contentions about the Air Quality Control Act **[Leg. 27; IPANM 18–19]**, in heavy oil and gas producing regions, the air is far out of compliance with legal, health-based standards. **[RP 49–50].** Similarly, liquid fracking waste continues to contaminate the land and water **[RP 75–77]** and indigenous ancestral landscapes continue to be destroyed. **[RP 90–95]**. In short, Defendants fundamentally fail to control pollution from oil and gas extraction, and the laws cited by Defendants do not demonstrate otherwise.

[23] The Legislature cites, for instance, to recent regulations that prohibit venting and flaring of methane and other releases from oil and gas extraction. **[Leg. 28–29]**. These regulations—while riddled with exceptions and plagued by underenforcement **[RP 51, 53]**—do not detract from the well-pled facts that air quality in the Permian and San Juan basins is out of compliance with the law, unhealthy and continues to worsen and that huge quantities of oil and gas waste are still spilled with regularity. **[RP 49–50, 70–72, 75–77]**. In fact, contrary to the claims of IPANM **[IPANM 19]**, the oil and gas producing regions of New Mexico *do not* meet minimum federal and state health standards for air quality. Plaintiffs are not asking for a higher floor, merely for a regime that, through control of pollution, actually protects a healthful environment. The existence of the cited regulations is not the same as control of pollution and therefore does not, in the absence of factual development, demonstrate compliance with the PCC.

remedies before bringing a constitutional case, especially given their allegations that administrative advocacy has in fact been unavailable or unavailing.[24] *Sandia Sav. & Loan Ass'n v. Kleinheim*, 1964-NMSC-067, ¶ 14, 74 N.M. 95 ("[I]t is not necessary to exhaust administrative remedies in situations where the administrative agency could not pass upon the issue of constitutionality and relief therefrom would not be possible."); *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, ¶ 29, 85 N.M. 521 ("The doctrine of exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which an administrative tribunal clearly lacks jurisdiction, or which are vain and futile.").[25] To the extent that Defendants seek to show that Plaintiffs' complaint does not allege *every* relevant fact or cite every relevant piece of law, we agree: that is precisely why this case should be sent back to the trial court for further development.

In all, Plaintiffs' complaint demonstrates that Defendants have not complied with their constitutional duty to control pollution and control despoilment of the air

[24] For example, Plaintiffs cannot challenge specific fracking projects even when sited near their homes and schools **[RP 10–11]**. Permit challenges or proposed rules based on public health or environmental concerns are futile because OCD can only consider these matters in limited circumstances. **[RP 52–54]**.

[25] *New Energy Economy vs. Shoobridge*, 2010 NMSC-049, 149 N.M. 42, does not advance Defendants' position as it merely stands for the unremarkable proposition that a court cannot halt a lawful administrative procedure before it is complete. **[Exec Ds 28; Leg 9, 13]**.

and water consistent with using natural resources for the maximum benefit of the people. Plaintiffs' complaint outlines the environmental and health harms caused by oil and gas production without pollution mitigation, all permitted by Defendants. If the facts pled in the complaint are taken as true, this case must proceed so the court can determine if, as Plaintiffs have alleged, Defendants have complied with their constitutional duties to establish and maintain a pollution control scheme to protect New Mexicans and New Mexico from the harms of oil and gas pollution.

III. PLAINTIFFS CIVIL RIGHTS CLAIMS ARE VALID.

A. Plaintiffs' pled viable equal protection claims.

Defendants' responses to Plaintiffs' equal protection claims boil down to three arguments, none of which has merit.

First, Defendants wrongly assert that an equal protection claim must be targeted at a single statute or regulation. That is not the law. Moreover, the complaint identifies the specific Legislative statutes and conduct that created, funded and implemented the statutory framework that allows pollution from oil and gas development to disproportionately harm specific groups of Plaintiffs. It also identifies the specific regulations and enforcement conduct by the Executive Defendants that allow pollution from oil and gas development to disproportionately harm specific groups of Plaintiffs. Defendants cite no cases that

bar equal protection claims aimed at conduct based on multi-statute and/or multi-regulatory frameworks or that are aimed at discretionary government actions that have a discriminatory effect. That is because courts have a long history of applying equal protection in these circumstances. See, e.g., *Martinez/Yazzie*, No. D-101-CV-2014-02224 (1st Jud. Dist. Ct. July 20, 2018); *Van Soelen*, 2023-NMSC-027; *Griego v. Oliver*, 2014-NMSC-003; *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, 138 N.M. 331.[26]

