IN THE SUPREME COURT OF THE STATE OF ALASKA

NELSON KANUK, a minor, by and through his guardian, SHARON KANUK; ADI DAVIS, a minor, by and through her guardian, JULIE DAVIS; KATHERINE DOLMA, a minor, by and through her guardian, BRENDA DOLMA; AMANDA ROSE AHTAHKEE LANKARD, a minor, by and through her guardian, GLEN "DUNE" LANKARD; and AVERY and OWEN MOZEN, minors, by and through their guardian, HOWARD MOZEN;

Appellants,

v.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Appellee.

Supreme Court No. S-14776

Superior Court Case No: 3AN-11-07474 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE SEN K. TAN, PRESIDING

BRIEF OF APPELLEE

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AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitution, article VIII, section 1: STATEMENT OF POLICY. It is the policy of the state to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Alaska Constitution, article VIII, section 2: GENERAL AUTHORITY. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people.

Alaska Constitution, article VIII, section 3: COMMON USE. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Alaska Constitution, article VIII, section 4: SUSTAINED YIELD. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the state shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Alaska Constitution, article VIII, section 5: FACILITIES AND IMPROVEMENTS. The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

Alaska Constitution, article VIII, section 6: STATE PUBLIC DOMAIN. Lands and interests therein, including submerged and tidal lands, possessed or acquired by the state, and not used or intended exclusively for governmental purposes, constitute the state public domain. the legislature shall provide for the selection of lands granted to the state by the united states, and for the administration of the state public domain.

Alaska Constitution, article XII, Section 11: LAW-MAKING POWER. As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.

Alaska Rule of Evidence 201(b): (b) General Rule. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Alaska Civil Rule 19(a) & (b): Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subsection (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

AS 09.50.250(1). Actionable claims against the state

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560--36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary

function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

AS 44.62.190. Notice of proposed action

(a) At least 30 days before the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be

(1) published in the newspaper of general circulation or trade or industry publication that the state agency prescribes and posted on the Alaska Online Public Notice System; in the discretion of the state agency giving the notice, the requirement of publication in a newspaper or trade or industry publication may be satisfied by using a combination of publication and broadcasting; when broadcasting the notice, an agency may use an abbreviated form of the notice if the broadcast provides the name and date of the newspaper or trade or industry journal and the Internet address of the Alaska Online Public Notice System where the full text of the notice can be found;

(2) furnished to every person who has filed a request for notice of proposed action with the state agency;

(3) if the agency is within a department, furnished to the commissioner of the department;

(4) when appropriate in the judgment of the agency,

(A) furnished to a person or group of persons whom the agency believes is interested in the proposed action; and

(B) published in the additional form and manner the state agency prescribes;

(5) furnished to the Department of Law together with a copy of the proposed regulation, amendment, or order of repeal for the department's use in preparing the opinion required after adoption and before filing by AS 44.62.060;

(6) furnished by electronic format to all incumbent State of Alaska legislators, and furnished to the Legislative Affairs Agency;

(7) furnished by electronic format, along with a copy of the proposed regulation, amendment, or order of repeal, as required by AS 24.20.105(c).

(b) If the form or manner of notice is prescribed by statute, in addition to the requirements of filing and furnishing notice under AS 44.62.010--44.62.300, or in addition to the requirements of filing and mailing notice under other sections of this chapter, the notice shall be published, posted, mailed, filed, or otherwise publicized as prescribed by the statute.

(c) The failure to furnish notice to a person as provided in this section does not invalidate an action taken by an agency under AS 44.62.180--44.62.290.

(d) Along with a notice furnished under (a)(2), (4)(A), or (6) of this section, the state agency shall include the reason for the proposed action, the initial cost to the state agency of implementation, the estimated annual costs to the state agency of implementation, the name of the contact person for the state agency, and the origin of the proposed action.

(e) Notwithstanding (a) of this section, if a person who is to receive a notice under (a) of this section requests that the state agency mail the notice, the state agency shall furnish the notice to the person by mail.

AS 44.62.210. Public proceedings

(a) On the date and at the time and place designated in the notice the agency shall give each interested person or the person's authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally. The state agency may accept material presented by any form of communication authorized by this chapter and shall consider all factual, substantive, and other relevant matter presented to it before adopting, amending, or repealing a regulation. When considering the factual, substantive, and other relevant matter, the agency shall pay special attention to the cost to private persons of the proposed regulatory action.

(b) At a hearing under this section the agency or its authorized representative may administer oaths or affirmations, and may continue or postpone the hearing to the time and place which it determines.

AS 44.62.230. Procedure on petition

Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation under AS 44.62.180-44.62.290, a state agency shall, within 30 days, deny the petition in writing or schedule the matter for public hearing under AS 44.62.190-44.62.215. However, if the petition is for an emergency regulation, and the agency finds that an emergency exists, the requirements of AS 44.62.040(c)

and 44.62.190-44.62.215 do not apply, and the agency may submit the regulation to the lieutenant governor immediately after making the finding of emergency and putting the regulation into proper form.

AS 44.62.300. Judicial review of validity

An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid

(1) for a substantial failure to comply with AS 44.62.010 - 44.62.320; or

(2) in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the statement do not constitute an emergency under AS 44.62.250.

AS 46.14.010. Emission control regulations

(a) After public hearing, the department may adopt regulations under this chapter establishing ambient air quality standards, emission standards, or exemptions to implement a state air quality control program required under 42 U.S.C. 7401 - 7671q (Clean Air Act), as amended, and regulations adopted under those sections. The standards established under this section may be for the state as a whole or may vary in recognition of local conditions.

(b) Unless the governor has determined that an emergency exists that requires emergency regulations under AS 44.62.250, the department may adopt the following types of regulations only after the procedures established in (a), (c), and (d) of this section and compliance with AS 46.14.015:

(1) a regulation that establishes an ambient air quality standard for an air pollutant for which there is no corresponding federal standard;

(2) a regulation that establishes an ambient air quality standard or emission standard that is more stringent than a corresponding federal standard;

(3) a regulation that establishes an equivalent emission limitation for a hazardous air pollutant for which the federal administrator has not adopted a corresponding maximum achievable control technology standard; or

(4) a regulation that regulates emissions from an emissions unit or stationary source or establishes an emission standard under the authority of AS 46.14.120(e) or 46.14.130(c)(2).

(c) In preparation for peer review under AS 46.14.015 and before adopting a regulation described under (b) of this section, the department shall

(1) find in writing that exposure profiles and either meteorological conditions or emissions unit characteristics in the state or in an area of the state reasonably require the ambient air quality standard, or emission standard to protect human health and welfare or the environment; this paragraph does not apply to a regulation under (b)(3) of this section;

(2) find in writing that the proposed standard or emission limitation is technologically feasible; and

(3) prepare a written analysis of the economic feasibility of the proposal.

(d) Before adopting a regulation described in (b)(2) of this section, the department shall find in writing that exposure profiles and either meteorological conditions or emissions unit characteristics are significantly different in the state or in an area of the state from those upon which the corresponding federal regulation is based.

(e) When incorporated into more than one permit, emission standards and limitations, emissions monitoring and reporting requirements, and compliance verification requirements that are generally applicable statewide or are generally applicable to individual emissions unit or stationary source types shall be adopted in regulation unless they have been requested by the owner and operator to whom the permit is issued. The department shall, by regulation, adopt a standard, limitation, or requirement described in this subsection as soon as its general applicability is reasonably foreseeable.

(f) An emission standard adopted by the department may be applicable to individual emissions units within a stationary source or to all emissions units within a stationary source. For purposes of determining compliance with applicable regulations and with permit limitations, the department may allow numerical averaging of the emissions of each air pollutant from several emissions units within a stationary source if

(1) requested by the owner and operator; and

(2) allowed under 42 U.S.C. 7401--7671q (Clean Air Act), as amended, and regulations adopted under those sections.

AS 46.14.015. Special procedure for more stringent regulations

(a) Before the department adopts a regulation described under AS 46.14.010(b), written findings under AS 46.14.010(c) and (d) shall be made available by the department to the public at locations throughout the state that the department considers appropriate.

(b) Before the department adopts a regulation described in AS 46.14.010(b), the department shall submit the findings described under (a) of this section, the studies on which the findings are based, and other related data for peer review to a minimum of three separate parties who are not employees of the department and who are determined by the commissioner to be technically qualified in the subject matter under review. The commissioner shall ensure that the peer review includes an analysis of the factors considered by the commissioner to support the standards proposed to be adopted and recommendations, if any, for additional research or investigation considered appropriate. Peer review reports shall be submitted to the commissioner within 45 days after the department submits a matter for peer review unless the commissioner determines that additional time is required.

(c) The department shall make available to the public at least 30 days before the public hearing required under AS 46.14.010(a), at convenient locations, copies of the department's proposed regulation, the findings of the department describing the basis for adoption of the regulation, and the peer review reports, submitted under (b) of this section.

(d) The department shall contract with persons to perform peer review under (b) of this section. All persons selected shall be selected on the basis of competitive sealed proposals under AS 36.30.200 - 36.30.270 (State Procurement Code). The commissioner may not contract with a person to perform peer review under this section if the person has a significant financial interest or other significant interest that could bias evaluation of the proposed regulation. An interest is not considered significant under this subsection if it is an interest possessed generally by the public or a large class of persons or if the effect of the interest on the person's ability to be impartial is only conjectural.

18 AAC 50.040(h)(21) & (j)(9). Federal standards adopted by reference

* * *

(h) The following provisions of 40 C.F.R. 51.166 (Prevention of Significant Deterioration of Air Quality) and 40 C.F.R. Part 52 (Approval and Promulgation of Implementation Plans, as revised as of August 2, 2010, are adopted by reference:

* * *

(21) 40 C.F.R. 52.22 (Enforceable Commitments for Further Actions Addressing the Pollutant Greenhouse Gases (GHGs)).

* * *

(j) The following provisions of 40 C.F.R. Part 71 (Operating Permits), as revised as of August 2, 2010, are adopted by reference, except as provided in 18 AAC 50.326:

* * *

(9) 40 C.F.R. 71.13 (Enforceable Commitments for Further Actions Addressing Greenhouse Gases (GHGs)).

Hawaii Const. Art. XI, section 1: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

STATEMENT OF JURISDICTION

Plaintiffs, six minors living in Alaska, filed the First Amended Complaint on July 21, 2011.[1] Defendant, State of Alaska, Department of Natural Resources, moved to dismiss the complaint on August 12, 2011.[2] On March 16, 2012, the Superior Court issued an order granting the State's motion to dismiss.[3] On May 11, 2012, the Superior Court issued an order and final judgment dismissing Plaintiffs' complaint.[4] Plaintiffs timely filed a notice of appeal on June 13, 2012. This Court has jurisdiction to hear Plaintiffs' appeal under AS 22.05.010(a) & (b).

STATEMENT OF ISSUES

1. Was the Superior Court correct that there are no judicially discoverable and manageable standards for resolving Plaintiffs' public trust doctrine claim, meaning that claim is barred by the political question doctrine?

2. Was the Superior Court correct that it could not decide Plaintiffs' public trust doctrine claim without making an initial policy determination of a kind clearly for non-judicial discretion, meaning that claim is barred by the political question doctrine?

3. Should the Superior Court's dismissal be affirmed on the alternative ground that article VIII of the Alaska Constitution commits authority over natural resource

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1 (Exc. 26-53.)

2 (Exc. 54-55.)

3 (Exc. 165-175.)

4 (Exc. 176-77.)

management and conservation to the legislature, meaning Plaintiffs' public trust doctrine claim is barred by the political question doctrine?

4. Should the Superior Court's dismissal be affirmed on the alternative ground that a court cannot undertake an independent assessment of Plaintiffs' public trust doctrine claim without expressing lack of the due respect for decisions made by Alaska's political branches, meaning that claim is barred by the political question doctrine?

5. Should the Superior Court's dismissal be affirmed on the alternative ground that Plaintiffs' public trust doctrine claim is barred by sovereign immunity?

6. Should the Superior Court's dismissal be affirmed on the alternative ground that Plaintiffs' public trust doctrine claim fails to state a claim upon which relief can be granted?

7. Should the Superior Court's dismissal be affirmed on the alternative ground that Plaintiffs lack standing to pursue their public trust doctrine claim?

STATEMENT OF THE CASE

Reducing greenhouse gas emissions is one of the most complex and consequential policy issues now before the country, requiring the balancing of competing environmental, economic, and other interests. Plaintiffs believe the solution to this complex problem is for the State to mandate a six percent reduction in greenhouse gas emissions every year until 2050. And they believe that of the three branches of government it is the judiciary that should establish that policy.

The Superior Court was correct to dismiss Plaintiffs' complaint because it raises political questions. The Superior Court's dismissal can also be affirmed on several

alternative grounds. For one, Plaintiffs' complaint challenges acts and omissions that are protected by sovereign immunity. Also, Plaintiffs' complaint fails to state a claim upon which relief can be granted. And, to even consider the merits of this case a court would have to overlook Alaska's standing requirements, which Plaintiffs cannot meet. For all of these reasons, the Court should affirm the Superior Court's dismissal of Plaintiffs' complaint.

