IN THE SUPREME COURT OF UTAH

No. 20230022-SC

NATALIE R., A MINOR, BY AND THROUGH HER GUARDIAN, DANIELLE ROUSSEL, *et al.*,

Appellants,

v.

STATE OF UTAH, *et al.*,

Appellees.

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

---

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF UTAH AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

Robert A. Skinner*
Sara E. Berinhout*
Andrew B. Cashmore*
Nicole S. L. Pobre*
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, Massachusetts 02199
(617) 951-7000
robert.skinner@ropesgray.com

John Mejia (13965)
AMERICAN CIVIL LIBERTIES UNION OF UTAH
311 South State Street, Suite 310
Salt Lake City, UT 84111
(801) 521-9862
jmejia@acluutah.org

---

* All attorneys designated with an asterisk have been admitted *pro hac vice* or have applied for admission *pro hac vice*.

Matthew R. Segal*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
One Center Plaza, Suite 850
Boston, MA 02108
(617) 299-6664
msegal@aclu.org

Dated: October 3, 2023

Additional Counsel:

Andrew G. Deiss (7184)
John Robinson Jr. (15247)
Corey D. Riley (16935)
Deiss Law PC
10 West 100 South, Suite 700
Salt Lake City, Utah 84101
(801) 433-0226
deiss@deisslaw.com
jrobinson@deisslaw.com
criley@deisslaw.com

Andrew L. Welle*
Our Children's Trust
1216 Lincoln Street
Eugene, Oregon 97401
(574) 315-5565
andrew@ourchildrenstrust.org

Counsel for Appellants

Erin T. Middleton (10666)
Assistant Solicitor General

David N. Wolf (6688)
Michael Begley (16396)
Trevor Gruwell (18003)
Assistant Utah Attorneys General

Sean D. Reyes (7969)
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
(801) 366-0100
emiddleton@agutah.gov
dnwolf@agutah.gov
mbegley@agutah.gov
tgruwell@agutah.gov

Counsel for Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Other Authorities

NOTICE AND CONSENT PURSUANT TO RULE 25(E)

Counsel for the parties received timely notice. All parties consented to the filing of this amicus brief.

No party or counsel of a party authored any part of this amicus brief or contributed money to fund preparing or submitting the brief. No other person contributed money to fund preparing or submitting this brief.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Utah ("ACLU of Utah") is a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Utahns. The American Civil Liberties Union, with approximately 1.6 million members, is among the oldest, largest, and most active civil rights organizations in America. For decades, the ACLU of Utah and the ACLU have litigated questions involving civil liberties in the state and federal courts.

Among the liberty interests crucial to the amici and their members is access to the judicial system. Preserving the justiciability of legal issues—thus ensuring that provisions in the Utah Constitution are not just words on paper but meaningful guarantees for the people of Utah—is essential to our democracy. It is in defense of justiciability, and of access to justice, that amici write in this case, as they have also done in another case pending before this Court. *See Utah State Legislature v. League of Women Voters of Utah*, No. 20220991-SC (argued July 11, 2023).

INTRODUCTION

The Utah Constitution confers upon this Court a robust and vital role in adjudicating constitutional claims advanced by Utah's people. Far from requiring the Court to shrink from constitutional claims that implicate political controversies, the Utah Constitution reflects its framers' understanding that this Court should act as an "ark of safety to this land in times of great political excitement" when the

political branches are "lured here and there, by political questions."[1] Nevertheless, the District Court below relied on federal case law, *see, e.g.*, R.409, R.11 (*Natalie R. v. State, et al.*, Case No. 220901658, Dkt. 36, Memorandum Decision and Order 2, 4 (Utah 3d Jud. Dist. 2022) (the "Order")), and specifically the test set forth by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), in ruling that the plaintiffs' state constitutional claims are nonjusticiable political questions. That ruling is not rooted in the Utah Constitution or this Court's precedent.

The federal political question doctrine has never formed the basis of nonjusticiability in Utah. The federal doctrine addresses considerations unique and inherent to the federal Constitution, federal judiciary, and federal legislative process. While federal precedent may provide useful guidance in certain areas of constitutional law, placing Utah's justiciability doctrine in lockstep with the federal doctrine for courts established by Article III of the U.S. Constitution would conflict with the text and original public meaning of the Utah Constitution, principles of federalism, the practices of neighboring states, and landmark precedents of this Court.

