IN THE SUPREME COURT OF THE STATE OF UTAH

NATALIE R., a minor, by and through her guardian, DANIELLE ROUSSEL; et al. *Plaintiffs-Appellants*, vs. STATE OF UTAH; et al., *Defendants-Appellees*.	No. 20230022-SC On Appeal from the Third Judicial District Court, Salt Lake County, Honorable Robert Faust No. 220901658

APPELLANTS' REPLY BRIEF

Erin T. Middleton (10666)
Assistant Solicitor General

David N. Wolf (6688)
Michael Begley (16396)
Trevor Gruwell (18003)
Assistant Utah Attorneys General

Sean D. Reyes (7969)
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
(801) 366-0100
emiddleton@agutah.gov
dnwolf@agutah.gov
mbegley@agutah.gov
tgruwell@agutah.gov

Attorneys for Appellees

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

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

Attorneys for Appellants

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INTRODUCTION

The citizens who ratified Utah's Constitution understood its fundamental protections to restrict the State from taking years off the lives of children and causing profound injuries to their health and safety. Those are precisely the existential harms at stake for these Youth Plaintiffs. That the Youth's injuries derive from the State's fossil fuel policies and practices does not limit the fundamental protections afforded to their lives and health by Utah's Constitution.

This Court's precedent establishes that fundamental rights are not defined by the particular form of governmental interference at issue. Otherwise, the protections afforded by Utah's Constitution would be rendered meaningless. The plain text, history, and traditions of Utah's inalienable rights and due process provisions clearly establish that they encompass fundamental protection against the harms these Youth are experiencing. Defendants offer no authority or historical support to the contrary.

A plain reading of Plaintiffs' complaint belies Defendants' contention, raised for the first time on appeal, that the Youth have not demonstrated a ripe controversy. Resolving the Youth's claims on a full evidentiary record is urgently necessary here because, as the allegations demonstrate, Defendants' ongoing implementation of the challenged provisions is already causing them serious and mounting harm.

Declaring the challenged policies and practices unconstitutional would alleviate Plaintiffs' harms. First, a favorable ruling would resolve the controversy presented here by eliminating the statutory mandates for State officials to maximize, promote, and systematically authorize fossil fuel development, which induce Defendants' deprivation of Plaintiffs' fundamental rights. Second, a declaratory judgment, informed by scientific findings of fact at trial, would provide a meaningful constitutional standard for preventing state deprivation of children's fundamental rights to life, health, and safety, which would thereafter guide Defendants' regulatory practices. These remedies suffice for redressability.

ARGUMENT

I. The Youth Have Stated Claims for Violations of Fundamental Rights Under Utah's Constitution

Defendants' contention that Plaintiffs cannot invoke the bedrock protections for their lives, health, and safety merely because the method of government interference involves fossil fuels "misunderstand[s] the way [Utah's courts] apply constitutional guarantees. The Utah Constitution enshrines principles, not application of those principles." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶70 n.23, 450 P.3d 1092. Defendants' attempt to deny the applicability of the Youth's fundamental rights contradicts this Court's established method of interpretation, contravenes the explicit text and original public meaning of Utah's

inalienable rights and due process provisions, and conflicts with ample and growing precedent from courts across the country and around the world recognizing that the harms to youth from fossil fuel policies implicate fundamental rights and are subject to judicial review.

A. Plaintiffs' Fundamental Right to Life Is Explicitly Protected

In their opposition brief, Defendants mischaracterize the basis of Plaintiffs' claims as an unrecognized constitutional "right to be free from fossil fuel emissions," Def. Br. 44. At the outset, Defendants' mischaracterization of Plaintiffs' rights fails because the right to life is explicit in the Constitution. A party may challenge the "level of generality at which an asserted right is framed" only where a party claims infringement of an *unenumerated* liberty interest that has "not previously received constitutional protection." *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶70, 472 P.3d 843; *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("careful description" requirement is for unenumerated "fundamental liberty interest[s]").

Here, the Youth's claims do not turn on an unestablished, unenumerated liberty interest, but on the explicit right to life, which includes fundamental protections for health and safety that are well-grounded in Utah's Constitutional text, history, and precedent. Aplt. Br. 52-68. Indeed, courts have taken it as a "given" that serious injuries to health "count as direct and substantial

impairments of th[e] fundamental right to life." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1080 (10th Cir. 2015). Defendants would have this Court read the express protections of life out of Utah's Constitution.

Defendants' reliance on cases involving unestablished, unenumerated liberty interests under the U.S. Constitution is further misplaced because none involved the rights or harms alleged here. "*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner . . . . Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights[.]" *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015). In *Collins v. City of Harker Heights*, the claimant's asserted "right to be free from unreasonable risks of harm to his body" failed because the complaint did not challenge affirmatively harmful government conduct, but a failure to protect. 503 U.S. 115, 117, 125-26 (1992). In *Reno v. Flores*, the Court found, on summary judgment, that the evidence did not support a violation of the right to "freedom from physical restraint" because the parties already settled claims regarding detainment conditions through a consent decree. 507 U.S. 292, 298, 302 (1993). Here, Plaintiffs' allegations show that Defendants' affirmative conduct is taking years off of their lives and substantially injuring their health *today*. R.9-31, 39-42, 49.

The citizens who ratified Utah's Constitution would never have doubted that it fundamentally restricts the government from affirmatively causing profound harms to the lifespans, health, and safety, of children.[1] Neither Defendants nor the district court offered any textual analysis or historical support to the contrary. At this early stage, Plaintiffs have provided more than sufficient support to make out a *prima facie* case to allow them the opportunity to present evidence of their constitutional claims. Aplt. Br. 52-68; *see New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 n.6 (2022) (courts decide constitutional questions of original public meaning "based on the historical record compiled by the parties").