I. THE COMPLAINT

Plaintiffs are six minors living in Alaska.[5] They are concerned about climate change.[6] They claim that more than 200 years of burning fossil fuels has caused a substantial increase in the atmospheric concentration of heat-trapping greenhouse gases, such as carbon dioxide (CO_2).[7] Failing to act soon to reduce the global concentration of greenhouse gases, they say, "will ensure the collapse of the earth's natural systems resulting in a planet that is largely unfit for human life."[8]

According to Plaintiffs, article VIII of the Alaska Constitution "requires the State to hold public resources in trust for public use and … the State has a fiduciary duty to manage such resources for the common good with the public as beneficiaries."[9] They claim the atmosphere is a public trust resource under article VIII and that the State of

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5 (Exc. 29-34; Am. Compl. ¶¶ 7-21.)

6 (Exc. 29-34; Am. Compl. ¶¶ 7-21.)

7 (Exc. 37-38; Am. Compl. ¶ 35.)

8 (Exc. 38-39; Am. Compl. ¶ 36.)

9 (Exc. 27; Am. Compl. ¶ 1.)

Alaska, Department of Natural Resources, has breached its fiduciary duty to protect and preserve the atmosphere.[10]

At the same time, Plaintiffs acknowledge that climate change is a global problem requiring international cooperation and action. They claim the "best available science ... shows that to protect Earth's natural systems, average global peak surface temperature must not exceed 1° C above pre-industrial temperatures this century."[11] To prevent this, concentrations of global atmospheric CO_2 must decline to less than 350 parts per million by the end of this century.[12] Today's atmospheric CO_2 levels exceed 390 parts per million and are steadily rising.[13] According to Plaintiffs, to have the "best chance of reducing the concentration of CO_2 in the atmosphere to 350 ppm by the end of the century..., the best available science concludes that atmospheric [CO_2] emissions need to peak in 2012 and then begin to decline at a global average of 6% per year through 2050 an[d] 5% per year through 2100."[14] Plaintiffs claim that "[i]f sovereign governments do not act immediately to reduce carbon emissions into the atmosphere, present and future generations of children will face mass suffering on a planet that may be largely uninhabitable."[15]

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10 (Exc. 27-28; Am. Compl. ¶¶ 2-4.)

11 (Exc. 40; Am. Compl. ¶ 38.)

12 (Exc. 40; Am. Compl. ¶ 38.)

13 (Exc. 40; Am. Compl. ¶ 38.)

14 (Exc. 42; Am. Compl. ¶ 43.)

15 (Exc. 42-43; Am. Compl. ¶ 44.)

Plaintiffs admit that Alaska's executive branch has taken action to address greenhouse gas emissions and climate change.[16] On September 14, 2007, then-Governor Sarah Palin signed Administrative Order 238, which established the Alaska Climate Change Sub-Cabinet to advise the Governor on the preparation and implementation of an Alaska climate change strategy.[17] The strategy was to include "building the state's knowledge of the actual and foreseeable effects of climate warming in Alaska, developing appropriate measures and policies to prepare communities in Alaska for the anticipated impacts from climate change, and providing guidance regarding Alaska's participation in regional and national efforts addressing the causes and effects of climate change."[18] Governor Palin further ordered that the strategy "identify priorities needing immediate attention along with longer-term steps we can take as a state to best serve all Alaskans and to do our part in the global response to this global phenomenon."[19]

The Sub-Cabinet released several reports outlining recommendations to the Governor about how to adapt to and mitigate climate change.[20] The Sub-Cabinet also completed a greenhouse gas inventory for Alaska, outlining the sources of Alaska's greenhouse gas emissions and projected emissions for future years.[21] The Sub-Cabinet

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16 (Exc. 43; Am. Compl. ¶ 45.)

17 (Exc. 43; Am. Compl. ¶¶ 45-46.)

18 (Exc. 43; Am. Compl. ¶ 46.)

19 (Exc. 44; Am. Compl. ¶ 47.)

20 (Exc. 44; Am. Compl. ¶ 48.)

21 (Exc. 44; Am. Compl. ¶ 48.)

also formed several work groups and advisory groups including the Alaska Climate Change Sub-Cabinet Mitigation Advisory Group.[22]

The Advisory Group issued a number of policy recommendations to address climate change but did not recommend State-mandated greenhouse gas reductions.[23] Among the Advisory Group's recommendations were: increased energy efficiencies, renewable energy implementation, better building standards, forest management and other strategies for carbon sequestration, waste reduction and recycling, reducing fugitive methane emissions, transportation system management, alternative fuels research and development, establishing goals for statewide greenhouse gas emissions reductions, encouraging the State government to lead by example, and exploring market-based systems to manage greenhouse gas emissions.[24] The Advisory Group estimated that implementing its recommendations would reduce greenhouse gas emissions in Alaska by approximately nineteen percent by 2025.[25] The recommendations have allegedly not yet been implemented.[26]

In addition to the work of the Sub-Cabinet, the Alaska Department of Environmental Conservation has issued a report on expected impacts of climate change in Alaska.[27] Although Plaintiffs do not mention it in their complaint, it is indisputable that

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22 (Exc. 44; Am. Compl. ¶ 49.)

23 (Exc. 44; Am. Compl. ¶ 49.)

24 (Exc. 44-46; Am. Compl. ¶ 49.)

25 (Exc. 46; Am. Compl. ¶ 49.)

26 (Exc. 46; Am. Compl. ¶ 49.)

27 (Exc. 47; Am. Compl. ¶ 52.)

DEC has also begun regulating greenhouse gas emissions in Alaska in line with the approach of the federal government.[28] In *Massachusetts v. EPA*,[29] the United States Supreme Court held that greenhouse gases qualify as "air pollutants" under the Clean Air Act.[30] In response, among other actions, the Environmental Protection Agency issued rules regulating greenhouse gas emissions by new or modified major stationary sources.[31] Those rules would potentially impose new Clean Air Act obligations on millions of sources throughout the United States.[32] In recognition of the massive economic impact of such action, EPA included "tailoring" provisions intended to "phase-in" the regulatory scheme over five years.[33] Under this tailoring scheme, as sources are phased in they are required to obtain construction and operating permits from EPA or the appropriate state authority and otherwise to comply with relevant emissions restrictions.[34] On March 11, 2011, EPA approved the tailoring provisions in a revised state

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28 If need be, the Court can take judicial notice of that fact. *See Martin v. Mears*, 602 P.2d 421, 426 n.6 (Alaska 1979) (suggesting that, on a motion to dismiss, a court can consider facts that are "properly the object of strict judicial notice," such as statutes); Alaska R. Evid. 201(b).

29 549 U.S. 497 (2007).

30 *Id.* at 528-29, 532.

31 *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule*, 75 Fed. Reg. 31514 (June 3, 2010).

32 *Id.*

33 *Id.*

34 *Id.*

implementation plan submitted by DEC.[35] Upon approval of that plan, DEC began regulating greenhouse gas emissions in Alaska in line with EPA's approach.[36]

Plaintiffs are apparently unimpressed by all of these efforts. They complain that, to date, no further significant affirmative action has been taken by the State to address greenhouse gas emissions.[37] Alleging that the State has breached its fiduciary duty to manage the atmosphere for the common good, Plaintiffs seek as a remedy a number of judicial declarations and injunctions requiring the State to reduce CO_2 emissions in Alaska by at least six percent each year from 2013 until 2050, and prepare a full and accurate annual accounting of Alaska's CO_2 emissions.[38]

II. PROCEEDINGS BEFORE THE SUPERIOR COURT AND THE DISMISSAL OF THE COMPLAINT

On August 12, 2012, the State moved to dismiss Plaintiffs' complaint on several grounds.[39] First, the State argued that Plaintiffs' complaint was non-justiciable because it raised political questions.[40] Second, the State argued that Plaintiffs' complaint should be dismissed on grounds of sovereign immunity.[41] Third, the State argued that

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35 *Approval and Promulgation of Implementation Plans; Alaska: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision; Final Rule*, 76 Fed. Reg. 7116 (Feb. 9, 2011).

36 *See* 18 AAC 50 040(h)(21) & (j)(9).

37 (Exc. 44; Am. Compl. ¶ 48.)

38 (Exc. 52; Am. Compl. ¶¶ 5-6.)

39 (Exc. 54-55.)

40 (Exc. 73-77.)

41 (Exc. 78-80.)

Plaintiffs had misapprehended the public trust doctrine and that their public trust doctrine claim was meritless.[42] Finally, the State argued that Plaintiffs lacked standing.[43]

During oral argument on the State's motion to dismiss, the Superior Court requested that the parties submit any decisions from other courts concerning the public trust doctrine and greenhouse gas emissions.[44] On February 23, 2012, Plaintiffs and the State each submitted the requested information.[45] At that time, five state courts—in Colorado, Iowa, Minnesota, Arizona, and New Mexico—had dismissed, on the merits, public trust doctrine claims similar to Plaintiffs' claim, and no court had accepted Plaintiffs' public trust doctrine theory.[46] On March 2, 2012, the State filed a document notifying the Superior Court that a Washington superior court had recently dismissed a public trust doctrine claim similar to Plaintiffs' claim, and that a California case had been voluntarily dismissed by the plaintiffs.[47]

Since that time, there have been additional court decisions. With their opening brief Plaintiffs submitted one of those decisions: a final judgment from a Texas

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42 (Exc. 80-88.)

43 (Exc. 88-93.)

44 Plaintiffs' lawsuit is one of several supported by an organization called Our Children's Trust. According to the Our Children's Trust website, lawsuits raising public trust doctrine claims and seeking reductions in greenhouse gas emissions have been filed in twelve states and in a federal district court. Petitions for rulemaking to reduce greenhouse gas emissions have been filed in the remaining states. *See* http://ourchildrenstrust.org/page/31/legal-action (last visited on January 11, 2013).

45 (Exc. 178-246.)

46 (Exc. 243.)

47 (Exc. 264-72.)

district court, dated August 2, 2012, denying a request to order the State of Texas to regulate greenhouse gas emissions.[48] The State is aware of the following additional decisions: (1) an opinion and order from an Oregon Circuit Court, dated April 5, 2012, dismissing a public trust doctrine claim similar to Plaintiffs' claim on several grounds, including sovereign immunity, separation of powers, and the political question doctrine;[49] (2) a decision from the United States District Court for the District of Columbia, dated May 31, 2012, dismissing a federal public trust doctrine claim similar to Plaintiffs' claim for lack of federal jurisdiction and on displacement-of-federal-common-law grounds;[50] (3) a decision from a New Mexico district court, dated July 14, 2012, dismissing in part a public trust doctrine claim similar to Plaintiffs' claim;[51] and (4) a decision from the Court of Appeals of Minnesota, dated October 1, 2012, affirming the dismissal of a public trust

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48 (Pls.' Op. Br., App'x A.)

49 (Def.'s App'x A.)

50 *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012).

51 (Def.'s App'x B.) In dismissing the original complaint, the New Mexico district court had stated that "it would be the height of arrogance for a court to say it could determine what was the best standard to apply [concerning greenhouse gas emissions] and to totally bypass all of the State expertise at a place like the environment department, or the Environmental Improvement Board, and assume that the court could do a better job than that agency could do." (Exc. 227.) Still, the New Mexico court granted plaintiffs leave to file an amended complaint. (*Id.*) The New Mexico court then allowed part of the amended complaint to proceed to discovery, stating, "[the motion to dismiss is denied] to the extent that Plaintiffs have made a substantive allegation that, notwithstanding statutes enacted by the New Mexico Legislature which enable the state to set air quality standards, the process has gone astray and the state is ignoring the atmosphere with respect to greenhouse gas emissions." (Def.'s App'x B at 2.)

doctrine claim similar to Plaintiffs' claim because the public-trust doctrine does not apply to the atmosphere.[52]

On February 23, 2012, Plaintiffs moved the Superior Court for leave to file a supplemental brief.[53] On February 29, 2012, the State opposed Plaintiffs' motion.[54] The Superior Court granted Plaintiffs' motion for leave on March 16, 2012.[55]

On March 16, 2012, the Superior Court issued an order granting the State's motion to dismiss.[56] The Superior Court only addressed the State's argument that Plaintiffs' complaint was barred by the political question doctrine. It concluded that Plaintiffs' complaint was non-justiciable.[57]

STANDARD OF REVIEW

The Superior Court's dismissal of Plaintiffs' complaint pursuant to Alaska Civil Rule 12(b)(6) should be reviewed de novo.[58] As the Superior Court did, the Court should liberally construe the complaint and treat all factual allegations as true.[59] Dismissal is appropriate "where it appears beyond doubt that the plaintiff can prove no

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52 *Aronow v. Minnesota*, No. A12–0585, 2012 WL 4476642, at *2 (Minn. Ct. App. Oct. 1, 2012).

53 (Exc. 247-57.)

54 (Exc. 258-63.)

55 (Exc. 273-74.)

56 (Exc. 165-175.)

57 (Exc. 175.)

58 *Clemensen v. Providence Alaska Medical Ctr.*, 203 P.3d 1148, 1151 (Alaska 2009).

59 *Id.*

set of facts in support of the claims that would entitle the plaintiff to relief."[60] To survive the motion to dismiss, Plaintiffs must "allege a set of facts consistent with and appropriate to some enforceable cause of action."[61]

The Superior Court's dismissal of the complaint as non-justiciable was correct, and this Court should affirm on that basis. The Court may also affirm the dismissal of the complaint based on any grounds supported by the record.[62] As explained below, Plaintiffs' complaint suffers on its face from several flaws that require its dismissal.[63]

ARGUMENT

I. THE SUPERIOR COURT WAS CORRECT THAT THE COMPLAINT IS BARRED BY THE POLITICAL QUESTION DOCTRINE

The State identified four factors that show that Plaintiffs' claim raises political questions.[64] The Superior Court considered two of those factors, and agreed that both are present and show that Plaintiffs' claim is non-justiciable.

