IN THE SUPREME COURT OF THE STATE OF ALASKA

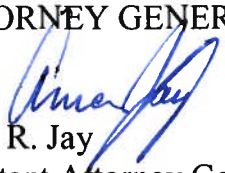
ESAU SINNOK, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, et al.,	)	Supreme Court No. **S-17297**
	)	
Appellees.	)	
	)	

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

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

BRIEF OF APPELLEE STATE OF ALASKA

KEVIN G. CLARKSON
ATTORNEY GENERAL



Anna R. Jay
Assistant Attorney General
Alaska Bar No. 1711062
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5275

Filed in the Supreme Court
of the State of Alaska on
June ___, 2019

MEREDITH MONTGOMERY, CLERK
Appellate Courts

By: _____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ALASKA STATUTES

RULES

OTHER AUTHORITIES

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Statutes:

AS 44.62.640. Definitions for AS 44.62.010–44.62.630.

(a) In AS 44.62.010–44.62.319, unless the context otherwise requires,

. . .

(3) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation on a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public . . . .

Court Rules:

Rule 61. Harmless Error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

INTRODUCTION

Five years ago, this Court held in *Kanuk ex rel. Kanuk v. State, Department of Natural Resources*[1] that a legal challenge seeking injunctive and declaratory relief concerning the State's response to climate change was not suitable for judicial resolution. The Court concluded that the plaintiffs' claims for injunctive relief raised issues properly committed to the executive and legislative branches of government, and the declaratory relief they sought would not settle the legal relations at issue. The dismissal of *Kanuk* was not based on technical concerns with how the claims were pled, but rather on a careful consideration of what policy determination the Court was being asked to make and whether it could make that determination without offending the principle of the separation of powers. Today, another group of young Alaskans concerned about climate change (collectively, "Sinnok") has sued the State of Alaska, five state agencies, the Governor, and the Commissioner of the Department of Environmental Conservation (collectively, "the State"), seeking similar declaratory and injunctive relief. The minor technical differences in the way the two lawsuits frame the issues do not meaningfully distinguish these cases. Once more this Court is being asked to interject itself into the policy-making function of the political branches and to weigh competing concerns of "employment, resource development, power generation, health, culture, [and] other

---

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

economic and social interests."[2] Once more this Court should decline to do so. The Court should follow its precedent and affirm the district court's dismissal of this case.

ISSUES PRESENTED

Nonjusticiable political question. A request for relief that would require the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion" raises a nonjusticiable political question.[3] Sinnok asks the Court to direct the State's approach to climate change and greenhouse gas regulation, overriding the legislative and executive branches' determination of how best to weigh the "employment, resource development, power generation, health, culture, [and] other economic and social interests"[4] that inform the State's current policy decisions. Are Sinnok's claims for injunctive relief nonjusticiable?

Dismissal of claims for prudential reasons. This Court has held that declaratory relief should be denied where it would not prevent future litigation or protect against injury, including in the climate change context. Sinnok seeks declarations that the State has certain obligations relating to the atmosphere and that its failure to fulfill those obligations has resulted in the violation of Sinnok's constitutional rights. Did the court appropriately dismiss his claims for declaratory relief on prudential grounds?

Review of agency denial of petition for rulemaking. In the absence of a due process claim, denials of petitions for rulemaking are only reviewable for arbitrariness.

---

2 *Id.* at 1098.

3 *Id.* at 1097 (Alaska 2014) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

4 *Id.* at 1097–98.

DEC provided Sinnok with a four-page letter outlining the legal, fiscal, and practical considerations that led it to deny Sinnok's petition for rulemaking—including DEC's concern that Sinnok's proposed policy change was not a "regulation" under Alaska law. Was the denial of the petition arbitrary?

STATEMENT OF THE CASE

I. Sinnok filed a petition for rulemaking with the Department of Environmental Conservation, asking the agency to adopt a policy of prioritizing the reduction of greenhouse gas emissions.

Sinnok submitted a petition for rulemaking to the Alaska Department of Environmental Conservation (DEC) in August 2017.[5] [Exc. 1-6] The petition asked DEC to regulate stationary and mobile sources of carbon dioxide emissions and the extraction of fossil fuels within Alaska to (1) ensure that Alaska reduces its total in-boundary and consumption carbon dioxide emissions to at least 85 percent below 1990 levels by 2050; (2) establish interim benchmarks to guide progress toward that requirement; and (3) ensure that Alaska's carbon dioxide emissions are reduced by at least 8.5 percent per year, beginning in 2018. [Exc. 4-5] The petition also asked DEC to prepare a "carbon budget" in order to meet those targets; to prepare an annual accounting of greenhouse gas emissions; to adopt a "Climate Action Plan"; to amend the proposed regulations two years after their effective date and every five years thereafter to ensure that the State

---

[5] The group of youth who filed the petition with DEC largely overlaps with the group of youth named in this lawsuit, although several youth who joined the petition did not join the lawsuit, and several youth who are named in the lawsuit did not join the petition. [*See* Exc. 2, 144] For ease of reference, the State refers to both groups collectively as "Sinnok."

reduces greenhouse gas emissions in a manner consistent with the "best climate science"; and to recommend that the legislature adopt a statute codifying these changes. [Exc. 4-5]

A month later, then-DEC-Commissioner Larry Hartig responded with a four-page letter denying the petition. [Exc. 140-43] The Commissioner explained that while he "appreciate[d] the efforts of the petitioners in submitting this Petition," certain "practical and legal hurdles" prevented him from granting it. [Exc. 140, 142] First, the petition proposed policies that would guide DEC but would not directly affect the public or be used in dealing with the public. [Exc. 141] The Commissioner therefore concluded that the petition did not propose a "regulation" as defined by Alaska law. [Exc. 141] Second, the Commissioner explained that the petition proposed actions that were "inconsistent with the practical and fiscal constraints on the State and DEC," especially without "additional appropriations from the Alaska Legislature." [Exc. 141] Third, the Commissioner concluded that some of the petition's proposals likely exceeded DEC's statutory authority. [Exc. 141-42] The Commissioner also noted that even if DEC could grant the petition, it would not achieve the climate goals sought by Sinnok: Climate change and greenhouse gas emissions are global problems, and Alaska's greenhouse gas emissions comprise only about .08 percent of global emissions. [Exc. 142]

Noting that granting the petition would likely "have significant consequences for employment, resource development, power generation, health, culture, and other economic and social interests within the state," [Exc. 142] the Commissioner explained that resource development decisions "are inherently difficult and require consideration of many conflicts and tradeoffs, and balancing the needs of many constituencies. Policy

questions of this nature are best addressed in partnership with the Legislature." [Exc. 142-43] He therefore encouraged Sinnok to "continue to engage with the State's executive branch, and to also reach out to the legislative branch, in seeking creative solutions to addressing climate change in Alaska." [Exc. 143]

II. After the Department of Environmental Conservation denied Sinnok's petition for rulemaking, Sinnok filed a complaint in superior court, seeking declaratory and injunctive relief against the State.

After DEC denied his petition for rulemaking, Sinnok filed a complaint in superior court, seeking declaratory and injunctive relief against DEC, the Alaska Department of Natural Resources, the Alaska Oil and Gas Conservation Commission, the Alaska Energy Authority, the Regulatory Commission of Alaska, the State of Alaska, and, in their official capacities, then-Governor Walker and then-Commissioner Hartig (collectively, "the State").[6] Sinnok's first count alleged that the State had violated his substantive due process rights under the Alaska Constitution by causing and contributing to climate change through an "Energy Policy" and "historic and ongoing affirmative and systemic actions taken pursuant thereto and as part thereof." [Exc. 229] Specifically, he alleged that the State's Energy Policy was evidenced by the "systemic authorization, permitting, encouragement, and facilitation of activities resulting in dangerous levels of GHG emissions." [Exc. 221-22] He asserted that the State's implementation of its alleged Energy Policy endangered his "[life], liberty, and property and other unenumerated

---

[6] Under Civil Rule 25(d)(1), the current Governor and Commissioner of DEC have been automatically substituted as parties.

rights, including the rights [to] personal security, bodily integrity, and autonomy and to a stable climate system that sustains human life and liberty." [Exc. 229-30]

Sinnok's second count alleged that the State had placed him in state-created danger in violation of his due process rights. [Exc. 231-32] He alleged that the State had long caused and contributed to "dangerous interference with our atmosphere and climate system by and through [its] Energy Policy" with deliberate indifference to his safety. [Exc. 231] He argued that after placing him in "a position of climate danger," the State failed to take steps to ameliorate the risks posed by climate change. [Exc. 232] Sinnok alleged that the State has "not utilized or implemented [its] authority to require and implement reductions of Alaska's [greenhouse gas] emissions at rates that would preserve the rights of Youth Plaintiffs." [Exc. 232]

