



IN THE NEW MEXICO SUPREME COURT  
In the Court of Appeals. No. A-1-CA-42006  
In the First Jud. Dist. No. D-101 CV-2023-01038

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,

**S-1-SC-40980**

vs.

THE STATE OF NEW MEXICO; THE NEW MEXICO  
LEGISLATURE; GOVERNOR MICHELLE LUJAN GRISHAM;  
NEW MEXICO ENVIRONMENT DEPARTMENT; SECRETARY  
JAMES KENNEY in his official capacity; ENERGY MINERALS  
NATURAL RESOURCES DEPARTMENT; SECRETARY SARAH  
COTTRELL PROPST, in her official capacity; ENVIRONMENTAL  
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' PETITION FOR WRIT OF CERTIORARI**  
**TO REVIEW JUNE 3, 2025 COURT OF APPEALS DECISION**

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Plaintiffs ask this Court to review, for the first time, the Pollution Control Clause, Article XX, Section 21, of the New Mexico Constitution, which provides:

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

The appellate court effectively erased this clause from the Constitution, finding that courts cannot enforce this clause and Defendants' conduct in this area of substantial public interest is beyond judicial review. Plaintiffs -- frontline community members, Indigenous peoples, youth, and environmental organizations, who suffer ongoing harm from massive oil and gas pollution authorized by Defendants -- brought claims against Defendants for not fulfilling their duties under the Pollution Control Clause, and violating Plaintiffs' substantive due process rights to life, liberty, property, safety, and happiness and their rights to equal protection. While the trial court denied Defendants' motions to dismiss, the appellate court, on interlocutory appeal, issued an erroneous decision, eviscerating the Pollution Control Clause, and summarily dismissing all of Plaintiffs' constitutional claims, without allowing Plaintiffs to prove the massive amounts of uncontrolled pollution permitted by Defendants or the extensive, disproportionate harm to Plaintiffs. The appellate court fundamentally misunderstood the nature of

positive constitutional rights, the strength of state civil rights under the New Mexico Constitution, and the power of declaratory relief. Plaintiffs' complaint raises significant New Mexico constitutional questions which have never been considered by this Court. It is imperative that this Court, as the final arbiter of the New Mexico Constitution, clarify the scope and enforceability of the Pollution Control Clause, the power of the Declaratory Judgment Act to provide relief in cases of systemic constitutional violations, and the validity of Plaintiffs' civil rights claims.

#### QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate court fundamentally misapprehend its duty to enforce positive constitutional rights, wrongly ignore relevant constitutional jurisprudence from New Mexico and other states, and effectively erase the Pollution Control Clause by finding Plaintiffs' claims under the Clause nonjusticiable and beyond judicial review?
2. Did the appellate court erroneously conclude, on motions to dismiss, that Defendants have fulfilled their duties under the Pollution Control Clause by holding that any amount of pollution control and revenue raised from the extraction of oil and gas fulfills the duties imposed?
3. Did the appellate court misconstrue and limit the power of the Declaratory Judgment Act?

4. Did the appellate court err in deciding that substantive due process under the New Mexico Constitution cannot be invoked to protect residents from state actions permitting oil and gas pollution that harms their life, liberty, property, safety, happiness, and beautiful and healthful environment?
5. Did the appellate court err in deciding that the New Mexico Constitution's equal protection clause can never protect classes of people disproportionately harmed by state actions permitting oil and gas pollution?

#### BASIS FOR GRANTING THE WRIT

There are 70,000 oil and gas production sites in New Mexico—all authorized to operate by Defendants without consideration of human health or the environment. In authorizing this production without controlling pollution, Defendants allow these sites to spew toxins into the atmosphere, resulting in dangerously unhealthy air quality that is unsafe to breathe. Defendants allow these sites to spill millions of gallons of toxic liquid waste each year, contaminating land and water. Simultaneously, Defendants allow thousands of inactive, unplugged oil and gas wells to continue to leak toxic pollutants, contaminating the air, water and land. Plaintiffs' complaint demonstrates that unmonitored pollution from oil and gas production harms human health and devastates New Mexico's environment, biodiversity, cultural resources and climate. Despite this harm, Defendants have

allowed production to more than triple since 2018, fueling an unprecedented, ever-growing pollution crisis.

