IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-42001; No. A-1-CA-42003; No. A-1-CA-42006
From First Judicial District No. D-101-CV-2023-01038

MARIO ATENCIO, *et al*.

Plaintiffs-Appellees,

vs.

THE STATE OF NEW MEXICO; et al.
Defendant-Appellants.

vs.

NEW MEXICO CHAMBER OF COMMERCE, and
INDEPENDENT PETROLEUM ASSOCIATION OF
NEW MEXICO
Intervenors-Defendants-Appellants.

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

Mia Montoya Hammersley
Assistant Professor of Law & Director
Charlotte Bieri, *Student Clinician*
Savannah Collins, *Student Clinician*
Hannah Ziomek, *Student Clinician*
Environmental Justice Clinic
Vermont Law and Graduate School
164 Chelsea Street, P.O. Box 96
South Royalton, VT 05068
mmontoya@vermontlaw.edu
802-831-1630

James R. May, Esq., Of Counsel
Richard S. Righter Distinguished Professor of Law
Washburn University School of Law
1700 SW College Ave.
Topeka, KS 66621
james.may@washburn.edu
785-670-1786

Martha F. Davis, Of Counsel
University Distinguished Professor of Law
Co-Director, Center for Global Law & Justice
Northeastern University School of Law
416 Huntington Ave.
Boston, MA 02115
m.davis@northeastern.edu
617-373-8921

Christophe Courchesne, Of Counsel
Associate Professor of Law & Director
Lauren Carita, *Student Clinician*
Environmental Advocacy Clinic
Vermont Law and Graduate School
164 Chelsea Street, P.O. Box 96
ccourchesne@vermontlaw.edu
802-831-1627

Counsel for Amici Curiae

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae[1] comprise a group of twenty-seven law professors and scholars who teach, research, and publish scholarly work in the subject areas of environmental law and state constitutional law, and therefore have an interest in the outcome of this case.[2] While a complete list is included at the conclusion of this brief, *Amici* include the following:

Amicus **Patrick Parenteau** is an Emeritus Professor of Law and Senior Fellow for Climate Policy in the Environmental Law Center at Vermont Law and Graduate School. He has been involved in drafting, litigating, implementing, teaching, and writing about environmental law and policy for over three decades. He is a Fullbright US Scholar, a Fellow in the American College of Environmental Lawyers, and a recipient of the Kerry Rydberg Award for excellence in public interest environmental law.

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[1] As required by N.M.R. App. P. 12-320(C), *Amici Curiae* represent that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Vermont Law & Graduate clinical students Lauren Carita, Hannah Ziomek, Charlotte Bieri, and Savannah Collins, and Northeastern Law students Eleazar Loyo, and Owen Doherty, assisted in the preparation of this brief.

[2] Given *Amici*'s specific expertise and this Court's interest in focused briefing that aids its decision-making process, *Amici* address only Counts I and II of the Complaint and refer the Court to the Plaintiffs-Appellees' brief for legal argument on Counts III, IV, and V.

Amicus **Craig Anthony Arnold** is the Boehl Chair in Property & Land Use, the Director of the Resilience Justice Project, and Professor of Law at the University of Louisville. As the Director of the Resilience Justice Project, he focuses on the unequal vulnerabilities of marginalized and oppressed communities to shocks, such as climate change, disasters, and gentrification. His publications on environmental justice and land use have been used by the U.S. Environmental Protection Agency and American Planning Association, used by Black graduate students at Harvard to create a new course in race and urban design, and was recently cited by the Pakistan Supreme Court in a landmark climate justice case.

Amicus **David Cassuto** is a Professor of Law, Director of the Brazil-American Institute for Law and Environment, and Kerman Family Faculty Scholar at the Haub School of Law at Pace University. He teaches courses in constitutional law, comparative law, and environmental law. He was also a Fullbright Fellow at FGV Direito Rio, in Rio de Janeiro, Brazil.

Amicus **Nazune Menka** is a Denaakk'e (Koyukon Athabaskan) and Lumbee Assistant Professor of Law and Faculty Director for the Center for Indian Law & Policy at Seattle University School of Law. She teaches and writes about Indigenous Peoples and Native Nations, constitutional law, legal history, property law, and environmental law and policy. She has previously served as the Executive Director of the Center for Indigenous Law & Justice at Berkeley Law. Prior to

serving as Executive Director, Professor Menka served in several capacities at Berkeley Law including in the Environmental Law Clinic as a Supervising Attorney, as a Lecturer, and as the Tribal Cultural Resources Project Policy Fellow.

Amicus **Richard Wallsgrove** is an Associate Professor of Law and Co-Director of the Environmental Law Program at the University of Hawaii at Manoa. He is a co-author on the Pacific chapter of the *Fifth U.S. National Climate Assessment*. During his time as the Policy Director for the Blue Planet Foundation, he spearheaded regulatory and legislative advocacy that led to the passage of the nation's first 100 percent renewable portfolio standard.

Amici affirm the state trial court's finding that the New Mexico Constitution affords justiciable claims to address programs and policies that contribute to climate change. The Due Process and Inherent Rights clauses of the New Mexico Constitution, in addition to Article XX, § 21, especially, are judicially enforceable mandates. *Amici* have reached out by email to all Parties to this case to provide notice of their intention to file this motion pursuant to Rule 12-320(D)(1).

SUMMARY OF ARGUMENT

Article XX § 21 of the New Mexico Constitution ("Section 21") sets out judicially manageable standards, and Appellees have stated a justiciable claim under these standards. Appellants' assertion to the contrary flies in the face of the plain text of Section 21, the accepted understanding of Section 21 at the time it was

adopted, and the fundamental structure of the state Constitution. New Mexico courts regularly consult persuasive authority from other state jurisdictions, both for inspiration and to promote uniformity in approaches. Sister courts across the country have found similarly structured constitutional provisions to create justiciable rights in the areas of environmental rights, education, welfare, and other contexts.

