IN THE SUPREME COURT OF THE STATE OF ALASKA

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' REPLY BRIEF

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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. SUMMARY OF ARGUMENT

Appellees (the "State" or "Defendants") do not dispute that the superior court disregarded Appellants' ("Plaintiffs") allegations regarding the existence, content, and profoundly dangerous effects of the State's Energy Policy, as stated in AS 44.99.115(2)(B). St. Br. 45-46. Defendants' concession of the justiciability of a constitutional challenge to a policy embedded in statute, Tr. 10, 48; State's Brief ("St. Br.") 17, should therefore be the end of the matter. Plaintiffs' allegations demonstrate that through their affirmative actions implementing the State's Energy Policy, Defendants are knowingly contributing to the destruction of Alaska's climate system, unjustifiably infringing the constitutional rights of these young Plaintiffs. Appellants' Opening Brief ("Op. Br.") 9-15. The court's failure to accept those allegations as true was instrumental to its erroneous conclusion that *Kanuk v. State, Department of Natural Resources*[1] requires dismissal of Plaintiffs' claims and therefor constitutes reversible error.

Relying on inapposite cases,[2] Defendants ask this Court to contravene clear precedent, including *Kanuk*, and forever place the State's actions implementing its

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

[2] Defendants fail to disclose the unpublished nature of many of their cited cases in contravention of Alaska Rule of Appellate Procedure 214(d), that several are on appeal, relevant or accurate subsequent case history, in one instance that a case was directly reversed on the very point for which Defendants cite it, and in another that it was abrogated on the point cited. *See* St. Br. 22, 23, 25, 27, 28, 30, 31 (*citing Alec. L. v. McCarthy*, 561 F.App'x 7 (D.C. Cir. 2014) (unpublished); *Aji P. v. Washington*, No. 18-2-04448, 2018 WL 3978310 (Wash. Super. Aug. 14, 2018) (unpublished), *appeal noted*, No. 93616-9-A (Wash. September 18, 2018); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (unpublished); *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229 (Or. Cir. May 11, 2015) (unpublished),

Energy Policy beyond this Court's duty to safeguard fundamental individual rights. Plaintiffs' claims are squarely within judicial authority for several reasons, each of which individually support, and together conclusively establish, the justiciability of this case, as compelled by *Kanuk*.

First, Alaska's courts have a duty to decide the merits of constitutional claims. The narrow exception for claims inextricably implicating matters solely dedicated to the political branches—primarily issues such as foreign and military affairs—has no bearing on Plaintiffs' claims. Second, the facts and claims presented here are fundamentally distinct from those in *Kanuk*, which this Court found nonjusticiable for lack of the very "initial policy determination" Plaintiffs challenge here: the State's Energy Policy.[3] Because no political question is implicated by Plaintiffs' claims, the superior court erred in reaching prudential consideration of Plaintiffs' requested declaratory relief. Even were such consideration proper, a reasoned analysis demonstrates that declaratory relief would be appropriate. At minimum, the superior court could declare the State's Energy Policy unconstitutional and invalidate AS 44.99.115(2)(B). Finally, assuming the truth of

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aff'd on other grounds sub nom Chernaik v. Brown, 295 Or. App. 584 (2019), *cert. granted*, No. S066564 (Or. May 23, 2019); *Colegrove v. Green*, 328 U.S. 549 (1946), *abrogated by Evenwel v. Abbot*, 136 S.Ct. 1120 (2016); *Forslund v. State*, No. A17-0033, 2017 WL 3864082 (Minn. Ct. App. Sept. 5, 2017) (unpublished), *political question ruling reversed*, 924 N.W.2d 25, 31 (2019); *O'Connor v. United States*, 72 F.App'x 768 (10th Cir. 2003) (unpublished); *Robinson v. Salazar*, 885 F.Supp.2d 1002 (E.D. Cal. 2012), *aff'd on grounds of waiver sub nom Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2010); *Svitak v. Washington*, 178 Wash.App. 1020 (2013) (unpublished). As the Ninth Circuit recently noted, accurate citation of cases is important to the duty of candor to the court. *See Swinomish Indian Tribal Community v. BNSF Railway Company*, No. 18-35704, 2019 WL 3074050 (9th Cir. May 22, 2019).

[3] 335 P.3d at 1097-99.

