



IN THE NEW MEXICO SUPREME COURT

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,

v.

No. S-1-SC-40980

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
MELANIE A. KENDERDINE, in her official capacity;
ENVIRONMENTAL IMPROVEMENT BOARD; and the OIL
CONSERVATION COMMISSION,

Defendants—Respondents,

-and-

INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO,
and NEW MEXICO CHAMBER OF COMMERCE,

Intervenors/Defendants—Respondents

INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO'S ANSWER BRIEF

Oral Argument Requested Pursuant to Rule 12-319(B) NMRA

SPENCER FANE, LLP
Jeffrey J. Wechsler
Kari E. Olson
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jwechsler@spencerfane.com
kaolson@spencerfane.com

Attorneys for Independent Petroleum Association of New Mexico

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
STATEMENT OF COMPLIANCE.....	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	4
SUMMARY OF PROCEEDINGS	5
I. THE POLLUTION CONTROL CLAUSE	5
II. THE ALLEGATIONS IN THE COMPLAINT.....	6
III. THE DECISION OF THE DISTRICT COURT.....	7
IV. THE DECISION OF THE COURT OF APPEALS	7
ARGUMENT	9
I. THE POLLUTION CONTROL CLAUSE DOES NOT CREATE A PRIVATE RIGHT OF ACTION	9
A. This Court Should Adopt a Framework for Evaluating Whether a Constitutional Provision Creates an Implied Cause of Action	9
B. The Text and Structure of the PCC Do Not Reflect a Clear Intent to Create a Private Right	11
C. The PCC Does Not Provide a Judicially Manageable Standard	14
D. The PCC Commits the Balancing of Pollution Control and Resource Development to the Legislature.....	20
E. The Declaratory Judgment Act Does Not Create Substantive Rights....	21
F. The <i>Yazzie</i> Case Does Not Support Plaintiffs’ Theory	22
II. THE JUDICIARY CANNOT RESOLVE PLAINTIFFS’ CLAIMS WITHOUT VIOLATING THE SEPARATION OF POWERS.....	26
A. Foundational Principles	26
B. The Relief Plaintiffs Seek Would Intrude on Core Legislative Functions.....	27
C. The Political Question Doctrine Precludes Plaintiffs’ Claims	28
D. The Requested Relief Would Preempt Existing Administrative Remedies.....	36

III. PLAINTIFFS’ EQUAL PROTECTION AND DUE PROCESS CLAIMS FAIL	37
A. Plaintiffs’ Disparate Impact Equal Protection Theory Is Without Precedent.....	37
B. Plaintiffs’ Due Process Claims Fail.....	40
IV. PLAINTIFFS LACK STANDING	41
V. PRACTICAL CONSIDERATIONS UNDERSCORE THE NONJUSTICIABLE NATURE OF PLAINTIFFS’ CLAIMS.....	43
A. Trial Would Be Unmanageable	43
B. The Requested Relief Would Mire the Court in Decades of Oversight	44
C. The Requested Relief Would Destabilize the Regulatory Regime and the Economy	46
D. Allowing the Case to Proceed Could Have Far-Reaching Consequences 47	
CONCLUSION.....	47

STATEMENT OF COMPLIANCE

The undersigned counsel certifies that the body of this brief contains approximately 10,267 words in compliance with Rule 12-318(F)(3) NMRA. The font is Times New Roman, a proportionally spaced typeface

TABLE OF AUTHORITIES

	Page(s)
New Mexico Cases	
<i>ACLU v. City of Albuquerque</i> , 2008-NMSC-045, 144 N.M. 471	41
<i>Amdor v. Grisham</i> , 2025-NMSC-024	13, 26
<i>American Linen Supply of N.M., Inc. v. City of Las Cruces</i> , 1963-NMSC-176, 73 N.M. 30	21
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91	19, 34
<i>Atencio v. State</i> , No. A-1-CA-42006, Op. ¶ 62 (N.M. Ct. App. June 3, 2025)	<i>passim</i>
<i>Cates v. Mosher Enterprises, Inc.</i> , 2017-NMCA-063	9
<i>Cockrell v. Bd. of Regents of N.M. State Univ.</i> , 2002-NMSC-009, 132 N.M. 156	13, 26, 34
<i>Cordova v. LeMaster</i> , 2004-NMSC-026, 136 N.M. 217	40
<i>Eturriaga v. Valdez</i> , 1989-NMSC-080, 109 N.M. 205	29, 31
<i>Forest Guardians v. Powell</i> , 2001-NMCA-028, 130 N.M. 368	41
<i>Gallegos v. Homestake Min. Co.</i> , 1982-NMCA-052, 97 N.M. 717	26, 29
<i>Gonzales v. N.M. Dep't of Health</i> , 2000-NMSC-029, 129 N.M. 586	38
<i>Grisham v. Van Soelen</i> , 2023-NMSC-027	12, 15, 28, 36

<i>Hill v. Cmty. of Damien of Molokai</i> , 1996-NMSC-008, 121 N.M. 353	38
<i>Jaramillo v. City of Albuquerque</i> , 1958-NMSC-107, 64 N.M. 427	12, 20
<i>Kelly v. Marron</i> , 1915-NMSC-092, 21 N.M. 239	26, 27, 29
<i>Martinez/Yazzie v. State</i> , No. D-101-CV-2014-00793 (N.M. 1st Jud. Dist. Ct.)	22, 25, 46
<i>N.M. Mining Assn. v. N.M. Water Quality Control Comm</i> , 2007- NMCA-010, 141 N.M. 41	17
<i>Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n</i> , 2006-NMCA-115, 140 N.M. 464.....	37
<i>Public Service Co. of New Mexico v. New Mexico Environmental Improvement Board</i> , 1976-NMCA-039 (Lopez, J. dissenting)	19
<i>Sanders-Reed v. Martinez</i> , 2015-NMCA-063	20
<i>State v. Ochoa</i> , 2009-NMCA-002, 146 N.M. 32	38
<i>State ex rel. Candelaria v. Grisham</i> , 2023-NMSC-031	27
<i>State ex rel. Clark v. Johnson</i> , 1995-NMSC-048, 120 N.M. 562	42
<i>State ex rel. Coll v. Johnson</i> , 1999-NMSC-036, 128 N.M. 154	23, 29, 32
<i>State ex rel. Schwartz v. Johnson</i> , 1995-NMSC-080, 120 N.M. 820	28, 42
<i>Stokes v. Morgan</i> , 1984-NMSC-032, 101 N.M. 195	36
<i>Sugg v. Albuquerque Public School District</i> , 1999-NMCA-111, ...	40

<i>TexasFile LLC v. Bd. of Cnty. Comm’rs of Cnty. of Lea</i> , 2019-NMCA-038	21
<i>Welch v. Sandoval Cnty. Valuation Protests Bd.</i> , 1997-NMCA-086, 123 N.M. 722	39
<i>Yedidag v. Roswell Clinic Corp.</i> , 2015-NMSC-012	9
Other Jurisdictions	
<i>Abbott v. Burke</i> , 20 A.3d 1018 (N.J. 2011).....	44, 45
<i>Aji P. v. State</i> , 480 P.3d 438 (Wash. Ct. App. 2021).....	31, 33, 47, 48
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	9
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992).....	19, 34
<i>Armijo by and Through Chavez v. Wagon Mound Public Schools</i> , 159 F.3d 1253, 1264 (10 th Cir. 1998).....	41
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	<i>passim</i>
<i>Bonner v. Daniels</i> , 907 N.E.2d 516 (Ind. 2009)	24
<i>City of Pawtucket v. Sundlun</i> , 662 A.2d 40 (R.I. 1995).....	23
<i>Coalition for Adequacy & Fairness v. Chiles</i> , 680 So. 2d 400 (Fla. 1996) (per curiam), <i>superseded by</i> <i>constitutional amendment</i>	23
<i>Committee for Educ. Rights v. Edgar</i> , 672 N.E.2d 1178 (Ill. 1996).....	24
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	9