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60 *Id.*

61 *Id.*

62 *Winterrowd v. State*, --- P.3d ----, 2012 WL 5373512, at *2 (Alaska Nov. 2, 2012).

63 In their opening brief, Plaintiffs suggest in a footnote that the Superior Court should have given Plaintiffs leave to file a second amended complaint. (Op. Br. at 8 n.2.) Any such argument is waived both because Plaintiffs make it in a footnote, and because Plaintiffs did not raise that issue before the Superior Court. *See Int'l Seafoods of Alaska, Inc. v. Bissonette*, 146 P.3d 561, 569 (Alaska 2006) (issues raised in a footnote are waived); *Millette v. Millette*, 177 P.3d 258, 267–68 (Alaska 2008) (issues are waived for purposes of appeal if not adequately raised below). Furthermore, as the flaws in the complaint could not be remedied by an amended complaint, Plaintiffs' argument is meritless.

64 (Exc. 73-78.)

First, the Superior Court held that there are no "judicially discoverable and manageable standards" for adjudicating Plaintiffs' claim.[65] Because the purpose of the public trust doctrine is "to *prevent* the state from giving out exclusive grants or special privileges [in trust assets] as was so frequently the case in ancient roman tradition," not to impose affirmative duties regarding management of trust assets, the "wholesale application of private trust law principles" to the public trust doctrine is inappropriate.[66] Since private trust law does not provide a legal standard for adjudicating Plaintiffs' claim, and because Plaintiffs did not provide any other usable standard, the Superior Court held that Plaintiffs' claim was non-justiciable.[67]

Second, the Superior Court held that determining whether the State breached its supposed fiduciary duty to protect and preserve the atmosphere required the court to make policy determinations of a kind clearly for non-judicial discretion.[68] The court rejected Plaintiffs' suggestion that it be guided solely by the "best available science," finding that other considerations, such as energy needs and potential economic disruption, are involved in making greenhouse gas emission policy; that it is not the judiciary's role to balance these competing interests; and that government agencies are much better equipped to make policy decisions.[69]

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65 (Exc. 172-74.)

66 (Exc. 173 (quoting *Brooks v. Wright*, 971 P.2d 1025, 1031, 1033 (Alaska 1999).)

67 (Exc. 172-74.)

68 (Exc. 174-75.)

69 (*Id.*)

The Superior Court was correct that these two factors are present in this case and show that Plaintiffs' claim is non-justiciable. The Superior Court's dismissal can also be affirmed because of the presence of the two factors the court did not reach: a textually demonstrable constitutional commitment of the issue to a coordinate political department, and the impossibility of a court undertaking independent resolution of this issue without expressing lack of the respect due coordinate branches of government.

A. The political question doctrine

Rooted in the separation of powers doctrine is the principle that political questions are non-justiciable.[70] To identify a political question, this Court has adopted the approach used by the United States Supreme Court in *Baker v. Carr*.[71] In *Baker*, the Supreme Court listed six characteristics of 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.[72]

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70 *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336 (Alaska 1987).

71 369 U.S. 186 (1962).

72 *Abood*, 743 P.2d at 336-37 (quotations omitted); *Baker*, 369 U.S. at 217.

The presence of just one *Baker* factor indicates a political question.[73] Here, at least the first four factors are present.

B. Article VIII of the Alaska Constitution commits authority over natural resource management and conservation to the legislature

The first *Baker* factor is present because the Alaska Constitution, in article VIII, section 2, expressly commits to the legislature the authority to "provide for the utilization, development, and conservation of all natural resources belonging to the State." Under Alaska law, article VIII is the source of the public trust doctrine.[74] The State contends that the atmosphere is not the type of natural resource covered by article VIII.[75] However, even if Plaintiffs are correct, and the atmosphere is covered by article VIII, then section 2 of article VIII expressly commits to the legislature the authority to establish policy for the utilization, development, and conservation of the atmosphere. It would violate the separation of powers doctrine for a court to dictate to the legislature or an executive agency what policies to establish.

In *Brooks v. Wright*,[76] this Court affirmed that, under article VIII, authority over natural resource management is assigned to the legislature. In that case, the Court considered whether Alaska's citizens could participate in natural resource management

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73 *Abood*, 743 P.2d at 336-37; *Baker*, 369 U.S. at 217 (political question exists if "one of these formulations is inextricable from the case at bar").

74 *See, e.g., State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010) ("The common-law public trust doctrine has been incorporated into the constitution and statutes of Alaska."); *Pullen v. Ulmer*, 923 P.2d 54, 59-60 (Alaska 1996) ("public trust responsibilities imposed on the state by the provisions of article VIII").

75 *See infra* at 41-44.

76 971 P.2d 1025 (Alaska 1999).

through the ballot initiative process.[77] Under the Alaska Constitution, an issue can only be included in a ballot initiative if the issue involves "the law-making powers assigned to the legislature."[78] The Court held that natural resource management was an appropriate subject for an initiative.[79] That natural resource management involved "law-making powers assigned to the legislature" was so uncontroversial that the parties did not even appear to dispute it. They only disputed whether the legislature had exclusive law-making authority, or whether the legislature shared authority with the people participating through the initiative process.[80] Here, Plaintiffs want to bypass the legislature and the initiative process in favor of a court-ordered natural resource management policy. That is improper.

Plaintiffs have other ways to obtain the relief they seek here. All citizens can seek to effect changes in the law through the electoral process (although Plaintiffs must wait until they reach age eighteen to vote). Plaintiffs can also petition the State to enact the policies they favor. Because the Alaska legislature has directed DEC to regulate air quality in the State,[81] Plaintiffs can petition to have DEC mandate reductions in greenhouse gas emissions.[82] Had they done that, DEC's response might have been

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77 *Id.* at 1026.

78 *Id.* at 1027 (citing Alaska Const. art. XII, § 11).

79 *Id.* at 1033.

80 *Id.*

81 *See* AS 46.14.010.

82 *See* AS 44.62.230.

subject to limited judicial review.[83] The courts cannot, however, step into the shoes of DEC and make policy in the first instance because the Alaska Constitution has committed the relevant policymaking authority to the legislature.

For all of these reasons, the first *Baker* factor shows that Plaintiffs' complaint should be dismissed.

C. The Superior Court was correct that there are no judicially discoverable and manageable standards for resolving Plaintiffs' claim

The second *Baker* factor is present because the public trust doctrine does not provide judicially discoverable and manageable standards to guide the Court in reviewing and making policy concerning greenhouse gas emissions. Article VIII of the Alaska Constitution does not provide standards. Nor do any of the Alaska cases that discuss the public trust doctrine. Before the Superior Court, Plaintiffs conceded that these sources do not provide any standards.[84]

Before this Court, Plaintiffs offer a hodgepodge of sources where the Court can look for the appropriate standard, including, "ancient roman law,"[85] "English common law,"[86] caselaw from other states,[87] a decision from a Texas district court and

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83 *Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d 334, 339 (Alaska 1985) (holding that an agency's response to a petition for rulemaking can be reviewed for compliance with due process).

84 (Exc. 105 ("The State is correct that the Alaska Constitution and Alaska cases do not provide any standards to guide the Court in 'reviewing the State's policy concerning [greenhouse gas] emissions.'").)

85 (Op. Br. at 34.)

86 (*Id.*)

87 (*Id.* (citing Exc. 120-22).)

the Texas constitution,[88] "private trust law,"[89] and "science."[90] As for the actual standard the Court should adopt, Plaintiffs appear to offer the following: "what is necessary to protect and preserve the functionality and integrity of the public trust asset and prevent substantial impairment, thereby directing the court's inquiry to science and facts."[91] Plaintiffs primarily rely on the United States Supreme Court's decision in *Illinois Central Railroad Company v. Illinois*[92] as the source of their "substantial impairment" standard.[93] Plaintiffs' reliance on *Illinois Central* is misplaced. And the standard they offer is not at all manageable.

1. There are no judicially discoverable standards for resolving Plaintiffs' claim

In Alaska, the public trust doctrine is best understood as a property law doctrine that prevents the State from transferring property when that would deny public access to certain natural resources. While the Court has occasionally cited the doctrine to strike down State actions that would deny public access to resources, it has rejected attempts to use the doctrine to impose affirmative duties on the State.

The Supreme Court's decision in *Illinois Central* does support the imposition of affirmative duties on the government by way of the public trust doctrine.

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88 (*Id.*)

89 (*Id.*)

90 (*Id.* at 33.)

91 (*Id.* at 32-33.)

92 146 U.S. 387, 452 (1892).

93 (Op. Br. at 33.)

In that case, the Supreme Court held that the public trust doctrine prevented the State of Illinois from conveying to a private corporation fee simple title to submerged lands in the harbor of Chicago.[94] The Supreme Court held that conveyance was forbidden because a state holds the title to the lands under navigable waters "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[95] A state can only transfer ownership in such lands if it is "promoting the interests of the public therein, or [if such lands] can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining."[96] "Thus, traditionally, the [public trust] doctrine has functioned as a restraint on the states' ability to alienate submerged lands in favor of public access to and enjoyment of the waters above those lands."[97] That the doctrine prevents "substantial impairment of the public interest" in trust resources simply means that a state cannot convey interests in land in a way that would substantially restrict public access to resources. It does not mean that a state has an affirmative duty, enforceable in court, to protect natural resources from substantial impairment caused by others.

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94 146 U.S. at 452.

95 *Id.*

96 *Id.* at 453 (emphasis added).

97 *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012); *see also PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1234 (2012) (noting that the public trust doctrine "concerns public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses").

The traditional public trust doctrine is the law in Alaska. In *CWC Fisheries, Inc. v. Bunker*,[98] which was the first time this Court applied the public trust doctrine, the Court held that the doctrine guarantees public access to navigable waterways.[99] The Court cited *Illinois Central* and adopted the "substantial impairment" test, but again as a limit on the State's ability to transfer interests in land that would restrict public access to navigable waterways, not as a measure of the State's affirmative duty to manage natural resources in a particular way: "The control of the State [over such waters] for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[100] To ensure that the State does not substantially impair access to navigable waterways, the Court held that the State conveys lands beneath waterways "subject to continuing public easements for purposes of navigation, commerce, and fishery."[101]

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98 755 P.2d 1115 (Alaska 1988).

99 *Id.* at 1118.

100 *Id.*

101 *Id.* at 1118.

In subsequent cases the Court has consistently interpreted the public trust doctrine as a recognition in article VIII of a public right of access to certain resources.[102] The Court has never interpreted the public trust doctrine as imposing an affirmative duty on the State to protect natural resources from public misuse. In *Brooks* the Court made that distinction clear: the State acts as "trustee" over certain natural resources "not so much to avoid *public* misuse of these resources as to avoid the *state's* improvident use or conveyance of them."[103]

Curiously, Plaintiffs rely on *Baxley v. State*[104] to posit that the Court applies principles of private trust law to the public trust doctrine,[105] even though in *Brooks* the Court said that was "dicta" and an "overbroad interpretation" of *Baxley*.[106] The Court explained in *Brooks* that "application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources" because that might suggest that the State has a duty to maximize the economic yield from trust assets, rather than conserving trust assets for future generations.[107] The Court also noted that

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102 *See, e.g., Alaska Riverways,* 232 P.3d at 1211 (holding that "[u]nder the public trust doctrine, the state holds title to the beds of navigable waters 'in trust for the people of the State'"); *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009) (holding that the State "has a 'property-like interest' in the waters of the [S]tate"); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994) (holding the public trust doctrine under article VIII limits that State's power to restrict a group's access to certain natural resources).

103 971 P.2d at 1033 (emphasis added).

104 958 P.2d 422 (Alaska 1998).

105 (Op. Br. at 34-35.)

106 971 P.2d at 1031-32.

107 *Id.*

"[i]t would be a strict violation of democratic principle for the original voters and legislators of a state to limit, through a trust, the choices of the voters and legislators of today."[108] Plaintiffs' reliance on *Baxley* is therefore misplaced.

Another example of the Court rejecting Plaintiffs' notion of the public trust doctrine is *Greenpeace, Inc. v. State*.[109] In that case, an environmental group asked the Court to hold that article VIII required the State to broadly assess the environmental impacts of a proposal to develop an oilfield in the Beaufort Sea.[110] Alaska statutes required the State determine the project's consistency with Alaska's coastal management standards; the environmental group argued article VIII imposed a "'public trust' responsibility" on the State to do more (the group wanted something akin to an environmental impact statement under the National Environmental Policy Act).[111] The Court rejected that invitation to extend the public trust doctrine, holding that nothing in article VIII "directly or indirectly suggests the need for such an analysis."[112]

For all of these reasons, Plaintiffs' "substantial impairment" standard, as a supposed measure of the State's affirmative duty to protect natural resources, is not a judicially discoverable standard. The claimed source of the standard—*Illinois Central*—does not support the existence of such a duty. Moreover, this Court's decisions

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108 *Id.* at 1033 (quoting James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 Envtl. L. Rev. 527, 544 (1989)).

109 79 P.3d 591 (Alaska 2003).

110 *Id.* at 593.

111 *Id.* at 593, 597.

112 *Id.* at 597. Similarly, nothing in article VIII directly or indirectly suggests that the State must prepare a full and accurate annual accounting of Alaska's CO_2 emissions.

interpreting the public trust doctrine reject the notion that the doctrine imposes affirmative trust-like duties on the State. Without a judicially discoverable standard to guide the Court, Plaintiffs' public trust doctrine claim should be dismissed.

