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IN THE SUPREME COURT OF THE STATE OF ALASKA

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

TRIAL COURT CASE NO. **3AN-17-09910 CI**

APPELLANTS' PETITION FOR REHEARING

Pursuant to Alaska Rule of Appellate Procedure 506(a)(1) and (2), Appellants (Youth Plaintiffs) request rehearing of the Court's January 28, 2022 Opinion because the Majority: (1) overlooked and misapplied controlling authority, principles of law, and material facts showing a judicial declaration of AS 44.99.115(2)(b)'s unconstitutionality would provide meaningful redress; and (2) misconceived Youth Plaintiffs' facial challenge to AS 44.99.115(2)(b) as an as-applied challenge focused on agency actions.

I. Declaratory Relief Alone Would Provide Meaningful Redress

This case is distinguishable from *Kanuk v. State Department of Natural Resources*,[1] and declaratory relief would "settle[] the legal relations between the parties more fully than it would have in *Kanuk*[,]"[2] satisfying the Majority's standard. Unlike *Kanuk*, which challenged the State's failure to address climate change, Youth Plaintiffs allege that AS 44.99.115(2)(b), the State's codified policy of affirmatively "promoting"—actively supporting and increasing—fossil fuel development, transport, and use, is causing the dangerous rate of Alaska's greenhouse gas (GHG) emissions.[3] Declaratory relief would "clarify and settle" the legal relations between the parties and "terminate and afford relief from the . . . controversy giving rise to the proceeding"[4] because it would resolve the constitutionality of AS 44.99.115(2)(b).

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[1] 335 P.3d 1088 (Alaska 2014).
[2] Slip op. at 45.
[3] *E.g.*, Exc. 222 ¶ 237(a) ("By and through" Defendants' policy to "promot[e] the development, transport" and "use" of fossil fuels "by Alaskans and for export" as codified in AS 44.99.115(2)(b), "Defendants cause and contribute to dangerous levels of GHG emissions and Climate Change Impacts."; Exc. 223-25 ¶¶ 237(b)-(p) (Defendants' implementing conduct); Exc. 218-21 ¶¶ 219-33 (Alaska's substantial resulting GHGs).
[4] *Kanuk,* 335 P.3d at 1101 (quoting *Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005)).

Declaratory relief sets constitutional parameters, "case by case," by which state policies must abide.[5] It does not dictate what the State's policy must be; it only clarifies whether the policy under judicial review is constitutionally permissible.[6] Here, it would provide "clear guidance about the consequences of . . . future conduct,"[7] on whether Defendants can or *cannot* actively "promot[e]"[8] fossil fuels.[9] A declaratory judgment alone is sufficient relief under Alaska's Declaratory Judgment Act "whether or not further relief is or could be sought[,]"[10] and carries a presumption that government officials will "abide by an authoritative interpretation of the . . . constitution[.]"[11] If AS 44.99.115(2)(b) is declared unconstitutional, the State would no longer be able to "promot[e] the development, transport" and "use" of fossil fuels,[12] or deny ADEC's authority to promulgate Plaintiffs' proposed rule,[13] and Alaska's resulting GHG

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[5] *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 38-39 (Alaska 2001) ("constitutional provision[s] . . . are subject to definition, interpretation, and refinement through the traditional course of adjudication, case by case.").

[6] *E.g.*, *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 585 (Alaska 2007) ("[W]e go no further than the Alaska Constitution demands, and merely affirm that the State does not strike the proper constitutional balance between its own compelling interests and the fundamental rights of its citizens[.]"); *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).

[7] *Kanuk*, 335 P.3d at 1091.

[8] AS 44.99.115(2)(b).

[9] Youth Plaintiffs alleged continuing, not just past, harmful implementation of AS 44.99.115(2)(b), necessitating judicial review. Exc. 227 ¶ 239(f); *contra* slip op. at 46.

[10] AS 22.10.020(g); *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725 (Alaska 2000) (declaring constitutional violation without further relief); *id.* at 730 ("declaratory relief is often the simplest and most effective form of judgment in cases" of "significant public interest").

[11] *Utah v. Evans*, 536 U.S. 452, 463-64 (2002); slip op. at 43 n.120.

[12] Whether Article VIII allows the profound destruction to children's lives and *all* State resources resulting from AS 44.99.115(2)(b) is a merits question, and as a matter of prudence, cannot be predetermined absent a factual record. Exc. 201-14 ¶¶ 169-204.

[13] Slip op. at 54 ("the Department cannot use its rule-making authority to 'contradict a clear legislative policy.'") (citation omitted).

emissions and endangerment of Youth Plaintiffs will be lessened.[14] The Majority's contrary finding disregards factual allegations it must take as true and contradicts its own conclusion that AS 44.99.115(2)(b) prevents Defendants from reducing Alaska's GHGs.[15]

The Majority's misuse of "prudential concerns" to abdicate the Court's duty of constitutional review is particularly problematic in this case challenging State conduct the Court acknowledges is creating "an existential threat to human life[.]"[16] According to the alleged facts, which must be assumed as true, without this Court's intervention, Defendants ongoing implementation of AS 44.99.115(2)(b)[17] will destroy the climate and natural resources of Alaska and the health, safety, and futures of these young plaintiffs.[18] The "dynamic acceleration of climate change" has been and continues to be caused by the entrenched policy and actions of Alaska's political branches,[19] making the courts *the only* independent and "competent branch" to address Youth Plaintiffs' claims.[20]

