**IN THE SUPREME COURT OF THE STATE OF ALASKA**

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| ESAU SINNOK, et al., | ) | |
| | ) | |
| Appellants, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF ALASKA, et al., | ) | |
| | ) | |
| Appellees. | ) | Supreme Ct. No. S-17297 |
| | ) | |

**Trial Court Case No. 3AN-17-09910 CI**

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE GREGORY MILLER, PRESIDING

# APPELLANTS' BRIEF


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## AUTHORITIES PRINCIPALLY RELIED UPON

### Alaska Constitution

**Article I, Section 1 Inherent Rights**

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

**Article I, Section 7 Due Process**

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

**Article VIII, Section 1 Statement of Policy**

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

**Article VIII, Section 2 General Authority**

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

**Article VIII, Section 3 Common Use**

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

**Article VIII, Section 4 Sustained Yield**

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

**Article VIII, Section 13 Water Rights**

All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

**Article VIII, Section 14 Access to Navigable Waters**

Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

**Article VIII, Section 15 No Exclusive Right of Fishery**

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. *[Amended 1972]*

**Article VIII, Section 16 Protection of Rights**

No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

**Article VIII, Section 17 Uniform Application**

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

## Alaska Statutes

**AS 44.99.115 Declaration of State Energy Policy**

The State of Alaska recognizes that the state's economic prosperity is dependent on available, reliable, and affordable residential, commercial, and industrial energy to supply the state's electric, heating, and transportation needs. The state also recognizes that worldwide supply and demand for fossil fuels and concerns about global climate change

will affect the price of fossil fuels consumed by Alaskans and exported from the state to other markets. In establishing a state energy policy, the state further recognizes the immense diversity of the state's geography, cultures, and resource availability. Therefore, it is the policy of the state to

(1) institute a comprehensive and coordinated approach to supporting energy efficiency and conservation by

(A) encouraging statewide energy efficiency codes for new and renovated residential, commercial, and public buildings;

(B) decreasing public building energy consumption through conservation measures and energy-efficient technologies; and

(C) initiating and supporting a program to educate state residents on the benefits of energy efficiency and conservation, including dissemination of information on state and federal programs that reward energy efficiency;

(2) encourage economic development by

(A) promoting the development of renewable and alternative energy resources, including geothermal, wind, solar, hydroelectric, hydrokinetic, tidal, and biomass energy, for use by Alaskans;

(B) promoting the development, transport, and efficient use of nonrenewable and alternative energy resources, including natural gas, coal, oil, gas hydrates, heavy oil, and nuclear energy, for use by Alaskans and for export;

(C) working to identify and assist with development of the most cost-effective, long-term sources of energy for each community statewide;

(D) creating and maintaining a state fiscal regime and permitting and regulatory processes that encourage private sector development of the state's energy resources; and

(E) promoting the efficiency of energy used for transportation;

(3) support energy research, education, and workforce development by investing in

(A) training and education programs that will help create jobs for Alaskans and that address energy conservation, efficiency, and availability, including programs that address workforce development and workforce transition; and

(B) applied energy research and development of alternative and emerging technologies, including university programs, to achieve reductions in state energy costs and stimulate industry investment in the state;

(4) coordinate governmental functions

(A) by reviewing and streamlining regulatory processes and balancing the economic costs of review with the level of regulation necessary to protect the public interest;

(B) by using one office or agency, as may be specified by law, to serve as a clearinghouse in managing the state's energy-related functions to avoid fragmentation and duplication and to increase effectiveness; and

(C) by actively collaborating with federal agencies to achieve the state's energy goals and to meet emissions, renewable and alternative energy, and energy production targets.

**AS 44.99.125 Implementation of Policy**

(a) The governor shall conduct the affairs of the state and carry out state programs in conformity with this policy.

(b) The lieutenant governor shall deliver copies of this Act to Congress and the President of the United States.

## I. JURISDICTIONAL STATEMENT

Appellants,[1] Plaintiffs below ("Plaintiffs"), appeal to the Alaska Supreme Court from the judgment of dismissal entered in the Superior Court, Third Judicial District by the Honorable Gregory Miller on October 30, 2018. Plaintiffs timely filed their notice of appeal on November 29, 2018 pursuant to Alaska Rule of Appellate Procedure 202(a). AS 22.05.010 bestows this Court with jurisdiction over this matter.

## II. STATEMENT OF ISSUES PRESENTED

1. The superior court erred by failing to liberally construe and assume the truth of the facts alleged in Plaintiffs' amended complaint regarding Appellants' ("the State's", or "Defendants'") Energy Policy and how Defendants' affirmative systemic actions implementing that policy exacerbate climate change in violation of Plaintiffs' constitutional rights.

2. The superior court erred by determining the constitutional claims raised in Plaintiffs' amended complaint were nonjusticiable under the political question doctrine where Plaintiffs challenge the State's Energy Policy, reflected in, among other actions

[1] Appellants in this case are: Esau Sinnok; Linnea L., a minor, by and through her guardian, Hank Lentfer; Tasha Elizarde; Cade Terada; Kaytlyn Kelly; Brian Conwell; Jode Sparks; Margaret "Seb" Kurkland; Lexine D., a minor, by and through her guardian, Bernadette Demientieff; Elizabeth Bessenyey; Vanessa 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, by and through her guardian, Melanie Sagoonick. Appellees in this case are: the State of Alaska; Michael Dunleavy, Governor of the State of Alaska, in his official capacity; Alaska Department of Environmental Conservation; Jason Brune, 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.

and policy statements, AS 44.99.115(2)(B), and Defendants' affirmative systemic conduct in implementing that policy, as violative of Plaintiffs' constitutional rights.

3. The superior court erred by misconstruing Counts I through IV of Plaintiffs' amended complaint as presenting a single constitutional claim to an unenumerated substantive due process right to a stable climate system and dismissing those counts in full.

4. The superior court erred by determining that Defendants' denial of Plaintiffs' petition for rulemaking was not arbitrary and by not addressing whether that denial violated Plaintiffs' constitutional rights.

## III. STATEMENT OF THE CASE

Plaintiffs are sixteen youth, ages five to twenty at the time of filing this suit,[2] from across the State of Alaska, each of whom are experiencing profound harm to their lives, liberties, and property as a result of the climate crisis to which Defendants have substantially contributed and continue to make more dangerous. Exc. 149-177 ¶¶ 14-91 (describing harms to Plaintiffs). For example, Plaintiff Esau's village of Shishmaref is being wiped off the map as a result of climate-induced warming, loss of sea-ice, increasingly frequent and severe storms, flooding, and coastal erosion. Exc. 149-154 ¶¶ 14-23. These and other climate impacts endanger Esau and his family, his food security, and the very existence of his village and culture. *Id*. Plaintiff Summer's village of Unalakleet, her cultural traditions, and her safety and welfare are similarly endangered by

[2] Plaintiffs filed suit on October 27, 2017. Exc. 248. Plaintiffs now range from seven to twenty-one years of age.

climate change, as are the fish and wildlife she depends on for subsistence and survival. Exc. 174-177 ¶¶ 85-91. These are only two examples among the many profound physical, emotional, and cultural harms each of the sixteen youth Plaintiffs are already and will increasingly suffer absent urgent reductions of Alaska's greenhouse gas ("GHG") emissions. Exc. 149-177 ¶¶ 14-91; *see Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1093-95 (Alaska 2014) (finding standing based on climate harms).

Despite longstanding knowledge of these dangers to Plaintiffs, Exc. 214-218 ¶¶ 205-218, Defendants have adopted and implemented, and continue to implement, a statewide Energy Policy that causes, contributes to, and exacerbates climate change. Exc. 147-48, 221-227 ¶¶ 7, 235-239 (describing the State's challenged "Energy Policy"). By engaging and persisting in a systemic, policy-driven practice of affirmatively permitting, authorizing, promoting, and facilitating activities which have and are resulting in dangerous levels of GHG emissions (including the development, extraction, transport, export, and combustion of fossil fuels), Defendants harm and endanger Plaintiffs' culture, health, welfare, property, and livelihoods. *Id.* Through this action, Plaintiffs ask the judiciary to fulfill its duty under Alaska's constitutionally-mandated separation of powers to assess the constitutionality of the State's Energy Policy and Defendants' affirmative acts in implementing that policy and to safeguard Plaintiffs' fundamental rights under Alaska's Constitution. Exc. 228-245 ¶¶ 244-282, Prayer for Relief ¶¶ 1-13.