2. There are also no manageable standards for resolving Plaintiffs' claim

Even if Plaintiffs' "substantial impairment" standard were a judicially discoverable standard, the Court should reject it as not manageable. Plaintiffs are asking a Superior Court judge to dictate what levels of greenhouse gas emissions the State will allow from now until 2050. In *Native Village of Elim v. State*,[113] this Court noted that "[c]ourts are singularly ill-equipped to make natural resource management decisions."[114] In *American Electric Power Company v. Connecticut* ("AEP"),[115] the United States Supreme Court explained some of the reasons why.

In *AEP*, several states brought a nuisance claim against major greenhouse gas emitters alleging harms from climate change.[116] The Supreme Court affirmed dismissal of the claim on the ground that federal common law in this area was displaced by the Clean Air Act.[117] But the Supreme Court's unanimous opinion makes it clear that greenhouse gas emission standards should be set by agencies subject to appropriate judicial review of the agency's action, not by courts.

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113 990 P.2d 1 (Alaska 1999).

114 *Id.* at 8.

115 131 S. Ct. 2527 (2011).

116 131 S. Ct. at 2532-35.

117 *Id.* at 2537.

The Supreme Court noted that setting greenhouse gas emission standards requires an "informed assessment of competing interests," and "[a]long with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance."[118] "The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators."[119] "Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[120] Trial judges are also handicapped, compared to agencies, in that they "are confined by a record comprising the evidence the parties present," and can bind the parties before them but no one else, not even other judges.[121]

Agencies, on the other hand, can "commission scientific studies or convene groups of experts for advice, [] issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of [other] regulators."[122] Also, agency regulations properly promulgated have the force of law and can bind more than just the parties to a lawsuit. For these reasons, the Supreme Court concluded that it was "altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."[123]

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118 *Id.* at 2539.

119 *Id.*

120 *Id.* at 2539-40.

121 *Id.* at 2540.

122 *Id.*

123 *Id.* at 2539.

Two federal district courts have also concluded that there are no manageable standards for a court to determine appropriate greenhouse gas emission limits.[124] Plaintiffs spend several pages in their brief arguing why this case is different from one of those cases, *Kivalina*.[125] *Kivalina* and this case are not as different as Plaintiffs say—and, if anything, this case presents a clearer political question. *Kivalina* involved a nuisance claim, for which at least there is a judicially discoverable standard—reasonableness—unlike Plaintiffs' claim for which there is no standard. But the *Kivalina* court still dismissed the nuisance claim on political question grounds for a reason that is salient here—because whatever standard applies, determining how to regulate greenhouse gas emissions and address climate change is not manageable for a trial court.[126] Among other things, the *Kivalina* court concluded that it could not adjudicate a claim "based on the emission of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere."[127]

Neither can the Alaska Superior Court. Although Plaintiffs only seek to regulate greenhouse gas emissions in Alaska, they admit that reducing atmospheric concentrations of greenhouse gases and addressing climate change requires international

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124 *See Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 864-65 (S.D. Miss. 2012); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009), *aff'd on other grounds by* 696 F.3d 849 (2012).

125 (Op. Br. at 29-33.)

126 *Kivalina*, 663 F. Supp. 2d at 874-76.

127 *Id.* at 875. Although the Ninth Circuit affirmed the district court's ruling on different grounds, it did not disagree with the district court's political question conclusion.

cooperation and action. State courts are as equally ill-equipped as federal courts at making policy in this area. For all of these reasons, the second *Baker* factor shows that Plaintiffs' complaint should be dismissed.

D. The Superior Court was also correct that it could not decide this matter without making an initial policy determination of a kind clearly for non-judicial discretion

The third *Baker* factor is present because the Court cannot decide this matter without making an initial policy determination of a kind clearly for non-judicial discretion. This factor "exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis."[128] Regulating greenhouse gas emissions requires balancing competing environmental, economic, and other interests. In *Massachusetts v. EPA*,[129] after holding that greenhouse gas emissions could be regulated under the Clean Air Act, the United States Supreme Court declined to say whether EPA should exercise its discretion and regulate such emissions on the grounds that doing so would involve "policy judgments" that the courts have "neither the expertise nor the authority to evaluate."[130] Alaska courts should also decline to make policy judgments that would usurp DEC's expertise and authority.

In their opening brief, Plaintiffs argue that resolving their public trust doctrine claim does not involve "policy determinations" for two reasons. First, they say

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128 *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005).

129 549 U.S. 497 (2007).

130 *Id.* at 533-34.

their claim is different from the nuisance claims in *AEP* and *Kivalina* because while nuisance claims require the consideration of competing interests, for Plaintiffs' claim a court should only consider whether the State is complying with its supposed fiduciary duty to protect the atmosphere, and should not consider the costs of any particular policy decision.[131] Second, Plaintiffs say that a court need only declare that the State has an affirmative fiduciary obligation to protect the atmosphere, which, they say, is not a policy determination.[132] Plaintiffs are wrong on both points.

A court cannot adjudicate Plaintiffs' public trust doctrine claim, and determine what amount of greenhouse gas emissions will be allowed in Alaska, by considering only the benefits mandated reductions in greenhouse gas emissions and not the costs. One of the cases Plaintiffs cite repeatedly in their brief, *National Audubon Society v. Superior Court*,[133] makes it clear that when fulfilling its public trust duties a state should consider "the cost both in terms of money and environmental impact" of any decision.[134] Also, as the United States Supreme Court has held, any decision to regulate greenhouse gas emissions involves "policy judgments."[135] And even if Plaintiffs' public trust doctrine claim could be characterized as a claim for breach of the State's fiduciary duty, a court could not adjudicate that claim without considering the costs of regulating emissions. A claim for breach of fiduciary duty requires determining whether the trustee

131 (Op. Br. at 37-40.)

132 (Op. Br. at 40.)

133 658 P.2d 709 (Cal. 1983).

134 *Id.* at 729.

135 *Massachusetts*, 549 U.S. at 533-34.

has acted with "reasonable care" concerning the trust asset,[136] which triggers a cost-benefit analysis. Moreover, courts have long recognized that public trust resources will be subject to competing uses, and they leave it to the political branches to reconcile those interests.[137] For all of these reasons, Plaintiffs' suggestion that the public trust doctrine allows a court to order reductions in greenhouse gas emissions while ignoring the costs of that action should be rejected.

The Court should also reject Plaintiffs' suggestion that a court can declare that the State breached its affirmative fiduciary obligation to protect the atmosphere without making a policy determination. As the Superior Court held, making such a declaration "*necessarily* involves a public policy determination about how the State should 'fulfill' its fiduciary duty."[138] Plaintiffs respond that they "are not asking the superior court to determine who the State should allow to emit [greenhouse gases] or by how much."[139] But Plaintiffs are asking the Superior Court to choose mandatory annual reductions in emissions over, say, forest management and other strategies for carbon sequestration (one of the many recommendations of the Advisory Group).[140] Plaintiffs

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136 *See, e.g., Holmes v. Wolf*, 243 P.3d 584, 599 (Alaska 2010) (a fiduciary has a duty to act with reasonable care).

137 *CWC Fisheries*, 755 P.d at 1121 n.15 ("the legislature will generally be afforded broad authority to make policy choices favoring one trust use over another"); *Light v. United States*, 220 U.S. 523, 537 (1911) (recognizing that the United States holds public lands in trust for the people, but "it is not for the courts to say how that trust shall be administered. That is for Congress to determine.").

138 (Exc. 174.)

139 (Op. Br. at 41.)

140 *See supra* at 6.

are also asking the Superior Court to determine precisely what amount of greenhouse gas emissions will be allowed in the State for the next several decades, regardless of the costs. Those are all policy decisions that the political branches should make. Finally, to the extent Plaintiffs suggest that they are seeking a declaratory judgment regarding the State's alleged fiduciary duty and no other relief, the Court should reject that as a request for an advisory opinion.[141]

For all of these reasons, the third *Baker* factor shows that Plaintiffs' complaint should be dismissed.

E. Adjudicating Plaintiffs' claim would express a lack of the due respect for policy decisions made by Alaska's political branches

The fourth *Baker* factor is present because a court cannot undertake an independent assessment of the State's policy concerning greenhouse gas emissions without expressing a lack of the due respect for decisions that Alaska's political branches have made. Plaintiffs recognize that the State has taken several steps to address greenhouse gas emissions. The executive branch has studied the subject, convened a Sub-Cabinet and an Advisory Group, and issued several reports.[142] The legislature has provided DEC with statutory authority to regulate air quality in the state, and DEC has begun regulating greenhouse gas emissions in line with EPA's tailoring approach.[143]

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141 *State v. ACLU of Alaska*, 204 P.3d 364, 368–69 (Alaska 2009) ("[W]hile Alaska's standing rules are liberal this court should not issue advisory opinions or resolve abstract questions of law.") (quoting *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097–98 (Alaska 1988)).

142 *See supra* at 5-7.

143 *Id.* at 7.

Although DEC has authority to issue emission standards more stringent than EPA's,[144] thus far DEC has chosen to follow EPA's approach.[145] Plaintiffs would have this Court overturn those policy decisions, bypass DEC's rulemaking procedure, and mandate different standards. Doing that would obviously convey a lack of the respect that is due Alaska's political branches.[146]

Indeed, to grant the relief Plaintiffs request the Superior Court would not only express a lack of respect to Alaska's political branches, it would have order the State to violate state law. Agencies only have the powers granted to them by the legislature.[147] Neither DNR nor DEC has statutory authority to mandate reductions in greenhouse gas emissions without complying with the requirements of the Administrative Procedures Act[148] for promulgating regulations.[149] Those requirements include providing public notice,[150] and an opportunity to comment,[151] and judicial review of the agency action.[152]

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144 *See* AS 46.14.015.

145 *See* 76 Fed. Reg. 7116; 18 AAC 50 040(h)(21) & (j)(9).

146 *Cf. Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971) (holding that courts should not examine the wisdom of agency regulations).

147 *McDaniel v. Cory*, 631 P.2d 82, 88 (Alaska 1981) ("Administrative agencies rest their power on affirmative legislative acts. They are creatures of statute and therefore must find within the statute the authority for the exercise of any power they claim.").

148 AS 44.62.

149 *Jerrel v. State*, 999 P.2d 138, 143-44 (Alaska 2000) (holding that administrative agencies must comply with AS 44.62 when issuing regulations pursuant to delegated statutory authority).

150 AS 44.62.190

151 AS 44.62.210

152 AS 44.62.300.

State law imposes additional requirements on DEC's ability to enact the emissions reductions Plaintiffs seek because those reductions would make state emission standards more stringent than the corresponding federal standards.[153] There is also no provision of state law—or funding—that would allow DNR or DEC to perform an annual "full and accurate accounting of Alaska's current carbon dioxide emissions."[154]

For all of these reasons, the fourth *Baker* factor shows that Plaintiffs' complaint should be dismissed.

II THE COURT SHOULD ALSO AFFIRM DISMISSAL OF THE COMPLAINT BECAUSE PLAINTIFFS' CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

Even if the complaint were not barred by the political question doctrine, it should still be dismissed on grounds of sovereign immunity. Plaintiffs say their claim against the State is for breach of fiduciary duty,[155] which is a tort claim.[156] Under Alaska's Tort Claims Act, the State enjoys sovereign immunity with respect to tort claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency."[157] Because Plaintiffs challenge discretionary acts or omissions on the part of DNR, the State is protected by sovereign immunity.

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153 *See* AS 46.14.015 (requiring special procedures to adopt state emissions standards that are more stringent than the corresponding federal standards).

154 (Exc. 52; Am. Compl. ¶ 6.)

155 (Exc. 35; Am. Compl. ¶ 25.)

156 *Clemensen*, 203 P.3d at 1151 n.12.

157 AS 09.50.250(1).

In *State v. Abbott*,[158] this Court adopted the planning-operational test to determine whether an agency act or omission was discretionary and immune from judicial review. Acts that involve planning, which are immune, are "decisions involving questions of policy," determined by an "evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy."[159] By contrast, operational acts are "decisions relating to the normal day-by-day operations of the government," and are not entitled to immunity.[160]

Whether and how to reduce greenhouse gas emissions, and by how much, requires an evaluation of the "financial, political, economic, and social effects" of the chosen plan or policy, as well as the environmental effects, and therefore involves protected discretionary acts or omissions. Indeed, in *State v. Brady*,[161] the Court held that the State enjoyed sovereign immunity from a tort claim very similar to the one brought by Plaintiffs. The plaintiffs in *Brady* alleged that the State was negligent for failing to stop a northern spruce bark beetle epidemic that was decimating the state's forests.[162] Citing article VIII, the plaintiffs argued that the State held Alaska's forests in trust, and

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158 498 P.2d 712 (Alaska 1972).

159 *Id.* at 720; *see also State v. Brady*, 965 P.2d 1, 16 (Alaska 1998) (holding that the State's "policy-level decisions ... about whether to undertake activities" are immune); *Freeman v. State*, 705 P.2d 918, 920 (Alaska 1985) (holding that even though the State had a duty to maintain the Dalton Highway in a safe condition, the State's decision how to do that was an exercise of discretion immune from tort liability).

160 *Abbott*, 498 P.2d at 720.

161 965 P.2d 1 (Alaska 1998).

