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IN THE SUPREME COURT OF THE STATE OF ALASKA

ESAU SINNOK, et al.)
)
Appellants,)
)
v.)
)
STATE OF ALASKA, et al.)
)
Appellees.) Supreme Court Case No. **S-17297**
)

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

**APPELLANTS' MOTION FOR LEAVE TO FILE REPLY BRIEF TO
SUPPLEMENTAL BRIEF OF APPELLEES**

Pursuant to Alaska Rule of Appellate Procedure 503(a), Appellants hereby request that they be allowed to submit the attached Supplemental Reply Brief.¹ On

¹ Counsel for Appellants conferred with counsel for Appellees regarding this Motion prior to filing. Appellees oppose this Motion.

March 3, 2020, a Justice of this Court granted Appellants' Motion for Leave to File Supplemental Brief and allowed Appellees an opportunity to file a responsive brief. Appellees filed their Supplemental Brief of Appellee State of Alaska on April 21, 2020. The proposed Supplemental Reply Brief for which Appellants seek leave for filing is necessary for the limited purpose of briefly addressing the arguments that Appellees raise for the first time in their Supplemental Brief, specifically the severability of AS 44.99.115(2)(B) and Appellees' contention that Appellants requested invalidation of AS 44.99.115(2)(B) for the first time at oral argument and in Appellants' Supplemental Brief. In order to provide Appellants with an opportunity to respond to newly raised arguments and to aid the Court in resolving the issues raised in this case, Appellants respectfully request that the Court allow them the opportunity to submit the attached Supplemental Reply Brief.

DATED this 28th day of April, 2020 at Eugene, Oregon.

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 STATE OF ALASKA, et al.,)
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 Appellees.) Supreme Ct. No. S-17297
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Trial Court Case No. 3AN-17-09910 CI

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

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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Filed in the Supreme Court of the State
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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. SUMMARY OF ARGUMENT

In their Supplemental Brief, Appellees (the “State” or “Defendants”) raise arguments for the first time in this litigation, newly contending that: (1) these young Appellees’ (“Plaintiffs”) requested relief does not encompass a request to declare AS 44.99.115(2)(B) unconstitutional; and (2) subsection (2)(B) is not severable from AS 44.99.115. Defendants’ first new argument is contradicted by the record, including Defendants’ own previous filings; Defendants’ second new argument is a matter for consideration only after a finding of subsection (2)(B)’s unconstitutionality. Neither argument bears on the political question issue before this Court, and, by failing to raise these new arguments previously, Defendants waived both.

II. ARGUMENT

A. Plaintiffs Request for Invalidation of AS 44.99.115(2)(B) Is Not New

As an initial matter, Defendants’ contention that Plaintiffs’ “request to declare AS 44.99.115(2)(B) is new” St. Supp. Br. 8, does not bear on the question at issue here: whether the political question doctrine bars Alaska’s Courts from determining the constitutionality of the State’s Energy Policy – the “initial policy determination” lacking in *Kanuk v. State, Department of Natural Resources*.¹ As explained in their Opening Brief, Plaintiffs challenge the State’s Energy Policy *both* as reflected in the State’s explicit declaration of policy to promote fossil fuels in AS 44.99.115(2)(B) and “through a clear pattern and practice of *de facto* implementation consistent” therewith, which

¹ 335 P.3d 1088, 1097 (Alaska 2014).

demonstrates the State’s policy even apart from its explicit declaration in AS 44.99.115(2)(B). Pl’s Op. Br. 9-13. Thus, a declaration that the State’s Energy Policy of promoting fossil fuels violates Plaintiffs’ rights would provide meaningful relief regardless of specific reference to AS 44.99.115(2)(B).

Moreover, the record clearly contradicts Defendants’ novel argument that Plaintiffs’ “request to declare AS 44.99.115(2)(B) is new.” St. Supp. Br. 8. Plaintiffs have consistently pleaded and argued their claims as encompassing a challenge to AS 44.99.115(2)(B), including a request for a declaration of unconstitutionality. The Amended Complaint specifically requests a declaration that Defendants have violated Plaintiffs’ constitutional rights “by and through their Energy Policy” Exc. 242 ¶¶ 4-6. In describing the challenged “Energy Policy” in the Amended Complaint, Plaintiffs explicitly identified the “Declaration of State Energy Policy” in AS 44.99.115(2)(B) to “promot[e] the development, transport” and use of fossil fuels “by Alaskans and for export.” Exc. 147-48 ¶ 7, 222 ¶ 237(a). The Amended Complaint demonstrates that this policy is the moving force guiding the actions through which Defendants systemically promote fossil fuels, causing Alaska’s substantial greenhouse gas emissions and the resulting endangerment of these young Plaintiffs. Exc. 223 ¶ 237(b) (AS 44.99.115 directs the governor to implement AS 44.99.115(2)(B)); Exc. 180 ¶ 100 (the governor has supervisory authority over and directs the activities of agency Defendants); 179-186 ¶¶ 96-116 (Defendants’ extensive authority over fossil fuel development, transportation, and combustion); Exc. 180-81 ¶ 103 (the governor uses his authority and directs agency Defendants to use their authority to permit, authorize, and promote fossil fuels); 223-25