Plaintiffs' claims are consistent with, and in fact dictated by, this Court's precedent regarding the justiciability of climate claims. In 2014, this Court dismissed a single-count complaint brought by a group of Alaskan youth in 2011, alleging that the

State's *inaction* on climate change – its "fail[ure] to take steps to protect the atmosphere" – violated Alaska's public trust doctrine. *Kanuk*, 335 P.3d at 1090. Because the *Kanuk* plaintiffs had not challenged an "initial policy determination" by the political branches and did not allege that the State had a policy that violated the public trust doctrine, this Court declined, on political question grounds, to decide Alaska's obligation to reduce its emissions. *Id.* at 1097. Crucially, this Court noted that policy determination was not its to make "*in the first instance*." *Id.* at 1098 (emphasis added). In concluding its opinion in *Kanuk*, this Court anticipated a justiciable constitutional challenge to State policy based on climate harms, stating 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). This is precisely that case.

In line with this Court's direction, on August 28, 2017, sixteen Alaska youth, including twelve of the Plaintiffs here, petitioned Defendants to adopt a rule to reduce Alaska's emissions at rates necessary to safeguard their fundamental constitutional rights, and bring the State's Energy Policy into constitutional compliance. Exc. 178 ¶ 93; Exc. 1-114 (hereinafter, "Petition"). The proposed regulation, if implemented, would result in reduction of Alaska's GHG emissions at yearly rates consistent with global reductions necessary to avert catastrophic climate change. Exc. 1-6. Confirming their commitment to and in furtherance of their ongoing Energy Policy, Defendants denied Plaintiffs' Petition on September 27, 2017, Exc. 178 ¶ 94; Exc. 140-43, affirmatively refusing to reduce

GHG emissions resulting from their systemic policy-driven actions with respect to fossil fuels. Exc. 178, 222 ¶¶ 94, 236.

Plaintiffs then instituted this action, calling on Alaska's judiciary to assess the State's Energy Policy for compliance with Alaska's constitutional guarantees of fundamental rights. Specifically, Plaintiffs allege that by and through the State's Energy Policy, Defendants have and continue to cause and contribute to climate change, endangering and harming Plaintiffs in violation of their **substantive due process rights** under Article I, Section 7 of the Alaska Constitution, Exc. 228-231 ¶¶ 244-252 (Count I), **equal protection rights** under Article I, Section 1 of the Alaska Constitution, Exc. 232-235 ¶¶ 258-265 (Count III), **public trust rights** constitutionalized under Article VIII, Sections 1, 2, 3, 4, 13, 14, 15, 16, and 17 of the Alaska Constitution, Exc. 235-240 ¶¶ 266-277 (Count IV), and under a **state-created danger substantive due process claim** under Article I Section 7 of the Alaska Constitution, Exc. 231-32 ¶¶ 253-57 (Count II). Plaintiffs also allege that Defendants' denial of their Petition violates each of Plaintiffs' foregoing constitutional rights. Exc. 240-41 ¶¶ 278-282 (Count V). As relief, Plaintiffs' request a declaration of their rights and Defendants' violation thereof, and a court order for Defendants to prepare and implement a remedial plan of their own devising to reduce Alaska's GHG emissions by rates necessary to protect Plaintiffs' constitutional rights. Exc. 241-245, Prayer for Relief ¶¶ 1-10.

Defendants moved to dismiss, wrongly equating Plaintiffs' constitutional claims and factual allegations to those presented in *Kanuk*, and arguing in sole reliance on *Kanuk* that, except for review of the denial of Plaintiffs' Petition, the political question

doctrine and prudential considerations bar judicial consideration of all of Plaintiffs' claims. Exc. 117-18, 119-124. Contrary to rudimentary separation of powers principles, Defendants' asserted that Alaska's judiciary lacks power to assess the constitutionality of government policies and that courts may only *implement* the political branches' policy determinations. Exc. 135-36. Defendants also argued, remarkably, that Alaska's courts have no power to assess the denial of a rulemaking petition for compliance with Alaska's guarantee of substantive constitutional rights. Exc. 265-66, 268-69.

The superior court held oral argument on Defendants' motion to dismiss on April 30, 2018. Exc. 264. Plaintiffs' filed an amended complaint on August 24th, 2018, providing additional specificity to their allegations regarding the actions and statements of policy comprising and evidencing the State's Energy Policy. Exc. 127-48, 221-227 ¶¶ 7, 235-239. On September 5, 2018, the parties filed a joint letter stipulating that Plaintiffs' amended complaint necessitated "no further briefing or argument for the [superior] Court to resolve Defendants' pending Motion to dismiss" and that "the Court should consider the Motion to Dismiss to be Defendants' response" to the amended complaint. Exc. 246-47.

At oral argument, counsel for Defendants conceded that Plaintiffs' claims would not implicate a political question and that the court would have jurisdiction "if [Plaintiffs] could identify a specific executive act, a regulation, some manifestation of policy in a specific act of the political branches and they could draw a link to the violation of their rights . . . ." Exc. 268. This is exactly what Plaintiffs have done in the Amended Complaint, explicitly pointing to AS 44.99.115(2)(B) as clearly reflecting the State's

Energy Policy that Plaintiffs challenge as unconstitutional. Exc. 222 ¶ 237(a). Plaintiffs have provided specific allegations as to how this policy, and Defendants implementation thereof, is exacerbating climate change and violating Plaintiffs' constitutional rights. Exc. 191-201 ¶¶ 136-168 (science of causation of climate change through GHG emissions); Exc. 201-214 ¶¶ 169-204 (climate change impacts in Alaska are already severe and will increase absent immediate reductions of Alaska's GHG emissions); Exc. 214-218 ¶¶ 205-218 (Defendants' longstanding knowledge of climate danger); Exc. 218-221 ¶¶ 219-233 (Alaska's significant GHG emissions); Exc. 221-228 ¶¶ 234-243 (Defendants' systemic aggregate actions implementing the State's Energy Policy cause Alaska's GHG emissions). As such, jurisdiction over Plaintiffs' claims is clear.[3]

Failing to accept Plaintiffs' detailed and undisputed factual allegations as true and to draw all reasonable inferences therefrom in Plaintiffs' favor, which allegations distinguish this case factually and legally from *Kanuk*, the superior court treated this case as identical to *Kanuk* and erroneously dismissed Plaintiffs' claims. Ignoring Plaintiffs' clear allegations and reference to the State's Energy Policy in AS 44.99.115(2)(B), the superior court inexplicably ruled that "Plaintiffs do not identify specific policies the state has enacted that have directly contributed to climate change" and that Plaintiffs did not allege how Defendants' actions implementing the State's Energy Policy exacerbate

[3] Defendants' have not disputed the truth or sufficiency of any of Plaintiffs' allegations, including the existence of the State's Energy Policy, which is challenged here, or the allegations that such Policy has and continues to exacerbate climate change and the dangers to these young Plaintiffs.

climate change in violation of Plaintiffs' constitutional rights. Exc. 255. Having mistakenly concluded that Plaintiffs did not identify a state policy for constitutional review (in spite of Plaintiffs having cited to AS 44.99.115(2)(B)), the court erroneously ruled that adjudicating Plaintiffs' claims for injunctive relief would "in essence create a policy where none now exists" in violation of the political question doctrine. Exc. 256. Misapplying *Kanuk* and misconstruing Plaintiffs' allegations as presenting a single claim, the superior court then erroneously concluded that Plaintiffs' requested declaratory relief was precluded by prudential concerns. Exc. 261. Finally, the court dismissed Plaintiffs' challenge to the denial of their Petition, again failing to assume the truth of Plaintiffs' allegations and erroneously applying a narrow, unconstitutional standard of review. Exc. 262.

## IV. STANDARD OF REVIEW

This Court reviews "a motion to dismiss de novo, construing the complaint liberally and accepting as true all factual allegations." *Kanuk*, 335 P.3d at 1092 (citation and quotations omitted). "Motions to dismiss are disfavored and before dismissal will be granted it must be beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief." *Id.* (internal quotations and citation omitted and alterations normalized). In reviewing a motion to dismiss, this Court "view[s] the facts in the best light for the nonmovant and draw[s] all reasonable inferences in that party's favor." *Id.* (internal quotations and citation omitted and alterations normalized). This Court reviews questions of constitutional interpretation de novo, adopting "the rule of law that is most persuasive in light of precedent, reason and policy." *Id.* (citation omitted).