This environmental degradation is occurring in one of the few states where voters added an environmental clause to their Constitution. Plaintiffs seek to enforce the New Mexico constitution to ensure basic environmental and public health protections. Defendants have excluded oil and gas pollution from pollution control statutes and repealed the only statute that required assessing the environmental impacts of development. The Oil and Gas Act does not allow consideration of the environment or public health when authorizing new drilling. The Environment Department, which oversees state air quality, authorizes new air pollution from oil and gas operations despite air quality that violates basic health standards. And no state agency has the resources to monitor and regulate the industry. Defendants' failure to enact and implement basic oversight and environmental and public health protections needs to be addressed by the courts in their crucial role of enforcing the Constitution. The appellate ruling erroneously shirks this fundamental duty.

**I. The Pollution Control Clause creates a positive constitutional right which must be enforced by the Court.**

In 1971, New Mexicans voted to amend their Constitution to include the Pollution Control Clause, establishing the fundamental importance of a beautiful



and healthful environment and commanding the State to control pollution and prevent the despoilment of the air, water and other natural resources consistent with beneficial development. Before this amendment, the State already had “supreme” police powers to regulate industry and pollution pursuant to Article XI, Section 14 of the New Mexico Constitution. By adding the Pollution Control Clause, the State elevated pollution control to the level of a constitutional duty, “to protect the atmosphere and other natural resources, and delegate[d] the implementation of that specific duty to the Legislature.” *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 16); *see also Brief of Amici Curiae Law Professors in Support of Plaintiffs Appellees*, filed below, pages 8 – 9 (Art. XX, § 21 was intended to command that the legislature “take positive action ... to protect the environment” and was a “mandate from the people asking for more pollution control.”)

Just as education clauses within many state constitutions create a positive duty to establish an adequate system of education, *see, e.g.*, Decision and Order at 8-9, *Martinez-Yazzie v. State*, No. D-101-CV-2014-02224 (1st Jud. Dist. Ct. July 20, 2018), New Mexico’s Pollution Control Clause creates a positive duty to “control ... pollution and ... despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources

for the maximum benefit of the people.” N.M. Const. art. XX, § 21.<sup>1</sup> Positive constitutional rights found in state constitutions differ from negative rights (such as freedom from government regulation of speech) guaranteed by the U.S. Constitution, and “require the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty.” *Martinez-Yazzie* at 16 (internal quotations and citation omitted).

For example, the New York Constitution (discussed in the constitutional law professors’ *amici* brief, pages 21 – 22) contains a clause similar in structure to New Mexico’s Pollution Control Clause:

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivision, and in such manner and by such means, as the legislature may from time to time determine.

N.Y. Const. art. XVII, § 1. New York courts have repeatedly affirmed this provision is justiciable and provides enforceable standards. *See Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977) (provision “imposes upon the State an affirmative

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<sup>1</sup> While the appellate court noted that *Martinez-Yazzie* is a non-precedential district court opinion, it failed to recognize that Judge Singleton relied on many opinions from higher state courts that held the political branches accountable for their positive constitutional duties. *See, e.g., Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989) (“[J]udiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution ... This duty must be exercised even when such action serves as a check on the activities of another branch of government...”); *Gannon v. State*, 319 P.3d 1196, 1226 (Kan. 2014) (“[W]hen the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances.”).

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]”). Our Pollution Control Clause likewise establishes a subject of “fundamental importance” and mandates legislative action with some discretion, creating an enforceable duty.<sup>2</sup>

## **II. If the Court of Appeals’ decision stands, New Mexico will be an outlier that fails to find positive constitutional duties justiciable.**

In reversing the trial court’s decision denying Defendants’ motions to dismiss, the appellate court fundamentally misunderstood the nature of positive constitutional rights (or duties) contained in state constitutions. The court seemingly ignored Plaintiffs’ brief and the constitutional law professors’ *amicus* brief explaining the nature of these rights, and erroneously ignored the jurisprudence from other states where state courts have met their obligations to enforce constitutional duties.