Appellees also state an actionable claim under Article II, § 18 of the New Mexico Constitution (the "Due Process Clause"), which incorporates the elements of Article II, § 4 of the state constitution (the "Inherent Rights Clause"). Appellees allege violations of "life, liberty, property, safety and/or happiness." These claims completely align with the protected elements of the state's Due Process Clause, as construed in light of the Inherent Rights Clause. The Complaint includes detailed allegations that fully support the assertion that Appellants have violated Appellees' fundamental rights. While the federal Constitution does not include an inherent rights clause, most state constitutions include such a provision. This Court should find persuasive value in the decisions of sister state courts nationwide, which have repeatedly upheld the justiciability of claims framed as violations of inherent rights, whether directly under their own inherent rights clauses, under their states' due process clauses, or both.

In light of this powerful support for Appellees' claims, *Amici* urge this Court to affirm the lower court's conclusion that the Appellees have stated justiciable claims under New Mexico's Constitution.

ARGUMENT

I. ARTICLE XX, § 21 OF THE STATE CONSTITUTION CREATES JUSTICIABLE RIGHTS.

A. Section 21 Incorporates Judicially Manageable Standards.

Section 21 establishes clear, judicially manageable standards to be interpreted and enforced by courts.[3] The prefatory first sentence establishes the "fundamental importance" of protecting the state's "beautiful and healthful environment" for the "public interest, health, safety, and the general welfare." The second sentence then commands that the legislature "*shall* provide for control of pollution and despoilment" of these natural resources, consistent with their beneficial development. Art. XX, § 21 (emphasis added). The mandatory language of this provision provides the basis for courts to review whether the legislature has met its constitutional obligations. As Professor Hershkoff observed in her

[3] N.M. CONST. art. XX, § 21 reads in full: "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." (Adopted Nov. 2, 1971.)

influential article on positive rights in state constitutions, "when a state constitution commits the state to particular public policies, the role of the state court is to ensure that government uses its assigned power to achieve, or at least move closer to achieving, the specified goals." Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1145 (1999); *Accord State v. Lujan*, 1977-NMCA-010, ¶ 4, 90 N.M. 103, 105, 560 P.2d 167, (noting that the words "shall" and "must" generally indicate that the provisions of a statute are mandatory and not discretionary); *see also State v. Boyse*, 303 P.3d 830, 832 (2013) (stating that "the rules of statutory construction 'apply equally to constitutional construction'"). If the courts of this state were to turn away from their duty to review the state's compliance with this provision, it would leave unenforceable a public interest that the people of this state deem "fundamental." *See* Richard Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1306-09 (2014) (discussing the danger that underenforcement of constitutional principles on justiciability grounds will foreclose any future review). Even if such a hands-off approach *might* be justified in a federal context, the judiciary in New Mexico has rejected it. *See Grisham v. Van Soelen*, 2023-NMCA-027, ¶ 34, 539 P.2d 272, 285 (rejecting federal approach in *Rucho v. Common Cause* and finding partisan gerrymandering to be justiciable under state constitution).

Only where there is truly no law to apply have courts found an absence of meaningful standards of review. *See Rucho v. Common Cause*, 588 U.S. 684, 721 (2019) (concluding that partisan gerrymandering is "not law"). *But see id*. at 722 (Kagan, J., dissenting) (asserting that partisan gerrymandering is "not beyond the courts"); *accord Grisham*, 2023-NMCA-027, ¶ 34 (citing Justice Kagan's dissent with approval and finding partisan gerrymandering to be justiciable under New Mexico law). Here, the detailed allegations in the complaint—which must be taken as true at this point—chronicle the New Mexico Environment Department's consistent violations of its statutory duty to prevent or abate air pollution in the counties with heavy oil and gas production where Appellees live, work, recreate, and practice ceremony. *See, e.g.*, Complaint ¶¶ 157-185, 199-216, *et seq*. (describing specific harms arising from oil and gas production policies in New Mexico). *See also*, *e.g*., Complaint ¶¶ 274-324, *et seq*. (alleging that oil and gas production in the San Juan and Permian Basins and other areas is endangering the health and lives of the state residents). Federal pollution control laws provide ample intelligible standards for the court to apply in judging whether the legislature and executive branches are living up to the constitutional commands**.** *See, e.g*., James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENVER U. L. REV. 919, 953-958 (2008). The fact that the legislature retains some discretion to balance pollution control with the

"beneficial development" of the state's natural resources does not mean that such discretion is unfettered or unreviewable. If at trial the facts show that the state is violating the standards and norms that are meant to protect people's health and quality of life, then the court will be able to consider what remedies are appropriate to protect the Appellees' constitutional rights.

This approach is consistent with Section 21's intent to create enforceable rights. This intent is squarely confirmed by the official guide prepared by the New Mexico Legislative Council Service in July 1971, created to assist the legislature's consideration of Section 21. Specifically, the summary of "Arguments For," which prevailed when the legislature approved Section 21, emphasizes the command that the legislature "take positive action . . . to protect the environment." Constitutional Amendments Proposed by the 1971 Legislature and Arguments For and Against, New Mexico Legislative Council Service, Santa Fe, New Mexico, July 1971, at 34-35.[4] At the same time, the "Arguments Against" laid out by the Legislative Council Service, which failed to secure the support of the majority of legislators,

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[4] The central significance and content of Section 21's command is further emphasized in the authoritative description in the Oxford University Press volume on the New Mexico Constitution. According to the author, "[t]he maintenance of a beautiful and healthful environment in New Mexico is made a constitutional *requirement* by this section. The legislature is *mandated* to enact appropriate laws to control and limit the pollution and despoilment of natural resources." CHARLES SMITH, THE NEW MEXICO STATE CONSTITUTION 188 (2011) (emphasis added).

argued without basis that there could be no judicial enforcement of the Amendment. *Id*. at 35-36. The legislature's rejection of that position, and the Amendment's ultimate adoption through popular vote, are powerful evidence that Section 21 is intended to create a judicially enforceable mandate. It was with that understanding that the state adopted Section 21 by the largest margin of approval of any amendments put before the New Mexico voters in November 1971. *See*, *e.g.*, *Seven Amendments Win State Approval*, CLOVIS NEWS-JOURNAL, Nov. 3, 1971, A-1; Bill Feather, *Easier Amendment Proposal Fails*, ALBUQUERQUE J., Nov. 4, 1971, A-5; *League Outlines Proposed Amendments*, LAS CRUCES SUN-NEWS, Oct. 13, 1971, at 5 (League of Women Voters guide published in advance of statewide vote states that "the amendment could be considered a mandate from the people asking for more pollution control.").