The Utah Constitution dictates the justiciability of claims in Utah courts. Any limits on that justiciability ought to follow the framework developed in those same

[1] Utah State Archives and Recs. Serv., Constitutional Convention Records (Series 3212) (April 23, 1895), https://images.archives.utah.gov/digital/collection/3212/id/14218/rec/1 ("State Constitutional Convention Records (Series 3212)").

courts—rather than the "wholesale adoption of federal" political question doctrine. *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12 n.4, 299 P.3d 1098, 1103 n.4 (emphasizing that "no state court" has supported the "wholesale adoption of federal standing doctrine," which is premised on Article III of the U.S. Constitution, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As recognized by similarly situated state courts examining their own states' constitutions, adopting the federal political question doctrine as a matter of state constitutional law would jeopardize the delicate balance between the branches of state government, and unduly limit the state courts in their fulfilment of crucial adjudicatory responsibilities.

Questions of justiciability are among the most fundamental to any functioning judiciary. Never has this Court outsourced to the federal courts its duty to answer those questions. It should not start now. This Court should reverse the District Court and restore the delicate balance of powers that this state's constitution has long developed and preserved.

ARGUMENT

I. Utah is Not Beholden to the Federal Political Question Doctrine

The federal political question doctrine was developed in federal courts and premised on limitations placed on the federal judiciary by the federal Constitution. By design, our system of federalism means that limitations on judicial review and considerations of judicial deference inherent to the federal courts are wholly

inapplicable to the states. Indeed, considering the vast "differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed." Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 976 (1985). That is the situation here: federal courts have never urged state supreme courts to adopt the federal political question doctrine, and this Court has never done so.

A. By its own terms, the federal political question doctrine expressly applies only to federal courts.

The U.S. Supreme Court has acknowledged that "state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Indeed, even Justice William Brennan—the author of *Baker v. Carr*—admonished state courts that they "need not apply federal principles . . . of justiciability that deny litigants access to the courts." William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489, 490–92 (1977). As with all federal justiciability rules, the federal political question doctrine is premised on the text of Article III of the U.S. Constitution, which limits the "judicial power of the United States"—not state courts—to adjudicate only cases and controversies of a judicial nature. U.S. Const.

art. III. Consistent with Article III, the federal political question doctrine cases ask only "whether there is an 'appropriate role for *the Federal Judiciary*' in remedying the problem" asserted by the plaintiff. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2484 (2019) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018)) (emphasis added). Thus, nothing in federal precedent suggests, let alone commands, that state courts develop political question doctrines under which they would refuse to address constitutional questions arising under their own state constitutions.

Unsurprisingly, therefore, the federal political question doctrine almost exclusively applies to disputes unique to the federal court system, and inapplicable to the state judiciary. Indeed, most questions deemed nonjusticiable "political questions" in the federal case law are matters not of concern in the state context, *e.g.*, foreign policy and Congressional impeachment. *See, e.g., United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (noting that questions concerning "the rights of a part of a foreign empire, which asserts, and is contending for its independence . . . are generally rather political than legal in their character"); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829) ("A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question . . . ."); *Charlton v. Kelly*, 229 U.S. 447, 474–76 (1913) (applying a treaty, despite an alleged breach by the other party, because "the political branch of the government recognizes the treaty obligation as still existing . . . ."); *Nixon v. United States*, 506

U.S. 224 (1993) (holding that a challenge to the Senate's use of a committee to receive evidence during an impeachment trial raised a political question); *see also* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 Stan. L. Rev. 1031, 1036–40.

B. This Court has never endorsed the federal political question doctrine.

The district court's application of the political question doctrine below was premised on its conclusion that "Utah courts rely on federal case law when interpreting and applying" the doctrine. Order 3. That is not so. As sole support for its proposition, the district court cites *Skokos v. Corradini*, a case in which the Court of Appeals of Utah considered several federal cases as one part of its broader determination that the doctrine was inapplicable. 900 P.2d 539 (Utah Ct. App. 1995). While Utah courts do not flatly disregard considerations articulated in federal precedent, neither *Skokos* nor any other Utah opinion has ever applied the federal political doctrine articulated by the U.S. Supreme Court. Nor has this Court ever endorsed the lockstep application of the federal doctrine in Utah state court.