Sinnok's third count alleged that the State violated his right to equal protection under the Alaska Constitution. [Exc. 233-35] He asserted that he is a member of the class of youth, and that the State deliberately discriminated against him and future generations by "exerting [its] sovereign authority for the economic benefit of industry and prior and present generations of adults" to the detriment of future generations. [Exc. 233]

Sinnok's fourth count alleged that the State violated the public trust doctrine by failing to adequately protect Alaska's public trust resources, including the atmosphere, sea, seashore, surface lands, and submerged lands. [Exc. 236-40]

Sinnok's final count asserted that DEC and Commissioner Hartig violated his constitutional rights by rejecting his petition for rulemaking. [Exc. 240-41] He asserted that the denial of the petition was a part of the State's Energy Policy, through which the

State "continue[s] to knowingly authorize, permit, encourage, facilitate, and promote activities that result in dangerous levels of GHG emissions." [Exc. 240] Sinnok alleged that because the denial of the petition "continue[d] to cause, contribute to, and exacerbate dangerous levels of [greenhouse gas] emissions in Alaska," the denial was arbitrary and violated the public trust doctrine and his rights to due process and equal protection. [Exc. 241]

Sinnok requested declaratory relief announcing that the State has a duty to protect the atmosphere and, under the theories asserted in his five counts, that the State has violated several of his constitutional rights.[7] He also requested injunctive relief directing the State to refrain from further violations of his rights; to "prepare a complete and accurate accounting of Alaska's [greenhouse gas] emissions"; and to develop "an enforceable state climate recovery plan," including a carbon budget, to "implement and achieve science-based numeric reductions" of greenhouse gas emissions "consistent with global emissions reductions rates necessary to stabilize the climate system." [Exc. 244-45]

---

[7] Sinnok sought declarations stating that (1) the State has "constitutional duties and constitutional and statutory authority" to protect Sinnok's rights, including the right to a stable climate system; (2) the State has "constitutional duties and constitutional and statutory authority" under the public trust doctrine to protect Alaska's natural resources, including the atmosphere; (3) the State has "materially caused, contributed to, and/or exacerbated climate change" through its "Energy Policy," in violation of Sinnok's constitutional rights; (4) the State's "Energy Policy" has placed Sinnok in danger, in violation of his constitutional rights; (5) the State, through its "Energy Policy," has violated Sinnok's right to equal protection; (6) the State has violated its duties under the public trust doctrine to protect the atmosphere and other natural resources; and (7) DEC and then-Commissioner Hartig violated Sinnok's constitutional rights by denying his petition for rulemaking. [Exc. 241-44]

The State moved to dismiss the complaint for failure to state a claim. [Exc. 283-89]

III. The superior court granted the State's motion to dismiss Sinnok's complaint, reasoning that his claims are not suitable for judicial resolution.

The superior court granted the State's motion to dismiss. Relying on *Kanuk*, the court concluded that if it were to "bypass the executive or legislative branch and make a policy judgment [about the State's approach to climate change], it would violate the separation of powers and conflict with" the political question doctrine. [Exc. 255-56] The court noted that Sinnok had not identified any "specific policies the state has enacted that have directly contributed to climate change," and that, as in *Kanuk*, it was "not the judiciary's role to make a policy decision 'in the first instance.' " [Exc. 255-56] The court concluded that Sinnok's claims for injunctive relief thus presented a nonjusticiable political question. [Exc. 256]

The court held that *Kanuk* mandated dismissal of Sinnok's claims for declaratory relief, too. [Exc. 256-61] The court concluded that "[w]ithout a definite and [concrete] controversy, this case appears to be the same as *Kanuk* and similar to" cases from other jurisdictions dismissing climate change-related claims against governmental entities. [Exc. 258-61] Because 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," the court concluded that there was no actual controversy appropriate for judicial resolution. [Exc. 261]

Last, the court addressed Sinnok's challenge to the denial of his petition for rulemaking. The court noted that Sinnok did not allege any facts to show that the Commissioner arbitrarily denied his petition; Sinnok appeared to argue only that the decision was arbitrary because it denied his constitutional rights. [Exc. 262] This argument, the court concluded, simply amounted to a disagreement with the substance of the Commissioner's decision. [Exc. 262] The court noted that the Commissioner timely issued a four-page explanation of his decision, which he explained through case law, statute, and "well-reasoned analysis." [Exc. 262] The denial of Sinnok's petition, the court concluded, thus satisfied the due process requirements established in *Johns v. Commercial Fisheries Entry Commission*.[8] [Exc. 262]

Sinnok now appeals.

STANDARDS OF REVIEW

This Court reviews a superior court's dismissal of a claim under Civil Rule 12(b)(1) and 12(b)(6) de novo, "deeming all facts in the complaint true and provable. Because complaints must be liberally construed, a motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted."[9] However, to

---

[8] 699 P.2d 334, 339-40 (Alaska 1985) (finding no error in denying a rulemaking petition where the denial letter "meets the requirements of the [APA], and demonstrates that the refusal to grant a hearing was not arbitrary").

[9] *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253 (Alaska 2000); *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 871 (Alaska 2014).

survive a motion to dismiss, "a complaint must 'disclose information from which a court could conclude that a valid claim is alleged showing the pleader is entitled to relief.' "[10]

The Court reviews an agency's denial of a rulemaking petition for compliance with the Administrative Procedure Act and to ensure that the agency's denial was not arbitrary.[11]

ARGUMENT

I. Sinnok's claims for injunctive relief present a nonjusticiable political question.

This Court announced in *Kanuk* that it is not equipped to decide how the State should approach the challenge of climate change.[12] The Court explained that it could not direct the State to adopt a particular regulatory policy without first engaging in the type of legislative policy-making that is reserved to the political branches.[13] Sinnok now asks this Court to undertake the same policy-making endeavor it could not undertake in *Kanuk*. [Exc. 244] He does not argue that *Kanuk* is bad law; rather, he asserts that because he has pled his claim differently, *Kanuk's* rationale should not apply.[14] [At. Br.

---

10 *Martin v. Mears*, 602 P.2d 421, 427 (Alaska 1979).

11 *Johns* 699 P.2d at 339-40; *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 358 (Alaska 1971).

12 *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097-99 (Alaska 2014).

13 *Kanuk*, 335 P.3d at 1097-98.

14 Sinnok has provided no argument that the Court should upset stare decisis and overturn *Kanuk*. This Court has "consistently held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."*Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004). The Court will "overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of

17-25] His argument rests on a fundamental misunderstanding of *Kanuk*. The plaintiffs' complaint in *Kanuk* raised a nonjusticiable political question not because it alleged the State's failure to act instead of affirmative state action, or because it did not specifically allege the existence of an "Energy Policy"; it raised a nonjusticiable question because it asked the Court to step outside its institutional role in violation of separation-of-powers principles in order to grant the relief the plaintiffs sought.[15] Sinnok requests materially the same relief that the *Kanuk* plaintiffs did. Just as in *Kanuk*, granting Sinnok's relief would entail making "an initial policy determination of a kind clearly for nonjudicial discretion"[16] and imposing on the State a judicially created standard for addressing climate change. This Court should follow its precedent, which is consistent with national political question jurisprudence, and hold that Sinnok's claims for injunctive relief present a nonjusticiable political question.

---

changed conditions, and that more good than harm would result from a departure from precedent." *Id.* (quoting *State, Commercial Fisheries Entry Comm'n v. Carlson,* 65 P.3d 851, 859 (Alaska 2003)). Because Sinnok did not raise the issue in his opening brief, any argument that the Court should overturn *Kanuk* is waived, and Sinnok cannot raise the issue in his reply brief. *See Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 6 n.14 (Alaska 2009) (holding that argument not raised in appellant's opening brief was waived); *Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) (holding that a waiver due to inadequate briefing "is not correctable by arguing the issue in a reply brief").

15 *Kanuk*, 335 P.3d at 1097-99.

16 *Id.* at 1097.

A. Sinnok asks the Court to make a legislative policy decision that the Court has already determined it cannot make.

The political question doctrine, which "stems primarily from the separation of powers doctrine,"[17] states that certain matters are not suitable for judicial resolution and are "better directed to the legislative or executive branches of government"—i.e., to the political branches.[18] Alaska employs the test announced by the United States Supreme Court in *Baker v. Carr* to determine whether a case presents a nonjusticiable political question.[19] Under the *Baker* test, at least one of six elements will be " 'prominent on the surface' of any case involving a political question":

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[20]

---

17 *Id.* at 1096 (quoting *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336 (Alaska 1987)).