Plaintiffs' allegations and applying the correct standard of review demonstrates the superior court's error in dismissing Plaintiffs' challenge to the denial of their rulemaking petition. Contrary to Defendants' arguments, the justiciability of Plaintiffs' claims is compelled, rather than foreclosed by *Kanuk*:

> 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.[4]

II. ARGUMENT

A. Plaintiffs' Constitutional Claims Do Not Present a Political Question

1. It is the Courts' Duty to Decide Constitutional Individual Rights

Alaska's courts have a constitutional duty to decide the merits of constitutional claims such as those presented here.[5] The political question doctrine is a "narrow exception to that rule"[6] excluding review *only* when one of the formulations announced in *Baker v. Carr* is "inextricable from the case[.]"[7] The United States Supreme Court has long distinguished claimed infringements of individual fundamental rights, like Plaintiffs' claims, from those implicating political questions,[8] as has this Court.[9]

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[4] 335 P.3d. at 1099 (citation omitted).

[5] *Id.*; *State, Dept. of Health and Human Servs. v. Planned Parenthood of Alaska, Inc.,* 28 P.3d 904, 913-14 (Alaska 2001) (Courts cannot defer to other branches under separation of powers when "infringement of a constitutional right results."); *Abood v. Gorsuch*, 703 P.2d 1158, 1162 (Alaska 1985) (A constitutional question is one "to which the nonjusticiability doctrine does not apply.").

[6] *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

[7] 369 U.S. 186, 217 (1962).

[8] *See, e.g., Marbury v. Madison*, 5 U.S. 137, 165-66 (1803); *Baker*, 369 U.S. at 227 (quoting *Pacific States Tel. & T. Co. v. Oregon*, 223 U.S. 118, 150-51 (1912); *see also*

In keeping with this distinction between political and individual rights, and because the *Baker* factors are "listed in descending order of both importance and certainty,"[10] nonjusticiable political questions arise predominantly in matters of foreign and military affairs,[11] the internal workings of legislative bodies,[12] and other areas where, under the first *Baker* factor, there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[13] Even in these areas, nonjusticiability is the exception, not the rule, due to the "impossibility of resolution by any semantic cataloging."[14] Rarer still, are claims rendered nonjusticiable under the second *Baker* factor for lack of "judicially discoverable and manageable standards."[15]

Each of the cases Defendants cite as examples of "constitutional claims implicat[ing] nonjusticiable political questions," St. Br. 25 n. 53, are inapplicable and

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Erwin Chemerinsky, *Federal Jurisdiction*, § 2.6 n.7 (5th ed. 2007) ("If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question.") (citation omitted). For instance, claims under the U.S. Constitution's Guaranty Clause, which secures rights to states rather than individuals, present nonjusticiable political questions. U.S. Const. Art. IV, § 4; *Baker*, 369 U.S. at 224.

[9] *Abood v. League of Women Voters*, 743 P.2d 333, 340 (Alaska 1987) ("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.").

[10] *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (citation omitted).

[11] *Baker*, 369 U.S. at 211; *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973).

[12] *Malone v. Meekins*, 650 P.2d 351, 357 (Alaska 1982); *Abood v. Gorsuch*, 703 P.2d 1158, 1163 (Alaska 1985).

[13] *Baker*, 369 U.S. at 217.

[14] *Id.* at 217; *id.* at 211 ("It is error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance.").

[15] *Id.* at 217; *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019) (partisan gerrymandering).

readily distinguishable. Each case involved issues that are unequivocally textually committed to other branches,[16] a lack of judicially discoverable and manageable standards,[17] or is not good law.[18] Defendants proffer no argument, nor could they, that there is a textually demonstrable and exclusive constitutional commitment of energy and climate issues to the political branches nor that the well-established standards governing Plaintiffs' due process, equal protection, and public trust claims are neither judicially discoverable nor manageable.[19] Indeed, the superior court did not even mention the first two *Baker* factors; it erroneously concluded that the justiciability of Plaintiffs' claims is foreclosed by *Kanuk* solely under the third *Baker* factor. Exc. 255-56.

2. This Case Is Fundamentally Distinguishable from *Kanuk*

[16] *Gilligan*, 413 U.S. at 6 (military affairs); *Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (foreign and military affairs); *Edgington v. City of Overland Park*, 815 P.2d 1116, 1124 (Kansas Ct. App. 1991) (internal rules of legislative bodies); *Salazar*, 885 F.Supp.2d at 1028, 1030 (recognizing textual commitment of Indian tribe recognition and noting the "plaintiffs' claims are not constitutional challenges"); *Pellegrino v. O'Neill*, 193 Conn. 670, 681 (1984) (textual commitment of determination of number of judges).