Before this case, Utah courts had found nonjusticiable political questions in only narrow circumstances, such as cases contesting the election or disqualification of legislators, a matter specifically committed to the legislature by article VI, section 1 of Utah's Constitution. *See State v. Evans*, 735 P.2d 29, 32 (Utah 1987) ("declin[ing] to interfere with or second-guess the action of the House of

Representatives" in voting against disqualification of two House members); *Ellison v. Barnes*, 63 P. 899, 900 (1901) (finding that courts lack jurisdiction to decide contests for seats in state legislature).

In none of those cases did this Court rely on the *Baker* factors or otherwise import the federal political question doctrine wholesale into Utah constitutional law. It should decline to do so now. The adjudicatory power of Utah courts is constrained only by the Utah Constitution. For the reasons explained below, that document does not compel the application of a political question doctrine resembling the one developed in federal court.

II. The Text, Structure, and Original Public Meaning of Utah's Constitution Weigh Against Any Political Question Doctrine, or, at a Minimum, Against its Expansion

Far from supporting the lockstep adoption of the federal political question doctrine, the text, structure, and original public meaning of Utah's Constitution counsel in favor of eliminating the political question doctrine altogether as a matter of Utah constitutional law. At a minimum, the doctrine's reach should be limited to the two narrow contexts in which this Court has already applied it.

As a threshold matter, the political question doctrine lacks any textual basis in the Utah Constitution. The case or controversy requirement of Article III of the U.S. Constitution, which provides the *entire* textual basis for the federal political question and standing doctrines, is absent from Utah's Constitution. *See Baker*, 369

U.S. at 210; *Gregory*, 2013 UT 18, ¶ 12. This Court has recognized that, "[u]nlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III." *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983); *see also* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Resources L. 349, 393 (2016) ("Utah courts note that the requirements of the Utah Constitution are distinguishable from the requirements of Article III of the United States Constitution.").[2] It follows, and is well-established, that Utah's standing requirements "are not identical to those of the federal system," because they are based on the separation of powers provision in *Utah*'s Constitution and *Utah*'s unique history. *Gregory*, 2013 UT 18, ¶ 12 n.4; *see also Jenkins*, 675 P.2d at 1149. The reasons Utah has rejected the "wholesale adoption of federal standing doctrine," *Gregory*, 2013 UT 18, ¶ 12 n.4, apply with

[2] As legal scholars have repeatedly recognized: "Nearly every state court begins an analysis of standing with a variation of the following statement: 'Unlike the federal system, the judicial power of the state . . . is not constitutionally restricted by the language of Article III of the United States Constitution requiring 'cases' and 'controversies,' since no similar requirement exists in the [state's] Constitution.'" M. Ryan Harmanis, *States' Stances on Public Interest Standing*, 76 Ohio St. L.J. 729, 739 (2015) (citing *Gregory*, 299 P.3d at 1102; *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 919 (Ariz. 1985)). This unquestionable tenet of state law is firmly supported by the U.S. Supreme Court. *See, e.g.*, *ASARCO Inc.*, 490 U.S. at 617 ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . .").

equal force to the adoption of the federal political question doctrine, which is also rooted in Article III, *Baker*, 369 U.S. at 210.

For example, the district court invoked the political question doctrine because it believed climate-related issues are "'matters of the greatest societal interest.'" Order 6 (quoting *Gregory*, 2013 UT 18, ¶ 113 n.29). But that reasoning turns Utah's precedent on its head. Utah courts, like those of countless other states, routinely *expand* the justiciability of claims where "matters of great public interest and societal impact are concerned," even when those claims would be deemed nonjusticiable under the federal standing doctrine. *Id.* at ¶ 12; *see also Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978) ("Appellants cite the usual rule that one must be personally adversely affected before he has standing to prosecute an action. While such is true, it is also true that this Court may grant standing where matters of great public interest and societal impact are concerned."); *see, e.g.*, *Cedar Mountain Envtl., Inc. v. Tooele County* ex rel. *Tooele Cty. Comm'n*, 2009 UT 48, ¶ 18, 214 P.3d 95, 100; *Youngblood v. S.C. Dep't of Soc. Servs.*, 741 S.E.2d 515, 518 (S.C. 2013) (recognizing "public importance exception" to standing requirements); *Freemantle v. Preston*, 728 S.E.2d 40, 43 (S.C. 2012) (same); *To-Ro Trade Shows v. Collins*, 27 P.3d 1149, 1155 (Wash. 2001) (waiving standing requirements when "the interest of the public" warrants review on the merits); *In re Deming*, 736 P.2d 639, 660 (Wash. 1987) (en banc) (Utter, J., concurring). This foundational principle

of Utah's standing doctrine applies with equal force to nonjusticiable political questions.