162 *Brady*, 965 P.2d at 16.

was wasting that public resource by failing to stop the beetle epidemic.[163] They sought damages and an injunction requiring the State to protect the forests.[164]

The Court had "little difficulty" finding the State immune from those public trust doctrine claims.[165] The Court held that while the line between acts of policymaking and operational acts was sometimes "vague and wavering," "the broad failures that the Bradys attribute to the State fall well on the immune 'planning' side of the line."[166] Although the statutes and constitutional provisions cited by the plaintiffs obligated the State, as a general matter, to protect the forests, the plaintiffs could not point to "statutes, regulations or policies prescribing *specific* courses of conduct that the State has neglected or violated."[167] The Court held that "[p]lanning how to translate those broad commands [from article VIII and other sources] into policies, programs, and allocations of money and personnel is a quintessential 'discretionary function'" that is immune from judicial review:

> The prospect of having to apply the passages that the Bradys cite as tort standards reminds us of why we treat choices involving the assessment of competing priorities and allocation of scarce resources as discretionary functions. The DNR commissioner and his or her subordinates have a duty to make those policy-level decisions, but the Bradys cannot sue the State in tort over the decisions they make. *The proper remedies for unwise or*

163 *Id.* at 16-17.

164 *Id.* at 16. Plaintiffs allege that climate change has caused a bark beetle epidemic and also want to compel the State to protect Alaska's forests. (Exc. 30-31, 50; Compl. ¶¶ 12, 61.) In this way, Plaintiffs' breach of fiduciary duty claim mirrors the claim that was dismissed in *Brady*.

165 *Brady*, 965 P.2d at 16.

166 *Id.*

167 *Id.*

> *unduly timid decisionmaking at that level are electoral, not judicial.* We thus conclude that the State is immune from the Bradys' tort claims regarding its management of its forests and response to the beetle epidemic.[168]

The Court's reasoning in *Brady* applies here. As in *Brady*, Plaintiffs claim that article VIII imposes a fiduciary duty on the State to protect natural resources, fault the State for failing to adequately protect one of those resource (the atmosphere), and ask the Superior Court to order the State to comply with its duty. But translating that duty "into policies, programs, and allocations of money and personnel is a quintessential 'discretionary function'" that is immune from judicial review.[169] The Court should therefore affirm the Superior Court's dismissal of the complaint.

III. THE COURT SHOULD ALSO AFFIRM THE DISMISSAL OF THE COMPLAINT BECAUSE PLAINTIFFS' PUBLIC TRUST DOCTRINE CLAIM IS MERITLESS

The Court should also affirm the dismissal of the complaint because Plaintiffs' claim is based on a flawed understanding of the public trust doctrine. Plaintiffs contend that the public trust doctrine imposes an affirmative fiduciary duty on the State to protect and preserve natural resources. They also argue that the atmosphere is a public trust resource of the type covered by article VIII. Plaintiffs are wrong on both points.

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168 *Id.* at 17 (emphasis added).

169 *Id.*

A. The public trust doctrine does not impose an affirmative fiduciary duty on the State to prevent public misuse of natural resources

In Alaska, the public trust doctrine does not impose affirmative, trust-like duties on the State to prevent public misuse of natural resources. The Court made that clear in *Brooks*.[170] Plaintiffs' public trust doctrine claim is therefore meritless.

Plaintiffs admit that Alaska law does not support their claim.[171] But, they say the Court should depart from its prior holdings and expand the public trust doctrine for several reasons. First, they say the Court should expand the doctrine because the Court supposedly "applies general principles of private trust law when defining the sovereign's duty to protect public trust assets."[172] That is wrong—as the Court said in *Brooks*.[173] The Court also said in *Brooks* that expansion of the public trust doctrine is "inappropriate."[174]

Plaintiffs also contend that other courts apply principles of private trust law to the public trust doctrine. But, the language Plaintiffs quote from those cases is taken out of context, and the holdings in those cases in no way support the imposition of affirmative fiduciary duties on state governments by way of the public trust doctrine. For example, Plaintiffs cite *Idaho Forest Industries, Inc. v. Hayden Lake Watershed*

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170 *Brooks*, 971 P.2d at 1033.

171 (Op. Br. at 23.)

172 (Op. Br. at 23.)

173 *Brooks*, 971 P.2d at 1033. In their argument Plaintiffs again rely on language from the Court's decision *Baxley* that the Court disavowed in *Brooks* as "dicta" and an "overbroad interpretation." *Id.* at 1032.

174 *Id.* at 1031, 1033.

Improvement District,[175] but that case merely interpreted the public trust doctrine as a property law doctrine: "This trust preserves the public's right of use in such land and, as a result, restricts the state's ability to alienate any of its public trust land."[176] In *Idaho Forest*, the court referred to private trust law only when discussing how the trust character of land could be terminated.[177]

Plaintiffs also cite *Arizona Center For Law In Public Interest v. Hassell*,[178] but that case, too, applied the public trust doctrine as a property law doctrine. In that case, the court applied "well-established" law and invalidated a state statute that had attempted to relinquish the state's property interest in all lands beneath navigable waterways.[179] Similarly, in *Ohio v. City of Bowling Green*,[180] the court said the public trust doctrine creates a state "property interest" in resources.[181] The language Plaintiffs

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175 733 P.2d 733 (Idaho 1987).

176 *Id.* at 737.

177 *Id.* at 738. Plaintiffs cite another Idaho case, *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), which also interpreted the public trust doctrine as a property law doctrine. *Id.* at 1094 (finding that the public trust doctrine was not violated by the granting of a permit for an encroachment because the property at issue "has not been placed entirely beyond the control of the state and the legislature has not given away or sold the discretion of its successors").

178 837 P.2d 158 (Ariz. Ct. App. 1991).

179 *Id.* at 173. Plaintiffs cite another Arizona case, *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, which also recognized that the public trust doctrine is a property law doctrine: "The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people." 972 P.2d 179, 199 (Ariz. 1999).

180 313 N.E.2d 409 (Ohio 1974).

181 *Id.* at 411.

quote from *City of Milwaukee v. Wisconsin*,[182] concerned the power of the State of Wisconsin to convey submerged lands to the City of Milwaukee, not any state duty to preserve resources.[183]

In *District of Columbia v. Air Florida, Inc.*,[184] the court declined to reach the public trust claims because they were not raised in the lower court.[185] Though the court said in dicta that the public trust doctrine "has evolved from a primarily negative restraint on states' ability to alienate trust lands into a source of positive state duties,"[186] its support for that statement was a California case that applied the public trust doctrine as a property law doctrine and did not impose any affirmative duties.[187]

In *Geer v. Connecticut*[188] the issue was whether a state violated the Commerce Clause by forbidding the transportation of game birds out of state.[189] Though the court said in dicta that the state legislature had a duty "to enact laws as will best

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182 214 N.W. 820 (Wis. 1927).

183 *Id.* at 830.

184 750 F.2d 1077 (D.C. Cir. 1984).

185 *Id.* at 1084.

186 *Id.*

187 *Id.* The court cited *National Audubon Society v. Superior Court,* which found that the State of California had the power to reconsider an allocation of certain water rights to the City of Los Angeles because that allocation was causing a lake to dry up and impairing public trust uses of the lake. 658 P.2d 709, 729 (Cal. 1983). The court did not hold that California had a duty under the public trust doctrine to take any particular action, and stated that in reconsidering the water allocation decision California should consider "the cost both in terms of money and environmental impact of obtaining water elsewhere." *Id.*

188 161 U.S. 519 (1896).

189 *Id.* at 522.

preserve the subject of the trust, and secure its beneficial use in the future to the people of the state," in the next sentence the court noted that "the question of individual enjoyment" of trust resources "is one of public policy, and not of private right."[190] So too here—questions about the preservation of the atmosphere are questions of public policy, not questions of private rights to be resolved in court.

Finally, Plaintiffs rely on *Kelly v. 1250 Oceanside Partners*.[191] Though the court in that case stated that the State of Hawaii had "an affirmative duty to preserve and protect the State's water resources," that conclusion was based on a unique provision of the Hawaiian Constitution.[192] *Kelly* is also of no help to Plaintiffs because in that case the court did not mandate any action by Hawaii. The court merely considered whether Hawaii breached its public trust duty by issuing a water discharge permit, and concluded that the state had not breached its duty.[193]

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190 *Id.* at 534.

191 140 P.3d 985 (Hawaii 2006).

192 *Id.* at 1005. The Hawaiian Constitution states that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources." Haw. Const. Art. XI, section 1.

193 *Id.* at 1014.

The Law Professors amici also claim that the public trust doctrine imposes a fiduciary duty on the State to protect trust resources.[194] In support of that contention the Law Professors mostly rely on the same out-of-context quotes from the above cases. They make two additional arguments. First they say the "public trust doctrine is an attribute of sovereignty itself."[195] True, but that says nothing about whether the doctrine imposes affirmative duties. Second, they say the doctrine "assumes constitutional force as an inherent attribute of sovereignty."[196] That argument is curious (and unhelpful) because, in Alaska, it is well settled that the doctrine has "constitutional force" and that its source is article VIII.[197]

By relying on out-of-context quotes from out-of-state cases, Plaintiffs and amici make it seem as if they are asking the Court to adopt, for Alaska, a widely accepted interpretation of the public trust doctrine. Not so. What they are asking is that the Court be the first to adopt the controversial views of Professor Joseph L. Sax, who argued in a 1970 law review article for an expansive interpretation of the public trust doctrine, and posited that "a private action seeking more ... extensive enforcement of air pollution laws

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194 (Law Profs.' Br. at 4-10.) The Alaska Inter-Tribal Council also filed an amicus brief urging the Court to overturn the Superior Court's dismissal of Plaintiffs' complaint. However, the Council's brief did not include any legal argument. Its entire brief consisted of factual allegations about the causes and effects of climate change. Those allegations should not be considered by the Court as they are outside the record. *See, e.g., Vanek v. State*, 193 P.3d 283, 286-87 (Alaska 2008) (review of the dismissal of a complaint is based on the "facts in the complaint"). Those allegations are also irrelevant to the legal issues raised in this appeal.

195 (Law Profs.' Br. at 6.)

196 (Law Profs.' Br. at 8.)

197 *See, e.g., Pullen*, 923 P.2d at 59-60.

would rarely be likely to reach constitutional limits."[198] But this Court appears to disagree and has relied instead on critics of Professor Sax, such as Professor James L. Huffman. Professor Huffman has explained that Professor Sax's views should be rejected in part because "[i]t would be a strict violation of democratic principle for the original voters and legislators of a state to limit, through a trust, the choices of the voters and legislators of today."[199]

A New York Supreme Court case, which this Court cited in *Brooks*, provides a good explanation of why the Court should reject Plaintiffs' proposed expansion of the public trust doctrine. In *Evans v City of Johnstown*,[200] the plaintiffs sought to enjoin a municipality's operation of a sewage plant because it allegedly caused odors.[201] The plaintiffs claimed that by operating a smelly sewage plant the municipality was violating its public trust duty to protect the air.[202] In dismissing that claim, the court used language that could have been written with this case in mind:

> [Plaintiffs] attempt to use the private trust standard, i.e., that trustees must use trust assets in a reasonable fashion. This standard must be rejected. While the use of the name "public trust" may suggest duties similar to those under a private trust, that interpretation is not feasible. If the court could reverse executive action concerning natural resources merely because the action was deemed unreasonable, then the court would be a superexecutive

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198 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 557 (1970).

199 Huffman, *supra* note 108 at 544 (quoted in *Brooks*, 971 P.2d at 1033).

200 410 N.Y.S.2d 199 (N.Y. Sup. Ct. 1978).

201 *Id.* at 758-59.

202 *Id.* at 207-08.

body. It is not the duty of the courts to review executive action in such a manner.[203]

For the same reasons, Plaintiffs' public trust doctrine claim is meritless.

B. The atmosphere is not a public trust resource of the type covered by article VIII

Even if article VIII did impose an affirmative fiduciary duty on the State to prevent public misuse of natural resources, Plaintiffs' claim would still have no merit because the atmosphere is not the type of public trust resource covered by article VIII.

Article VIII refers to several natural resources, including "land," "water," "fish," "forests," "wildlife," and "grasslands," but does not mention the atmosphere.[204] For this reason alone, the Court should reject Plaintiffs' proposed expansion of the public trust doctrine.

Though the list of resources in section 2 of article VIII is non-exclusive, section 2 cannot reasonably be read as including the atmosphere. Section 2 states that "[t]he 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." Even if there were any ambiguity in the phrase "belonging to the State," the minutes from the constitutional convention make it clear that this section was only intended to apply to resources "over which the state has a proprietary interest."[205]

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203 *Id.*

204 Alaska Const. art. VIII, §§ 1-6.

205 Minutes of the Constitutional Convention, Day 57, January 18, 1956.

The atmosphere does not fit into this category because Alaska does not possess the atmosphere and has no control over its composition.

Because air continuously circulates around the world, the State cannot be said to possess the atmosphere. The State also has little to no control over the concentration of greenhouse gases in the atmosphere. Rather, as Plaintiffs allege, the concentrations of greenhouse gas in Alaska and around the world are the result of 200 years of burning fossil fuels.[206] For all of these reasons, the atmosphere is not the type of resource that the constitutional Framers intended to be managed under article VIII, section 2, as a resource "belonging to the State."[207]

Plaintiffs argue that the Court should expand the public trust doctrine to include the atmosphere.[208] There are at least two problems with this argument. First, the Court has said expanding the doctrine is "inappropriate."[209] Second, as the doctrine is based on the Alaska Constitution, it is not the Court's role to expand the doctrine beyond the language of article VIII. Courts have a duty to say what the law is, not what it should

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206 (Exc. 37-38; Am. Compl. ¶ 35.)

