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**In the Supreme Court of the State of Utah**

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NATALIE R., a minor, by and through  
her guardian, DANIELLE ROUSSEL; et al.

*Plaintiffs-Appellants,*

vs.

STATE OF UTAH; et al.,

*Defendants-Appellees.*

Appellate Case No. 20230022-SC  
Brief of Amicus Curiae Law  
Professors in Support of Plaintiffs-  
Appellants and Reversal

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**Appeal from the Third Judicial District Court, Salt Lake County, Honorable**

**Robert Faust, Trial Court Case No. 220901658**

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**STATEMENT OF NOTICE PURSUANT TO RULE 25(E)(4) AND CONSENT  
PURSUANT TO RULE (E)(5)**

Counsel to all parties received notice of and consented to Law Professors' request to file a brief of amicus curiae.

**STATEMENT PURSUANT TO RULE 25(E)(6)**

No party or party's counsel authored this amicus brief, in whole or in part; no party or party's counsel contributed funding intended for the preparation or submission of this amicus brief; and no person contributed funding intended for the preparation or submission of this amicus brief.



## **STATEMENT OF IDENTITY AND INTERESTS OF AMICUS CURIAE**

*Amicus curiae* are law professors and scholars (listed on the signature page) who teach, research, and publish in the subject areas of constitutional, human rights, and environmental law.<sup>1</sup>

### **INTRODUCTION**

The youth Plaintiffs in this case assert that the State of Utah through its statutory policy to maximize, promote, and systematically authorize the development of fossil fuels in Utah, is actively causing and contributing to Utah's hazardous air quality and dangerous climate crisis impacts, harming the young plaintiffs and violating their state constitutional rights to life and to be free from substantial government endangerment of their health and safety.

On November 9, 2022, the Honorable Robert Faust of the Third Judicial District Court dismissed the case, concluding—among other reasons—that substantive due process does not apply to fossil fuels policy—a conclusion no other court has reached. *Amicus Curiae* Law Professors and Scholars file this amicus brief to illustrate the breadth of circumstances and subject matters to which courts have historically applied substantive due process, demonstrating that there is no exception for fossil fuel policies. Rather, the reach of Utah's

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<sup>1</sup> *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

Constitutional rights to life and liberty clearly encompass protection from the profound harms the youth are experiencing to their lives, health, and safety because of the development of fossil fuels pursuant to state law.

### **ARGUMENT**

“[C]ourts have the unquestioned right to **declare any act of government . . .**  
which violates the constitution, to be utterly void.”

*Ritchie v. Richards*, 47 P. 670, 676 (Utah 1896) (emphasis supplied)

There is no basis in law for the notion that fossil fuel policies are exempt from the explicit constitutional protections of life and liberty provided by Utah’s Constitution and the district court erred in concluding otherwise. Constitutional rights apply broadly, and courts have a “duty” to “safeguard the rights of the individual . . . **from whatever source.**” *State v. Holtgreve*, 200 P. 894, 900 (Utah 1921) (emphasis added). *See also Boyd v. United States*, 116 U.S. 616, 635 (1886) (“constitutional provisions for the security of person” “should be liberally construed”); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) (“liberty” and “property” are “broad and majestic terms,” purposely left to gather meaning from experience, and relate to “the whole domain of social and economic fact”). Indeed, “courts have the unquestioned right to declare **any act of government . . .** which violates the constitution, to be utterly void.” *Ritchie*, 47 P. at 676 (Bartch, J., concurring) (emphasis added).

Simply put, Utah and U.S. Supreme Court precedent demonstrates that courts do not look to the type of governmental conduct at issue when applying substantive due process claims, but rather the effect of the conduct on the rights infringed. There is no exception for fossil fuels policy when applying substantive due process, nor is there any legal basis to create such a novel exception as doing so would significantly erode substantive due process and leave the constitutional rights of these plaintiffs unprotected.