And not only does the political question doctrine lack any textual basis in Utah's Constitution—the text, structure, and original public meaning of Utah's constitution all affirmatively cut against the doctrine's application.

The text of the Utah Constitution's Open Courts Provision, which is without corollary in the federal Constitution, *requires* Utah Courts to play a robust remedial role that is incompatible with the judicial retreat of the federal political question doctrine. The Open Courts Provision provides: "All courts shall be open, and every person, for an injury done to the person in his or her person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay." Utah Const. art. I.11. This Court has observed that, while "some states with open courts provisions have construed them to guarantee only procedural rights and court access," in Utah the open courts provision "has been interpreted to protect substantive rights to remedies throughout our state's history." *Laney v. Fairview City*, 2002 UT 79, ¶ 33, 57 P.3d 1007, 1017, *holding modified by Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99, ¶ 33, 175 P.3d 1042. The provision owes its existence to "distrust of," rather than deference to, the legislative branch, including a concern that legislation would be swayed by "corporate interests." *Id.* So, while the U.S. Supreme Court has admonished federal courts

applying the federal question doctrine to consider whether, for instance, a judicial decision might "[dis]respect" another branch of government, *Baker*, 369 U.S. at 217, such considerations cannot trump the rights of injured Utahns to access the courts, and the remedies that courts provide, under the Utah Constitution.

The structure of Utah's Constitution also cuts against the adoption of a political question doctrine. The Constitution repeatedly instructs Utah's courts to run toward, rather than from, legal questions affecting the lives of Utah's people. Utah's courts are courts of general plenary jurisdiction that exercise broad power *except as* expressly limited by constitution or statute. *See* Utah Const. art. VII, § 5. As set forth in the Utah Constitution: "The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs." *Id.* That plenary jurisdiction stands in sharp contrast to the U.S. Constitution, which vests the federal courts with limited jurisdiction and "split[s] the atom of sovereignty" by vesting the federal and state governments with different powers. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020) (citations omitted).

Finally, the original public meaning of Utah's Constitution cuts against any restrictions on adjudicating cases implicating "political" questions. As noted, the Framers of the Utah Constitution specifically understood that this Court was to act as an "ark of safety" from the other political branches. State Constitutional

Convention Records (Series 3212). Meanwhile, nothing in contemporaneous court decisions, or in Utah's constitutional conventions, suggests that Utah's Framers contemplated the scope of limitations on judicial authority set forth by *Baker* and the federal political question doctrine. In fact, only a paucity of opinions in the early years of this Court so much as *reference* such justiciability limitations, *see Ellison*, 63 P. at 900, and the Court did not return to the issue until several decades later. *See Ewing v. Harries*, 250 P. 1049, 1053–54 (1926). And in those early decisions and throughout the following decades, Utah courts have considered the state's own constitutional principles in narrowly applying this nonjusticiability doctrine. *See, e.g.*, *Ellison*, 63 P. at 900; *Ewing*, 250 P. at 1053.

In short, the text, structure, and history of the Utah Constitution provide no affirmative reason to embrace the federal political question doctrine, while providing multiple reasons to reject it.

III. The Basis for the District Court's Expansion of Utah's Political Question Doctrine is Untenable

The District Court reasoned that Plaintiffs' claims are nonjusticiable because "[n]either Utah's Constitution, nor the United States Constitution, addresses anything about fossil fuels or global climate change which would permit the Court to grant a judicial remedy." Order 6. This reasoning finds no support in Utah precedent because, at most, the District Court's observation simply means that the Utah Constitution has not committed these matters to another branch of the Utah

government. Even under the broadest formulation of the political question doctrine, the question is not whether the constitution expressly prescribes a remedy for the violation of the right asserted by the plaintiff, but instead whether the constitution precludes any such remedy by affirmatively placing the issue "wholly within the control and discretion of other branches of government." *Skokos*, 900 P.2d at 541; *Baker*, 369 U.S. at 211 (limiting the doctrine to "matter[s] . . . committed by the Constitution to another branch of government").