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[1] Contrary to Defendants' mischaracterization of Plaintiffs' claims as challenging a failure to protect under a state-created danger theory, Plaintiffs are "master[s] of the complaint" who "control[] the claims to be litigated" and Defendants cannot transform them into ones "that were not pleaded[.]" *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 602-03 (Utah 2019). Defendants' contention that third parties are solely causing the harm, and not Defendants, Def. Br. 61, directly contradicts the factual allegations, which are to be taken as true, and the conclusions of courts in comparable cases. *E.g., Juliana v. United States*, 947 F.3d 1159, 1166-67 (9th Cir. 2020); *Held v. Montana*, No. CDV-2020-307, Order on Mot. to Dismiss, 7-12 (Mont. 1st Jud. Dist. Ct. Aug. 4, 2021). Moreover, Defendants did not dispute the sufficiency of the allegations demonstrating that the challenged policies and conduct are causing Plaintiffs' harms, which is a matter for determination on the evidence.

B. This Court Has Rejected Defendants' Methodology, Which Mischaracterizes Fundamental Rights

Contrary to Defendants' position, Utah's courts neither define constitutional rights nor limit their applicability by the "particular form of governmental interference." *K.T.B.*, 2020 UT 51, ¶52. This Court and others have rejected that methodology because it would cause the Court to "entirely overlook the substantial [constitutional] interests at the heart" of cases involving fundamental rights. *Id.* ¶52; *accord, e.g.*, *Guertin v. Michigan*, 912 F.3d 907, 919 (6th Cir. 2019) ("To show that the government has violated one's [constitutional right], a plaintiff need not establish any constitutional significance to the means by which the harm occurs.") (cleaned up).

In *K.T.B.*, this Court rejected the mischaracterization of a "Mother's fundamental right to parent" as a "right to retain parental rights despite failing to comply with required procedure." 2020 UT 51, ¶57. The Court explained that this overly-narrow description "incorrectly define[d] the right" by reference to the form of government interference the mother was challenging. *Id.* ¶¶55, 57. Here, Defendants' invocation of a "right to be free from fossil fuel emissions," Def. Br. 55, makes the same analytical error. *K.T.B.* is unequivocal that the characterization of fundamental rights "does not depend on the form of governmental interference at issue." *K.T.B.*, 2020 UT 51, ¶62.

Defendants' contention that this principle only applies when "courts have already recognized the specific fundamental right at issue" is circular and unfounded. Def. Br. 47. By Defendants' logic, courts never could have recognized important fundamental rights like personal security and bodily integrity. *E.g.*, *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985); *Malan v. Lewis*, 693 P.2d 661, 674 n.17 (Utah 1984); *Guertin*, 912 F.3d at 919. Contrary to Defendants' contention, *Guertin* identified the fundamental right at issue in that case broadly as "bodily integrity." 912 F.3d at 919. In the passage misleadingly modified by Defendants, Def. Br. 60-61 (*quoting, with significant alteration, Guertin*, 912 F.3d at 921), the court explained *how* the government had violated the right, not the definition of its scope. The court explicitly noted that the right to bodily integrity applies both in and outside the contexts of government-imposed punishment and physical restraint, "regardless of the manner" of governmental intrusion. 912 F.3d at 919.

Indeed, if courts determined which rights were fundamental by reference to whether there is a deeply-rooted history of protection from the particular form of government interference, it would eviscerate the inalienable rights and due process protections enshrined in Utah's Constitution, rendering them inapplicable to new and changing circumstances, contrary to their original public meaning and intent. "For the law to freeze the meaning of those clauses as of one

point in time would be to deny the essential meaning and purpose that was built into those clauses by the broad, expansive language the Constitution uses." *DeBry v. Noble,* 889 P.2d 428, 435 (Utah 1995). As Defendants concede, "there is room for new applications of fundamental rights." Def. Br. 45.

Defendants' mischaracterization of Plaintiffs' claims as asserting a right to a clean and healthy environment likewise fails. Nowhere in their Complaint do Plaintiffs assert that right. That the violation of Plaintiffs' fundamental rights results from environmental degradation does not transform their well-pleaded claims into assertions of a right to a clean and healthy environment. *See K.T.B.*, 2020 UT 51, ¶52; *Utah Stream Access Coal.*, 439 P.3d at 602-03. Defendants' argument "entirely overlook[s] the substantial [constitutional] interests at the heart" of this case—their rights to life, health, and safety. *K.T.B.*, 2020 UT 51, ¶52.[2]

C. The Fundamental Constitutional Protections for Life, Health, and Safety Unquestionably Extend to Youth and Children

Defendants assert that Plaintiffs' rights should be defined by the manner of

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[2] None of the "right to a healthy environment" cases on which Defendants rely, Def. Br. 60 n.25, is binding, none involved the same profound harm to Utah's children at issue here, and none invoked the bedrock protections against affirmative governmental deprivation of life, health, and safety under Utah's Constitution. When confronted with claims alleging profound harms to life, health, and safety from fossil fuel policies, courts have held that such claims implicate fundamental rights. *See* note 6, *infra*.

government interference because they imply, incorrectly, that the Youths' "status or conduct has not already received constitutional protection." Def. Br. 48. But *K.T.B.* makes clear that rights are not to be defined by reference to the particular form of government interference in *any* circumstances, irrespective of a party's status and conduct. *K.T.B.*, 2020 UT 51, ¶¶56-57 (rejecting mischaracterization of asserted right for both reasons, independently).

Moreover, the very cases on which Defendants rely make clear that only "the nature of *parental* rights is defined based on" the status and conduct of the individual invoking the right. *Id.* ¶59 (emphasis added); *Kingston v. Kingston*, 2022 UT 43, ¶29, 532 P.3d 958 (same); Def. Br. 46-47 (citing only parental rights cases). Defendants offer no authority or justification for limiting Plaintiffs' fundamental rights based on their status and conduct. Nor is there any.

To the contrary, this Court's precedent recognizes that children are entitled to enhanced constitutional protection when it comes to their health and safety. *Jensen v. Cunningham*, 2011 UT 17, ¶¶73-74, 250 P.3d 465 (other fundamental constitutional interests "must yield" to "protecting the health" of children and this "is especially the case where a child's life is endangered"); *Kingston*, 2022 UT 43 (same). The U.S. Supreme Court has also long recognized children's special constitutional status and need for protection, in a wide range of contexts. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 221, 226 (1982) (policies that impose a lifetime of

hardship on children for matters beyond their control are an "area of special constitutional sensitivity"); *Weber v. Aetna Cas. & Sur. Co.,* 406 U.S. 164, 175 (1972) (rejecting the law's imposition of disabilities on children of unwed parents). Youth and children are also uniquely vulnerable to and disproportionately injured by the physiological harms of fossil fuel emissions. R.44-50, 54-57, 67-72.