<i>Hancock v. Comm’r of Educ.</i> , 822 N.E.2d 1134 (Mass. 2005)	45
<i>Hornbeck v. Somerset County Bd. of Educ.</i> , 458 A.2d 758 (Md. Ct. App. 1983)	23
<i>Ex parte James</i> , 836 So. 2d 813 (Ala. 2002) (per curiam)	22
<i>Japan Whaling Ass’n v. American Cetacean Soc.</i> , 478 U.S. 221 (1986)	29, 37
<i>Kanuk ex rel. Kanuk v. State</i> , 335 P.3d 1088 (Alaska 2014)	33
<i>King v. Iowa</i> , 818 N.W.2d 1 (Iowa 2012)	24
<i>Kromko v. Ariz. Bd. of Regents</i> , 165 P.3d 168 (Ariz. 2007)	23
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	27
<i>Mark v. Borough of Hatboro</i> , 51 F.3d 1137 (3rd Cir. 1995)	41
<i>Marrero v. Pennsylvania</i> , 739 A.2d 110 (Pa. 1999)	23
<i>McDuffy v. Sec. of Exec. Office of Educ.</i> , 615 N.E.2d 516 (Mass. 1993)	45
<i>Montana Environmental Information Center v. Department of Environmental Quality</i> , 1999 MT 248 (Mont. 1999)	12
<i>Nebraska Coalition v. Heineman</i> , 731 N.W.2d 164 (Neb. 2007)	24, 44
<i>Nixon v. United States</i> , 506 U.S. 224 (1993)	16, 32
<i>Okla. Educ. Ass’n v. Oklahoma</i> , 158 P.3d 1058 (Okla. 2007)	22

<i>Palmer v. State</i> , 829 S.E.2d 255 (S.C. Ct. App. 2019).....	20
<i>Robinson Township v. Commonwealth</i> , 83 A.3d 901 (2013).....	13
<i>Sagoonick v. State</i> , 503 P.3d 777 (Alaska 2022).....	22, 33, 36
<i>San Antonio Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973).....	24
<i>Union Elec. Co. v. E.P.A.</i> , 427 U.S. 246	19
<i>Washington v. Davis</i> , 426 U.S. 229 (1976).....	39
<i>Zivotofsky ex rel. Zivotofsky v. Clinton</i> 566 U.S. 189	29

Constitution, Statutes, Regulations

N.M. Const. art. II, § 8	12, 15
N.M. Const. art. III, § 1	26, 30
N.M. Const. art. IV, § 30	28, 42
N.M. Const. art. XII, § 1	12, 15
N.M. Const. art. XX, § 21	<i>passim</i>
NMSA 1978, § 44-6-2 (1975).....	21
NMSA 1978, § 70-2-12(B) (2019)	18
NMSA 1978, § 74-2-5(B)(1) (2021).....	18
NMSA 1978, § 74-2-7(A)(1) (2021)	18
NMSA 1978, § 74-6-4(D) (2025)	17
19.15.2 to .112 NMAC.....	18
20.2.1 to .350 NMAC.....	18

20.6.2.1201 NMAC.....	18
Fla. Const. art. IX, § 1	23
Mont. Const. art. II, § 3.....	12
Pa. Const. art. I, § 27.....	13

INTRODUCTION

This case presents two certified questions: (1) whether Plaintiffs have stated a claim upon which relief can be granted under the Pollution Control Clause of the New Mexico Constitution, and (2) whether Plaintiffs have stated viable equal protection and due process claims under Article II, Section 18. The Court of Appeals answered both questions in the negative, reversing the district court and ordering dismissal of Plaintiffs’ Complaint. *Atencio v. State*, No. A-1-CA-42006, Op. ¶ 62 (N.M. Ct. App. June 3, 2025). This Court should affirm.

The Independent Petroleum Association of New Mexico (“IPANM”) represents over 350 businesses, owners, operators, workers, and families in New Mexico’s oil and gas industry. IPANM’s members are the companies that hold the permits, drill the wells, and comply with the regulatory framework that Plaintiffs ask this Court to declare unconstitutional. They would bear the direct and immediate consequences of the extraordinary relief Plaintiffs seek.

Plaintiffs do not challenge a single statute, regulation, permit, or agency action. Instead, they mount an unprecedented attack on the *entire* statutory, regulatory, and enforcement framework governing oil and gas activity in New Mexico—spanning seven separate Acts, hundreds of regulations, thousands of permits, and multiple executive agencies. They ask this Court to declare the whole of this framework unconstitutional, to suspend all oil and gas permitting, and to

install a district court judge as overseer of pollution control policy for the foreseeable future. Neither the text of the Pollution Control Clause, the structure of the New Mexico Constitution, the separation of powers, nor any precedent of this Court supports that extraordinary invitation.

SUMMARY OF PROCEEDINGS

I. THE POLLUTION CONTROL CLAUSE

In November 1971, the people of New Mexico voted to amend the state Constitution to include what is now Article XX, Section 21, commonly known as the Pollution Control Clause (“PCC”). The provision states:

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.

N.M. Const. art. XX, § 21. The PCC was placed in Article XX, titled “Miscellaneous,” rather than in Article II, the Bill of Rights. Its first sentence declares environmental protection to be of “fundamental importance to the public interest.” Its second sentence directs the Legislature to act: “the legislature shall provide for control of pollution . . . consistent with the use and development of these resources for the maximum benefit of the people.” *Id.* The provision contains no rights-creating language, no sufficiency standard, and no private remedy.

II. THE ALLEGATIONS IN THE COMPLAINT

Plaintiffs' Complaint is unprecedented in scope. It does not challenge a single statute, regulation, or agency action as unconstitutional. Instead, it asserts that the *entirety* of New Mexico's statutory, regulatory, permitting, and enforcement framework for oil and gas activity is collectively inadequate. The Complaint targets seven separate Acts—the Oil and Gas Act, the Air Quality Control Act, the Hazardous Waste Act, the Radioactive and Hazardous Materials Act, the Solid Waste Act, the Groundwater Protection Act, and the Water Quality Act—comprising more than one hundred individual statutes, along with their implementing regulations, thousands of individual permits, and the actions and inactions of multiple executive agencies over many decades.

The relief Plaintiffs seek is equally expansive. They ask this Court, among other things, to: (1) declare that Defendants are “out of compliance” with their constitutional duties; (2) enjoin Defendants to “suspend additional permitting of oil and gas wells;” (3) order Defendants to “enact, fund and implement a statutory, regulatory and enforcement structure and plan;” (4) require Defendants to “treat the byproduct waste of oil and gas extraction, including produced water, as Hazardous Waste;” and (5) retain jurisdiction “to ensure that the Defendants promptly and fully comply.” [RP 104-06 ¶¶ 1–13]

III. THE DECISION OF THE DISTRICT COURT

The district court substantially denied Defendants’ motions to dismiss and for judgment on the pleadings, granting dismissal only of the New Mexico Civil Rights Act (“NMCRA”) claims against the Legislature and individual government officers. The court stated that Plaintiffs had alleged sufficient facts to support a claim for declaratory relief and that it was “premature” to determine whether the PCC guarantees a fundamental right to pollution control. *Atencio*, Op. ¶ 11.

IV. THE DECISION OF THE COURT OF APPEALS

On interlocutory review, the Court of Appeals reversed. The court concluded that “Plaintiffs have presented no claim upon which relief can be granted” and remanded “with instructions that the district court is to dismiss Plaintiffs’ complaint.” *Atencio*, Op. ¶ 62.

The Court of Appeal’s analysis proceeded in three parts. First, the court held that the PCC “contains no enforceable right, guaranteed to any individual or group, to be free from a given amount of pollution” and “does not create an individual right the judiciary may enforce or protect.” *Id.* ¶¶ 23, 29. The court found that the PCC’s first sentence “is more aptly viewed as a declaration that a beautiful and healthful environment is in the public interest,” and that its second sentence “requires that legislation designed to limit pollution only do so to the extent that it does not contradict the development and use of natural resources.” *Id.* ¶¶ 23, 25. The court

emphasized that the PCC, unlike the education clause, “lacks any language that we may infer to create a standard against which the maximum amount of allowable pollution could be measured.” *Id.* ¶ 26.

