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3AN-17-99101CI

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ESAU SINNOK; LINNEA L., a minor, by and through her guardian, HANK LENTFER; TASHA ELIZARDE; CADE TERADA; KAYTLYN K., a minor, by and through her guardian, MAURICE KELLY; BRIAN CONWELL; JODE S., a minor, by and through his guardian, CONNIE SPARKS; MARGARET KURLAND; LEXINE D., a minor, by and through her guardian, BERNADETTE DEMIENTIEFF ELIZABETH B., a minor, by and through her guardian, ILONA BESSENYEY; VANESSA D., a minor, by and through her Guardian, JULEE DUHRSEN; ANANDA ROSE AHTAHKEE L., a minor, by and Through her guardian, GLEN "DUNE" LANKARD; GRIFFIN PLUSH; CECILY S. and Lila S., minors, by and through their guardians, MIRANDA WEISS and BOB SHAVELSON; and SUMMER S., a minor a minor, by and through her guardian, MELANIE SAGOONICK

Plaintiffs,

v.

STATE OF ALASKA;
WILLIAM WALKER, Governor of the

State of Alaska, in his official capacity; ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION; LAWRENCE HARTIG, Commissioner of Alaska Department of Environmental Conservation, in his official capacity; ALASKA DEPARTMENT OF NATURAL RESOURCES; ALASKA OIL AND GAS CONSERVATION COMMISSION; ALASKA ENERGY AUTHORITY; and REGULATORY COMMISSION OF ALASKA

Defendants.

Case No. 3AN-17-09910CI

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs are sixteen youth, ages five to twenty, from across the State of Alaska, each of whom are experiencing profound harm to their lives, personal security, liberties, and property as a result of the climate crisis to which Defendants have substantially contributed and continue to make more dangerous. Compl., ¶¶ 14-91. Despite longstanding knowledge of the danger to Plaintiffs and their futures, Defendants, as a matter of statewide policy, have engaged in and persist in a systemic practice of affirmative actions: permitting, authorizing, encouraging, and facilitating activities resulting in levels of greenhouse gas emissions in Alaska which harm and endanger Plaintiffs' culture, health, welfare, property, and livelihoods. *Id.* at ¶ 7 (describing Defendants' "Climate and Energy Policy").

In the midst of Defendants' ongoing systemic, policy-driven actions, sixteen Alaska youth, including twelve of the Youth Plaintiffs here, submitted a Petition for Rulemaking asking Defendants to adopt a rule to reduce Alaska's emissions at rates necessary to safeguard their fundamental constitutional rights. *Id.* at ¶ 93; *Id.* at Exhibit A (hereinafter, "Petition"). The proposed regulation, if implemented, would result in reduction of Alaska's greenhouse gas emissions at yearly rates consistent with global reductions necessary to avert catastrophic climate change. Petition, 1-5, *passim.* Consistent with, pursuant to, and in furtherance of their Climate and Energy Policy, Defendants denied Plaintiffs' Petition, enabling Defendants to persist in their systemic policy-driven actions and their ongoing infringement of Plaintiffs' constitutional rights. Compl., at ¶ 94.

Through their complaint, Plaintiffs ask this Court to fulfill its duty under Alaska's constitutionally-mandated separation of powers to safeguard Plaintiffs' fundamental rights under the Alaska Constitution's due process, equal protection, and public trust provisions. *Id.* at ¶¶ 241-278. In their Motion to Dismiss, Defendants do not dispute that Plaintiffs' allegations, once proven, establish a violation of Plaintiffs' constitutional rights. However, Defendants mistakenly assert that this case implicates a nonjusticiable political question, wrongly equating Plaintiffs' claims, and the factual allegations on which they are based, to those presented in *Kanuk v. State*. 335 P.3d 1088 (Alaska 2014).

In *Kanuk*, the Alaska Supreme Court dismissed a single-count complaint, with seven requests for relief, alleging that the State's *inaction* on climate change – it's "fail[ure] to take steps to protect the atmosphere..." – violated Alaska's public trust doctrine. 335 P.3d 1088, 1090 (Alaska 2014). Because the *Kanuk* plaintiffs did not challenge an "initial policy determination" by the political branches of government, the Court declined, on political question grounds, to decide the rate at which Alaska is obligated to reduce its greenhouse gas emissions. *Id.* at 1097. The Court said that policy determination was not it's to make "*in the first instance*." *Id.* at 1098 (emphasis added). Having declined to decide what steps the State might take in light of its alleged inaction under the public trust doctrine, the Court then determined, on prudential grounds, that it should not declare at that juncture whether the atmosphere is a public trust resource or whether the State, by failing to act, had breached its obligations to protect the atmosphere. *Id.* at 1101.