This brief is intended to help the Court review the district court's heretofore unprecedented exemption of fossil fuel policy from the constitutional protections of substantive due process by (1) documenting the first principle that the constitution's framers intended due process to apply to new circumstances affecting fundamental rights rather than remain static; (2) analyzing precedent holding that due process rights apply to government-caused harms irrespective of the particular mechanism of government interference; and (3) illustrating the many circumstances to which courts have applied substantive due process protections, demonstrating their broad applicability, particularly to government harm to health and safety.

**A. The constitutional framers intended due process rights to apply to new circumstances affecting fundamental rights rather than remain static**

Thomas Cooley, one of the most influential constitutional law scholars in the second half of the nineteenth century explained that constitutional rights:

**[A]re to be applied, not only to the subjects directly within the contemplation of those who framed them, but also to a great variety of new circumstances which could not have been anticipated,** but which must nevertheless be governed by the general rules which the instruments establish.” *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* \*38 (2d ed. Little, Brown, & Company 1871) (emphasis supplied).

This Court, which looks to Cooley’s writings to interpret Utah’s Constitution,<sup>2</sup> recognizes this need to apply founding principles in “new circumstances,” and has long recognized that to honor the essential meaning of the constitutional language protecting life and liberty these concepts are intended to be adapted for “future operation,” *People v. City Council of Salt Lake City*, 64 P. 460, 462-63 (Utah 1900), rather than “freez[ing]” their meaning “as of one point in time.” *DeBry v. Noble*, 889 P.2d 428, 435 (Utah 1995).<sup>3</sup> The court below, by focusing on and

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<sup>2</sup> *E.g.*, *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 51, 140 P.3d 1235.

<sup>3</sup> *See also* 16A Am. Jur. 2d Constitutional Law § 608 (Construction and Definition of Terms “Life, Liberty, and Property” as Used in State and Federal Constitutions) (“The words ‘life, liberty, and property,’ as used in State and Federal Constitutions, are representative terms and are intended to cover every right to which a member of the body politic is entitled under the law; in short, all that

exempting Utah’s fossil fuel policy rather than on the policy’s harms to Plaintiffs’ protected rights to life, health, and safety, “freezes” the terms life and liberty, refuses to adapt them for “future operation,” robs them of their “essential meaning,” and, therefore, drastically shrinks the Constitution’s “expansive language” which protects these rights.

Moreover, this Court gives particular solicitude when the potential harm to the rights to health and safety is to children. *See, e.g., Jensen v. Cunningham*, 2011 UT 17, ¶ 78, 250 P.3d 465 (recognizing that the health and safety of children overrides other fundamental rights); *see also Kingston v. Kingston*, 2022 UT 43, 532 P.3d 958 (same). In this regard, Plaintiffs are not seeking to create a new right. They are simply asking the court to recognize the same right to health and safety that courts have recognized for the wide range of plaintiffs impacted by the expansive array of government actions to which courts have traditionally applied substantive due process, as discussed below. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015) (plaintiffs are not seeking a new right to marriage but recognition of that existing right as applied to them); *see* Section C (discussing broad range of circumstances and policies to which courts have applied substantive due process).

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makes life worth living, or all the rights consistent with public safety. The liberty thus guaranteed is a very broad and extensive concept.”).

Most significantly and contrary to the district court’s conclusion, this Court has already applied substantive due process to fossil fuel policies—specifically to a provision of the Utah Oil and Gas Conservation Act. *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 349 (Utah 1991).

Federal case law likewise demonstrates that substantive due process is not a fixed concept and applies to new circumstances that arise in time. *Rochin v. California*, 342 U.S. 165, 169 (1952). Utah’s due process provision is materially identical to the U.S. Constitution’s due process provisions. Compare Utah Const. art. I, §§ 1 and 7 with U.S. Const. amend. V. Therefore, this Court can look to longstanding U.S. Supreme Court case law which likewise demonstrates the broad applicability of rights protected by substantive due process. This case law is further instructive because Utah’s due process protections are at least as broadly applicable as those in the federal Constitution and, indeed, may afford broader protections. *E.g., Cunningham*, 2011 UT 17, ¶ 46. (“our state constitutional provisions [may] afford more rights than the federal Constitution.”).

