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; ANANDA 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 No. 3AN-11-07474 CI

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

APPELLANTS' BRIEF

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Article VIII, Section 2
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.

Article VIII, Section 3
Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII, Section 6
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 public domain.

APPENDIX

A. *Bonser-Lain v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-11-002194, slip op. (Dist. Ct. Tex., July 9, 2012)

I. JURISDICTIONAL STATEMENT

Appellants, Nelson Kanuk, Adi Davis, Katherine Dolma, Ananda Rose Ahtahkee Lankard, and Avery and Owen Mozen, by and through their respective guardians (collectively "Our Children"), appeal to the Alaska Supreme Court from the judgment of dismissal entered in the Superior Court, Third Judicial District by Honorable Sen K. Tan on May 11, 2012. Our Children timely filed their notice of appeal on June 13, 2012 pursuant to Alaska Rule of Appellate Procedure 202(a). Alaska Statute 22.05.010 bestows this Court with jurisdiction over this matter.

II. STATEMENT OF ISSUES PRESENTED

1. The superior court erred by failing to declare the atmosphere is a public trust resource and must be protected for present and future generations under Article VIII of the Alaska Constitution.

2. The superior court erred by determining the constitutional public trust claims raised in Our Children's amended complaint were non-justiciable under the political question doctrine.

III. STATEMENT OF THE CASE

Humanity, and especially Our Children and future generations, face an atmospheric crisis of epic proportions. Exc. 37-43. According to data from the National Oceanic and Atmospheric Administration ("NOAA") and the National Aeronautics and Space Administration ("NASA"), the Earth's average surface temperature has increased by about 0.8°C (1.4°F) in the last 100-150 years. Exc.

37-38. In fact, the eight warmest years on record (since 1850) have all occurred since 1998. *Id.* Coupled with the increase in the temperature of the earth, other aspects of the climate are also changing, such as rainfall patterns, snow and ice cover, and sea levels. *Id.*

The State's Department of Environmental Conservation ("DEC") estimated that, in 2005, gross Alaskan emissions of greenhouse gases were 52.82 million metric tons of carbon dioxide equivalent ("MTCO2e"), a rise of more than 23% from 1990 emissions levels. Exc. 46. DEC also projected that by 2020, gross Alaskan emissions of greenhouse gases would rise to 61.5 MTCO2e. *Id.* Alaska's annual emissions are similar to those of Oregon, Nevada, and Connecticut -- all states that have 3.5-7 times the population of Alaska. *Id.* DEC has also identified many significant, life-altering impacts, such as increased coastal erosion and displacement of coastal communities, melting of arctic tundra and taiga resulting in the damage of Alaska's infrastructure, warmer summers resulting in insect infestations, more frequent and larger forest fires, the alteration of Alaska's boreal forests, decreased arctic ice cover resulting in loss of habitat and prey species for marine mammals, and changes in terrestrial and oceanic species abundance and diversity resulting in the disruption of the subsistence way of life. Exc. 47.

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. Exc. 40. To prevent global heating greater

than 1° C and to protect Earth's oceans (an essential harbor of countless life forms and absorber of greenhouse gases), concentrations of atmospheric carbon dioxide ("CO2") must decline to less than 350 ppm by the end of this century. *Id.* However, today's atmospheric CO2 levels exceed 390 ppm and are steadily rising. *Id.* Despite this scientific data and its own department's dire forecast, the State has done next to nothing to address greenhouse gas ("GHG") emissions. Exc. 43-46. Other than forming a sub-cabinet to study climate change and the sub-cabinet's publication of a couple of reports recommending a number of measures to address climate change, the State has not taken any affirmative action to control and reduce GHG emissions. *Id.*

Our Children, whose ages range from an infant to teenagers, seek to change this through application of the public trust doctrine, as provided for in Article VIII of the Alaska Constitution, to the atmosphere. Exc. 34-35. The public trust doctrine is a legal mandate establishing a sovereign obligation in states to hold critical natural resources in trust for the benefit of its citizens. *Id.* The theory underlying the public trust doctrine can be traced to ancient times, where the things which are naturally everybody's, such as "air, flowing water, the sea, and the sea-shore" were codified in Roman law. Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). The public trust doctrine has since evolved and been judicially enforced, beginning in the United States with the U.S. Supreme Court's seminal case on the subject,

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892), and in Alaska with the Alaska Supreme Court's decision in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988).