¶¶ 237(b)-(p) (Defendants’ systemic permitting and promotion of fossil fuels); Exc. 191-201 ¶¶ 136-68 (science of causation of climate change through fossil fuel greenhouse gas emissions); Exc. 218-221 ¶¶ 219-233 (Alaska’s substantial fossil fuel greenhouse gas emissions); Exc. 201-14 ¶¶ 169-204 (Alaska’s already severe climate impacts); Exc. 149-177 ¶¶ 14-91 (Plaintiffs’ climate injuries). These allegations are to be presumed true, viewed in the light most favorable to Plaintiffs, and all reasonable inferences are to be drawn in Plaintiffs’ favor.²

In Docketing Statement A to Plaintiffs’ Notice of Appeal, Plaintiffs’ explicitly noted that the constitutionality of AS 44.99.115(2)(B) is at issue in this case. Likewise in the briefs, Plaintiffs consistently focused on the State’s Energy Policy reflected in AS 44.99.115(2)(B), Defendants systemic implementation thereof, and the duty of Alaska’s courts’ to declare the policy, its implementation, and the underlying legislation unconstitutional, should Plaintiffs’ claims succeed.³ As the record demonstrates, it is not Plaintiffs’ request for declaratory relief that is new, but rather Defendants’ unfounded and belated contention that Plaintiffs did not previously seek such relief.⁴

² *Kanuk*, 335 P.3d at 1092.

³ See Pl’s Op. Br. 6-8, 9-11, 17-19, 26-27, 44; Pl’s R. Br. 1, 2, 8-10, 16-17.

⁴ Defendants have waived the argument by raising it for the first time only in a supplemental brief on appeal. See *Katz v. Murphy*, 165 P.3d 649, 662 (Alaska 2007) (“We have consistently recognized that a party may not raise an issue for the first time on appeal and that cursory treatment of an issue amounts to a waiver.”); see also *Weiner v. Burr, Please & Kurtz, P.C.*, 221 P.3d 1, 6 n. 14 (Alaska 2009) (argument not raised in opening brief waived); *Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n. 3 (Alaska 1991) (waiver due to inadequate briefing).

Moreover, Defendants’ own previous arguments directly contradict their new position. Defendants now claim that Plaintiffs first requested a declaration of the unconstitutionality of AS 44.99.115(2)(B) at oral argument and in Plaintiffs’ Supplemental Brief, St. Supp. Br. 9, but only recently Defendants argued the opposite: that Plaintiffs’ Supplemental Brief “merely reiterates the issues already comprehensively briefed by the parties in this case.” St. Opp. to Mtn. for Leave to File Supp. Br. 3; *see id.* at 1, 3 n.9. In support of their prior, contradictory argument, Defendants even cited portions of the briefing wherein Plaintiffs explicitly noted that “[a]t minimum, the superior court could declare the State’s Energy Policy unconstitutional and invalidate AS 44.99.115(2)(B).” *See* St. Opp. to Mtn. for Leave to File Supp. Br. at 3 n.9 (comparing Plaintiffs’ Supplemental Brief to Plaintiffs’ prior briefing, citing Pl’s R. Br. at 16).

Even had Plaintiffs not previously requested a declaration of the unconstitutionality of AS 44.99.115(2)(B), which they *did*, such relief would still be available because, under Alaska’s Rules of Civil Procedure, “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the pleadings.”⁵ Moreover, Plaintiffs requested “such other and further relief as the Court deems just and equitable[,]” Exc. 245, ¶ 10, and this Court has made clear that “claim[s] should not be dismissed as long as some relief might be available on the basis of the alleged facts.”⁶

⁵ Alaska Rule of Civil Procedure 54(c).

⁶ *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009) (citation omitted).