207 Section 4 of article VIII also does not apply to the atmosphere. Section 4 provides that "replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." As section 4 also only applies to resources "belonging to the State," it does not include the atmosphere. Moreover, section 4 only applies to "replenishable resources." Though the composition of the atmosphere can be altered, the quantity of air is largely fixed and cannot be "replenished" in the way that fish and timber can be.

208 (Op. Br. 18.)

209 *Brooks*, 971 P.2d at 1031, 1033.

be.[210] The Court should therefore reject Plaintiffs' suggestions that the doctrine be expanded because the atmosphere is "inextricably linked" to other resources,[211] or because the atmosphere contains water.[212]

The cases Plaintiffs rely on are not on point. The cases from outside Alaska are irrelevant because they do not shed any light on the meaning of the Alaska Constitution. Even if those cases were relevant, they do not help Plaintiffs. For example, the Supreme Court said in *Illinois Central* that the public trust includes "property of a special character," and held that such property "cannot be placed entirely beyond the direction and control of the state."[213] But the atmosphere can hardly be considered "property." And as the concentration of greenhouse gases in Alaska's atmosphere is not now and never has been under the control of the State, the atmosphere cannot be considered property of a special character. The other non-Alaska cases Plaintiffs cite are unhelpful because they mostly involve public uses of water.[214] Likewise, in *Alaska*

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210 *See, e.g., Marbury v. Madison*, 1 Cranch 137, 178 (1803).

211 (Op. Br. 24-26.)

212 (Op. Br. 26.)

213 146 U.S. at 454.

214 *See Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 355, 358 (N.J. 1984) (public right to swim in tidal waters); *Weden v. San Juan County*, 958 P.2d 273, 276 (Wash. 1998) (public right to use waters for recreation); *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Hawaii 2000) (public right to use groundwater); *Air Florida*, 750 F.2d at 1083 (doctrine protects water-related uses). In *Center for Biological Diversity v. FPL Group* the court held that wildlife are a public trust resource, an unremarkable conclusion that the United States Supreme Court recognized over a hundred years ago in *Geer*. 83 Cal. Rptr. 3d 588, 597 (Cal. Ct. App. 2008).

Riverways, this Court interpreted the doctrine as applying to the "title to the beds of navigable waters."[215]

The Law Professors amici also argue that the atmosphere is a public trust resource, although they fail to cite any Alaska law or even acknowledge that the source of the public trust doctrine in Alaska is the Alaska Constitution. In addition to the cases Plaintiffs cite, amici rely on cases holding that states have the power to regulate air quality,[216] and that a property interest in land includes the right "to have exclusive control of the immediate reaches of the enveloping atmosphere."[217] They also point to the constitutions of other states[218] and a federal statute that allows states to seek damages for harm to the air.[219] None of those sources say anything about the meaning of article VIII of the Alaska Constitution.

For all of these reasons, Plaintiffs' public trust doctrine claim is meritless.

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215 *Alaska Riverways*, 232 P.2d at 1211. In a three-page decision that Plaintiffs attach to their opening brief, a Texas district court found that the atmosphere is a public trust resource based on language in the Texas Constitution referring to "all of the natural resources of this State." (Op. Br. App'x A at 1-2.) That decision provides no help in discerning the meaning of the Alaska Constitution and it should not be followed. And even in that case the court refused to order the State of Texas to regulate greenhouse gas emissions. (*Id.* at 3.)

216 *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907).

217 *United States v. Causby*, 328 U.S. 256, 264 (1946).

218 (Law Profs. 16 n.8.)

219 42 U.S.C. § 9601(16).

IV. THE COURT SHOULD ALSO AFFIRM THE DISMISSAL OF PLAINTIFFS' COMPLAINT BECAUSE PLAINTIFFS LACK STANDING

The Court can also affirm dismissal of the complaint because Plaintiffs lack standing. First, Plaintiffs have not alleged that they have a sufficient personal stake in the outcome of the debate over how to address climate change. Second, Plaintiffs admit that greenhouse gas emissions in Alaska have not caused climate change. Third, Plaintiffs admit that reducing greenhouse gas emissions in Alaska will not prevent further climate change. For all of these reasons, Plaintiffs lack standing.

A. Applicable legal principles

Alaska recognizes two different theories of standing: interest-injury standing and citizen-taxpayer standing.[220] Only interest-injury standing is at issue here. "Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of."[221] This means the plaintiff must have a "sufficient personal stake in the outcome of the controversy," sometimes called the "injury-in-fact" requirement.[222] The interest adversely affected may be economic, or intangible, such as an aesthetic or environmental interest.[223] "However, while Alaska's standing rules are liberal this court should not issue advisory opinions or resolve abstract questions of

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220 *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987).

221 *Id.*

222 *Id.*; *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1040 (Alaska 2004).

223 *Trustees*, 736 P.2d at 327.

law."[224] The Court "should only hear cases in which a genuine adversarial relationship exists regarding an interest-injury."[225]

B. Plaintiffs lack a sufficient personal stake in this case

In *Wagstaff v. Superior Court*,[226] the Court explained that the "injury-in-fact" requirement "serves to distinguish a person with a direct stake in the outcome of litigation—even though small—from a person with a mere interest in the problem."[227] "While the injury-in-fact requirement has been relaxed, it has not been abandoned, as it is necessary to assure the adversity which is fundamental to judicial proceedings."[228]

If there ever were a case brought by plaintiffs with a mere interest in a problem, as opposed to a direct stake in the outcome of litigation, this is that case. Plaintiffs are no doubt concerned that climate change will render the planet inhabitable. But that concern is not enough to satisfy the "injury-in-fact" requirement. If it were, and if Plaintiffs' allegations are true, then every person in Alaska could and might want to bring this case. A standing requirement that does not distinguish Plaintiffs from any other person in Alaska is no requirement at all.

In *Center for Biological Diversity v. United States Department of Interior*,[229] the Court of Appeals for the District of Columbia Circuit dismissed, on

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224 *Bowers*, 755 P.2d at 1097-98.

225 *Id.*

226 535 P.2d 1220 (Alaska 1975)

227 *Id.* at 1225 (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)).

228 *Id.*

229 563 F.3d 466 (D.C. Cir. 2009).

standing grounds, a claim alleging harm based on climate change. In that case, an environmental group challenged a decision by the United States Department of Interior to approve expanded leasing areas off the coast of Alaska for oil and gas development on the ground that the decision allegedly failed to consider the effects of the expanded development on climate change.[230] The court dismissed the petition in part because the plaintiffs could not meet the injury-in-fact requirement:

> [C]limate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore Petitioners' alleged injury is too generalized to establish standing.[231]

The same reasoning applies here. Allowing Plaintiffs to bring this suit based only on their concern about climate change—a concern undoubtedly shared by everyone if Plaintiffs' allegations are true—would constitute an abandonment of the injury-in-fact requirement.

Were the Court to find that Plaintiffs have alleged an injury-in-fact, and not otherwise find that Plaintiffs lack standing, then the complaint would have to be dismissed for failure to join indispensable parties.[232] If Plaintiffs can bring this suit, then so can every other Alaskan. Some absent Alaskans might agree with Plaintiffs that greenhouse gas emissions should be reduced by six percent on an annual basis; others might think that reduction is too high or low. Unless added as parties, these absent

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230 *Id.* at 471.

231 *Id.* at 478.

232 Alaska Civil Rules 19(a) & (b).

Alaskans would be unable to protect their interest in determining the appropriate limits on greenhouse gas emissions. Accordingly, these absent Alaskans are "persons to be joined if feasible."[233]

Every other Alaskan must also be joined if feasible because, in their absence, the State would be subject to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations" relating to greenhouse gas emissions.[234] Absent Alaskans unhappy with the Superior Court's judgment in this case would not be collaterally estopped from bringing a subsequent case against the State over greenhouse gas emissions. Such cases could be filed over and over again.

It not being possible to join every Alaskan in this case, the Superior Court would have to decide whether this case should be dismissed by applying the factors in Alaska Civil Rule 19(b). Those factors point overwhelmingly in favor of dismissal: a judgment in this case would be prejudicial to absent Alaskans; there is no way to lessen that prejudice; and Plaintiffs have an adequate alternative remedy—the ability to seek reductions in greenhouse gas emissions through the political process. For all of these reasons, Plaintiffs' complaint should be dismissed.

C. Plaintiffs lack standing because they admit that greenhouse gas emissions from Alaska have not caused climate change

Plaintiffs also lack standing because—as they acknowledge—climate change is caused by the "substantial increase in the atmospheric concentrations of heat-

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233 Alaska Civil Rule 19(a).

234 *Id.*

trapping greenhouse gases," which has been caused by "more than 200 years" of burning fossil fuels.[235] Because Plaintiffs do not allege that the State has caused them harm, or even that emissions from Alaska have led to high concentrations of greenhouse gases or caused climate change, they lack standing.[236]

D. Plaintiffs lack standing because they admit that the injunction they request will not redress their harms

Plaintiffs also lack standing because they acknowledge that reducing greenhouse gas emissions in Alaska will not prevent or reverse climate change. Plaintiffs acknowledge that reducing atmospheric greenhouse gas concentrations, and preventing further climate change, requires global action. They allege that harmful climate change can only be prevented if "sovereign governments" take immediate action to reduce the concentration of atmospheric CO_2 from 390 to 350 ppm by the end of this century.[237] But because the injunctive relief Plaintiffs request, applying only in Alaska, would not reduce

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235 (Exc. 37-38; Am. Compl. ¶ 35.)

236 *See, e.g., Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*, 210 P.3d 1213, 1219 (Alaska 2009) holding that the plaintiffs lacked standing to sue automobile dealerships that caused them no harm); *Kivalina*, 663 F. Supp. 2d at 878-82 (holding that an Alaskan native village did not have standing to sue energy and utility companies for damages related to greenhouse gas emissions because the village's alleged injuries were due to global warming and were not traceable to the defendants).

237 (Exc. 40-43; Am. Compl. ¶¶ 38-44.)

the concentration of atmospheric CO_2 from 390 to 350 ppm, it would not redress or prevent any of Plaintiffs' alleged harms.[238] Plaintiffs therefore lack standing.[239]

CONCLUSION

For all of these reasons, the Court should affirm the Superior Court's dismissal of the complaint.

DATED this 18th day of January, 2013.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:
Seth M. Beausang
Assistant Attorney General
Alaska Bar No. NA 1111078

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[238] Plaintiffs' proposal to impose mandatory reductions on greenhouse gas emissions in Alaska may even prove counterproductive. Regulating greenhouse gases in only one region may actually increase global emissions. This phenomenon, called "carbon leakage," occurs when carbon emitters shift their operations to less-regulated regions. *See, e.g., North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010) ("Indeed, a patchwork of nuisance injunctions could well lead to increased air pollution.").

[239] *See Peter A. v. State*, 146 P.3d 991, 996 (Alaska 2006) (holding that appellant lacked standing to request relief that would not have redressed his alleged injury); *Shearer v. Mundt*, 36 P.3d 1196, 1199 (Alaska 2001) (same); *cf. U.S. ex rel. Greathouse v. Dern*, 289 U.S. 352, 360 (1933) (holding that a court of equity should not "compel the doing of an idle act").

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon; LISA CHERNAIK, guardian of Olivia Chernaik; KELSEY CASCADIA ROSE JULIANA, a minor and resident of Lane County, Oregon, and CATHY JULIANA, guardian of Kelsey Juliana, Plaintiffs, v. JOHN KITZHABER, in his official capacity as Governor of the State of Oregon; and the STATE OF OREGON, Defendants.	Case No. 16-11-09273 OPINION AND ORDER

THIS MATTER came before the Court on The State of Oregon and Governor's Motion to Dismiss (filed October 18, 2011). The Court heard oral argument on Defendants' motion on January 23, 2012. Tanya Sanerib and Christopher Winter of Crag Law Firm represented Plaintiffs and Roger Dehoog of the Department of Justice represented Defendants (the "State") at oral argument. Mr. Dehoog also filed the State's Motion to Dismiss and William Sherlock of Hutchinson, Cox, Coons, DuPriest, Orr, & Sherlock, P.C. and Mr. Winter filed Plaintiffs' Response to Defendants' Motion to Dismiss (filed December 2, 2011).

I. BACKGROUND

On May 19, 2011, Plaintiffs filed an Amended Complaint for Declaratory Judgment and Equitable Relief. In summary, Plaintiffs are children and their families who live in Oregon and

allege that their personal and economic well being is directly dependent upon the health of the state's natural resources held in trust for the benefit of its citizens, including water resources, submerged and submersible lands, coastal lands, forests, and wildlife. Plaintiffs allege that all of these assets are currently threatened by the impacts of climate change. Specifically, Plaintiffs allege that the interests of Plaintiffs will be adversely and irreparably injured by Defendants' failure to establish and enforce adequate limitations on the levels of greenhouse gas ("GHG") emissions that will reduce the level of carbon dioxide concentrations in the atmosphere. (Am. Compl. ¶ 11.) In the prayer for relief, Plaintiffs seek:

(1) A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect the atmosphere.

(2) A declaration that water resources, navigable waters, submerged and submersible lands, islands, shore lands, coastal areas, wildlife and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets.