Ignoring these facts, Appellants contend that the sole remedy for a violation of the Amendment is through an electoral campaign to defeat the recalcitrant legislators responsible for the legislature's inaction. But that argument proves too much. Certainly, such an approach is available in a democracy. However, if that were the only way to enforce constitutional provisions, then much of the state's rich history of constitutional adjudication, which builds squarely on *Marbury v.*

Madison, would be thrown into question.[5] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The courts of this state have repeatedly recognized that the judiciary's proper "function and duty [is] to say what the law is and what the Constitution means." *Grisham v. Van Soelen*, 2023-NMCA-027, 539 P.3d 272, 285 (citation omitted) (finding partisan gerrymandering claim to be justiciable); *State ex rel. Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 15, 119 N.M. 150, 156, 889 P.2d 185, 191 ("The reviewability of executive and legislative acts is implicit and inherent in the common law and in the division of powers between the three branches of government."); *State v. Gutierrez,* 1993-NMSC-062, ¶ 55, 116 N.M. 431, 446, 863 P.2d 1052 ("[T]he primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, . . . has been vested in the judicial branch.") (internal quotation marks and citation omitted); *Dillon v. King,* 1974-NMSC-096, ¶ 28, 87 N.M. 79, 529 P.2d 745 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see Marbury*, 5 U.S. at 178 ("It is emphatically the province and duty of the judicial department to say what the law is.").

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[5] *Marbury v. Madison* has been cited at least thirty-nine times by this state's courts. Westlaw search term "Marbury," conducted Oct. 6, 2024.

This Court should reject the Appellants' approach—which ignores text and history, turns *Marbury v. Madison* on its head, and shields constitutional controversies from judicial review—and affirm the judiciary's power to interpret and apply this provision of the New Mexico State Constitution.

B. Section 21's Justiciability is Further Supported by the State Constitution's Fundamental Structure.

Courts of this state have adopted a functionalist approach to separation of powers. *See, e.g., Martinez v. State of New Mexico*, No. D-101-CV-2014-00793, Decision and Order at 8-9 (1st Jud. Dist. Ct., Jul. 20, 2018). And no wonder. Appellants' rigid formalist interpretation of Article III, § 1, is plainly unworkable, contradicted by decades of state courts' review of state constitutional issues and the state judiciary's repeated endorsement of *Marbury v. Madison*.

A significant body of case law and scholarship recognizes that state constitutions, including New Mexico's, are not merely miniaturized versions of the federal constitution. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 330 (2003). *See also State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d. 1 (1997) (adopting independent mode of analysis for state constitution's due process clause); *State v. Cordova*, 1989-NMSC-083, ¶ 17, 109 N.M. 211, 217, 784 P.2d 30, 36 (departing from federal courts' "totality of circumstances" test for determining probable cause); *see generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG

PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013). Instead, even in instances where state constitutional wording is similar to the federal constitution, the concerns and values that motivated the state-level drafters are very often quite different than those of the federal framers. That is especially true of a state constitution such as New Mexico's, which was drafted during the Progressive era, more than a century after America's founding. *See*, *e.g.*, AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES, 19 (2017) (noting that New Mexico's 1911 constitution responded to the concerns of the time).

This insight explains why Appellants' reading of Article III, § 1 of the state constitution, is fundamentally misguided. At least forty state constitutions contain explicit separation of powers provisions. Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. at 337. Appellants argue for rigid formalist interpretation of Article III, § 1 that would preclude judicial oversight of state constitutional claims. *See* Scott R. Bauries*, Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 737 (2010) (explaining functionalist vs. formalist approaches). Yet state courts are not bound to follow such an inflexible approach. Indeed, an in-depth analysis of this issue concluded that an explicit separation of powers provision "does not have any

discernable impact on whether courts choose to abstain from the merits of constitutional litigation on the very grounds of separation of powers." *Id*. at 746. Further, the analysis found that the significant majority of states with explicit separation of powers provisions rejected the formalist reading when considering the justiciability of state constitutional education clauses. *Id*. at 741-743 tbl.1 (eighteen of twenty-six courts found such constitutional claims to be justiciable).

Properly understood, this state's separation of powers provision supports Appellees' claims. Rather than enforcing strict, inflexible lines between the three branches, "the core of the state approach is government accountability," and "[t]he separation of powers is a tool that the people have enlisted to help them better monitor and control government." Jonathan Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L. J. 545, 616 (2023). The purpose of the separation of powers provision is not to establish rigid boundaries of power nor build walls between the branches of government, but to reinforce vertical avenues for ensuring that government bodies are meeting their obligations to the people. That is exactly the role of judicial review here: to provide an avenue for the people to enforce the state's duties under Section 21.

The case for judicial enforcement of Section 21 is bolstered by the relative ease with which the legislature and the people can respond if the courts over-enforce a state constitutional norm. The constitution of New Mexico has been

amended 178 times in 107 years. In this state, constitutional amendments are put to a majority vote of the legislature before being submitted to the voters for approval by a majority vote, a relatively low threshold that allows for rapid response to emerging issues. Because of this state constitutional design, courts do not hold a monopoly on constitutional interpretation; rather, the legislature and the people are well-positioned to respond to judicial decisions if needed. *See, e.g.*, Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV., at 1161. The availability of such a dialogue—and the possibility of appropriate corrective measures—provides further support for finding that Section 21 is justiciable.

Finally, that Section 21 exists outside of the state constitution's Bill of Rights does not make it non-justiciable. Justiciable provisions appear throughout the constitution and are not limited to the Bill of Rights. *See, e.g.*, N.M. CONST. art. XVI, § 1 (confirming water rights); N.M. CONST. art. XVII, § 2 (banning child labor in mines). As a unique, freestanding provision adopted in 1971, Section 21 was added to the "Miscellaneous" section of the constitution to avoid the need to amend the entire constitution. *See generally* NEW MEXICO LEGISLATIVE COUNCIL SERV., PIECEMEAL AMENDMENT OF THE CONSTITUTION OF NEW MEXICO SINCE 1911 23 (2016) (indicating that piecemeal amendments have been favored as a way to avoid opening the entire constitution for review).