Second, Defendants wrongly assert that disparate impact equal protection claims, such as Plaintiffs', must allege and prove intentional discrimination. Defendants rely primarily on federal equal protection case law, but fail to mention that the New Mexico Supreme Court has repeatedly "recognized that the Equal Protection Clause of the New Mexico Constitution affords 'rights and protections' independent of the United States Constitution." *Breen*, 2005 NMSC-028, ¶ 14. Under New Mexico equal protection law, Plaintiffs do not have to prove intentional discrimination. *See Id.* ¶¶ 10-15, 30-32 (setting forth the standards and burden of proof).

Judge Singleton, in ruling that New Mexico's complex system of statutes,

[26] Defendants' citation to *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 30, 129 N.M. 586, that equal protection challenges can be made only as to a single statute or regulation is misplaced. That case plainly states that disparate impact claims can be made to challenge a specific identifiable "practice or policy." That is precisely what Plaintiffs have done here.

regulations and local school district practices violated at-risk students' equal protection rights to an education, found that invidious intent or animus is not a required element in a disparate impact equal protection claim:

> No New Mexico authority is cited for the proposition that animus must be shown in an equal protection case raised under the New Mexico Constitution, and the Court did not find this requirement in the equal protection cases it reviewed.

Martinez/Yazzie, No. D-101-CV-2014-02224, Decision and Order at 63-65 (July 20, 2018). Defendants' citation to *Welch v. Sandoval Cnty. Valuation Protests Bd.*, 1997-NMCA-086, ¶ 15, 123 N.M. 722, is misplaced because the Court of Appeals in *Welch* explicitly relies on a *federal* decision interpreting the federal equal protection clause (*Hunter v. Underwood*, 471 U.S. 222, 227 (1985)) without discussion of the New Mexico Constitution's equal protection clause. The New Mexico Supreme Court has never adopted, nor should it here, the federal courts' abrupt and inappropriate narrowing of federal constitutional equal protection that began in *Washington v. Davis*, 426 U.S. 229, 241 (1976), cited in *Hunter*. Our Court should instead interpret New Mexico's equal protection clause consistently with the civil rights cases cited in Plaintiffs' Brief-In-Chief, to not require intent as an element of disparate impact.[27]

[27] Even *Washington v. Davis* recognized that discriminatory intent does not have to be "express or appear on the face of the statute," and that "a law's disproportionate impact" is relevant. "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate. … Necessarily, an invidious discriminatory purpose

Third, Defendants wrongly assert that the three classes to which Plaintiffs belong are not similarly situated to any other New Mexicans, although Defendants do not dispute the fact that Plaintiffs' classes are treated very differently than other New Mexicans. Plaintiffs correctly contend that the state has protected New Mexicans who do not live near oil and gas wells from air and water pollution and land degradation far more than those who live near these wells. By affirmatively permitting oil and gas development without protecting Indigenous people and their sacred sites, Frontline Communities, and nearby Youth from the severely harmful effects of pollution and degradation allowed by the state, Defendants are clearly creating two groups of New Mexicans and treating one of those groups – those living near oil and gas wells permitted by the State – differently. For example, in contrast with their treatment of Plaintiffs, Defendants implemented "Special Rules" to severely limit drilling and pollution in areas of New Mexico where residents have more political power. *See*, *e.g.*, 19.15.29.9 NMAC (regarding Santa Fe and the Galisteo Basin).

Plaintiffs' disparate impact claims are not based on their geographic location, but on Defendants' conduct in granting oil and gas permits while failing

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may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 241-242.

to regulate these very dangerous activities to protect Plaintiffs. Like their similarly-situated New Mexico residents living elsewhere, 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 limits on the health harming pollution and environmental destruction caused by oil and gas extraction. The equal protection clause is meant to protect classes of people like Plaintiffs who have traditionally lacked the political power to protect themselves from abusive impacts of state decision-making, or whose fundamental rights are negatively impacted by state action.