(3) A declaration that Defendants have failed to uphold their fiduciary obligations to protect these trust assets for the benefit of Plaintiffs as well as current and future generations of Oregonians by failing to adequately regulate and reduce carbon dioxide emissions in the State of Oregon.

(4) An order requiring Defendants to prepare, or cause to be prepared, a full and accurate accounting of Oregon's current carbon dioxide emissions and to do so annually thereafter.

(5) An order requiring Defendants to develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science.

(6) A declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by six percent each year until at least 2050.[1]

[1] Plaintiffs, in the Amended Complaint, include a section entitled "Science Documenting the Climate Crisis." This section sets forth the Plaintiffs' claims regarding the impact of fossil fuels and carbon dioxide on the environment and global temperatures. Plaintiffs allege that "to limit average surface heating to no more than 1°C (1.8°F) above pre-industrial temperatures, and to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million."

Climate change has been an issue of concern in Oregon for over three decades.[2] More recently, and more relevant to the case at bar, in 2004, then-Governor Ted Kulongoski appointed the Governor's Advisory Group on Global Warming ("Governor's Advisory Group"). In December 2004, the Governor's Advisory Group issued its report entitled *Oregon Strategy for Greenhouse Gas Reductions*, which recommended the following GHG reduction goals for Oregon:

> (1) By 2010, arrest the growth of, and begin to reduce, statewide GHG emissions.
>
> (2) By 2020, the state's total GHG emissions should not exceed a level 10 percent below the levels emitted in 1990.
>
> (3) By 2050, the state's total GHG emissions should be reduced to a level of at least 75 percent below 1990 levels. GOVERNOR'S ADVISORY GROUP ON GLOBAL WARMING, OREGON STRATEGY FOR GREENHOUSE GAS REDUCTIONS (2004), http://oregon.gov/ENERGY/GBLWRM/docs/GWReport-Final.pdf.

In 2007, the Legislative Assembly enacted House Bill 3543 (HB 3543), which was largely codified in ORS 468A.200 to ORS 468A.260. In relevant part, ORS 468A.200 to ORS 468A.260 did three things. First, it legislatively found that global warming "poses a serious threat to the economic well-being, public health, natural resources and the environment of Oregon." ORS 468A.200(3).[3] Second, it adopted the GHG reduction goals recommended by the Governor's Advisory Group in its 2004 report. ORS 468A.205(1). Third, it created the Oregon Global

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[2] In 1988, then-Governor Neil Goldschmidt created the Oregon Task Force on Global Warming. Based on the task force's recommendations, the Legislature passed Senate Bill 576, which established Oregon's first carbon emissions reduction goals. http://www.oregon.gov/ENERGY/GBLWRM/Portal.shtml (Last accessed March 30, 2012).

[3] That global warming poses a "serious threat" is a "legislative finding" in the sense that the Legislature believes it is true and has, accordingly, decided to act upon that finding. As a former legislator, this Court understands the importance of legislative findings, which are not findings of truth in the same sense that judicial findings seek to be. In the context of the case at bar, this Court wishes to make clear that it makes no comment about the actual truth, or lack thereof, of global warming.

Warming Commission (the "Commission"). ORS 468A.215(1). The Commission is comprised of 25 members[4] whose pertinent duties include:

(1) Recommending ways to coordinate with state and local efforts to reduce GHG emissions consistent with ORS 468A.205;

(2) Recommending statutory and administrative changes, policy measures and other recommendations to be carried out by state and local governments, businesses, nonprofit organizations and residents to further the goals established in ORS 468A.205;

(3) Examining GHG cap-and trade systems as a means of achieving the goals established in ORS 468A.205;

(4) Examining funding mechanisms to obtain low-cost GHG emissions reduction; and

(5) Collaborating with state and local governments, the State Department of Energy, Department of Education, and State Board of Higher Education to develop and implement an outreach strategy to educate Oregonians about the impacts of global warming and to inform Oregonians of ways to reduce GHG emissions. ORS 468A.235 to ORS 468A.245.

Additionally, the Office of the Governor and other state agencies working to reduce GHG emissions must inform the Commission of their efforts and consider input from the Commission for such efforts. ORS 468A.235.

Essentially, Plaintiffs seek a judgment from the Court that the actions undertaken by the Governor and the Legislature to address climate change are inadequate. Plaintiffs, in the Amended Complaint, allege that in order to protect Oregon's public trust assets, the best available science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts per million. (Am. Compl. ¶ 26.) To reduce carbon dioxide to 350 parts per million by the end of the century, Plaintiffs allege that the best available science concludes that carbon

[4] The Commission is comprised of twenty-five members, eleven of whom are "voting members." The voting members must have "significant experience" in the following fields: manufacturing, energy, transportation, forestry, agriculture, environmental policy. Additionally, two members of the Senate, not from the same political party, and two members of the House of Representatives, not from the same political party, shall serve as nonvoting members. ORS 468A.215.

dioxide emissions must not increase and must begin to decline at a global average of at least six percent each year, beginning in 2013, through 2050, then decline at a global average of five pereent a year. (Am. Compl. ¶ 27.) Plaintiffs allege that the GHG emission goals established in ORS 468A.205 fail to achieve the necessary GHG reductions according to the best available seience. (Am. Compl. ¶ 36.) Furthermore, Plaintiffs allege that even if the goals established by the Legislature were adequate, Oregon has fallen far short of those goals. *Id.*

II. DISCUSSION

A. The Seope of Oregon's Uniform Declaratory Judgments Act

The State argues that the relief Plaintiffs seek exeeeds the Court's authority under Oregon's Uniform Declaratory Judgments Act, ORS 28.010 to 28.160. The Declaratory Judgment Act confers on Oregon eourts the "power to deelare rights, status, and other legal relations, whether or not further relief is or could be elaimed." ORS 28.010. The purpose of the Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." *Id.* The State argues that Plaintiffs do not ask the Court to interpret a specific statute or provision of thc Constitution, and do not allege that Defendants have violated any such provision, but rather ask the Court to impose a new affirmative duty on Defendants. Plaintiffs argue that they simply ask the Court to make declarations under the Act regarding Defendants' authority to protect public trust assets identified in both statutes and the Constitution.

In *Pendleton School District 16R v. State of Oregon*, 345 Or 596, 599 (2009), Plaintiffs – eighteen school districts and seven public school students – filed an action against the State of Oregon "seeking a declaratory judgment that Article VII, section 8, of the Oregon Constitution requires that the legislature fund the Oregon public school system at a level sufficient to meet

certain quality educational goals established by law." Plaintiffs also sought an injunction directing the Legislature to appropriate the necessary funds. *Id.* The Court held that the courts could grant a declaratory judgment that the Legislature failed to fully fund the public school system, if that is the case, as required by Article VIII, section 8, of the Oregon Constitution. *Id.* at 610. In other words, the Court held that courts could grant a declaratory judgment that the Legislature violated a constitutional provision.

Here, unlike in *Pendleton School District*, Plaintiffs have not alleged that Defendants have failed to adhere to a specific constitutional provision or statute. Instead, Plaintiffs ask the Court to create and impose an affirmative duty on Defendants. Then, Plaintiffs argue that the Court should find that Defendants failed to meet this obligation. Plaintiffs argue that they are not asking the Court to *create* a new duty but merely to recognize a duty well supported by "state sovereignty, the common law of Oregon, as well as in its statutes and the state Constitution." (Pls.' Resp. to Defs.' Mot. to Dismiss 10). However, the many statutes, cases, and constitutional provisions Plaintiffs cite to do not support their argument. In this case, the only clear duty is the one already enunciated by the Legislature in ORS 468A.200 to ORS 468A.260. Thus, the Court concludes that Plaintiffs' requested relief asks this Court to extend the law by creating a new duty rather than interpret a pre-existing law. Therefore, the Court concludes that the relief Plaintiffs seek exceeds the Court's authority under Oregon's Declaratory Judgment Act.

B. Sovereign Immunity

Defendants argue that sovereign immunity bars suits against the state except in those limited instances in which the state has expressly waived its immunity. Thus, Defendants argue, Plaintiffs must either show that their claim avoids invoking immunity, or that immunity has been expressly waived. Article IV, section 24, of the Oregon Constitution incorporates the doctrine of

sovereign immunity from suit. In *Lucas v. Banfield*, 180 Or 437, 441 (1947), the Court recognized that "a declaratory judgment proceeding must be dismissed when relief is sought against the State and when it has not consented to be sued." In some circumstances, however, the courts have found that declaratory judgment actions implicating the state were nonetheless not actions against the state. In *Hanson v. Mosser*, 247 Or 1. 7 (1967), *overruled on other grounds by Smith v. Cooper*, 256 Or 485 (1970), the Court held that when state officers, "act beyond or in abuse of their delegated authority they act as individuals, and a suit to enjoin their wrongful acts is not one against the state."

Plaintiffs argue that the courts have the authority to declare legal rights and relations,[5] regardless of whether the state is a party. In other words, Plaintiffs argue, the rights of beneficiaries to enforce a trust cannot be abrogated, even by the doctrine of sovereign immunity. Plaintiffs, citing *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983), argue that sovereign immunity does not bar this suit because this is simply a case where the beneficiaries (Plaintiffs) of a trust seek a declaration, among other relief, against the trustee for wasting trust resources.

Plaintiffs completely mischaracterize the law. In *Mitchell*, the Court found that owners of interests in allotments on Indian tribal lands could sue the United States only *after* finding the United States had waived sovereign immunity. *Id.* at 212. Specifically, the Court held, "It is axiomatic that the United States may not be sued without its consent and that the existence of

[5] Plaintiffs argue that pursuant to the plain text of Oregon's Uniform Declaratory Judgment Act, the Court has the ability to declare the rights of beneficiaries and the duties of trustees. ORS 28.040. However, even if the Declaratory Judgment Act fails to offer an adequate remedy, Plaintiffs argue that Article I, section 10, of the Oregon Constitution (the "Remedy Clause") mandates that Plaintiffs have a remedy available for their alleged injury. Plaintiffs' argument is flawed. The Remedy Clause states, "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." It generally serves as a limit on the Legislature's ability to abolish common law remedies available to individuals at the time the Oregon Constitution was adopted. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 118-19 (2001). Thus, where no remedy ever existed at common law, there can be no violation of this provision. *Id.* at 118-19. Because Plaintiffs did not have the right to sue the State of Oregon and the Governor for violating their fiduciary obligations with respect to certain public trust assets at the time the Oregon Constitution was adopted, no provision of the Remedy Clause has been violated.

consent is a prerequisite for jurisdiction ... we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." *Id.* Contrary to Plaintiffs' contention, the *Mitchell* Court in no way held that the rights of beneficiaries to enforce a trust superseded the doctrine of sovereign immunity. In fact, the Court did just the opposite.

Here, Plaintiffs' claim is against the State of Oregon and Governor Kitzhaber. Thus, unless Plaintiffs' claim either avoids invoking immunity or the State has waived immunity, Plaintiffs' claim is barred by sovereign immunity and the Court has no jurisdiction to hear the case. As to Defendant State of Oregon, Plaintiffs' claim is barred by sovereign immunity. Plaintiffs' Amended Complaint does not suggest that Defendant State of Oregon has acted "beyond or in abuse of its delegated authority," and Defendant State of Oregon has not waived immunity. Likewise, Plaintiffs' claim as to Defendant Kitzhaber is also barred by sovereign immunity. Plaintiffs' Amended Complaint does not suggest that Governor Kitzhaber has acted "beyond or in abuse of his delegated authority," and Governor Kitzhaber has not waived immunity.[6] Thus, the Court concludes that Plaintiffs' claims are barred by sovereign immunity and the Court does not have jurisdiction to hear the case.

[6] To be clear, Plaintiffs do allege that both the State and Governor have violated their fiduciary obligations with respect to certain public trust assets. Nevertheless, this case is distinguishable from *Hanson*. In *Hanson*, the plaintiffs alleged that defendants acted illegally when they awarded a contract to a bidder other than the lowest bidder. In other words, plaintiffs alleged that defendants acted in clear violation of an established law. Here, Plaintiffs first ask this Court to declare, or create, the obligations allegedly owed by Defendants. Then, Plaintiffs ask the Court to find that Defendants are in violation of these newly created obligations. Because the Court would first have to declare, or create, these fiduciary obligations, the Court concludes that this case is distinguishable from *Hanson* and thus barred by sovereign immunity.

C. The Separation of Powers Doctrine

i. Separation of Powers Doctrine

Defendants argue that Plaintiffs' requested relief violates the Separation of Powers Doctrine as it requires the Court to substitute its own standards for those standards developed through the legislative process. The Separation of Powers Doctrine stems from Article III, section 1, of the Oregon Constitution. It provides,

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, exeept as in this Constitution expressly provided. Or Const, Art III, §1.