## V. ARGUMENT

### A. The Superior Court Erred by Failing to Assume the Truth of the Facts Alleged in Plaintiffs' Amended Complaint

Throughout its decision, the superior court contravened the standard applicable to a motion to dismiss, failing to accept Plaintiffs' well-pleaded allegations as true, to view the facts in the light most favorable to Plaintiffs, and to draw all reasonable inferences in Plaintiffs' favor. *Kanuk*, 335 P.3d at 1092. Plaintiffs' allegations demonstrating that Defendants are causing, contributing to, and exacerbating climate change through continued implementation of the State's Energy Policy are unquestionably *more than sufficient* to satisfy the minimum showing required at this early stage. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (on a motion to dismiss "general allegations embrace those specific facts that are necessary to support the claim."). The superior court's conclusion that Plaintiffs did not demonstrate the existence of a State policy that contributes to climate change, Exc. 255, not only ignores Plaintiffs' allegations, including clear identification of statutory declarations, it runs contrary to established Supreme Court authority that litigants may challenge the constitutionality of both written and *de facto* policies. *See, e.g., Allee v. Medrano*, 416 U.S. 802, 812 (1974).

Contrary to the superior court's ruling, Plaintiffs clearly alleged the existence of the State's Energy Policy, which forms the centerpiece of this action. In paragraph 237 of the amended complaint, Plaintiffs cited to the State's official, statutory policy declarations as reflecting and evidencing the State's Energy Policy:

> • The State of Alaska adopted H.B. 306, which, while simultaneously recognizing 'concerns about climate change' declared that '[i]t is the intent

> of the Legislature that. . . the state remain a leader in petroleum and natural gas production' and declared that it is the 'policy of the state to . . . promot[e] the development, transport, and efficient use of nonrenewable and alternative energy resources, including natural gas, coal, oil, gas hydrates, heavy oil, and nuclear energy, for use by Alaskans and for export. . . .' State Government—Energy Policy—Declaration, 2010, Alaska Laws Ch. 82 (H.B. 306); AS § 44.99.115(2)(B);
>
> • The State of Alaska adopted AS § 44.99.125 directing the governor to 'conduct the affairs of the state and carry out state programs in conformity' with the statements of intent and policy in H.B. 306 and AS § 44.99.115(2)(B); . . . .

Exc. 222-23 ¶ 237(a), (b) (citing AS §§ 44.99.115(2)(B), 44.99.125). Plaintiffs' explained that, consistent with those statutory declarations, Defendants' systemic aggregate actions and statements with respect to fossil fuels further evidence the State's Energy Policy:

> By and through their affirmative aggregate and systemic actions with respect to fossil fuels, and GHG emissions, Defendants have demonstrated that their policy, practice, and custom with respect to GHG emissions in Alaska (hereinafter "Defendants' Energy Policy" or "Energy Policy"), consists of: systemic authorization, permitting, promotion, encouragement, and facilitation of activities, including the development, extraction, transport, export, and combustion of fossil fuels, resulting in, and exacerbating, dangerous levels of GHG emissions, without regard to Climate Change Impacts or the fundamental rights of present and future generations of Alaskans, including these Youth Plaintiffs.

Exc. 147-48 ¶ 7. Plaintiffs then provided categories and specific examples of Defendants' affirmative, systemic actions and statements implementing and evidencing the State's Energy Policy. *See, e.g.*, Exc. 223-24 ¶¶ 237(k) (Defendants' have *never* found a disposal of state lands for fossil fuel development not to be "consistent with the public interest" under Article VIII of the Alaska Constitution); Exc. 225 ¶ 237(p) (former Governor Walker's March 20, 2018 Juneau Empire op-ed stating that underestimating the risks of climate change is "to gamble with our children's futures" yet pledging that the

"state will continue to be an energy producer for as long as there is a market for fossil fuels."); Exc. 224-25 ¶ 237(n) (Defendants continue to actively and aggressively pursue expansion of oil and gas development in Alaska); Exc. 225 ¶ 237(o) (denial of Plaintiffs' Petition for rulemaking); *see generally* Exc. 223-27 ¶¶ 237(c)-(p), 239. These allegations are more than adequate at this stage to demonstrate the existence of the State's Energy Policy and to "embrace those specific facts that are necessary to support" Plaintiffs' claims at later stages of this litigation. *Lujan*, 497 U.S. at 889.[4]

The superior court's conclusion that Plaintiffs did not identify a "specific polic[y] the state has enacted," Exc. 255, is clearly incorrect. Plaintiffs cited to the written policy declarations in their amended complaint, which the superior court ignored. Exc. 222-23 ¶ 237(a),(b) (citing AS §§ 44.99.115(2)(B), 44.99.125).

Further, even had Plaintiffs not cited to such written policy statements, the superior court's insistence that Plaintiffs point to a written declaration of policy runs contrary to established Supreme Court authority permitting constitutional challenges to both written and *de facto* policies. *See, e.g., Allee*, 416 U.S. at 812 (approving injunction where the "complaint charged that the enjoined conduct was but one part of a single plan

[4] This Court can take judicial notice of official State actions consistent with and further demonstrating the State's Energy Policy which have transpired since Plaintiffs filed their amended complaint. For instance, Governor Dunleavy abolished the Alaska Climate Strategy and Climate Action for Alaska Leadership Team shortly after taking office. Administrative Order No. 309, Feb. 21, 2019. *See, e.g., Pub. Safety Employees Ass'n, AFSCME Local 803, AFL-CIO v. City of Fairbanks*, 420 P.3d 1243, 1247 n. 9 (Alaska 2018) (*citing Mullins v. Oates*, 179 P.3d 930, 936 n. 10 (Alaska 2008) as "taking judicial notice of reasonably indisputable fact on appeal."); Alaska R. Evid. 201(c) ("A court may take judicial notice . . . whether requested or not."); Alaska R. Evid. 203(b) ("Judicial notice may be taken at any stage of the proceeding.").

by the defendants, and the District Court found a pervasive pattern of intimidation in which the law enforcement authorities sought to suppress appellees' constitutional rights.").[5] Plaintiffs' amended complaint encompasses a challenge to both. Exc. 147-48, 221-27 ¶¶ 7, 235-239 (detailing the State's Energy Policy, as evidenced by AS § 44.99.115(2)(B) and "Defendants' affirmative aggregate and systemic actions" with respect to fossil fuels in Alaska.) As the Ninth Circuit has unequivocally held: "[A] wrongful taking of liberty [may] result [] from either affirmatively enacted or de facto policies, practices, or customs . . . ." *Haygood v. Younger*, 769 F.2d 1350, 1359 (9th Cir. 1985) (en banc) (*cert. denied sub nom. Cranke v. Haygood*, 478 U.S. 1020 (1986); *see also LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) (affirming injunction against agency that engaged in a systemic "pattern of officially sanctioned officer behavior violative of plaintiffs' constitutional rights") (citation omitted); *Id.* ("The [U.S.] Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a 'pattern' of illicit law enforcement behavior.") (collecting cases). In dismissing Plaintiffs' claims, the superior court entirely ignored this authority as well as Plaintiffs' allegations demonstrating the State's Energy Policy through both written statutory declarations and through a clear pattern and practice of *de facto* implementation consistent with those declarations.

[5] The availability of challenges to *de facto* policies is necessary to prevent the constitutionally untenable scenario in which official, systemic government practices avoid judicial check simply by virtue of their purposely not having been committed to writing.

When a *de facto* policy is alleged, its existence is a factual matter for determination on the evidence. *Mitchell v. Dupnik*, 75 F.3d 517, 525 (9th Cir. 1996) (evidence established the existence of a "*de facto* policy . . . [that] did not meet the requirements of due process" even where pattern and practice establishing *de facto* policy ran contrary to official written policy); *see also Anderson v. State Commercial Fisheries Entry Comm'n*, No. 7006, 166, 1984 WL 908386 (Alaska 1984) (affirming based on complete lack of evidence of asserted *de facto* policy).[6] In any case, Plaintiffs' allegations asserted ample factual and statutory evidence of the State's Energy Policy to survive a motion to dismiss.

The superior court further failed to take Plaintiffs' detailed factual allegations as true in concluding that Plaintiffs did not explain how Defendants' actions implementing the State's Energy Policy cause and contribute to climate change. The superior court wrote:

> Plaintiffs do not explain how the 'systemic authorization, permitting, promotion, encourage [sic], and facilitation of activities [of the state]' has exacerbated Climate Change.