Of significance to the Court's review here, the *Kanuk* Court concluded that "if the plaintiffs are able to allege claims for affirmative relief in the future that are justiciable

under the political question doctrine, *they appear to have a basis on which to proceed* even absent a declaration that the atmosphere is subject to the public trust doctrine." *Id.* at 1103 (emphasis added). The Court noted that "allegations that the State has breached its duties with respect to the management" of "trust resources such as water, shorelines, wildlife, and fish" – resources "inextricably linked" to the atmosphere – do not depend on a declaratory judgment about the atmosphere. *Id.*

In addition to presenting entirely different substantive due process and equal protection claims under the Alaska Constitution – claims not brought in *Kanuk* – this case presents precisely the kind of justiciable public trust claims the Supreme Court anticipated in its concluding remarks in *Kanuk.* Premised upon harms to recognized public trust resources and constitutionally protected interests, and based substantially upon factual developments that have transpired over the seven years since *Kanuk* was filed, Plaintiffs' claims allege Defendants' affirmative infringement of their fundamental rights resulting from implementation of Defendants' clearly established policy determinations regarding climate change and greenhouse gas pollution in Alaska. Defendants' Climate and Energy Policy has been made abundantly clear in the years since *Kanuk* was decided, including by and through Defendants' denial of Plaintiffs' 2017 Petition for Rulemaking, which requested emissions reductions consistent with the injunctive relief Plaintiffs' request in their Complaint.

Because Plaintiffs have brought justiciable constitutional claims, consistent with the guidance of *Kanuk*, Defendant's prudential considerations argument for dismissal is moot in that the *Kanuk* Court's prudential considerations only arose out of its political question determination.

Defendants further erroneously assert that review in this case is limited to compliance with the Administrative Procedure Act. In so doing, Defendants attempt to circumvent this Court's constitutional duty to ensure that the actions of the coordinate branches do not transgress fundamental individual rights. As another court recently stated in a climate case involving similar claims based on similar facts: "At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary." *Juliana v. United States*, 217 F.Supp.3d 1224, 1241 (D. Or. 2016). For the reasons stated below, this Court should deny Defendants' Motion to Dismiss and allow Plaintiffs' complaint to proceed to trial.

II. STANDARD OF REVIEW

Motions to dismiss under Rule 12(b)(6) are viewed by Alaska's courts "with disfavor and should rarely be granted." *Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*, 210 P.3d 1213, 1217 (Alaska 2009) (citation and internal quotation marks omitted). In reviewing a motion to dismiss, Alaska courts construe the complaint liberally and assume the truth of the facts alleged. *Jacob v.* State, 177 P.3d 1181, 1184 (Alaska 2008). Dismissal is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief. *Clemenson v. Providence Alaska Medical Center*, 203 P.3d 1148, 1151 (Alaska 2009).

III. ARGUMENT

Defendants erroneously assert that, with the exception of Plaintiffs' challenge to Defendants' denial of their Petition, all of Plaintiffs' claims should be dismissed under *Kanuk* as implicating a political question and for prudential considerations. Defendants'

reliance on *Kanuk* to suggest that this case presents a nonjusticiable political question is misplaced for a multitude of reasons. Among these reasons are: (1) both the claims in this case and the government actions from which they arise are fundamentally distinct from those decided in *Kanuk*; (2) the "initial policy determination" found lacking in *Kanuk*, without which the Court would not decide the case, has been firmly established by Defendants and challenged by Plaintiffs in their complaint; and (3) this Court has a constitutional duty to check the coordinate branches' infringements of Plaintiffs' fundamental constitutional rights, a duty to which the political question doctrine does not apply. Further, federal precedent, flowing from the same U.S. Supreme Court case relied upon by Alaska's courts, *Baker v. Carr*, establishes that cases premised upon harms stemming from climate change do not implicate nonjusticiable political questions. 369 U.S. 186 (1962); *see, e.g., Juliana*, 217 F.Supp.3d 1224.

Defendants' assertion that *Kanuk* renders declaratory relief in this case inappropriate on prudential considerations is equally mistaken. The *Kanuk* court only reached the prudential considerations analysis because it declined, on political question grounds, to determine the contours of the State's obligations in a "failure to act" case in the absence of an initial policy determination from another branch. 335 P.3d at 1101-02. Since Plaintiffs' claims here implicate no political question, the prudential considerations at issue in *Kanuk* do not apply. *Id.* at 1101-02.

Lastly, contrary to Defendants' contentions, Plaintiffs' claim regarding Defendants' denial of their Petition, like Plaintiffs' other claims, presents a legitimate issue of constitutional significance requiring this Court's full consideration on the merits and a fully developed factual record.