In sum, Section 21's role in the structure of this state's constitution favors a finding of justiciability.

C. The Context of Section 21's Adoption Supports its Justiciability.

Environmental issues were prominent when Section 21 was adopted in 1971, arising as part of expanding international, national, and subnational recognition of environmental rights. *See generally*, James R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, 42 CARDOZO L. REV. 983, 989-91 (2021). In the late 1960s and early 1970s, there was increasing interest in, and urgency around, environmental issues. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES at 148-149. The first Earth Day was held on April 22, 1970. Internationally, the United Nations held its first conference focusing on the environment in Stockholm in 1972, adopting the Stockholm Declaration and Action Plan for the Human Environment. *See* Declaration of the United Nations Conference on the Human Environment: In Report of the United Nations Conference on the Human Environment, *Rep. of the United Nations Conference on the Human Environment*, UN Doc. A/CONF. 48/14 (1972). In the United States, environmentalists were inspired by the civil rights movement, and judicial enforcement of government's environmental obligations was a high priority. *See generally* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971) (urging environmentalists to enforce environmental rights in court).

As the specialized field of environmental law took shape, litigation was an important tool to tackle not only individual protections but also national environmental issues. Samuel P. Hays, *Environmental Litigation in Historical Perspective*, 19 UNIV. OF MICH. J. L. REFORM 969, 969 (1986). Reflecting the importance of this strategy, the Environmental Defense Fund was founded in 1967, followed by the Natural Resources Defense Council in 1970.

State-level constitutional reform was a key aspect of the environmental rights movement. *See* Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 ENV'T L. REP. 50028 (1975) (noting the success of incorporating environmental provisions into state constitutions). Though attempts to achieve federal constitutional recognition of a right to a healthful environment were unsuccessful, fourteen states adopted new constitutional amendments regarding environmental protection and conservation between 1960 and 1980. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES at 151, tbl.7.1.

Most of these state constitutional provisions, including New Mexico's, create positive rights, using language that commands government action. *Id.* at 165-68. Several state courts have found these constitutional amendments to be amenable to judicial enforcement. This is consistent with their framers' intent. *Id.* at 148 (noting that state constitutional environmental provisions in the 1960s and '70s were intended to enable litigation). For example, the Montana Supreme Court

enforced that state's 1972 constitutional amendment in *Mont. Env't Info. Ctr. v. Dep't of Env't Quality* in a challenge to legislative exemptions of arsenic discharges in well water testing. 988 P.2d 1236, 1246 (Mont. 1999). More recently, a Montana trial court upheld claims filed by Montana youth who challenged legislative actions as inconsistent with the state constitution. *See Held v. Montana*, No. CDV-2020-307, 2023 Mont. Dist. at *129–30 (Mont. 1st Dist. Aug 14, 2023), *appeal pending*, DA 23-0575 (Mont.). Pennsylvania's constitutional provision on environmental rights, approved in 1971, has also been found to be justiciable. *See In Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Pa. Env't Def. Found. v. Commonwealth (PEDF II)*, 161 A.3d 911 (Pa. 2017). Hawai'i's constitutional environmental standards have been judicially enforced. *See*, *e.g.*, *In re Maui Elec. Co*., 506 P.3d 192, 202 n.15 (Haw. 2022) (construing HAW. CONST., Art. XI, § 9). Likewise, the high courts of Louisiana and Michigan have found their states' constitutional environmental standards to support justiciable claims. *See Save Ourselves, Inc. v. Louisiana Control Comm'n*, 452 So. 2d 1152, 1156-1157 (La. 1984) (identifying standards for reviewing claims under state constitution's environmental amendment); *Highway Comm'n v. Vanderkloot*, 392 Mich. 159, 182 (1974) (recognizing that the mandatory language of state constitution imposes requirements on state government, reviewable by the court). *See generally*, James R. May, *Subnational Climate Rights*, 26 U. PENN. J. CONST. L. 26 (2024).

The Alaska Supreme Court also found that state's environmental constitutional protections to be justiciable. Appellants' assertions to the contrary rest on a misreading of *Sagoonick v. State,* 503 P.2d 777 (AK. 2022). Significantly, the *Sagoonick* court squarely acknowledged that courts have "a duty to ensure compliance with constitutional principles, and we have a duty to redress constitutional rights violations." *Id.* at 796. Contrary to Appellants' contentions that Alaska's environmental constitutional amendment is not enforceable, the Alaska court opined that courts reviewing compliance with Article VIII, sections 1 and 2 of Alaska's Constitution are required to at least take a "hard look" to ensure that the government has exercised "reasoned discretion." *Id*. at 788. Substantive review is appropriate here given that Section 21 expressly recognizes the "fundamental importance" of the "protection of the state's beautiful and healthful environment." The Appellees have identified a pattern of statutory exemptions and exclusions from key environmental protections that the Court can redress through such an examination. *See* Complaint ¶¶ 175-98.

This state's citizens, who overwhelmingly voted for Section 21, understood it to be enforceable by the courts. The Jan.-Feb. 1971 newsletter of the environmental organization New Mexico Citizens for Clean Air and Water, for instance, told readers that "an environmental bill of rights . . . will be presented to the voters as a constitutional amendment at the next general election," scheduled

for November of that year." Harvey Mudd II, *Environmental Legislation in the 1971 Session*, NMA Jan.-Feb. 1971, at 12. *See* ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES, at 148 (explaining that "constitutional declarations that the state must maintain a healthy or healthful natural environment" were often known as "environmental bills of rights"). The newsletter explained that the amendment, "would give clear constitutional grounds for future legal action against polluters." *Id*. The availability of such judicial enforcement was understood to be essential to vindicate the interests identified in such new constitutional provisions. *See* Richard J. Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENVT'L AFF. 473, 482 (1974) (noting that if "legislatures are unwilling to enact legislation to guarantee citizens' rights to a decent or healthful environment . . . citizens hoping to vindicate their environmental rights may have to move from the legislative to the judicial arena"). This context for Section 21's adoption provides ample support for the justiciability of Appellees' claims.