Exc. 255 (second alteration in original). As an initial matter, Plaintiffs' did not, as the superior court's alteration of their allegations would suggest, allege merely that the State's authorization, permitting, promotion, encouragement, and facilitation of *its own activities* has exacerbated climate change. A simple reading of the paragraph of

[6] *Anderson* is an unpublished decision and is cited herein as persuasive authority. *See McCoy v. State*, 80 P.3d 757, 764 (Alaska 2002) (unpublished decisions may be cited as persuasive authority).

Plaintiffs' amended complaint quoted by the superior court demonstrates that Plaintiffs alleged that Defendants exercise determinative control over activities across the state, including those of third parties, "including the development, extraction, transport, export, and combustion of fossil fuels" which are "resulting in, and exacerbating, dangerous levels of GHG emissions . . . ." Exc. 147-48 ¶ 7; *see also* 179-186 ¶¶ 96-116 (detailing Defendants' respective authority and control over GHG emitting activities, including issuance of required leases, permits, and authorizations without which such activities could not occur).[7]

Greatly exceeding the detail required of allegations at this stage, Plaintiffs' amended complaint demonstrates how GHGs resulting from Defendants' authorization, permitting, promotion, encouragement, and facilitation of GHG-generating activities exacerbate climate change. Exc. 191-201 ¶¶ 136-168 (science of causation of climate change and climate change impacts through GHG emissions); Exc. 201-214 ¶¶169-204 (climate change impacts in Alaska are already severe and will increase absent immediate reductions of Alaska's GHG emissions); Exc. 214-18 ¶¶ 205-218 (Defendants' longstanding knowledge of climate danger); Exc. 218-221 ¶¶ 219-233 (Alaska's significant GHG emissions); Exc. 221-228 ¶¶ 234-243 (Defendants' systemic aggregate actions in causing Alaska's GHG emissions). These allegations are more than adequate at

[7] As a single example from these allegations of Defendants' authority and control, Defendant Alaska Oil and Gas Conservation Commission exercises permitting authority for oil and gas drilling in Alaska with jurisdiction extending to "all land in the state lawfully subject to its police powers, including land of the United States and land subject to the jurisdiction of the United States." Exc. 184 ¶ 113; AS § 31.05.027.

this stage, during which Plaintiffs need only provide "general allegations" that "embrace those specific facts that are necessary to support the claim." *Lujan*, 497 U.S. at 889.

Finally, in dismissing Plaintiffs' claims, the superior court erred by relying on its assertion that "Plaintiffs concede that Alaska at most contributes a very small share of global pollution and that their requested claims would not 'fix' climate change materially." Exc. 255. First, as Plaintiffs' allegations make clear, Alaska's substantial, unmitigated emissions pose a significant danger to Plaintiffs. Exc. 193 ¶ 142 ("A substantial portion of every ton of $CO_2$ . . . persists in the atmosphere for as long as a millennium or more" affecting the climate); Exc. 218-221 ¶¶ 219-233 (Alaska's significant GHG emissions). Second, that the reduction of Alaska's emissions alone would not "fix" climate change is irrelevant, because, as this Court ruled in *Kanuk*, plaintiffs asserting harms from climate change and requesting reductions of Alaska's emissions have injury-interest standing. 335 P.3d at 1092-95; *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007) (reduction in "emissions would slow the pace of global emissions increases, no matter what happens elsewhere."). Third, the superior court's reasoning disregards that Plaintiffs allege harm to constitutional rights, which by their nature prevent *government* from harming individuals irrespective of whether parties not bound by Alaska's Constitution are causing similar harm. Plaintiffs are not asking Alaska to *solve* climate change. Even if every other government in the world continued to emit GHGs, Plaintiffs would still have a right not to have their own government's Energy Policy contribute to climate destruction in their name.

### B. The Superior Court Erred By Determining That Plaintiffs' Constitutional Claims Present a Nonjusticiable Political Question

Having erroneously found that Plaintiffs did not identify a policy of the state that contributes to climate change, the superior court further erred in ruling that Plaintiffs' claims for injunctive relief presented nonjusticiable political questions under *Kanuk*. However, the justiciability of Plaintiffs' claims is compelled, rather than foreclosed, by *Kanuk* for at least four reasons. First, the "initial policy determination" lacking in plaintiffs' complaint in *Kanuk*, without which this Court would not decide the case, is now properly presented for constitutional review in the present action as the State's Energy Policy, Defendants' commitment to which is only further confirmed by their denial of Plaintiffs' Petition. Second, the claims in this case and the government conduct from which they arise are fundamentally distinct from those presented in *Kanuk*. Third, Alaska's courts have a constitutional duty to assess the actions and policies of the political branches for compliance with Alaska's constitutional protection of fundamental rights. Fourth, federal precedent, applying the same inquiry under *Baker v. Carr*, 369 U.S. 186 (1962), that Alaska's courts look to for determination of the presence of a political question, establishes that cases premised upon harms stemming from climate change do not implicate nonjusticiable political questions.

The U.S. Supreme Court developed the modern encapsulation of the political question doctrine in *Baker* , announcing six formulations under which a case might present a nonjusticiable question. 369 U.S. 217. In identifying "political questions," Alaska's courts adhere to the *Baker* formula. *Abood v. League of Women Voters of*

*Alaska*, 743 P.2d 333, 336 (Alaska 1985). Under the *Baker* test "there should 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." *Zivotofsky ex rel. Zivotofsky 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. "[M]erely characterizing a case as political will [not] render it immune from judicial scrutiny." *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982).

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

In ruling that the injunctive relief Plaintiffs seek presents a nonjusticiable political question under *Kanuk*, the superior court relied on its erroneous finding that Plaintiffs did not identify a state policy that contributes to climate change. The superior court concluded:

> A court order granting the Plaintiffs' injunctive relief would in essence create a policy where none now exists. . . . Plaintiffs' do not avoid the problem in *Kanuk* where the Court held that it is not the judiciary's role to make a policy decision 'in the first instance.' Plaintiffs' . . . claims [for injunctive relief] are 'materially indistinguishable from [those] . . . presented in *Kanuk*, and therefore are non-judiciable political questions.

Exc. 256. However, as demonstrated above, Plaintiffs *did* identify and challenge the constitutionality of the State's Energy Policy and Defendants' systemic affirmative actions in implementing that policy. Exc. 222 ¶ 237(a) (citing AS 44.99.115(2)(B)). Adjudicating Plaintiffs' constitutional claims would therefore not require Alaska's courts to make policy "in the first instance," but only to assess the constitutionality of

Defendants' *already existing* policy determinations and implementing actions, a traditional and familiar judicial exercise.

In *Kanuk*, this 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).[8] This factor is only applicable where a court "cannot resolve a dispute in the absence of a *yet-unmade* policy determination . . . ." *Zivotovsky*, 566 U.S. at 204 (Sotomayor, J. concurring) (emphasis added). Within the context of the *Kanuk* plaintiffs' challenge to the State's *inaction* on climate change – its "fail[ure] to take steps to protect the atmosphere" – this 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 1090, 1098 (emphasis added).

In stark contrast to *Kanuk*, as demonstrated in Section V.B.1, *supra*, Plaintiffs here challenge the State's Energy Policy, where the political branches have already made the "underlying policy choice[]" "in the first instance" regarding Alaska's GHG emissions. *Id.* Specifically, Defendants have expressed a policy to "promot[e] the development, transport, and efficient use of nonrenewable and alternative energy resources, including natural gas, coal, oil, gas hydrates, heavy oil, and nuclear energy, for use by Alaskans and

[8] 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.

for export[.]" AS 44.99.115(2)(B). Consistent with that policy declaration and providing further evidence of the State's Energy Policy, Defendants have demonstrated a clear pattern and practice of systemic authorization, permitting, and promotion of activities, "including the development, extraction, transport, export, and combustion of fossil fuels" resulting in, and exacerbating, dangerous levels of GHG emissions. Exc. 147-48 ¶ 7. Further evidencing Defendants' Energy Policy is Defendants' denial of Plaintiffs' Petition. Plaintiffs' took heed of this Court's ruling in *Kanuk* that the rate at which Alaska must reduce its GHG emissions was not a determination for the courts to make "in the first instance" and petitioned Defendants' to adopt a rule to reduce Alaska's emissions at rates necessary to safeguard their constitutional rights. Exc. 178 ¶ 93; Exc. 1-6. Defendants' denial of the Petition served only to confirm Defendants' commitment to the State's Energy Policy. Exc. 178 ¶ 94.