Nor is there any basis to limit the Youth's fundamental rights based on their conduct. These innocent Youth simply seek to grow to adulthood safely. Even adults incarcerated for criminal conduct enjoy fundamental constitutional protection from imposition of conditions that endanger their lives, health, and safety. *E.g., Wickham v. Fisher*, 629 P.2d 896, 898, 901 (Utah 1981) (government policies that subject a person to conditions "inimical to the maintenance of the[ir] health" and safety raise "serious constitutional issues" under Utah's protections of life and liberty); *Brown v. Plata*, 563 U.S. 493 (2011) (conditions that endangered prisoners' lives, health, and safety violated due process); *Helling v. McKinney*, 509 U.S. 25, 35 (1993).[3] These fundamental protections from government

[3] Even in the criminal context, courts afford children convicted of crimes special protection beyond that afforded adults. *Roper v. Simmons,* 543 U.S. 551, 575 (2005) (capital punishment of a minor, as opposed to an adult, violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (mandatory life-without-parole sentences for children, as opposed to adults, is cruel and unusual punishment).

endangerment apply with at least equal, if not greater force to the State's imposition of pervasive dangerous, inescapable, and life-threatening conditions upon these innocent children. R. 9-31, 43, 48; *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (Since it is unconstitutional "to hold convicted criminals in unsafe conditions, it must be unconstitutional" to subject those "who may not be punished at all" to such conditions.).[4]

D. Utah's Early Fossil Fuel Development Is Not Determinative of the Youth's Claims

That fossil fuel development occurred in early Utah does not determine the constitutionality of the statutes and conduct challenged here. As an initial matter, none of the historic laws Defendants cite mandated that the government actively maximize, promote, and systematically permit fossil fuels, as the provisions

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[4] Recognizing that Plaintiffs have stated a claim under Utah's inalienable rights and due process clauses would not open the door to claims in the hypothetical circumstances on which Defendants speculate. Def. Br. 53. Utah's courts "generally frown upon unsupported slippery-slope arguments." *Matter of Childers-Gray*, 2021 UT 13, ¶117, 487 P.3d 96; s*ee also, Rochin v. California*, 342 U.S. 165, 174 (1952) ("hypothetical situations can be conjured up . . . producing practical differences despite seemingly logical extensions. But the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'"). Unlike the hypotheticals Defendants offer, the allegations here, which are to be taken as true, demonstrate that the State's perpetuation of fossil fuels is substantially harming children's health and taking years off their lives, R.43-72, as pediatricians around the state have observed. *See* Br. of Amic. Cur. Utah Ch. – Amer. Acad. of Pediatrics, et al.

challenged here do. *See, e.g.*, Revised Statutes of the State of Utah § 2370 (1898) (state lands "*may* be leased" for fossil fuel development) (emphasis added); *id.* at § 3588 (eminent domain "*may* be exercised" for infrastructure for mining purposes) (emphasis added). In addition, the historic levels of fossil fuel use and development in early Utah are incomparable to today's. R.39.

Moreover, historical policies and practices do not determine the constitutionality of contemporary government policies and conduct. Even Utah's "first Legislature could have enacted an unconstitutional law," *Maese*, 2019 UT 58, ¶46, and "was not immune from constitutional violations," *id.* ¶92 & n.35 (Lee, J., joined by Durrant, C.J., concurring). Neither the "antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack[.]" *Williams v. Illinois*, 399 U.S. 235, 239 (1970); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (same); *Kitchen v. Herbert*, 755 F.3d 1193, 1216 (10th Cir. 2014) (same); *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Unless "explicitly mandated by the Constitution," even "ancient practices" are subject to judicial assessment for constitutionality. *Williams*, 399 U.S. at 240. Here, nothing in Utah's Constitution mandates the development of fossil fuels, nor even mentions them. This was a

deliberate decision by Utah's framers.[5]

The duration of a practice does not determine its constitutionality because Utah's Constitution "enshrines principles, not application of those principles." *Maese,* 2019 UT 58, ¶70 n.23; *see Brown v. Bd. of Educ.,* 347 U.S. 483, 493-95 (1954) (declaring longstanding policy of "separate but equal" unconstitutional); *Brown v. Bd. of Educ.,* 349 U.S. 294, 298 (1955) (ordering nationwide desegregation). The relevant inquiry is not what the ratifiers of Utah's Constitution thought about "how it would apply" to the specific circumstances of the time, "but instead to seek the objective original meaning of the text by discerning the broad animating principle behind the text and then to apply it to concrete (and modern) circumstances." Peter J. Smith, *Originalism and Level of Generality,* 51 Ga. L. Rev. 485, 506 (2017); *Maese,* 2019 UT 58, ¶70 n.23 (same).

This Court has also recognized that policies and practices, which at one time may have been constitutional, can become unconstitutional due to changed

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[5] Indeed, Utah' framers considered and rejected the idea that mining, including for fossil fuels, should be specified as a public use for purposes of eminent domain in Utah's Constitution. *Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah,* Day 52, 1414, 1416. The very year of Utah Constitution's passage, this Court ruled that mining is not "affected with a public interest" and that "no legislative flat can make it so." *Holden v. Hardy,* 46 P. 756, 761 (Utah 1896) (citations omitted).

circumstances. *Malan*, 693 P.2d at 668-69; *see also, e.g.*, *Vigeant v. Postal Tel. Cable Co.*, 157 N.E. 651, 655 (Mass. 1927) ("It is nothing new in constitutional law that a statute valid at one time may become void at another time because of altered circumstances."). Recognizing this principle, Justice Wolfe wrote that even long-standing policies and conduct may become unconstitutional when, due to changing circumstances, they "endanger society or a substantial portion of it." *McGrew v. Indus. Comm'n*, 85 P.2d 608, 621 (Utah 1938) (Wolfe, J., concurring).