18 *Id.*

19 *See, e.g., Id.* (citing *Baker v. Carr*, 396 U.S. 186, 217 (1962)).

20 *Baker*, 396 U.S. at 217 (quoted in *Kanuk*, 335 P.3d at 1096-97).

Sinnok's claims most clearly implicate the third *Baker* factor: Deciding the case would require the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion."[21]

In *Kanuk*, this Court looked to the relief sought by the plaintiffs—an injunction ordering that (1) the State's obligation to protect the atmosphere must be "dictated by best available science"; (2) the State must reduce carbon dioxide emissions by a specific amount each year; and (3) the State must prepare an annual accounting of carbon dioxide emissions in Alaska—and concluded that it could not grant relief without infringing on the political branches' policy-making function.[22] The Court explained that "[w]hile the science of anthropogenic climate change is compelling, government government reaction to the problem implicates realms of public policy besides the objectively scientific," and ordering the State to take one particular approach would require the Court to make a policy determination that is "not [the Court's] to make in the first instance."[23]

Sinnok's claims for injunctive relief in this case are strikingly similar and would require the Court to make the very same policy determination that it could not make in *Kanuk*. Sinnok's complaint asks the court to (1) enjoin the State from further infringement of the plaintiffs' rights through continued implementation of its alleged "Energy Policy"[24]; (2) order the State to "develop and submit to the Court . . . an

---

21 *Kanuk*, 335 P.3d at 1097.

22 *Id.* at 1097-99.

23 *Id.* at 1097–98.

24 The State does not concede that any such Energy Policy exists, but for the purposes of a motion to dismiss, the State assumes Sinnok's factual allegations to be true.

enforceable state climate recovery plan . . . to implement and achieve science-based numeric reductions of Alaska's . . . emissions, . . . consistent with global emissions reductions rates"; and (3) order the State to "prepare a complete and accurate accounting of Alaska's [greenhouse gas] emissions." [Exc. 244] Just as in *Kanuk*, the Court cannot order the State to implement "science-based" emissions reductions and provide an ongoing accounting of Alaska's emissions because it cannot determine what approach to greenhouse gas regulation is required as a matter of law:

> The legislature—or an executive agency entrusted with rule-making authority in this area—may decide that employment, resource development, power generation, health, culture, or other economic and social interests militate against implementing what the plaintiffs term the "best available science" in order to combat climate change. . . . We cannot say that an executive or legislative body that weighs the benefits and detriments to the public and then opts for an approach that differs from the plaintiffs' proposed "best available science" would be wrong as a matter of law. . . .[25]

The Court is ill-equipped to make this kind of policy determination because it "lack[s] the scientific, economic, and technological resources an agency can utilize," is "confined by [the] record," and "may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures."[26]

These limitations constrain the Court's role as much today as when the Court decided *Kanuk*. The executive and legislative branches remain the best arbiters of

---

As explained below, whether such a policy exists does not affect the political question analysis in this case.

25 *Kanuk*, 335 P.3d at 1097-98.

26 *Id.* at 1099.

complex policy decisions involving the prioritization of competing public interests. As the United States Supreme Court has explained in the context of federal regulations, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum. . . . Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance."[27] To grant the relief Sinnok seeks, the Court would have to step outside of its institutional role to weigh scientific, economic, technological, and other factors to make a policy choice that is properly committed to the executive and legislative branches. The superior court thus correctly concluded that *Kanuk* bars judicial resolution of these claims.

B. This case is not materially distinguishable from *Kanuk*.

Sinnok attempts to distinguish this case from *Kanuk* on two grounds. First, he asserts that the State has already developed a greenhouse gas policy and that ordering the State to implement a different policy would therefore not require the Court to make an "initial policy determination."[28] Second, he argues that the Court should look to the claim asserted, rather than the relief requested, to determine whether a nonjusticiable political question exists—and that his claim differs from *Kanuk* because he alleges affirmative state action, rather than a failure to act. Neither argument has merit. Ordering the State to implement a policy where none exists (as requested in *Kanuk*), and ordering the State to

---

27 *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011).

28 *See Kanuk*, 335 P.3d at 1097.

implement a different policy where one does exist (as requested by Sinnok), entail the same infringement on the political branches' prerogative to develop an approach to greenhouse gas regulation. And this Court's decision in *Kanuk* did not turn on any distinction between allegations of state action or inaction; rather, the Court looked only to the plaintiffs' requested relief to determine whether their claim presented a nonjusticiable political question.

1. Ordering the State to adopt a different energy policy would require the Court to make a legislative policy judgment.

Sinnok attempts to distinguish this case from *Kanuk* by asserting that the State has already decided on an energy policy and thus the Court "need not make any initial policy determination" in order to decide his claims. [At. Br. 17-19] Relying on language in *Kanuk* stating that a court cannot dictate a state's policy decision "in the first instance,"[29] Sinnok infers that once the State makes an initial policy determination, no political question remains. [At. Br. 18] Sinnok's argument misses the import of the political question doctrine.

The fact that this Court declined, in *Kanuk*, to make a policy determination "in the first instance"[30] does not mean that once the State makes a policy determination, the Court can then order it to make a *different* policy determination. If the State has decided on an energy policy, directing the State to adopt a different policy would still require the Court to override the political branches' determination of how best to weigh the

---

29 *Id.* at 1098.

30 *Id.* at 1098.

"employment, resource development, power generation, health, culture, [and] other economic and social interests"[31] that must inform the State's approach to greenhouse gas regulation. Revising what Sinnok terms the State's "Energy Policy" would require the Court to direct the leasing, licensing, and permitting of fossil fuel development and extraction; the regulation of oil and gas drilling; the oversight of coal mining and reclamation; the running of public and private utilities; the shipping of fossil fuels out of state; the restriction of public and private "facilities and activities that emit significant levels of" greenhouse gases; and the operation of projects and facilities that rely on fossil fuels. [*See* Exc. 222-25] Such an undertaking would necessitate re-writing countless statutes and regulations—which is the role of the political branches, not the judiciary.

This is not to suggest that a court can never review state action for constitutionality. As the State explained before the superior court, the judiciary can ordinarily review specific enactments or actions taken by the government—such as a statute, a regulation, an executive action, or the grant or denial of a permit.[32] [Tr. 10, 48,

---

31 *Id.* at 1097–98.

32 *See DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) (finding no political question was implicated because the "[a]ppellants do not seek to litigate the political and social wisdom of AID's foreign policy. They challenge the legality of AID's *implementation* of the Policy." (emphasis added)); *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008) ("[T]he first *Baker* formulation is primarily concerned with direct challenges to *actions taken by a coordinate branch* of the federal government." (emphasis added)); *Lamont v. Woods*, 948 F.2d 825, 832 (2d Cir. 1991) ("Appellees do not seek to adjudicate the lawfulness or political wisdom of the government's policy . . . . Rather, appellees take issue only with appellants' method of administering that policy. For this reason, the instant case . . . is justiciable."); *Planned Parenthood Fed'n, Inc. v. AID,* 838 F.2d 649 (2d Cir.1988) ("While courts are not competent to formulate national policy or to review controversies which 'revolve around policy choices and value determinations constitutionally committed' to Congress

51] Indeed, where Sinnok does identify a discrete act of government—DEC's denial of his rulemaking petition—the State does not argue that his challenge presents a nonjusticiable political question.

But while courts may be equipped to evaluate specific acts *implementing* a governmental policy, they cannot judge the wisdom of the political branches' "policy choices and value judgments"[33] in the abstract.[34] As the Second Circuit has recognized in the federal context, "courts are not competent to formulate national policy."[35] Yet that is what Sinnok seeks to accomplish. He asks the Court to declare the State's broad policy invalid and to impose a new policy of judicial invention that the State will presumably be bound to implement in the form of new statutes, regulations, and permitting decisions.[36]

---

or the executive branch, it is a court's duty to determine whether the political branches, in exercising their powers, have 'chosen a constitutionally permissible means of implementing that power.' ").

33 *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012).

34 *See DKT Mem'l Fund, Ltd.*, 810 F.2d at 1238; *Lamont*, 948 F.2d at 832; *Planned Parenthood Fed'n, Inc.*, 838 F.2d at 649. Sinnok's assertion that recognizing the nonjusticiability of his claims would "grant the political branches unreviewable authority to implement *any* policy, regardless of its effect on our lives, liberty, or property" is based on a misunderstanding of the State's argument. [At. Br. 26 (emphasis in original)] The State does not, and did not, argue that a court can never review the implementation of state policies.

35 *Planned Parenthood Fed'n, Inc.*, 838 F.2d at 649.

