

No. 20230022-SC

IN THE UTAH SUPREME COURT

NATALIE R., A MINOR, BY AND THROUGH HER GUARDIAN

DANNIELLE ROUSSELL; ET AL.,

Plaintiff/Appellants,

v.

STATE OF UTAH; ET AL.,

Defendants/Appellees.

Review of Memorandum Decision and Order Granting
Defendants' Motion to Dismiss, entered on November 9, 2022
at No. 220901658 in the Third District Court for Salt Lake County

BRIEF OF *AMICI CURIAE*
UTAH CHAPTER – AMERICAN ACADEMY OF PEDIATRICS
UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT
UTAH MOMS FOR CLEAN AIR
VOICES FOR UTAH CHILDREN
IN SUPPORT OF APPELLANTS

Jonathan G. Jemming (10200)
Catherine E. Lilly (7746)
P.O. Box 9096
Salt Lake City, UT 84109
(801) 755-3903
jemming.law@gmail.com

Counsel for Amici Curiae

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NOTICE AND CONSENT PURSUANT TO RULE 25(e)

Counsel for the parties received timely notice of the filing of this brief via email.

All parties consented to the filing of the amicus brief.

STATEMENT OF AUTHORSHIP

Per Utah Rule of Appellate Procedure 25(e)(6), this brief has been authored by counsel, Catherine E. Lilly and Jonathan G. Jemming, for the Utah Chapter of the American Academy of Pediatrics, the Utah Physicians for a Healthy Environment, Utah Moms for Clean Air, and Voices for Utah Children. No party or party's counsel authored this brief in whole or part; no party or party's counsel contributed money to that was intended to fund preparing or submitting the brief; and no person—other than *amici*—contributed money that was intended to fund preparing or submitting the brief.

INTERESTS OF THE *AMICI CURIAE*

Amici are leading Utah experts in public health, children's medicine, and advocacy for children's rights, including organizations representing children and health professionals. Through their research and/or clinical work, education and advocacy, *amici* observe and document the harmful impacts of localized air pollutants and greenhouse gas (GHG) emissions on children. This generation of children is suffering—and will continue to suffer as they age—harms different from those of prior generations. *Amici* feel a special responsibility to safeguard the health of Youth Plaintiffs and that of their generation.

Utah Chapter – American Academy of Pediatrics

The Utah Chapter of the American Academy of Pediatrics, (“UT AAP”) is a non-profit educational organization and professional society comprising more than 700 members, including pediatricians, residents, and medical students from Utah hospitals, community clinics, and school-based health centers. UT AAP works to support the optimal health of children by addressing the needs of children, their families, their communities,

and their health care providers.

The UT AAP's youth patients are being harmed by the Appellees' codified fossil fuel policies and programs that Youth Plaintiffs' challenge in this case.

Utah Physicians for a Healthy Environment

Founded in 2007, Utah Physicians for a Healthy Environment ("Utah Physicians") is the largest community service organization of health professionals in the state of Utah, with about 450 physicians and 3,500 members of the lay public as members and/or supporters. Organization members are dedicated to protecting the health and well-being of the citizens and children of Utah by promoting science-based education and interventions that result in measurable improvements to the environment. Utah Physicians formed their group because they were troubled by the health risks that currently exist in Utah's environment and understand that the health of their patients and the people of Utah is significantly and adversely impacted by pollution – particularly localized air pollution.

Utah Physicians' patients are harmed by the State of Utah's codified endorsement of fossil fuel development and have been adversely affected by the resulting localized air pollution and greenhouse gas emissions in Utah.

Utah Moms for Clean Air

Utah Moms for Clean Air ("the Moms") is a citizen network of mothers dedicated to improving Utah's air quality and safeguarding the environment for the health of their children. The Moms use the power of motherhood to protect the right of all children to breathe clean air.

The Moms have children who are suffering from asthma and other respiratory

ailments that are made worse when air pollution exceeds health standards, often called “Red Alert” days. The Moms’ children have been harmed by air pollution from the development and combustion of fossil fuels pursuant to the laws Youth Plaintiffs challenge here. They have observed that on unhealthy air days, emissions emanating from the development and combustion of fossil fuels extracted in Utah pursuant to state law contribute to air pollution concentrations and their children suffer as a result.

A ruling in favor of the Youth Appellants in this case will help to address the region’s air pollution problems, enhancing the health and wellbeing of the Moms’ children. A favorable ruling will affect the Moms’ children, improving their ability to enjoy life and helping to protect their health. Without a favorable ruling, the Moms’ children will continue to be disproportionately impacted by Utah’s codified policies favoring fossil fuel development and will be further harmed by air pollution and greenhouse gas emissions.

Voices for Utah Children

Voices for Utah Children advocates and advances policies and practices that are good for all of Utah’s children. Originally established in 1985 by Roz McGee as Utah Children, in 2002 Utah Children became Voices for Utah Children. Voices for Utah Children has continued to actively serve the community’s youth since that time.