II. Appellants Challenge AS 44.99.115(2)(b) On Its Face

The Majority misconceived Youth Plaintiffs' challenge to AS 44.99.115(2)(b), writing that "plaintiffs' as-applied claims upset[] our usual approach to reviewing State

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[14] *See* note 3, *supra*, and accompanying text.
[15] Slip op. at 54.
[16] Slip. op. at 3, 41-50.
[17] In a similar case challenging the constitutionality of a statute promoting fossil fuels, a court ruled that declaratory judgment alone would provide meaningful redress. *Held v. State of Montana*, CDV-2020-307, Order on Mot. to Dismiss at 18 (Mont. First Jud. Dist. Ct., Lewis & Clark Cty., Aug. 4, 2021) ("Youth Plaintiffs sufficiently demonstrate that finding [the] State Energy Policy . . . unconstitutional would alleviate their injuries.").
[18] Exc. 226-27 ¶ 239.
[19] *Id.*
[20] Slip. op. at 45.

agency action" in "ensuring that the agency has taken a hard look at all factors material and relevant to the public interest."[21] However, Youth Plaintiffs challenge AS 44.99.115(2)(b) *on its face*,[22] and, as the Majority acknowledges, Alaska's courts must ensure legislation complies with the *substantive* protections of Alaska's Constitution.[23]

AS 44.99.115(2)(b) is facially unconstitutional if "there is no set of circumstances under which" it "can be applied consistent with the requirements of the constitution."[24] That is the constitutional standard—which is, in part, a question of fact—that must be applied by the lower court on a full record. AS 44.99.115(2)(b) is not above constitutional review.[25] The facts alleged, if proven, will demonstrate that AS 44.99.115(2)(b) cannot withstand any level of constitutional scrutiny and that, in fact, its directive to "promot[e]" fossil fuels is detrimental to any interest the State could purport to have balanced against Youth Plaintiffs' lives, health, and safety. Youth Plaintiffs' allegations show that every molecule of additional emissions further endangers them;[26] increasingly *forecloses* utilization, development, and conservation of *all* State

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[21] Slip op. at 17, 34-35 (cleaned up); *see also*, *id.* at 38 ("plaintiffs really are challenging how the policy is being applied rather than the policy itself.").
[22] *E.g.* Appellants' Suppl. Reply Br. at 5 (favorable ruling would strike AS 44.99.115(b)).
[23] Slip op. at 33 n.89, 34 nn.93-95, and accompanying text.
[24] *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 372 (Alaska 2009).
[25] That AS 44.99.119(2)(b), like all statutes, involves a balance of interests does not affect the Court's duty to decide its constitutionality. *E.g.*, *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001) ("[W]e have a duty. . . to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution."); *Planned Parenthood of Alaska*, 35 P.3d at 46 (directing superior court to apply "difficult balance of interests that frames the disputed constitutional questions"); *Planned Parenthood of Alaska*, 171 P.3d at 585.
[26] Exc. 149-77 ¶¶ 14-91 (Plaintiffs' health and safety already being harmed); Exc. 193-95 ¶¶ 144, 145, 147 (GHG levels critical; additional GHGs cause existential harm).

resources;[27] and *undermines* Alaska's economy.[28] To insulate from review and effectively presume the constitutionality of AS 44.99.115(2)(b), without a full factual record or argument from the parties on the scope of protections in Alaska's Constitution, as the Majority has here, is a miscarriage of justice. If found unconstitutional, Alaska's courts have "not only the power but the duty to strike" AS 44.99.115(2)(b).[29]

III. Conclusion

The judge-made doctrine of "prudential concerns" should not be misused to evade the Court's duty to check the State's endangerment of the lives of politically-powerless children.[30] The Opinion perverts the concept of "prudence,"[31] allowing Alaska's political branches to implement a policy the Court acknowledges "creates an existential threat to human life[.]"[32] The profound harms posed to Youth Plaintiffs can be proven at trial and prevented by a declaratory judgment. Or they can be proven by the further unfolding of the climate catastrophe Defendants continue to perpetrate through AS 44.99.115(2)(b). The Opinion guarantees the latter. Youth Plaintiffs' Petition for Rehearing should be granted, and this case remanded for a determination, on a full factual record, of the constitutionality of 44.99.115(2)(b).

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[27] Exc. 201-14 ¶¶ 169-204.
[28] Exc. 213-14 ¶ 203; Exc. 217 ¶ 217; *see also* Exc. 90-92.
[29] *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913.
[30] The enormity and unprecedented existential dangers of the climate crisis challenge the capacity of the human psyche to helpfully respond. But that does not limit the capacity of the rule of law or the courts' role. Indeed, when others lack capacity is when we most need our system of justice as a bulwark to embrace the constitutional challenge before it.
[31] Prudence is the "careful good judgment that allows someone to avoid danger or risks." https://www.merriam-webster.com/dictionary/prudence.
[32] Slip op. at 3.

DATED this 7th day of February, 2022 at Eugene, Oregon.

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CERTIFICATE OF TYPEFACE

Appellants hereby certify, by and through their attorneys, that the foregoing Petition for Rehearing complies with Alaska Rule of Appellate Procedure 513.5(C)(2) and has been typed in Times New Roman, 13-point font.

[*Signature Page Follows*]

DATED this 7th day of February 2022 at Eugene, Oregon.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date true and correct copies of **Appellants' Petition for Rehearing** were served via email on the following:

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