IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ESAU SINNOK; LINNEA L., a minor, by and through her guardian, HANKLENTFER; TASHA ELIZARDE; CADE TERADA; KAYTLY K., a Minor, by and through her guardian, MAURICE KELLY; BRIAN CONWELL; JODE S., a minor, by and through his guardian, CONNIE SPARKS; MARGARET KURLAND; LEXINE D., a minor, by and through her guardian, BERNADETTE DEMIENTIFF; ELIZABETH B., a Minor, by and through her guardian, ILONA BESSENYEY; VANESSA D., a minor, by and through her guardian, JULEE DUHRSEN; ANANDA ROSE AHTAHKEE L., a minor, by and her guardian, GLEN "DUNE" LANKARD; GRIFFIN PLUSH; CECILY S. and LILA S., minors, by and through their guardians, MIRANDA WEISS and BOB SHAVELSON; and SUMMER S., a minor, by and through her guardian, MELANIE SAGOONICK,

Plaintiffs,

v.

STATE OF ALASKA; WILLIAM WALKER, Governor of the State of Alaska, in his official capacity; ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION; LAWRENCE HARTIG, Commissioner of Alaska Department of Environmental Conservation, in his official capacity; ALASKA DEPARTMENT OF NATURAL RESOURCESL ALASKA OIL AND GAS CONSERVATION COMMISSION; ALASKA ENERGY AUTHORITY; and REGULATORY COMMISSION OF ALASKA,

Defendants.

Case No. 3AN-17-09910 CI

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TO THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE JUDGE GREGORY MILLER, PRESIDING

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Esau Sinnok, Ananda Rose Ahtahkee L., and fourteen other Alaska youths and children are suing the State of Alaska, Governor Bill Walker, five Alaska agencies, and Lawrence Hartig, Commissioner of the Alaska Department of Environmental Conservation (DEC).[1] Plaintiffs allege that the State is violating the Alaska Constitution, including the public trust doctrine and guarantees of due process and equal protection, by failing to enact regulations to reduce greenhouse gas emissions in Alaska.

The Complaint strongly resembles one filed in 2011 by Ananda and five other Alaska children (the "*Kanuk*" case). In *Kanuk*, the plaintiffs also alleged that the State was violating the Alaska Constitution and public trust doctrine by failing to reduce greenhouse gas emissions in Alaska.[2] The superior court granted the State's motion to dismiss the *Kanuk* case, and the Alaska Supreme Court affirmed that dismissal.[3]

The Supreme Court concluded in *Kanuk* that three of the plaintiffs' claims presented nonjusticiable political questions. Those claims sought to compel the State to regulate and reduce greenhouse gas emissions by amounts that would purportedly prevent harmful climate change, according to what the plaintiffs termed the "best available science."[4] The most obvious reason why these claims were nonjusticiable was

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1 In addition to DEC, the state agencies namcd as Defendants are: Alaska Department of Natural Resources, Alaska Oil and Gas Conservation Commission, Alaska Energy Authority, and Regulatory Commission of Alaska.

2 *Kanuk v. State*, 335 P.3d 1088, 1090 (Alaska 2014).

3 *Id.* at 1103.

4 *Id.* at 1097.

"the impossibility of deciding [these claims] without an initial policy determination of a kind clearly for nonjudicial discretion."[5] The Supreme Court recognized that other interests might militate against implementing the mandatory emissions reductions proposed by the plaintiffs, and the Court was unable to opine as a matter of law how an executive or legislative body should weigh those competing interests.[6]

The Supreme Court held that for prudential reasons the remaining four claims for relief in *Kanuk* were also not appropriate for judicial determination. Those claims sought declaratory judgments establishing the State's constitutional duties with respect to the public trust doctrine and the regulation of greenhouse gas emissions.[7] The Supreme Court concluded that declaratory relief should not be granted because it "would not tell the State what it needs to do to satisfy its trust duties," nor would it "provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties as trustee."[8]

Kanuk mandates dismissal of all but one of Plaintiffs' claims. Except for one claim, Plaintiffs seek virtually the same relief as was sought in *Kanuk*: declarations establishing the State's constitutional duties with respect to the regulation of greenhouse gas emissions, a declaration that the State has violated those duties, an order that the State achieve science-based reductions of greenhouse gas emissions in Alaska, and a

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5 *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

6 *Id.*

7 *Id.* at 1099.