A. None of Plaintiffs' Claims Presents a Nonjusticiable Political Question

The U.S. Supreme Court developed the modern encapsulation of the political question doctrine in the 1962 case of *Baker v. Carr*, announcing six formulations under which a case might present a nonjusticiable question. 369 U.S. 186 (1962). In identifying "political questions," Alaska's courts adhere to the *Baker* formula. *Abood v. League of Women Voters of Alaska*, 703 P.2d 1158, 1160 (Alaska 1985). Under the *Baker* test "there shall be no dismissal for non-justiciability" unless "one of these formulations is *inextricable* from the case at bar." *Baker*, 369 U.S. at 217 (emphasis added). "In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotovsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (citation and quotations marks omitted). The political question doctrine is a "narrow exception to that rule...". *Id.* at 195. "Merely characterizing a case as political will [not] render it immune from judicial scrutiny." *Malone v. Meekins*, 650 P.2d 352, 356 (Alaska 1982).

1. The Claims and Facts of This Case Are Fundamentally Distinguishable from *Kanuk*

Defendants rely exclusively on *Kanuk* and a singular *Baker* factor to assert that the injunctive relief Plaintiffs seek presents a nonjusticiable political question, disregarding the clearly distinct nature of Plaintiffs' claims and the factual circumstances on which they are based. Determining whether a political question is implicated requires a discriminating "case by case inquiry," *id.*, into "the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. As an initial matter, Defendants' contention that the injunctive relief Plaintiffs seek is "materially indistinguishable" from the relief found to implicate a political question within the context of the claims presented in *Kanuk*,

obfuscates the proper inquiry, which focuses on whether the *claims* present a political question. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001) ("It is legally indisputable that a trial court order requiring state compliance with constitutional standards does not violate the separation of powers"); *Center for Biological v. Mattis*, 868 F.3d 803, 829 (9th Cir. 2017) ("Assessing the equities of injunctive relief does not" implicate the political question doctrine.); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the...remedy is to be determined by the nature and scope of the constitutional violation.") (citing *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 16 (1971).

Plaintiffs' claims are fundamentally distinct from those presented in *Kanuk*. While the *Kanuk* plaintiffs' sole public trust claim rested exclusively on state *inaction*[1] – Alaska's "fail[ure] to take steps to protect the atmosphere...", 335 P.3d at 1090, – here, Plaintiffs' five distinct claims under Alaska's constitutional guarantees of substantive due process, equal protection, and public trust rights derive primarily from Defendants' *affirmative actions* in causing and contributing to dangerous levels of greenhouse gas concentrations. This distinction is of substantial importance and removes the claims here from the political question arena, placing them squarely within clear constitutional jurisprudence. *See State Dep't of Nat. Res. v. Tongass Cons. Soc.*, 931 P.2d 1016, 1020 n.3 (Alaska 1997) (issue concerning legislative inaction presented political question as

[1] Even in the context of the *Kanuk* plaintiffs' inaction-based claim, the Supreme Court ruled that plaintiffs had firmly established standing, that their claim was not barred by sovereign immunity, and that the case presented no problems regarding joinder of interested third parties. 335 P.3d 1088. Defendants do not contend that standing, sovereign immunity, or joinder are at issue here.

distinguished from case concerning affirmative legislative action) (citing *Paris v. U.S. Dep't of Housing and Urban Dev.*, 988 F.2d 236 (1st Cir. 1993); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (Distinguishing case based on inaction stating: "The Petitioners here complain that affirmative legislative action deprives them of their votes....[T]hese considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation.")

The *Kanuk* Court's reliance on *Svitak ex. rel. Svitak v. State* in reaching its political question conclusion underscores this important distinction. *Kanuk*, 335 P.3d at 1098 (citing *Svitak*, No. 69710-2-1, 2013 WL 6632124, at *2 (Wash. App. Dec. 16, 2013). Crucially, in *Svitak*, the Washington State Court of Appeals found claims seeking stricter regulation of greenhouse gases implicated a political question where the plaintiffs' case was "a challenge to state inaction" and did "not challenge an affirmative state action or the state's failure to act as unconstitutional..." *Svitak*, 2013 WL 6632124, at *2.[2]

Each of Plaintiffs' claims here rests principally on Defendants' infringement of fundamental constitutional rights through their *affirmative acts*, a dispositive factor in Plaintiffs' favor, which Defendants fail to address in their motion for dismissal on

[2] Tellingly, in a subsequent climate case, a Washington State Court recently found the *Svitak* case inapplicable in light of the "emergent and accelerating need for a science based response to climate change and the governmental actions and inactions since" the case was decided. *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, Order Granting Motion to Amend Complaint to Assert Constitutional Claims, at *5 (Wash. Super. Ct. April 18, 2017); *See also Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, Order at *6 (Wash. Super. Ct. Nov. 19, 2015) ("The mandatory duty [to regulate greenhouse gases] must be understood in the context not just of the Clean Air Act but in recognition of the Washington State Constitution and the Public Trust Doctrine.")