In *Rochin*, the United States Supreme Court described the due process clause as the “least specific and most comprehensive protection of liberties,” describing due process as “a summarized constitutional guarantee of respect for those personal immunities which . . . are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Id.* at 169-70 (citations

omitted). Emphasizing that “the concept of due process of law is not final and fixed,” the Court strongly counseled for the need for judicial judgment:

To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges[.]

*Rochin*, 342 U.S. at 171.

As discussed below, the district court’s mechanical application of substantive due process deprived the plaintiffs of the “most important aspect of constitutional adjudication”—a recognition of their constitutionally protected rights. *Rochin*, 342 U.S. at 171.

**B. Substantive due process rights apply irrespective of the mechanism of government harm**

In ruling that substantive due process does not apply to fossil fuels policies, the district court erred by focusing the substantive due process inquiry on the mechanism of government harm - fossil fuel policies - rather than whether the harms to the Plaintiffs’ longevity, health, and safety resulting from that policy are protected by the Constitutional rights to life and liberty. *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶ 52, 472 P.3d 843 (Substantive due process requires the court to ask whether plaintiff has a constitutionally protected interest rather than whether the plaintiff “has a constitutionally protected interest in being free from

a particular form of governmental interference”). *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092 (“The Utah Constitution enshrines principles, not application of those principles.”). *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019); *Rochin*, 342 U.S. at 169.

This Court reasoned in *K.T.B.* that focusing on the form of government interference leads the court to “entirely overlook the substantial [constitutional] interests at the heart of this case.” 2020 UT 51, ¶ 52. By focusing on the form of government interference, rather than the Youth Plaintiffs’ constitutional rights, the district court “entirely overlook[ed]” the youths’ protected interests in their longevity, health, and safety under Utah’s constitutional protections of life and liberty.

Consistent with *K.T.B.*, federal case law, including longstanding U.S. Supreme Court case law, also makes clear that the applicability of substantive due process turns on whether government has caused harm to a protected interest, and not on the particular mechanism of government harm. In *Guertin*, a federal court decision arising from “the infamous government-created environmental disaster commonly known as the Flint Water Crisis,” the Sixth Circuit Court of Appeals held that the plaintiffs had established sufficient facts alleging that several government officials violated citizens’ substantive due process rights to



health and safety by providing contaminated water in its municipal system. 912 F.3d at 915, 934-36.

The *Guertin* Court's decision makes plain the district court in this case's error—exempting fossil fuel policy from the protections of life and liberty—ruling that “to show that the government has violated one's [constitutional] right[,] a plaintiff need not ‘establish any constitutional significance to the means by which the harm occurs[.]’” *Id.* at 919 (citation omitted). In *Guertin*, the government's management of Flint's water system was the “means by which the harm occur[ed].” The court observed that rather than hinder the plaintiffs' claims, the “lack of a comparable government-created public health disaster precedent . . . showcases the grievousness of their alleged conduct.” *Id.* at 933.

Significantly, the *Guertin* Court did not fret over whether utility management was subject to substantive due process rights. Rather, the court properly focused on the harm this management caused to plaintiffs, concluding that “[i]f ever there was an egregious violation of the right to bodily integrity, this is the case.” *Id.* at 935. Youth Plaintiffs here similarly allege that the State's fossil fuel policies are causing egregious harms to their health and safety. There is no reason to exempt those policies from substantive due process.

In *Rochin*, the U.S. Supreme Court similarly focused its substantive due process inquiry on the “human rights” at stake, rather than on “the machinery of

government” affecting those rights. *Rochin*, 342 U.S. at 169. Such an approach makes sense because it eliminates judicial policymaking with respect to what policies are subject to substantive due process, and what are not. In focusing on the “human rights” the Court explained that the Constitution “exacts a continuing process of application”<sup>4</sup> and elucidated this process of applying substantive due process in a way that resonates strongly in the Plaintiffs’ case:

‘[D]ue process of law’ requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims.