36 This distinction is analogous to the difference between an agency policy and an agency rule in the federal regulatory context: "Unlike legislative rules, which may be immediately reviewable once they are finalized (i.e., issued as a final rule), policy statements often cannot be challenged until the agency takes further action to implement or enforce the policy." Congressional Research Service, *General Policy Statements: Legal Overview* 14 (April 14, 2016).

Sinnok's request is thus the same as that of the *Kanuk* plaintiffs: He is asking the Court to establish by injunction an energy policy for the State. This Court has already held that the judiciary is not suited to make that determination.[37]

2. The Court should look to the relief Sinnok requests in order to determine whether his claims present a nonjusticiable political question.

Sinnok does not dispute that the relief he requests is materially indistinguishable from the relief requested by the plaintiffs in *Kanuk*. [At. Br. 20-25] But he attempts to distinguish this case from *Kanuk* by asserting that a court must determine whether the claims at issue present a political question—not whether the requested relief presents a political question. [At. Br. 20] Sinnok alleges that the State has taken affirmative action in this case (by "authoriz[ing], permitting, encourag[ing], and facilitate[ing] . . . activities resulting in dangerous levels of GHG emissions" [Exc. 221-22]) whereas the plaintiffs in *Kanuk* had alleged that the State failed to act. [At. Br. 21-23] Sinnok argues that his allegations of state action " 'lift this controversy' out of the arena of the political question doctrine." [At. Br. 21-25] His argument is not supported by case law.

The Court in *Kanuk* determined that the plaintiffs' claims presented a nonjusticiable political question by analyzing the relief they sought—not by analyzing how the plaintiffs pled their claims or whether they alleged affirmative state action.[38]

---

37 *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097-99 (Alaska 2014).

38 *Id.* at 1097-1100.

This approach—looking to the relief the plaintiffs seek—is appropriate because only by analyzing the relief requested can the Court determine whether it is being asked to direct the State's policy choices, oversee government functions that are committed to a different branch, or otherwise act beyond the role of the judiciary. Sinnok argues that the Court's approach was "an anomaly in political question jurisprudence" and should not be repeated here. [At. Br. 21] But he offers no authority to support this assertion. Contrary to Sinnok's contention, the Court's approach in *Kanuk* was consistent with national political question jurisprudence: Case law from at least five federal circuits reflects a longstanding and widely accepted practice of looking to the relief requested in a given case to determine whether a nonjusticiable political question exists.[39]

---

[39] *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068, 1074 (N.D. Cal. 2015), aff'd sub nom. *Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017) ("The Court finds that it lacks the standards necessary to fashion the type of injunctive relief Plaintiff seeks. Accordingly, the Court finds it must dismiss this case as non-justiciable because it involves a political question."); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 685 (E.D. La. 2006) ("[T]he nature of the relief sought by the plaintiffs in this action supports a determination that this suit does not fall under the second prong of the political question test."); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2005) ("An action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in 'overseeing the conduct of foreign policy or the use and disposition of military power.' "); *Schroder v. Bush*, 263 F.3d 1169, 1174-76 (10th Cir. 2001) ("[I]t is clear to us that Appellants' request that courts maintain market conditions, oversee trade agreements, and control currency—all to the advantage of small farmers—would require courts to make 'initial policy determinations' in an area devoid of 'judicially discoverable and manageable standards' and where 'multifarious pronouncements by various departments' would lead to confusion and disarray."); *Brown v. Hansen*, 973 F.2d 1118, 1121 (3d Cir. 1992) ("The political question doctrine . . . precludes courts from granting relief that would violate the separation of powers mandated by the United States Constitution."); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other

Sinnok also argues that even if the Court does base its analysis on the relief requested, his claims should still be justiciable because "declaratory and broad-based injunctive relief to remedy systemic constitutional violations like those presented here" is "well within the broad remedial authority of the courts." [At. Br. 24] This argument ignores the Court's holding in *Kanuk*. The fact that a plaintiff requests injunctive relief does not, on its own, resolve the question of justiciability; rather, the Court must undertake a "discriminating inquiry into the precise facts and posture of the particular case."[40] The Court in *Kanuk* held that an injunction directing the State's approach to greenhouse gases presented a political question because it would have required a "science- and policy-based inquiry" "better reserved for executive-branch agencies or the legislature."[41] Sinnok does not dispute that he is requesting materially the same relief that the plaintiffs requested in *Kanuk*. The particular injunctive relief he is requesting—just as in *Kanuk*—thus implicates a nonjusticiable political question.

Even if the Court were to consider the character of Sinnok's factual allegations in its political question analysis, nothing in *Kanuk* or the greater body of political question jurisprudence suggests that justiciability turns on the distinction between state action and

---

branches, such suits are far more likely to implicate political questions."); *Gordon v. Texas*, 153 F.3d 190, 193-95 (5th Cir. 1998) (analyzing justiciability of claims based on the type of relief sought).

[40] *Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting that the question of justiciability cannot be resolved "by any semantic cataloguing").

[41] *Kanuk*, 335 P.3d at 1099.

state inaction, as Sinnok suggests.[42] [At. Br. 21-24] In *Kanuk*, the plaintiff's claims presented a nonjusticiable political question because the Court "cannot say that an executive or legislative body that weighs the benefits and detriments to the public and then opts for an approach that differs from the plaintiffs' proposed 'best available science' would be wrong as a matter of law. . . ."[43] The Court did not hold, or even imply, that its ability to impose a regulatory scheme on the State depends on whether the State's "approach" to climate change consists of action or inaction. And numerous courts—including the United States Supreme Court—have found claims based on affirmative state action to present nonjusticiable political questions.[44]

---

[42] The cases cited in Sinnok's brief do not support his argument that claims involving state action are always justiciable. [At. Br. 20-25] In none of those cases was the distinction between state action and state inaction the determining factor in the political question analysis. *See Svitak ex rel. Svitak v. Washington*, 178 Wash. App. 1020 (2013) (affirming dismissal of Svitak's claim because it asked the "court to compel [Washington] to create an economy-wide regulatory program to address climate pollution" that "would necessarily involve resolution of complex social, economic, and environmental issues," and noting that Svitak had not raised a constitutional claim regarding *either* "an affirmative state action" *or* "the State's failure to undertake a duty to act") (emphasis added); *State, Department of Natural Resources v. Tongass Conservation Society,* 931 P.2d 1016, 1019 (Alaska 1997) (explaining that "ascertaining the legislature's true motive" was particularly difficult "when the court is asked to evaluate why the legislature failed to take action," but that "[i]n general, judicial inquiries into the motives of those *enacting or rejecting* proposed legislation are to be avoided" (emphasis added)); *Gomillion v. Lightfoot,* 364 U.S. 339, 347 (1960) (finding a justiciable question in part because the Court was asked only to assess the constitutionality of a recently enacted statute, rather than to assess a state's failure to change its legislative apportionment scheme). At most, those cases support the proposition that *some* claims involving state action are justiciable—a proposition the State does not contest.

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

[44] *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 272, 305 (2004) (challenging enactment of new redistricting plan); *Gilligan v. Morgan*, 413 U.S. 1, 3, 7-10 (1973) (involving National Guard's actions causing injury and death of students at Kent State University);

Nor do Sinnok's allegations of state action meaningfully distinguish this case from *Kanuk* on factual grounds. The "affirmative state action" Sinnok alleges—namely, "systemic authorization, permitting, promotion, encouragement, and facilitation of activities . . . resulting in, and exacerbating, dangerous levels of [greenhouse gas] emissions, without regard to Climate Change Impacts" [Exc. 147-48]—is no different from the "inaction" alleged in *Kanuk*: "failing to take steps to protect the atmosphere in the face of significant and potentially disastrous climate change."[45] Declining to stop greenhouse gas emissions, and allowing greenhouse gas emissions to continue, are merely two ways to describe the same policy decision. However Sinnok characterizes the State's response to climate change, at the core he is asking the Court to tackle the same problem alleged in *Kanuk* by ordering the State to adopt a new approach to greenhouse

---

Corrie v. Caterpillar, Inc., 503 F.3d 974, 980 (9th Cir. 2007) (claim involving government financing of bulldozers used to demolish homes in Palestine); *Schneider v. Kissinger*, 412 F.3d 190, 191 (D.C. Cir. 2005) (claim involving kidnapping, torture, and death of Chilean general); *O'Connor v. United States*, 72 F. App'x 768, 769-70 (10th Cir. 2003) (challenging constitutionality of U.S. invasion of Iraq); *Aktepe v. USA*, 105 F.3d 1400, 1401, 1403-04 (11th Cir. 1997) (claim arising from injury and death that resulted from missile strike on Turkish vessel); *Tiffany v. United States*, 931 F.2d 271, 272, 277-79 (4th Cir. 1991) (claim arising from allegedly negligent interception of private airplane leading to midair crash); *DaCosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973) (involving challenge to President's decision to mine ports and carry out air strikes in Vietnam); *Farmer v. Rountree*, 252 F.2d 490, 490 (6th Cir. 1958) (claim seeking to enjoin government from collecting taxes); *Aji P. v Washington*, No. 18-2-04448-1, 2018 WL 3978310, at *2 (Wash. Super. Aug. 14, 2018) (alleging affirmative state action exacerbating climate change (*see also* Complaint for Declaratory & Injunctive Relief, Docket No. 18-2-04448-1 SEA (Wash. Super. Feb. 16, 2018))); *see also Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 (5th Cir. 2011) (claim involving alleged agreement by OPEC nations to fix price of petroleum products).