D. Peer Courts Have Found Similarly Structured Constitutional Provisions to be Justiciable.

The courts of this state often look to, and credit, the persuasive value of the decisions of sister courts confronting similar issues. For example, in assessing a novel case of search and seizure, the New Mexico State Supreme Court noted that it would "seek guidance" from, *inter alia*, "the decisions of courts of

our sister states interpreting their correlative state constitutional guarantees . . ." *State v. Gutierrez*, 1992-NMSC-062, 116 N.M. 431, 435-36 (1993) (surveying decisions from Kansas, North Carolina, Massachusetts, and others). The court explained that it did not look to sister states for binding precedent, instead adopting a comparative lens because "we find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions." *Id*. at 436; *See also Moses v. Skandera*, 2015-NMSC-036, 367 P.3d 838 (2015) (citing cases from Hawai'i and South Dakota in construing the New Mexico State Constitution provision prohibiting appropriation of funds to support any sectarian or private school); *Griego v. Oliver*, 2014-NMSC-003, 5 N.M. 320, 316 P.3d 865 (2013) (invaliding New Mexico's state ban on same-sex marriage, citing rulings from Colorado, Iowa, Massachusetts, California, and Connecticut); *State v. Vallejos*, 1997-NMSC-040, 123 N.M. 739 (1997) (citing rulings from Florida, New Jersey, West Virginia, and New York in holding that the New Mexico Constitution is violated when police exceed the standards of proper investigation and create a likelihood of entrapment for an ordinary person).

Jurisprudence from sister states involving comparable state constitutional provisions provides significant persuasive authority supporting the justiciability of Section 21. Importantly, consideration of this analogous jurisprudence can

promote the national uniformity identified as an important value by this state's Supreme Court.

One such notable analogue is Article XVII, § 1, of the New York State Constitution, which provides:

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

N.Y. CONST. art. XVII, § 1 (1938).

Although Article XVII (N.Y.) and Section 21 (N.M.) address distinct areas of public concern, their structure is remarkably similar. Section 21 identifies the protection of the state's "beautiful and healthful" environment to be of "fundamental importance," and mandates that the legislature address this interest in accordance with general criteria set out in the Amendment. Article XVII likewise identifies "aid, care, and support of the needy" as an important public concern, and mandates the legislature take action to provide for it, leaving some discretion to the legislature as to the manner and means.

New York courts have repeatedly affirmed that Article XVII is justiciable and sets out enforceable standards. In *Tucker v. Toia*, 43 N.Y.2d 1, 8 (1977), the New York Court of Appeals held that Article XVII, Section 1 "imposes upon the State an affirmative duty to aid the needy." Thus, "the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by

our Constitution." *Id.* at 7. *See also Callahan v. Carey,* 12 N.Y.3d 495, 502 (2009) (recognizing that Article XVII obligates the state "to provide decent shelter for homeless adults"); *McCain v Koch*, 70 N.Y.2d 109, 113-114 (1987) (issuing an injunction, under Article XVII, requiring New York City to "provide housing which satisfies minimum standards of sanitation, safety, and decency"). In *Aliessa v. Novello*, New York's high court reaffirmed that the provisions of Article XVII establish constitutional limits on the legislature's discretion and that a statutory scheme that ignores plaintiffs' "need" in allocating benefits "violates the letter and spirit of article XVII, § 1." *Aliessa v. Novello*, 96 N.Y.2d 418, 429 (2001).

The substantive focus of Article XVII, *e.g.*, general assistance to the poor, is unusual among state constitutions. However, many states have constitutional education clauses that are structured similarly to Section 21. These clauses may mandate that the state legislature achieve a specific standard, such as an "efficient system" of public education (TEX. CONST. art. VII, § 7), or a "thorough and efficient system of public schools" (MINN. CONST. art. XIII, § 1), or they may simply mandate the establishment of public schools without specifying a standard (S.C. CONST. art. XI, §3; N.Y. CONST. art. XI, § 1). At the same time, these clauses give the legislature some discretion as to the means of achieving that standard, using words such as "appropriate legislation" (CONN. CONST. art. XIII, § 1), "as it determines" (TENN. CONST. art. XIII, § 1), "in such manner" (KAN. CONST. art. VI.

§ 1), or "as may be desirable" (S.C. CONST. art. XI, § 3). The availability of some legislative discretion does not, however, defeat the enforceability of these provisions. The high courts in each of these states have found these clauses to be justiciable: *see e.g.*, *Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell*, 176 A.3d 28 (Conn. 2018) (rejecting claim that reviewing the constitutionality of the state's education funding scheme presented a nonjusticiable political question); *Gannon v. State*, 319 P.3d 1196, 1231 (Kan. 2014) (concluding the same, relying on sister-state precedents); *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018) ("Although specific determinations of educational policy are matters for the Legislature, it does not follow that the judiciary cannot adjudicate whether the Legislature has satisfied its constitutional duty"); *Campaign for Fiscal Equity v. N.Y.*, 100 N.Y.2d 893, 905-908 (2003) (confirming judicial role in determining whether the legislature has met the state constitution's mandate of a system "wherein all the children of this state may be educated"); *Abbeville Cnty. Sch. Dist. v. State*, 767 S.E.2d 157, 166 (S.C. 2014) ("Nothing in the text of the article precludes the judiciary from exercising its authority over the [education clause's] provisions, or intervening when the Defendants' laudable educational goals fall short of their constitutional duty"); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993) (declaring it the court's "duty to consider the question of whether the legislature…disregarded, transgressed, and defeated" provisions of the state

constitution); *Neeley v. West Orange-Cove Consol. Independent School Dist.*, 176 S.W.3d 746, 772 (Tex. 2005) (holding the Texas Constitution's education clause justiciable and rejecting arguments that proper funding levels presented a political question); *Morath v. The Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 847 (Tex. 2016) (holding that the legislature's discretion over education policy "is not without bounds" and may be reviewed by the judiciary).

