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

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| 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

# SUPPLEMENTAL BRIEF OF APPELLEE STATE OF ALASKA

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## AUTHORITIES PRINCIPALLY RELIED UPON

**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.

## INTRODUCTION

Sinnok's opening and reply briefs cite extensively to *Juliana v. United States*, a federal district court opinion holding that 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."[1] In its brief, the State explained how "*Juliana's* logic is directly contrary to this Court's reasoning in *Kanuk* [*ex rel. Kanuk v. State, Department of Natural Resources*, 335 P.3d 1088 (Alaska 2014)], and Sinnok has offered no reason to disregard established Alaska law in favor of a district court decision from Oregon—particular one that has been characterized as 'certainly contravene[ing] or ignor[ing] longstanding authority.'" [Ae. Br. 32] Because the Ninth Circuit reversed the district court's decision in *Juliana*, and because the Ninth Circuit's decision further supports the State's argument that the separation of powers doctrine makes Sinnok's claims nonjusticiable, the State provided notice to this Court of that appellate decision.

Sinnok then filed a supplemental brief that mainly reiterates the same arguments he raised in his opening and reply briefs. The only real difference is that Sinnok has recharacterized the declaratory relief he is seeking in his complaint: he now argues that he seeks a declaration that a statutory provision expressing one aspect of the State's approach to energy matters violates his constitutional rights. And he argues that the Ninth Circuit's decision is not controlling, not correct, and not relevant.

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[1] 217 F. Supp. 3d 1224 (D. Or. 2016).

Despite Sinnok's assertions otherwise, his complaint is not simply seeking a declaration that a statutory provision is unconstitutional. And focusing on Sinnok's requested relief—including this new request—illustrates precisely why his claims present a political question depriving this Court of jurisdiction.

## ARGUMENT

### I. The Ninth Circuit's decision in *Juliana*—including its application of the second *Baker* factor—supports the State's position that Sinnok's claims present nonjusticiable political questions.

In *Juliana v. United States*, plaintiffs challenged federal policies, acts, and omissions for contributing to climate change.[2] They sought a declaration that their constitutional and public trust rights have been violated and an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce $CO_2$ emissions.[3] The federal defendants moved to dismiss, arguing—among other things—that the case presented a nonjusticiable political question and that the plaintiffs lacked standing to sue.[4] The district court denied the motion to dismiss, concluding the case did not present a political question and the plaintiffs had standing to sue.[5]

On appeal, the Ninth Circuit reversed.[6] It did not analyze the political question issue but concluded the plaintiffs do not have standing because an Article III court cannot

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2 *Id.* at 1234.

3 *Id.* at 1233.

4 *Id.* at 1235.

5 *Id.* at 1235–48.

6 947 F.3d 1159 (9th Cir. 2020).

redress the injuries alleged.[7] The Court's conclusion was based, in large part, on the separation of powers doctrine.[8] The Court asked whether the judiciary had the constitutional authority to grant the declaratory and injunctive relief the plaintiffs sought, and concluded it did not.[9] The Court held that granting such relief would "enjoin the Executive from exercising discretionary authority expressly granted by Congress" and would "enjoin Congress from exercising power expressly granted by the Constitution."[10] Furthermore, it would "require the judiciary to pass judgment [on a government response that] necessarily would entail a broad range of policymaking."[11] It would redirect to the judicial branch "complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches"—decisions that "plainly require consideration of competing social, political, and economic forces, which must be made by the People's elected representatives rather than by federal judges interpreting the basic charter of Government for the entire country."[12]

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7 *Id.* at 1169–73.

8 *Id.*

9 *Id.* at 1171.

10 *Id.* at 1170.

11 *Id.* at 1172.

12 *Id.* at 1171–72 (internal quotation marks and citation omitted).

In arriving at this conclusion, the Ninth Circuit compared the issue of redressability in *Juliana* with the political question doctrine.[13] The separation of powers doctrine lies at the heart of both analyses.[14] For this reason alone, *Juliana* is relevant.

Sinnok's assertion that the Ninth Circuit decision implicated none of the six *Baker* factors, used primarily to evaluate whether a claim is a political question, is simply wrong. [At. Supp. Br. 1] The Ninth Circuit relied heavily on the second *Baker* factor: a lack of judicially discoverable and manageable standards for resolving the issue.[15] It discussed how the U.S. Supreme Court's recent decision that partisan gerrymandering claims present a political question beyond the reach of Article III courts supported its decision that the *Juliana* plaintiffs' injuries are not redressable by Article III courts.[16] The Ninth Circuit noted that *Rucho v. Common Cause* "reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide the exercise of such authority."[17] In determining that partisan gerrymandering was a political question, the *Rucho* Court relied heavily on the second *Baker* factor.[18] And the Ninth

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13 *Id.* at 1173.

14 *Id.* at 1173 & 1174 n.9.