[45] *Kanuk*, 335 P.3d at 1090.

gas regulation. The Court has already held that it cannot grant this relief without making a policy determination that is not the Court's to make.[46]

C. Constitutional claims and climate change-based claims are not always justiciable.

The question of justiciability cannot be resolved "by any semantic cataloguing,"[47] and "[d]rawing exact boundaries between the political and the justiciable is not possible."[48] Sinnok asserts that constitutional claims and climate change-based claims are categorically justiciable. [At. Br. 25-31] This argument is inconsistent with the principle that the existence of a political question cannot be determined categorically. What is more, his argument is directly contrary to controlling precedent: *Kanuk* held that a constitutional claim based on climate change presented a nonjusticiable political question.[49]

1. Constitutional claims can present nonjusticiable political questions.

Sinnok argues that questions of constitutional law, as a matter of course, "do not implicate the political question doctrine." [At. Br. 25] This argument is squarely foreclosed by the Court's holding in *Kanuk*.[50] The plaintiffs in *Kanuk* alleged that the State had breached its public trust obligations under Article VIII of the Alaska

---

46 *Id.* at 1098.

47 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

48 *Kanuk*, 335 P.3d at 1096.

49 *Id.* 1097-99.

50 *Id.*

Constitution.[51] The Court nonetheless held that plaintiffs' constitutional claim presented a nonjusticiable political question.[52] *Kanuk* is not an outlier; case law from around the country is replete with examples of courts concluding that constitutional claims implicate nonjusticiable political questions.[53]

This is not to say that the Court cannot review the constitutionality of legislative or executive action when there is no political question present. Sinnok points to this Court's statement in *State, Department of Health and Social Services v. Planned Parenthood of Alaska, Inc.* that the Court "cannot defer to [a coordinate branch] when infringement of a

---

51 *Id.* at 1091.

52 *Id.* at 1097-99.

53 *E.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 3, 11 (1973) (alleging violation of rights to speech and assembly, as well as injury and death of several students); *Colegrove v. Green*, 328 U.S. 549, 550 (1946) (alleging violation of "various provisions of the United States Constitution"); *Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir. 1975) (alleging violation of First Amendment's Establishment Clause); *Aji P. v State*, No. 18-2-04448-1, 2018 WL 3978310 at *2-3 (Wash. Super. Aug. 14, 2018) (alleging violation of rights to life, liberty, property, equal protection, and a healthful and pleasant environment); *Forslund v. State*, No. A17-0033, 2017 WL 3864082, at *1 (Minn. Ct. App. Sept. 5, 2017), review granted in part (Nov. 14, 2017) (alleging violation of state constitution's Equal Protection Clause and Education Clause); *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1031 (E.D. Cal. 2012), aff'd sub nom. *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015) (due process and equal protection claims raised nonjusticiable political question of tribal recognition); *Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 731 N.W.2d 164, 169, 183 (Nebraska 2007) (alleging violation of provisions of Nebraska Constitution); *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058, 1062 (Okla. 2007) (alleging violation of state constitutional right to a uniform, adequate education); *Edgington v. City of Overland Park*, 815 P.2d 1116, 1120, 1124 (Kansas Ct. App. 1991) (alleging violation of due process and equal protection); *Pellegrino v. O'Neill*, 193 Conn. 670 (1984) (alleging violation of state constitutional right to justice without delay); *Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir. 1975) (per curiam) (alleging violation of First Amendment's Establishment Clause).

constitutional right results from [its] action."[54] [At. Br. 25] While it is ordinarily the province of the judiciary to review the constitutionality of legislative or executive action, the political question doctrine recognizes that in some circumstances, courts cannot or should not attempt to determine whether there has been a constitutional violation in the first place.[55] This Court's statement in *Planned Parenthood* merely spells out the rule to which the political question doctrine is the exception. In the same paragraph of the *Planned Parenthood* decision, the Court explains that "[i]n light of the separation of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature."[56] As the United States Supreme Court has explained, "[i]n invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable" in a given context.[57] Sinnok's argument that a constitutional claim is always justiciable is therefore without merit.

2. Climate change-based claims can present nonjusticiable political questions.

Sinnok contends that federal precedent "provides persuasive authority that climate cases do not implicate nonjusticiable political questions." [At. Br. 27] Like his argument about the justiciability of constitutional claims, this argument is clearly contrary to this

---

54 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 914 (Alaska 2001) (alterations in appellants' brief).

55 *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992).

56 *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913–14.

57 *U.S. Dep't of Commerce v. Montana*, 503 U.S. at 458.

Court's holding in *Kanuk*—the only controlling precedent on the matter.[58] And the majority of case law from around the country is consistent with *Kanuk* in concluding that climate change-based claims for injunctive relief can present nonjusticiable political questions.[59]

For example, a Washington state court recently dismissed a complaint remarkably similar to Sinnok's, holding that the issues involved in addressing climate change "are quintessentially political questions that must be addressed by the legislative and executive branches of government . . . [and] cannot appropriately be resolved by a court."[60] The court in that case, *Aji P. v. Washington*, held that granting plaintiffs' requested relief—which was nearly identical to the relief Sinnok requests here[61]—"would

---

[58] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097-99 (Alaska 2014).

[59] Appellate courts that have considered the issue have also affirmed dismissal of climate change-related claims on a number of other grounds. *See, e.g.*, *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225-27 (N.M. Ct. App. 2015) (affirming summary judgment for state because there was no common-law cause of action under public trust doctrine for regulation of atmosphere where legislature had enacted statutory framework); *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014) (affirming dismissal of suit against federal agencies because public trust doctrine is a matter of state law); *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013) (ordering dismissal of case against state and regional environmental agencies because plaintiffs did not satisfy causation and redressability requirements of standing).

[60] *Aji P. v Washington*, No. 18-2-04448-1, 2018 WL 3978310, at *1 (Wash. Super. Aug. 14, 2018). Sinnok's counsel also represented the plaintiffs in *Aji P. See* Complaint for Declaratory & Injunctive Relief, Docket No. 18-2-04448-1 SEA (Wash. Super. Feb. 16, 2018).

[61] Like Sinnok, the plaintiffs in *Aji P.* requested that the court:

> Declare that Defendants' systemic policy, practice, and customs described herein have materially caused, contributed to, and/or exacerbated climate change, in violation of Plaintiffs' fundamental

require the Court to usurp the roles of the legislative and executive branches of our state government."[62] The court explained that "[a]ny climate action plan and regulatory regime would require the assessment of numerous costs and benefits, balancing many interests, and resolving complex social, economic, and environmental issues" and that "[t]his policy-making is the prerogative and the role of the other two branches of government, not of the judiciary."[63] Echoing the concerns this Court expressed in *Kanuk*, the *Aji P.* court went on to state, "This court 'is not equipped to legislate what constitutes a "successful" regulatory scheme by balancing public policy concerns, nor can [it] determine which risks are acceptable and which are not. These are not questions of law; [this Court] lacks the tools.' "[64]

> and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, including a stable climate system that sustains human life and liberty, and other unenumerated rights, including the right to be free from unreasonable risk of harm, and the right to reasonable safety." [*Aji P.*, 2018 WL 3978310, at *2]

The plaintiffs also asked the court to declare that the State had "placed Plaintiffs[] in a position of danger with deliberate indifference to their safety" and that the State had violated the public trust doctrine. *Id.* at *2. They also asked for injunctive relief ordering Washington "to prepare a complete and accurate accounting of Washington's GHG emissions, including those emissions caused by the consumption of goods and services within the state" and to submit to the court "an enforceable state climate recovery plan" including "a carbon budget, to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system and protect the vital Public Trust Resources on which Plaintiffs now and in the future will depend." *Id.* at *2.

62 *Id.* at *3.

63 *Id.* at *3.