Accordingly, the superior 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. 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. The superior court need only review the State's Energy Policy and Defendants' implementing actions 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.")

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

The superior court's reliance on *Kanuk* and a single *Baker* factor to assert that the injunctive relief Plaintiffs seek presents a nonjusticiable political question is erroneous for the further reason that it disregards the clearly distinct nature of Plaintiffs' claims and the factual circumstances on which they are based. These distinctions are noteworthy because determining whether a political question is implicated requires a discriminating "case by case inquiry," *Malone*, 650 P.2d at 357 (quotations omitted), into "the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217.

As an initial matter, the superior court's conclusion that the injunctive relief Plaintiffs seek is "materially indistinguishable" from the relief found to implicate a political question within the context of *Kanuk* obfuscates the proper inquiry, which ordinarily focuses on whether the *claims* present a political question, not the requested relief. Indeed, in *Baker* itself, finding no nonjusticiable political question implicated, the U.S. Supreme Court stated:

> Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, *it is improper now to consider what remedy would be most appropriate if plaintiffs prevail at the trial.*

369 U.S. at 198 (emphasis added); *see also Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("[T]he 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)); *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 doctrine."); *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009) ("Even if the relief demanded is unavailable, the claim should not be dismissed as long as some relief might be available on the basis of the alleged facts.") (citation omitted); *Ctr. for Biological Diersity v. Mattis*, 868 F.3d 803, 829 (9th Cir. 2017) ("Assessing the equities of injunctive relief does not" implicate the political question doctrine).[9]

In contrast to the single, *inaction*-based public trust claim in *Kanuk*, each of Plaintiffs' claims – including substantive due process, state-created danger, and equal protection claims not brought in *Kanuk* – rests principally on Defendants' infringement of fundamental constitutional rights through their *affirmative acts* in causing and contributing to dangerous levels of GHG concentrations. Exc. 147-48, 221-227 ¶¶ 7, 235-

[9] This Court's focus on the relief requested in *Kanuk* is an anomaly in political question jurisprudence that can only be explained by this Court's conclusion that a challenge to an initial policy determination by the political branches was prerequisite to adjudicating the *Kanuk* plaintiffs' claims. This Court would not determine "the extent of the State's duty" and afford consistent injunctive relief without the context of a constitutional challenge to an *existing* policy. 335 P.3d at 1101 (absence of initial policy determination for judicial review prevented "determin[ation of] precisely what [the State's] obligations entail."). The anomalous relief-focused analysis in *Kanuk* should not be applied to Plaintiffs' claims here, which present a traditional constitutional challenge to the State's *existing* Energy Policy and Defendants' pattern and practice of affirmative conduct in implementing that Policy. Further, *Kanuk* supports the availability of injunctive emissions reductions. Were Alaska's courts incapable of ordering emissions reductions under any circumstances without implicating a political question, this Court could have dismissed *Kanuk* for lack of redressability. Instead, this Court ruled that the *Kanuk* plaintiffs had injury-interest standing with respect to their requested injunctive relief – relief similar to that requested here. *Id.* at 1092-9.

39; Exc. 228-241 ¶¶ 244-282. This distinction is of substantial importance and removes the claims here from the political question analysis of *Kanuk*, 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 distinguished from case concerning affirmative legislative action) (citing *Paris v. U.S. Dep't of Housing & Urban Dev.*, 988 F.2d 236 (1st Cir. 1993);[10] As the U.S. Supreme Court noted in distinguishing a previous case based on inaction from those presented in *Gomillion v. Lightfoot*:

> 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.

364 U.S. 339, 346-47 (1960). Plaintiffs' allegations that Defendants' affirmative actions implementing the State's Energy Policy infringe their constitutional rights likewise "lift this controversy" out of the arena of the political question doctrine.

In *Kanuk*, this 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 n.51 (citing *Svitak*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. App. Dec. 16,

[10] The superior court noted that *Tongass* "did not hold that state action is *per se*" justiciable under the political question doctrine. Exc. 254-55. Plaintiffs never argued otherwise. Nonetheless, the distinction between affirmative action and inaction is crucial to this Court's inquiry under *Kanuk* and the third *Baker* factor in differentiating between challenges to implementation of *existing* policy and challenges to the failure to adopt protective policies "in the first instance." *Kanuk*, 335 P.3d at 1090, 1098. Further, as explained below, claims challenging affirmative government action as infringing fundamental individual rights are quintessentially reviewable by the judiciary. *See* Section V.B.3, *infra*.

2013) (unpublished decision that has "no precedential value and [is] not binding on any court" under Washington General Rule 14.1(a))). Crucially, in *Svitak*, the Washington State Court of Appeals found claims seeking stricter regulation of GHGs 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.[11]

Importantly, like Plaintiffs' other claims, Plaintiffs' public trust claim here is also based upon Defendants' affirmative actions and presents exactly the justiciable public trust claim envisioned in this Court's concluding remarks in *Kanuk*. This 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." *Kanuk*, 335 P.3d. at 1103 (emphasis added). The Court noted that "[a]llegations that the State has breached its duties with regard 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

[11] 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. Order Granting Motion to Amend Complaint to Assert Constitutional Claims, *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, at *3 (Wash. Super. Ct. April 19, 2017); *see also* Order Affirming the Department of Ecology's Denial of Petition for Rule Making, *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, at *6 (Wash. Super. Ct. Nov. 19, 2015) ("Th[e] mandatory duty [to regulate greenhouse gases] must be understood in the context not just of the Clean Air Act itself but in recognition of the Washington State Constitution and the Public Trust Doctrine.").

atmosphere. *Id.* Consistent with *Kanuk*, Plaintiffs' public trust claim focuses primarily on Defendants' affirmative acts in implementing the State's Energy Policy, thereby "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. Exc. 236-240, 243 ¶¶ 270, 273, 277, Prayer for Relief ¶ 6. This is precisely the type of justiciable public trust claim this Court contemplated in the conclusion of its *Kanuk* opinion. 335 P.3d at 1103.

Further, even if the focus of the political question inquiry were focused on the relief requested rather than the claims presented, Plaintiffs' requested injunctive relief is well within the broad remedial authority of the courts and does not intrude upon the separation of powers concerns underlying the political question doctrine. As the U.S. Supreme Court made clear in an another institutional reform case:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

*Swann*, 402 U.S. at 15. Plaintiffs seek a declaration of their constitutional rights and the violation thereof, and a court order for Defendants' to prepare and implement a plan of their own devising to remedy those violations by reducing Alaska's GHG emissions at rates necessary to safeguard Plaintiffs' fundamental rights. The canon of our Nation's most celebrated cases is replete with decisions approving declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those presented here. *See, e.g., Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); *Bolling v. Sharpe* 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Brown v. Plata*, 563 U.S.

493 (2011). As in *Plata*, Alaska's courts can set the constitutional floor necessary for preservation of Plaintiffs' rights and leave to Defendants the specifics of developing and implementing a compliance plan. 563 U.S. at 533 (approving Eighth Amendment remedy ordering California to develop and implement plan to reduce state-wide prison population to no more than 137.5% of design capacity); *see also* Substantive Limits on Liability and Relief, 90 Harv. L. Rev. 1190, 1248 (1977) ("[I]n each of the" U.S. Supreme Courts institutional reform cases "the court sought a proposed plan from the defendant officials before being forced to consider shaping one of it[s] own over their objections.").

### 3. It is the Judiciary's Duty to Assess Affirmative Government Actions and Policies for Compliance with Alaska's Constitutional Protection of Fundamental Rights

This Court has consistently and unequivocally emphasized that questions of constitutional law, particularly claims alleging the infringement of fundamental rights through affirmative government actions and policies, do not implicate the political question doctrine. As this Court stated in *Planned Parenthood of Alaska, Inc.*:

> 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 . . . .

28 P.3d at 913-14 (citation and quotation marks omitted); *see also, e.g., League of Women Voters*, 743 P.2d at 340 ("If the League's claim is to survive this justiciability challenge, it must involve a right protected by either the Alaska Constitution or the United States Constitution."); *Abood v. Gorsuch*, 703 P.2d 1158, 1162 (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, 896 n. 12 (Alaska 1998) ("It is within the province of this court to determine constitutional issues and deprivation of constitutional rights.").