At the core of Voices for Utah Children’s mission is diversity, equity, and inclusion and belonging. Commitment to these values is unwavering – across their work in the State of Utah.

To minimize health and safety harms and health care costs to children from the beginning stages of life, Voices for Utah Children see improving air quality and addressing

climate change as paramount concerns. In this matter, the Appellee's own studies demonstrate the harms faced by the community due to poor air quality and GHG emissions. Voices for Utah Children supports the Appellants in this matter and their challenge to the Appellees' fossil fuel policy.

INTRODUCTION

Utah's children, including Youth Plaintiffs, are born into a world made hazardous to their health and well-being by localized air pollution and (GHGs) increasingly emitted by human activities. Air pollution and GHG emissions are causing major physical, chemical, and ecological changes to the planet, manifesting in Utah as stay-indoor days, increasing temperatures and deadly heatwaves, extreme weather events, changing precipitation patterns, and droughts, flooding, increasingly frequent and severe wildfires and wildfire smoke, and other harms to the health and safety of children. The medical community agrees that children in the U.S. will face increasing and compounded health harms over their lives if the current trajectory of GHG emissions continues; “[w]ithout significant intervention, this new era will come to define the health of an entire generation.”¹

There is a scientific consensus that children are especially vulnerable to localized air pollution and climate-related health effects because of their developing bodies; higher exposure to air, food, and water per unit body weight; higher metabolic rate; unique

¹ Renee N. Salas et al., *The Lancet Countdown on Health and Climate Change, Policy Brief for the United States of America* 6 (2019), <https://www.lancetcountdownus.org/wp-content/uploads/2020/11/LancetCountdownPolicyBrieffortheUS2019.pdf>.

behavior patterns; and dependence on caregivers.² The Utah laws mandating fossil fuel development that are challenged as unconstitutional in this case are directly causing and worsening these impacts by causing significant amounts of localized air and GHG pollution. Adverse public health impacts can be significantly mitigated if the laws Youth Plaintiffs challenge in this case, which direct the state to maximize, promote, and systematically authorize fossil fuel development, are declared unconstitutional. However, the window of opportunity to preserve health and safety for Youth Plaintiffs, their generation, and future generations of Utah’s children is rapidly closing.

The Intergovernmental Panel on Climate Change Synthesis Report confirms that “[c]limate change is a threat to human well-being and planetary health (*very high confidence*). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*).... The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).”³

Consequently, *amici* urge the Court to overturn the dismissal of Youth Plaintiff’s case and afford these Utah children the opportunity to seek protection of their fundamental rights at trial, as this is the only mechanism available to children who lack political power.

² Samantha Ahdoot & Susan E. Pacheco, *Global Climate Change and Children’s Health*, 136 *Pediatrics* e1468, e1470 (2015).

³ IPCC, *Summary for Policymakers*, in *Climate Change 2023: Synthesis Report* 24 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

ARGUMENT

I. AIR POLLUTION AND CLIMATE CHANGE UNIQUELY HARM CHILDREN, INCLUDING YOUTH PLAINTIFFS, YET THEY ARE POLITICALLY POWERLESS TO CHANGE GOVERNMENT POLICIES THAT PERPETUATE AIR POLLUTION AND GREENHOUSE GAS EMISSIONS

A. Children Are Uniquely Vulnerable to and Disproportionately Harmed by the Dangerous Air Quality Resulting from the Development and Combustion of Fossil Fuels

The development and combustion of fossil fuels emits dangerous localized air pollutants, including sulfur dioxide (SO₂), nitrogen oxides (NO_x), particulate matter (PM), carbon dioxide (CO₂), volatile organic compounds (VOCs), and mercury (Hg).⁴ VOCs and NO_x contribute to the formation of ozone and fine particulate matter.⁵ All these pollutants contribute to adverse health impacts, including heart and lung diseases, increased emergency room visits and hospital admissions, and premature deaths.⁶

Children are uniquely vulnerable to these localized air pollutants because their bodies and brains are still developing and they breathe more air relative to their body weight than adults, increasing the exposure of their narrow airways that are already vulnerable to toxins that can cause swelling and constriction.⁷ Children's lungs, immune system, and brains are immature at birth and continue to rapidly develop until late adolescence. Air pollution harms these developing systems causing an increase in chronic

⁴ U.S. EPA, *Power Plants and Neighboring Communities*, <https://www.epa.gov/power-sector/power-plants-and-neighboring-communities> (last updated May 11, 2023).

⁵ *Id.*

⁶ *Id.*

⁷ Frederica Perera & Kari Nadeau, *Climate Change, Fossil-Fuel Pollution, and Children's Health*, 386 *New Eng. J. Med.* 2303, 2304 (2022).

cough; bronchitis; reduced lung function, and likely permanent loss of lung capacity; wheezing; asthma attacks; ear infections; childhood cancers; brain development disorders; impaired cognition, memory, and executive functioning; and other health harms.⁸

The link between air pollution and harms to children's physical health is well-established for a wide range of health conditions, including cardiovascular and respiratory diseases, central nervous system disorders, metabolic conditions, reproductive dysfunction, organ damage, cancer, and other serious health effects.