Yet this Court has considered, and decided on the merits, countless cases raising politically sensitive issues. *See, e.g.*, *State v. J.M.S. (In re Int. of J.M.S.)*, 2011 UT 75, ¶ 12, 280 P.3d 410, 413 (considering the statutory meaning of "procedure" in the abortion context); *Wood v. Univ. of Utah Med. Ctr*., 2002 UT 134, 67 P.3d 436 (adjudicating controversial provisions of the Utah Wrongful Life Act); *Salt Lake City v. Roberts*, 2002 UT 30, 44 P.3d 767 (adjudicating politically charged privacy issue related to police searches).

The District Court's contrary approach rests on two legal errors. *First*, it faulted Plaintiffs' constitutional claims for asserting what the District Court called "things that are not expressed in Utah's constitution." Order 6. But Plaintiffs assert that their constitutional claims are anchored in the Utah Constitution, *see* Pl. Op. Br. 18–25. Regardless, the Utah Constitution expressly cautions against giving less weight to rights deemed to be unenumerated. Article I, Section 25 provides: "This

enumeration of rights shall not be construed to impair or deny others retained by the people." To say that a right is nonjusticiable because it is unenumerated would be to impair it.

Thus, not surprisingly, this Court has a strong history of adjudicating, and sometimes recognizing, rights that are very much protected by, but not specifically enumerated in, the Utah Constitution. In *State v. Chettero*, for instance, this Court considered whether a traffic stop "restrict[ed] [plaintiff's] movement in a manner implicating his fundamental right to travel." 297 P.3d 582, 584 (Utah 2013). The court considered the claim on the merits, without finding that it presented a nonjusticiable political question. *Id.*; *see also Salt Lake City v. Larsen*, 2000 UT App 265 (unpublished opinion) (adjudicating alleged violations of the "right to travel" and other "unenumerated rights"). So too has this Court adjudicated claims involving alleged violations of a right to privacy. *See, e.g.*, *State v. Atwood*, 831 P.2d 1056, 1058 (Utah Ct. App. 1992); *State v. Larocco*, 794 P.2d 460, 469 (Utah 1990); *City of Salina v. Wisden*, 737 P.2d 981, 983 (Utah 1987). And this Court has long recognized parental rights that are "not limited to the exercise of rights specifically enumerated in either the United States or the Utah Constitutions." *In re J.P.*, 648 P.2d 1364, 1372 (Utah 1982); *see also State v. C.L.W. (In re Int. of Z.C.W.)*, 500 P.3d 94, 98 (Utah Ct. App. 2021) (permitting claimants to rely on multiple unenumerated parental rights). Similarly, this Court has recognized that Utah's

Constitution provides "legal protection [for] a person's bodily integrity[,]" *Malan v. Lewis*, 693 P.2d 661, 674 n.17 (Utah 1983), and that "[a]mong the historic liberties" is "a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

What is more, the line between rights that are *enumerated* or *unenumerated*—a boundary that is notoriously "artificial" or "wobbly," Laurence H. Tribe, Reflections on Unenumerated Rights, 9 U. Pa. J. Const. L. 483, 483 (2007)—is not a tenable one to draw for the crucial purpose of determining justiciability. As constitutional scholars have repeatedly acknowledged: "Some unenumerated rights have been deemed to be justified because they are necessary to protect those expressly stated in the Constitution. Others are held to derive from enumerated rights. Another set can be extrapolated from existing limits on governmental power. Within each, there is an implicit recognition that the process of interpretation includes layers of meaning beyond those expressly stated in the text." Amy L. Landers, *Hyperreal: Law and the Interpretation of Visual Media*, 109 Ky. L.J. 127, 135–36 (2021).

The words of this Court say it best:

> [O]ften, our judicial 'characteristic roles may have significant political overtones.' But that does not mean we or our district courts can simply 'shirk' those roles by announcing them nonjusticiable. . . . The money line here is this: The exercise of [judicial authority to adjudicate

> constitutional claims], when not abrogated by statute, neither runs afoul of the political question doctrine nor violates the separation-of-powers requirements of article V, section 1. A contrary conclusion would mean a doomsday for our historic judicial function.