8 *Id.* at 1102.

requirement that the State prepare an accounting of greenhouse gas emissions in Alaska. (Compl., Prayer for Relief ¶¶ 1-10) As in *Kanuk*, some of these claims for relief are nonjusticiable, and the rest are otherwise not appropriate for judicial determination. The one exception is Plaintiffs' claim that DEC and Commissioner Hartig arbitrarily denied Plaintiffs' Petition for rulemaking—that claim appears to be justiciable, but it is meritless. This case should be dismissed.

STATEMENT OF FACTS

I. Introduction.

Plaintiffs are concerned about climate change caused by greenhouse gas emissions. (Compl. ¶¶ 1-5) They allege many present and future harms from climate change. (*Id.* ¶ 5) For example, Plaintiffs allege that climate change is resulting in a loss of the sea ice that buffers coastal villages, resulting in increased erosion. (*Id.* ¶ 15) They allege that climate change is making it more difficult to engage in subsistence activities. (*Id.* ¶¶ 16-20) This in turn threatens native traditions, heritage, and culture. (*Id.* ¶ 22) Plaintiffs allege numerous other harms from climate change. (*Id.* ¶¶ 23-91, 132-204)

II. Plaintiffs' Petition for rulemaking and DEC's denial of the Petition.

On August 28, 2017, Plaintiffs submitted to DEC a Petition for rulemaking concerning greenhouse gas emissions; the Petition is as an exhibit to the Complaint. (*Id.* ¶ 92) The Petition asked DEC to regulate stationary and mobile sources of carbon dioxide (CO_2) emissions and the extraction of fossil fuels within the State to, among other things, ensure that CO_2 emissions attributable to Alaska would be reduced by at least 85 percent below 1990 levels by 2050; establish interim benchmarks to guide

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progress toward that requirement; and ensure that Alaska's CO_2 emissions be reduced by at least 8.5 percent per year beginning in 2018. (Petition at 3) The Petition also sought to compel DEC to prepare a numerical statewide goal or carbon budget in order to meet these targets; prepare an annual accounting of greenhouse gas emissions; adopt a Climate Action Plan; amend the regulations two years after their effective date and every five years thereafter to ensure that the State reduces greenhouse gas emissions in a manner consistent with the best climate science; and recommend that the Legislature adopt a statute codifying these regulations. (*Id.* at 3-4)

On September 27, 2017, Commissioner Hartig sent Plaintiffs a letter denying the Petition ("Letter," attached as Ex. A).[9] 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. (Letter at 1, 3) One reason was that the Petition proposed policies that would govern DEC, but not anything that would affect the public or be used in dealing with the public. (*Id.* at 2) Accordingly, the Petition did not appear to propose a "regulation" as defined by Alaska statutes and

[9] As the Petition is attached as exhibit to the Complaint, out of fairness the Court should consider Commissioner Hartig's Letter denying the Petition when deciding this motion. The Letter properly can and should be considered in connection with the motion to dismiss because it is mentioned in the Complaint, and is even the basis for one of Plaintiffs' claims, even though the Letter is not attached to the Complaint. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (on a motion to dismiss a court will consider "documents incorporated into the complaint by reference"); *cf. Ahwinona v. State*, 922 P.2d 884, 886 (Alaska 1996) (on a motion to dismiss a court will consider documents attached to the complaint). The Commissioner's Letter is also the kind of public record that may be judicially noticed. *See, e.g., F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993); Alaska R. Evid. 201. The court can take judicial notice at "any stage of the proceeding." Alaska R. Evid. 203(b).

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caselaw. (*Id.*) The Petition also proposed actions that were "inconsistent with the practical and fiscal constraints on the State and DEC" especially without "additional appropriations from the Alaska Legislature." (*Id.*) Some of what the Petition proposed also likely exceeded DEC's statutory authority. (*Id.* at 2-3)

The Commissioner also determined that climate change and greenhouse gas emissions are problems that need nationwide and global solutions. (*Id.* at 3) Because Alaska's greenhouse gas emissions comprise only about 0.59 percent of nationwide emissions, and only about 0.08 percent of global emissions, even if DEC could grant the Petition, it would not achieve the climate goals sought by Plaintiffs. (*Id.*) Granting the Petition would, however, likely "have significant consequences for employment, resource development, power generation, health, culture, and other economic and social interests within the state." (*Id.*)

The Commissioner concluded his letter by noting 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." (*Id.* at 3-4) The Commissioner encouraged Plaintiffs 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." (*Id.* at 4)

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III. Plaintiffs' legal contentions.