The harmful impacts of exposure to air pollution are so severe that experts estimate that, because of premature death and other medical harms resulting from Utah's current levels of air pollution, 75% of Utahns are losing at least one healthy year of life, 23% are losing at least five healthy years of life, and, on average, Utahns are losing approximately three healthy years of life.⁹

These sobering statistics do not account for the unique vulnerabilities of and disproportionate impact to children from air pollution or increasing smoke from wildfires,

⁸ See Utah Physicians for a Healthy Environment, *Air Pollution and Health*, <https://www.uphe.org/air-pollution-health/> (last visited July 24, 2023); Binter, C.A., et al, *Air Pollution, White Matter Microstructure, and Brain Volumes: Periods of Susceptibility from Pregnancy to Preadolescence*, Environmental Pollution (2022), <https://doi.org/10.1016/j.envpol.2022.120109> <https://www.sciencedirect.com/science/article/abs/pii/S0269749122013239>; World Economic Forum, *Children Are Dying From Air Pollution. Here's How We Can Protect Them*, <https://www.weforum.org/agenda/2021/11/how-we-can-protect-children-dying-from-air-pollution/>.

⁹ Isabella M. Errigo et al., *Human Health and Economic Costs of Air Pollution in Utah: An Expert Assessment*, 11 Atmosphere 1238 (2020).

which is increasingly prevalent in Utah.¹⁰ Consequently, Utah's youth and children are already losing and will lose even greater numbers of years off their lifespans because of Utah's already dangerous air pollution and because of increasing smoke from wildfires, higher ozone levels, and more frequent dust storms, caused and exacerbated by climate change than these figures portray. Not including wildfire smoke, approximately 85% of the air pollution causing medical harm to and shortening the lifespans of Utah's youth is the product of fossil fuel combustion and development.¹¹

B. Children Are Uniquely Vulnerable to and Disproportionately Harmed by Climate Change

Utah children including Youth Plaintiffs are disproportionately impacted by the harmful effects of climate change resulting from the development and combustion of fossil fuels, including heat exposure, extreme weather events, wildfire and wildfire smoke, changing precipitation patterns, infectious disease, and less nutritious, more expensive food. Children's heightened exposure and immature physiological development render them particularly susceptible to the detrimental effects of climate change.

i. Children Are Particularly Vulnerable to Rising Temperatures and Dangerous Heat Waves

Utah children are particularly vulnerable to the rising temperatures and increasingly frequent and deadly heat waves. Heat is the leading weather-related killer in the United

¹⁰ A.J. Crimins et al., *Executive Summary*, in *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* (2016).

¹¹ *Id.*

States,¹² and children are at elevated risk of heat-related illness and death compared to adults due to their greater surface area to body mass ratio, lower rate of sweating, and slower rate of acclimatization.¹³ Children have more difficulty adapting to heat than adults, as their thermoregulatory systems are not yet fully developed, which increases the risk of dehydration, renal disorders, and heat-related morbidity.¹⁴ The very youngest are at a particularly elevated risk of heat-related death: within the first seven days of life, infant mortality increases 25% on extremely hot days.¹⁵ Among student athletes, death from heat-related illness is rising,¹⁶ and nationally, over 9,000 high school athletes are treated for heat-related illnesses each year.¹⁷ Between 2000 and 2013, deaths from heat stroke doubled among U.S. high school and college football players.¹⁸ Extreme heat places young children at higher risk of kidney and respiratory disease as well as fever and electrolyte imbalance.¹⁹ Extreme heat also negatively affects children's school performance and well-being. Heat and increasing temperatures make it more difficult for children to learn, perform well on

¹² National Weather Service, *Weather Related Fatality and Injury Statistics*, <https://www.weather.gov/hazstat/> (last visited July 18, 2023).

¹³ Bareket Falk & Raffy Dotan, *Children's Thermoregulation During Exercise in the Heat: A Revisit*, 33 *Applied Physiology, Nutrition, & Metabolism* 420, 425 (2008).

¹⁴ Perry E. Sheffield & Philip J. Landrigan, *Global Climate Change and Children's Health: Threats and Strategies for Prevention*, 119 *Env't Health Persps.* 291 (2011).

¹⁵ Xavier Basagaña et al., *Heat Waves and Cause-specific Mortality at all Ages*, 22 *Epidemiology* 765 (2011).

¹⁶ Perera & Nadeau, *supra* note 7, at 2307.

¹⁷ Janet L. Gamble & John Balbus, *Ch. 9 Populations of Concern*, in *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* 248, 255 (2016), <https://health2016.globalchange.gov/populations-concern>.