Second, the court determined that resolving Plaintiffs’ claims would violate the separation of powers because Plaintiffs’ complaint “asks that we reweigh these interests and, separate and apart from the Legislature, determine that it has failed to balance these interests in accordance with a judicially created standard.” *Id.* ¶ 33. Applying the *Shoobridge* framework, the court further found that granting Plaintiffs’ requested relief “would nullify” existing administrative remedies. *Id.* ¶¶ 39–44. The court also found that all six *Baker v. Carr* factors supported treating Plaintiffs’ claims as nonjusticiable political questions. *Id.* ¶¶ 45–51.

Third, the court held that Plaintiffs had not stated viable due process or equal protection claims. On due process, the court found no “enforceable right[] . . . to adequate pollution control policies or a beautiful and healthful environment” under either federal or state law. *Id.* ¶¶ 54–57. On equal protection, the court concluded that Plaintiffs “alleged no classification that results in discriminatory treatment” because the challenged statutes are facially neutral and the geographic proximity of Plaintiffs to pollution sources makes them “not similarly situated to other New Mexicans.” *Id.* ¶¶ 58–61.

Judge Wray specially concurred, agreeing that the PCC does not create “an individual or enforceable right” to “a beautiful and healthful environment” but expressing reluctance to foreclose the possibility that the PCC “creates any right at all.” *Id.* ¶ 64. Judge Wray nonetheless agreed that Plaintiffs’ claims fail under rational basis review and that the relief requested “would require the judiciary to second-guess the policy choices the Legislature has made.” *Id.* ¶ 64.

ARGUMENT

I. THE POLLUTION CONTROL CLAUSE DOES NOT CREATE A PRIVATE RIGHT OF ACTION

A. This Court Should Adopt a Framework for Evaluating Whether a Constitutional Provision Creates an Implied Cause of Action

This Court has not previously articulated a comprehensive standard for determining whether a provision of the New Mexico Constitution creates an implied private right of action. In the statutory context, this Court and the Court of Appeals have considered factors derived from *Cort v. Ash*, 422 U.S. 66 (1975), including whether the plaintiff is a member of a class for whose benefit the statute was enacted, whether there is any indication of legislative intent to create or deny a remedy, and whether an implied remedy would be consistent with the legislative scheme. *See Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 31; *Cates v. Mosher Enterprises, Inc.*, 2017-NMCA-063, ¶¶ 7–8; *cf. Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

While that framework for evaluating whether *a statute* creates an implied cause of action, *a constitutional provision* stands in a different relationship to the judiciary. It is not a statute enacted by the Legislature but the supreme law adopted by the People. The question is not whether the Legislature intended to create a private remedy, but whether the provision itself, by its text and structure, creates or recognizes a right that the judiciary is duty-bound to enforce.

The Court of Appeals' analysis provides a useful analytical framework. The court examined the PCC's text for rights-creating language, compared the provision to other constitutional provisions that have been held to create enforceable rights, and considered whether the provision commits the matter to another branch of government. *See Atencio*, Op. ¶¶ 21–29. This Court should engage in that same process.

IPANM respectfully urges this Court to adopt a framework that considers: (1) whether the text or structure of the constitutional provision reflects a clear intent to create a private right; (2) whether the provision includes a judicially enforceable standard; and (3) whether the provision commits the matter to the discretionary judgment of another branch of government. As shown below, the PCC fails each of these elements.

B. The Text and Structure of the PCC Do Not Reflect a Clear Intent to Create a Private Right

Plaintiffs' case rests on the premise that the PCC, either alone or in conjunction with the Inherent Rights and Due Process Clauses, creates an enforceable right to adequate pollution control legislation or a "fundamental right to a beautiful and healthful environment." [BIC 11-13] The Court of Appeals correctly rejected this premise. Four features of the PCC's text and structure demonstrate that it was not designed to create individual rights.

First, the PCC contains no rights-creating language. The provision does not use the word "right" or any synonym. It does not say that the people "have a right to" a clean environment, nor does it say people are entitled to any particular level of environmental protection. The first sentence declares that environmental protection "is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const. art. XX, § 21. The operative phrase is "public interest"—not individual rights. *Atencio*, Op. ¶ 23 The second sentence directs the *Legislature* to act: "the Legislature shall provide for control of pollution." N.M. Const. art. XX, § 21. This is duty-imposing language directed at a government institution, not rights-granting language directed at the people. *See Atencio*, Op. ¶ 25.

By contrast, provisions that have been held to create enforceable rights use language such as "all elections shall be free and open, and no power . . . shall at any

time interfere to prevent the free exercise of the right of suffrage” (N.M. Const. art. II, § 8, interpreted in *Grisham v. Van Soelen*, 2023-NMSC-027), or “a uniform system of free public schools sufficient for the education of, and open to, all the children” (N.M. Const. art. XII, § 1). The PCC shares none of these structural characteristics.

Second, the PCC is located in Article XX (“Miscellaneous”), not in the Bill of Rights. Constitutional structure matters. The Bill of Rights, Article II, contains the provisions that this Court and the NMCRA have long recognized as creating enforceable individual rights—due process, equal protection, inherent rights, free elections, and freedom of speech, among others. The PCC sits in Article XX alongside provisions like the eight-hour work day (§ 19), which this Court held was not self-executing in *Jaramillo v. City of Albuquerque*, 1958-NMSC-107, ¶ 14, 64 N.M 427. The framers’ decision to place the PCC in Article XX rather than Article II is strong structural evidence that it was not intended to create an individual right on par with the rights in the Bill of Rights.

This stands in sharp contrast to other states that have recognized enforceable environmental rights. Montana placed its environmental right in Article II—the Declaration of Rights—alongside freedom of speech, religion, and due process: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment.” Mont. Const. art. II, § 3; *see also Montana*

Environmental Information Center v. Department of Environmental Quality, 1999 MT 248 (Mont. 1999). Pennsylvania likewise placed its Environmental Rights Amendment in Article I, its Declaration of Rights: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” Pa. Const. art. I, § 27; *see also Robinson Township v. Commonwealth*, 83 A.3d 901 (2013). These structural choices were not accidental. New Mexico’s framers made a different choice.

Third, the PCC’s first sentence parallels legislative power language, not rights language. As the Court of Appeals observed, the first sentence’s declaration that environmental protection is of “fundamental importance to the public interest, health, safety and the general welfare” mirrors the language used to describe the scope of the Legislature’s police powers in Article IV, § 1, which exempts from public annulment laws designed for the “preservation of the public peace, health or safety.” *Atencio*, Op. ¶ 23. The terms “public interest,” “health,” “safety,” and “general welfare” are the traditional markers of police power, not of individual rights. *See Cockrell v. Bd. of Regents of New Mexico State Univ.*, 2002-NMSC-009, ¶ 13, 132 N.M. 156 (“It is the particular domain of the legislature, as the voice of the people, to make public policy); *Amdor v. Grisham*, 2025-NMSC-024, ¶ 63 (“The Legislature’s constitutional police power is the broadest power possessed by governments, to protect public health and welfare, which encompasses laws

providing for preservation of the public peace, health and safety”); This suggests the first sentence confirms that environmental protection falls within the Legislature’s regulatory authority—not that it creates a private entitlement.

Fourth, the PCC contains no private remedy. Even if one were to read the PCC as creating some form of right or duty, the provision says nothing about how it is to be enforced. It creates no cause of action, identifies no class of plaintiffs, specifies no remedy, and establishes no procedure for judicial review. This silence on remedies is telling. Compare Montana’s Article IX, § 1(3), which expressly directs the Legislature to “provide adequate remedies” for environmental degradation—language that contemplates judicial enforcement even as it assigns the initial task to the Legislature. The PCC’s silence reinforces the conclusion that enforcement was intended to occur through the political process—elections, legislative advocacy, and administrative participation—rather than through litigation.

C. The PCC Does Not Provide a Judicially Manageable Standard

The second element this Court should consider is whether the PCC provides a judicially manageable standard. A judicially manageable standard is one that gives courts a textual foothold from which to assess compliance—a benchmark against which to measure government action. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying “a lack of judicially discoverable and manageable standards for

resolving” an issue as a hallmark of nonjusticiability). The PCC contains no such standard.