Here, Plaintiffs allegations demonstrate that circumstances in Utah have changed considerably since 1896, including Utah's level of fossil fuel development, R.39, accumulating fossil fuel emissions, R.5-6, 40-41, 75, the scientific community's understanding of their impacts, R.42, 72-78, and the availability of alternatives, R. 80-81. Under present circumstances, the challenged provisions and conduct substantially endanger these Youth. R.5-6, 9-31. At this early stage, these allegations are taken as true and Plaintiffs should be afforded the opportunity to present evidence of their constitutional claims.

E. There Is No "Fossil Fuel Exception" to Fundamental Rights Under Utah's Constitution

Defendants purport to disavow the district court's untenable conclusion that substantive due process does not apply to fossil fuel policy. R.416; Def. Br. 44 n.17. However, Defendants' position that "there is no precedent for extending"

fundamental rights to the present circumstances is both incorrect and a distinction without a difference. Under either position, courts could foreclose entire policy arenas from review for consistency with fundamental rights simply because a complaint raises issues of first impression. That is contrary to the very nature of constitutional rights.

Moreover, there is ample and growing precedent from courts across the country and around the world recognizing that the harms from fossil fuel policies implicate fundamental rights, including the rights to life, health, and safety of youth, and that such claims are appropriate for judicial review.[6] This Court should

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[6] *E.g.*, *Held v. Montana*, No. CDV-2020-307, Order Granting Mots. for Certification of Orders as Final, 6 (Mont. 1st Jud. Dist. Ct. Sep. 18, 2023) (state fossil fuel policy infringed youth's fundamental rights to health and safety); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) ("where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans . . . and dramatically alter the planet's ecosystem, it states a claim for a due process violation."), *rev'd on other grounds and remanded*, 947 F.3d 1159 (9th Cir. 2020); *Matter of Hawai'i Electric Light Co., Inc.*, 526 P.3d 329, 337 (Haw. 2023) (Wilson, J., concurring) ("the right to a life-sustaining climate system is also included in the due process right to 'life, liberty, [and] property'"); *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316, No. CV-19-00631627-0000, ¶¶106, 112, 119-20 (Ontario Super. Ct. Apr. 14, 2023) (claims challenging Ontario's climate policy implicated rights to life, liberty, and security of the person and were justiciable); *Cecilia La Rose v. His Majesty the King*, 2023 FCA 241, A-289-20, ¶117 (Can. Fed. Ct. App. 2023) (claims challenging Canada's climate policy stated claim for violation of fundamental rights to life, liberty, and security of the person); *M.K. Ranjitsinh & Ors. v. Union of India & Ors.*,

reject Defendants' attempt to place fossil fuels, which are nowhere mentioned in Utah's Constitution, above its express restrictions and protections for the constitutional rights of children to life, health, and safety.

II. The Youth's Constitutional Claims Are Justiciable

Judicial review is not only appropriate here,[7] but urgently necessary. Contrary to their incorrect contentions regarding the ripeness of Plaintiffs'

2024 INSC 280 (Sup. Ct. India 2024) (climate change and air pollution implicate rights to life and health); *Stichting Urgenda v. The State of the Netherlands,* No. 19/00135, Judgment, ¶5.7.9 (Sup. Ct. Neth. Dec. 20, 2019) ("Climate change threatens human rights"); *Leghari v. Fed'n of Pakistan*, W.P. No. 25501/2015, Order, ¶6 (Lahore High Ct. of Lahore, Pak. Sep. 4, 2015) ("On a legal and constitutional plane [climate change] is clarion call for the protection of fundamental rights of the citizens"); *KlimaSeniorinnen v. Switzerland*, App. No. 53600/20, Judgment (Grand Chamber) (Apr. 9, 2024) (climate change implicates human rights, including health); *Duarte Agostinho v. Portugal and 32 Other Member States,* App. No. 39371/20, Decision (Grand Chamber) (Apr. 9, 2024) (claims involving climate harms to lives, health, and safety of children should be addressed by domestic courts where full factual record can be developed); *Inhabitants of La Oroya v. Peru*, Inter-Am Ct. H.R. (ser. C) No. 511, Judgment, ¶143 (Nov. 27, 2023) ("States have a heightened duty to protect children against risks to their health produced by the emission of polluting gases that contribute to climate change.") (unofficial translation); *see also* The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am Ct. H.R. (ser. A) No. 23, ¶54 (Nov. 15, 2017) ("[C]limate change has a wide range of implications for the effective enjoyment of human rights, including the rights to life [and] health").

[7] Defendants offer no direct argument for affirmance of the district court's political question ruling, which should be reversed for the reasons set forth in Plaintiffs' opening brief. Aplt. Br. 10-37. Defendants do not dispute that Utah's

claims—an issue Defendants raise for the first time here[8]—the allegations clearly demonstrate that Defendants' implementation of the challenged statutes is ongoing and already causing serious and mounting harm to these Youth. R.36-40. Indeed, Defendants do not dispute that Plaintiffs' allegations are sufficient to establish injury and causation. A ruling in Plaintiffs' favor would alleviate Plaintiffs' harms by removing the statutory mandates under which Defendants are causing harm. A declaratory judgment, informed by scientific findings of fact at trial, would also provide a meaningful constitutional standard for preventing state deprivation of children's fundamental rights to life and health, which would thereafter guide Defendants' regulatory practices. These remedies suffice for redressability.

A. The Youth's Constitutional Claims Are Ripe for Judicial Resolution

A plaintiff "may seek and obtain a declaration as to whether a statute is

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Constitutional provisions, not *Baker v. Carr*, 369 U.S. 186 (1963), govern the justiciability of Plaintiffs' claims. Nor do Defendants dispute that application of those provisions demonstrates the errors of the district court's political question ruling. To the extent Defendants indirectly address the second *Baker* factor in their redressability arguments, well-established, judicially manageable standards are readily available to resolve Plaintiffs' constitutional claims. *See* Aplt. Br. 25-32.