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<sup>2</sup> Contrary to the decision below, Plaintiffs do not assert an individual right to be free from a certain amount of pollution. Plaintiffs seek enforcement of their positive constitutional right to a system that actually controls pollution. When the state has a constitutional duty, plaintiffs impacted by the failure to fulfill that duty can bring claims to require compliance with the constitution. This Court has the opportunity to clarify this basic state constitutional premise—that state constitutions, unlike the federal constitution, can and do create positive constitutional rights (or affirmative duties) that are enforceable in court.

For example, Alaska’s courts have maintained judicial oversight to ensure compliance with its “Natural Resources Clause”:

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest. The legislature shall provide for the utilization, development and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Alaska Const. art. VIII, §§ 1, 2. The Alaska Supreme Court asserted its “duty to ensure that constitutional principles are followed” which requires “the State to take a ‘hard look’ at all factors material and relevant to the public interest,” including “considering the cumulative impacts.” *Sullivan v. REDOIL*, 311 P.3d 625, 635 (Alaska 2013). “It is within the discretion of the legislature to modify [oil and gas law] so long as the principles contained in article VIII of the Alaska Constitution are being met.” *Id.* at 633. “We recognize that article VIII is not a complete delegation of power to the legislature; we have a duty to ensure compliance with constitutional principles, and... a duty to redress constitutional rights violations.” *Sagoonick v. State*, 503 P.3d 777, 796 (Alaska 2022).

Similarly, the Louisiana Constitution states:

The natural resources of the state, including air and water, and the healthful, scenic, historic and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.

La. Const. art. IX, §1. According to the Louisiana Supreme Court, this article “imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to fully implement this policy.” *Save Ourselves v. La. Env’t Control Comm’n*, 452 So. 2d 1152 (La. 1984). The court held that it has a duty to ensure other branches of government comply with their constitutional obligations to balance the protection of the environment with the development of natural resources. *Id.* The court held that the Legislature and executive agencies had a constitutional duty of “reasonableness” and the constitution requires the state “to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare...[T]he constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.” *Id.* at 1157.

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

Thus, even in states where constitutions do not mandate pollution control, courts have determined that the state must conduct substantive environmental review before approving new projects and that Legislature conduct is reviewable by the court.<sup>3</sup> In sharp contrast, the appellate court's decision here leaves the Legislature to do as it pleases and the Pollution Control Clause a dead letter. This Court must ensure the Clause has meaning and hold the State accountable through judicial review.<sup>4</sup>

**III. The Court of Appeals erroneously concluded, at the motions to dismiss phase, that Defendants have complied with the Constitution.**

Acknowledging that it was not commenting on the adequacy of any pollution control statutes or regulations, the appellate court nevertheless held that “the Legislature has complied with its constitutional duty to balance pollution control policies with resource development that maximally benefits the people.” Opinion at 26-27. This pronouncement erroneously accepts Defendants’ interpretation that “the use and development of these resources for the maximum

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<sup>3</sup> Michigan’s Supreme Court also held that its constitutional environmental provisions create a duty for the state, and require, at a minimum, environmental analysis before proceeding with agency actions affecting the environment. *State Highway Comm’n v. Vanderkloot*, 220 N.W.2d 416, 425 (Mich. 1974).

<sup>4</sup> Recognizing increasing state constitutional protections, this Court noted “[a] chronic underappreciation of state constitutional law has been hurtful to state and federal law and the proper balance between state and federal courts in protecting individual liberty.” *Grisham v. Van Soelen*, 2023-NMSC-027¶ 19 n.7 (internal quotes and citations omitted).

benefit of the people” means extracting natural resources for economic gain and relies on “facts” not in Plaintiffs’ complaint. At the Motion to Dismiss phase, the court was required to accept all the well-pled facts in Plaintiffs’ complaint as true and has wrongly denied Plaintiffs the opportunity to challenge with evidence the conclusion that Defendants have fulfilled their duties. Even if the Clause requires a “balancing” of environmental protection against use and development of natural resources, that “balancing” is still subject to judicial review of actual evidence, not just argument of counsel.