1. The PCC Imposes a Balancing Duty, Not an Enforceable Standard

The second sentence of the PCC does not simply command pollution control. It commands the Legislature to “provide for control of pollution and control of despoilment . . . consistent with the use and development of these resources for the maximum benefit of the people.” N.M. Const. art. XX, § 21. The qualifying phrase “consistent with” introduces a balancing requirement—the Legislature must weigh pollution control against resource development and determine the combination that maximizes public benefit. This is the language of discretionary policymaking, not of enforceable rights.

Unlike provisions that have been found to create enforceable standards, the PCC contains no word or phrase that could serve as a benchmark for judicial measurement. The free elections clause requires elections to be “free and open.” N.M. Const. art. II, § 8. *See Van Soelen*, 2023-NMSC-027. The education clause requires a “sufficient” system of public schools. N.M. Const. art. XII, § 1. These words, however imprecise, give courts a textual foothold from which to assess compliance. The PCC contains no comparable term. It does not require “adequate” pollution control, or “reasonable” control, or even “minimal” control. As the Court of Appeals held, the PCC “lacks any language that we may infer to create a standard

against which the maximum amount of allowable pollution could be measured.”
Atencio, Op. ¶ 26.

2. Plaintiffs Do Not Offer a Standard

As the Court of Appeals observed, “the PCC contains no standard by which [the Court] may measure Defendants’ environmental protection policies.” *Atencio*, *Id.*, ¶ 48. The absence of a standard “strengthens the conclusion that there is a textually demonstrable constitutional commitment to the legislature.” *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

Yet despite seeking expansive and unprecedented relief under the PCC, Plaintiffs offer no proposed standard for their claim. Rather, Plaintiffs suggest that development of a judicially manageable standard can wait until the end of trial. *See [BIC 21–25]* This is exactly backwards. A standard must exist at the onset of a case, not at its conclusion. The standard defines the claim, determines what evidence is relevant, and provides the rule of decision. Without a standard, the parties cannot know what must be proven, the court cannot direct discovery, and no principled judgment is possible. Plaintiffs’ failure to identify any standard for decision strongly suggests there are none. Worse, Plaintiffs’ proposal to shift the burden of creating a standard to the trial court would trap litigants in a legal purgatory, forced to litigate for years without a defined rule of law to guide the resolution of the case.

Plaintiffs argue that a judicially manageable standard can be derived from the Legislature's own implementing legislation. *See* [BIC at 22–24] But this approach faces an insurmountable circularity problem. If the court derives the standard for PCC compliance from the Legislature's own prior enactments, then the standard is whatever the Legislature says it is. But Plaintiffs are arguing that the Legislature has failed to implement the PCC adequately. If the Legislature's own statutes supply the standard, and the Legislature can change those statutes at any time, the standard becomes a moving target that the Legislature itself controls—which means, in practical effect, there is no judicially enforceable standard at all. The district court would be asking whether the Legislature has met a standard defined by the Legislature's own prior enactments, which the Legislature is free to amend or repeal.

Moreover, in practical terms, Plaintiffs are not arguing that New Mexico has *no* pollution controls. Plaintiffs concede that the Legislature has enacted numerous statutes and the executive agencies have promulgated extensive regulations. [RP 44-51]; *Atencio*, Op. ¶ 26; *see generally, e.g.*, NMSA 1978, § 74-6-4(D) (2025) (requiring the Water Quality Control Commission to “adopt water quality standards for surface and ground waters ... [which] shall at a minimum protect the public health or welfare ...”); *N.M. Mining Assn. v. N.M. Water Quality Control Comm.*, 2007-NMCA-010, ¶ 7, 141 N.M. 41 (“to protect groundwater, the [Water Quality Control] Commission has adopted regulations and standards, including human

health standards that control discharges and provide for remediation and protection of groundwater ...”); 20.6.2.1201 NMAC (requiring notice of intent to discharge from “facilities for the production, refinement, pipeline transmission of oil and gas or products thereof, the oil field service industry as related to oil and gas production activities, oil field brine production wells, and carbon dioxide facilities); NMSA 1978, § 74-2-5(B)(1) (2021) (requiring the Environmental Improvement Board (EIB) to adopt state-level rules and standards to “attain and maintain national ambient air quality standards and prevent or abate air pollution”); NMSA 1978, § 74-2-7(A)(1) (2021); 20.2.72.200(A) NMAC (requiring stationary sources of emissions, such as oil and gas facilities or factories, to obtain a permit before commencing construction); *generally* 20.2.1 to .350 NMAC (standards and requirements adopted by EIB pursuant to authority under Environmental Improvement Act and Air Quality Control Act; NMSA 1978, § 70-2-12(B)(21) to – (22) (2019) (authorizing the Oil Conservation Commission to make rules and orders to “regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment” and to (“regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, including administering the Water Quality Act”); 19.15.2 to

.112 NMAC (standards and regulations adopted by Oil Conservation Commission pursuant to authority under Oil and Gas Act).

Their complaint is that these controls are *insufficient*. But “insufficient” measured against what? Not against the PCC’s text, which contains no standard. Not against federal law—the Clean Air Act, the Clean Water Act, and RCRA independently establish minimum environmental standards that New Mexico must meet regardless of the PCC. *See, e.g., Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 267 “[T]he State has virtually absolute power in allocating emission limitations so long as the national standards are met”) (emphasis added); *Public Service Co. of New Mexico v. New Mexico Environmental Improvement Board*, 1976-NMCA-039, ¶ 38 (Lopez, J. dissenting) (noting “if the Board continues to promulgate regulations below the federal requirements, its actions will be without effect”); *Arkansas v. Oklahoma*, 503 U.S. 91, 102 (1992) (“Section 301(a) of the [Clean Water] Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit. ... In the absence of an approved state program, the EPA may issue an NPDES permit under § 402(a) of the Act.”).

Plaintiffs are asking this Court to create a standard above the federal floor and above the current regulatory framework, based on a constitutional provision that contains no standard and requires the Legislature to balance competing interests.

That is precisely the “standard we alone would create” problem the Court of Appeals identified. *Atencio*, Op. ¶ 44.

D. The PCC Commits the Balancing of Pollution Control and Resource Development to the Legislature

The final element is whether the provision commits the issue to the discretion of another branch of government. The PCC does so expressly. It states that “the legislature shall provide for control of pollution . . . consistent with the use and development of these resources for the maximum benefit of the people.” N.M. Const. art. XX, § 21. The Court of Appeals found this commitment unmistakable: the PCC “expressly commits pollution control and resource development to the Legislature.” *Atencio*, Op. ¶ 48.

Because the PCC is not self-executing, Plaintiffs are bound by the standards and procedures the Legislature has established. *See Jaramillo*, 1958-NMSC-107, ¶ 8 (explaining that a self-executing provision “supplies the rule or means by which the right given may be enforced”); *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 15 (holding that the existing “constitutional and statutory framework” defined the available judicial review under Art. XX, § 21 and did not permit a separate cause of action); *see also Palmer v. State*, 829 S.E.2d 255, 260–61 (S.C. Ct. App. 2019) (“Constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.”).

E. The Declaratory Judgment Act Does Not Create Substantive Rights

Plaintiffs argue that this case does not require the Court to find an implied cause of action because the Declaratory Judgment Act (“DJA”) authorizes courts to “declare rights . . . whether or not further relief is or could be claimed.” NMSA 1978, § 44-6-2 (1975); **[BIC 20–21]** But the DJA is a procedural mechanism, not a source of substantive law. It allows courts to declare rights that exist; it does not create rights where none exist. *See American Linen Supply of N.M., Inc. v. City of Las Cruces*, 1963-NMSC-176, ¶ 7, 73 N.M. 30 (“No new substantive rights were created by the declaratory judgment act.”); *TexasFile LLC v. Bd. of Cnty. Comm’rs of Cnty. of Lea*, 2019-NMCA-038, ¶ 25.