Although the Separation of Powers Doctrine mandates three separate and distinet branches of government, that separation is not always complete as some interaction bctween the branehcs remains desirable. *Rooney v. Kulongoski*, 322 Or 15, 28 (1995), *citing* The Federalist No 51 (A. Hamilton or J. Madison) (stating that separation of powers is deemed "essential to the prescrvation of liberty"); *Monaghan v. School District No. 1*, 211 Or 360, 364 (1957). Thus, a violation of separation of powers will be found only if the violation is elear. *Rooney,* 322 Or at 28. To determine whether there has been a clear violation of the Separation of Powers Doctrine, the court makes two inquiries: (1) the "unduc burden" inquiry; and (2) the "functions" inquiry. *Id.*

First, using the "undue burden" inquiry, the court must determine whether one department has "unduly burdened" the actions of another department in an area of responsibility or authority committed to the other department. *Id.* The "undue burden" inquiry "corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influcnce between governmental departments." *Id.* In *Rooney*, the Oregon Supreme

Court held that their ballot title review function did not offend the Separation of Powers Doctrine. *Id.* at 29-30. The Court noted that "judicial review of the Attorney General's acts done pursuant to statute is a *well-established* role for the court and does not present the potential for the court to influence coercively the Attorney General." *Id.* at 29 (emphasis added).

Here, Plaintiffs' requested relief seeks to, among other things: (1) impose a fiduciary obligation on Defendants to protect the atmosphere from climate change;[7] (2) declare that Defendants have failed to meet this standard; and (3) compel Defendants to address the impact of climate change by reducing GHG emissions in a specific amount over an established timeframe. (Am. Compl. ¶¶ 47-52.) Plaintiffs argue that the requested relief does not place an undue burden on the other branches of government because the requested relief leaves up to Defendants' discretion how to make the necessary reductions of GHG emissions to protect public trust assets. In other words, Plaintiffs argue that their requested relief would not impose an undue burden on the Legislature because what is regulated[8] (i.e. the sources of carbon dioxide emissions) and how it is regulated are questions largely left to Defendants' discretion. Furthermore, Plaintiffs argue that Plaintiffs' requested relief does not require the Court to "strike out" any existing legislation. Plaintiffs argue that the requested relief is "concurrent" to HB 3543 in that it "will ensure the state meets its public trust obligations, which is separate from the inquiry that led to the adoption of HB 3543, and does not require the Court to 'strike out' any existing legislation." (Pls.' Resp.

[7] While the declaration that the atmosphere is a public trust resource is only one aspect of Plaintiffs' requested relief, the atmosphere is central to the entire Amended Complaint. Plaintiffs want the atmosphere to be protected, through GHG emission reduction, in order to protect other named public trust assets.

[8] At oral argument, the Court asked Plaintiffs, "Under the Public Trust Doctrine, what would be the limit on a court's actions?" In other words, where is the line? The Court granted leave to Plaintiffs' counsel to send a letter to the Court addressing this issue after oral argument. Plaintiffs, in their letter, argue that it is not up to the Court to determine whether specific activities (like field burning in Lane County) will be allowed to occur – that decision is reserved for Defendants. But Plaintiffs fail to provide this Court with a satisfactory answer. While Plaintiffs' interpretation of the Public Trust Doctrine may not require certain activities to cease, Plaintiffs fail to realize that they, through this Court, are unconstitutionally seeking to force Defendants to protect certain resources in a specific manner contrary to the manner in which the Legislature has already chosen to act.

to Defs.' Mot. to Dismiss 25), *citing Brown v. Transcon Lines*, 284 Or 587, 610 (1978) (explaining that a new statutory law and a "pre-existing common law" can be "cumulative, rather than exclusive.").

Contrary to their own stated position, Plaintiffs are clearly asking this Court to substitute its judgment for that of the Legislature. Plaintiffs ask the Court to: (1) order Defendants to "develop and implement a carbon reduction plan that will protect trust assets by abiding by the best available science," and (2) issue a "declaration that the best available science requires carbon dioxide emissions to peak in 2012 and to be reduced by at least six percent each year until at least 2050." (Am. Compl. ¶¶ 51, 52.) Unlike in *Rooney*, Plaintiffs ask this Court to step far outside of its well-established role – of adjudicating facts and analyzing extant law in the context of a concrete dispute – to affirmatively declare a law that is in contrast with laws established by the Legislature. If this Court were to grant Plaintiffs' requested relief, it would effectively "strike down" HB 3543 and ORS 468A.200 to ORS 468A.260. Plaintiffs' requested relief would create a more stringent standard for GHG emission reductions and would thereby displace those goals established by the Legislature in HB 3543 and ORS 468A.200 to ORS 468A.260. It is hard to imagine a more coercive act upon the legislative department than to strike out a statutory provision and supplant it with the Court's own formulation.[9] Thus, the Court concludes that Plaintiffs' requested relief would impose an "undue burden" on the legislative branch and thus violates the Separation of Powers Doctrine. Indeed, it is difficult to analyze this case as being anything other than an "undue burden" on the legislative branch when the Plaintiffs are really asking a solitary judge in one of thirty-six counties to completely subvert the legislative process

[9] It is well within the court's established role to strike down statutes when they are unconstitutional. Here, there is no allegation of unconstitutionality.

and thereby subvert the elective representatives of the sovereign acting in concert with one another. 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. If "not doing enough" were the standard for judicial action, individual judges would regularly be asked to substitute their individual judgment for the collective judgment of the Legislature, which strikes this Court as a singularly bad and undemocratic idea.

Second, using the "functions" inquiry, the Court must determine whether one department is, or will be, performing functions committed to another department. *Rooney*, 211 Or at 28. In Oregon, the constitutionally-mandated framework for addressing issues of statewide significance is as follows. The Governor is the chief executive of the state. Or Const, Art V, §1. In that capacity, it is his constitutional duty to see "that the Laws be faithfully executed." *Id.* at §10. The principal responsibility for making "the Laws" lies with the Legislature. Or Const, Art IV, §1 (vesting state's legislative power in the Legislative Assembly). However, in the course of discharging his executive duties, the Governor is required to keep the Legislature informed as to the condition of the state and he must recommend new laws to the Legislature as is appropriate. Or Const, Art V, §11. This is exactly the approach that the Governor and Legislature have taken with respect to climate change.[10] The 2007 Legislative Assembly, following the recommendations from the Governor's Advisory Group, enacted ORS 468A.200 to ORS 468A.260, which adopted specific GHG emissions goals for the state to achieve by 2010, 2020, and 2050. Plaintiffs, without arguing that ORS 468A.200 to ORS 468A.260 is unconstitutional or violates any statute, ask the Court to draft a similar but more stringent statute. This is classic lawmaking and is a function constitutionally reserved to the Legislature. One of the functions of

[10] See "Background" section, above.

the Legislature is to decide politically – based upon whatever facts it deems relevant to the determination – whether or not global warming is a problem and what, if anything, ought to be done about it. Whether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature's GHG emission goals are too weak, too stringent, or are altogether unneeessary is beside the point. These determinations are not judicial functions. They are legislative funetions. Thus, the Court concludes that Plaintiffs' requested relief violates the Separation of Powers Doetrine.

ii. Political Question Doctrine

Defendants argue that a closely-related reason that this Court lacks jurisdiction to award deelaratory or injunctive relief against Defendants is the Political Question Doctrinc. Thc doctrine provides that certain issues are not justiciable because they have been eonstitutionally reserved to the political branches of government. Thus, the Political Question Doctrine is a variation on the Separation of Powers Doctrine. While the Oregon Supreme Court has recognized the Political Question Doctrine,[11] it is not clear whether this doctrine extcnds morc, less, or the same freedom from judicial scrutiny as the Separation of Powers Doctrine standing alone. Thus, it is instructive to look to the federal courts for their application of the doetrine under the federal Constitution.

The federal courts have developcd the Politieal Question Doctrine much more fully than the Oregon courts. However, under federal law, the central principle remains the same – certain issues are not justiciable because they havc been constitutionally reserved to the political

[11] In *Putnam v. Norblad*, 134 Or 433 (1930), the Oregon Supreme Court recognized the Political Question Doctrine. The Court stated that "[i]t is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provision." *Id.* at 440. The Court acknowledged that it was "not always easy to define the phrase 'political' question, nor to determinc which matters fall within its scope[.]" *Id.*

branches of government. In *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), the court analyzed the political question doctrine at length. The court explained,

> The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches, rather than the judiciary. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007). 'The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch.' *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). 'A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.' *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 785 (9th Cir. 2005).

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth six independent factors for the courts to use in determining whether a suit raises a nonjusticiable political question. *Native Village of Kivalina*, 663 F. Supp.2d at 871, citing *Baker*, 369 U.S. 186 (1962). Defendants argue that two factors are particularly relevant to the case at issue:

(1) A lack of judicially discoverable and manageable standards for resolving it; or

(2) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. *Id.* at 872, *citing Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005).[12]

First, Defendants argue that despite the precise GHG reductions that Plaintiffs call for, their suit lacks the sort of judicially discoverable standards necessary to resolve this dispute. The *Baker* court explained that the focus of this factor is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled,

[12] The remaining factors are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (3) an unusual need for unquestioning adherence to a political decision already made; or (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Native Village of Kivalina*, 663 F.Supp.2d at 871-72.

rational, and based upon reasoned distinctions.'" *Baker*, 369 U.S. at 873-74 *citing Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). In the instant case, Plaintiffs seek a declaration that Defendants have a fiduciary obligation to hold certain assets in trust and that the only way to satisfy this fiduciary obligation is to reduce GHG emissions to certain levels. Plaintiffs argue that their claims are based on the "long-recognized" public trust doctrine and that the court must only look to case law to find the judicial standards necessary to adjudicate the present dispute.

Although the cases cited by Plaintiffs discuss the Public Trust Doctrine, the manner in which the doctrine is invoked in those cases is substantially less onerous than the manner in which Plaintiffs seek to invoke the doctrine here. In fact, Plaintiffs have not pointed this Court to a single case where, in order to satisfy their fiduciary obligation, a trustee was required to harness and control GHG emissions. Even if this Court were to find that Defendants had a fiduciary obligation to hold certain assets in trust, it would be left asking what trust standards to apply. Plaintiffs' suit would require this Court to decide whether capping GHG emissions at the levels recommended by Plaintiffs is the proper way to protect the named trust assets and how these trust assets could be meaningfully regulated in Oregon – a relatively small political unit. These are all policy questions, which would require the Court to engage in a largely unguided weighing of competing public interests for which the Court does not have judicially discoverable standards.

Second, yet closely related, Defendants argue that Plaintiffs' suit requires this Court to "make an initial policy determination of a kind clearly for nonjudicial discretion" in order to decide the case before it. Plaintiffs ask this Court to cap GHG emissions at the levels recommended by Plaintiffs, rather than those already established by the Legislature. That is a policy decision that has already been addressed by the Legislature. With the Legislature this

decision should remain. Therefore, this Court concludes that Plaintiffs' suit presents political questions, which necessarily are decided by the political branches of government, not the judiciary. Consequently, this Court lacks jurisdiction to award declaratory or injunctive relief against Defendants.

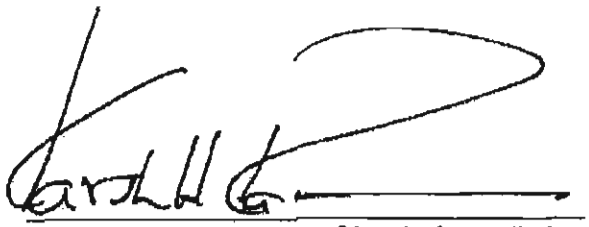
D. Court's discretion to deny relief pursuant to ORS 28.060

Because the Court finds that: (1) the relief Plaintiffs seek exceeds the Court's authority under Oregon's Declaratory Judgment Act; (2) Plaintiffs' claims are barred by sovereign immunity; (3) Plaintiffs' requested relief violates the Separation of Powers Doctrine; and (4) Plaintiffs' suit presents political questions, it declines to address whether it would, in its discretion, grant or deny relief pursuant to ORS 28.060 at this time.

III. ORDER

IT IS HEREBY ORDERED that The State of Oregon and Governor's Motion to Dismiss is GRANTED. Mr. Dehoog shall prepare the judgment which shall, by reference, incorporate this Opinion and Order.

Dated this 5th day of April, 2012.



Karsten H. Rasmussen, Circuit Court Judge

cc: Tanya Sanerib, via email
Christopher Winter, via email
William Sherlock, email
Roger Dehoog, via email

STATE OF NEW MEXICO
SANTA FE COUNTY
FIRST JUDICIAL DISTRICT COURT

AKILAH SANDERS-REED,
by and through her parents Carol
and John Sanders-Reed, and
WILDEARTH GUARDIANS,

Plaintiffs,

v. No. D-101-CV-2011-01514

SUSANA MARTINEZ,
in her official capacity as Governor
of New Mexico, and
STATE OF NEW MEXICO,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

THIS MATTER having come before the Court on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("Motion"), the Court having considered the Motion, Plaintiffs' response thereto, Defendants' reply in support, and the arguments of counsel at a hearing on June 29, 2012,

THE COURT FINDS that the Motion is well taken to the extent the Complaint attempts to assert claims based on the New Mexico Legislature's failure to act with respect to the atmosphere, but that Defendants' other arguments are not appropriate for disposition at the pleading stage.

Therefore, IT IS HEREBY ORDERED, that the Motion is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is GRANTED to the extent Plaintiffs are asserting claims based on the New Mexico Legislature's failure to act with respect to the atmosphere.

2. The Motion is DENIED to the extent that Plaintiffs have made a substantive allegation that, notwithstanding statutes enacted by the New Mexico Legislature which enable the state to set state air quality standards, the process has gone astray and the state is ignoring the atmosphere with respect to greenhouse gas emissions.

3. Defendants' oral request for certification for interlocutory appeal is DENIED at this time, but may be renewed after the Court rules on a summary judgment motion.

HON. SARAH SINGLETON
DISTRICT JUDGE

APPROVED as to form:

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