B. Plaintiffs pled viable substantive due process claims.

Plaintiffs ask this Court to make a straightforward ruling. The Due Process Clause explicitly guarantees the fundamental rights to life, liberty, and property, N.M. Const. art. II, § 18, and Defendants violate these fundamental rights by permitting uncontrolled oil and gas extraction and concomitant pollution. As Defendants concede, the threshold inquiry for Plaintiffs' substantive due process claims concerns whether government action has deprived Plaintiffs of their fundamental rights. *Bounds*, 2013-NMSC-037, ¶ 50. **[Exec. Ds 38-39; Leg. 38]**. Plaintiffs meet this threshold.

Defendants avoid substantive analysis of the question before this Court and instead cursorily and repeatedly assert that the Due Process Clause "is not a

guarantee of a minimal level of safety or security." *Sugg v. Albuquerque Pub. Sch. Dist.*, 1999-NMCA-111, ¶ 15, 128 N.M. 1. **[Exec. Ds 40; Leg. 39-40]**. Defendants ignore that the Due Process Clause *explicitly guarantees* the fundamental rights to life, liberty, and property. N.M. Const. art. II, § 18. Moreover, as set forth in Plaintiffs' Brief-In-Chief at 34-36, each of these rights inextricably requires the existence of a safe and healthful environment. *See Whipple v. Village of N. Utica*, 79 N.E.3d 667, 675-76 (Ill. App. Ct. 3d Dist. 2017); *In re Haw. Elec. Light Co., Inc.*, 526 P.3d 329, 337 (Haw. 2023) (Wilson, J. concurring) ("I write separately to emphasize the right to a life-sustaining climate system is also included in the due process right to life, liberty, and property…"); *Minors 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.).

Plaintiffs have not asked the Court to find a right to live in an environment *free* from all pollution, but instead ask the Court to recognize a right to live in a healthful environment, as part of their state constitutional rights to life, liberty, property, and safety. Thus, federal decisions holding that traditional Substantive Due Process does not include a right to a wholly *pollution-free* environment are immaterial. **[*See, e.g.* Exec. Ds 40-41]**. Importantly, whether employing original or interstitial analysis, New Mexican courts are not restricted by federal jurisprudence when determining the rights and protections guaranteed under the New Mexico Constitution. Indeed, New Mexican courts have a well-established history of

finding that this State's Constitution provides more expansive protections than its federal counterpart. **[BIC 31-33]**.

Despite Defendants' assertions to the contrary, Plaintiffs have pled detailed facts to establish that numerous, specific actions taken by Defendants to permit uncontrolled oil and gas extraction and concomitant pollution harm Plaintiffs' health, destroy their air, land, water, and sacred and cultural resources, and thereby violate their fundamental rights to life, liberty, and property. **[BIC 33-36, 44-46]**.[28] It is the court's duty to protect Plaintiffs from this active violation of their fundamental rights.

Plaintiff's complaint demonstrates that Defendants' government actions depriving Plaintiffs of their rights "shock[] the conscience." *Bounds*, 2013-NMSC-037, ¶ 49 (internal quotations omitted). **[Exec. Ds 38; Leg. 38]**. Defendants have permitted tens of thousands of oil and gas extraction sites with no consideration of human health or the environment. **[RP 43-54]**. This ongoing and ever-increasing emission of carcinogenic and toxic pollutants has directly and significantly harmed Plaintiffs. It has degraded their physical and mental health, contributing to persistent respiratory and cardiovascular problems, cancer, and mental distress among Plaintiffs and their loved ones; and despoiled their personal property, as

[28] Defendants' assertions that Plaintiffs identify no specific actions that violate their Due Process rights **[Exec. 37; Leg. 39]** overlook nearly 50 pages of Plaintiffs' complaint **[RP 43-95]**.

well as their sacred sites, threatening Plaintiffs' subsistence, livelihoods, and ability to sustain their cultural lifeblood. **[RP 7-31]**. Moreover, while Defendants are aware of the harms to Plaintiffs, as well as their own failure to control existing pollution, they continue to permit additional pollution at an uncontrolled pace. *See, e.g.,* **[RP 56-57; 64; 68-69]**.