*Id.* at 172 (citation omitted). It is exactly this type of fact-based inquiry and consideration of claims that Youth Plaintiffs seek from Utah’s judiciary. Such consideration would comport with *Rochin*’s directive to engage in the “judicial exercise of judgment,” rather than freeze due process of law at some fixed stage of time.

Similarly, the U.S. Supreme Court’s analysis in *Obergefell* illustrates that substantive due process rights are intended to provide broadly applicable protections. 576 U.S. 644. In *Obergefell*, the Court again focused its substantive due process inquiry not on whether substantive due process applied to or provided a narrowly-defined fundamental right to a freedom from the particular type of

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<sup>4</sup> *Rochin*, 342 U.S. at 170.

policies being challenged – same-sex marriage restrictions – but on whether the challenged policies harmed the petitioners broadly applicable right to marry. *Id.* at 671. The Court noted that in each case in which it examined the right to marry, it examined the right “in its comprehensive sense” and, in applying the right to the particular policies challenged in each case, asked whether there was sufficient justification for its infringement. *Id.*

As these cases illustrate, and as this Court explained in *Matter of K.T.B.*, focusing the substantive due process inquiry on the particular government policy causing the harm rather than whether an asserted harm is encompassed within constitutional protection, would cause a court to “entirely overlook” the “substantial” constitutional “interests at the heart” of a case—precisely what the district court in this case did. 2020 UT 51, ¶ 52

As Plaintiffs amply demonstrate by reference to the authorities and sources this Court looks to under its “original public meaning” approach to interpreting Utah’s Constitution, the history and tradition underlying Utah’s protections of life and liberty establish that they provide fundamental protections against substantial government diminishment of a person’s lifespan and substantial

harm and endangerment of their health and safety, precisely the harms Plaintiffs' allege here.<sup>5</sup>

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<sup>5</sup> See *Summit Water Distrib. Co. v. Utah State Tax Comm'n*, 2011 UT 43, ¶ 14, 259 P.3d 1055 (relying on period dictionary definitions to interpret Utah's Constitution); Appellants' Brief at 54-56 (period dictionary definitions support Appellants' claims); see *Richards v. Cox*, 2019 UT 57, ¶ 13, 450 P.3d 1074 (looking to corpus linguistics to interpret Utah's Constitution); Appellants' Brief at 55-56 (corpus linguistics analysis supports Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 29 (applying plain text analysis to interpret Utah's Constitution); Appellants' Brief at 56-57 (plain text analysis supports Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 53 (looking to sibling courts interpretation of similar constitutional provisions to interpret Utah's Constitution); Appellants' Brief at 58-59, 60-62 (sibling courts' analyses of similar constitutional provisions support Appellants' claims); *Am. Bush*, 2006 UT 40, ¶ 51 (looking to writing of Thomas Cooley to interpret Utah's constitution); Appellants' Brief at 59 (writings of Thomas Cooley support Appellants' claims); see *Jensen v. Union Pac. Ry. Co.*, 21 P. 994, 995 (Sup. Ct. of Terr. of Utah 1899) and *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 674 (Utah 1985) (tracing lineage of constitutional provisions through Sir Edward Coke to Magna Carta to interpret Utah's Constitution and similar federal provisions); Appellants' Brief at 59 (lineage of Utah's Constitution through the Magna Carta and writings of Coke support Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 40 (looking to writings of Blackstone to interpret Utah's Constitution); Appellants' Brief at 59 (Blackstone's writings support Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 169 (Nehring, J., dissenting) (looking to Locke's writings to interpret Utah's Constitution); Appellants' Brief at 59-60 (Locke's writings support Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 31 (looking to common law to interpret Utah's Constitution); Appellants' Brief at 64-68 (common law supports Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 55 (looking to 1898 code to interpret Utah's Constitution); Appellants' Brief at 64-66 (1898 and other Utah historical code provisions support plaintiffs Appellants' claims); see *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982) (looking to basic principles for which organized government is established to interpret Utah's Constitution); Appellants' Brief at 66-68 (basic principles for which organized government is established support Appellants' claims); see *Am. Bush*, 2006 UT 40, ¶ 13 (looking to proceedings of Utah's constitutional convention to interpret Utah's Constitution); Appellants' Brief at 59 (proceedings of Utah's constitutional convention support Appellants' claims).