[17] *Forslund*, 2017 WL 3864082, *political question ruling reversed*, 924 N.W.2d 25, 31 (right to "adequate" education); *Nebraska Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W. 2d 164, 536 (Nebraska 2007) (same); *Oklahoma Educ. Ass'n v. State of Oklahoma*, 158 P.3d 1058, 1061 (Oklahoma 2007) (same).

[18] *Colegrove*, 328 U.S. 549, *abrogated by Evenwel*, 136 S.Ct. 1120, 1123 (noting *Colegrove*'s ruling left constitutional violations unchecked for decades until *Baker*).

[19] *Juliana v. United States*, the only case to have engaged in a thorough application of all six *Baker* factors to claims similar to those presented here, found the claims "squarely within the purview of the judiciary." 217 F.Supp.3d 1224, 1235-42 (D.Or. 2016). Currently on appeal, the federal government is notably *not* contending *Juliana* is nonjusticiable under the political question doctrine. No. 18-36802 (9th Cir.)

In the context of the *Kanuk* plaintiffs' challenge to the State's inaction on climate change, this Court ruled that it could not determine the State's obligations to reduce greenhouse gas emissions ("GHGs") "in the first instance."[20] However, in deciding *Kanuk*, this Court contemplated a climate case "alleg[ing] claims for affirmative relief . . . that are justiciable under the political question doctrine. . . ."[21] This is precisely that case. In contrast to *Kanuk*'s single *inaction*-based public trust challenge to the State's failure to "protect the atmosphere,"[22] Plaintiffs' public trust and other constitutional claims—including due process, state-created danger, and equal protection claims not asserted in *Kanuk*—are each premised on Defendants' causation and contribution to climate change through their *affirmative* systemic implementation of the State's Energy Policy. Op. Br. 3, 5, 21-22. A "discriminating inquiry into the precise facts and posture of the particular case"[23] shows these distinctions demonstrate justiciability here.

Ordinarily, the political question analysis focuses on the claims presented, not the relief requested.[24] Because "the nature of the . . . remedy is to be determined by the

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[20] 335 P.3d at 1098.

[21] *Id.* at 1103.

[22] *Id.* at 1090.

[23] *Baker*, 369 U.S. at 217.

[24] *Id.* at 198 ("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 trial."); *id.* at 227-28 (discussing *Pacific States Tel. & T. Co.*, 223 U.S. 118, as conducting claim-by-claim analysis); *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968) ("[S]eparation of powers problems related to improper judicial interference in areas committed to other branches . . . . arise, if at all, only from the substantive issues the

nature and scope of the constitutional violation"[25] a focus on relief prior to determination of the merits would undermine the judicial duty to serve as a proportional check on constitutional violations of the other branches.[26] Aside from *Kanuk*, Plaintiffs are aware of no case focusing on the relief requested and finding a nonjusticiable political question, except where the *subject matter of the* ***claims*** was textually committed to another branch under the first *Baker* factor.[27] No such textual commitment is involved here.

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individual seeks to have adjudicated."); *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 915 ("It is legally indisputable that a trial court order requiring state compliance with constitutional standards does not violate the separation of powers doctrine."); *Kanuk*, 335 P.3d at 1092 ("Even if the relief demanded is unavailable, the claim should not be dismissed as long as some relief might be available based on the basis of the alleged facts.").

[25] *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citation omitted).

[26] *See Comer v. Murphy Oil USA*, 585 F.3d 855, 877 n. 17 (5th Cir. 2009) (vacated for rehearing *en banc* which never occurred) ("Even if a particular case involves a claim for injunctive or other equitable relief that the court finds to be impracticable, a court sitting in equity has the discretion to limit or mold relief for reasons of practicality. There is no need or authority to invoke the political question doctrine for such reasons.").

[27] *Gilligan*, 413 U.S. at 10. Defendants' cases, each non-precedential, St. Br. 20 n. 39, confirm that courts that have looked to requested relief in the political question inquiry have done so, like *Gilligan*, in assessing *claims* under the first *Baker* factor. The two outliers, *Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp. 676 (E.D.La. 2006), and *Gordon v. Texas*, 153 F.3d 190 (5th Cir. 1998), which found no political questions, erroneously looked to the requested relief without regard to any *Baker* factor and assert the mistaken supposition that damages are less intrusive than injunctive relief. *See Bell v. Hood*, 327 U.S. 678, 684 n. 4 (1946) ("It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1384 (2015) ("[T]he ability to sue to enjoin unconstitutional actions by state and federal officials . . . reflects a long history of judicial review of illegal executive action, tracing back to England."); *Ziglar v. Abassi*, 137 S.Ct. 1843, 1851-52, 1862 (2017) (rejecting damages action stating "[t]o address these kinds of [large-scale] policy decisions, detainees may seek injunctive relief"); *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 915 ("It is legally

