IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

NATALIE R., a Minor, by and through her Guardian, DANIELLE ROUSSEL; et al., **Plaintiffs,** **vs.** **STATE OF UTAH, et al.,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 220901658** **Honorable Robert P. Faust**

The Court has before it Defendants' Motion to Dismiss. Oral argument was held with respect to the Motion on November 4, 2022. Following the hearing, the matter was taken under advisement. After reviewing the record, the Court hereby enters the following ruling:

BACKGROUND

Plaintiffs are children, appearing through their guardians, and one adult, who assert they are uniquely vulnerable to and face disproportionate harms to their physical and psychological health, safety, and development as a result of Utah's development and combustion of fossil fuels. Specifically, Plaintiffs allege the State of Utah is violating their substantive due process rights protected by Utah Constitution, Article I, Sections 1 and 7, by impinging on Plaintiffs' right to life.

LEGAL STANDARD

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

RULING

After reviewing the record, and while Plaintiffs have a valid concern, the Court finds Plaintiffs' claims are precluded because (1) the political question doctrine prevents the Court from creating climate change and fossil fuels policy; (2) Plaintiffs' requested equitable relief cannot effectively redress their alleged harms; and (3) the Court should not extend the substantive due process doctrine into areas where it has not previously been applied, such as global climate change and fossil fuels policy.

POLITICAL QUESTION DOCTRINE

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

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted. Utah Const. art. V, § 1.

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

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

Similar to this matter before this Court, the Washington Court of Appeals considered a similar case:

> The appellants are 13 youths (the Youths) between the ages of 8 and 18 who sued the State of Washington, Governor Jay Inslee, and various state agencies and their secretaries or directors (collectively the State) seeking declaratory and injunctive relief. The Youths alleged that the State "injured and continue[s] to injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that [the State] knew would result in greenhouse gas ("GHG") emissions, dangerous climate change, and resulting widespread harm." To this end, the Youths asserted substantive due process, equal protection, and public trust doctrine claims, among others. They asked the trial court to declare that they have "fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." *Aji P. by & through Piper v. State*, 16 Wash. App. 2d 177, 183, 480 P.3d 438, 444–45, *review denied sub nom. Aji P. v. State,* 198 Wash. 2d 1025, 497 P.3d 350 (2021).

The Court's holding made clear that the issues raised by Plaintiffs are non-justiciable political questions:

> We firmly believe that the right to a stable environment should be fundamental. In addition, we recognize the extreme harm that greenhouse gas emissions inflict on the environment and its future stability. However, it would be a violation of the separation of powers doctrine for the court to resolve the Youths' claims. Therefore, we affirm the superior court's order dismissing the complaint. *Id.* at 445.

The Court noted that "the resolution of the Youths' claims is constitutionally committed to the legislative and executive branches. 'Article 2, section 1, of the Washington State Constitution vests all legislative authority in the legislature and in the people,' through the power of initiative and referendum." *Id.* at 477.

Utah's Constitution is not materially different. As in Washington, the power to create and repeal environmental legislation is constitutionally committed to the political branches or the people directly in Utah.

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

> The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government. *Juliana v. United States,* 947 F.3d 1159, 1164–65 (9th Cir. 2020).

Plaintiffs rely on a Montana District Court case distinguishing *Juliana* based on the claim that declaratory relief might be acceptable but injunctive relief was not. (Op. at 4.) However, that Court observed, "Article II, Section 3 of the Montana Constitution does provide a fundamental right to a clean and healthy environment, and that parties such as the Plaintiffs are entitled to bring a direct action in court to enforce that right." *Held v. Montana*, Order on Mot. to Dism. at 23, Cause No. CDV-2020-307, August 4, 2021. Utah's Constitution has no parallel to this right. And as the *Aji P.* Court wrote, "Because our state constitution does not address state responsibility for climate change, it is up to the legislature, not the judiciary, to decide whether [—and to what

extent—] to act as a matter of public policy." 16 Wash. App. 2d at 192. The argument that declaratory relief can address climate change also failed in the Oregon Supreme Court and Washington Court of Appeals. *Chernaik v. Brown,* 367 Or. 143 (2020); *Aji P.*, 16 Wash. App. 2d 177.