political question grounds. *See* Compl., at ¶7, *passim*. Importantly, like Plaintiffs' substantive due process, state-created danger,[3] and equal protection claims, Plaintiffs' public trust claim here is also substantially based upon Defendants' affirmative actions. Consistent with *Kanuk*, Plaintiffs' public trust claim focuses primarily on Defendants' affirmative acts in "abdicat[ing] control and alienat[ing] substantial portions and capacities of our atmosphere" in a manner that restricts Plaintiffs' access to recognized public trust resources, including Alaska's waters, land, fish, and wildlife. Compl., at ¶¶ 267, 269, 273, Prayer for Relief ¶ 6. This is precisely the type of justiciable public trust claim the *Kanuk* Court contemplated in the conclusion of its opinion. *Id.* at 1103.

2. The "Initial Policy Determinations" at Issue Have Already Been Made

This case is fundamentally different from *Kanuk* for the further reason that the "initial policy decision" found to be lacking in *Kanuk* is clearly present here and forms a substantial basis of Plaintiffs' claims. The *Kanuk* Court focused its political question analysis on the third *Baker* formulation: "the impossibility of deciding [a matter] without an initial policy determination of a kind clearly for nonjudicial discretion." 335 P.3d at 1097 (quoting *Baker*, 369 U.S. at 217).[4] This factor is only applicable where a court "cannot resolve a dispute in the absence of a *yet-unmade* policy determination...."

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[3] State inaction is the second element of Plaintiffs' state-created danger claim where after having affirmatively acted to endanger Plaintiffs and impair trust resources, a state duty arises to act reasonably to redress the danger. The *Svitak* and *Kanuk* plaintiffs never alleged that government inaction in that context violates their fundamental constitutional rights.

[4] The *Baker* tests are "listed in descending order of both importance and certainty..." *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (citation and internal quotation marks omitted). *Kanuk* is the only Alaska Supreme Court case to have ever discussed the third *Baker* factor.

Zivotovsky, 566 U.S. at 204 (emphasis added). Within the context of the *Kanuk* plaintiffs' inaction-based challenge, the Supreme Court ruled that the rate at which Alaska should be required to reduce its greenhouse gas emissions presented such an as-yet unmade policy determination, and that the "underlying policy choice" was not the Court's "to make *in the first instance.*" *Kanuk*, 335 P.3d at 1098.

In stark contrast to *Kanuk*, Plaintiffs' allegations, the truth of which must be assumed here, assert that Defendants have already made the "underlying policy choice" "in the first instance" regarding Alaska's greenhouse gas emissions. Specifically, Plaintiffs allege:

> By and through their affirmative aggregate and systemic actions with respect to fossil fuels, CO_2 and GHG emissions, Defendants have demonstrated that their policy, practice, and custom with respect to climate change in Alaska (hereinafter "Defendants' Climate and Energy Policy" or "Climate and Energy Policy"), consists of: 1) systemic authorization, permitting, encouragement, and facilitation of activities resulting in dangerous levels of GHG emissions, without regard to Climate Change Impacts or any climate change mitigation standards, and 2) perpetual denial and delay of development of climate change mitigation standards, plans, and actions. By and through their Climate and Energy Policy, as evidenced by and effectuated through their affirmative aggregate and systemic actions, Defendants have materially caused and contributed to, and continue to materially cause and contribute to climate change and Climate Change Impacts.

Compl., at ¶ 7.

Accordingly, the Court need not make any initial policy determination in adjudicating Plaintiffs' claims because the applicable policy decisions have already been made and continue to be implemented to the detriment and deprivation of Plaintiffs'

fundamental rights. *See Haygood v. Younger*, 769 F.2d 1350, 1359 (9th Cir. 1985) ("[A] wrongful taking of liberty [may] result[] from either affirmatively enacted or de facto policies, practices, or customs...") (*cert. denied sub nom Cranke v. Haygood*, 478 U.S. 1020 (1986)). The other policy decision at issue in this case, that which authorizes Plaintiffs' claims and provides the familiar standards governing their review, was made by the framers of Alaska's Constitution, and those who ratified it, when they incorporated the guarantees of fundamental rights upon which Plaintiffs' claims rest. This Court need only review Defendants' challenged actions as alleged in the complaint for compliance with those familiar standards. *Hickel v. Cowper*, 874 P.2d 922, 932 n. 24 (Alaska 1994) ("The meaning of the constitution and its application to particular facts are questions squarely within the jurisdiction and inherent power of the judiciary.")