The distinction between challenges to affirmative action and inaction explains *Kanuk*'s anomalous focus on the relief requested under the third *Baker,* which is only applicable "in the absence of a yet-unmade policy determination."[28] *Kanuk*'s challenge to the State's *failure to act* to protect the atmosphere—its failure to create and adopt protective polices—suggests the *absence* of prior applicable policy determinations by the political branches. Any determination of and order to enforce the State's obligations to reduce its emissions thus would have prevented the political branches from making those determinations "in the first instance"—the determining factor of nonjusticiability in *Kanuk.*[29] That consideration is not implicated here because the very focus of Plaintiffs' challenge is the constitutionality of Defendants' *affirmative actions* in implementing determinations that have *already been made* and codified in the State's Energy Policy, as stated in AS 44.99.115(2)B). Op. Br. 9-10, 21-22.[30] The superior court's failure to accept

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indisputable that a trial court order requiring state compliance with constitutional standards does not violate the separation of powers doctrine.").

[28] *Zivotovsky*, 566 U.S. at 204 (Sotomayor, J. concurring).

[29] *Kanuk*, 335 P.3d at 1098. Plaintiffs never claimed the action/inaction distinction is *always* dispositive of justiciability, but rather that it 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.'" Op. Br. 22 n. 10; *contra* St. Br. 22 n. 42 (citing nine cases ruled nonjusticiable on the basis of a textual commitment under the first *Baker* factor; one under the second, *Aji P.*, 2018 WL 3978310, which is on appeal, *see* note 2, *supra*; and did not even conduct a *Baker* analysis, and no cases implicating the third *Baker* factor).

[30] A proper focus on claims demonstrates that the negative constitutional rights Plaintiffs assert contrast with the positive right *Kanuk* asserted*,* further highlighting the error of Defendants' equation of action with inaction, St. Br. 23, and the importance of the distinction in distinguishing this case from *Kanuk*. In most instances substantive constitutional rights only "forbid[] the State itself to deprive individuals" of protected

as true the allegations of the existence, nature, and effect of the State's Energy Policy—which failure Defendants do not dispute—was critical to its holding that "granting Plaintiffs' injunctive relief would in essence create a policy where none now exists," thus, erroneously, implicating the same concerns as in *Kanuk*. Exc. 255. Because Plaintiffs challenge Defendants' affirmative implementation of "initial policy determinations" that have already been made, the facts and claims presented here are fundamentally distinct from *Kanuk*. The superior court committed reversible error in disregarding Plaintiffs' allegations and ruling otherwise.

Indeed, Defendants concede the justiciability of challenges to the constitutionality of a statute as well as its implementation. Tr. 10, 48; St. Br. 17. That is precisely the challenge presented here: Plaintiffs seek to determine the constitutionality of Defendants' affirmative actions implementing the State's Energy Policy, as stated in AS 44.99.115(2)(B).[31] Defendants' concession should end of the inquiry.

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interests rather than "imposing affirmative obligation[s]" to "guaranty certain minimal levels of safety and security[.]" *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195 (1989); *see also Kanuk*, 335 P.3d at 1102 ("[O]ur past application of public trust principles has been as a restraint on the State[]. . . .").

[31] Plaintiffs do not challenge the State's Energy Policy "in the abstract." *Contra,* St. Br. 18. Indeed, Defendants' concede that Plaintiffs "assert[] that the State's ***implementation*** of its . . . Energy Policy endanger[s] their 'life, liberty, and property'" and other rights. St. Br. 5 (emphasis added); *id.* at 19 ("[Plaintiffs] allege[] the state has taken affirmative action in this case (by 'authoriz[ing], permitting, encourage[ing], and facilitat[ing] . . . activities resulting in dangerous levels of GHG emissions.") (*quoting* Exc. 221-22); *see generally* Exc. 147-48, 221-27. Defendants' cases, , regarding the ability to challenge policy, St. Br. 17 n. 32, 18 n. 34, each pertain to foreign and military issues textually committed to the other branches under the first *Baker* factor.