15 *Id.* at 1173 (explaining in detail the applicability of *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494, 2508 (2019), which highlighted the second *Baker* factor as determinative of its political doctrine analysis) and *id.* at 1187 (dissent) (describing majority opinion as being grounded "exclusively in the second *Baker* factor").

16 *Id.* at 1173.

17 *Id.* (citing *Rucho v. Common Cause*, 139 S. Ct. at 2506–07, 2508).

18 *Rucho*, 139 S. Ct. at 2494, 2496, 2502.

Circuit incorporated into its decision the reasoning from *Rucho*, concluding that the lack of standards precluded it from determining if any climate change plan would sufficiently remediate the plaintiff's claimed constitutional violations.[19]

Sinnok's implication that the Ninth Circuit found in a footnote without any analysis that the claims in *Juliana* did not present a political question is misleading. [At. Supp. Br. 1] The decision was not unanimous, and in responding to the dissent's accusation that the majority was blurring the standing and political question doctrines, the majority noted in a footnote, "Contrary to the dissent, we do not find this to be a political question, although the doctrine's factors often overlap with redressability concerns."[20] In so stating, the majority did not affirmatively hold that the *Juliana* plaintiffs' claims did not implicate the political question doctrine. Rather, the footnote explains that it was not analyzing the case under the political question doctrine—like the dissent accused it of doing—but rather under the standing doctrine. The two doctrines are distinct but there is "significant overlap."[21] This "significant overlap" makes *Juliana* relevant.

Although not binding authority, *Juliana* provides persuasive support for the State's position by illustrating how the second *Baker* factor applies to render Sinnok's claims nonjusticiable political questions. Just as the Ninth Circuit concluded that a lack of judicially discoverable and manageable standards prevented it from determining if any

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19 *Juliana*, 947 F.3d at 1173.

20 *Id.* at 1174 n.9 (responding to dissent at 1185–90 & 1185 n.10).

21 *Id.* at 1174 n.9.

climate change plan would sufficiently safeguard plaintiffs' claimed constitutional violations, so too does a lack of measurable standards impede the Court's review here.

In an attempt to divert this Court's attention from the second *Baker* factor, Sinnok's supplemental brief incorrectly asserts that the State argues "solely" and "exclusively" that Sinnok's claims are nonjusticiable political questions under the third *Baker* factor. [At. Supp. Br. 1] And Sinnok contends that the State therefore waived any arguments about how the second *Baker* factor also applies to this litigation. This is both legally and factually flawed. As a legal matter, whether a case presents a political question (for whatever reason) is not an issue that can be waived.[22] As a factual matter, the State discussed multiple *Baker* factors—including the second *Baker* factor—by analogizing to cases that rely on multiple *Baker* factors and, as Sinnok concedes, addressing the second *Baker* factor at oral argument.[23] [At. Br. 1 n.2] Although the State's continued position is that 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"[24]—the second *Baker* factor,

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22 *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 344 (Alaska 2011) ("The question of subject matter jurisdiction can be raised at any time."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) ("The existence of a political question deprives a court of jurisdiction. [The litigant] remains free to assert the argument at any time, and the district court has an independent obligation to make sure that the disposition of the case will not require it to decide a political question.") (internal citation omitted).

23 *See, e.g.*, Ae. Br. 20 n.39, 21 & n.42, 28–31 & n.67.

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

and *Juliana's* application of the second *Baker* factor, also supports the State's position that Sinnok's claims are nonjusticiable.

Finally, Sinnok's argument that *Rucho* supports its position is unsound. In *Rucho*, the Court noted that while the U.S. Constitution does not have judicially measurable standards for preventing political gerrymandering, some state constitutions, like Florida, do.[25] Sinnok then cites to examples of how the Alaska Constitution is often more protective than its federal corollary. [At. Supp. Br. 13 n.48] But that fact does not mean the Alaska Constitution has measurable standards this Court can use to resolve Sinnok's claims. And the lack of such standards supports the State's position that Sinnok's claims present a political question.

## II. The relief Sinnok requests confirms that Sinnok's claims present nonjusticiable political questions.

Whether a claim is judicially redressable is at the heart of the political question analysis. Redressability is not, as Sinnok argues, relevant only to the issue of federal standing. [At. Supp. Br. 4–5]

This Court illustrated how redressability is tied to the political question doctrine in *Kanuk*,[26] by looking *only* to the plaintiffs' requested relief to determine that many of their claims presented nonjusticiable political questions. [Ae. Br. 16] The Court in *Kanuk* held that a political question arises "when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and

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25 139 S. Ct. at 2507.

26 335 P.3d at 1097.

factual analysis."[27] That is precisely what was requested in *Kanuk*, and that is precisely what Sinnok requests here. Sinnok's requested relief—that this Court review the State's approach to energy matters and impose a different energy policy—is not just relevant to the political question doctrine, it is determinative of it.

