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, HANKLENTFER; TASHA ELIZARDE; CADE TERADA; KAYTLY 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 DEMIENTIFF; 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 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, 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 RESOURCESL ALASKA OIL AND GAS CONSERVATION COMMISSION; ALASKA ENERGY AUTHORITY; and REGULATORY COMMISSION OF ALASKA,

Defendants.

Case No. 3AN-17-09910 CI

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IN THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE JUDGE GREGORY MILLER, PRESIDING

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

DEPARTMENT OF LAW
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TABLE OF AUTHORITIES

Cases

DEPARTMENT OF LAW
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Statutes

Constitutional Provisions

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INTRODUCTION

Plaintiffs ask this Court to order the State of Alaska to develop and submit to the Court a "state climate recovery plan" that will "achieve science-based reductions in Alaska's greenhouse gas emissions consistent with global emissions reductions rates necessary to stabilize the climate system." (Compl. Prayer for Relief ¶ 10) The State did not cause climate change and Plaintiffs agree—by acknowledging the need for "global emissions reductions"—the State has no ability to "stabilize the climate system." Nevertheless, Plaintiffs believe the State's policy should be to reduce Alaska's carbon dioxide emissions by at least 8.5 percent per year beginning in 2018 no matter what economic or other consequences may follow. (Petition at 3)

The Alaska Supreme Court dismissed on political question and prudential grounds nearly identical claims for relief in *Kanuk ex. rel. Kanuk v. State, Department of Natural Resources.*[1] In that case, the plaintiffs sought an injunction compelling six percent annual reductions in Alaska's carbon dioxide emissions, but the Supreme Court held that claim for relief and others presented a political question.[2] The Supreme Court was unable to say that an "executive or legislative body that weighs the benefits and detriments to the public and then opts for an approach that differs from the plaintiffs' proposed 'best available science' would be wrong as a matter of law."[3] And the Supreme Court emphasized that it could not "hasten the regulatory process by imposing

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1 335 P.3d 1088 (Alaska 2014).

2 *Id.* at 1098.

3 *Id.*

[its] own judicially created scientific standards."[4] In *Kanuk* the plaintiffs also sought declaratory judgments concerning the State's obligations to reduce greenhouse gas emissions, as Plaintiffs do in this case, but the Supreme Court dismissed those claims on prudential grounds.[5]

This case is controlled by *Kanuk*, with the exception of Plaintiffs' new claims against the Department of Environmental Conservation (DEC) and Commissioner Hartig. Those claims are based on the denial of the Petition, and the Court should dismiss those claims as meritless.

ARGUMENT

I. Under *Kanuk*, claims for injunctive relief to compel the State to establish a particular greenhouse gas emissions policy are barred by the political question doctrine.

In the Opening Brief at 9-12, relying on the dismissal of nearly identical claims in *Kanuk*, Defendants explained that Plaintiffs' claims for injunctive relief should be dismissed for presenting a political question. In the Opposition Brief at 4-15, Plaintiffs attempt to distinguish *Kanuk* and offer four arguments why their claims should not be dismissed. None of Plaintiffs' arguments have merit.

A. Even if Plaintiffs' claims are based on State "actions," as opposed to "inaction," that does not save the claims from dismissal under *Kanuk*.

In *Kanuk*, the Alaska Supreme Court held that claims for injunctive relief to compel the State to adopt a particular greenhouse gas emissions policy were barred by

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4 *Id.*

5 *Id.* at 1101-03.

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the political question doctrine because it was "obviously" impossible to decide those claims "without an initial policy determination of a kind clearly for nonjudicial discretion."[6] The Supreme Court held that weighing the various interests affected by the potential regulation of greenhouse gas emissions was the job of the legislature or an executive agency, and not of the courts.[7] As additional reasons why courts should not attempt to impose "judicially created scientific standards" concerning greenhouse gas emissions, the Supreme Court also cited the facts that the judiciary "lack[s] the scientific, economic, and technological resources an agency can utilize . . . [, is] confined by [the] record and may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures."[8] Plaintiffs do not dispute that the injunctive relief they seek in this case is materially indistinguishable from the relief sought in *Kanuk*. (Opp'n Br. 6-7)

Instead, Plaintiffs first try to avoid dismissal under *Kanuk* by characterizing their claims as based on "affirmative actions" by the State, instead of on "inaction." (Opp'n Br. 6-9) The Court should reject Plaintiffs' argument. For one reason, the Alaska Supreme Court focused exclusively on the injunctive *relief* that was sought in *Kanuk* when explaining why those claims were barred by the political question doctrine.[9]

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6 *Id.* at 1097 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

7 *Id.* at 1097-98.