64 *Id.* at *3 (internal citations omitted); *cf. Kanuk*, 335 P.3d at 1098 ("We cannot say that an executive or legislative body that weighs the benefits and detriments to the public

In California, in an environmental nuisance claim brought by the Native Village of Kivalina against ExxonMobil, a federal district court held that it could not decide Kivalina's climate change-based claims without usurping the political branches' policy-making role.[65] Determining whether ExxonMobil's actions amounted to nuisance would require the court to weigh, among other considerations, the availability and reliability of energy-producing alternatives, "safety considerations and the impact of the different alternatives on consumers and business at every level," the benefits derived from energy-production choices, and "the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale."[66] The court concluded that it lacked judicially discoverable and manageable standards to undertake that determination.[67] The plaintiffs' claims also would have required the court to make a policy determination not suited to judicial resolution: "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[68]

---

and then opts for an approach that differs from the plaintiffs' proposed "best available science" would be wrong as a matter of law, nor can we hasten the regulatory process by imposing our own judicially created scientific standards.").

65 *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874-75, 877 (N.D. Cal. 2009). The Ninth Circuit Court of Appeals affirmed the decision on federal displacement grounds without reaching the question of justiciability. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012).

66 *Native Vill. of Kivalina*, 663 F. Supp. 2d at 874-75.

67 *Id.* at 875.

68 *Id.* at 877.

The federal district court in California reached the same conclusion in a carbon dioxide emissions-based nuisance claim against General Motors. In *California v. General Motors Corp.*, the court held that the plaintiffs' environmental nuisance claim presented a nonjusticiable political question because "regardless of the relief sought, the Court is left to make an initial decision as to what is unreasonable in the context of carbon dioxide emissions," which "would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court."[69]

In another Washington case, *Svitak ex rel. Svitak v. Washington*, a group of children sought declaratory and injunctive relief requiring the state to implement a greenhouse gas emissions policy similar to the policy Sinnok seeks.[70] The Court of Appeals of Washington in *Svitak* affirmed dismissal of the plaintiffs' claims in part because they presented a nonjusticiable political question.[71] The court explained that "Svitak's declaratory judgment action asks this court to create a new regulatory program," which "would necessarily involve resolution of complex social, economic, and

---

69 *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (internal citations omitted).

70 *Svitak ex rel. Svitak v. Washington*, 178 Wash. App. 1020 (2013).

71 *Id.*

environmental issues."[72] The court concluded that weighing those competing interests and developing a climate policy was the role of the legislature, not the judiciary.[73]

An Oregon court reached a similar conclusion in *Chernaik v. Brown*.[74] The plaintiffs asked the court to order the State of Oregon to implement certain climate change regulations based on the "best available science," including specific yearly reductions in greenhouse gas emissions.[75] Although the court analyzed the plaintiffs' claims under the "separation of powers doctrine," rather than the political question doctrine, the court concluded that granting plaintiffs' requested relief would amount to judicial usurpation of the legislature's role.[76] The court explained, "The Plaintiffs effectively ask the Court to do away with the Legislature entirely on the issue of GHG emissions on the theory that the Legislature is not doing enough"—something the court concluded was "a singularly bad and undemocratic idea."[77]

Sinnok's assertion that climate change-based claims are always justiciable is thus demonstrably without merit—the cases Sinnok cites in support of his argument at best

---

72 *Id.*

73 *Id.* Sinnok asserts that *Svitak* is inapposite because it involved a "single-count public trust claim[] based on *inaction* with respect to governmental failure to address climate change." [At. Br. 31 n.15] But as explained above, whether a complaint alleges action or inaction, and whether it includes a public trust claim or some other claim, do not determine the existence of a political question. Nor does Sinnok offer any argument for why a multi-count claim would be justiciable where a single-count claim is not.

74 *Chernaik v Brown*, No. 16-11-09273, 2015 WL 12591229, at *9 (Or. Cir. May 11, 2015).

75 *Id.*

76 *Id.* at *8-10.

77 *Id.*

stand for the proposition that *some* climate change-based claims may be justiciable.[78] [At. Br. 27-31] Only one court has allowed claims analogous to Sinnok's to proceed to the merits: In *Juliana v. United States*, the United States District Court for the District of Oregon held that the plaintiffs presented justiciable claims for declaratory and injunctive relief based on the government's "deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history."[79] But *Juliana's* logic is directly contrary to this Court's reasoning in *Kanuk*, and Sinnok has offered no reason to disregard established Alaska law in favor of a district court decision from Oregon—particularly one that has been characterized as "certainly contravene[ing] or ignor[ing] longstanding authority."[80] The weight of authority supports the conclusion that Sinnok's claims are not justiciable.

Nor does Sinnok's status as a young person alter the justiciability calculus, as *amicus* League of Women Voters Alaska suggests. [League Br. 8-12] The League asserts

---

78 *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325, 329 (2d Cir. 2009), rev'd on other grounds, 564 U.S. 410 (2011) (noting that "[n]owhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches" and that the court could not "require any unilateral, mandatory emissions reductions over entities not party to the suit"); *Comer v. Murphy Oil USA*, 585 F.3d 855, 875, 879 (5th Cir. 2009) (finding no political question in part because the plaintiffs' common law tort claim would not "require the district court to fix and impose future emission standards upon defendants and all other emitters"); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1239 (D. Or. 2016).

79 *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233, 1241-42 (D. Or. 2016).

80 *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250 (E.D. Pa. 2019). *Juliana* is currently on appeal to the Ninth Circuit Court of Appeals; the court heard oral argument on June 4, 2019. Docket No. 18-36082 (9th Cir.).

that because Sinnok is young and vulnerable, reaching the merits of his case is particularly important. [League Br. 8-10] But the League identifies no authority to support the proposition that a court's ability to make a legislative policy determination depends on how important that determination is. Regardless of Sinnok's age, ruling on the merits of his claim would require the Court to weigh the "employment, resource development, power generation, health, culture, [and] other economic and social interests" that inform the State's approach to climate change—the precise inquiry that the Court in *Kanuk* said it cannot undertake.[81] Nor does the fact that Sinnok cannot yet vote mean that the Court is bound to hear his otherwise nonjusticiable claims. [League Br. 11-12] If the Court were to follow that logic, then it would be required to decide every claim invoking the rights of people ineligible to vote—regardless of whether the judiciary has the institutional ability to decide those claims.

II. The superior court properly dismissed Sinnok's claims for declaratory relief on prudential grounds.

Kanuk similarly supports the dismissal of Sinnok's declaratory relief claims on prudential grounds. In *Kanuk*, the Court held that "absent the prospect of any concrete relief," prudence dictated that the Court not reach the merits of the plaintiffs' claims for declaratory judgment—claims nearly identical to Sinnok's[82]—because while the Court is institutionally capable of interpreting the constitution, it will decline to do so when the

---

81 *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1098-99 (Alaska 2014).

82 *Id.* at 1100.

underlying claim does not present an " 'actual controversy' that is appropriate for [judicial] determination."[83] Sinnok's claims for declaratory relief should likewise be dismissed on prudential grounds.

Declaratory relief "helps avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants."[84] It is a discretionary remedy that serves "to clarify and settle legal relations, and to 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.' "[85] "[A] court should decline to render declaratory relief when neither of these results can be accomplished."[86]

Sinnok's first prayer for relief asks the Court to declare that the State has "constitutional duties and constitutional and statutory authority to protect and refrain from infringing" on a host of rights, including the right to a stable climate system. [Exc. 241] His second prayer for relief asks the Court to declare that the State has "constitutional duties and constitutional and statutory authority" under the public trust doctrine to control and protect the atmosphere and other public trust resources. [Exc. 242]

Just as in *Kanuk*, declaring that the atmosphere is subject to the public trust doctrine or that the State has a duty not to infringe on individuals' constitutional rights

---

83 *Id.* at 1099-1100.

84 *Id.* at 1103 (quoting Charles Alan Wright, et al., Federal Practice and Procedure § 2751 at 457–58 (3d ed.1998)).

85 *Id.* at 1101 (quoting *Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005)).

86 *Id.* (quoting *Lowell v. Hayes*, 117 P.3d at 755).

would not instruct the State on how to fulfill its constitutional obligations and avoid future litigation; it would not provide Sinnok with "any certain basis on which to determine in the future whether the State has breached its duties"; it would not compel any particular state action; and it would not protect Sinnok from the injuries he alleges.[87] Particularly because Sinnok cannot obtain concrete relief in the form of an injunction, issuing declaratory relief "would not serve to declare expediently 'in one action the rights and obligations of [the] litigants' and thus avoid further litigation."[88] The declaratory judgment Sinnok seeks thus would not serve the purposes of declaratory relief.