The Clause mandates that the Legislature provide for pollution control in a manner that is *consistent* with the use of natural resources for the benefit of New Mexicans. Contrary to the appellate opinion, the Clause does not specify that the maximum benefit must be achieved through maximal extraction of mineral resources. The Clause mandates that Defendants be held accountable to a reasonable level of pollution control.

#### **IV. The Court of Appeals incorrectly eviscerated the breadth and power of Declaratory Judgments.**

As the ultimate arbiter of the Constitution, courts have the duty to interpret and enforce the Constitution.<sup>5</sup> This can be done through the Declaratory Judgment

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<sup>5</sup> The framers of our Constitution “intended to create rights and duties and they made it imperative upon the judiciary to give meaning to those rights through judicial review of the conduct of the separate governmental bodies.” *State v.*

Act which mandates that “the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico.” NMSA 1978 § 44-6-13. “The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.” § 44-6-14.

The appellate court erred when it decided the Act only applies to cases involving individual rights and that a declaratory judgment would not redress Plaintiffs’ claims. Positive constitutional rights fall within the realm of “rights, status or other legal relations of the parties” covered by the Act. The Court of Appeals ignored this language. A declaration that Defendants have not fulfilled their duties to meet those rights would redress Plaintiffs’ claims because it would mean Defendants must actively control pollution to comply with the Constitution.

**V. This Court should decide whether substantive due process rights apply to health and environmental harms.**

Plaintiffs allege Defendants’ authorization of oil and gas production and concomitant pollution causes extensive harm to their health and environment, thereby impinging on their fundamental rights to life, liberty, property, safety,

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*Gutierrez*, 1993-NMSC-062, ¶ 55. State courts have the obligation to weigh the constitutionality of legislative acts. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 59.



happiness, and a healthful and beautiful environment guaranteed by the New Mexico Constitution, Article II, §§ 4 and 18. The appellate court dismissed these claims, contradicting this Court's holding that the Inherent Rights Clause and Due Process Clause in tandem can support a justiciable claim, *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 58, and erroneously finding that our Constitution does not support a fundamental right to a clean environment, that allegations of harm to health and the environment do not amount to violations of a protected liberty or property interest, and that the only standard for evaluating a substantive due process claim is whether it shocks the conscience. The court erroneously held that deliberate indifference alleged by Plaintiffs only applies in the context of medical care in prisons and ignored the state-created danger standard also alleged. Plaintiffs should have the opportunity to prove how Defendants' actions impact multiple fundamental rights. This Court should determine whether the Constitution provides fundamental rights related to a safe and healthy environment.

**VI. The Court of Appeals misapprehended disparate impact equal protection claims.**

The appellate court erroneously dismissed Plaintiffs' equal protection claims. The court misunderstood that facially neutral laws that disparately impact similarly situated classes can violate equal protection, *see Griego v. Oliver*, 2014-NMSC-003, ¶¶ 20, 27, and that neither a specific statutory classification nor discriminatory intent is required. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028,

¶¶ 10-15, 30-32.

Plaintiffs' complaint demonstrates how Defendants' authorization of oil and gas production and pollution disparately impacts three distinct classes of Plaintiffs. Frontline Plaintiffs are exposed to greater levels of pollution and harm than people not living close to oil and gas development. Indigenous Plaintiffs uniquely endure destruction of cultural resources and ancestral landscapes, and greater health harms. Youth Plaintiffs suffer greater damage to their physical and mental health than adults due to pollution and the climate crisis. Plaintiffs' well-pled equal protection claims should be allowed to proceed so they can prove discriminatory impact under the appropriate level of scrutiny.

RESPECTFULLY SUBMITTED,

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

The body of this petition for writ of certiorari uses Times New Roman, a proportionally-spaced typeface, and contains 3150 words, as counted by Microsoft Word 365, version 2409. This petition therefore complies with NMRA 12-502(D)(3).

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of July, 2025, a true and correct copy of the foregoing document was e-filed and served through the Court's e-filing system upon counsel of record.

/s/ gail evans

Gail Evans