Our Children seek declaratory and equitable relief against the State for breach of its public trust obligations stemming from Article VIII. Exc.26-53. In their complaint, each Appellant alleged that he or she had been significantly harmed by climate change, including but not limited to being harmed by increased erosion, flooding and forest fires, diminishment and impairment of wildlife, and impact on subsistence and daily activities. Exc. 29-34; *see also* Our Children's Trust Alaska DVD at R. 294. Appellants also alleged that the public trust doctrine, as codified and embodied in Article VIII, applies to the atmosphere and imposes an affirmative fiduciary obligation upon the State to protect it as a public trust resource. Exc. 34-35, 48-49. Appellants further alleged that the best available science dictates the State's fiduciary obligation and said science requires a 6% annual decrease in carbon dioxide emissions from 2013 to 2050 to protect this public trust resource. Exc. 36-40, 49. Despite such science and its own findings, the State has refused to take any affirmative action to combat the effects of climate change in Alaska. Exc. 43-51. Accordingly, Our Children turned to the superior court for relief.

Specifically, Our Children sought declaratory relief that: 1) the atmosphere is a public trust resource under Article VIII; 2) Article VIII imposes an affirmative

fiduciary obligation upon the State to protect and preserve the atmosphere; 3) the State's fiduciary obligation is dictated by the best available science which requires reduction of CO2 by at least 6% per year from 2013 through 2050; 4) the State breached its fiduciary obligation; and 5) that the State's fiduciary obligation is enforceable by citizen beneficiaries of the trust. Exc. 51-52, 166-67. Our Children also sought injunctive relief requiring the State to reduce CO2 emissions 6% per year from 2013 to 2050 and to annually prepare a full and accurate accounting of Alaska's current CO2 emissions. Exc. 52, 166-67.

IV. STANDARD OF REVIEW

Decisions of trial courts regarding motions to dismiss involve legal issues which the Supreme Court reviews *de novo*. *Krause v. Matanuska-Susitna Borough*, 229 P.3d 168, 174 (Alaska 2010) (citations omitted). In doing so, the Supreme Court is to liberally construe the complaint, accept all factual allegations as true, and draw all reasonable inferences in favor of the non-moving party. *Krause*, 229 P.3d at 174; *Lowell v. Hayes*, 117 P.3d 745, 750 (Alaska 2005). The Supreme Court may affirm a decision to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Lowell*, 117 P.3d at 750 (quoting *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001). Only where all of the relief sought cannot be obtained and the relief that can be obtained is not sought is full dismissal of the complaint appropriate. *See Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler*

Corp., 129 P.3d 905, 912-13 (Alaska 2006) (declaratory relief request remanded due to superior court's failure to determine issue).

Further, the Supreme Court applies its independent judgment to questions of constitutional law and will adopt a rule of law that is most persuasive in light of precedent, reason, and policy. *Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011).

V. INTRODUCTION

The superior court erred by determining the issues Our Children asserted in their complaint were non-justiciable and dismissing it in its entirety. In doing so, the superior court asserted that Our Children through their claims were asking it to review and dictate State policy concerning GHG emissions. Exc. 172. The superior court determined there were no judicially discoverable and manageable standards it could use to address Our Children's claims. Exc. 171. The superior court also concluded that it would have to determine whether the State breached its affirmative duty to protect and preserve the atmosphere under the public trust doctrine, a decision that would necessarily require the court to make a policy determination about how to fulfill its fiduciary obligation under the public trust doctrine. Exc. 174. However, in reaching this conclusion, the superior court misconstrued Our Children's complaint and the relief they seek therein.

Our Children are not asking the superior court to review the State's GHG emissions policy nor are they asking it to dictate what that policy should be.

Rather, Our Children are asking the superior court to declare that the atmosphere is a public trust resource under Article VIII and that the State, as trustee, has an affirmative fiduciary obligation to protect and preserve the atmosphere as a public trust resource. The answering declarations to these threshold questions depends upon interpretation and construction of the Alaska Constitution, a task squarely assigned to the judiciary. Construing the Constitution and issuing this declaratory relief does not require the superior court to review the State's policy concerning GHG emissions or make an initial policy determination. Similarly, determining the State's fiduciary obligation and whether the State breached it does not involve reviewing the State's GHG emissions policy or imposing policy thereon. Rather, given the facts that the atmosphere is substantially impaired, the State's GHG emissions are increasing, the best available science establishes that such emissions must be reduced to protect and preserve the atmosphere, and the State is not taking any action to reduce its GHG emissions, there is nothing the superior court has to decide in terms of policy.[1]