In re Childers-Gray, 2021 UT 13, ¶¶ 67-68, 487 P.3d 96, 115 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

Second, even if the District Court had been correct to suggest that certain rights not specifically enumerated in the Utah Constitution are nonjusticiable, and even if it were possible to draw a clear line between those rights and justiciable rights, the rights at issue here would fall on the justiciable side of that line. Plaintiffs' argument is rooted in liberty interests of health and safety, which are potential jeopardized by environmental harm. Environmental issues, including ones like those raised here, have long been deemed justiciable. In *Utah Chapter of Sierra Club v. Air Quality Board*, this Court recognized that "[t]he negative impact of carbon dioxide concentrations in the atmosphere is an issue of national and global concern," and considered the merits of an environmental group's challenge to the reasonableness of an administrative agency's interpretation of a related environmental regulation. 2009 UT 76, ¶ 35, 226 P.3d 719, 730–31. Likewise, in a more recent case, this Court examined a commission's decision to approve power purchase agreements between public electric utility and power producers, despite challenges premised on the environmental implications. *See Ellis-Hall Consultants, LLC v. Pub. Serv. Comm'n of Utah*, 2014 UT 52, 342 P.3d 256, 262.

IV. Similarly Situated State Courts Have Declined to Adopt the Federal Political Question Doctrine

Given the unique roles played by the federal and state judiciaries—and inapplicability of considerations driving the federal political question doctrine to the state government context—precedent of similarly situated states is far more compelling on this issue than that of federal courts. And, notably, when faced with questions of justiciability, similarly situated states of Wyoming, Colorado, and Minnesota are among the long list of those to have declined to adopt the federal political question doctrine—opting instead for a more narrowly tailored doctrine rooted in state constitutional principles and precedent.[3] Notably, the Separation of Powers provisions of these states' constitutions are almost identical to that of Utah's. *See* Utah Const. art. V; Wyoming Const. art. II; Colorado Const. art. III; Minnesota Const. art. III.

In *State v. Campbell County School District*, for instance, the Wyoming Supreme Court undertook a lengthy analysis of the political question doctrine.

[3] Other such states include: New Mexico, Oklahoma, South Dakota, Virginia, West Virginia, California, Massachusetts, and New York. *See Mutz v. Mun. Boundary Comm'n*, 1984-NMSC-070, ¶ 19, 688 P.2d 12, 19 (N.M. 1984); *Schabarum v. California Legislature*, 70 Cal. Rptr. 2d 745 (Cal. Ct. App. 1998); *Backman v. Sec'y of the Commonwealth*, 441 N.E.2d 523, 527 (Mass. 1982); *In re N.Y. State Inspection, Sec. & L. Enf't Emps. v. Cuomo*, 475 N.E.2d 90, 93 (N.Y. 1984); *Okla. Educ. Ass'n v. State* ex rel. *Oklahoma Legislature*, 158 P.3d 1058 (Okla. 2007); *Davis v. North Dakota*, 804 N.W.2d 618, 641 (N.D. 2011); *Virginia v. Cnty. Bd.*, 232 S.E.2d 30, 44 (Va. 1977); *Jefferson Cnty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, 875 S.E.2d 162, 172 (W. Va. 2022).

Wyoming v. Campbell Cnty. Sch. Dist., 32 P.3d 325, 333 (Wyo. 2001) (finding the political question doctrine inapplicable to school funding actions). It held, in no uncertain terms, that "[t]he federal doctrine of nonjusticiable political question, as discussed and applied in *Baker* and later federal decisions, has no relevancy and application in state constitutional analysis."[4] *Id.* at 334. Instead, in considering how to apply separation of powers principles to disputes that implicate the legislature and political process, the court explained: "When insufficient action in the legislative process occurs, judicial monitoring in the remediation phase can help check political process defects . . . . When these defects lead to continued constitutional violations, judicial action is entirely consistent with separation of powers principles and the judicial role." *Id.* at 332–33 (internal citation omitted).