8 *Id.* at 1098-99 (internal quotations omitted) (quoting *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011)).

9 *Id.* at 1097-99 (describing the injunctive relief sought by plaintiffs, and holding that these "claims" were "obviously" non-justiciable under the third *Baker* factor).

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Regardless of whether Plaintiffs' claims are based on actions or inaction, "government reaction to the problem [of climate change] implicates realms of public policy besides the objectively scientific" and is not justiciable.[10]

The decision of the Washington Court of Appeals in *Svitak ex rel. Svitak v. Washington*,[11] which was cited in *Kanuk*,[12] did not turn on a distinction between claims based on state actions and inactions as Plaintiffs suggest. (Opp'n Br. 8) Indeed, in that case the court noted that the State of Washington had already enacted a statute to reduce greenhouse gas emissions; the plaintiffs challenged Washington's "failure to accelerate the pace and extent of greenhouse gas reduction."[13] The court concluded that the plaintiffs were asking the "court to compel [Washington] to create an economy-wide regulatory program to address climate pollution" that "would necessarily involve resolution of complex social, economic, and environmental issues."[14] The court held that the "creation of such programs … is inappropriate because it invades the prerogatives of the legislative branch, thereby violating the separation of powers doctrine."[15] Far from exempting claims based on actions from dismissal under the political question doctrine, the court deemed its conclusion that the doctrine applied as

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10 *Id.* at 1097.

11 No. 69710–2–1, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013).

12 *Kanuk*, 335 P.3d at 1098 n.51.

13 *Svitak*, 2013 WL 6632124, at *1.

14 *Id.* at *2.

15 *Id.*

"particularly true here, where the legislature has already acted."[16] None of other the cases on which Plaintiffs rely hold that claims based on affirmative actions are exempt from the political question doctrine.[17]

Even if *Kanuk* hadn't focused exclusively on the relief that was sought, and it mattered whether Plaintiffs' claims were based on actions or inaction, the Court should still reject Plaintiffs' argument, find this case to be controlled by *Kanuk*, and dismiss the claims for injunctive relief. The "affirmative actions" that Plaintiffs allege in this case—"the systemic authorization, permitting, encouragement, and facilitation of activities resulting in dangerous levels of [greenhouse gas emissions], without regard to Climate Change Impacts" (Compl. ¶ 7)—are no different than the "inaction" alleged in *Kanuk*: "failing to take steps to protect the atmosphere in the face of significant and potentially disastrous climate change."[18]

B. *Kanuk* is clear that adjudicating Plaintiffs' claims for injunctive relief would require the Court to make a policy judgment of a legislative nature.

Plaintiffs also attempt to avoid dismissal of their claims for injunctive relief by arguing that *Kanuk* does not apply if "the applicable policy decisions have already been made." (Opp'n Br. 10) That argument seems to implicitly suggest that something has changed since the Alaska Supreme Court's decision in *Kanuk*, such as the State having

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16 *Id.* The Washington superior court that later declined to follow *Svitak* (because it was unpublished) also did not draw a distinction between claims based on state actions and inactions. (Opp'n Br. 8 n.2)

17 To the extent any of those cases conflict with *Kanuk*, the Court is bound by the Alaska Supreme Court's recent decision in *Kanuk*.

18 *Kanuk*, 335 P.3d at 1090.

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established a new policy concerning greenhouse gas emissions. The Court should reject Plaintiffs' argument for several reasons.

For one, Plaintiffs are incorrect in their interpretation of the third *Baker* factor, which exists when a "court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis."[19] In *Kanuk*, the Alaska Supreme Court held that assessing the State's response to climate change, and ruling on the claims for injunctive relief, required just such a policy judgment.[20]

Plaintiffs point to Justice Sotomayor's concurrence in *Zivotofsky ex rel. Zivotofsky v. Clinton*,[21] and language from *Kanuk*, to argue that the third *Baker* factor only exists when a court "cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch."[22] (Opp'n Br. 9-11) But under the third *Baker* factor courts should never make a policy judgment of a legislative nature.[23] In the *Peabody* case cited in *Kanuk*, the Court of Appeals for the Ninth Circuit explained why Plaintiffs are incorrect: the third *Baker* factor exists when a court would have to make an "initial policy determination," but does not exist when a case "involves

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19 *Id.* at 1097 (quoting *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005)).