The Alaska Supreme Court also reached the same conclusion as *Juliana*:

> A number of young Alaskans — including several Alaska Natives — sued the State, alleging that its resource development is contributing to climate change and adversely affecting their lives. They sought declaratory and injunctive relief based on allegations that the State has, through existing policies and past actions, violated . . . their individual constitutional rights. The superior court dismissed the lawsuit, concluding that the injunctive relief claims presented non-justiciable political questions better left to the other branches of government and that the declaratory relief claims should, as a matter of judicial prudence, be left for actual controversies arising from specific actions by Alaska's legislative and executive branches. The young Alaskans appeal, raising compelling concerns about climate change, resource development, and Alaska's future. But we conclude that the superior court correctly dismissed their lawsuit. *Sagoonick v. State*, 503 P.3d 777, 782 (Alaska 2022), *reh'g denied* (Feb. 25, 2022).

Moreover, a federal district court in Pennsylvania considering a case where minor children filed an action against federal authorities claiming that the federal government had violated their due process rights to life and "personal bodily integrity" by "allowing and permitting fossil fuel production, consumption and its associated CO2 pollution," held, "[b]ecause I have neither the authority nor the inclination to assume control of the Executive Branch, I will grant Defendants' Motion" to Dismiss. *Clean Air Council v. United States*, 362 F.Supp.3d 237 (2019).

Additionally, the Iowa Supreme Court also considered a case where environmentally concerned plaintiffs asked the courts to amend state policies regarding water quality. The court held that these were non-justiciable policy questions:

> In our view, stating that the legislature must "broadly protect[ ] the public's use of navigable waters" provides no meaningful standard at all. Different uses matter in different degrees to different people. How does one balance farming against swimming and kayaking? How should additional costs for farming be weighed

> against additional costs for drinking water? Even if courts were capable of deciding the correct outcomes, they would then have to decide the best ways to get there. Should incentives be used? What about taxes? Command and-control policies? In sum, these matters are not "claims of legal right, resolvable according to legal principles, [but] political questions that must find their resolution elsewhere." *Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780, 796-97 (2021).

Neither Utah's Constitution, nor the United States Constitution, addresses anything about fossil fuels or global climate change which would permit the Court to grant a judicial remedy.

Next, Plaintiffs fail to satisfy the second prong of the *Baker* test, which requires "judicially discoverable and manageable standards for resolving" the issues before the Court. *Baker*, 369 U.S. at 217. In the present case, Plaintiffs ask the Court to declare unconstitutional statutes governing the production of fossil fuels. Such policy decisions would require the Court to "decide matters beyond the scope of our authority with resources not available to the judiciary." *Aji P. by & through Piper*, 16 Wash. App. 2d at 189–90. While Plaintiffs cite the case of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for the proposition that a "mathematically precise standard" is not necessary-in the instant, such is clearly distinguishable, as in the present case, NO guiding or limiting principles are provided.

Finally, the fourth *Baker* factor cautions against, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" *Baker*, 369 U.S. at 217. Energy policy, fossil fuels development, and global climate change are paradigm examples of "matters of the greatest societal interest [that] involving a grand, overarching balance of important public policies [and] are beyond the capacity of courts to resolve." *Gregory v. Shurtleff*, 2013 UT 18, 299 P.3d 1098, 1132 n.29.

In this case, Plaintiffs ask the Court to declare legislative acts unconstitutional based on things that are not expressed in the constitution. They seek a different weighing of the interests involved, though the Legislature has already balanced the interests and created policy through

statute. Striking down the legislature's fossil fuel policies would be contrary to our constitutional system and violate the separation of powers.

PLAINTIFFS CLAIMS ARE NOT REDRESSABLE

There are three (3) requirements for traditional standing in Utah. "'First, plaintiffs must assert that they have been or will be 'adversely affected by the [challenged] actions.' Second, they must 'allege a causal relationship between [their] injury [and] the [challenged] actions.' And third, 'the relief requested must be substantially likely to redress the injury claimed.' 'E]ach step must be demonstrated in order to confirm standing.'" *S. Utah Wilderness All. v. Kane Cnty. Comm'n*, 2021 UT 7, ¶ 23, 484 P.3d 1146, 1155 (Internal citations omitted). *See also Carlton v. Brown*, 2014 UT 6,123, 323 P.3d 571 ("Utah's standing requirements are similar to the federal court system in that they contain the same three basic elements—injury, causation, and redressability").

In the present case, Plaintiffs ask the Court to declare policy explanations in the two (2) statutes unconstitutional, without addressing the operative language of the statutes. The Court should not, however, declare a constitutional violation without a "'limited and precise' standard discernible in the Constitution for redressing the asserted violation." *Juliana,* 947 F.3d at 1173 (*quoting Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019)* (the court was unable to adopt a standard for gerrymandering cases that was not "relatively easy to administer as a matter of math")). As noted above, Plaintiffs offer no such precise standard for redressability.