Likewise, Our Children are not asking the superior court to tell the State how it must achieve the 6% annual reduction in CO2 emissions that the best available science establishes is necessary to preserve and protect the atmosphere. Instead, Our Children are asking the Court to recognize that the best available science dictates that CO2 emissions must be reduced by a certain rate to a certain

[1] These allegations, all of which are made in Our Children's complaint, are to be taken as true for purposes of reviewing a motion to dismiss.

level by a certain time and leave it up to the State as to how it chooses to get there. In order to ensure the State is meeting these scientific targets, Our Children request that the superior court order the State to prepare an annual accounting of CO2 emissions. As such, these are claims that the superior court can address and this is relief it can grant.

Consequently, the superior court erred by dismissing all of Our Children's claims as being non-justiciable.[2]

A. The Public Trust Doctrine.

The public trust doctrine is an ancient legal mandate that established the sovereign's obligation to hold essential natural resources in trust for the benefit of its citizens. As codified in Roman Law, the things which are naturally everybody's include the air, flowing water, the sea, and the sea-shore. Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). Similarly, under English common law, "there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common... Such (among others) are the elements of light, air, and water . . . ." 2 William Blackstone, *Commentaries on the Laws of England* 4 (1766). Likewise, more than a century ago, the United States Supreme Court recognized the public trust doctrine functioned as a bulwark to

[2] Even if Our Children were not entitled to any of the relief requested, the superior court should grant leave to amend the complaint. *See* AK. R. CIV. P. 15(a); *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1039 (Alaska 2004).

protect resources too valuable to be disposed of at the whim of a legislative body: "The state can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of peace." *Ill. Cent. R.R. Co.* 146 U.S. at 453.

The court's role in public trust disputes is well-defined -- it is the court's constitutional role to ensure that the assets of the public trust are protected by the other two branches of government. This is so because:

> [t]he public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. The Legislature [therefore] cannot order the courts to make the doctrine inapplicable to these or any proceedings ... It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority.

San Carlos Apache Tribe v. Superior Court of Arizona, 972 P.2d 179, 215 (Ariz. 1999); *see also Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991) (citations omitted) ("Judicial review of public trust dispensations complements the concept of a public trust . . . [T]he legislative and executive branches are judicially accountable for their dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res."); and *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.* 671 P.2d 1085, 1092 (Idaho 1983) ("Final determination whether the alienation or impairment of a

public trust resource violates the public trust doctrine will be made by the judiciary.")

Thus, while the legislature may be charged with enacting laws regarding the utilization, development and conservation of natural resources within Alaska, the foundation of public trust law is built upon the understanding that the "judiciary ha[s] a responsibility to examine whether the legislature has acted within the bounds of its regulatory power ... [and] to determine whether the state [as trustee] has acted in conformity with its 'special obligation to maintain the public trust.'" *See* Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Public Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 Ecology L. Q. 135, 146 (2000)(quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 511 (1970)).

The Alaska Supreme Court first recognized the public trust doctrine in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, (Alaska 1988), wherein it relied upon *Illinois Central* and held that a state conveyance of tideland was subject to the public's continuing easement for purposes of navigation, commerce, and fishery. *Id.* at 1118. In determining whether a state conveyance had passed title to a parcel of tideland free of any public trust obligations under *Illinois Central*, the Court held that that it had to first determine "whether the conveyance was made in furtherance of some specific trust purpose and second, whether the conveyance

can be made without substantial impairment of the public's interest in the state tidelands." *Id.* at 1119. Later that same year, this Court addressed whether a statute granting hunting guides exclusive guide areas violated the common use clause set forth in Article VIII, Section 3 in *Owsichek v. State*, 863 P.2d 488 (Alaska 1988). Examining the history of the clause, the *Owsichek* Court stated that the framers intended "to guarantee broad public access to natural resources." *Id.* at 493. Relying upon the historic principles concerning a sovereign's management of water and wildlife resources, the *Owsichek* Court stated the framers achieved their purpose by "constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters." *Id.* As such, the *Owsichek* Court concluded that the "common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people" and struck down the statute. *Id.* at 495.