Sinnok's remaining five prayers for relief ask the Court to declare that the State, through its alleged "Energy Policy," has violated Sinnok's rights. [Exc. 242-44] But the Court explained in *Kanuk* that "once the court has declined, on political question grounds, to determine precisely what [the State's] obligations entail" with regard to the atmosphere, the Court cannot declare that the State has shirked those obligations.[89] The Court in *Kanuk* thus declined to decide whether the State had "failed to uphold its fiduciary obligation" with regard to the atmosphere.[90] Just as in *Kanuk*, because the Court in this case must decline, on political question grounds, to define the State's obligations with regard to greenhouse gas regulation, it cannot declare that the State has failed to fulfill those obligations and has thereby violated Sinnok's rights.

---

87 *Id.* at 1102.

88 *Id.* at 1100, 1103.

89 *Id.* at 1101.

90 *Id.* at 1099.

Sinnok argues that the prudential considerations noted in *Kanuk* do not apply here "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*." [At. Br. 35] But the prudential concerns that led to dismissal in *Kanuk* did not depend on the pace of climate change in Alaska. Any "developments and acceleration of climate change impacts in Alaska" do not alter the fact that declaratory relief would neither "tell the State what it needs to do in order to satisfy its . . . duties and thus avoid future litigation" nor "provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties."[91] Sinnok does not explain why the "distinct factual circumstances" of this case make it any more likely that declaratory relief would settle the parties' future claims. And, as explained above, Sinnok has not meaningfully distinguished the facts of this case. The inaction alleged in *Kanuk* is the same as the action alleged here—allowing greenhouse gas emissions to continue at a rate the plaintiffs deem unsatisfactory. The prudential concerns noted by the Court in *Kanuk* thus apply with equal force here, and Sinnok's attempt to distinguish this case is unavailing.

Sinnok also argues that even if he is not entitled to the declaratory relief he seeks, the superior court should not have dismissed his complaint because a "claim should not be dismissed as long as some relief might be available on the basis of the alleged facts." [At. Br. 36] But he does not identify any other relief that might be available, and a court

---

91 *Id.* at 1102.

cannot be required to deny a motion to dismiss based on the mere suggestion that some unidentified relief could possibly be available. Sinnok's unsupported, blanket assertion does not set forth any argument for why this Court should depart from its decision in *Kanuk*.

III. Sinnok's challenge to DEC Commissioner Hartig's denial of his petition for rulemaking is meritless.

Sinnok's final claim alleges that DEC and Commissioner Hartig violated Sinnok's rights by denying his petition for rulemaking. This claim, too, is meritless. DEC complied with the Administrative Procedure Act and provided reasonable, non-arbitrary reasons for denying Sinnok's petition—and Sinnok does not argue otherwise. Sinnok's argument that this Court should instead review the denial of his petition for violation of his substantive due process rights is unsupported by authority, contrary to established administrative law, and antithetical to the political question doctrine.

A. The denial of Sinnok's petition for rulemaking was not arbitrary.

Judicial review of an agency's denial of a rulemaking petition is limited to determining whether the agency complied with the Administrative Procedure Act (APA) and whether the agency's denial was arbitrary.[92] Sinnok expressly disavows any argument that DEC's denial of his petition was procedurally unsound. [At. Br. 39] The only question before the Court is thus whether DEC's denial of Sinnok's petition was arbitrary.[93]

---

92 *Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d 334, 339-40 (Alaska 1985); *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 358 (Alaska 1971).

93 *Johns*, 699 P.2d at 339-40.

To determine whether an agency's denial of a rulemaking petition was arbitrary, the Court looks to the face of the agency's written denial letter.[94] Here, the Commissioner's four-page letter containing a detailed explanation of the legal, fiscal, and practical reasons for denying Sinnok's petition cannot be characterized as arbitrary. Indeed, Sinnok does not actually argue that DEC's denial of his petition was arbitrary. Rather, he asserts that the Commissioner's conclusion that the petition failed to propose a regulation—one of the Commissioner's several reasons for denying the petition—was erroneous. [At. Br. 36-43] But the Commissioner's conclusion was reasonable and consistent with this Court's precedent.

Alaska's Administrative Procedure Act defines a "regulation" as

> every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency.[95]

The Court applies this definition by inquiring (1) whether the agency policy in question "implements, interprets, or makes specific the law enforced or administered by the agency," and (2) whether it "affects the public or is used by the agency in dealing with the public."[96] An agency policy that affects the public only in an attenuated manner does not constitute a regulation: A "nonspecific, downstream effect alone—that is, that an

---

94 *See id.*

95 AS 44.62.640(a)(3).

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

agency plan may eventually be implemented by regulation—is insufficient to demonstrate sufficient meaningful impact on the public to satisfy the second indicium of a regulation."[97] Here, the Commissioner concluded that Sinnok's petition would establish policy directives for DEC but would not establish standards that directly govern public conduct—such as specific, enforceable greenhouse gas emissions standards—except through subsequent and more specific regulations to implement Sinnok's proposed policy. [Exc. 141]

Sinnok's arguments about how his petition would affect the public only underscore the fact that his proposed policy "[would] be implemented and [would] affect the public chiefly through downstream 'administrative actions such as leases, permits, land conveyances, classification orders, and mineral orders' "—like the Bristol Bay Area Plan that this Court found not to be a regulation in *State, Department of Natural Resources v. Nondalton Tribal Council*.[98] [At. Br. 41-43] Sinnok argues that his petition would affect the public because it "would result in increasing denials of initial and renewal applications for leases and permits" and would "require all state-permitted GHG-emitting activities to cease or eliminate their emissions" by 2050. [At. Br. 42-43] But his petition does not propose any specific guidelines for permitting or lease approval, and it does not include any particular standards for restricting greenhouse gas emissions. [Exc. 4-5] The effects on the public that Sinnok mentions would only result from

---

97 *Nondalton Tribal Council*, 268 P.3d at 303.

98 *Id.* at 304.

subsequent implementation by more specific regulations or guidelines. An agency action that "embodies no finding as to a particular application and does not establish criteria by which particular applications should be evaluated" is not a regulation.[99] Sinnok's petition thus did not propose a "regulation" under the APA.

Even if DEC erred in concluding that Sinnok's petition failed to propose a regulation, the denial of the petition still was not arbitrary. In his denial letter, the Commissioner cited several "practical and legal hurdles" that prevented him from granting the petition. [Exc. 142] For example, he explained that limitations on data availability and agency resources would not allow DEC to produce a yearly carbon accounting and inventory; DEC was already working on an inventory but had only been able to complete accounting through 2010. [Exc. 141] He explained that DEC did not appear to have statutory authority to regulate fossil fuel extraction "based on the emissions associated with their end use." [Exc. 141] And he noted that because the petition proposed a more stringent policy than is required by federal law, DEC would have to make certain written findings that must be "supported by studies, submitted for peer review, and . . . made available for public inspection"[100]—a process that could constrain DEC's ability to meet some of Sinnok's proposed benchmarks. [Exc. 142]

The Commissioner also noted that granting the petition would not achieve the climate goals sought by Sinnok without global action but would likely "have significant

---

99 *Id.*

100 *See* AS 46.14.010, AS 46.14.015.

consequences for employment, resource development, power generation, health, culture, and other economic and social interests within the state." [Exc. 142] And, echoing this Court's concern that enacting a greenhouse gas regulatory scheme entails a legislative policy determination, the Commissioner explained that "[p]olicy questions of this nature are best addressed in partnership with the Legislature." [Exc. 143] All of these are reasonable and non-arbitrary justifications for the Commissioner's denial of the petition, and Sinnok does not argue otherwise. [At. Br. 36-43] His challenge to the denial of the petition therefore must fail.

B. An agency's denial of a rulemaking petition is not subject to review for compliance with substantive rights.

Under Alaska law, the Court's inquiry ends when it determines that an agency's denial of a rulemaking petition complied with the APA and was not arbitrary.[101] But Sinnok asserts that the Court must also "review agency actions for alleged infringements of substantive constitutional rights." [At. Br. 37-41] His argument is unsupported by authority and conflates the analytical frameworks for judicial review of different kinds of state action.

Sinnok asserts that after this Court announced the limited scope of review applicable to an agency denial of a rulemaking petition in *Johns v. Commercial Fisheries Entry Commission*,[102] it went on to "address[] the substantive constitutionality of the

---

101 *Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d 334, 339-40 (Alaska 1985); *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 358 (Alaska 1971).