Additional sibling court and United States Supreme Court case law further demonstrates that freedom from substantial government endangerment of health and safety is a fundamental due process right. *E.g.*, *Braam ex rel. Braam v. Washington*, 81 P.3d 851, 865 (Wash. 2003) (“[C]hildren have substantive due process rights to be free of unreasonable risk of harm” and “a right to reasonable safety.”); *Brown v. Plata*, 563 U.S. 493, 501 (2011) (government imposition of conditions that interfere with “basic health needs” violate “minimum constitutional requirements”); *see also* United Nations, Universal Declaration of Human Rights, art 25(2), Dec. 10, 1948, G.A. Res. 217A (III) (“childhood is entitled to special care and assistance”).

**C. The many circumstances to which courts have applied substantive due process protections demonstrate their broad applicability, particularly to government harm to health and safety**

The district court’s error in exempting fossil fuel policies from substantive due process by ignoring the harm caused by those policies is illustrated by the breadth of policy areas and factual circumstances to which courts have applied substantive due process protections, including in cases involving harms to health and safety, as plaintiffs assert here. With respect to the precedent of this Court alone, these policy arenas include confinement,<sup>6</sup> parental rights,<sup>7</sup> criminal

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<sup>6</sup> *Wickham v. Fisher*, 629 P.2d 896 (Utah 1981).

<sup>7</sup> *Jensen*, 2011 UT 17.

justice,<sup>8</sup> evidentiary issues,<sup>9</sup> statutes of limitation,<sup>10</sup> agriculture,<sup>11</sup> land use,<sup>12</sup> vested rights of action,<sup>13</sup> pollution control,<sup>14</sup> and labor laws.<sup>15</sup> In interpreting Utah's Constitution this Court has stated that it is aided by evidence presenting a "poignant, straightforward, and easy to interpret representation" – one with a clear “unifying theme.” *Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 44, 466 P.3d 178 (“When we look to the historical record, we hope that it resembles a Norman Rockwell painting . . . rather than a ‘Jackson Pollock’”) (citation omitted). This Court's precedent establishes such a unifying theme – that substantive due process rights apply to a diverse range of circumstances; the district court erred in overlooking it here.

Federal case law likewise demonstrates that substantive due process applies broadly to a full spectrum of policies and circumstances, illustrating that there is no exception for fossil fuel policies.<sup>16</sup>

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<sup>8</sup> *State v. Colonna*, 766 P.2d 1062 (Utah 1988).

<sup>9</sup> *State v. Tiedmann*, 2007 UT 49, 162 P.3d 1106.

<sup>10</sup> *Mitchell v. Roberts*, 2020 UT 34, 469 P.3d 901.

<sup>11</sup> *State v. Mason*, 78 P.2d 920 (Utah 1938).

<sup>12</sup> *Patterson v. Am. Fork City*, 2003 UT 7, 67 P.3d 466.

<sup>13</sup> *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, 44 P.3d 663.

<sup>14</sup> *Salt Lake City v. Young*, 45 Utah 349, 145 P. 1047 (1915).

<sup>15</sup> *McGrew v. Indus. Comm'n*, 96 Utah 203, 85 P.2d 608 (1938).