20 *Id.*

21 566 U.S. 189 (2012).

22 *Zivotofsky*, 566 U.S. at 204 (Sotomayor, J., concurring).

23 *Kanuk*, 335 P.3d at 1097; *see also Zivotofsky*, 566 U.S. at 204 (explaining that the second and third *Baker* factors apply when "a dispute calls for decisionmaking beyond courts' competence") (Sotomayor, J., concurring).

simply implementing policy determinations Congress has already made."[24] Here, Plaintiffs are not asking the Court to implement a greenhouse gas emissions policy that the executive or legislature has established, for example by asking the Court to enforce regulations or statutes relating to greenhouse gas emissions. Nor are Plaintiffs challenging a particular permit the State issued as violating the public trust doctrine or another section of the constitution. Rather, Plaintiffs are asking that the Court compel the State to establish a particular greenhouse gas emissions policy in the first instance.

Even if Plaintiffs were correct in their understanding of the third *Baker* factor, the Court should still reject Plaintiffs' argument. Plaintiffs do not allege any facts to show that since *Kanuk* the State has established a new policy concerning greenhouse gas emissions. Just the opposite: Plaintiffs allege that Defendants have a "longstanding knowledge of the dangers that [greenhouse gas] emissions pose," and have "historically engaged in and continue to persist in a systematic pattern and practice of policies" that cause dangerous levels of greenhouse gas emissions. (Compl. ¶ 231) The one recent act alleged by Plaintiffs is DEC's denial of the Petition, but according to Plaintiffs, DEC's denial was not the reflection of a new state policy but was "consistent with … Defendants' Climate and Energy Policy." (Compl. ¶ 232)

C. That Plaintiffs allege violations of the constitution does not save their claims from dismissal under *Kanuk*.

Plaintiffs contend that because they allege violations of the constitution, the Court is "duty-bound" to allow this case to proceed. (Opp'n Br. 11-12) *Kanuk* provides

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[24] *Peabody*, 400 F.3d at 784.

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the easy response to that argument: in *Kanuk* the plaintiffs also alleged that the State had violated its duties under the Alaska Constitution and the public trust doctrine, yet the Alaska Supreme Court still dismissed the claims for injunctive relief for presenting a political question.[25] While it may be true that many constitutional claims do not raise a political question, some do, and *Kanuk* was clear that constitutional claims "obviously" raise a political question when the claims would require a court to establish a particular greenhouse gas emissions policy.

D. Most courts agree with the Alaska Supreme Court that claims for injunctive relief to compel the regulation of greenhouse gas emissions are not justiciable.

Plaintiffs contend that the federal appellate courts are unanimous that claims "premised on climate change ... fall squarely within the judiciary's purview." (Opp'n Br. 12-13) But Plaintiffs' only two examples are decisions that were both reversed on appeal, and which involved tort claims against energy companies, not claims against a government like the ones Plaintiffs bring.[26] When litigants have sought injunctions to compel governments to regulate and reduce greenhouse gas emissions, most courts have dismissed the claims and deferred to the political branches on separation of powers grounds.

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25 *Kanuk*, 335 P.3d at 1097; *see also id.* at 1099 ("public trust doctrine" has been "'constitutionalized' in Alaska's common use clause, article VIII, section 3").

26 *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd by Am. Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *rehearing en banc granted by*, 598 F.3d 208 (2010), *appeal dismissed by*, 607 F.3d 1049 (2010).

For example, in *Alec L. v. Jackson*, the plaintiffs sued six federal agencies seeking declaratory and injunctive relief for the agencies' alleged failure to regulate and reduce greenhouse gas emissions.[27] The District Court for the District of Columbia framed the question in the case as "whether a federal court may make determinations regarding to what extent carbon-dioxide emissions should be reduced, and thereafter order federal agencies to effectuate a policy of its own making."[28] Answering "no," the court held that combating climate change was "best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the 'primary regulator of greenhouse gas emissions.' "[29] The Court of Appeals for the District of Columbia affirmed the district court's dismissal.[30]

In *Alec L.*, the district court heavily relied on the U.S. Supreme Court's decision in *American Electric Power*,[31] as did the Alaska Supreme Court in *Kanuk*.[32] *American Electric Power* involved public nuisance claims by several states and others against four private power companies premised on the companies' emissions of greenhouse gases and contributions to climate change.[33] While the U.S. Supreme Court did not rely on the political question doctrine for its decision that the federal claims in the case should be

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27 863 F. Supp. 2d 11 (D.D.C. 2012).