102 699 P.2d at 339-40.

agency action to which Johns' petition was directed under a separately applicable substantive standard" in a second appeal. [At. Br. 39] But the appeal cited by Sinnok did not involve judicial review of an agency denial of a rulemaking petition. Rather, the Court in that appeal reviewed the constitutionality of an *existing* regulation.[103] And in *K&L Distributors*, which Sinnok also cites, the Court inquired into the substantive rights implicated by an agency's grant of a tax credit—it did not ask whether the agency's denial of a petition for rulemaking implicated substantive rights.[104]

The strict scrutiny standard that Sinnok invokes—whether the agency's action was "narrowly tailored to achieve a compelling governmental interest" [At. Br. 40]—applies to governmental action alleged to violate a fundamental right.[105] Unsurprisingly, Sinnok identifies no case from any court in this country holding that there is a fundamental right to rulemaking. And for good reason: The adoption of regulations is a discretionary agency function.[106] At most, Sinnok has a statutory right to *petition* for rulemaking,[107] but he does not have a fundamental right to have specific rules enacted.

---

103 *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1264 (Alaska 1988).

104 *K & L Distributors, Inc.*, 486 P.2d at 352.

105 *Compare Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d at 339-40 and *K & L Distributors*, 486 P.2d at 358, *with Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 (Alaska 2004) ("We have previously applied strict scrutiny to review the constitutionality of laws that infringe upon the fundamental rights of minors.") and *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1137–38 (Alaska 2016) ("[I]t has long been established that a law burdening the fundamental right of reproductive choice demands strict scrutiny.").

106 AS 46.03.020(10).

107 AS 44.62.220.

The denial of a rulemaking petition does not deprive an individual of the underlying substantive right implicated by the rulemaking petition. For example, Alaska recognizes a fundamental right to privacy.[108] But if an individual concerned about privacy petitioned for a rule to prohibit wiretapping, and that petition was denied, the denial of the petition would not violate the individual's right to privacy. Likewise, the denial of Sinnok's petition cannot be said to violate the substantive rights his proposed rules were intended to protect.

Indeed, Sinnok's proposed standard would allow an individual to circumvent the political question doctrine altogether simply by filing a petition for rulemaking with an agency. Challenging the denial of a rulemaking petition on substantive grounds is simply "an attempt to ask the [C]ourt to do indirectly what it cannot do directly,—i.e., pass on a purely political question."[109] The Court cannot "hasten the regulatory process by imposing [its] own judicially created scientific standards,"[110] whether those standards are initially proposed in a superior court complaint or an agency rulemaking petition.

C. The denial of a rulemaking petition can be reviewed on a motion to dismiss.

Sinnok also asserts that DEC's denial of his rulemaking petition cannot be assessed on a motion to dismiss because the court must "decide whether, *in fact*," the State's reasons for denying the petition "are the means least restrictive to Plaintiffs'

---

108 Alaska Const. art. I, § 6; *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

109 *Daly v. Madison Cty.*, 378 Ill. 357, 370 (1941).

110 *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1098 (Alaska 2014).

rights." [At. Br. 41 (emphasis in original)] This argument relies on an inapplicable constitutional standard, as discussed above.[111] And contrary to Sinnok's assertion, the Court need only look to the face of DEC's denial letter to determine whether DEC's reasons for denying Sinnok's petition were arbitrary.[112] Sinnok's argument that DEC's denial of his rulemaking petition cannot be decided on a motion to dismiss is therefore without merit.

IV. Sinnok's remaining arguments do not affect the outcome of this case.

In addition to challenging the superior court's conclusion that his claims are not appropriate for judicial resolution, Sinnok alleges several points of error in the court's order. Because this Court reviews a motion to dismiss de novo and may affirm on any basis supported by the record,[113] these purported errors are not grounds for reversal. The record supports the superior court's conclusion that Sinnok's claims for injunctive relief are nonjusticiable and that his claims for declaratory relief should not be heard for prudential reasons. The Court therefore need not consider any of the remaining claims of error in the superior court's reasoning. Even if the Court does consider these arguments, they are meritless or allege only harmless error.[114]

---

111 *Compare Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d 334, 339-40 (Alaska 1985) and *K & L Distributors*, 486 P.2d 351, 358 (Alaska 1971), *with Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 (Alaska 2004) and *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1137–38 (Alaska 2016).

112 *See Johns*, 699 P.2d at 339-40 & n.7 (determining whether agency denial of rulemaking petition was arbitrary by looking to the face of the denial letter).

113 *Kanuk*, 335 P.3d at 1092, 1103 n.85.

114 *See* Civil Rule 61 ("[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for

A. Any failure to assume the truth of Sinnok's allegations was harmless.

Sinnok argues that the superior court failed to accept his allegations as true and to draw all reasonable inferences in his favor, as required on a motion to dismiss. [At. Br. 9] Specifically, he asserts that the court erred in concluding that he did not demonstrate the existence of a state policy that contributes to climate change. [At. Br. 9]

The court's conclusion that Sinnok failed to identify how the State's alleged energy policy has contributed to climate change is, at most, harmless error. [At. Br. 13-15] Even assuming that the State of Alaska has contributed to climate change, Sinnok's claims still are not suitable for judicial resolution. This Court in *Kanuk* recognized the likelihood that the State's current approach to greenhouse gases contributed to climate change but nonetheless concluded that "government reaction to the problem implicates realms of public policy besides the objectively scientific."[115] Despite "compelling" evidence of anthropogenic climate change, the Court concluded that it was the purview of the political branches to decide whether "employment, resource development, power generation, health, culture, or other economic and social interests militate against implementing what the plaintiffs term the 'best available science' in order to combat climate change."[116]

---

setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

115 *Kanuk*, 335 P.3d at 1097.

116 *Id.* at 1098.

Sinnok also argues that the court should not have relied on his concession that his requested relief "would not 'fix' climate change materially." [At. Br. 15] But even if Sinnok's requested relief could materially improve climate change, his claim would still be nonjusticiable for the same reason: The balancing of competing public interests is a policy determination for the political branches to make.

Sinnok asserts that the court also erred in requiring him to identify a written policy, even though a plaintiff may in some cases bring suit against state actors based on a de facto policy.[117] [At. Br. 11-13] But the superior court noted only that Sinnok had been unable to identify *any* "specific policies the state has enacted"—written or de facto. [Order at 8-9] And to the extent Sinnok argues that the court should have assumed the existence of a state energy policy, the existence *vel non* of such a policy does not affect the political question analysis, as explained in section I.B.1, *supra*.

B. Any error in the enumeration of Sinnok's purported rights was harmless.

Sinnok argues that the superior court erred because it treated all of his claims for declaratory relief as stemming from the alleged violation of his "fundamental right to a stable climate system." [At. Br. 32-34] Sinnok asserts that the court overlooked his invocation of the rights to life, property, bodily integrity, and personal security, among others. [At. Br. 33] He does not explain how this oversight amounts to prejudicial error. Sinnok's claims for declaratory relief were appropriately denied on prudential grounds

---

[117] *E.g.*, *Haygood v. Younger*, 769 F.2d 1350, 1359 (9th Cir. 1985) (considering "wrongful taking of liberty [that] results from either affirmatively enacted or de facto policies, practices or customs").

because (1) declaring that the State has a duty to protect both the atmosphere and Sinnok's rights "would not tell the State what it needs to do" to fulfill its constitutional obligations "and thus avoid future litigation"; "it would not provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties"; "it would not compel the State to take any particular action"; and it would not "protect the plaintiffs from the injuries they allege in their complaint"[118]; and (2) the Court cannot declare that the State has failed to protect Sinnok's rights once the Court has declined to determine the extent of the State's obligations. The declaratory relief Sinnok seeks thus would not serve the purposes of declaratory relief, regardless of whether he alleges the violation of one right or several. Any error in the superior court's characterization of Sinnok's claim was therefore harmless.

C. The superior court's reference to a right to a stable climate system was not error.

Sinnok also complains that the superior court erroneously reached the merits of whether Alaska's constitution provides the right to a stable climate system. [At. Br. 34-35] The basis of this argument is unclear. The pages of the court order cited by Sinnok address the question of justiciability, analyzing the approach various courts have taken to deciding whether climate change-based claims are justiciable. [Exc. 256-261] The superior court did not attempt to answer whether a right to a stable climate system exists; indeed, Sinnok concedes that the court did not decide on the matter. [At. Br. 35; Exc. 256-261] But even if the court had opined on the existence of such a right, Sinnok has not

---

118 *Kanuk*, 335 P.3d at 1102.

explained how that would have constituted error or altered the outcome of the case. He merely asserts, without further explanation, that "[t]he superior court erred in considering the issue and basing its prudential consideration analysis thereon." [At. Br. 35] Sinnok's argument is therefore without merit.

CONCLUSION

For the foregoing reasons, the Court should AFFIRM the dismissal of Sinnok's complaint.