<sup>16</sup> Additional sibling court precedent, interpreting state constitutional provisions that are materially the same as Utah's, also demonstrates that freedom from substantial government endangerment of health and safety is a fundamental due process right. *E.g., Braam*, 81 P.3d at 865 (“[C]hildren have substantive due

The many policy areas to which the United States Supreme Court and sibling courts have applied substantive due process include, but are not limited to foster programs,<sup>17</sup> utilities regulation,<sup>18</sup> mental health facilities,<sup>19</sup> prison administration,<sup>20</sup> child custody, police searches,<sup>21</sup> criminal adjudication,<sup>22</sup> criminal penalties,<sup>23</sup> abortion,<sup>24</sup> public housing administration,<sup>25</sup> municipal housing ordinances,<sup>26</sup> school segregation,<sup>27</sup> education curriculum,<sup>28</sup> mandatory

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process rights to be free of unreasonable risk of harm” and “a right to reasonable safety.”); *Brown*, 563 U.S. 493 at 501 (2011) (government imposition of conditions that interfere with “basic health needs” violate “minimum constitutional requirements”).

<sup>17</sup> *E.g.*, *Braam*, 81 P.3d 851.

<sup>18</sup> *E.g.*, *Mays v. Snyder*, 323 Mich. App. 1 (2018), *aff'd Mays v. Governor of Michigan*, 506 Mich. 157 (2020); *Guertin*, 912 F.3d 907, rehearing en banc denied, 924 F.3d 309 (6th Cir. 2019), cert denied *City of Flint, Michigan v. Guertin*, 140 S. Ct. 933 (2020).

<sup>19</sup> *E.g.*, *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>20</sup> *E.g.*, *Brown*, 563 U.S. 493.

<sup>21</sup> *E.g.*, *Rochin*, 342 U.S. 165.

<sup>22</sup> *E.g.*, *Riggins v. Nevada*, 504 U.S. 127 (1992).

<sup>23</sup> *E.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (Jackson, J., concurring).

<sup>24</sup> *E.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>25</sup> *E.g.*, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

<sup>26</sup> *E.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

<sup>27</sup> *E.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>28</sup> *E.g.*, *Myer v. Nebraska*, 262 U.S. 390 (1923); *Breese v. Smith*, 501 P.2d 159 (Alaska 1972).

public school attendance,<sup>29</sup> school dress codes,<sup>30</sup> vaccine mandates,<sup>31</sup> marriage,<sup>32</sup> contraception, sexual activity,<sup>33</sup> forcible administration of medication,<sup>34</sup> involuntary electric shock therapy,<sup>35</sup> restriction of physician assisted suicide,<sup>36</sup> and many others. The courts' due process analyses in these cases illustrate not only the doctrine's expansive reach to a wide array of subject areas but reinforces the above points regarding the proper focus on harm to protected rights and the need for continued, rather than static application, limited by history and tradition.

For example, in 1982 the U.S. Supreme Court considered “for the first time the substantive rights of involuntarily committed [intellectually disabled] persons under the Fourteenth Amendment to the Constitution.” *Youngberg*, 457 U.S. at 314, and found that a claim to safe conditions under the “right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process

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<sup>29</sup> *E.g.*, *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

<sup>30</sup> *E.g.*, *Breese*, 501 P.2d 159.

<sup>31</sup> *E.g.*, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905).

<sup>32</sup> *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell*, 576 U.S. 644; *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>33</sup> *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>34</sup> *E.g.*, *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Cruzan by Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261 (1990); *Mills v. Rogers*, 457 U.S. 291 (1982); *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980).

<sup>35</sup> *E.g.*, *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983).

<sup>36</sup> *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).



Clause.”<sup>37</sup> In other words, the Court did not apply the doctrine to this specific policy area until almost 100 years after the states ratified the U.S. Constitution. In contrast to the district court here, the U.S. Supreme Court addressed the government’s policies and practices allegedly harming an individual’s health and safety, rather than saying it was precluded from reviewing the constitutionality of health care policy just because it had never done so before.