3. It is the Judiciary's Role to Decide Cases of Fundamental Individual Rights

"[U]nder Alaska's constitutional structure of government, 'the judicial branch...has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution" including compliance by the other branches. *Kanuk*, 335 P.3d at 1099 (quoting *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))). As the U.S. Supreme Court explained in *Bowsher v. Synar*: "The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty." 478 U.S. 714, 721 (1986); *see also Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913 n. 70.

In keeping with this principle, the Alaska Supreme Court has consistently and unequivocally emphasized that questions of constitutional law, particularly claims

alleging the infringement of fundamental rights, do not implicate the political question doctrine. *See, e.g., Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913-14 ("In light of the separation of powers doctrine, we have declined to intervene in political questions.... But under the same doctrine, we cannot defer to [a coordinate branch] when infringement of a constitutional right results from [its] action...") (citation and quotation marks omitted); *League of Women Voters*, 743 P.2d at 240 ("If the League's claim is to survive this justiciability challenge, it must involve a right protected either by the Alaska Constitution or the United States Constitution."); *Abood v. Gorsuch*, 703 P.2d 1158, 1161 (Alaska 1985) (A question of constitutional law is one "to which the nonjusticiability doctrine does not apply."); *State, Dep't of Military and Veterans' Affairs v. Bowen*, 953 P.2d 888, 895 n. 10 (Alaska 1988) ("It is within the province of this court to determine constitutional issues and deprivation of constitutional rights.").

Under Alaska's constitutional separation of powers, the courts are duty-bound to serve as a check and balance to the other branches in the protection of constitutional liberties. Rooted as they are in constitutionally protected fundamental rights, Plaintiffs' claims are "squarely within the authority of the court, not in spite of, but *because* of, the judiciary's role within our divided system of government." *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 914 (emphasis in original).

4. Federal Precedent Establishes That Claims Premised on Climate Change Do Not Implicate Nonjusticiable Political Questions

No federal appellate court has found a single claim premised on climate change to implicate a nonjusticiable political question. To the contrary, those that have confronted the issue have found that such claims fall squarely within the judiciary's purview. In

Connecticut v. American Elec. Power Co., Inc., (*"AEP"*), the Second Circuit ruled that public nuisance claims against power companies premised on climate change implicated none of the *Baker* formulations. 582 F.3d 309, 324-332 (2d Cir. 2009), rev'd on other grounds *Amer. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011). Similarly, in *Comer v. Murphy Oil USA*, the Fifth Circuit ruled that the plaintiffs' nuisance, trespass, and negligence claims against oil and energy companies did not implicate a political question. 585 F.3d 855, 880 (5th Cir. 2009) (vacated for a rehearing en banc which never occurred). Whereas the climate change-related claims at issue in *AEP* and *Comer* were rooted in common law, Plaintiffs' claims here are premised upon infringement of fundamental constitutional rights. As such, it is even more clear in this case than in *AEP* and *Comer* that Plaintiffs' claims are justiciable. *Bowen*, 953 P.2d at 895 n. 10 ("It is within the province of this court to determine constitutional issues and deprivation of constitutional rights.")

The clear justiciability of Plaintiffs' claims is underscored by *Juliana v. United States*, the only case in any jurisdiction involving claims and underlying factual circumstances substantially similar to those presented here. 217 F.Supp.3d 1224 (D. Or. 2016). Like Plaintiffs here, the *Juliana* plaintiffs alleged infringement of their fundamental constitutional rights based upon the federal government's aggregate and systemic actions related to greenhouse gas emissions. *Id.* at 1240. After a thorough and reasoned analysis of all six *Baker* formulations' application to the claims at hand, *id.* at 1235-1242, the *Juliana* court concluded that the case did not present a nonjusticiable political question, emphatically concluding:

> There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary.

Id. at 1241.

Notably, with respect to the third *Baker* factor, the court explicitly rejected the contention that it could not "set a permissible emissions level without making *ad hoc* policy determinations about how to weigh competing economic and environmental concerns." *Id.* at 1238. This was so because, as in this case, "plaintiffs do not ask this Court to pinpoint the 'best' emissions level; they ask this Court to determine what emissions level would be sufficient to redress their injuries." *Id.* at 1239. "That question can be answered" solely by reference to standards governing protection of constitutional rights, and "without any consideration of competing interests." *Id.*; *see also*, *Coleman v. Schwarzenegger*, 2010 WL 99000, at *1 (E.D. Cal. & N.D. Cal. Jan. 12, 2010) (ordering state to reduce prison population to 137.5% of intended design capacity, a target "which extend[ed] no further than necessary to correct the violation of inmates' constitutional rights") *affirmed sub nom. Brown v. Plata*, 563 U.S. 493 (2011).