Even were the political question inquiry remedy-focused, the superior court could, at minimum, declare the State's Energy Policy unconstitutional, invalidating AS 44.99.115(2)(B). *See* Section II. B, *infra*. Plaintiffs' requested injunctive relief is also well within judicial power to correct systemic constitutional violations.[32] Neither form of relief necessitates policymaking because Plaintiffs "do not ask this Court to pinpoint the 'best' emissions level;" they ask this Court to declare the State's Energy Policy unconstitutional and order Defendants to develop a remedial plan "sufficient to redress their injuries."[33] Exc. 242-44. That question can be answered solely by reference to standards governing protection of constitutional rights and "without any consideration of competing interests."[34] Nor would the requested relief result in Defendants' asserted parade of horribles of judicial management. St. Br. 17. Consistent with precedential remedies in other constitutional cases, Plaintiffs request injunctive relief directing Defendants to prepare and implement a remedial plan of *their own devising*. Exc. 244.[35]

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[32] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("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.")

[33] *Juliana*, 217 F.Supp.3d at 1238-39

[34] *Id*. For instance, the standards governing Plaintiffs' due process and equal protection claims consider whether the State's Energy Policy "is narrowly tailored to promote a compelling government interest" and is "the least restrictive means available to vindicate that interest." *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 266 (Alaska 2004).

[35] *See, e.g.*, *Hills v. Gautreaux*, 425 U.S. 284 (1976) (approving structural remedy for systemic constitutional violations); *Brown v. Bd. of Ed.*, 349 U.S. 294 (1955) (directing entry of structural remedies to desegregate public schools); *Brown v. Plata*, 563 U.S. 493 (2011) (approving remedy to reduce statewide prison populations to judicially determined

Such an order would not "direct[] any individual agency to take any particular action."[36] While it is not the courts' role to set policy "in the first instance,"[37] where, as here, such policy determinations have already been made and their implementation is alleged to infringe constitutional rights, courts are duty-bound to confront the merits of such claims.[38] Orders remedying those violations do not make policy, they enforce constitutional rights.

3. Federal Climate Precedent Supports Justiciability

Federal case law involving claims premised on climate change further supports the justiciability of this case. No federal appellate court has found a single claim premised on climate change to implicate a nonjusticiable political question. Those that have confronted the issue have found such claims eminently justiciable. In *Connecticut v. American Electric Power Company, Inc.*, ("*AEP*"), the Second Circuit found that public nuisance climate claims seeking injunctive relief implicated none of the *Baker* factors.[39] On appeal, in dismissing on grounds of displacement, the U.S. Supreme Court explicitly

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constitutional safeguard of 137.5% 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.").

[36] *Juliana*, 217 F.Supp.3d at 1239.

[37] *Kanuk*, 335 P.3d at 1098.

[38] *Kanuk*, 335 P.3d. at 1099; *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913.

[39] 582 F.3d 309, 324-32 (2d Cir. 2009).

left the Second Circuit's political question ruling intact.[40] Likewise, in *Comer*, the Fifth Circuit found common law tort climate claims implicate no political question.[41] Given the judiciary's duty to serve as a check on the coordinate branches in the protection of fundamental rights, the justiciability of Plaintiffs' *constitutional claims* is all the more pronounced than in *AEP*[42] and *Comer*, which raised only common law *tort claims*.[43]

Juliana, the only case in any jurisdiction to have conducted a *Baker* analysis of constitutional claims and factual allegations on all fours with those presented here, further supports justiciability.[44] Like Plaintiffs here, the *Juliana* plaintiffs claim infringement of their due process, equal protection, and public trust rights resulting from their government's knowing contributions to climate change through its systemic implementation of its fossil fuel energy policy.[45] The *Juliana* court's thorough analysis of each of the *Baker* factors demonstrates that "[t]here is no need to step outside the core

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[40] *Amer. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011) (noting that *at least* four of the eight participating Justices found no political question issue).

[41] 585 F.3d 855, 880 (5th Cir. 2009) (vacated for rehearing *en banc* that never occurred).

[42] As explained in Plaintiffs' opening brief, the U.S. Supreme Court's determination in *AEP* that the judiciary's asserted lack of scientific expertise and resources warranted deferring to the other branches to prescribe the appropriate rate of emissions reductions "in the first instance" is inapplicable where those branches' subsequent policy determinations and implementing actions are alleged to violate constitutional rights. 564 U.S. at 427-29; Op. Br. 30 and n. 14. The statutory displacement analysis under which the Supreme Court considered those concerns does not apply to constitutional claims.

[43] *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 914 (finding constitutional claims "squarely within the authority of the court, not in spite of, but *because* of, the judiciary's role within our divided system of government").