The Wyoming Supreme Court went on to describe the widespread criticisms of the federal political question doctrine with quotes from Justice Brennan, Alexander Bickel, and Professors Erwin Chemerinsky and Robert B. Keiter. The criticisms range from the confusing nature of the doctrine, the difficulty in applying the *Baker* factors in a uniform or principled way, to its inapplicability to state courts

[4] On numerous occasions, this Court has looked to the Wyoming Supreme Court's approach when faced with previously unresolved issues. *See, e.g., Q-2 LLC v. Hughes*, 2016 UT 8, ¶ 19 n.47, 368 P.3d 86, 92 n.47, holding modified by *Anderson v. Fautin*, 2016 UT 22, 379 P.3d 1186 (considering Wyoming's approach to adverse possession); *Smith v. Frandsen*, 2004 UT 55, ¶ 15, 94 P.3d 919, 924 (noting Wyoming's approach in similar case regarding duty of disclosure).

more generally. As the court explained, "[l]eading scholars debate whether the political question doctrine even exists, its wisdom and validity, and its scope and rationale." *Id.* at 334 (citing Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964); Louis Henken, *Is There a "Political Question" Doctrine?* 85 Yale L.J. 597 (1976) (Henken was a law clerk to Justice Frankfurter and a constitutional scholar of the highest stature); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031 (1985); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?* 100 Dick. L. Rev. 303 (1996); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 6–9 (1959)).

The Colorado Supreme Court reached an almost identical conclusion when it considered the federal political question doctrine. *See Lobato v. Colorado*, 218 P.3d 370 (Colo. 2009) (en banc) (declining to find that the adequacy of the state's education financing system is a nonjusticiable political question).[5] The court noted that while it "has cited or applied the *Baker* justiciability analysis only in rare

[5] This Court has also looked to the Colorado Supreme Court for guidance. *See, e.g.*, *Patterson v. State*, 2021 UT 52, ¶ 211, 504 P.3d 92, 137 (considering Colorado's approach to constitutionality of the statute of limitations for habeas petitions); *In re G.J.P.*, 2020 UT 4, 459 P.3d 982.

circumstances," it "has never invoked this test to preclude judicial review of a statute's constitutionality." *Id.* at 368. And the court emphasized the "[i]mportant differences [that] exist between federal and state constitutional law on judicial power and the separation of powers." *Id.* at 370. Notably, the court also expressed concern that "[a] ruling that the plaintiffs' claims are nonjusticiable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility . . . ." *Id.* at 372.

The Supreme Court of Minnesota has likewise rejected the federal formulation of the political question doctrine: "We have not adopted the [U.S.] Supreme Court's analysis in *Baker v. Carr* to resolve whether a case presents a political question, and we decline to do so here." *Cruz-Guzman v. State*, 916 N.W.2d 1, 8 n.4 (Minn. 2018).[6] Instead, like Wyoming and Colorado, Minnesota courts consider separation of powers principles embedded in the Minnesota Constitution to determine justiciability. *See id.* at 7–8. As the court explained, "the courts are the appropriate domain" for determining "whether the Legislature has violated its constitutional duty" to Minnesota citizens. *Id.* at 9. As should also be true for Utah.

[6] This Court has also looked to the Minnesota Supreme Court for guidance. *See State v. Machan*, 2013 UT 72, ¶ 14, 322 P.3d 655, 659; *see also Lee v. Utah State Tax Comm'n*, 2013 UT 29, 304 P.3d 831.

V. Even if the Court Were to Sanction the Adoption of the Federal Political Question Doctrine, that Doctrine is Still Unlikely to Support Nonjusticiability in this and Similar Cases

For the reasons stated above, this Court should decline to adopt the political question doctrine as it exists under federal law in favor of a more limited doctrine rooted in the Utah Constitution. Yet even if this Court were to disagree, following federal precedent would not support a finding of nonjusticiability in this and similar cases.

At the highest level, use of this doctrine is exceptionally rare. In fact, the U.S. Supreme Court has used it as a basis for dismissal only three times since its *Baker* decision in 1962. *See Gillian v. Morgan*, 413 U.S. 1, 6 (1973) (holding that a suit seeking to "establish standards for the training, kinds of weapons and scope and kind of orders to control the actions of the National Guard" and "assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved" by the court raised a nonjusticiable political question); *Nixon*, 506 U.S. at 224, 228, 238 (holding that a challenge to the Senate's use of a committee to receive evidence during an impeachment trial raised a political question); *Rucho*, 139 S. Ct. at 2507 (holding that a constitutional challenge to partisan gerrymandering under the federal constitution raised a political question, but recognizing that state courts "are actively addressing the issue on a number of fronts" because "[p]rovisions in state statutes

and state constitutions can provide standards and guidance for state courts to apply."); *see also* Bradley & Posner, *supra*¸ at 1036–40 (describing the doctrine's history and limited application).