¹⁸ *Id.*

¹⁹ Zhiwei Xu et al., *The Impact of Heat Waves on Children's Health: A Systematic Review*, 58 *Int'l J. Biometeorology* 239, 244 (2013).

tests, and even to attend school.²⁰ Warming temperatures also increase the amount of pollen and allergens produced by plants as well as particulate matter in the air, which “exacerbates respiratory disease and asthma in children.”²¹

ii. Children Are Uniquely Harmed by Wildfire and Wildfire Smoke

Utah children are already being harmed by exposure to smoke from wildfires brought on by climate change. For example, children’s asthma and respiratory issues are exacerbated by decreased air quality stemming from increased temperatures and wildfires caused by climate change.²² In the United States, approximately 8.4% of children already suffer from asthma.²³ Wildfires produce dangerous air quality both locally and in downwind areas by spewing fine particulate matter, carbon monoxide, oxides of nitrogen, and volatile organic compounds that are ozone precursors into the air.²⁴

Children are particularly vulnerable to and are at an increased risk of injuries to their health from dangerous air quality, including from wildfire smoke.²⁵ Exposure to all types

²⁰ See Joshua Graff Zivin & Jeffrey Shrader, *Temperature Extremes, Health, and Human Capital*, 26 *Future Children* 31, 40 (2016); Jisung Park, *Hot Temperature, High Stakes Exams, and Avoidance Behavior: Evidence from New York City Public Schools*, NBER (2017); Hyunkuk Cho, *The Effects of Summer Heat on Academic Achievement: A Cohort Analysis*, 83 *J. Env’t Econ. & Mgmt.* 185, 192 (2017).

²¹ A.J. Crimins et al., *Executive Summary*, in *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* (2016).

²² *Id.*

²³ U.S. EPA, *Key Findings of America’s Children and the Environment*, <https://www.epa.gov/americaschildrenenvironment/key-findings-americas-children-and-environment> (last visited Mar. 6, 2020).

²⁴ Utah Dep’t of Environmental Quality, *Health Impacts of Wildfire Smoke*, <https://deq.utah.gov/air-quality/health-impacts-of-wildfire-smoke> (last updated July 17, 2023).

²⁵ *Id.*; Utah Dep’t of Health, *Climate Change and Public Health in Utah* 32 (2012).

of air pollution can impair the development of all critical organs during intra-uterine life, infancy, and childhood. The consequences can be lifelong, increasing Youth Plaintiffs' risk of chronic and acute cardiovascular, respiratory, brain, and neurological disorders, cancer, reproductive problems, birth defects, and other medical problems, including risk of premature death.²⁶

Utah, particularly northern and western Utah (with populations consisting of over 25% children), already experiences dangerous air quality from wildfire smoke.²⁷ In the summer of 2021, Utah experienced some of the worst air quality in the world because of wildfire smoke, with the Salt Lake City area, containing the highest density of children in the state, experiencing the worst air quality in the entire world on August 6, 2021.²⁸

iii. Children Are Disproportionately Harmed by Changing Precipitation Patterns

Anthropogenic climate change is causing changes in Utah's rain and snowfall, accumulation of snowpack, the intensity of storms, and the frequency and severity of droughts and floods, harming Utah children and endangering their lives, health, and safety.²⁹

²⁶ World Economic Forum, Children Are Dying From Air Pollution. Here's How We Can Protect Them, <https://www.weforum.org/agenda/2021/11/how-we-can-protect-children-dying-from-air-pollution/>.

²⁷ Jia Coco Liu et al., *Particulate Air Pollution from Wildfires in the Western US Under Climate Change*, 138 *Climatic Change* 655, 662 (2016).

²⁸ Lexy Peery, KUER 90.1, *Utah Had the Worst Air in the World Today – Here's What You Need to Know to Be Safe*, (Aug. 6, 2021).

²⁹ U.S. EPA, *What Climate Change Means for Utah* (Aug. 2016).

Ninety-five percent of Utah's water supply comes from melting snowpack.³⁰ Due to rising temperatures, the amount of precipitation falling as rain relative to snow is increasing.³¹ Increasing temperatures and diminished snowfall have caused Utah's snowpack to decrease since the 1950s; the snowpack in some areas decreased nearly 80% between 1955 and 2022.³² Youth and children are uniquely vulnerable to dehydration and other health impacts of the resulting increasing water scarcity and drought in Utah resulting from climate change.³³

Droughts are associated with health issues such as water-borne and vector-borne diseases, cardiovascular and respiratory conditions, injuries, kidney conditions, esophageal cancer, food insecurity and malnutrition, mental health disorders, and mortality.³⁴ Children are most vulnerable to the health impacts of droughts, experiencing respiratory illness, diarrheal illnesses, and malnutrition.³⁵ Droughts lead to water insecurity for families in impacted areas, and contribute to worsened respiratory health, mental health, undernutrition, and infectious diseases among children.³⁶ Drought and climate change also

³⁰ Utah Division of Water Resources, *Snowpack*, <https://water.utah.gov/snowpack/#:~:text=Monitoring%20snowpack%20helps%20our%20water,get%20us%20through%20dry%20years> (last visited Sept. 29, 2023).