[44] 217 F.Supp.3d at 1235-42.

[45] *Id.* at 1240.

role of the judiciary to decide this case."[46] The court noted that, as here, "this lawsuit asks this Court to consider whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary."[47] Because Alaska's Constitution affords *at least* as much protection as the federal constitutional liberties asserted in *Juliana*, and because the separation of powers principles upon which the political question doctrines rests exists "to better secure liberty," it is at least as clear here as in *Juliana* that Plaintiffs' claims implicate no nonjusticiable political question.[48]

Contrary to Defendants' assertion, Plaintiffs do not argue categorically, contrary to *Kanuk*, that "climate change-based claims are always justiciable," St. Br. 31, but only that *this one is*. Defendants' reliance on inapposite, distinguishable cases to argue that climate cases "can present nonjusticiable political questions," St. Br. 26-33, disregards the "discriminating inquiry into the precise facts and posture of th[is] particular case."[49] The majority of Defendants' cases presented single-count public trust claims premised on government *failure to act* on climate change—precisely the claims and facts in *Kanuk*.[50]

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[46] *Id.* at 1241.

[47] *Id.*

[48] *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

[49] *Baker*, 369 U.S. at 217.

[50] *Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M.Ct. App. 2015); *Alec L.*, 561 F.App'x 7 (unpublished); *Svitak*, 178 Wash.App. 1020 (unpublished); *Chernaik*, 2015 WL 12591229 (unpublished). The trial court in *Chernaik* noted that "[i]t is well within the court's established authority to strike down statutes when they are unconstitutional. Here, there is no allegation of unconstitutionality." *Id.* at *9 n. 14. On appeal, the court did not even discuss separation of powers. 295 Or. App. 584.

Many of Defendants' cases did not even discuss the political question doctrine at all.[51] Likewise, *Aji P.* did not analyze a single *Baker* factor and is currently on appeal.[52] *California v. General Motors Corp.*, an unpublished case asserting only common law public nuisance claims, relied heavily on the political question analysis of the district court from *AEP*,[53] which was later overturned on appeal.[54] The district court's analysis in *Native Village of Kivalina v. ExxonMobil Corp.*, which asserted only common law public nuisance climate claims,[55] likewise runs contrary to the political question analysis of *AEP*. Indeed, the Ninth Circuit did not even discuss the political question on appeal in *Kivalina*.[56] Thus, *Juliana* remains the only case in any jurisdiction to have conducted a *Baker* analysis of claims similar to those presented here, strongly supporting

[51] *Sanders-Reed*, 350 P.3d 1221; *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013); *Clean Air Council v. United States*, 362 F.Supp.3d 237 (E.D. Penn. 2019). The *Clean Air Council* court's statement that "the *Juliana* Court certainly contravened or ignored longstanding authority" did not relate to justiciability and mischaracterized the right to a stable climate system capable of sustaining human life recognized in *Juliana* as the "right to a healthy environment." *Id.* at 250-51. The *Alec L.* district court rejected the political question defense, *Alec L. v. Jackson*, 863 F.Supp.2d 11, 13 n. 5 (D.D.C. 2012), and the appellate court did not even address it. *Alec L.*, 561 F.App'x 7 (unpublished).

[52] 2018 WL 3978310, *appeal noted*, No. 93616-9-A (Wash. September 18, 2018).

[53] 2007 WL 2726871 (unpublished).

[54] *AEP*, 582 F.3d 309, 324-32 (2d Cir. 2009).

[55] 663 F.Supp.2d 863 (N.D.Cal. 2009).

[56] 696 F.3d 849 (9th Cir. 2012).

justiciability. As *Juliana* concluded, Plaintiffs' claims are "squarely within the purview of the judiciary."[57]

B. The Superior Court Erred In Reaching and Applying Prudential Considerations

In *Kanuk*, this Court only reached prudential consideration of declaratory relief as a result of having first declined "on political question grounds, to determine precisely what th[e State's] obligations entail" in the absence of a challenge to an initial policy determination.[58] Because reviewing the constitutionality of the State's statutorily codified Energy Policy presents no nonjusticiable political question, *see* Section II.A, *infra*, the superior court erred in reaching prudential consideration of declaratory relief. Even were such consideration proper, the court erred by not making the proper prudential considerations inquiry under *Kanuk* with respect to each, or indeed *any*, of Plaintiffs asserted constitutional rights as to whether a declaration thereof, or any other declaratory relief, could "clarify and settle [the] legal relations" or "afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."[59] Instead, the court conflated Plaintiffs' multiple constitutional claims, Op. Br. 5, 33-35, with a single claim to the right

[57] 217 F.Supp. 3d at 1241.