The Kansas Supreme Court's analysis of its state constitution's education clause is particularly instructive. In *Gannon*, the Kansas Supreme Court found its education clause to be justiciable, reasoning in part that the word "shall" creates a clear, mandatory constitutional duty that is distinguishable from a mere direction that the legislature should strive towards. *Gannon*, 319 P.3d at 1220.[6] The *Gannon* court contrasted this with other constitutional provisions using language such as "may," that do not create such an affirmative duty. *Id.* at 1221. Similar choices between mandatory and discretionary language are also apparent in the New Mexico Constitution. *Compare* N.M. CONST. art. II, § 20 ("Private property *shall* not be taken or damaged for public use without just compensation.") *with* N.M. CONST. art. IV, § 42 ("The senate, in exercising its advice and consent

[6] "The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." KAN. CONST. art. VI, § 1.

responsibilities over gubernatorial appointments, *may* by resolution designate the members of an appropriate standing committee to operate as an interim committee . . .") (emphasis added).

Notably, the Kansas education provision in Art. VI, § 1 of the state constitution does not qualify its command with standard-setting language. Rather, it contains a straightforward mandate that the legislature provide for "intellectual . . . improvement" by "establishing and maintaining public schools, educational institutions, and related activities." Appellant, The New Mexico Legislature, erroneously asserts that the Kansas constitution mandates a "suitable" education, arguing that this language distinguishes the Kansas case from Section 21, and that it supplies a standard supporting judicial review. Brief of App. New Mexico Legislature at 16. But the word "suitable" appears only in Art. VI, § 6, the section of the Kansas constitution addressing school financing. *Gannon*, 319 P.3d at 1219. The Kansas courts found Art. VI § 1 to be justiciable despite the absence of such standard-setting language, based on the clear command to the legislature. *See*, *e.g.*, KAN. CONST. art. VI § 1 ("The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools . . ."). Likewise, the use of the word "shall" in Section 21 is sufficient to demonstrate justiciability, particularly considering the entire wording of the provision. It conveys a constitutional command deliberately chosen

by Section 21's drafters and overwhelmingly approved by the people of the State of New Mexico.

Still, Appellants argue that even when the constitutional provision conveys a mandate, the language in these clauses regarding the means of achieving the mandate creates wide latitude for legislative choices, barring judicial review. However, the courts cited above have rejected such extreme deference. As they recognize, it is the provisions regarding the scope of discretion that constrain the actions of the legislature and reserve a place for judicial review of legislative decisions. For instance, Connecticut's education clause includes "qualifying terms such as 'appropriate legislation' that imply a judicial role in disputes arising thereunder, particularly when coupled with the word 'shall,' which itself implies a constitutional duty that is mandatory and judicially enforceable." *Rell*, 990 A.2d at 220 (internal citation omitted).[7] The court opined that "courts should view [such cases] with a heavy thumb on the side of justiciability, and with the recognition that, simply because the case is connected to the political sphere, it does not necessarily follow that it is a political question." *Id.* at 218. *See also Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (establishing courts' role in enforcing state constitution's education clause).

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[7] "There shall always be free public elementary and secondary schools in this state. The general assembly shall implement this principle by appropriate legislation." CONN. CONST. art. VIII, § 1.

Once courts find that an education clause establishes a constitutional duty that binds the legislature, they recognize an obligation to address the justiciable claim. The Tennessee Constitution, for example, commands that the General Assembly "provide for . . . a system of free public schools." TENN. CONST. art. XI, § 12. The Tennessee provision does not incorporate any explicit qualifying language, but simply commands that an educational system be established considering the state's recognition of "the inherent value of education." *Id.* When presented with a claim to enforce this provision, the state's high court cited *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and concluded that a court has no other choice than to adjudicate the government's adherence to the constitution, for doing otherwise "would be a denigration of our own constitutional duty." *McWherter*, 851 S.W.2d at 148 (Tenn. 1993).

The Supreme Court of Texas came to a similar conclusion when it held that although the language of the education clause may be imprecise when it comes to specific policy prescriptions, "it is not *inherently* the Legislature's role to define and interpret the Constitution," and in fact, "courts have the ultimate authority to determine whether the Legislature's interpretation of these terms is arbitrary or unreasonable and, therefore, unconstitutional." *Morath*, 490 S.W.3d at 846-47 (emphasis in original). Indeed, the *Morath* Court astutely noted that "[i]f the framers [of the constitution] had intended the legislature's discretion to be

absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the legislature provide whatever public education it deemed appropriate." *Id.* at 847. Therefore, once a review of a state education clause reveals a mandate to the legislature to provide education and includes even a modicum of guidance as to what that education should look like, the task falls to the judiciary to determine whether the legislature's policies adhere to that mandate. *See Rell*, 990 A.2d at 245-50 (collecting cases as of 2010).

In sum, state courts across the country have not shied away from their obligation to enforce standards and legislative obligations set out in state constitutions, in contexts ranging from welfare to education to the environment. In exercising that duty, these courts ensure that the directives enshrined in constitutional language and endorsed by the people of the state, are implemented and respected. The examples cited here from sister courts around the nation provide persuasive authority to support this Court in finding that Appellees have presented justiciable claims under Section 2.

II. IN COMBINATION, THE STATE CONSTITUTION'S DUE PROCESS CLAUSE AND INHERENT RIGHTS CLAUSE ESTABLISH JUSTICIABLE RIGHTS.

A. The New Mexico Supreme Court Has Made Clear that These Twin Provisions of the State's Bill of Rights Can Support Justiciable Claims.

Count II of the Complaint sets out a claim based on two provisions of the New Mexico Constitution's Bill of Rights, Article II, Sections 4 and 18. Section 4 provides that all persons born have "certain natural, inherent and inalienable rights," including but not limited to "rights of enjoying and defending life and liberty, of acquiring, possessing and protection property, and of seeking and obtaining safety and happiness." N.M. CONST. art. II, § 4 (the "Inherent Rights Clause"). Section 18 provides in pertinent part that "[n]o person shall be deprived of life, liberty or property without due process of law." N.M. CONST. art. II, § 18 (the "Due Process Clause"). The Supreme Court of New Mexico has held that the Inherent Rights Clause and Due Process Clause in tandem can support a justiciable claim. *See Morris v. Brandenberg*, 2016-NMSC-027, ¶ 58, 10 N.M. 121, 376 P.3d 836, 855-856. Appellees have stated such a claim here. Indeed, Appellees' claims that Appellants have violated their rights to "life, liberty, property, safety and/or happiness" are completely aligned with the specific fundamental protections set out in the Inherent Rights Clause. *See, e.g.*, Complaint ¶ 9, 97, 118, 121, 123, 155, 293, 354, 379.