As the Court of Appeals recognized, even under the DJA the inquiry circles back to whether the PCC creates an individual right—because that is the “right” Plaintiffs ask the court to “declare.” *Atencio*, Op. ¶ 19. If the PCC creates only a legislative duty to balance competing interests without guaranteeing any particular outcome to any individual, there is nothing for the DJA to declare. The only declaration the court could issue would be a restatement of what everyone already agrees upon: that the Legislature has a constitutional duty to balance pollution control with resource development for the maximum benefit of the people. As the Alaska Supreme Court held in an analogous case, such a declaration would “provide no guidance to the legislature” and would not “terminate the uncertainty or

controversy” as the DJA requires. *Sagoonick v. State*, 503 P.3d 777, 802 (Alaska 2022).

F. The *Yazzie* Case Does Not Support Plaintiffs’ Theory

Throughout this litigation, Plaintiffs have relied heavily on *Yazzie v. State of New Mexico*—an unpublished, non-precedential decision of the First Judicial District—for the proposition that the PCC creates an enforceable constitutional cause of action. Indeed, Plaintiffs cite *Yazzie* no fewer than seven times in their Brief in Chief. But this reliance is misplaced for two independent reasons.

First, although this Court did not have an opportunity to consider the Education Clause in *Yazzie*, many courts have dismissed actions like the one championed by Plaintiffs on grounds that judicial relief would usurp the legislature’s power. The Oklahoma Supreme Court has ruled, for example:

The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature’s domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. To do as the plaintiffs ask would require this Court to invade the Legislature’s power to determine policy. This we are constitutionally prohibited from doing.

Okla. Educ. Ass’n v. Oklahoma, 158 P.3d 1058, 1066 (Okla. 2007); accord *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) (per curiam) (“[T]he duty to fund Alabama’s public schools is a duty that . . . the people of this State have rested squarely upon the shoulders of the Legislature” and “any specific remedy that the judiciary could

impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.”); *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168, 172 (Ariz. 2007) (“[T]he Legislature’s funding decisions are immune from judicial review.”); *Coalition for Adequacy & Fairness v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996) (per curiam) (“[T]he Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs.”), *superseded by constitutional amendment*, Fla. Const. art. IX, § 1; *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 790 (Md. Ct. App. 1983) (“The quantity and quality of educational opportunities to be made available to the State’s public school children is a determination committed to the legislature”); *Marrero v. Pennsylvania*, 739 A.2d 110, 113-14 (Pa. 1999) (determinations of “adequate” education funding “are exclusively within the purview of the General Assembly’s powers, and they are not subject to intervention by the judicial branch”) (citation and indentation omitted); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (“[W]e believe the proper forum for this deliberation is the General Assembly, not the courtroom”).

Similarly, many courts have held that state constitutional education clauses like Article XII, Section 1 do not provide “judicially manageable standards” for a court to resolve education funding controversies. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 24, 128 N.M. 820; *see, e.g., Chiles*, 680 So. 2d at 406-07 (courts

cannot decide “adequacy” of school funding without “subjectively evaluat[ing] the Legislature’s value judgments as to the spending priorities to be assigned to the state’s many needs, education being one among them”); *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (“It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. . . . Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.”); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009) (education clause delegates educational quality determinations to “the sound legislative discretion of the General Assembly” without providing standards for judicial evaluation); *King v. Iowa*, 818 N.W.2d 1, 17 (Iowa 2012) (text and history of education clause “indicate a commitment of authority to the general assembly, rather than a constraint upon it”); *Nebraska Coalition v. Heineman*, 731 N.W.2d 164, 179-81 (Neb. 2007) (court order regarding education funding “would be subjective and unreviewable policymaking” because “control of the purse strings of government is a legislative function” and “a multitude of policy decisions . . . go into state funding decisions”) (internal citation omitted); *cf. San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (recognizing that education presents “a myriad of intractable economic, social, and even philosophical problems” and that “[t]he very complexity of the

problems of financing and managing a statewide public school system” counsels deference to “the legislature’s efforts to tackle the problems”) (internal citations omitted).

As the Illinois Supreme Court cautioned:

The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. . . . Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.

Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191–92 (Ill. 1996). These observations apply with even greater force to the PCC, which—unlike education clauses—expressly requires the Legislature to balance competing interests and contains no sufficiency standard.

Second, even if *Yazzie* were correctly decided, there are meaningful differences between the Education Clause and the PCC. The Education Clause requires a “sufficient” system, providing a textual yardstick. The PCC contains no such word. The Education Clause imposes a singular duty—providing education—without requiring the Legislature to balance that duty against competing interests. The PCC imposes a balancing duty. The Education Clause’s command is “open to all the children,” identifying a class of beneficiaries. The PCC identifies no

beneficiaries and no right-holders. These structural differences are dispositive. *See Atencio*, Op. ¶¶ 27–28.

II. THE JUDICIARY CANNOT RESOLVE PLAINTIFFS’ CLAIMS WITHOUT VIOLATING THE SEPARATION OF POWERS

A. Foundational Principles

Article III of the New Mexico Constitution provides:

The powers of government of this state are divided into three distinct departments, the legislative, executive and judicial and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1. Within this framework, “[i]t is the particular domain of the legislature, as the voice of the people, to make public policy.” *Cockrell*, 2002-NMSC-009, ¶ 13; *see also Amdor*, 2025-NMSC-024, ¶ 63 (“The Legislature’s constitutional police power is the broadest power possessed by governments, to protect public health and welfare, which encompasses laws providing for preservation of the public peace, health and safety.”); *Kelly v. Marron*, 1915-NMSC-092, 21 N.M. 23 (“Upon the legislative branch of government is cast the duty of enacting such laws as are deemed calculated to promote the prosperity and happiness of the people and provide for the general welfare.”).

“Under separation of powers courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the legislature.” *Gallegos v. Homestake Min. Co.*, 1982-

NMCA-052, ¶ 25, 97 N.M. 717. In *Kelly*, the first New Mexico case interpreting Article III, this Court instructed that “[t]he judicial department must keep within its sphere; that it must not arrogate to itself a superiority over the other two co–ordinate and coequal departments of the government, and erect itself into a tribunal to watch with jealous scrutiny the acts confided by the fundamental law to another department.” 1915-NMSC-092, ¶ 38; *see also Marbury v. Madison*, 5 U.S. 137, 179 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion”).

The “test for infringement on our constitutional separation of powers is whether the actions of one governmental branch disrupts the proper balance between the branches.” *Atencio*, Op. ¶ 32 (quoting *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 24). This Court has recently instructed that “an attempt to foreclose legislative action in areas where legislative authority is undisputed . . . [is o]ne mark of undue disruption.” *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031, ¶ 15.

B. The Relief Plaintiffs Seek Would Intrude on Core Legislative Functions

Plaintiffs ask this Court to order Defendants to “enact, fund and implement a statutory, regulatory and enforcement structure and plan.” [RP 106 ¶ 7] They further ask the Court to retain jurisdiction to evaluate whether the resulting legislation is satisfactory. *Id.* ¶ 13. This is a direct request for the judiciary to dictate

what public policies the Legislature should prioritize and how it should appropriate funds—core legislative functions that the Constitution reserves exclusively to the Legislature. *See* N.M. Const. art. IV, § 30 (“[M]oney shall be paid out of the treasury only upon appropriations made by the legislature.”); *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 14 (“The legislature must exercise its exclusive power of deciding how, when, and for what purpose the public funds shall be applied.”).

As the Court of Appeals recognized, Plaintiffs do not challenge a single statute or specific government action. Instead, they assert that numerous legislative enactments and executive actions, operating collectively, are constitutionally inadequate. Granting the relief Plaintiffs seek would require the judiciary to “conduct anew the deliberative legislative process that resulted in the laws and regulations currently in place and find that they fall below a standard we alone would create.” *Atencio*, Op. ¶ 44. That is precisely what the separation of powers forbids.

C. The Political Question Doctrine Precludes Plaintiffs’ Claims

1. The Court Should Clarify that in Certain Cases the Political Question Doctrine Is Not Prudential

The Court of Appeals treated the political question doctrine as “merely persuasive” under New Mexico law. *Id.* ¶ 46 (citing *Van Soelen*, 2023-NMSC-027, ¶ 48). IPANM respectfully submits that this understates the doctrine’s force.