Further, contrary to Defendants' insinuation that this case presents a political question due to a lack of judicial scientific expertise, the *Juliana* court clarified: "The science may be complex, but logistical difficulties are immaterial to the political question analysis." 217 F.Supp. at 1239 (citing *Alperin*, 410 F.3d at 552, 555). As Supreme Court Justice Breyer wrote:

> The Supreme Court has...decided basic questions of human liberty, the resolution of which demanded an understanding of scientific matters.... Scientific issues permeate the law.... Courts review the reasonableness of

> administrative agency conclusions about the safety of a drug, the risks attending nuclear waste disposal, the leakage potential of a toxic waste dump, or the risks to wildlife associated with the building of a dam. Patent law cases can turn almost entirely on an understanding of the underlying technical or scientific subject matter. And, of course, tort law often requires difficult determinations about the risk of death or injury associated with exposure to a chemical ingredient of a pesticide or other product.... [W]e must search for law that reflects an understanding of the relevant underlying science, not for law that frees [defendants] to cause serious harm.

Breyer, Stephen, J., "Science in the Courtroom," *Issues in Science and Technology* 16, no. 4 (Summer 2000).

The federal *Juliana* case stands for the clear proposition that the constitutionally-rooted principle of separation of powers calls upon the judiciary to confront the merits of climate cases premised on violations of fundamental rights. Alaska's Constitution affords *at least* as much protection of individual liberties as its federal counterpart. *See Planned Parenthood of Alaska, Inc.*, 28 P.3d at 909; *Myers v. Alaska Pyschiatric Institute*, 138 P.3d 238, 245 (Alaska 2006). Accordingly, it is at least as clear here as it was in *Juliana* that the political question doctrine does not bar Plaintiffs' claims.

B. The *Kanuk* Court's Prudential Concerns Are Not Applicable to This Case

Again relying exclusively on *Kanuk*, Defendants argue that the prudential concerns at issue in that case advise against the issuance of Plaintiffs' requested declaratory relief. Contrary to Defendants' contentions, the requested declaratory relief is appropriate and their reliance on *Kanuk* is wholly misplaced.[5]

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[5] Even were this Court to conclude that Plaintiffs' requested declaratory relief is not available, dismissal would still be inappropriate. "Even if the relief demanded is

The *Kanuk* Court only reached its analysis of prudential considerations as a result of first having found that the plaintiffs' state inaction claim implicated the political question doctrine, at least with respect to the injunctive relief sought. 335 P.3d at 1097-98, 1101. As a second step, the Court then found under prudential considerations that declaratory relief "cannot be granted once the Court has declined, on political question grounds, to determine precisely what th[e State's] obligations entail." *Id.* at 1102. The *Kanuk* court only reached its prudential considerations analysis as the second step of a two-part inquiry, contingent upon its finding under the first step that the political question doctrine prevented a determination of the State's obligations.

For the reasons explained above, the political question doctrine is not implicated in this case. As such, the second step of the *Kanuk* court's analysis – whether declarations that Defendants have breached their constitutional duties would implicate prudential considerations – is not at issue.[6]

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unavailable, the claim should not be dismissed as long as some relief might be available on the basis of the alleged facts." *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009). Plaintiffs requested that the Court "[a]ward such other and further relief as the Court deems just and equitable." Compl., Prayer for Relief at ¶ 13.

[6] Further, given the distinct factual circumstances underlying the present case, including the developments and acceleration of climate change impacts in Alaska resulting from Defendants affirmative actions since the *Kanuk* case, it is not unlikely that the Alaska Supreme Court's analysis of prudential considerations would differ from *Kanuk*, were it to even reach those considerations here. "[T]he decision whether to entertain a declaratory-judgment action in one case is not a precedent in another case in which the facts are different." Wright & Miller, Federal Practice and Procedure, § 2759 (4th ed., April 2017 Update). These distinctions are particularly notable given Alaska's "deep-seated commitment to the idea that the doors of Alaska's courts should be open to its citizens to the greatest extent possible." *State v. ACLU of Alaska*, 204 P.3d 364, 375 (Alaska 2009) (Carpenti, J., dissenting).

Moreover, prudential considerations weigh in favor of justiciability here. Plaintiffs seek declarations that Defendants' climate and energy policies have affirmatively infringed their substantive due process and equal protection rights, placing them in danger with deliberate indifference to their safety. Compl., Prayer for Relief at ¶ 3-5. Those declarations of law are instrumental as a first step for these young citizens to seek a constitutionally compliant government system, which presently is rife with institutional discrimination against an entire class of people. *See Brown v. Bd. of Educ. Of Topeka, Shawnee County, Kan.*, 98 F.Supp. 797 (D. Kans. 1951) (Ruling against plaintiffs in action seeking "a declaratory judgment declaring unconstitutional the...segregation set up...by the school authorities of the City of Topeka), *rev'd,* 347 U.S. 483 (1954) (remanding for proceedings on formulation of declarations). Had courts been unwilling to review other government systems that were depriving citizens of fundamental rights, we would not have integrated schools, prison reform, or equality in marriage. *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan*, 347 U.S. 483; *Brown v. Plata*, 563 U.S. 493 (2011); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