All of Plaintiffs' claims are based on alleged violations of the Alaska Constitution. Plaintiffs allege that under Article VIII of the Constitution the State acts as a trustee over certain public trust resources, including the atmosphere. (Compl. ¶¶ 96-97, 123-127) They allege that DEC has primary authority to regulate air emissions in the state and that certain other agencies also have authority to take action to prevent climate change. (*Id.* ¶¶ 104-15) According to Plaintiffs, the State has a fiduciary duty to manage public trust resources for the common good of present and future Alaskans. (*Id.* ¶ 123) Plaintiffs allege that the State has allowed "dangerous and unlawful levels of [greenhouse gas] emissions and violated the [Plaintiffs'] Public Trust rights." (*Id.* ¶¶ 237, 263-73)

Plaintiffs also claim that among the liberty rights protected by Article I, Sections 7 and 21 of the Alaska Constitution, is "the right to a stable climate system that sustains human life and liberty." (*Id.* ¶ 119) They allege that the State has violated Plaintiffs' constitutional rights by allowing excessive emissions of greenhouse gases, relying on substantive due process and state-created danger theories. (*Id.* ¶¶ 241-54)

They also assert that the State has violated the equal protection clause of Article I, Section 1, by taking actions that destabilize the climate system, under the theory that youths and children are a suspect or quasi-suspect class who will be most affected by climate change. (*Id.* ¶¶ 121, 255-62)

Plaintiffs' final claim is that DEC and Commissioner Hartig violated Plaintiffs' due process rights by arbitrarily denying the Petition. (*Id.* ¶¶ 274-78) Plaintiffs rely on

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the Supreme Court's decision in *Johns v. Commercial Fisheries Entry Commission*, which established that courts may engage in a very limited review of an agency's denial of a petition for rulemaking only for "compliance with the demands of due process."[10] (*Id.* ¶ 12)

IV. Plaintiffs' prayers for relief.

Plaintiffs seek the following declarative and injunctive relief:

1. A declaration that Defendants have constitutional duties and constitutional and statutory authority to protect Plaintiffs' right to a stable climate system;

2. A declaration that Defendants have constitutional duties and constitutional and statutory authority under the public trust doctrine to protect Alaska's natural resources, including the atmosphere;

3. A declaration that Defendants have materially caused, contributed to, and/or exacerbated climate change in violation of Plaintiffs' constitutional rights;

4. A declaration that Defendants have, through their climate and energy policies, placed Plaintiffs in danger in violation of Plaintiffs' constitutional rights;

5. A declaration that Defendants have, through their climate and energy policies, violated Plaintiffs' constitutional equal protection rights;

6. A declaration that Defendants have violated their duties under the public trust doctrine to protect the atmosphere and other natural resources;

7. A declaration that DEC and Commissioner Hartig violated Plaintiffs' constitutional rights by arbitrarily denying the Petition;

[10] 699 P.2d 334, 339 (Alaska 1985).

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8. An injunction against Defendants prohibiting further violations of Plaintiffs' constitutional rights in relation to the regulation of greenhouse gas emissions;

9. An injunction requiring Defendants to prepare a complete and accurate accounting of Alaska's greenhouse gas emissions;

10. An injunction requiring Commissioner Hartig and Governor Walker, in collaboration with the other Defendants, to develop and submit to the Court an enforceable state climate recovery plan, and to implement and achieve science-based reductions in Alaska's greenhouse gas emissions consistent with global emissions reductions rates necessary to stabilize the climate system; and

11. Other miscellaneous relief.

(Compl. Prayer for Relief ¶¶ 1-12)

ARGUMENT

I. Standard of review.

When considering the motion to dismiss, the Court should construe the Complaint liberally and accept as true all factual allegations.[11] A motion to dismiss should be granted if it is "beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief."[12]

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11 *Kanuk*, 335 P.3d at 1092.

12 *Id.*

II. The political question doctrine compels dismissal of the claims for injunctive relief attempting to force the State to adopt regulations reducing greenhouse gas emissions.