[8] "[O]n countless occasions," this Court has "exercised [its] discretion to refuse to consider new issues, arguments, claims, or matters on appeal." *Patterson v. Patterson*, 2011 UT 68, ¶17, 266 P.3d 828.

constitutional" by "alleging facts indicating how he will be damaged by its enforcement" and that "defendant is enforcing such statute or has a duty to enforce it[.]" *Baird v.* State, 574 P.2d 713, 716 (Utah 1978); *Salt Lake Cnty. v. State*, 2020 UT 27, ¶21, 466 P.3d 158. Under Utah's notice pleading standard, a complaint need only to allege sufficient facts to make Defendants "reasonably aware of the conduct [they] allegedly engaged in and of how that conduct allegedly injured" Plaintiffs. *S. Utah Wilderness All. v. San Juan Cnty. Comm'n*, 2021 UT 6, ¶18, 484 P.3d 1160. Here, Plaintiffs' allegations are more than sufficient to meet these standards.

1. The Challenged Provisions Mandate and Direct Defendants to Maximize, Promote, and Systematically Authorize Fossil Fuel Development

The Complaint identifies and challenges the relevant statutory provisions through which Defendants are harming these Youth. R.33-36. As Plaintiffs' allegations demonstrate, Defendants control fossil fuel development in Utah. R.32-33. Pursuant to the Utah Energy Act, the Governor, the Office of Energy Development, and the Energy Advisor have statutory authority to coordinate state energy policy and develop and implement state energy goals, programs, and plans. R.32-33, 36; Utah Code §§ 79-6-101, *et seq.* Pursuant to the Utah Oil and Gas Conservation Act and the Utah Coal Mining and Reclamation Act, the Board and Division of Oil, Gas, and Mining have authority over the approval or denial of all

fossil fuel development projects in the state. R.33, 39; Utah Code §§ 40-6-1, *et seq.*, 40-10-1, *et seq.* Defendants concede that these acts govern permitting and regulation of oil, gas, and coal. Def. Br. 24. Utah's pleading standards do not require Plaintiffs to allege how every provision of these acts interrelates. *S. Utah Wilderness All.*, 2021 UT 6, ¶18. The complaint identifies and challenges the provisions of the statutory schemes that mandate and direct Defendants to utilize their authority thereunder to maximize, promote, and systematically authorize fossil fuel development. R.32-36; Utah Code §§ 79-6-301(1)(b)(i),[9] 40-10-1(1), 40-10-17(2)(a), 40-6-1, 40-6-13. No other provisions mandate or direct Defendants to utilize their authority in this manner.

The plain language of the challenged provisions demonstrates that Defendants have a "duty to enforce" them, satisfying the ripeness requirement for challenges to statutes under *Baird*, 574 P.2d at 716. For example, section 40-6-1 codifies the purposes of the Utah Oil and Gas Conservation Act, directing how Defendants are required to carry out their statutory authority over the approval

[9] Contrary to Defendants' paradoxical argument that Plaintiffs' challenge to section 79-6-301(1)(b)(i) is simultaneously both unripe and moot, neither is true. Though recent amendments to section 79-6-301 changed the structure of this provision, it still mandates that Defendants "shall promote the development" of "natural gas, coal, [and] oil[.]" Utah Code § 79-6-301(1)(b)(ii)(A). Such immaterial amendments do not moot constitutional challenges to statutes. *In re J. P.*, 648 P.2d 1364, 1371 (Utah 1982).

or denial of permits for all oil and gas development within the state. R.39 (without Defendants' authorization, no fossil fuel development in Utah can lawfully occur). Section 40-6-1 directs Defendants to utilize their authority over the approval or denial of permits to "foster, encourage, and promote the development, production and utilization" of "oil and gas" and to "authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained[.]" R.35-36.

In *Bennion v. ANR Production Co.*, this Court made clear that section 40-6-1 is a "statutory directive" that binds Defendants in the exercise of their authority over oil and gas development. 819 P.2d 343, 346-47 (Utah 1991). Defendants inaccurate contention that the *Bennion* Court only used the term "statutory directive" in quoting the claimant's argument is not supported by the opinion. The Court adjudicated the claim challenging an agency action as inconsistent with section 40-6-1, thereby recognizing the actionable legal effect and binding legal force of the "statutory directive." *Id.*

That statutory policy directives like section 40-6-1 do not "create rights that are not found" in other sections of a statute or "limit those actually given by the legislation" is irrelevant. Def. Br. 18 (*quoting Price Dev. Co., L.P. v. Orem City*, 2000 UT 26, ¶23, 995 P.2d 1237); *J.P. Furlong Co. v. Bd. of Oil, Gas, & Mining*, 2018 UT 22,

¶37 & n.12, 424 P.3d 858. Plaintiffs neither assert rights under nor seek to enforce the challenged provisions. Quite the opposite. Plaintiffs claim the challenged provisions violate fundamental rights secured to them by Utah's Constitution. The very cases on which Defendants rely establish that statutory policy directives, like section 40-6-1, direct Defendants how to "enforce[] and interpret[]" their authority over fossil fuel development. *J.P. Furlong Co.*, 2018 UT 22, ¶37 n.12 (*quoting Price Dev. Co., L.P.*, 2000 UT 26, ¶23); *see also Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045 (Utah 1991) (statutes are interpreted according to express purpose); *Croft v. Morgan Cnty.*, 2021 UT 46, ¶32, 496 P.3d 83 ("every word and every provision of a statute is to be given effect.") (cleaned up). To insulate such clear statutory instructions to agencies on the mere basis of their designation as a statement of policy or purpose would elevate form over substance, enabling the legislature to shield all manner of unconstitutional policies from judicial review as a matter of technicality. *See Elliott v. Dorius*, 557 P.2d 759, 761 (Utah 1976) (rejecting form over substance).

Each of the other provisions Plaintiffs challenge similarly directs Defendants to maximize, promote, and systematically permit fossil fuel development. Section 40-10-1 directs Defendants' conduct in their authority over the approval and denial of permits for coal mining operations to "insure the existence of an expanding and economically healthy" coal mining industry.