While the lower federal courts have applied the doctrine slightly more frequently, most often it is used within the realm of foreign affairs. *See id.* at 1069; *see also Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009) (concerning the status of Taiwan)*; Republic of the Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017) (regarding negotiations about nuclear disarmament).

Meanwhile, the federal doctrine's *Baker* factors have proven to be notoriously difficult to apply in any meaningful or consistent way. As the Supreme Court of Wyoming explained in its rejection of the *Baker* factors, many constitutional scholars agree: "[I]t is impossible for a court or a commentator to apply the *Baker v. Carr* criteria to identify what cases are political questions. As such, it hardly is surprising that the doctrine is described as confusing and unsatisfactory." *Campbell Cnty. School Dist.*, 32 P.3d at 335 (quoting Erwin Chemerinsky, *Federal Jurisdiction* 142 (Little, Brown and Co., 2d ed.1994)). Indeed, as the Wyoming Supreme Court emphasized, "[l]eading scholars debate whether the political question doctrine even exists, its wisdom and validity, and its scope and rationale." *Id.* Criticism is so ubiquitous, in fact, that Professor Chemerinsky and other legal

scholars "conclude that it 'should play no role whatsoever in the exercise of the judicial review power.'" *Id.* (citation omitted).

Against this backdrop of confusion and uncertainty, even if the Court agrees with the District Court that it should adhere to non-binding federal precedent—ruling that claims seeking adjudication of the constitutionality of codified legislation alleged to profoundly harm the health and safety of individuals, as are presented here, are nonjusticiable would mean a "doomsday for [the courts'] historic judicial function." *In re Childers-Gray*, 2021 UT 13, ¶ 68.

CONCLUSION

For the foregoing reasons, amici respectfully ask this Court to overrule the District Court's holding, which constitutes an unprecedented and undesirable expansion of Utah's limited political question doctrine.

Dated: October 3, 2023

Respectfully submitted,

Robert A. Skinner*
Sara E. Berinhout*
Andrew B. Cashmore*
Nicole S. L. Pobre*
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, Massachusetts 02199
(617) 951-7000
robert.skinner@ropesgray.com

/s/ *John Mejia*
John Mejia (13965)
AMERICAN CIVIL LIBERTIES UNION OF UTAH
311 South State Street, Suite 310
Salt Lake City, UT 84111
(801) 521-9862
jmejia@acluutah.org

Matthew R. Segal*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
One Center Plaza, Suite 850
Boston, MA 02108
(617) 299-6664
msegal@aclu.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, John Mejia, do hereby certify pursuant to Utah Rules of Appellate Procedure 25 and 27, that the foregoing brief complies with the required word court limits. Per the word processing system, Microsoft Word, the brief contains 5685 words.

CERTIFICATE OF SERVICE

I certify that on October 3, 2023, I served the brief of American Civil Liberties Union of Utah in Support of Appellants Natalie R., et al., via email on the following:

Andrew G. Deiss (7184)
John Robinson Jr. (15247)
Corey D. Riley (16935)
Deiss Law PC
10 West 100 South, Suite 700
Salt Lake City, Utah 84101
(801) 433-0226
deiss@deisslaw.com
jrobinson@deisslaw.com
criley@deisslaw.com

Andrew L. Welle*
Our Children's Trust
1216 Lincoln Street
Eugene, Oregon 97401
(574) 315-5565
andrew@ourchildrenstrust.org
* Counsel admitted pro hac vice

Counsel for Appellants

Erin T. Middleton (10666)
Assistant Solicitor General

David N. Wolf (6688)
Michael Begley (16396)
Trevor Gruwell (18003)
Assistant Utah Attorneys General

Sean D. Reyes (7969)
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
(801) 366-0100
emiddleton@agutah.gov
dnwolf@agutah.gov
mbegley@agutah.gov
tgruwell@agutah.gov

Counsel for Appellees

/s/ John Mejia
John Mejia
American Civil Liberties Union of Utah