The political question doctrine finds its roots in the Separation of Powers and “excludes from judicial review those controversies which revolve around policy

choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). If a case requires a policy judgment or a value-based choice—areas where the political branches are accountable to the electorate—the judiciary lacks the constitutional mandate to intervene without violating the boundary between interpretation and legislation. See *Gallegos v. Homestake Min. Co.*, 1982-NMCA-052, ¶ 25, 97 N.M. 717 (Under separation of powers, courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the legislature); *Kelly*, 1915-NMSC-092, ¶ 6 (“No express grant of power is given to the judiciary to supervise the acts and conduct of the Legislature in the passage of a legislative act.”); *Eturriaga v. Valdez*, 1989-NMSC-080, ¶ 17, 109 N.M. 205 (“It is not the province of this Court to invalidate substantive policy choices make by the legislature.”).

Thus, pursuant to *Baker* and its progeny, a controversy “involves a nonjusticiable political question ... where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Zivotofsky ex rel. Zivotofsky v. Clinton* 566 U.S. 189, 195 (quoting *Baker*, 369 U.S. 186); see also *Coll*, 1999-NMSC-036, ¶ 24 (citing *Baker*’s “listing of common characteristics

used in determining what constitutes a nonjusticiable political question”) (internal quotation marks omitted). Indeed, the United States Supreme Court has explained that “[t]he nonjusticiability or a political question is primarily a function of the separation of powers.” *Baker*, 369 U.S. at 210.

In sum, where, as here, the constitutional text expressly commits an issue to a coordinate branch, the political question doctrine is not merely a prudential consideration—it is a structural command derived from Article III, § 1 itself, which prohibits any branch from exercising “any powers properly belonging to either of the others.” N.M. Const. art. III, § 1. This Court should correct the logical error from the Court of Appeals and embrace the Political Question Doctrine as one of the reasons for finding Plaintiffs’ claims nonjusticiable.

2. The Political Question Doctrine Precludes Plaintiffs’ Claims

The Court of Appeals identified the six circumstances, any one of which renders a matter nonjusticiable:

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

Atencio, Op. ¶ 47 (quoting *Baker*, 369 U.S. at 217). The Court of Appeals then concluded: "Here, all six circumstances are presented by Plaintiffs' complaint." *Id.* ¶ 48. Each factor independently compels that conclusion.

Factor One: Textual Commitment to a Coordinate Branch. The PCC expressly commits pollution control and resource development to the Legislature. It states that "the legislature shall provide for control of pollution . . . consistent with the use and development of these resources for the maximum benefit of the people." N.M. Const. art. XX, § 21. As the Court of Appeals found, this language is a "textually demonstrable constitutional commitment" of the issue to the legislative branch. *Atencio*, Op. ¶ 48. The PCC does not invite the judiciary to second-guess the balance the Legislature strikes; it assigns that balancing function to the Legislature alone. *See Aji P. v. State*, 480 P.3d 438, 445 (Wash. Ct. App. 2021) (finding the first *Baker* factor satisfied where the plaintiffs sought to "force the legislature to legislate" on environmental matters constitutionally committed to the legislative branch); *Eturriaga*, 1989-NMSC-080, ¶ 17 ("It is not the province of this Court to invalidate substantive policy choices made by the legislature.").

Factor Two: Lack of Judicially Manageable Standards. As discussed at length in Section I.C, *supra*, the PCC "contains no standard by which we may measure Defendants' environmental protection policies." *Atencio*, Op. ¶ 48. The Court of Appeals observed that "[a]ny resolution of Plaintiffs' claims necessarily

requires judicial invention of some standard of maximum allowable pollutants in the environment," yet "Plaintiffs offer this Court no meaningful explanation of how this could be accomplished." *Id.* The absence of a standard "strengthens the conclusion that there is a textually demonstrable constitutional commitment to the legislature." *Nixon*, 506 U.S. at 228–29. *See also Coll*, 1999-NMSC-036, ¶ 24 (declining to reach the merits where plaintiffs' claims did "not provide judicially manageable standards which the Court can utilize").

Factor Three: The Impossibility of Deciding Without an Initial Policy Determination. The Court of Appeals found that "the judiciary cannot resolve Plaintiffs' claims without making a policy determination that Defendants have failed to properly balance pollution controls with resource development." *Atencio*, Op. ¶ 49. Because the PCC requires the Legislature to weigh pollution control against resource development for the maximum benefit of the people, any judicial evaluation of the Legislature's performance necessarily requires the court to make a policy judgment about the proper weight to be accorded to competing interests—employment, tax revenue, energy independence, environmental protection, public health, and economic development. "Without cognizable standards the judiciary may use to make such a determination, any conclusion we could offer would simply amount to a judicial declaration that our weighing of competing interests is superior to that of the Legislature's." *Id.* The Alaska Supreme Court reached the same

conclusion when confronted with an analogous constitutional provision requiring the legislature to balance resource development and conservation: the "science- and policy-based inquiry" and "policy choices necessary to implement resource development are better reserved for the [legislature]." *Sagoonick v. State*, 503 P.3d 777, 796 (Alaska 2022) (quoting *Kanuk ex rel. Kanuk v. State*, 335 P.3d 1088, 1092 (Alaska 2014)).

Factor Four: Lack of Respect Due Coordinate Branches. The Court of Appeals addressed the fourth, fifth, and sixth factors together, finding that each "relates to the need for the judiciary to respect policy decisions made by 'coordinate branches of government,' adhere to political decisions 'already made,' and avoid 'embarrassment' by making numerous, and possibly conflicting, pronouncements on the same questions presented to other branches." *Atencio*, Op. ¶ 50 (quoting *Baker*, 369 U.S. at 217). A judicial decree that the Legislature has failed in its constitutional duty to adequately control pollution—when the PCC itself assigns that duty to the Legislature and provides no standard for judicial measurement—would be an extraordinary expression of disrespect for the Legislature's policy judgments. It would tell the Legislature not that it has violated a specific constitutional command, but that a court, applying a standard of the court's own invention, has found the Legislature's balancing of competing interests to be inadequate. That is the kind of pronouncement the fourth factor was designed to prevent. *See Aji P.*, 480 P.3d at

447 (finding that retained jurisdiction over environmental policy "disrespects the coordinate branches" and "usurps . . . legislative authority"); *c.f.*, *Arkansas v. Oklahoma*, 503 U.S. 91, (reversing the lower court "[for making] a policy choice that it was not authorized to make" because while "it might be wise to prohibit any discharge into the Illinois River, even if that discharge would have no adverse impact on water quality[,] ... it was surely not arbitrary for the EPA to conclude that allowing the discharge would be even wiser. It is not our role ... to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency.").

Factor Five: Adherence to Political Decisions Already Made. The Legislature and Executive Defendants have already exercised the authority the PCC assigns to them. They have enacted the Oil and Gas Act, the Air Quality Control Act, and multiple other statutes; they have promulgated extensive implementing regulations; and they have created and funded specialized administrative agencies to administer and enforce those laws. *See Atencio*, Op. ¶¶ 34–37 (cataloguing the existing statutory and regulatory framework). This is not a case of legislative inaction. It is a case in which Plaintiffs disagree with the policy choices the Legislature has made—and that disagreement, however deeply felt, does not transform a political question into a justiciable one. *See Cockrell*, 2002-NMSC-009,

¶ 13 ("[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.").

Factor Six: The Potentiality of Embarrassment from Multiple Pronouncements. Granting Plaintiffs' requested relief would create precisely the confusion the sixth factor guards against. If the district court were to declare the existing framework unconstitutional and order Defendants to enact a new regulatory scheme—while retaining jurisdiction to evaluate whether that scheme is satisfactory—the result would be an indefinite period of overlapping and potentially conflicting directives from the judiciary, the Legislature, and the Executive agencies. The Legislature would enact laws; the court would evaluate them; the agencies would promulgate rules; the court would pass judgment on those as well. Plaintiffs and Defendants alike would receive contradictory signals about what the Constitution requires. "Absent specific controversies regarding particular agency decisions or regulations," the Court of Appeals cautioned, "the judiciary risks running afoul of previous, unappealed administrative rulings relating to the balance of interests articulated in the PCC." *Atencio*, Op. ¶ 50.