Section 40-10-17 mandates that Defendants "shall require" all "coal mining operations" to maximize coal extraction. Section 40-6-13 directs that Defendants "shall never" restrict "production of any pool or of any well." Even after recent amendments, section 79-6-301 continues to direct Defendants to "promote the development" of "natural gas, coal, [and] oil[.]" Utah Code § 79-6-301(1)(b)(ii)(A).[10]

2. Defendants' Ongoing Implementation of the Challenged Statutes Is Already Harming Plaintiffs

In stark contrast to the inapposite cases on which Defendants rely, there is no need to speculate whether a ripe controversy may arise "at some future time" because the allegations clearly demonstrate that Defendants' ongoing fulfillment of the challenged statutes' directives is already harming Plaintiffs. *Salt Lake Cnty.*, 2020 UT 27, ¶18; R.36-40. Defendants' contention that Plaintiffs have not alleged any harmful conduct that has occurred is belied by a plain reading of the Complaint; for example:

> • Between 1960 and the date of filing, Defendants issued authorizations resulting in the extraction of at least 1,709,140,620 barrels of oil, 14,386,078,152,000 cubic feet of natural gas, and 931,247,641 tons of coal in Utah. R.39.

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[10] *See also* Utah Code §§ 79-6-301(2)(government entities "shall conduct activities consistent with" 79-6-301(1)(b)(ii)(A)), 79-6-401 (Office of Energy Development to "implement" the "state energy policy under Section 79-6-301")

• Through their authorization of fossil fuel development, Defendants are responsible for the vast majority of the localized air pollution and substantial levels of greenhouse gas emissions that are harming Plaintiffs. R.39-42.

• The substantial majority of the fossil fuels extracted in Utah—all of which are extracted pursuant to Defendants' authorization—are combusted locally, causing and contributing to the dangerous air quality harming Youth Plaintiffs. Approximately 85% of the pollutants affecting air quality in Utah are from fossil fuel combustion. R.40-41.

• To the date of filing, fossil fuels extracted in Utah pursuant to Defendants' authorization resulted in at least 3,106,203,665 metric tons of CO_2 emissions, substantially contributing to climate change and the resulting harms to Youth Plaintiffs. R.41.

• Utah contains significant quantities of fossil fuels that have not yet been extracted. R.41.

• Defendants continue to promote and systematically issue authorizations for fossil fuel development in Utah, resulting in additional extraction of fossil fuels and resulting emissions that are causing additional and increasing harm to Plaintiffs. R.39.[11]

• With air quality and atmospheric levels of GHGs already at dangerous levels in Utah, every molecule of additional emissions from the development and combustion of Utah's fossil fuels further harms and endangers Youth Plaintiffs and exacerbates their existing injuries. R.42.

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[11] Indeed, since Plaintiffs filed their Complaint, Defendants have overseen the largest expansion of oil production in state history. *See* U.S. Energy information Administration, Utah Field Production of Crude Oil, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfput1&f=m.

These allegations, among others, are more than sufficient to make Defendants "reasonably aware of the conduct [they are] allegedly engaged in[,]" *S. Utah Wilderness All.*, 2021 UT 6, ¶18, and fundamentally distinguish the circumstances presented from those this Court has found insufficient to present a ripe controversy. In *Salt Lake County v. State*, "nothing in the Counties' complaint suggest[ed] they ha[d] been harmed, or that harm is imminent[.]" 2020 UT 27, ¶23. They alleged only that they would "*likely*" be harmed "*if*" the law they challenged were effectuated. *Id*. (emphasis in original). Similarly, in *Salt Lake County v. Bangerter*, there was no evidence in the record to show any "injury sustained or threatened[.]" 928 P.2d 384, 385 (Utah 1996) (citation omitted). The same in *Baird*. 574 P.2d at 716. In *Boyle v. National Union Fire Insurance Co.*, a suit to determine insurance coverage was premature before a separate, ongoing, and previously filed lawsuit determined liability. 866 P.2d 595 (Utah Ct. App. 1993). In contrast, Plaintiffs' allegations show that Defendants' systematic authorization of fossil fuels has already caused and continues to cause them increasing harm. R.9-31. It bears repeating: Defendants do not dispute that Plaintiffs' allegations are sufficient to establish injury and causation.

Contrary to Defendants' new argument on appeal, Plaintiffs are not limited to challenging the constitutionality of specific individual agency actions or required to specifically list each of the many actions through which Defendants

have already implemented the challenged provisions. Def. Br. 12, 19, 38. This is not a challenge to a statute *as applied* to any single permitting proceeding. Rather, Plaintiffs challenge the statutory provisions as *facially* unconstitutional, alleging that "[w]ith Utah's air quality and climate crises presenting an existential threat to the lives, health, and safety of Utah's youth, there is no set of circumstances in which statutory provisions directing the maximization, promotion, and systematic authorization of fossil fuel development can be constitutional[ly]" applied. R.8. To demonstrate a ripe controversy, Plaintiffs need only allege facts indicating that Defendants have, are presently, or will engage in actions harmful to them, *Baird*, 574 P.2d at 716. They have done so here. R.36-42.

Moreover, it is the aggregate effect of Defendants' actions, not any individual agency action by itself, that is causing the profound harms to these Youth. R.6, 7, 36-40. Where "the totality of various government actions contributes to the deprivation of constitutional protected rights," such claims do not turn on identification of individual agency actions. *Juliana*, 947 F.3d at 1167-68. Forcing all constitutional claims to identify a "discrete agency action that caused the violation" would "bar plaintiffs from challenging violations of constitutional rights[.]" *Id.* at 1167. Courts have long recognized that claimants may challenge systematic patterns and practices of government conduct as causing constitutional violations. *See, e.g.*, *Haygood v. Younger*, 769 F.2d 1350, 1359

(9th Cir. 1985) (en banc) (*cert. den'd* 478 U.S. 1020 (1986)) ("a wrongful" substantive due process violation may result "from either affirmatively enacted or de facto policies, practices or customs"); *Kuchcinski v. Box Elder Cnty.*, 2019 UT 21, ¶32, 450 P.3d 1056 (same under Utah's due process clause); *Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1186 (10th Cir. 2020) ("combined acts or omissions . . . under a governmental policy or custom may violate an individual's constitutional rights"). Here, Plaintiffs have alleged not only that Defendants engaged in a harmful systematic pattern and practice of conduct, but that the conduct is mandated by official policy codified in statute.[12]

B. Declaratory Relief Would Provide Meaningful Redress

Defendants complain that a ruling in Plaintiffs' favor would not resolve hypothetical future controversies regarding individual agency actions. R.33-34. But this straw man argument fails because a declaratory judgment need only