³¹ Abhinav Gupta, et al., *Changes in Streamflow Statistical Structure Across the United States Due to Recent Climate Change*, *Journal of Hydrology*, Vol. 620, Pt. B (May 2023).

³² U.S. EPA, *Climate Change Indicators: Snowpack*, <https://www.epa.gov/climate-indicators/climate-change-indicators-snowpack> (last updated July 21, 2023).

³³ Chouraqui JP. *Children's water intake and hydration: a public health issue*. *Nutr Rev.* 2023 Apr 11;81(5):610-624. doi: 10.1093/nutrit/nuac073. PMID: 36228121.

³⁴ *Id.* at 218.

³⁵ Margaret Sugg et al., *A Scoping Review of Drought Impacts on Health and Society in North America*, 162 *Climatic Change* 1177, 1187 (2020).

³⁶ Daniel Helldén et al., *Climate Change and Child Health: A Scoping Review and an Expanded Conceptual Framework*, 5 *Lancet Planetary Health* e164, e166-67 (2021).

contribute to increased wildfire in the United States.³⁷ Drought-related stressors often lead to severe mental health issues, including depression and anxiety, and children experience higher levels of stress during drought than adults.³⁸

Drought has also exposed lakebeds throughout the state. Residuals of pesticides and agricultural chemicals have migrated into many of the lakes, including the Great Salt Lake, over many decades. The exposed lakebeds pose additional threats to air quality. When wind blows over the parched lakebeds, it picks up dust, blowing it into populated areas, exposing Utah’s children to dust storms laced with particulate matter, numerous neurotoxic heavy metals, like mercury, lead, and arsenic, and other toxic chemicals.³⁹ Ninety percent of the dust in the Wasatch Front comes from dry lakebeds. Dust from the exposed lakebeds accumulates in snowpack, causing earlier snowmelt, further disrupting water supply and threatening water security.⁴⁰

When storms do bring precipitation to Utah, it falls more intensely due to anthropogenic climate change, increasing the risk of harms to Youth Plaintiffs’ health and safety from flooding and contaminated waters.⁴¹

³⁷ NOAA, *Wildfire Climate Connection*, <https://www.noaa.gov/noaa-wildfire/wildfire-climate-connection> (last updated July 24, 2023).

³⁸ Sugg et al., *supra* note 35, at 1183.

³⁹ New York Times, *As the Great Salt Lake Dires Up, Utah Faces an “Environmental Nuclear Bomb,”* (June 7, 2022).

⁴⁰ Michael M. Goodman et al., *Trace element chemistry of atmospheric deposition along the Wasatch Front (Utah, USA) reflects regional playa dust and local urban aerosols*, 530 *Chem. Geology* 119317 (2019), <https://doi.org/10.1016/j.chemgeo.2019.119317>.

⁴¹ Utah Dep’t of Public Safety & Division of Emergency Management, *2019 Utah State Hazard Mitigation Plan* 286 (Feb. 2019).

iv. Children Will Inherit the Worst of the Climate Crisis

Children are also disproportionately vulnerable to the physical and psychological harms of the climate crisis because, as they grow older, they will experience increasingly numerous, frequent, and severe climate change related injuries in comparison with present generations of adults.⁴² Under current GHG emission rates, children born in 2020 are expected to face more than a seven-fold increase in overall extreme climate events, such as heat waves, wildfires, crop failures, droughts, and floods, compared to an adult born in 1960.⁴³

C. Children Lack the Rights and Resources to Influence Government Policies

Children's ability to participate in politics that affect their own destinies is severely limited because they cannot vote, and lack the economic resources to participate in our society's politics. In all fifty states and the District of Columbia, the age of majority is eighteen or older. Even mature minors cannot vote. *See* U.S. Const. amend. XXVI § 2. Children cannot participate through the ballot box and must depend on guardians to make political decisions that protect their rights.

Children also lack the economic power held by adults to influence climate policies.

⁴² *See* Samantha Ahdoot, Susan E. Pacheco & Council on Environmental Health, *Global Climate Change and Children's Health*, 136 *Pediatrics* e1468 (2015); Rebecca Pass Philipsborn & Kevin Chan, *Climate Change and Global Child Health*, 141 *Pediatrics* e20173774 (2018); Wim Thiery et al., *Intergenerational Inequities in Exposure to Climate Extremes*, 374 *Science* 158 (2021); U.S. EPA, *Climate Change and Children's Health and Well-Being in the United States* (Apr. 2023); IPCC, *Summary for Policymakers*, in *Climate Change 2023: Synthesis Report* 7 (2023).

⁴³ Wim Thiery et al., *Intergenerational Inequities in Exposure to Climate Extremes*, 374 *Science* 158 (2021).