Plaintiffs' claims for injunctive relief are barred by the political question doctrine. The political question doctrine "stems primarily from the separation of powers doctrine, particularly 'the relationship between the judiciary and the coordinate branches of the . . . Government," and recognizes that some "questions are better directed to the legislative or executive branches of government."[13] The Supreme Court identifies political questions by looking for "six elements, one or more of which will be 'prominent on the surface of any case involving a political question."[14] Political questions are nonjusticiable.[15]

In *Kanuk*, the Supreme Court held that three of the plaintiffs' claims were nonjusticiable under the political question doctrine. Those nonjusticiable claims were the plaintiffs' requests that the superior court (1) declare that the State's obligation to protect the atmosphere be dictated by the best available science and that said science required specific annual reductions in CO_2 emissions; (2) order the State to reduce CO_2 emissions in Alaska by a specific amount each year; and (3) order the State to prepare an annual accounting of CO_2 emissions in Alaska.[16] The Supreme Court held that for these claims one of the six elements for identifying a political question was "obviously"

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

14 *Id.*

15 *Id.*

16 *Id.* at 1097.

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present: "the impossibility of deciding [the claims] without an initial policy determination of a kind clearly for nonjudicial discretion."[17] The Supreme Court explained that weighing the various interests affected by the potential regulation of greenhouse gas emissions was the job of the legislature or an executive agency, and not the courts:

> While the science of anthropogenic climate change is compelling, government reaction to the problem implicates realms of public policy besides the objectively scientific. 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, nor can we hasten the regulatory process by imposing our own judicially created scientific standards. The underlying policy choices are not ours to make in the first instance.[18]

The claims for injunctive relief in this case are materially indistinguishable from the claims that the Supreme Court found to present nonjusticiable political questions in *Kanuk*, and would similarly require the Court to step outside its judicial role and determine public policy. Those barred claims are Plaintiffs' requests for:

- An injunction against Defendants prohibiting further violations of Plaintiffs' constitutional rights in relation to the regulation of greenhouse gas emissions;

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17 *Id.* (quoting *Baker*, 369 U.S. at 217).

18 *Id.* at 1097-98.

- An injunction requiring Defendants to prepare a complete an accurate accounting of Alaska's greenhouse gas emissions; and
- An injunction requiring Commissioner Hartig and Governor Walker, in collaboration with Defendants, to develop and submit to the Court an enforceable state climate recovery plan, and to implement and achieve science-based reductions in Alaska's greenhouse gas emissions consistent with global emissions reductions rates necessary to stabilize the climate system.

(Compl., Prayer for Relief ¶¶ 8-10)

These claims ask the Court to compel the State to adopt regulations concerning greenhouse gas emissions that strictly prefer scientific standards over "employment, resource development, power generation, health, culture, or other economic and social interests"—which is precisely what the Supreme Court held in *Kanuk* was a policy choice entrusted to the legislative and executive branches.[19] As additional reasons why courts should not attempt to impose "judicially created scientific standards" concerning greenhouse gas emissions, the Supreme Court also cited the facts that the judiciary "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."[20] For all of these reasons, the political question doctrine compels dismissal of the claims

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19 *Id.*

20 *Id.* at 1098-99 (internal quotations omitted) (quoting *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011)).

for injunctive relief whose aim is to judicially compel the State to adopt regulations to reduce greenhouse gas emissions.

III. The Court should dismiss on prudential grounds the claims for declaratory relief attempting to establish the State's duties under the Constitution.

Kanuk also mandates dismissal on prudential grounds Plaintiffs' claims for declaratory relief. In *Kanuk*, the Supreme Court explained that declaratory relief should either "clarify and settle legal relations," or "'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding,'"[21] and should serve to "avoid further litigation" between the parties.[22] A court should decline to render declaratory relief that will not achieve those results.[23]

Applying this standard, the Supreme Court held that for prudential reasons four claims for relief in *Kanuk* were not appropriate for judicial determination. Those claims sought declaratory judgments that (1) the atmosphere is a public trust resource under the Alaska Constitution; (2) the State has an affirmative fiduciary obligation to protect and preserve it; (3) the State's duty is enforceable by citizen beneficiaries of the public trust; and (4) the State has failed to uphold its fiduciary obligation.[24] That declaratory relief would not have "advance[d] the plaintiffs' interests any more than it [would have] shape[d] the future conduct of the State."[25]

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

22 *Id.* at 1103.

23 *Id.* at 1101.

24 *Id.* at 1099.

25 *Id.* at 1103.