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[12] As Defendants concede, Def. Br. 38, where allegations are insufficient for jurisdiction (which includes ripeness, redressability, and political questions), the proper course is dismissal without prejudice. *Salt Lake Cnty.*, 2020 UT 27, ¶27. Below, Plaintiffs requested an opportunity to amend the Complaint if their allegations were deemed deficient in any respect, R.210, but the district court dismissed with prejudice, denying them that opportunity. R.432. Should this Court find the allegations deficient in any respect, Plaintiffs request correction of this error.

resolve the "controversy giving rise to the proceeding." Utah Code § 78B-6-404. Here the controversy is not over any hypothetical individual agency action that might follow a declaratory judgment for the Youth. It concerns the constitutionality of statutes that *presently* require Defendants to systematically promote, maximize, and authorize fossil fuel development, and of Defendants' pattern and practice of systematic conduct consistent therewith. Defendants' insistence that a declaratory judgment must resolve all hypothetical future controversies contravenes the principle that courts "develop[] a body of" constitutional "doctrine on a case-by-case basis." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Here, resolving the present controversy in Plaintiffs' favor would provide meaningful redress.

At the pleading stage, redressability is satisfied by allegations demonstrating that an "increased" adverse impact from government conduct would likely "be relieved" if the "governmental action is declared unconstitutional." *Jenkins v. Swan*, 675 P.2d 1145, 1153 (Utah 1983). Both the increased adverse impact and the extent it would likely be relieved are matters for determination on the evidence. *Id.; see also Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021) ("[F]ull redress" of the injury is not required as "the ability to effectuate a partial remedy satisfies the redressability requirement.") Here, the Youth's detailed allegations amply satisfy the *Jenkins* standard because "[a]ny reduction

in fossil fuel development in Utah is meaningful in addressing Youth Plaintiffs' injuries and reducing the risk of future harm." R.42; *see Held v. Montana,* No. CDV-2020-307, Findings of Fact, Conclusions of Law, and Order, 24 (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023) (Evidence established that "[e]very ton of fossil fuel emissions . . . increases the exposure of Youth Plaintiffs to harms now and additional harms in the future.").

Declaring the challenged laws and conduct unconstitutional would alleviate Plaintiffs' injuries by reducing fossil fuel development and resulting emissions. R. 81-82. First, a favorable ruling would remove the legal mandates for Defendants to maximize, promote, and systematically authorize fossil fuel development. It would also establish that they can no longer exercise their authority in that manner. Second, a declaratory judgment for the Youth, informed by scientific findings of fact at trial, would provide a meaningful constitutional standard for preventing state deprivation of children's fundamental rights to life, health, and safety, which would clarify the legal relationship between the parties and guide Defendants' regulatory conduct going forward.

1. Invalidating the Challenged Statutes Would Remove the Legal Mandates Directing Defendants to Cause Harm

A declaratory judgment for these Youth would invalidate the provisions under which Defendants are causing Plaintiffs' injuries. Thomas M. Cooley, *A*

Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, *44 (2d ed. Little, Brown & Company 1871) ("the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid[.]"). Here, the statutory directives for Defendants to maximize, promote, and systematically authorize fossil fuel development "stand as an absolute barrier" to Defendants' compliance with their constitutional obligation not to cause substantial harm to Plaintiffs' lives, health, and safety. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261-262 (1977). As agents of state law, Defendants cannot comply with their constitutional obligations where they are statutorily required to systematically authorize fossil fuel development projects and promote new development in state energy goals, programs, and plans. If these directives are declared unconstitutional, "that barrier will be removed," which alone is sufficient to meet the standard for redressability. *Id.* at 261-62; *Matter of Adoption of B.B.*, 2020 UT 52, ¶34, 469 P.3d 1083 (removal of government policy that serves as barrier to realization of rights suffices for redressability).[13] With the statutory directives for Defendants to

[13] Defendants' reliance on *California v. Texas,* 593 U.S. 659 (2021), is misplaced. There, legislative amendments eliminated the possibility of enforcement of the Affordable Care Act's minimum insurance coverage requirement. *Id.* Here,

promote and authorize fossil fuel development invalidated, Defendants will be able to comply with Utah's Constitution and refrain from causing further harm to Plaintiffs, in accordance with the findings of fact and conclusions of law rendered by the district court. *See* Section II.B.3.

Defendants' remarkable contention that they could continue to follow the statutory directives after a declaration of their unconstitutionality untenably denies the power of declaratory relief and the restraints that Utah's Constitution imposes on their conduct. Def. Br. 26, 36.[14] A declaratory judgment "ensures" that Defendants "cannot engage in similar . . . conduct" in the future. *Anatol Zukerman & Charles Krause Reporting, LLC v. United States Postal Serv.*, 64 F.4th 1354, 1366-67 (D.C. Cir 2023). Judicial declarations of unconstitutionality change the "legal status" of the challenged laws and conduct, *Utah v. Evans,* 536 U.S. 452, 463-64 (2002), and carry a presumption that governmental officials will "abide by [the

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Defendants have not and cannot point to anything that alters the clear mandates of the challenged statutory provisions.

[14] Defendants paradoxically argue that declaratory relief would both have no effect yet also carry the force of an injunction. Def. Br. 34 n.10. However, the law is clear that declaratory relief provides meaningful relief and is "plainly intended" to "act as an alternative to the strong medicine of the injunction" with "a less intrusive effect," *Steffel v. Thompson,* 415 U.S. 452, 466, 469 (1974), thereby giving defendants discretion about the policy mechanisms they choose for constitutional compliance in accordance with the declaratory judgment.

court's] authoritative interpretation" of the "constitution[.]" *Id.* (quoting *Franklin v. Massachusetts,* 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)).