Federal Reserve data charting wealth by age cohort shows that baby boomers (born 1946-1964) hold 57% of the nation's household wealth, while Gen Xers (born 1965- 1980) hold 21% and Millennials (born 1981-1996) hold a mere 3%.⁴⁴ Children are not even on the chart.⁴⁵

Without control of votes or economic resources, children are powerless to compete with well-resourced fossil fuel lobby groups, who utilize lobbying and advertising to heavily influence government policies that promote consumption and development of fossil fuels.⁴⁶ Between 2000 and 2016, these industries outspent the renewable energy industry tenfold on lobbying to successfully ensure the continued promotion of fossil fuel use.⁴⁷

The efforts of children to advocate for justice are heroic and important, but children are ultimately limited in their ability to directly participate in the political process to protect their rights under the executive and legislative branches, which makes it vital for the judicial branch to keep the courthouse doors open and allow youth access to justice to vindicate their fundamental rights. Children are not only future citizens and leaders; they have “present-tense rights and present-tense capacities to contribute to the common good.”⁴⁸ In recognition of these present-tense rights, courts have identified a special

⁴⁴ Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, Wash. Post, Dec. 3, 2019.

⁴⁵ *Id.*

⁴⁶ Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 *Climatic Change* 289 (2018).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1589.

judicial obligation to step in to protect children against harmful government action, which can only happen if children can access their courts to do so.

II. THERE IS A JUDICIAL ROLE IN REDRESSING THE HARMS TO YOUTH CAUSED BY AIR POLLUTION AND CLIMATE CHANGE

The trial court erred in determining that no judicial remedy is available to the Youth Plaintiffs. As argued in their opening brief, the district court based its decision on a faulty interpretation of the political question doctrine; an erroneous conclusion that due process does not extend to fossil fuel policies; and its incorrect assessment that Youth Plaintiffs do not have standing because their issue is not redressable. The court reasoned, in part, that they were asking the court to replace Utah's fossil fuel regulatory scheme with a new energy policy in violation of separation of powers.

In fact, Youth Plaintiffs are only asking the trial court to declare a handful of specific statutes that direct Utah's executive branch to perpetuate fossil fuels as unconstitutional, not to engage in policymaking. The court is *duty-bound* to make sure that these statutes do not violate their rights to life and liberty under the Utah Constitution.

“A dismissal is a severe measure” that is reviewed for correctness with no deference given to the trial court. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990) (citations omitted). The court, in summarily dismissing the case under Utah Rule of Civil Procedure 12(b), denied Youth Plaintiffs any sort of legal relief. Instead, the court essentially told the children that their only recourse is through the ballot box. However, children cannot vote and have no recourse in the way the court suggests. What the court missed was the unique circumstances of these children and the court's corresponding

obligation to review the challenged policies and enforce Utah’s Constitution. Precedent confers a special judicial role in protecting children who are explicitly excluded from the political process. “Indeed, it is most often through democracy that liberty is preserved and protected in our lives,” when the rights of individuals are violated by “the unlawful exercise of governmental power . . . the Constitution requires redress by the courts.” *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (quotation omitted).

A. The Court Has a Role in Protecting Vulnerable Individuals Marginalized From the Political Process, Like the Youth Plaintiffs

Utah’s statutes directing the government to perpetuate fossil fuels cause and contribute to harmful air pollution and climate change, disproportionately harming children, yet children are unable to influence these harmful policies through the political process. The judiciary has a duty to protect marginalized groups, like Youth Plaintiffs, excluded from the political process from harmful majoritarian policies.

The U.S. Supreme Court has repeatedly employed heightened scrutiny and stepped in to provide remedies to vulnerable individuals marginalized from the political process, like Youth Plaintiffs here, even when refraining from identifying a new suspect class or fundamental right.⁴⁹ In *City of Cleburne, Texas v. Cleburne Living Ctr.*, the Court declined

⁴⁹ Intervention is even more necessary here because fundamental rights are involved. Additionally, while Youth Plaintiffs do not assert violations of equal protection or Utah’s uniform operation of laws provision, those principles should be considered. The challenged policies knowingly inflict disproportionate and grave harms to the lives, health and safety of youth, discriminating against them relative to adults. Youth could be considered a suspect class with respect to the government conduct challenged here, which discriminates against a politically powerless minority and for whom the resulting harms are disproportionately borne, causing a lifetime of hardship.

to identify developmentally disabled persons as a suspect class, but nevertheless invalidated the political decision to require a special use permit for group homes as irrational and unsupported by a legitimate state interest. 473 U.S. 432, 450 (1985). “[H]istory makes clear that constitutional principles of equality . . . evolve over time; what once was a ‘natural’ and ‘self-evident’ ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.” *Id.* at 466 (Marshall, J., concurring). In *United States v. Virginia*, a female high school student sought the Court’s aid when she was excluded from the Virginia Military Institute’s (VMI) citizen-soldier program on the basis of gender. 518 U.S. 515, 523 (1996). The Court held that VMI’s male-only admission policy violated her equal protection rights under the Fourteenth Amendment. *Id.* at 557. As Justice Ginsburg noted, “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *Id.* Here, the State’s policy of maximizing fossil fuel extraction will foreclose the extension of the opportunity for longevity, health, and safety enjoyed by all previous generations to Utah’s children. Consequently, the Court should intervene to ensure that the rights of this vulnerable, politically-excluded group are protected.