C. Review of Defendants' Denial of Plaintiffs' Petition is Available for Compliance with the Alaska Constitution

The fifth count of Plaintiffs' complaint relates to DEC and Commissioner Hartig's denial of Plaintiffs' Petition, which Plaintiffs' submitted on August 28, 2017. Compl., at ¶ 93. In their Petition, Plaintiffs' proposed a regulation requiring DEC to reduce Alaska's greenhouse gas emissions in its management of stationary and mobile sources of CO_2 and the extraction of fossil fuels within the State of Alaska consistent with global reduction rates dictated by science as necessary to avert the worst

consequences of climate change, stabilize the climate system, and preserve Plaintiffs' constitutional rights. Petition at 1-5. Under the proposed regulation, DEC would also prepare annual inventories of greenhouse gas emissions in Alaska in order to track and ensure compliance with the mandated reductions. *Id.* Plaintiffs set forth clear legal authority demonstrating DEC's constitutional duties and constitutional and statutory authority to adopt the proposed regulation, as well as scientific evidence from hundreds of credible and authoritative peer-reviewed sources demonstrating the need for the proposed regulation to protect Plaintiffs' constitutional rights. Petition, *passim.* Defendants' DEC and Commissioner Hartig denied Plaintiffs' Petition in writing on September 27, 2018, citing a number of alleged justifications. Motion to Dismiss at Exhibit A ("Denial Letter"). The fifth count of Plaintiffs' complaint alleges that Defendants' denial of the Petition, in the context of Defendants' continuing systemic affirmative acts in causing and contributing to Alaska's climate crisis, violates Plaintiffs' constitutional substantive due process, equal protection, and public trust rights. Compl., at ¶¶ 274-78. Assuming the truth of Plaintiffs' factual allegations, this claim has clear merit.

1. The Courts have Inherent Authority to Review Agency Action for Compliance with the Constitution

Defendants mistakenly argue that review of an agency's denial of Plaintiffs' Petition is limited to ensuring compliance with the Administrative Procedure Act. To the contrary, the Alaska Supreme Court has made clear that courts have a duty to "review the propriety of the [administrative] action to the extent that constitutional standards may

require." *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971). The Court explained:

> It is the constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska. We would not be able to carry out this duty to protect the citizens of the state in the exercise of their rights if we were unable to review the actions of Administrative agencies simply because the legislature chose to exempt their decisions from judicial review.

Id. at 357. H 140 | H 140 + I 140

In keeping with this duty, in *Johns v. Commercial Fisheries Entry Comm'n*, the Court ruled that the judiciary has the inherent authority to review the denial of a petition for rulemaking "to look for administrative compliance with the demands of due process" even in the absence of statutorily authorized review. 699 P.2d 334, 339 (Alaska 1985). The review Plaintiffs seek here regarding the denial of their Petition is precisely that contemplated in *Johns* and *K & L Distributors*: compliance with the provisions of the Alaska Constitution, including those governing substantive due process, equal protection, and the public trust doctrine. In the context of Defendants' continuing systemic affirmative actions in causing and contributing to the climate crisis, the denial of Plaintiffs' Petition indisputably presents a meritorious question of constitutional importance. Assuming the truth of Plaintiffs' allegations, none of Defendants' alleged justifications for their denial can withstand constitutional scrutiny.

2. Whether the Petition Proposed a Regulation Should Not Be Resolved at the Motion to Dismiss Stage

Plaintiffs have stated a claim for which relief can be granted against DEC and Commissioner Hartig for denial of Plaintiffs' Petition. Whether relief should be granted and the propriety of Defendants alleged justifications for their denial of the Petition are

questions for the merits, not a motion to dismiss. Defendants' appear to concede both the justiciability of this claim and that its determination is a matter for the merits. Motion to Dismiss at 3.

Should the court entertain these arguments now, Defendant's assertion that Plaintiffs did not propose a "regulation" is clearly mistaken. Each of the criteria for defining a regulation under the APA is indisputably satisfied by the rule Plaintiffs proposed. *See* Petition at 1-5. "Whether an agency action is a regulation is a question of law that does not involve agency expertise, which [a court] review[s] applying [its] own independent judgment." *State, Dep't of Nat. Res. v. Nondalton*, 268 P.3d 293, 299 (Alaska 2012). "The legislature has broadly defined what constitutes a regulation under the APA." *Gilbert v. State, Dep't of Game, Bd. of Fisheries*, 803 P.2d 391 (Alaska 1990) (citing AS § 44.62.640).