28 *Id.* at 16.

29 *Id.* (quoting (quoting *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011)).

30 *Alec L. v. McCarthy*, No. 13–5192, 561 Fed. App'x 7, 8 (D.C. Cir. June 4, 2014).

31 863 F. Supp. 2d at 15-17.

32 *Kanuk*, 335 P.3d at 1098-99.

33 *Am. Electric Power Co.*, 564 U.S. at 415.

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dismissed, the Court's view as to the suitability of those claims to a judicial resolution is nevertheless apt here:

> The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance. . . .
>
> The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.[34]

The only federal court to come to a different conclusion is the District Court for the District of Oregon in *Juliana v. United States*.[35] The court's decision in that case has been stayed by the Ninth Circuit while it considers a petition for a writ of mandamus filed by the U.S. Government.[36] Among other things, the petition argues that the district court's decision conflicts with the Ninth Circuit's decision in *Washington Environmental Council v. Bellon*, which dismissed on standing grounds a lawsuit against the State of Washington based on Washington's failure to regulate greenhouse

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34 *Id.* at 427-28.

35 217 F. Supp. 3d 1224 (D. Or. 2016).

36 *In re: United States of America*, No. 17-71692 (9th Cir. July 25, 2017) (order) (Ex. A) (staying district court proceedings); *In re: United States of America*, No. 17-71692 (9th Cir. July 28, 2017) (order) (Ex. B) ("This petition for a writ of mandamus raises issues that warrant an answer."). The Ninth Circuit heard oral argument on the mandamus petition on December 11, 2017, but the court has not yet issued its decision on the petition.

gas emissions to the extent desired by the plaintiffs.[37] The doctrines of standing and political question overlap and both relate to the "constitutional and prudential limits to the powers of an unelected unrepresentative judiciary in our kind of government."[38]

State courts also agree the Alaska Supreme Court. In *Svitak*, the Washington Court of Appeals affirmed on political question grounds the dismissal of public trust doctrine claims against the State of Washington relating to Washington's regulation of greenhouse gas emissions.[39] Since *Kanuk*, state courts in Oregon[40] and New Mexico[41] have also rejected on separation of powers grounds claims related to those states' regulation of greenhouse gas emissions.

II. The Court should dismiss on prudential grounds Plaintiffs' claims for declaratory relief.

As Defendants explained in the Opening Brief at 12-14, *Kanuk* also mandates dismissal of Plaintiffs' claims for declaratory relief on prudential grounds. Plaintiffs do not appear to dispute that their claims for declaratory relief are materially

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37 732 F.3d 1131, 1147 (9th Cir. 2013).

38 *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)).

39 2013 WL 6632124, at *2-3.

40 *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229, at *10 (Or. Cir. Ct. May 11, 2015) (dismissing case on separation of powers grounds and stating that establishing greenhouse gas emissions policy is "classic lawmaking ... [that] is the core function constitutionally reserved to the Legislature").

41 *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1227 (N.M. Ct. App. 2015) ("Separation of powers principles would be violated by adhering to Plaintiffs' request for a judicial decision [concerning the regulation of greenhouse gas emissions] that independently ignores and supplants the procedures established [by the legislature].").

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indistinguishable from the claims that the Alaska Supreme Court held were not appropriate for judicial determination in *Kanuk*.[42]

Instead, Plaintiffs offer two reasons why the Court should hear their claims for declaratory relief. First, Plaintiffs posit that if the Court declines to dismiss the claims for injunctive relief under the political question doctrine, then Court should also hear the claims for declaratory relief. (Opp'n Br. 16) But, as explained, *Kanuk* compels the Court to dismiss Plaintiffs' claims for injunctive relief.

Next, Plaintiffs argue that "prudential considerations weigh in favor of justiciability" (Opp'n Br. 17), without explaining what those considerations are or how the considerations in this case differ from those in *Kanuk*. As in *Kanuk*, granting the declarations that Plaintiffs seek would not advance Plaintiffs' interest in seeing a reduction in greenhouse gas emissions, would not coerce the State into taking any action, and would not serve to avoid further litigation between the parties.[43] To the extent Plaintiffs are asking this Court to ignore *Kanuk*, which is controlling precedent from the Alaska Supreme Court, the Court should reject Plaintiffs' argument.

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[42] In a footnote, Plaintiffs assert that there are "distinct factual circumstances underlying the present case" (Opp'n Br. 16 n.6), but they do not explain how those unidentified distinct facts affect the Court's analysis of prudential considerations.