In *Brown v. Board of Education*, 347 US. 483 (1954), the Court once again stepped in to afford *children* like Youth Plaintiffs a legal remedy when they were excluded from the political process. In that case, African American children were denied admission to schools due to their race. *Id.* at 487-88. The Court held that segregation in public schools violates children’s equal protection rights under the Fourteenth Amendment, providing a remedy to vulnerable children. *Id.* at 496.

Similarly, in *Plyler v. Doe*, undocumented immigrant children sought the Court's aid when they were excluded from public schools. 457 U.S. 202, 205 (1982). The Court employed heightened scrutiny and provided a remedy, noting that

[M]ore is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic probability that they will contribute in even the smallest way to the progress of our Nation.

Id. at 223-24. Similarly here, where the challenged statutes are resulting in a lifetime of hardship to children for circumstances beyond their control for which they bear no responsibility, Utah Courts are duty bound to intervene to protect the rights of children and employ heightened scrutiny.

The Court also intervened to protect children born to unmarried parents. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972). In *Weber*, dependent unacknowledged children born outside marriage sought the Court's aid when they were barred from recovering under Louisiana's workmen's compensation laws upon the death of their biological fathers. 406 U.S. at 165-66. The Court held that discrimination based on birth status violated children's equal protection rights. *Id.* at 176. The Court noted that while it is "powerless to prevent the social opprobrium" inflicted upon these children, "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth." *Id.* at 175-76. Again, the Court employed heightened scrutiny to claims involving harms and discrimination to children based on circumstances beyond their control. *Id.* at

175. Thus, *Aetna* is yet one more case that shows that Courts have the duty to step in to protect Youth Plaintiffs, who have no say in the political process, and yet are profoundly harmed by Utah’s fossil fuel policy.

Utah’s Constitution, laws and jurisprudence similarly protect vulnerable groups marginalized from the political process, including youth and children like the Youth Plaintiffs here. Indeed, fundamental principles underlying their claims are grounded in deeply-rooted, explicit protections in the Utah Constitution. For example, the right to life is protected by article I, sections 1 and 7. It is the “most fundamental” right protected under Utah’s Constitution. *State v. Phillips*, 540 P.2d 936, 940 (Utah 1975), *disavowed on other grounds*, *State v. Taylor*, 664 P.2d 439 (Utah 1983). It protects against government policies and conduct that affirmatively and substantially reduce a person’s lifespan. *See S. Salt Lake City v. Maese*, 2019 UT 58, 450 P.3d 1092, 1097 (“When we interpret constitutional language, we start with the meaning of the text as understood when it was adopted.”).

As in the above state and federal cases, the challenged statutes are resulting in a lifetime of hardship for the Youth Plaintiffs. Accordingly, this Court is duty-bound to step in to protect them, especially here where the Youth Plaintiffs are politically powerless and marginalized as youth and children. Intervention is even more appropriate because fundamental rights are involved.

B. Courts Have a Special Role In Protecting Children From Government Action That Punishes Them Because of Circumstances Beyond Their Control

As discussed in *Plyler*, the U.S. Supreme Court employed heightened scrutiny because the challenged statute imposed a lifetime of hardship on undocumented immigrant

children based on their parent’s status, a fact of their life that was out of their control. 457 U.S. at 220. In doing so, the Court “appropriately [took] into account [the statute’s] costs to the Nation and to the innocent children who are its victims.” *Id.* at 224. Noting the long-term nature of the harm, the Court stated that “the deprivation of education takes an inestimable toll on the social, economic, intellectual and psychological well-being of the individual,” and “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.” *Id.* at 202-03.

Decades of U.S. Supreme Court jurisprudence document the judicial role in protecting children and the special consideration courts afford claims involving children’s rights in situations where children lack control over the circumstances under which they suffer harm. In *United States v. Windsor*, the Court considered the Defense of Marriage Act’s impact on children’s wellbeing, noting that the Act “humiliates tens of thousands of children now being raised by same-sex couples.” 570 U.S. 744, 772 (2013). The Court noted that the Act undermined “the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Id.*

In *Weber*, the Court acknowledged that barring children born outside marriage from collecting benefits constitutes hardship that is “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility.” 406 U.S. at 175. Further, in *Brown*, the Court noted “[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be

undone.” 347 U.S. at 494.

The *Brown* Court recognized that children do not have control over the color of their skin, and should not be deprived of educational opportunities solely because of their race. *See id.* Similarly, here, youth plaintiffs bear no responsibility for and cannot control the dangerous air pollution and climate changes resulting from the State’s systemic promotion of fossil fuel development, and are suffering serious harms from the State’s knowing causation of these harms, through which it has treated them as inferiors, denying them the opportunity for health and longevity enjoyed by present and prior generations of adults. Youth Plaintiffs, too, should not be deprived of their constitutional rights solely because they are children with no political agency.