Here, if after hearing the facts, including scientific evidence that a climate system that is safe for Alaska’s youth requires CO₂ concentrations of no greater than 350 parts per million, the superior court finds that: (1) the State’s promotion of fossil fuels contributes to dangerous climate destabilization; and (2) is not narrowly tailored to achieve a compelling purpose, the court would have “not only the power but the duty to strike the . . . underlying legislation” and declare AS 44.99.115(2)(B) unconstitutional.⁷

B. The Severability of Subsection (2)(B) Is a Question for Consideration After Determination of Its Constitutionality

The State argues for the first time, and without reference to any authority, that the State’s promotion of fossil fuels under AS 44.99.115(2)(B) “is not a standalone severable policy decision” St. Supp. Br. 8. By addressing the issue for the first time in a supplemental response brief, and with only cursory mention, Defendants have waived the argument for purposes of this appeal.⁸

Even had Defendants not waived the argument, the question of severability does not pertain to the issue before this Court: whether the political question doctrine bars Alaska’s courts from determining the constitutionality of the State’s policy to promote fossil fuels. That subsection (2)(B) is part of a broader statutory declaration of policy on

⁷ *State, Dept. of Health & Social Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

⁸ *Katz*, 165 P.3d at 662 (“We have consistently recognized that a party may not raise an issue for the first time on appeal and that cursory treatment of an issue amounts to a waiver.”); *Wiersum v. Harder*, 316 P.3d 557, 567 (Alaska 2013) (“As a general matter, a party waives an argument if the party did not raise it in the superior court.”); *see also Weiner*, 221 P.3d at 6 n. 14 (argument not raised in opening brief waived); *Adamson*, 819 P.2d at 889 n. 3 (waiver due to inadequate briefing).

energy matters in AS 44.99.115 is of no consequence. The factual allegations, which are to be taken as true, clearly demonstrate that the State’s policy of systemically promoting fossil fuels, consistent with subsection (2)(B), is profoundly endangering these youth.

Moreover, under this Court’s precedent, the question of subsection (2)(B)’s constitutionality is antecedent to the question of its severability; only after finding a provision in violation of Alaska’s constitution do courts ask whether any broader statute can survive invalidation of the offending subpart.⁹ Importantly, where severance is not possible, the statute as a whole must fall.¹⁰ Consistent with this process, should this litigation proceed to consideration of severability, subsection (2)(B) should be severed.¹¹ Otherwise AS 44.99.115 should be stricken in its entirety so that the State can enact a constitutionally compliant statutory energy policy. However, just as the merits of Plaintiffs claims are not yet before this court, it is premature to consider severability prior to a determination of subsection (2)(B)’s constitutionality.

III. CONCLUSION

Defendants have waived the new arguments they raise for the first time in their supplemental brief – arguments which do not support Defendants’ position in this appeal. Plaintiffs respectfully request this Court reverse the judgment of the superior court and remand for trial.

⁹ *Lyden Transport, Inc. v. State*, 532 P.2d 700, 712 (Alaska 1975) (Finding AS 42.10.130(d) unconstitutional and proceeding to severability analysis as second step).

¹⁰ *Id.* at 712 (“If the valid parts are dependent or not severable from the invalid parts, all must fail.”)

¹¹ AS 01.10.030

DATED this 28th day of April 2020 at Eugene, Oregon.

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 _____)
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ORDER

Upon consideration of Appellants’ Motion for Leave to File Supplemental Reply Brief, and Appellees’ response thereto, if any, it is hereby ORDERED that said Motion is GRANTED.

DATED this ___th day of _____, 20__.

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ESAU SINNOK, et al.,)	
)	
Appellants,)	
)	
v.)	
)	
STATE OF ALASKA, et al.,)	
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Appellees.)	Sup. Ct. No. S-17297
)	
<hr style="width: 45%; margin-left: 0;"/>		
Trial Court Case No. 3AN-17-09910 CI		

APPELLANTS' CERTIFICATE OF TYPEFACE

Pursuant to Rule of Appellate Procedure 513.5(c), Appellants hereby certify, by and through their attorneys, that the Appellants' Motion for Leave to File Supplemental Reply Brief, Appellants' Supplemental Reply Brief, and all accompanying documents submitted therewith in the above captioned matter were printed in 13 point font, proportionally spaced, in Times New Roman typeface in compliance with Appellate Rule 513.5(c).

[Signature page follows]

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date true and correct copies of **Appellants’ Motion for Leave to File Supplemental Reply Brief, Appellants’ Supplemental Reply Brief, a proposed Order, Appellants’ Certificate of Typeface,** and this **Certificate of Service** were served via email on the following:

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