[58] 335 P.3d at 1102.

[59] *Kanuk*, 335 P.3d 1101.

to a stable climate and based its prudential analysis on its irrelevant conclusion that "no Alaska Supreme Court or U.S. Supreme Court has" found such right. Exc. 9-14.[60]

A proper demonstrates that, even in the absence of injunctive relief, declaratory relief would not implicate prudential considerations. "[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."[61] Because the claims and facts presented here, premised as they are on Defendants' *affirmative actions* in implementing the State's Energy Policy, are fundamentally distinct from those presented in *Kanuk*, *Kanuk*'s prudential analysis does not control. At minimum, the superior court could declare the State's Energy Policy unconstitutional and invalidate AS 44.99.115(2)(B).[62] Exc. 242-43. Such relief would clarify and settle the controversy and provide "clear guidance on the consequences of future conduct"[63] because it would tell Defendants' what they *cannot do*—affirmatively and systemically permit, authorize, and promote fossil fuel development, extraction, and combustion to destabilize the climate system and public trust resources these youth

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[60] The existence of such a right was neither contested by Defendants nor briefed by the parties and does not speak to the prudential considerations analysis. As such, whether Alaska's constitution protects such a right is not at issue in this appeal. Op. Br. 34. n. 17.

[61] Wright & Miller, Federal Practice and Procedure § 2759 (4th ed. Nov. 2018 Update); *Baker*, 369 U.S. at 236-37 (same).

[62] *See, e.g., Planned Parenthood of Alaska, Inc.*, 28 P.3d at 912, 914 ("The superior court had not only the power but the duty to strike the challenged restriction and any underlying legislation if it found them to violate constitutional rights."); *Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122 (Alaska 2016) (invalidating abortion restriction law); *Brown v. Bd.*, 349 U.S. 294 (invalidating school segregation policy).

[63] *Kanuk*, 335 P.3d at 1091.

Plaintiffs depend on for their lives and liberties. The declaratory prohibition of such affirmative government conduct is precisely the purpose to which constitutional rights are directed[64] and declaratory relief is the well-established and traditional first step in judicial correction of systemic constitutional abuses such as those presented here.[65] Such relief would further provide resolution because Plaintiffs and the courts are entitled to "assume" that "executive . . . officials would abide by an authoritative interpretation of the . . . constitution[]" by Alaska's courts.[66] The court could also "[a]ward such other and further relief as the Court deems just and equitable." Exc. 245.[67]

C. 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 ruling in *Kanuk* that the rate at which Alaska must reduce its GHG emissions was not for the courts to determine "in the first instance" and petitioned Defendants to reduce Alaska's emissions at rates necessary to safeguard

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[64] *DeShaney*, 489 U.S. at 195.

[65] Substantive Limits on Liability and Relief, 90 Harv. L. Rev. at 1248 ("The court's first step [in constitutional institutional reform cases] should be to issue a form of declaratory judgment, placing the defendants on notice of the constitutional violation and retaining jurisdiction to determine whether the defendants have remedied the violations on their own initiative."); *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 912, 914.

[66] *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Chernaik v. Kitzhaber*, 263 Or.App. 463, 475-79 (2014) (rejecting assertion that "bare declarations" of plaintiffs' rights would not explicitly require state to do anything because "courts and the public are entitled to assume that the state will act in accordance with its duties as those duties are announced by the court").

[67] *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).

their constitutional rights. Exc. 178 ¶ 93; Exc. 1-6. Count V of Plaintiffs' amended complaint alleges that in denying the Petition pursuant to, in furtherance of, and as part of a systemic pattern and practice of implementing the State's Energy Policy, Defendants affirmatively refused to reduce the dangerous emissions resulting therefrom in violation of Plaintiffs' constitutional substantive due process, equal protection, and public trust rights. Exc. 240-41.[68] Defendants concede the justiciability of this claim, St. Br. 18, yet still seek to place their conduct beyond the constitutional protection of fundamental substantive rights, attempting to limit review to compliance with procedural due process under a facial arbitrariness standard. Like their political question arguments, Defendants' position undermines the constitutional system of checks and balances.[69]

Contrary to Defendants' arguments, this Court has clearly stated, without distinction between procedural and substantive constitutional claims:

> It is the constitutionally vested duty of this court to ensure that administrative action complies with the laws of Alaska. . . . [I]f the administrative action is questioned as violating, for example, the due

[68] Contrary to Defendants' assertion, Plaintiffs do not assert a "fundamental right to rulemaking." St. Br. 42. Nor do they assert, as in *Johns,* that the failure to grant a hearing on their petition violated their procedural rights. 699 P.2d at 338. They assert that Defendants' denial of the Petition violates well-established fundamental substantive due process, equal protection, and public trust rights. Exc. 240-41.