[43] *Kanuk*, 335 P.3d at 1100-03.

III. Plaintiffs' claims against DEC and Commissioner Hartig for denying the Petition are meritless.

In the Opening Brief, Defendants explained that Plaintiffs' claims against DEC for denying the Petition fail under *Johns v. Commercial Fisheries Entry Commission.*[44] (Op. Br. 14-15) In *Johns*, the Alaska Supreme Court held that an agency's denial of a petition for rulemaking is reviewable only to ensure "administrative compliance with the demands of due process."[45] The limited judicial review permitted in *Johns* entailed determining whether the agency's denial complied with the Administrative Procedure Act and determining from the face of the agency's written denial whether the denial was arbitrary.[46]

In *K & L Distributors v. Murkowski*, the Alaska Supreme Court elaborated on the "scope of review of an administrative decision to assure compliance with due process under Alaska law."[47] That review includes "assuring that the trier of fact was an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the hearing was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed."[48] Here, of course,

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44 699 P.2d 334 (Alaska 1985).

45 *Id.* at 339.

46 *Id.*

47 486 P.2d 351, 357 (Alaska 1971).

48 *Id.*

DEC did not grant Plaintiffs a hearing on the Petition, nor was it obligated to.[49] When reviewing an agency decision for compliance with due process the court should not "examine each factual finding to see that it is correct, or even that it is supported by substantial evidence."[50] Rather, the "review of factual determinations becomes a review to find whether the administrative decision has passed beyond the lowest limit of the permitted zone of reasonableness to become capricious, arbitrary or confiscatory."[51]

As Defendants explained in the Opening Brief, under the limited scope of review that applies in this case, Plaintiffs do not come close to alleging that DEC violated due process by denying the Petition. (Op. Br. 14-15) In response, Plaintiffs appear to make two arguments. First, they repeatedly contend that DEC's justifications for denying the Petition are "questions for the merits" that should not be considered on a motion to dismiss. (Opp'n Br. 19-21) Second, Plaintiffs take issue with one of those justifications: DEC's judgment that the Petition failed to propose a regulation as defined by Alaska

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49 *See* AS 44.62.230 ("Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation under AS 44.62.180-44.62.290, a state agency shall, within 30 days, deny the petition in writing or schedule the matter for public hearing under AS 44.62.190-44.62.215.").

50 *K & L Distributors*, 486 P.2d at 357.

51 *Id.* at 358.

statutes and caselaw. (Opp'n Br. 19-21; Letter 2) Neither of Plaintiffs' arguments have merit.[52]

A. Under *Johns*, the Court may review DEC's reasons for denying the Petition on a motion to dismiss, but only to determine if those reasons are arbitrary on their face.

In *Johns*, the Commercial Fisheries Entry Commission (CFEC) had adopted a regulation establishing a maximum of thirty-five limited entry permits for a herring fishery, and the plaintiff, who did not receive a permit, petitioned CFEC to change the regulation and increase the maximum number of permits to forty-nine.[53] CFEC denied the petition for rulemaking with a one-paragraph letter, with its only stated justification being that there was a "mathematical possibility" that CFEC might issue at least forty-nine permits for the fishery without needing to adopt a new regulation.[54] The superior court dismissed a challenge to CFEC's denial of the petition as not judicially reviewable.[55] The Alaska Supreme Court reversed, holding (as explained above) that the Court would review CFEC's denial "for administrative compliance with the demands of

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PHONE: (907) 269-5100

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52 Plaintiffs also assert that the Court may review the denial of the Petition for "compliance with the provisions of the Alaska Constitution, including those governing substantive due process, equal protection, and the public trust doctrine." (Opp'n Br. 19) To the extent Plaintiffs are seeking judicial review of the denial of the Petition beyond what *Johns* permits, the Court should reject their argument. The Court should also reject any attempt by Plaintiffs to use the denial of the Petition as a way to have the Court decide claims for injunctive or declaratory relief that are barred by *Kanuk*. The Court has to make a policy judgment of a legislative nature to decide those claims whether the claims are raised separately or in the context of DEC's denial of the Petition.

53 699 P.2d at 336.

54 *Id.* at 339-40 n.6.