Defendants falsely assert an attenuated connection between their actions and uncontrolled oil and gas pollution **[Exec. Ds 43; IPANM 40-41]**. These misleading characterizations either fundamentally misunderstand, or deliberately misrepresent, the reality that pollution is inherent within every phase of the oil and gas extraction process. **[RP 41-42]**. Permitting private natural resource activities *will* result in pollution. This does not imply alarmist conclusions about the illegality of every permit. **[IPANM 41]**. Instead, it rationally requires that Defendants control the *extent* of permitted pollution to prevent the most deleterious harms to Plaintiffs and to society at large—a requirement that they have not met.

Due to the vast magnitude of harm deliberately, knowingly, and repeatedly imposed by Defendants, Defendants' actions violate Plaintiffs' Due Process rights in a manner that shocks the conscience. **[BIC 44-45]**. As a result, it is incumbent upon this Court to intervene.

Additionally, while Plaintiffs need not rely on either the "deliberate indifference" or "state-created danger" standards to allege substantive due process

violations, the fact that Defendants' actions *do* satisfy both standards bolsters Plaintiffs' claims. Defendants challenge this notion, first seeking to limit the application of the "deliberate indifference" standard to "cases involving affirmative custodial relationships." **[IPANM 40]**.[29] *Cordova v. LeMaster*, 2004-NMSC-026, ¶ 30, 136 N.M. 217, defines the deliberate indifference standard as having two components: "an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the [prison] officials act with a sufficiently culpable state of mind." This definition nearly quotes *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991), but the *Miller* court includes *all* "offending officials" rather than only "[prison] officials." Thus, as it originated, the "deliberate indifference" standard is not limited to a rigid or narrow context, and the caselaw presents no explicit reason why it cannot be applied to an array of substantive due process violations. Here, Plaintiffs allege serious harms from pollution caused by oil and gas extraction **[RP 7-31]** as well as Defendants' persistent permitting of oil and gas extraction and pollution despite knowledge of these harms. *See, e.g.,* **[RP 56-57; 64; 68-69]**. Thus, Defendants' actions meet the deliberate indifference standard.

Contrary to Defendants' argument **[Exec. Ds 41-43]**, Plaintiffs do satisfy

[29] Defendants also try to impose the custodial cases limitation on the traditional "shocks the conscience" standard of Substantive Due Process analysis, with no precedential basis.

every element of the six-part test for the state-created danger theory of due process analysis set forth in *Sugg*. 1999-NMCA-111. Plaintiffs allege that (1) they are members of three limited and specifically definable groups, namely frontline communities, Indigenous peoples, and youth **[RP 7]**; (2) Defendants authorize oil and gas development without adequate pollution controls, creating immediate, proximate and serious harm to Plaintiffs' physical and mental health, personal property, and sacred, cultural sites **[RP 7-31; 43-95]**; (3) Defendants act with full knowledge of the consequences of their actions*, see, e.g.*, **[RP 56-57; 64; 68-69]**; (4) Defendants fail to correct or mitigate the harms they helped create in reckless disregard of the risk of injuries caused by the oil and gas pollution they encouraged **[RP 43-95]**; (5) Defendants' actions are conscience-shocking in light of the substantial harm knowingly and repeatedly inflicted upon Plaintiffs **[RP 7-31; 43-95]**; and (6) the harms arose from the State's uncontrolled authorization of oil and gas extraction **[RP 43-95]**. Thus, the state-created danger theory further bolsters Plaintiffs' substantive due process claims.

Finally, the contention that "Plaintiffs assert fundamental rights at the expense of other New Mexicans" **[Chamber 34]** is profoundly ill-informed. This argument relies entirely on "facts" not in the record and thus should not be reviewed at this motion to dismiss phase. Should this Court decide to review the argument, however, it is legally and factually flawed. First, it relies, without

evidence, on the false proposition that New Mexican oil and gas production cannot continue if pollution controls are put in place and enforced. Plaintiffs do not call for an end to oil and gas production, or even a phase-down of production; Plaintiffs simply assert that the failure to control preventable pollution from the oil and gas production process has harmed them and violated their constitutional rights and the State's constitutional obligations. Plaintiffs seek a statutory, regulatory and enforcement system in which environmental and public health protections exist and are followed as part of oil and gas industry operations. It is uncontrolled oil and gas pollution that harms New Mexicans, not Plaintiffs' constitutional case.