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Plaintiffs' claims for declaratory relief are materially indistinguishable from the claims that the Supreme Court held were not appropriate for judicial determination in *Kanuk*. Those claims are Plaintiffs' requests for:

- A declaration that Defendants have constitutional duties and constitutional and statutory authority to protect Plaintiffs' right to a stable climate system;
- A declaration that Defendants have constitutional duties and constitutional and statutory authority under the public trust doctrine to protect Alaska's natural resources, including the atmosphere;
- A declaration that Defendants have materially caused, contributed to, and/or exacerbated climate change in violation of Plaintiffs' constitutional rights;
- A declaration that Defendants have, through their climate and energy policies, placed Plaintiffs in danger in violation of Plaintiffs' constitutional rights;
- A declaration that Defendants have, through their climate and energy policies, violated Plaintiffs' constitutional equal protection rights;
- A declaration that Defendants have violated their duties under the public trust doctrine to protect the atmosphere and other natural resources;

(Compl., Prayer for Relief ¶¶ 1-6)

These declarations, if granted, would not advance Plaintiffs' interest in seeing a reduction in greenhouse gas emissions, nor would they coerce the State into taking any action. The declarations would also not serve to avoid further litigation between the parties. That Plaintiffs rely on new constitutional theories for their claims for

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declaratory relief does not lead to a different result than in *Kanuk*.[26] The Court should dismiss on prudential grounds Plaintiffs' claims for declaratory relief.

IV. Plaintiffs' due process claim against DEC and Commissioner Hartig is meritless.

Plaintiffs' final claim—and the only one that the Alaska Supreme Court has not already rejected in *Kanuk*—alleges that DEC and Commissioner Hartig violated Plaintiffs' due process rights by arbitrarily denying the Petition. This claim too is meritless.

In *Johns v. Commercial Fisheries Entry Commission*, the Supreme Court held that an agency's denial of a petition for rulemaking is reviewable only to ensure "administrative compliance with the demands of due process."[27] The Court should examine the denial only to ensure that the agency complied with the Administrative Procedure Act (APA) and that the agency action did not stray outside the "permitted zone of reasonableness to become capricious, arbitrary or confiscatory."[28]

Plaintiffs' claims fall outside of the narrow review permitted by *Johns*. Plaintiffs do not allege that that the Commissioner violated the APA when he denied the Petition—nor could they, as the Commissioner denied the Petition in writing and within

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26 *Id.* at 1100-03 (holding that "absent the prospect of any concrete relief" the plaintiffs did not "present an 'actual controversy' that is appropriate for [a judicial] determination").

27 699 P.2d at 339 (citing *K & L Distributors v. Murkowski*, 486 P.2d 351 (Alaska 1971)).

28 *Id.*; *K & L Distributors*, 486 P.2d at 358.

thirty days of its receipt.[29] Nor do Plaintiffs allege facts showing or even suggesting that the Commissioner's denial was so unreasonable as to be arbitrary. In his Letter, the Commissioner cited several "practical and legal hurdles" that prevented him from granting the Petition, including his concern that the Petition proposed actions that were not even a "regulation" as defined by Alaska statutes and caselaw,[30] were "inconsistent with the practical and fiscal constraints on the State and DEC," and that likely exceeded DEC's statutory authority. (Letter at 2-3) The Commissioner also reasonably determined that granting the Petition would not achieve the climate goals sought by Plaintiffs without global action (Letter at 3)—a fact that Plaintiffs readily admit[31]—but would likely "have significant consequences for employment, resource development, power generation, health, culture, and other economic and social interests within the state." (Letter at 3) All of these are reasonable and non-arbitrary explanations for the Commissioner's denial of the Petition. Plaintiffs do not allege any facts showing otherwise.

CONCLUSION

For all of these reasons, Plaintiffs' Complaint should be dismissed.

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29 *See* AS 44.62.230; *Johns*, 699 P.2d at 339-40.

30 *See Chevron U.S.A., Inc. v. State, Dep't of Revenue*, 387 P.3d 25, 36 (Alaska 2016) (to qualify as a regulation the agency action must "affect[] the public or [be] used by the agency in dealing with the public") (quoting *State, Dep't of Natural Res. v. Nondalton Tribal Council*, 268 P.3d 293, 300-01 (Alaska 2012)).

31 (Compl., Prayer for Relief ¶ 10) (Plaintiffs seeking an injunction that would force the State "to implement and achieve science-based reductions in Alaska's greenhouse gas emissions *consistent with global emissions reductions rates necessary to stabilize the climate system*" (emphasis added)).

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