Moreover, Plaintiffs have not shown their proposed declaration will have any effect on carbon emissions in Utah. Plaintiffs offer no analysis explaining how any of the challenged statutes might be used to interpret operative requirements in a manner that would reduce fossil fuel consumption. Indeed, in the one case cited by Plaintiffs on this point, the court found that, "it is

likely that if the governmental action is declared unconstitutional, the adverse impact on *Jenkins* will be relieved." *Jenkins v. Swan*, 675 P.2d 1145, 1153 (Utah 1983). The same is not true here.

Indeed, Plaintiffs admit that "Defendants' authority to require permits for and regulate fossil fuel development would remain intact," if their request is granted, (Op. at 17), and that "They do not ask this Court to determine what Utah's policy should be, or to order the State to adopt or implement any specific policy, or to prepare or effectuate any remedial plan." *Id.* at 4. "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005). Without knowing how legal requirements will change, Plaintiffs cannot promise it will have any effect at all.

Plaintiffs cite *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 346-47 & n.5 (Utah 1991), as an example of a case where the Utah Supreme Court issued a "declaration of public interest." The *Bennion* Court interpreted operative provisions of Utah Code Ann. § 40–6–6(5). *Id.* at 345-47. However, predicting how courts might interpret the operative provisions after the legislative intent elements are removed would be purely speculative, because all operative provisions would survive the requested relief. In fact, the *Bennion* Court refused to apply the "declaration of public interest" to deny "imposition of a statutory non-consent penalty" as plaintiffs requested. *Id.*at 352.

Plaintiffs' claimed harms would require a global solution, and a court attempting to address climate change would be forced to retain jurisdiction and implement a recovery plan. Indeed, even if the Court were to enter a declaration regarding the constitutionality of the challenged provisions in Plaintiffs' favor, without a concrete climate recovery plan, remediation is unlikely, thus failing the redressability requirement.

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

SUBSTANTIVE DUE PROCESS AND FOSSIL FUELS POLICY

There is no precedent for extending the doctrine of substantive due process into policy decisions regarding the development of fossil fuels. Courts have uniformly concluded substantive due process does not apply to fossil fuels policy. *See e.g. Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978)(*quoting Ferguson v. Skrupa,* 372 U.S. 726, 731 (1963)); *Bullseye Glass Co. v. Brown,* 366 F.Supp.3d 1190 (D. Oregon), *see also Wildgrass Oil & Gas Comm. v. Colorado,* 447 F. Supp. 3d 1051, 1068 (D. Colo. 2020), aff'd, 843 F. App'x 120 (10th Cir. 2021). Moreover, the Supreme Court also cited with approval a portion of a First Circuit case holding that the federal Coal Act did not infringe substantive due process rights because it was economic legislation and did not abridge fundamental rights. *E. Enterprises v. Apfel, 5*24 U.S. 498, 517 (1998)(*citing and reversing on other grounds Eastern Enterprises v. Chater, 1*10 F.3d 150 (C.A.1 1997)).

The Supreme Court has, "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition[.]'" *Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997). It protects only those freedoms "implicit in the concept of ordered liberty[.]" *Id.* A new policy proposal to cease or significantly curtail fossil fuel development is not implicit in this nation's history and traditions and is not involved with the concept of ordered liberty. Plaintiffs admit that fossil fuel development in Utah is "historic and ongoing." (Complaint ¶ 6.)

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

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

> Once again third parties—not the Government—are polluting the air. As I have discussed, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney, 489 U.S. at 197, 109 S.Ct. 998. Accordingly, Plaintiffs have failed to state a claim based on a violation of their right to life or bodily integrity. *Clean Air Council*, 362 F.Supp.3d at 253.

Accordingly, the principle of limiting substantive due process to prevent policy decisions by judges is entirely consistent with the political question doctrine's limitations on the courts' authority.

OPEN COURTS

Finally, Defendants' arguments do not violate Utah's Open Courts protections. Plaintiffs cite *Jeffs v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998), for the proposition that courts must be accessible to all for the resolution of their disputes. (Op. at 7.) However, the right provided under the Open Courts Clause, "revolves around the judicial system, not the specific results of the judicial action." *Jeffs*, 970 P.2d at 1250. This Court is open to the Plaintiffs in this matter and their claims are being considered in this Motion to Dismiss. This does not, however, mean Plaintiffs have a right to proceed to discovery and trial absent a meritorious case.

BASED UPON THE FORGOING, Defendants' Motion to Dismiss is granted. Plaintiffs' claims are dismissed with prejudice.

This Memorandum Decision and Order constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 9th day of November 2022

BY THE COURT:

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE

ROBERT P. FAUST
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I mailed/emailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 9th day of November 2022:

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