In the superior court, Defendants argued that, under the third *Baker* factor, Alaska's courts may only *implement* the policy determinations of the political branches but have no power to assess those determinations for compliance with Alaska's Constitution. Exc. 135-36. That position is repugnant to the very idea of the separated powers of government on which the political question doctrine is premised. *See Baker*, 369 U.S. at 217 (The political question doctrine is "essentially a function of the separation of powers."). 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) (quotation and citation omitted). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913 n. 70. If accepted, Defendants' argument would grant the political branches unreviewable authority to implement *any* policy, regardless of its effect on our lives, liberty, or property. Indeed, as Plaintiffs' allege in their amended complaint, Defendants' implementation of the State's Energy Policy continues to destabilize the climate system on which these young Plaintiffs' depend for their futures and their very lives. Exc. 147-48, 221-227 ¶¶ 7, 235-239. If Alaska's courts are without power to assess

the constitutionality of the State's Energy Policy, Alaska's constitutional guarantees are dead letters.

While it is not the courts' role to set policy "in the first instance," *Kanuk*, 335 P.3d at 1098, where such policy determinations have already been made and their implementation is alleged to infringe an individual's constitutional rights, Alaska's courts are duty-bound to confront the merits of such claims as a check and balance to the other branches in the protection of constitutional liberties. As this Court stated in *Kanuk*:

> The *Baker* factors for identifying non-justiciable issues do not apply to judicial interpretations of the constitution. Indeed, under Alaska's constitutional structure of government, the judicial branch has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution.

*Id.* at 1099 (quoting *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913 (citing *Marbury*, 5 U.S. (1 Cranch) at 177)). 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

Federal case law flowing from *Baker* provides persuasive authority that climate cases 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. *See Connecticut v. American Elec.*

*Power Co., Inc.*, 582 F.3d 309, 324-32 (2d Cir. 2009) ("*AEP*") (public nuisance climate claims against power companies implicated none of the *Baker* factors), *rev'd on other grounds Amer. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855, 880 (5th Cir. 2009) (common law tort climate claims against energy companies did not implicate political question) (vacated for a rehearing en banc that never occurred). Whereas the climate change-related claims at issue in *AEP* and *Comer* were rooted in common law tort claims, Plaintiffs' claims here are premised upon infringement of fundamental constitutional rights. Given the judiciary's duty to serve as a check on the actions of its coordinate branches in the protection of constitutional rights, it is therefore even more clear in this case than in *AEP* and *Comer* that Plaintiffs' claims are justiciable. *Bowen*, 953 P.2d at 896 n.12 ("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 constitutional claims and factual allegations on all fours[12] to those presented here. 217 F.Supp.3d 1224 (D. Or. 2016), *interlocutory appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018). Like Plaintiffs here, the *Juliana* plaintiffs alleged infringement of their fundamental constitutional rights (albeit under the U.S. Constitution) based upon the federal government's systemic policy-driven actions related to GHG emissions. *Id.* at 1240. After a thorough and reasoned

[12] While *Comer* and *AEP* both presented claims premised on harms arising from climate change, the plaintiffs in those cases did not, as here, allege government infringement of constitutional rights through affirmative policy-driven acts in causing and contributing to climate change.

analysis of all six *Baker* formulations' application to the claims at hand, *id.* at 1235-42, 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 California inmates' federal constitutional rights") *affirmed sub nom. Brown v. Plata*, 563 U.S. 493 (2011).[13]

[13] Similarly here, Alaska's courts are asked to decide whether Defendants' implementation of the State's Energy Policy conforms with standards applicable to Plaintiffs' constitutional claims. For instance, with respect to fundamental liberty interests under Alaska's due process clause, courts determine whether challenged

Further, rejecting arguments that the case presented a political question due to a lack of judicial scientific expertise and resources, the *Juliana* court clarified: "The science may well be complex, but logistical difficulties are immaterial to the political question analysis." 217 F.Supp.3d at 1239 (citing *Alperin*, 410 F.3d at 552, 555).[14] As Supreme Court Justice Breyer wrote:

> The Supreme Court has recently decided cases involving 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 . . . .

Justice Stephen Breyer, *Science in the Courtroom*, *Issues in Science and Technology*

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government action furthers a compelling state interest by means which are least restrictive of such liberties. *Breese v. Smith*, 501 P.2d 159, 170-71 (Alaska 1972).

[14] In *Kanuk*, this Court looked to the U.S. Supreme Court's discussion in *AEP* of the judiciary's asserted lack of scientific expertise and resources compared to the U.S. EPA. 335 P.3d at 1098-99 (quoting *Amer. Elec. Power Co., Inc.*, 564 U.S. at 428). That discussion is inapplicable here for three reasons. First, while it may be appropriate, as in *Kanuk*, to defer to the political branches to make policy determinations regarding GHG emissions "in the first instance," 335 P.3d at 1098, that deference is wholly inappropriate where a court is called to assess the constitutionality of existing policy determinations. *See* Sections V.B.1 and V.B.3, *supra*. Second, the U.S. Supreme Court's deference to the EPA as possessing comparably more relevant expertise came within its discussion of whether the Clean Air Act displaced the plaintiffs' common law tort claims. *Amer. Elec. Power Co., Inc.*, 564 U.S. at 428-29. It did not apply a political question analysis and it did not pertain to constitutional claims. Third, as explained in this section, courts may not avoid their duty to adjudicate claims properly before them simply because they involve science.

(2000).

The federal *Juliana* case stands for the clear proposition that the constitutionally-rooted principle of separation of powers upon which the political question doctrine rests calls upon the judiciary to confront the merits of climate cases premised on violations of fundamental rights through affirmative government conduct.[15] Alaska's Constitution affords *at least* as much protection of individual liberties as its federal counterpart. *See Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 245 (Alaska 2006) (federal Constitution sets minimum protections of liberty and Alaska's Constitution often provides more); *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 909 (same). Accordingly, it is at least as clear here as it was in *Juliana* that the political question doctrine does not bar Plaintiffs' claims. *Bowsher,* 478 U.S. at 721.

### C. The Superior Court Erred by Construing Counts I Through IV of Plaintiffs' Amended Complaint as Presenting a Single Constitutional Claim to an Unenumerated Substantive Due Process Right to a Stable Climate System and Dismissing Those Counts In Full

Having erroneously ruled that Plaintiffs' requests for injunctive relief implicate the political question doctrine, the superior court purported to apply a prudential considerations analysis to Plaintiffs' requests for declaratory relief, dismissing "on

[15] Each of the three cases are inapposite that the superior court cited as not supporting Plaintiffs' argument that the separation of powers calls upon the judiciary to confront the merits of climate cases premised on violations of fundamental rights. Exc. 258-260 (discussing *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. 2015), *Alec L. v. Jackson*, 863 F.Supp.2d 11 (D.D.C. 2012); and *Svitak,* 2013 WL 6632124). Like *Kanuk*, each of those cases presented single-count public trust claims based on *inaction* with respect to governmental failure to address climate change. None were, as here, premised on *affirmative* actions as violating constitutional rights.

prudential grounds for the same reasons stated in *Kanuk*." Exc. 261. While the superior court's prudential considerations analysis was itself erroneous, the court should not have reached such an analysis in the first place.

In *Kanuk*, after ruling that granting the plaintiffs' requested reductions of Alaska's GHG emissions would implicate a non-justiciable political question absent an "initial policy determination" by the political branches, this Court concluded that it could not grant the plaintiffs' requested declaratory relief for prudential reasons. Declarations as to whether the State had a duty to protect the atmosphere as part of the public trust and whether the State had breached that duty would "not tell the State what it need[ed] to do in order to satisfy its . . . duties[.]" *Kanuk*, 335 P.3d at 1102. Importantly, that conclusion rested on this Court's prior finding that it could not determine the extent of the State's duty in the absence of an initial policy determination by the other branches. In other words, this Court only reached its analysis of prudential considerations in *Kanuk* as a result of first having declined, "on political question grounds, to determine precisely what th[e State's] obligations entail." *Id.* at 1101. For the reasons explained above, the political question doctrine is not implicated in this case. Since Alaska's courts can determine the State's obligations without implicating a political question, the second step of the *Kanuk* analysis – prudential consideration of whether declarations that Defendants have breached their constitutional duties would "settle the parties' controversy"– is not at issue. *Id.* at 1091.