Second, and most significantly, the contention that Plaintiffs' fundamental rights claims fail "as a matter of law" because they intrude on the rights of others **[Chamber 38]** reveals a basic misunderstanding of constitutional law. It is the judiciary's role to protect constitutional rights even when there are competing interests—and there is a long-established history of New Mexican courts doing just that. *See, e.g.*, *Rodriguez*, 2016-NMSC-029 (agricultural industry has to provide workers compensation to farm and ranch laborers, even if it reduces industry profits);[30] *Griego*, 2014-NMSC-003 (county clerks have to validate same sex marriages, even if they disagree that people of the same sex can be wed); *NARAL*

[30] Notably, ten years after *Rodriguez*, New Mexico's agricultural industry remains alive and well, despite the industry's fear-mongering claims that it would not survive constitutionally adequate regulation.

v. Johnson, 1999-NMSC-005, 126 N.M. 788 (taxpayer dollars can be used for abortions, even if this contradicts the religious beliefs of some New Mexicans).

Rather than finding that the Inherent Rights Clause has no meaning **[Chamber 34]**, in *Morris v. Brandenburg*, the Court of Appeals found plaintiffs' request to recognize a right to "aid in dying" conflicted with the right to life in the Inherent Rights Clause. 2015-NMCA-100*,* ¶ 39. Here, by contrast, Plaintiffs' proposed right to a healthful environment is part of, nor contrary to, the rights enumerated in the Inherent Rights Clause. And unlike the right to a "dignified peaceful death," *id.* ¶ 45, which could apply only to certain patients who met very specific criteria, the right to a healthful environment benefits all New Mexicans, without exception.[31] Ultimately, *Morris* was decided by this Court, which did not mention the Appellate Court's "exclusionary defects" argument in *Morris v. Brandenburg*, 2016-NMSC-027, making the Chamber's position even more untenable.

C. The Legislature is not immune.

The Legislature's final argument wrongly conflates their separation of powers argument with legislative immunity, a limited doctrine based on New Mexico Constitution Article IV, Section 13, known as the speech and debate

[31] This remains true, contrary to the Appeals Court's flawed assertions. *See Atencio v. State,* 2026-NMCA-011, ¶ 48.

clause. This Court has interpreted and applied the speech and debate clause just once: *Stewart v. Ramczyk*, 2025-NMSC-032. That case involved one legislator's suit against another legislator for damages under the Human Rights Act for alleged retaliation in the exercise of her authority to make Senate office and seat assignments. This Court decided that the clause protected individual legislators from suits for damages based on their legislative activities and that the assignment of Senate offices and seats was within the protected "sphere of legitimate legislative activity." Notably, the Court rejected any broader application of its decision:

> In drawing on federal law, however, we are not adopting the federal courts' interpretations nor any particular approach to parsing the nuances of a legislator's immunity from suit. *See, e.g.*, […] *Cruz-Guzman v. State*, 916 N.W.2d 1, 13 (Minn. 2018) ("As appellants suggest, the House and Senate are essentially arguing that the Minnesota Constitution provides them with absolute immunity for violating a duty that the constitution specifically imposes on the Legislature. We decline to interpret one provision in the constitution—the Speech or Debate Clause—to immunize the Legislature from meeting its obligation under more specific constitutional provisions—the Education, Equal Protection, and Due Process Clauses.").

Stewart, 2025-NMSC-032, ¶ 15.

As demonstrated by the long history of Court review of legislative enactments under the Constitution, the Legislature's claim of immunity from any suit challenging the constitutionality of any statute or statutory scheme is wildly overreaching and wrong.

IV. CONCLUSION

Plaintiffs have pled valid constitutional claims under the Pollution Control Clause and civil rights clauses of the New Mexico Constitution. Plaintiffs should be given the opportunity to proceed with their case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2026, a true and correct copy of the foregoing document was attached to a motion for leave to file reply brief and thereby e-filed and served through the Court's e-filing system upon counsel of record.

/s/ gail evans
Gail Evans

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

The body of this Reply Brief uses Times New Roman, a proportionally-spaced typeface, and contains 9,997 words, as counted by Microsoft Word 365, version 2409. This petition therefore complies with NMRA 12-502(D)(3).

/s/ gail evans
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