Because a plaintiff obviously cannot challenge a policy in the abstract [Ae. Br. 18–19], Sinnok recharacterized at oral argument and in his supplemental brief his request for declaratory relief: he now asks the Court to declare AS 44.99.115(2)(B) unconstitutional. [At. Supp. Br. 10–12] That statutory provision encourages development of nonrenewable and alternative energy resources. That provision—or rather the part of that provision that promotes greenhouse gas-producing energy resources[28]—is not a standalone severable policy decision, but part of the State's broad approach to energy matters. Alaska Statute 44.99.115, as a whole, declares the "state energy policy." Among other things, it supports energy efficiency and conservation,[29] encourages development of both renewable,[30] and nonrenewable and alternative energy resources,[31] and supports energy research and education.[32]

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27 *Id.*

28 AS 44.99.115(2)(B) promotes development of nonrenewable energy resources with carbon emissions like coal, but also carbon-neutral energy resources like nuclear energy. It would seem Sinnok takes issue only with the part of AS 44.99.115(B)(2) that promotes greenhouse gas-emitting resource development.

29 AS 44.99.115(1).

30 AS 44.99.115(2)(A).

31 AS 44.99.115(2)(B).

32 AS 44.99.115(3).

As an initial matter, Sinnok's complaint does not ask the court to declare a particular statute (or subpart thereof) unconstitutional. Rather, Sinnok asks for a complete overhaul of the State's approach to energy matters and climate change. [Exc. 242–43] His complaint mentions AS 44.99.115(2)(B)[33] only as "evidence[]" of the State's broader "Energy Policy." [Exc. 222–23] Sinnok describes the State's "Energy Policy" as the "systemic authorization, permitting, promotion, encouragement, and facilitation of activities, including the development, extraction, transport, export, and combustion of fossil fuels," and asks that this "Energy Policy" be declared unconstitutional. [Exc. 147, 242–43] Sinnok's request to declare AS 44.99.115(2)(B) unconstitutional is new.

Even if this Court considers Sinnok's new request for relief that he did not plead, the issue still presents a nonjusticiable political question. The purpose of the political question doctrine is to bar claims that undermine the separation of powers. The separation of powers "limits the authority of each branch [of government] to interfere in the powers that have been delegated to the other branches."[34] It "preclude[s] the exercise of arbitrary power and . . . safeguard[s] the independence of each branch."[35] That purpose makes clear Sinnok's claims present political questions because the declaratory relief he seeks would require the court to "make a policy judgment of a legislative nature, rather than

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33 The complaint cites AS 44.99.115(2)(A) as evidence of the State's broader "Energy Policy," but that provision encourages the development of renewable resources such as wind and solar energy, so it appears Sinnok meant AS 44.99.115(2)(B), which encourages the development of nonrenewable and alternative energy resources.

34 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007).

35 *Id.*

resolving the dispute through legal and factual analysis."[36] It would require the court to "move beyond areas of judicial expertise."[37] Such a review would require weighing a number of competing interests that involve complex social, economic, and environmental impacts. [*See* Ae. Br. 26–32] Such broad policy determinations are within the province of the other branches of government—especially decisions about Alaska's natural resources that the Constitution expressly grants to the legislature: "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."[38]

Sinnok likens his request for review of a broad energy policy to cases in which this Court has reviewed *specific acts* implementing a government policy. [At. Supp. Br. 8–9] The *Planned Parenthood* cases Sinnok cites challenged the constitutionality of specific acts: a regulation denying Medicaid assistance for medically necessary abortions[39] and laws requiring parental consent or notice for a minor to have an abortion.[40] With the exception of Sinnok's challenge to DEC's denial of rulemaking, Sinnok does not challenge specific acts here. He asks the court to engage in a sweeping review of the State's approach to energy matters. He asks the court to legislate.

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

37 *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

38 *See, e.g.*, Alaska Const. art. 8, § 2. This implicates the first *Baker* factor.

39 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 907 (Alaska 2001).

40 *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007); *State v. Planned Parenthood of Alaska*, 35 P.3d 30 (Alaska 2001); *Planned Parenthood of the Great Northwest v. State*, 375 P.3d 1122 (Alaska 2016).

Reviewing the State's approach to energy is not, as Sinnok suggests, a simple matter of "strik[ing] the proper constitutional balance between [the State's] compelling interests and the fundamental rights of its citizens." [At. Supp. Br. 8] Energy policy involves consideration of complex, oft-conflicting rights of multiple groups of citizens. And energy policy involves decisions the Alaska Constitution committed to the legislature's discretion.[41] Furthermore, in order to review and make a declaration on the State's approach to energy matters, the court would need "judicially discoverable and manageable standards."[42] And the judiciary lacks those standards.

## CONCLUSION

For the reasons in the State's responsive brief, oral argument, and this supplemental brief, the Court should affirm the dismissal of Sinnok's complaint.

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41 Alaska Const., art. 8, § 2.

42 *Baker*, 369 U.S. at 217.