Even were such an analysis of prudential considerations at issue with respect Plaintiffs' constitutional claims, the superior court erred in concluding that the requested

declarations of Plaintiffs' constitutional rights and Defendants' infringement thereof is not available "on prudential grounds for the same reasons stated in *Kanuk*." Exc. 261. While nominally purporting to engage in a prudential considerations inquiry, the superior court offered no prudential considerations analysis or explanation for its conclusion that:

> A declaratory judgment would not impact greenhouse gas emissions in Alaska, protect Plaintiffs from the alleged injuries, or compel the state to take certain action.

Exc. 261.

Instead of engaging in an analysis of whether Plaintiffs' requested declarations would settle the controversy under *Kanuk*, the superior court erroneously misconstrued Plaintiffs' numerous constitutional claims as a single claim, asserting without basis, and contrary to Plaintiffs' allegations and arguments, that "Plaintiffs allege that the judiciable claim in each of their seven prayers for declaratory relief is that the State violated their fundamental right to a stable climate system." Exc. 256. Contrary to the superior courts' assertion, Plaintiffs' never so argued. The substantive due process right to a "stable climate that sustains human life and liberties" forms only one of Plaintiffs' numerous, independent constitutional claims. Exc. 187, 230, 231, 241 ¶¶ 120, 248, 252, Prayer for Relief ¶¶ 1, 3. Plaintiffs' also asserted violations of other rights protected under Alaska's due process clause, including their rights to life, property, bodily integrity, personal security, as well as their rights to provide for their basic human needs, safely raise families, to learn and practice their religious and spiritual beliefs and native cultural traditions and practices, and to live lives with sufficient access to clean air, water, shelter, and food. Exc. 229-231, 241 ¶¶ 247-252, Prayer for Relief ¶¶ 1, 3. Plaintiffs' also

asserted violations of their equal protection and public trust rights, and asserted violations of their due process rights under a substantive due process state-created danger theory. Exc. 231-244 ¶¶ 253-277, Prayer for Relief ¶¶ 1-6, 8. Plaintiffs' requested declaratory relief with respect to each of these claims, none of which turn on whether Alaska's due process clause protects the right to a stable climate system. Exc. 241-244, Prayer for Relief ¶¶ 1-6, 8. Defendants never challenged the merits of any of these claims nor the existence of any of the rights asserted.

Having misconstrued Plaintiffs' claims as presenting a single claim to a right to a stable climate system, the superior court erroneously reached consideration of whether Alaska's Constitution protects such a right – a merits issue that neither party briefed and which does not bear on the *Kanuk* prudential considerations analysis.[16] Notwithstanding the superior court's erroneous consideration of the issue, whether Alaska's Constitution affords a due process right to a stable climate is not before this Court because Defendants did not move to dismiss on that basis.[17] Further, contrary to the superior court's mistaken

[16] Notwithstanding the superior court's clear misinterpretation of Plaintiffs' arguments out of the context for which they were presented, Exc. 256-261, Plaintiffs never briefed the issue of whether Alaska's constitution protects a right to a stable climate system and only cited *Juliana v. United States* for purposes of the political question analysis. Exc. 128-131 (citing to *Juliana* in support of political question arguments only); *see also* Section V.B.4, *supra* (same arguments).

[17] Defendants never disputed that Alaska's constitution affords a right to a stable climate system, and consequently, Plaintiffs were never an afforded an opportunity to brief the issue, which turns on whether the asserted right is "within the intention and spirit of our local constitutional language" or is "necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Breese*, 501 P.2d at 169 n.43 (citation and quotation omitted). Consequently, while the superior court's error in *reaching* this issue is within the scope of this appeal, the question of whether Alaska's

reasoning, whether Alaska's constitution affords such a right does not speak to the *Kanuk* prudential consideration analysis of whether a declaration of the infringement of that right, if recognized, would "clarify and settle legal relations" or "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Kanuk*, 335 P.3d at 1101 (citation and quotations omitted). The superior court erred in considering the issue and basing its prudential consideration analysis thereon.

The superior courts' erroneous prudential considerations analysis aside, even were a prudential considerations analysis applicable, proper application demonstrates that, 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 *Kanuk,* prudential considerations would not bar Plaintiffs' requested declaratory relief. "[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. Nov. 2018 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

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due process clause encompasses a right to a stable climate system is not before this Court. In any case, the superior court neither conducted the requisite analysis under *Breese* nor concluded one way or another whether Alaska's constitution encompasses the asserted right. It noted only that neither the Alaska nor the United States Supreme Court has yet recognized the right. However, under *Breese* Alaska's courts are "under a duty[] to develop additional constitutional rights and privileges under our Alaska constitution . . . ." *Id.*

citizens to the greatest extent possible." *State v. ACLU of Alaska*, 204 P.3d 364, 375 (Alaska 2009) (Carpeneti, J., dissenting).

Further, 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 unavailable, the claim should not be dismissed as long as some relief might be available on the basis of the alleged facts." *Adkins*, 204 P.3d at 1033. Plaintiffs requested that the superior court "[a]ward such other and further relief as the Court deems just and equitable." Exc. 245, Prayer for Relief ¶ 13.

### D. The Superior Court Erred by Determining that Defendants Denial of Plaintiffs' Petition Was Not Arbitrary and by Not Addressing Whether It Violated Plaintiffs' Constitutional Rights

Plaintiffs' took heed of this Court's statements in *Kanuk* that the rate at which Alaska must reduce its GHG emissions was not for judicial determination "in the first instance." 335 P.3d at 1098. Following that instruction, Plaintiffs petitioned Defendants Alaska Department of Environmental Conservation ("DEC") and DEC's Commissioner to adopt a rule to reduce Alaska's emissions at rates necessary to safeguard their fundamental constitutional rights. Exc. 178 ¶ 93; *see generally* Exc. 1-114. Plaintiffs' proposed a regulation that would require reduction of Alaska's GHG emissions at rates consistent with global reductions necessary to avert catastrophic climate change. Exc. 2-6; *see generally* Exc.1-114. In their Petition, Plaintiffs set forth clear legal authority demonstrating DEC's constitutional duties and constitutional and statutory authority to adopt the proposed regulation, as well as evidence from hundreds of credible and authoritative peer-reviewed scientific sources demonstrating the need for the proposed

regulation in light of the urgent threat that Defendants' ongoing systemic actions in exacerbating climate change pose to their health, wellbeing, and futures and to the ecological and economic survival of the State Alaska. Exc. 1-114. Plaintiffs explained that by its systemic affirmative actions in causing dangerous levels of GHG emissions, the State is violating Plaintiffs' fundamental constitutional rights. Exc. 4-5. Confirming their commitment to, consistent with, and in furtherance of the State's Energy Policy, Defendants denied Plaintiffs' Petition, citing a number of alleged justifications, Exc. 140-43, thereby choosing to persist in their ongoing implementation of the State's Energy Policy, with their consequent GHG emissions, and the ongoing infringement of Plaintiffs' constitutional rights. Exc. 178, 240-41 ¶ 94, 278-82.

In Count V of their amended complaint, Plaintiffs allege that Defendants' denial of the Petition, in the context of their continuing systemic policy-driven affirmative acts in causing and contributing to Alaska's climate crisis, violates Plaintiffs' constitutional substantive due process, equal protection, and public trust rights. Exc. 240-41 ¶¶ 278-82. In dismissing Count V, the superior court failed to apply the correct standards of review applicable to the substantive constitutional rights Plaintiffs' assert as having been infringed through denial of their Petition. Instead, the superior court applied an unconstitutionally narrow and deferential standard of review, inquiring only whether the denial was arbitrary on its face and "complied with the statutory requirements" of AS 44.62.230. Exc. 261-62. That standard addresses the minimal *procedural* requirements an agency must meet in responding to a petition: it must "within 30 days, deny the petition in writing or schedule the matter for public hearing." AS § 44.62.230; *Johns v.*

*Commercial Fisheries Entry Comm'n*, 699 P.2d 334, 338-39 (Alaska 1985) ("*Johns I*") (looking to compliance with statute and arbitrariness standard with respect to agency's refusal to grant hearing on petition). The standard applied by the superior court does not speak to whether a petition denial violates constitutionally protected *substantive* due process, equal protection, and public trust rights, which require courts to look beyond the face of an agency's denial and apply applicable substantive standards of review.

Even where review of agency action is not specifically statutorily authorized, or is statutorily circumscribed, this Court's precedent is abundantly clear that such limitations do not relieve the judiciary of its duty to "review the propriety of the action to the extent that constitutional standards may require." *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971). This Court noted in *K&L Distributors, Inc.* that:

> 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 this state in the exercise of their rights if we were unable to review the actions of adminsitrative agencies simply because the legislature chose to exempt their decisions from judicial review.