This conclusion is consistent with the unique text, structure, and history of the state constitution. While sharing a common inspiration with the federal constitution, New Mexico's Due Process Clause has important differences with its federal analogue. In particular, New Mexico's provision provides that '[n]o

person" shall be deprived of due process. In contrast, the federal language focuses on state power (i.e., "no state shall"). Like most states, New Mexico's Due Process Clause is phrased not as a limitation on the State, but as a grant of affirmative rights to persons within the jurisdiction. *See* BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES at 138 (explaining that Western state constitutions expanded rights of individuals' and governments' obligations to them).

A rights-protective reading of the state's Due Process Clause is justified not only by the differences in text from its federal counterpart, but also because state and federal constitutions do not perform identical functions in our governmental structure. The federal government is one of enumerated powers, and the federal constitutional text sets limitations on government.[8] *See* BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES at 16. In contrast, states, including New Mexico, have general, unenumerated powers, a crucial structural distinction that reinforces the broader scope of state power and the justiciability of claims arising under this state's Bill of Rights. *Id*; *see*, *e.g*., U.S. CONST., amend X.

The New Mexico Supreme Court has instructed that the Due Process Clause should be interpreted through the lens of the state's Inherent Rights Clause. The Inherent Rights Clause, which has no counterpart in the federal constitution, is drawn from the Declaration of Independence and the philosophy of John Locke.

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[8] U.S. CONST. art. I, § 8.

Joseph Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L. QTRLY. 1, 11 (1997). New Mexico's high court has recognized that application of the Inherent Rights Clause may lead to "greater due process protections than those provided under federal law." *See Morris*, 2016-NMSC-027, ¶ 51. Clearly, the Inherent Rights Clause has legal weight under this state's jurisprudence. *See Griego*, 2014-NMSC-003, ¶ 1, ("[w]hen government is alleged to have threatened any of these rights, it is the responsibility of the courts to interpret and apply the protections of the Constitution"); *Morris,* 2016-NMSC-027, ¶ 58 (concluding that the Inherent Rights Clause should inform the protections of individual rights through the state Due Process Clause).

The prominent placement of the Inherent Rights Clause in New Mexico's Bill of Rights is a further indication that it was intended to have legal weight in protecting state's citizens' rights of "enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." N.M. CONST. art. II, § 4. The *Morris* court's conclusion that the Due Process Clause works together with the Inherent Rights Clause to protect individual fundamental rights is consistent with the text, history, and structure of the state constitution. *Morris,* 2016-NMSC-027, ¶ 58. There is no reason for this Court to revisit the State Supreme Court's prior determinations that claims of the

type presented by Appellants here, which are fully aligned with the rights identified in the Inherent Rights Clause, are justiciable.

B. Sister Courts have Repeatedly Found Similar State Constitutional Clauses to Create Justiciable Rights.

Beyond the controlling New Mexico case law cited above, the justiciability of the Appellees' claims here are further confirmed by the conclusions of sister courts construing similar provisions of their own state constitutions. Thirty-four state constitutions explicitly protect "inherent" or "inalienable" rights. Martha F. Davis, *Annotated Bibliography "Persons Born" and the Jurisprudence of Life*, 104 B.U. L. REV. ONLINE 161 (2024), at Table 1. Forty-two state constitutions contain due process clauses. *Id*. State courts across the country have repeatedly found that, alone or in combination, these provisions support justiciable claims involving individual rights.

State high courts have found inalienable or inherent rights clauses to be justiciable in cases involving a wide range of fundamental rights. *Commonwealth v. Weston W.*, 913 N.E.2d 832, 840 (Mass. 2009) (finding that "inherent rights" clause protected right to move freely within the Commonwealth); *Tully v. City of Wilmington*, 810 S.E.2d 208, 213-14 (N.C. 2018) (upholding justiciability of claim to "enjoy the fruits of their labors" under "inherent rights" clause); *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 472 (Kan. 2019) (inherent rights clause protects a right to abortion); *Members of the Med. Licensing Bd. of Ind. v.*

Planned Parenthood Great Nw., 211 N.E.3d 957, 973 (Ind. 2023) (finding that inherent rights clause is enforceable in abortion context); *Breese v. Smith*, 501 P.2d 159 (Alaska 1972) (inherent rights clause protects right to access public education); *Okla. Call v. Drummond*, 2023 OK 24, 526 P.3d 1123, 1130 (2023) (recognizing pregnant women's inherent "right to life" under state constitution).

Several state courts have found that "safety"—which is explicitly protected in the New Mexico Constitution—is an inherent right protected under states' Inherent Rights Clauses. For example, the Washington Supreme Court noted that "children have substantive due process rights to be free of unreasonable risk of harm" and "a right to reasonable safety." *Braam ex rel. Braam v. State*, 81 P.3d 851, 865 (Wash. 2003). In a decision that was subsequently vacated on other grounds, the New Mexico Supreme Court likewise endorsed the view that this state's constitutional protections extend to the safety of its citizens. *Reed v. Reed ex rel. Ortiz*, 124 N.M. 129, *judgment rev'd sub nom.*, 118 S. Ct. 1860 (1998) (noting that "our Constitution can offer not only to protect life, but also the 'more expansive' guarantee of obtaining safety").

Further, at least one jurist in Hawai'i has found that environmental rights are among the inherent rights protected by that state's Due Process Clause. In *Matter of Hawai'i Electric Light Co.*, 152 Haw. 352 (2023), an energy company sought to obtain regulatory approval to provide energy by burning eucalyptus trees.