The Utah Supreme Court has shown special consideration for the rights of children, as well. In *Jensen v. Cunningham*, the Utah Supreme Court ruled that even competing fundamentally protected constitutional interests “must yield” to “protecting the health” of children and that this “is especially the case where a child’s life is endangered.” 2011 UT 17, ¶ 74, 250 P.3d 465. This Court affirmed this principle in the recent case of *Kingston v. Kingston*, in which it once again made clear that the interests of children to health and safety override other fundamentally protected constitutional rights. 2022 UT 43, 532 P.3d 958.

Although the above cases deal with different aspects of a child’s life, the unifying feature is the special role of courts in protecting the welfare of children, particularly when they are harmed by a government action over which they have no control. Air quality and climate change are matters beyond children’s control. Children lack the rights and

resources needed to persuade the legislature to stop knowingly and actively causing and contributing to the dangerous air pollution and climate changes in Utah that are harming their health and safety and taking years off their lives. Youth Plaintiffs, like those in the above cases, cannot influence government policies, yet they suffer disproportionately the direct effects of Utah's fossil fuel agenda. The precedent laid out above demonstrates this Court's obligation to step in to protect them from the detrimental harms of climate change and poor air and allow them their constitutional right to their day in court to present evidence of their claims.

C. The Court's Role in Protecting These Children is Even More Vital Because of the Imminent and Severe Danger Posed by the State's Continuing Causation of Climate Change and Dangerous Air Quality

The Court's role in affording these children an opportunity to protect their fundamental rights is even more vital because neither children nor our planet can withstand the irreversible damage that will arise from more decades of continuing state promotion of fossil fuel development. Providing a remedy to children does not mean courts must open their doors to every minor plaintiff or issue. Rather, courts have a special role when the unlawful exercise of government power violates children's rights, especially in a way that poses lifelong harm for a matter beyond their control.

History shows the great harm that can flow from an abdication of judicial responsibility. It took fifty-eight years between *Plessy* and *Brown* to ban segregation in public facilities. *See Brown*, 347 U.S. at 495; *Plessy v. Ferguson*, 163 U.S. 537, 552-53 (1896). Thirty years passed after *Bowers v. Hardwick* before the Court recognized the fundamental constitutional rights of same-sex couples and their children. *See Obergefell*,

576 U.S. at 675; *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986).

The scientific consensus is that children do not have decades to spare regarding climate change and dangerous localized fossil fuel air pollution. Time is running out. Not only is government action already posing life-long harm to children, the problem is approaching the point of no return. Utah's children are being exposed to dangerous air pollution that is taking years off their lives *today*. Additionally, Utah's children, now and in the future, will experience worse and more frequent climate harms than today's generation of adults. With continued implementation of the challenged fossil fuel policies, Utah's hazardous air quality and dangerous climate harms, including extreme heat, drought, wildfires, and wildfire smoke, will continue to rise in frequency, intensity, and duration. If the state continues to perpetuate fossil fuel development pursuant to the laws challenged here, restoring a stable climate, which is essential for children's lives, health, and safety, will be impossible. Thus, it is critical that this Court afford these young people who lack political power the opportunity to protect themselves.

CONCLUSION

Considering the foregoing, *amici* respectfully urge this Court to overturn the trial court's dismissal of Appellants' case.

DATED this 3rd day of October, 2023.

Respectfully submitted,

/s/ Jonathan G. Jemming
Jonathan G. Jemming (10200)
Catherine E. Lilly (7746)
Counsel for Amici Curiae
PO Box 9096
Salt Lake City, Utah 84109

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2023 a true and correct copy of the foregoing *Amicus Brief* was filed electronically with the Utah Supreme Court at supremecourt@utcourts.gov and served by email to the following:

ERIN T. MIDDLETON
DAVID N. WOLF
MICHAEL BEGLEY
TREVOR GRUWELL
emiddleton@agutah.gov
dnwolf@agutah.gov
mbegley@agutah.gov
tgruwel@agutah.gov
Attorneys for Appellees

ANDREW L. WELLE
ANDREW G. DEISS
JOHN ROBINSON JR.
COREY D. RILEY
andrew@ourchildrenstrust.org
deiss@deisslaw.com
jrobinson@deisslaw.com
criley@deisslaw.com

/s/ Jonathan G. Jemming
Jonathan G. Jemming
JEMMING LAW, LLC

CERTIFICATES OF COMPLIANCE

I, JONATHAN G. JEMMING, certify that:

This brief complied with the type-volume limitation of Utah R. App. P. 25 and 27, I certify, using the word processing system, the foregoing brief contains 6375 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27, I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word in Times New Roman 13 point.

I also certify that any Public Version of this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(h).

/s/ Jonathan G. Jemming
Jonathan G. Jemming
Jemming Law, LLC