2. Declaring Defendants' Pattern and Practice of Systematically Authorizing Fossil Fuel Development Unconstitutional Will Provide Meaningful Redress

In addition to requesting that the challenged provisions be invalidated, Plaintiffs also separately requested that Defendants' pattern and practice of maximizing, promoting, and systematically authorizing fossil fuel development be declared unconstitutional. R.93. Contrary to Defendants' contentions, the allegations thoroughly demonstrate that Defendants continue in a longstanding[15] and ongoing pattern and practice of maximizing, promoting, and systematically authorizing fossil fuel development that is causing profound harms to Plaintiffs. Plaintiffs' allegations identify not only the specific practices through which Defendants are systematically causing harm, but the substantial levels of

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[15] Defendants' contention that when a harmful *de facto* policy exists prior to its codification in statute, there is "no link between the statutes and the [continuing] conduct" defies logic. Def. Br. 26. Defendants offer no reason to doubt that statutory language can direct and perpetuate longstanding agency customs, as is the case here. R.36. Moreover, it is well-established that litigants may challenge the constitutionality of both policies codified in law and *de facto* policies evidenced by patterns and practices of conduct. *See, e.g.*, *Kuchcinski*, 2019 UT 21, ¶32; *Haygood*, 769 F.2d at 1359; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) (U.S. Supreme Court has repeatedly upheld the appropriateness of judicial relief to "combat a 'pattern' of illicit law enforcement behavior.").

emissions that have resulted. R.36-42. Declaring these practices unconstitutional would "ensure" that Defendants can no longer engage in similar conduct in the future. *Anatol Zukerman & Charles Krause Reporting*, 64 F.4th at 1366-67.[16]

3. A Declaratory Judgment Would Meaningfully Guide Defendants' Regulatory Conduct Going Forward

A ruling in Plaintiffs favor would clarify their rights and provide a meaningful constitutional standard, informed by scientific findings of fact, governing Defendants' future regulatory conduct. As in any challenge, a determination of unconstitutionality here would not be made in a vacuum, but in the context of findings of fact and conclusions of law reached in light of the evidence presented. Here, Plaintiffs allege that localized air pollution and greenhouse gas concentrations are already at levels that are profoundly harming them, and that every additional ton of fossil fuel emissions brings further,

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[16] The non-binding cases on which Defendants rely to question the effect of declaratory relief are inapposite. *Nova Health Systems v. Gandy* merely illustrates that a declaratory judgment does not bind non-parties. 416 F.3d 1149, 1159 (10th Cir. 2005). In *United States v. Washington*, declaratory relief was unavailable because the claimant sought a declaration of a right without seeking a declaration of a violation. 759 F.2d 1353, 1356 (9th Cir. 1985). The claimants requested recognition of a "right to have the environment protected." *Id.* at 1365. Plaintiffs in *Iowa Citizens for Community Improvement v. State* asked for an "abstract declaration" that the state had a "duty to protect" recreational and drinking water. 962 N.W.2d 780, 792 & n.3 (Iowa 2021). The relief requested in these cases is incomparable to the Youth's request to have specific policies and practices declared unconstitutional for affirmatively causing harm.

escalating harm. R.42. They allege that additional fossil fuel emissions risk triggering tipping points after which runaway, catastrophic climate change becomes unstoppable and irreversible. R.77. They allege that alternatives to fossil fuels that do not cause such harms are readily available. R.80-81. If the evidence substantiates these and other allegations, they would be incorporated into the trial court's declaratory judgment. *See Held,* Findings of Fact, Conclusions of Law, and Order, 26-70 (finding similar allegations proven at trial). A declaratory judgment recognizing the violations of Plaintiffs' fundamental rights, and incorporating such findings, would thus clarify the legal relationship between the Youth and the State, setting a meaningful constitutional standard for preventing state deprivation of children's rights to life, health, and safety that would guide Defendants' regulatory conduct going forward. Indeed, declaratory relief is a "well-recognized and effective means of protecting important constitutional rights[.]" *Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, ¶18, 16 P.3d 533.

CONCLUSION

Where plaintiffs allege that ongoing government conduct is causing serious injuries to the health, safety, and lifespans of politically powerless children, surely Utah's Constitution does not countenance judicial silence on matters of such grave importance. Plaintiffs respectfully request that this Court reverse the

district court and remand so that the Youth may present evidence to prove their claims.

DATED this 22nd day of April, 2024.

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

Andrew G. Deiss (7184)
John Robinson Jr. (15247)
Corey D. Riley (16935)
DEISS LAW PC

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief contains 7,842 words, excluding the parts of the brief exempted by Utah Rule of Appellate Procedure 24(g)(2). Appellants' have filed an Unopposed Motion for Leave to File Overlength Reply Brief concurrently with this Reply Brief.
2. This brief has been prepared in a proportionately spaced typeface using Microsoft Word in 13-point Source Serif Pro font in compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(a).
3. This brief contains no non-public information and complies with Utah Rule of Appellate Procedure 21(h) regarding public and non-public filings.

DATED this 22nd day of April, 2024.

/s/ *Andrew L. Welle*

CERTIFICATE OF SERVICE

I certify that on this 22nd day of April, 2024, I caused to be served via email a true and correct copy of the foregoing **Reply Brief of Appellants** to the following at the email addresses listed below:

ERIN T. MIDDLETON
DAVID N. WOLF
MICHAEL BEGLEY
TREVOR GRUWELL
emiddleton@agutah.gov
dnwolf@agutah.gov
mbegley@agutah.gov
tgruwell@agutah.gov

Attorneys for Appellees

JONATHAN G. JEMMING
jemming.law@gmail.com

Attorneys for Amici Curiae, Utah Chapter – American Academy of Pediatrics; Utah Physicians for a Healthy Environment; Utah Moms for Clean Air; Voices for Utah Children

JEFFREY W. APPEL
STEPHANIE E. HANAWALT
jappel@rqn.com
shanawalt@rqn.com

ERIC LASCHEVER
eric.laschever@gmail.com

Attorneys for Amicus Curiae Law Professors

JOHN MEJIA
MATTHEW R. SEGAL
jmejia@acluutah.org

msegal@aclu.org

ROBERT A. SKINNER
ANDREW B. CASHMORE
NICOLE S.L. POBRE
SARA E. BERINHOUT
robert.skinner@ropesgray.com
andrew.cashmore@ropesgray.com
nicole.pobre@ropesgray.com
sara.berinhout@ropesgray.com

Attorneys for Amici Curiae American Civil Liberties Union of Utah and American Civil Liberties Union

/s/ Andrew L. Welle