55 *Id.* at 335.

due process," but also holding that CFEC's one-paragraph denial letter on its face "demonstrate[d] that the refusal to grant a hearing was not arbitrary."[56] Accordingly, the Supreme Court found "no error" in CFEC's denial of the petition for rulemaking.[57]

Under *Johns*, it is clear that the Court can review on a motion to dismiss DEC's reasons for denying the Petition, but only to determine whether the reasons expressed in DEC's written denial are on their face arbitrary. The Court should reject Plaintiffs' argument that the "propriety" of DEC's justification is a "question for the merits." (Opp'n 19-20)

The Court should also reject Plaintiffs' contention that the Complaint "unquestionably demonstrate[s] an infringement of their fundamental constitutional rights" because their factual allegations must be taken as true on a motion to dismiss. (Opp'n Br. 21) While Plaintiffs' factual allegations are taken as true, "unwarranted factual inferences and conclusions of law are not."[58] Plaintiffs do not allege any facts to show that DEC was arbitrary in denying the Petition; they don't even argue that DEC was arbitrary. While Plaintiffs argue in a conclusory fashion that DEC's denial of the Petition violated "substantive due process, equal protection, and public trust rights"

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PHONE: (907) 269-5100

56 *Id.* at 340.

57 *Id.*

58 *Haines v. Comfort Keepers, Inc.*, 393 P.3d 422, 429 (Alaska 2017) (citing *Dworkin v. First Nat'l Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968)).

(Opp'n Br. 18-19), they do not cite anything in DEC's Letter, or any legal authority, to support those claims. Thus, Plaintiffs' claims are meritless.[59]

B. Among other reasons for denying the Petition, DEC reasonably concluded that the Petition did not propose a "regulation."

In the Letter, DEC cited several "practical and legal hurdles" that prevented it from granting the Petition. (Letter 3; Op. Br. 15) Plaintiffs take issue with just one of DEC's reasons: the agency's conclusion that the Petition failed to propose a "regulation" as defined by Alaska statutes and caselaw. (Opp'n Br. 19-21) Because Plaintiffs do not dispute the reasonableness of the numerous other reasons for denying the Petition that DEC cited in the Letter, Plaintiffs' challenge to the Petition must fail.

With respect to DEC's conclusion that the Petition did not propose a regulation, the issue for the Court is not whether DEC is "correct," but whether DEC's "decision has passed beyond the lowest limit of the permitted zone of reasonableness to become capricious, arbitrary or confiscatory."[60] DEC's conclusion easily passes that low bar.

Regulations implement, interpret, or make specific statutes, and affect the public or are used by the State in dealing with the public.[61] DEC concluded that the Petition

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59 *Cf. Alyeska Pipeline Serv. Co. v. State*, 288 P.3d 736, 743 (Alaska 2012) ("It is especially important to properly raise and brief constitutional issues.") (citing *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970) ("[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.")). The Court should also reject as inconsistent with *Johns* Plaintiffs' argument that a "strict scrutiny" standard of review applies to their constitutional claims concerning the denial of the Petition. (Opp'n Br. 21).

60 *K & L Distributors*, 486 P.2d at 358.

61 *State, Dep't of Natural Res. v. Nondalton Tribal Council*, 268 P.3d 293, 301 (Alaska 2012).

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would establish policy directives for the agency, but would not establish standards that directly govern public conduct, such as specific, enforceable greenhouse gas emissions standards, except through subsequent and more specific regulations to implement those policies. (Letter 2) Caselaw from the Alaska Supreme Court supports DEC's conclusion.[62] Because DEC stated reasonable and non-arbitrary reasons for denying the Petition, Plaintiffs' claims concerning the denial of the Petition should be dismissed.

CONCLUSION

For all of these reasons, Plaintiffs' Complaint should be dismissed.

DATED February 12, 2018.

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62 *Id.* at 303-04 (holding that the Bristol Bay Area Plan, which set policies that guided a state agency's land-use decisions, was not a regulation because it would only affect the public through later implementation by subsequent regulations). Plaintiffs' reliance on two cases involving the Board of Fisheries is misplaced, as the Board of Fisheries enacts policies that are often used by the Department of Fish & Game in dealing with the public and that affect the public, and therefore meet the definition of a "regulation." *See, e.g.*, *Kenai Peninsula Fisherman's Co-op. Ass'n, Inc. v. State*, 628 P.2d 897, 905 (Alaska 1981) (finding that a Board of Fisheries policy was a "regulation" because it was used by the Department of Fish & Game in ordering an emergency closure of commercial fishing). In any event, the issue for the Court is not whether DEC is correct in its interpretation of the *Nondalton Tribal Council* decision, but merely whether DEC's interpretation passes the low bar of reasonableness, which it clearly does.