*Id*.

Defendants argued below that, under *K & L Distributors* and *Johns I*, the only review available for denial of a petition for rulemaking is for compliance with *procedural* due process; they contended that Alaska's courts have no power to assess the denial of a rulemaking petition for compliance with Alaska's guarantee of *substantive* constitutional rights. Exc. 265-66, 268-69. However, neither *K & L Distributors* nor *Johns I* announced such an abdication of judicial duty. In fact, both cases stand for the opposite proposition:

Alaska's Courts have a duty to review agency actions for alleged infringements of substantive constitutional rights. As this Court clearly stated without distinction between procedural and substantive constitutional claims in *K & L Distributors*, Alaska's courts must "review the propriety of the action to the extent that constitutional standards may require." 486 P.2d at 357.

Indeed, in both *K & L Distributors* and *Johns I*, separate from its limited, deferential review of *procedural* fairness claims, this Court reached the merits of the plaintiffs' *substantive* constitutional claims under separately applicable substantive standards, but only on the merits after development of a factual record. For instance, after dismissing Johns' procedural claim regarding the denial of a hearing on his petition, *Johns I*, 699 P.2d at 339-40, in a subsequent appeal, this Court addressed the substantive constitutionality of the agency action to which Johns' petition was directed under a separately applicable substantive standard. *Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1263-64 (Alaska 1988) ("*Johns II*"). Similarly, in *K & L Distributors, Inc.*, after performing a limited and deferential review of the *procedural* fairness of an agency hearing, this Court addressed whether the agency's determination at the hearing violated *substantive* equal protection and the commerce clause on review of a summary judgment record. 486 P.2d at 358-59. Plaintiffs do not contend, as in *Johns I*, that Defendants' refusal to grant a hearing on the Petition failed to afford proper procedure. 699 P.2d at 338-40. Rather, they contend that Defendants' affirmative refusal to reduce GHG emissions resulting from their continued implementation of the State's Energy Policy violates Plaintiffs' substantive constitutional due process, equal protection,

and public trust rights. Exc. 240-41 ¶¶ 278-282. As such, the limited, deferential standard of review of the procedural claims in *K & L Distributors* and *Johns I* is inapplicable to the substantive constitutional claims Plaintiffs assert in Count V. To rule otherwise would contravene the "constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska." *K & L Distributors, Inc.*, 486 P.2d at 357.

The correct constitutional standards applicable to Plaintiffs' Count V claims are well-established. For instance, Plaintiffs' claims of infringements to their fundamental substantive due process and equal protection rights require consideration of whether Defendants' affirmative refusal to reduce GHG emissions resulting from the State's Energy Policy is, under the strict scrutiny standard, narrowly tailored to achieve a compelling government interest. *Breese*, 501 P.2d at 170-71.

The superior court's failure to apply the correct substantive constitutional standards to Defendants' denial of the Petition is highlighted and compounded by its failure to accept Plaintiffs' well-pleaded allegations as true, to view the facts in the light most favorable to Plaintiffs, and to draw all reasonable inferences in Plaintiffs' favor. *Kanuk*, 335 P.3d at 1092. When determining whether agency action infringes fundamental substantive constitutional rights, courts cannot blindly defer to an agency's facial justifications for its actions. *Breese*, 501 P.2d at 162 n. 2 (approving "trial de novo rather than as an appellate tribunal reviewing a determination of an administrative body" where the proceeding was "in the nature of an action [to] establish plaintiff's [substantive] rights under the constitution."). Contrary to the superior court's determination, Plaintiffs' clearly alleged facts more than sufficient at this stage to

demonstrate how the denial of their Petition violates their substantive constitutional rights. Exc. 149-177 ¶¶ 14-91 (Plaintiffs are experiencing and threatened by profound climate dangers); Exc. 178-186 ¶¶ 96-116 (Defendants' authority over Alaska's GHG emissions); Exc. 191-214 ¶¶ 136-204 (current and threatened climate impacts in Alaska and science of GHG causation of climate change); Exc. 214-218 ¶¶ 205-218 (Defendants' longstanding knowledge of climate danger); Exc. 218-221 ¶¶ 219-233 (Alaska's substantial GHG emissions); Exc. 147-48, 221-227 ¶¶ 7, 235-39 (Defendants' aggregate systemic acts pursuant to the State's Energy Policy cause Alaska's substantial GHG emissions); Exc. 240-41 ¶¶ 278-282 (by and through Defendants denial of the Petition, Defendants continue to implement the State's Energy Policy).

Assuming the truth of Plaintiffs' allegations, including the economic and social effects of climate change in Alaska, *see, e.g.* Exc. 213-14 ¶ 203, none of Defendants' alleged justifications for their denial can withstand constitutional scrutiny. Further, the propriety of Defendants alleged justifications are questions for the merits, not a motion to dismiss. Consideration of those justifications requires the court to decide whether, *in fact*, Defendants' asserted reasons for affirmatively refusing to reduce GHG emissions resulting from the State's Energy Policy are the means least restrictive to Plaintiffs' rights to pursue interests more compelling than the preservation of Plaintiffs' health, safety, and futures. *Breese*, 501 P.2d at 170-71. Of course, assuming the truth of Plaintiffs' well-pleaded allegations, those justifications plainly fail.

Even were consideration of those justifications proper on a motion to dismiss, with respect to Defendant's assertion that Plaintiffs did not propose a "regulation," Exc. 141,

Defendants are clearly mistaken. Each of the criteria for defining a regulation under the APA is indisputably satisfied by the rule Plaintiffs proposed. Exc. Petition at 1-6. "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 Tribal Council*, 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 Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 396 (Alaska 1990) (citing AS § 44.62.640).

Defendants never disputed that Plaintiffs' proposed rule satisfies the first indicium required of a "regulation" under *Nondalton*, 268 P.3d at 300-01. As to the second indicium, 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 cap and annually reduce Alaska's GHG emissions. *Gilbert*, 803 P.2d at 396 (internal quotation and citation omitted); Exc. 4. 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). Accordingly, the rule would result in increasing denials of initial and renewal applications for leases and permits and would, by 2050, require all state-permitted GHG-emitting activities to cease

or eliminate their emissions. Exc. 4. This indisputably affects the rights of third parties to engage in GHG emissions-generating activities. 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 GHG emissions-generating activities. Plaintiffs' clearly proposed a "regulation."

Further, irrespective of whether Plaintiffs' proposed a "regulation," Defendants' denial of the Petition violates Plaintiffs' constitutional rights. Even if the proposed rule is not a "regulation," like each of Defendants' other alleged justifications, that justification cannot withstand constitutional muster under the rigorous fact-based inquiry required under *Breese*, 501 P.2d at 162 n. 2, 170-71. Regardless of the exact form or language of the Petition, by denying the substance of the Petition, Defendants have affirmatively refused to reduce GHG emissions resulting from their affirmative acts in implementing the State's Energy Policy. That decision violates Plaintiffs' rights regardless of whether the Petition proposed a "regulation."

## VI. CONCLUSION

This 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*. What these youth bring to this Court, in response to the Court's ruling in *Kanuk* and the ongoing infringements

perpetuated by Defendants at this moment of existential crisis, are clear claims that the State, and its political institutions, have instituted and continue to implement an Energy that is 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 a policy 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. This Court did not hold otherwise in *Kanuk*. To the contrary, this case presents precisely the claims and factual circumstances envisioned in *Kanuk* as presenting a justiciable case within the context of Alaska's actions relative to the climate crisis. 335 P.3d at 1103. To rule otherwise leaves the children of Alaska without recourse.

Plaintiffs' allegations, which must be taken as true, unquestionably suffice at this stage to demonstrate that the State's Energy Policy is causing catastrophic harm to Alaska's climate system and endangering Plaintiffs' lives and futures in violation of their rights under Alaska's Constitution. Under *Planned Parenthood of Alaska, Inc.*, these 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." 28 P.3d at 914. The staggering and profound harms suffered by and threatened to these young Plaintiffs are particularly salient to the questions before this Court. As this Court stated in *Abood v. League of Women Voters*, determining justiciability requires the Court to consider the actual hardship to the litigants of denying them relief. 743 P.2d at 336 (citation omitted).

For the foregoing reasons, Plaintiffs' respectfully request that this Court reverse the superior court's dismissal of their claims.

DATED this 26th day of March 2019 at Eagle River, Alaska.

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