In *Moore*, the United States Supreme Court stated, “[a]ppropriate limits on substantive due process **come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history** (and), solid recognition of the **basic values that underlie our society.**” *Moore*, 431 U.S. at 503 (emphasis added) (citation omitted). As discussed above, the rights to life and to be free from substantial government harm to one’s health and safety is such a basic value. The trial court’s reasoning in this case—which ignores these rights and draws an arbitrary and exclusionary line around energy policy—is the antithesis of the respectful approach that *Moore* counsels.

In *Skinner*, Justice Jackson noted that substantive due process imposes limits, “to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural

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<sup>37</sup> *Youngberg*, 457 U.S. at 315 (1982) (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

powers of a minority.” *Skinner*, 316 U.S. at 546 (Jackson, J., concurring). In this case Utah’s legislatively enacted energy policies are taking a toll on a vulnerable and politically powerless minority’s dignity, personal integrity, health, and safety. The district court erred in ignoring this toll and its constitutional import.

In sum, while substantive due process’s “history counsels caution and restraint . . . it does not counsel abandonment.” *Moore*, 431 U.S. at 502. The case law illustrates application of substantive due process claims to a wide array of government conduct. Rather than judicially abandoning Youth Plaintiffs—as did the district court when it created an exemption to due process for fossil fuels—this Court should afford the plaintiffs the opportunity to present their case for the careful consideration that Utah’s Constitution guarantees in the unique factual circumstances of the case.

In sum, the constitutionality of the profound government-caused harms to children from the State’s fossil fuel statutes alleged here is clearly a matter of substantive due process. The district court erred in ruling otherwise.

## **CONCLUSION**

Harkening to that most American of portrait painters—Norman Rockwell—this Court describes its search for constitutional meaning as hoping for a Rockwell with its “poignant, straightforward, and easy to interpret representation” not a Jackson Pollock bereft of any “unifying theme.” *Haik*, 2020

UT 29, ¶ 44 (citation omitted). The plain language of Utah’s Constitutional protections of life and liberty and the significant historical evidence documented by Plaintiffs present a “straightforward” unified theme. *Id.* Article I, Sections 1 and 7 protect against the significant diminishment of Utah’s lifespans and endangerment of their health and safety resulting from state policies, including the fossil fuel statutes at issue here. Nothing could be more “poignant” than vindicating these fundamental rights in Utah’s youngest and most vulnerable population.

Moreover, substantive due process is both an “historic and generative” principle. *Rochin*, 342 U.S. at 173. In applying the doctrine, courts both look back to history and tradition and to the present circumstances facing individuals today. Youth Plaintiffs’ case is properly focused from both perspectives. Looking back, the case falls squarely within and continues the doctrine’s historic roots in protecting the individual’s rights to health and safety. Looking at the present, the case applies the doctrine to contemporary circumstances resulting from state policies.

The court’s abilities to look wisely in both directions and apply substantive due process in a “generative” manner, rather than “freezing” the doctrine in a particular point in time “are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.” *Id.* at 172. This Court should

reverse the district court's dismissal of Plaintiffs' claims and remand to the district court for further proceedings.

DATED this 3rd day of October, 2023.

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that:

1. This brief complies with the word limits set forth in Utah Rule of Appellate Procedure 25(f) because this brief contains 4,523 words, excluding those parts of the brief exempted under the rule.
2. This brief has been prepared in a proportionately spaced typeface using Microsoft Word in 13-point Source Serif Pro font in compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(a).
3. This brief complies with Utah Rule of Appellate Procedure 21(h) regarding public and non-public filings.

DATED this 3rd day of October, 2023.

*/s/ Stephanie E. Hanawalt*

**CERTIFICATE OF SERVICE**

I certify that on this 3rd day of October, 2023, I caused to be served via email a true and correct copy of the foregoing **Brief of Amicus Curiae Law Professors** to the following at the email addresses listed below:

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