In sum, the Political Question Doctrine requires "judicial restraint in this instance." *Atencio*, Op. ¶ 51. As the Alaska Supreme Court explained when confronting a nearly identical constitutional structure, judicial restraint in the face of

a political question reflects "respect for, not dereliction of, the court's constitutional duty." *Sagoonick*, 503 P.3d at 795–96.

Plaintiffs resist this conclusion by arguing that the judiciary has a duty to enforce the Constitution and that leaving the specifics of compliance to the political branches avoids any Separation of Powers concern. [BIC 29–31] But this argument assumes its own conclusion. It presupposes that the PCC creates an enforceable standard the judiciary can apply. As demonstrated in Section I, it does not. When a constitutional provision commits a matter to the discretion of another branch and provides no standard for judicial review, the judiciary fulfills its constitutional role by recognizing that boundary—not by ignoring it. *See Van Soelen*, 2023-NMSC-027, ¶ 37 ("It is only when a legislative body adopts internal procedures that ignore constitutional restraints or violate fundamental rights that a court can and must become involved.") (citation omitted).

D. The Requested Relief Would Preempt Existing Administrative Remedies

The Court of Appeals correctly applied the *Shoobridge* framework and found that Plaintiffs' claims fail all three prongs permitting declaratory relief in advance of administrative proceedings. *Atencio*, Op. ¶¶ 39–44. Plaintiffs' claims are not purely legal—they require sweeping factual inquiry into pollution levels, sources, and benefits. *Id.* ¶ 41. They require specialized technical expertise held by administrative agencies, not the judiciary. *Id.* ¶ 42; *See Stokes v. Morgan*, 1984-

NMSC-032, ¶ 24, 101 N.M. 195 ("The special knowledge and experience of state agencies should be accorded deference"); *Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 36, 140 N.M. 464 ("[I]t is unrealistic to assume that appellate judges can unravel complex scientific issues, and therefore such matters are better left to agencies with special expertise") (internal citation omitted); *Japan Whaling Ass'n*, 478 U.S. at 230. ("the Judiciary is particularly ill suited to make [decisions around policy choices and value determinations], as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature. "). And Defendants have created exclusive statutory and regulatory remedies that would be prematurely nullified by judicial intervention. *Id.* ¶ 43. Plaintiffs chose not to challenge any specific permit, rule, or agency action through existing administrative processes—including the OCC intervention process that Plaintiff Tso himself has utilized. Complaint ¶ 30. Having bypassed every available administrative remedy, Plaintiffs cannot now ask the judiciary to declare the entire system inadequate.

III. PLAINTIFFS' EQUAL PROTECTION AND DUE PROCESS CLAIMS FAIL

A. Plaintiffs' Disparate Impact Equal Protection Theory Is Without Precedent

Plaintiffs assert that Defendants' failure to "adequately regulate oil and gas production and pollution" has resulted in unconstitutionally disparate treatment of frontline community members, Indigenous people, and youth. [BIC 37–44]

Plaintiffs concede they do not allege any facially discriminatory statute. *Id.* at 37. Instead, they advance a theory that facially neutral pollution-control statutes have a "disparate impact" on these populations. The Court of Appeals correctly rejected this unprecedented theory, and this Court should affirm.

First, the cases on which Plaintiffs rely are inapposite. *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, 129 N.M. 586, involved a specific employment policy with a measurable disparate impact on an identifiable group. *Hill v. Cmty. of Damien of Molokai*, 1996-NMSC-008, 121 N.M. 353, involved a specific restrictive covenant applied in a discriminatory manner. *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, addressed pretextual traffic stops targeting individuals based on race. In each case, there was a discrete, identifiable state action that produced a measurable disparate effect on a defined class. Plaintiffs here identify no such discrete action. Instead, they challenge an interlocking network of statutes, regulations, agency budgets, and permitting decisions spanning decades and multiple agencies, and claim that their collective effect is disparately harmful. That is not a disparate impact claim—it is a request for the court to redesign an entire regulatory system.

Second, Plaintiffs conflate geographic proximity to industrial activity with membership in a protected class. As the Court of Appeals correctly observed, the fact that Plaintiffs live near oil and gas sites makes them *differently situated*, not

similarly situated to other New Mexicans who are subjected to discriminatory treatment. *Atencio*, Op. ¶ 61. The statutory and regulatory scheme does not classify anyone by race, age, or geographic location. Oil and gas resources exist where geology placed them. The State did not locate oil and gas deposits near Indigenous communities; it permitted extraction where the resources are found.

Third, even as to Indigenous Plaintiffs, Plaintiffs concede they allege no discriminatory intent. A facially neutral law producing disproportionate effects violates equal protection only upon proof of discriminatory intent or purpose. *Welch v. Sandoval Cnty. Valuation Protests Bd.*, 1997-NMCA-086, ¶ 15, 123 N.M. 722; *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). The cases Plaintiffs cite for the proposition that New Mexico recognizes intent-free disparate impact claims involve specific statutory schemes—employment discrimination, fair housing—where the Legislature has chosen to impose disparate impact liability. They do not support extending that theory to the constitutional Equal Protection Clause as applied to an entire regulatory framework.

Finally, under any level of scrutiny, Plaintiffs’ claims fail. Judge Wray’s concurrence correctly concluded that rational basis review is appropriate and that the statutory and regulatory scheme “easily passes muster under that standard.” *Atencio*, Op. ¶ 68. Under New Mexico’s rational basis test, the regulatory framework—with its multiple statutes, agencies, rulemaking processes, and

enforcement mechanisms—plainly bears a rational relationship to the legitimate governmental purposes of managing natural resource development while controlling pollution.

B. Plaintiffs’ Due Process Claims Fail

Plaintiffs’ substantive due process claims rest on two theories, both of which fail. First, Plaintiffs invoke the “deliberate indifference” and “shocks the conscience” standards. [BIC 44–46] But these standards derive from cases involving affirmative custodial relationships—prisons and state-run institutions—where the government has a special obligation because it has deprived individuals of the ability to care for themselves. *See Cordova v. LeMaster*, 2004-NMSC-026, ¶ 30, 136 N.M. 217. The Court of Appeals was right that Plaintiffs have not shown these standards apply to the regulatory context. *Atencio*, Op. ¶ 57 n.9. Extending “deliberate indifference” to how the State structures its regulatory framework would mean that any regulatory scheme a plaintiff considers inadequate could be attacked as a due process violation. That is not deliberate indifference—it is a policy disagreement.

Second, Plaintiffs invoke the “state-created danger” theory, citing *Sugg v. Albuquerque Public School District*, 1999-NMCA-111, ¶ 18. [BIC 45] But that doctrine addresses situations where the state affirmatively places an individual in danger—such as placing a child in a dangerous environment. *See Armijo by and*

Through Chavez v. Wagon Mound Public Schools, 159 F.3d 1253, 1264 (10th Cir. 1998); *see also Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995) (observing “cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury;” e.g. where a woman left by state trooper was eventually raped and where town clerk was abducted at knife point and held hostage for three days by prisoner participating in work release program). Issuing permits for lawful industrial activity under a comprehensive regulatory scheme is categorically different. If permitting lawful activity that incidentally produces pollution constitutes a “state-created danger,” then every environmental permit issued by every agency in the state is a potential due process violation. That cannot be the law.

IV. PLAINTIFFS LACK STANDING

In a closely related doctrine, Plaintiffs lack standing because they cannot show that their claims are judicially redressable. To have standing, a plaintiff must establish, *inter alia*, “redressability,” which requires a showing that the injury “is likely to be redressed by a favorable decision.” *ACLU v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471.