Enforcing the state constitutional right to a clean and healthful environment, the state supreme court upheld the decision of the Public Utility Commission to deny the company's application. In a concurring opinion, Justice Wilson opined that the "right to a life-sustaining climate system" is separately and independently protected by the state's due process clause, as part of "life, liberty, and property." *Id*. at 360 (Wilson, J., concurring). And as noted in the majority opinion, the fundamental rights protected by the Hawai'i constitution are necessarily developing as circumstances change, particularly in the area of climate. According to the court, "[t]he right to a life-sustaining climate system is not just affirmative; it is constantly evolving." *Id*. at 358. *See* May, *Subnational Climate Rights*, 26 U. PENN. J. CONST. L., at 59-60.

The propriety of exercising judicial review in these cases is bolstered by recent scholarship examining inherent rights clauses, which confirms that their drafters generally intended them to establish justiciable rights. Anthony B. Sanders, *Social Contracts: The State Convention Drafting History of the Lockean Natural Rights Guarantees* (Aug. 02, 2024). The enforceability of these clauses was recognized from their earliest origins. *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1312 (2015).

This was a common understanding of these provisions when New Mexico adopted its own inherent rights provision in 1911.

In sum, New Mexico is far from alone in determining that Inherent Rights Clauses and State Due Process Clauses can support justiciable claims. Many sister courts have reached the same conclusion, and in some instances have gone further to find that Inherent Rights Clauses create independent, justiciable rights. In this state, the Supreme Court's decisions in *Morris* and *Griego* make clear that the Inherent Rights and State Due Process Clauses, both situated in the Bill of Rights, combine to support a finding of justiciability particularly where, as here, the Appellees have raised claims that are in complete alignment with the fundamental rights articulated in the Constitution. *Morris,* 2016-NMSC-027, ¶ 58; *Griego*, 2014-NMSC-003, ¶ 1.

CONCLUSION

Because Section 21 sets out justiciable standards, because judicial review of Appellee's claims is fully consistent with the state constitution's provisions regarding separation of powers, and because the state constitution's Due Process Clause encompasses the guarantees of Article II, § 4 of the state constitution, *Amici* urge this Court to affirm the decision below.

Respectfully submitted,

December 13, 2024,

Randall Abate[9]
Assistant Dean for Environmental Law Studies,
The George Washington University Law School

J. Michael Angstadt
Assistant Professor of Environmental Studies
Environmental Law & Policy, Colorado College

Craig Anthony Arnold
Boehl Chair in Property & Land Use
Professor of Law, Affiliated Professor of Urban & Public Affairs
Director of the Resilience Justice Project, University of Louisville

Joshua Ash
Director of the Environmental Law and Policy Clinic
University of Pittsburgh School of Law

Luciana Bauer
Founder Lawyer, JUSCLIMA

Rebecca Bratspies
Professor, CUNY School of Law

David Cassuto
Professor of Law & Kernan Family Scholar
Elisabeth Haub School of Law at Pace University

Kim Diana Connolly
Professor of Law
University at Buffalo School of Law

Tim Duane
Professor Emeritus of Environmental Studies
University of California, Santa Cruz

Richard Frank
Professor of Environmental Practice

[9] Titles and organizational affiliations of individual signatories are included for identification purposes only.

University of California, Davis School of Law

Wes Henricksen
Associate Professor of Law
Barry University Dwayne O. Andreas School of Law

Sam Kalen
William T. Schwartz Distinguished Professor
University of Wyoming College of Law

Ryke Longest
John H. Adams Clinical Professor of Law, Duke School of Law

Daniel Magraw
Senior Fellow & Adjunct Professor
Foreign Policy Institute, Johns Hopkins University SAIS

Patrick McGinley
Charles H. Haden II Professor of Law
West Virginia University College of Law

Nazune Menka
Assistant Professor of Law
Faculty Director for the Center for Indian Law & Policy
Seattle University School of Law

Joe Mintz
Professor Emeritus, Nova Southeastern College of Law

Patrick Parenteau
Emeritus Professor of Law, Senior Fellow for Climate Policy
Vermont Law and Graduate School

Zygmunt J.B. Plater
Emeritus Professor, Boston College of Law
Adjunct Professor, University of Maine Law School

Amber Polk
Assistant Professor of Law, University of Alabama School of Law

Ann Powers
Emerita Professor, Pace Law School
Daniel J. Rohlf
Professor of Law, Lewis and Clark Law School

William Snape
Professor and Assistant Dean
American University, Washington College of Law

Wendy E. Wagner
Richard Dale Endowed Chair, University of Texas School of Law

Richard Wallsgrove
Associate Professor of Law
Co-Director of Environmental Law Program,
William S. Richardson School of Law, University of Hawaiʻi at Mānoa

Mary Christina Wood
Philip H. Knight Professor of Law, University of Oregon School of Law

Tseming Yang
Professor of Law, Santa Clara University School of Law

/s/ *MIA MONTOYA HAMMERSLEY*
Mia Montoya Hammersley
Assistant Professor of Law & Director
Charlotte Bieri, *Student Clinician*
Savannah Collins, *Student Clinician*
Hannah Ziomek, *Student Clinician*
Environmental Justice Clinic
Vermont Law and Graduate School
164 Chelsea Street, P.O. Box 96
South Royalton, VT 05068
mmontoya@vermontlaw.edu
802-831-1630

Of counsel: Martha F. Davis
University Distinguished Professor of Law

Co-Director, Center for Global Law & Justice
Northeastern University School of Law
416 Huntington Ave.
Boston, MA 02115
m.davis@northeastern.edu
617-373-8921

James R. May, Esq.
Richard S. Righter Distinguished Professor of Law
Washburn University School of Law
1700 SW College Ave.
Topeka, KS 66621
james.may@washburn.edu
785-670-1786

Christophe Courchesne
Associate Professor of Law & Director
Lauren Carita, *Student Clinician*
Environmental Advocacy Clinic
Vermont Law and Graduate School
164 Chelsea Street, P.O. Box 96
ccourchesne@vermontlaw.edu
802-831-1627

Counsel for Amici Curiae

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

The body of this response brief uses Times New Roman, a proportionally-spaced typeface, and contains 7,157 words. This brief therefore complies with NMRA 12-318(F)(3).

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2024, a true and correct copy of the foregoing document was e-filed and served through the Court's e-filing system upon counsel of record.

/s/ *MIA MONTOYA HAMMERSLEY*
Mia Montoya Hammersley