[69] The presumption of reviewability of administrative conduct "controls unless rebutted by affirmative indication of legislative intent." *Johns v. Commercial Fisheries Entry Com'n*, 699 P.2d 334, 339 n. 5 (Alaska 1985) (citation omitted). Where the legislature "intends to preclude review of constitutional claims, its intent to do so must be clear"—a heightened showing required "to avoid the 'serious constitutional questions' that would arise if a . . . statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (2004) (citation omitted). Defendants point to no statutory language evidencing intent to preclude review of a petition denial for compliance with substantive constitutional rights.

> process clause, we will not hesitate to review the propriety of the action *to the extent that constitutional standards may require*.[70]

Unlike the narrow review for procedural due process in *Johns* and *K & L Distributors*, courts conducting review for compliance with substantive constitutional rights do not defer to an agency's facial justifications for its actions.[71] Instead, substantive due process and equal protection rights require consideration of whether Defendants' affirmative refusal to reduce emissions resulting from their implementation of the State's Energy Policy is, under the strict scrutiny standard, narrowly tailored to achieve a compelling government interest.[72] Assuming the truth of Plaintiffs' allegations (as required on a motion to dismiss) demonstrating the profoundly dangerous effects of the State's Energy Policy and Defendants' affirmative refusal to reduce resulting emissions, Op. Br. 40-41, each of Defendants' alleged justifications would plainly fail any standard of scrutiny.[73]

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[70] *K & L Distributors v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971) (emphasis added).

[71] *Breese v. Smith*, 501 P.2d 159,162 n. 2 (Alaska 1972) (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").

[72] *Id.* at 170-71; *Treacy*, 91 P.3d at 266. Indeed, in *K & L Distributors* and *Johns*, separate from its limited, deferential review of *procedural* claims, this Court reached the merits of the *substantive* constitutionality of the underlying agency decisions under separate substantive standards. *See* At. Br. 39.

[73] The Petition and allegations demonstrate that the State's emissions undermine the very economic and social interests Defendants assert in denying the Petition. Exc. 45-92, 191-214. Alleged difficulties of practical and fiscal restraints and administrative procedures do not justify the infringement of Plaintiffs' constitutional rights. *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 914 ("Many of the most heralded constitutional decisions of the past century have . . . effectively required state expenditures."). Defendants have vast authority to require emissions reductions. *See, e.g.*, AS 46.03.020(10); Exc. 215-16 ¶ 210*; see also* Op. Br. 15 (response to contention that Alaska's emissions are *de minimis*).

Plaintiffs clearly proposed a "regulation" because their rule would indisputably "affect[] the public" within the meaning of *State, Dep't of Nat. Res. v. Nondalton Tribal Council*.[74] Irrespective of any implementing leasing, licensing, permitting, or other agency action, the proposed rule mandates the cessation of all state-permitted GHG emitting activities by 2050, an effect—which Defendants do not dispute—that is similar to the fishery closure in *Kenai Peninsula Fisherman's Coop. Assoc., Inc. v. State.*[75] Further, assuming the truth of Plaintiffs' allegations, even if the proposed rule is not a "regulation," that justification cannot withstand constitutional muster. 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 implementation of the State's Energy Policy, violating Plaintiffs' constitutional rights.

III. CONCLUSION

While the political branches may decide, "in the first instance,"[76] that various considerations favor one policy approach over another, any chosen approach must be constitutional. Whether the State's Energy Policy violates Plaintiffs' constitutional rights is "squarely within the authority of the court, not in spite of but because of the judiciary's role within our divided system of government."[77] Plaintiffs respectfully request this Court reverse the judgment of the superior court and remand for trial.

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[74] *State, Dep't of Nat. Res. v. Nondalton Tribal Council*, 268 P.3d 293, 301(Alaska 2012).

[75] 628 P.2d 897, 905 (Alaska 1981); *Nondalton Tribal Council*, 268 P.3d at 304.

[76] *Kanuk*, 335 P.3d at 1098.

[77] *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 914.

DATED this 25th day of July 2019 at Eagle River, Alaska.

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