For example, in *Forest Guardians v. Powell*, 2001-NMCA-028, 130 N.M. 368, a group of parents and schoolchildren sued the State alleging underfunding of

public schools. The Court of Appeals affirmed dismissal on standing grounds, holding that “even if Plaintiffs’ lawsuit was successful and the Land Office amended its rules and practices to increase income to the school lands trust,” the plaintiffs had “failed to establish that the result would be an actual increase in the funds available to individual public schools.” *Id.* ¶ 25. The same reasoning applies here.

Plaintiffs ask the district court to order Defendants to “enact, fund, and implement” a new statutory, regulatory, and enforcement framework.” [RP 105-106 ¶¶ 2, 12, & 13] But even if the Court granted that relief, the ultimate content of any new legislation would remain the Legislature’s prerogative. The Legislature could craft legislation, reject budget proposals, and develop rulemaking procedures in ways that might or might not address Plaintiffs’ specific concerns. The Constitution textually commits the appropriation power and the power to enact laws governing pollution control to the Legislature. *See* N.M. Const. art. IV, § 30 (“money shall be paid out of the treasury only upon appropriations made by the legislature”); *Id.* at art. III. § 1; *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 33, 120 N.M. 562 (“Article III, Section 1 mandates that it is the Legislature that creates the law”). Thus, any judicial directive to the Legislature regarding the content of legislation or the amount of appropriations would itself violate the separation of powers. *See* N.M. Const. art. IV, § 30; *State ex rel. Schwartz*, 1995-NMSC-080, ¶ 3; *Asplund*, 1926-NMSC-040, ¶ 48 (“Enough has already been said

of the mistaken view that the judiciary alone is responsible for the upholding of the Constitution. Within our own field we have that responsibility. But if we invade those of the legislative or of the executive, we ourselves become violators of the fundamental law.”).

V. PRACTICAL CONSIDERATIONS UNDERSCORE THE NONJUSTICIABLE NATURE OF PLAINTIFFS’ CLAIMS

A. Trial Would Be Unmanageable

Plaintiffs challenge not a single statute or regulation but the *entirety* of New Mexico’s oil and gas regulatory framework. To litigate such a challenge would require discovery and factual development of a staggering scope: the adequacy of seven Acts and their implementing regulations, the sufficiency of agency budgets and staffing, the appropriateness of thousands of individual permitting decisions, the appropriate air and water quality standards for hundreds of constituents, the pollution levels at hundreds of facilities, and the health and environmental effects across multiple geographic regions. Such a case would require millions of pages of documents, hundreds of depositions, scores of experts across multiple scientific disciplines, and months if not years of trial. The sheer scale of this undertaking confirms that Plaintiffs are asking the judiciary to perform a function for which it was never designed. *See Atencio*, Op. ¶ 44 (observing that Plaintiffs “challenge a vast interwoven network of statutes and regulations rather than advancing a claim that a particular statute or rule is unlawful”).

B. The Requested Relief Would Mire the Court in Decades of Oversight

The relief Plaintiffs seek—a declaration of unconstitutionality, an injunction to rewrite the regulatory framework, and retention of jurisdiction—would install the district court as a permanent overseer of pollution control policy. The experience of other states with education-clause litigation provides a cautionary tale. “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems.” *Nebraska Coalition v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007). States courts have struggled with such controversies over many years, making clear that school funding disputes are not susceptible of immediate resolution or present judicial enforcement. *Id.* at 182-83. In New Jersey, for example, a 1973 ruling declaring the school funding system unconstitutional led to over forty years of judicial oversight that the court eventually largely abandoned. *See Abbott v. Burke*, 20 A.3d 1018, 1025 (N.J. 2011). That led the Rhode Island Supreme Court to caution:

[T]he New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than [forty] years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.

Sundhun, 662 A.2d at 59. Today, the New Jersey court has largely abandoned its attempt to preside as a super-legislature over the state’s educational system, recently

acknowledging that “we are limited in our ability to order relief in this matter.” *Abbott v. Burke*, 20 A.3d 1018, 1025 (N.J. 2011); *see id.* at 1050-57 & n.7 (appendix) (summarizing history of New Jersey litigation).

Massachusetts followed a similar course. School funding litigation began there in 1978 and led to a ruling in 1993 that the state was not fulfilling its constitutional duties. *McDuffy v. Sec. of Exec. Office of Educ.*, 615 N.E.2d 516, 518-56 (Mass. 1993). Twelve years later, however, Massachusetts’ highest court disposed of the litigation in its entirety, rejecting a recommendation for further judicial action and terminating its retained jurisdiction, with the justices unable to agree on what role, if any, the court should have in the controversy. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1136-37 (Mass. 2005); *see id.* at 1156-57 (Marshall, C.J., and Spina and Cordy, JJ., concurring) (observing that proposals to address needs of at-risk children presented policy choices for the legislature—“Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions.”) (footnote omitted); *id.* at 1161 (Cowin and Sosman, JJ., concurring) (“[T]he constitutional requirement that the judiciary stay out of the business of educational policy is echoed in our well-established rule that allocation of taxpayer dollars . . . is the quintessential responsibility of the popularly-elected Legislature, not the courts. . . . Where, as here, the remedy for an alleged deprivation would require a

court to order the [state] to spend money that the Legislature has not appropriated, judicial intervention is not permitted.”) (citations and internal punctuation omitted).

The *Yazzie* case itself illustrates the problem. Judgment came in 2018, yet the case remains before the district court with no end in sight. The pollution-control challenge Plaintiffs propose would be orders of magnitude more complex.

C. The Requested Relief Would Destabilize the Regulatory Regime and the Economy

A moratorium on oil and gas permitting—even of limited duration—would have immediate and devastating consequences. IPANM’s members have invested hundreds of millions of dollars in their business interests, permits, and facilities. They depend on a consistent permitting process to maintain production levels, realize returns on investments, and prevent premature well abandonment. The injunctive relief sought by Plaintiffs will disrupt the operations, create insurmountable costs, and result in losses of investments and devaluations of assets and leasehold interests. **[RP 579-580]** The oil and gas industry supports over 100,000 jobs in New Mexico and funds over 30 percent of the state budget, including funds for public education, Medicaid and healthcare programs, infrastructure and public services and state investment funds for future budgets. Suspending the regulatory framework would destabilize not only the industry but the state’s fiscal foundation and the very regulatory agencies Plaintiffs say are underfunded.

D. Allowing the Case to Proceed Could Have Far-Reaching Consequences

If this Court were to recognize an enforceable right under the PCC, the consequences would extend well beyond oil and gas. Plaintiffs identify no limiting principle. Any industry that contributes to pollution — agriculture, mining, construction, manufacturing — could face similar constitutional challenges. And the logic would not run in only one direction: industry participants could argue that particular regulations fail to appropriately balance pollution control against resource development “for the maximum benefit of the people.” The PCC’s balancing structure, if made judicially enforceable, would become a vehicle for endless litigation over the adequacy and appropriateness of every environmental policy choice the Legislature makes.

CONCLUSION

Although this Court may have concerns related to the environmental impact from oil and gas activity in New Mexico, the sentiment from the Washington Court of Appeals in *Aji P.* resonates:

The Youths deserve a stable environment and a legislative and executive branch that work hard to preserve it. However, this court is not the vehicle by which the Youths may establish and enforce their policy goals. Because resolution of the Youths' claims would require this court to violate the separation of powers doctrine, we affirm.

Aji P., 480 P.3d at 458. For the foregoing reasons, IPANM respectfully requests that this Court affirm the decision of the Court of Appeals and order dismissal of Plaintiffs' complaint.

Respectfully submitted,

SPENCER FANE, LLP

By: /s/Jeffrey J. Wechsler

Jeffrey J. Wechsler

Kari E. Olson

Post Office Box 2307

Santa Fe, New Mexico 87504-2307

(505) 982-3873

jwechsler@spencerfane.com

kaolson@spencerfane.com

*Attorneys for Independent Petroleum
Association of New Mexico*

CERTIFICATE OF SERVICE

I hereby certify that caused a true and correct copy of this IPANM's Answer Brief to be e-filed through the Court's e-filing system and service platform, which caused all counsel of record to receive electronic service.

/s/ Jeffrey J. Wechsler