First, Plaintiffs' proposed rule "implements, interprets, and makes specific" the statutes mandating DEC's protection and conservation of Alaska's natural resources and prevention and abatement of pollution, specifying the manner in which these mandates pertain to required reductions of Alaska's greenhouse gas emissions. *See, Gilbert*, 803 P.2d at 396; Petition at 4-5, 14-15 (discussing DEC's authority to adopt the proposed rule). Second, the proposed rule clearly "affects the public [and would be] used by the agency in dealing with the public" because it requires DEC to manage stationary and mobile sources of CO_2 and the extraction of fossil fuels within the state so as to reduce emissions by specified yearly rates. *Gilbert*, 803 P.2d at 396; Petition at 3. The proposed rule would prohibit authorization of facilities or activities that individually, or in combination, result in statewide emissions in excess of the reductions mandated in any

given year. *See Kenai Peninsula Fisherman's Coop. Assoc., Inc. v. State*, 628 P.2d 897, 905 (Alaska 1981) (policy specifying that certain salmon stocks "shall be managed" as non-commercial or non-recreational resources was a "regulation" where it resulted in the emergency closure of a fishery). The required reductions in statewide emissions would also "affect the public" because they would ensure that Plaintiffs' constitutional rights are safeguarded by the State and that Alaska's natural systems and heritage are not irretrievably degraded by state-authorized emissions-generating activities. Plaintiffs' clearly proposed a "regulation" within the meaning of the Administrative Procedure Act.

3. Each of Defendants' Other Justifications for Denying the Petition Are Matters for Determination on the Merits, Rather Than a Motion to Dismiss

Defendants' other justifications for their denial of Plaintiffs' Petition are equally unconvincing and inadequate. Moreover, as Defendants appear to concede in their Motion to Dismiss, these are questions for the merits, not a motion to dismiss. Motion to Dismiss at 3. Nor have Defendants made a case for dismissal under a strict scrutiny standard, which applies in the context of Plaintiffs' claims here, which allege the infringement of fundamental constitutional rights. Plaintiffs' allegations, which must be taken as true for purposes of Defendants' Motion to Dismiss, unquestionably demonstrate an infringement of their fundamental constitutional rights by and through Defendants' denial of their Petition, particularly within the context of the climate crisis to which Defendants' continuing systemic actions contribute. The adequacy of Defendants' justifications for their denial is an issue for determination on the merits, not on a motion to dismiss. Assuming the truth of Plaintiffs' allegations, Defendants' denial of the Petition establishes both a violation of Plaintiffs' constitutional rights in-and-of-itself and

an example of the systemic, policy-based actions which form the basis of Plaintiffs' additional claims for violation of their constitutional rights.

IV. CONCLUSION

The Alaska Supreme Court was correct when it stated in *Kanuk* that the legislature and executive agencies entrusted with making policies "may decide that employment, resource development, power generation, health, culture, or other economic and social interests" favor one approach over another. The political branches have such discretion *as long as all approaches adopted are constitutionally compliant*. For instance, no Alaska legislature or agency can decide to discriminate against people of color for cultural reasons or other social interests. Nor can the legislature or executive deprive Alaskans of their right to marry, or vote, or to their personal security or privacy. All policy choices must be constitutional.

What these youth bring to this Court are clear claims that the State, and its political institutions, have made policies, and continue to make policies that are clearly unconstitutional, threatening the health, culture, welfare, lives and livelihoods, personal security, vital natural resources and other fundamental rights of an entire generation and generations of young people to come. No state entity has the authority to enact or implement such policies under any democratic theory of separation of powers. Nor does the Alaska judiciary have the ability to avoid acting as a check on the alleged unconstitutional conduct of the other branches. *Kanuk* did not hold otherwise. To the contrary, this case presents precisely the claims and factual circumstances envisioned by the *Kanuk* Court as presenting a justiciable case within the context of Alaska's actions relative to the climate crisis. 335 P.3d at 1103.

The motion to dismiss asks this Court to turn separation of powers and the political question doctrine into a black hole, subsuming all checks and balances on the political branches of government when it comes to energy and climate decision-making. Plaintiffs do not "ask the Court to compel the State to adopt regulations concerning greenhouse gas emissions that strictly prefer scientific standards," as the State claims. Motion to Dismiss, at 11. They ask the Court to compel action regarding emissions that strictly prefer the constitutional rights of young people and future generations. If the legislative or executive branches want to create constitutionally-compliant greenhouse gas emissions standards, they should swiftly do so, and Youth Plaintiffs would welcome it. Until such time, it is up to this Court to review Defendants' unconstitutional and ongoing systemic policies of choosing fossil fuels over these Youth Plaintiffs' fundamental rights.

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

RESPECTFULLY SUBMITTED this 19th day of January 2018.

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