The Court subsequently addressed the intent of the public trust doctrine in *Baxley v. State*, 958 P.2d 422 (Alaska 1998). Although the Court declined to address the plaintiffs' public trust claims due to their failure to sufficiently raise the issue at trial, the Court stated that the public trust doctrine "provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, 'and that the government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.'" *Id.* at 434 (quoting

McDowell v. State, 785 P.2d 1, 16 n. 9 (Alaska 1989). The Court then stated that it applies basic principles of trust law to public land trusts. *Id.* (citing *State v. Weiss*, 706 P.2d 681, 683 n. 4 (Alaska 1985).

The following year, the Court in *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999), the Court confronted a challenge to a ballot initiative concerning the use of snare traps and whether the public trust doctrine gave the state exclusive authority over wildlife management. The plaintiffs asserted that the state held wildlife resources in trust and that, as part of its fiduciary duty, the state retained exclusive authority over natural resource issues. *Id.* at 1031. The *Brooks* Court initially noted that the state's role concerning its' Article VIII duties has frequently been compared to a trust-like relationship in which the "state holds natural resources such as fish, wildlife, and water in 'trust' for the benefit of all Alaskans." *Id.* However, instead of creating a trust *per se*, the Court stated the intent of the common use clause was "to engraft in our constitution certain trust principles guaranteeing access to fish, wildlife and water resources of the state." *Id.* The Court stated that the purpose of the public trust doctrine was not to grant the legislature ultimate authority over natural resources but rather to prevent the state from giving out exclusive grants or special privileges. *Id.* As such, the State acts as trustee not so much to avoid public misuse of these resources but as to avoid the state's improvident use or conveyance of them. *Id.* In denying plaintiffs' claim, the Court held that the public trust doctrine did not grant the state exclusive

authority to manage wildlife and that the wholesale application of private trust law principles to the public trust was inappropriate. *Id.* at 1033.

Finally, in the most recent case applying the public trust doctrine, *State v. Alaska Riverways, Inc.*, 232 P.2d 1203 (Alaska 2010), the Court addressed the public's ability to construct wharves into adjacent navigable waterways. In that case, the state sought to require people "wharfing out" to enter into leases with the state, relying in part on the public trust doctrine and "the state's authority as sovereign to exercise a continuous supervision and control over navigable waters of the state and the land underlying the waters." *Id.* at 1211. The Court held that, under the public trust doctrine, the state had the authority to "regulate a riparian owner's use of adjacent state-owned lands to protect recreational and other public purposes, including 'the right to fish, hunt, bathe, swim, to use for boating, and general recreation purposes the navigable waters of the state . . . ." *Id.* Although the Court determined the state was statutorily authorized to require leases, it determined the public trust doctrine was not implicated since restricting public access to the lease area "will not substantially impair the public's interest in trust resources" and that "collection of rent is simply not a public purpose that the state has an obligation to protect under the public trust doctrine." *Id.* at 1212.

B. The Political Question Doctrine.

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. __,

132 S. Ct. 1421 (2012) (citing *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821) (describing the political question doctrine as "a narrow exception to that rule"). The political question doctrine is a well-established principle of justiciability that provides certain rare issues are not justiciable because they have been constitutionally committed to the political branches of government. *Baker v. Carr*, 369 U.S. 186, 210 (1962). It addresses those extraordinary situations where courts must defer from exercising their constitutional role. *Id.* at 216. The doctrine serves to prevent courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch. *Koohi v. U.S.*, 976 F.2d 1328, 1331 (9th Cir. 1992). A non-justiciable 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 W. Coal Co.,* 400 F.3d 774, 785 (9th Cir. 2005). Precisely defining the contours of the doctrine of justiciability is inherently difficult and requires considering "the actual hardship to the litigants of denying them the relief sought." *Abood v. League of Women Voters of Alaska,* 743 P.2d 333, 336 (Alaska 1987) (citing *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961). However, "[s]imply because . . . the case arises out of a 'politically charged' context does not transform the . . . [c]laims into political questions." *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005).

Nor will merely characterizing a case as political in nature render it immune from judicial scrutiny. *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982). To identify those rare non-justiciable political questions, Alaska courts utilize the approach adopted in *Baker*. *Abood*, 743 P.2d at 336-37. In *Baker*, the U.S. Supreme Court identified six factors, the presence of which demonstrates the existence of a non-justiciable political question:

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

Baker, 369 U.S. at 216. Unless one of the six formulations identified therein "is inextricable from the case at bar, there should be no dismissal for nonjusticiablity on the ground of a political question's presence." *Id.* at 217. As such, this test sets a high standard and the doctrine should be cautiously and sparingly invoked.

Indeed, the best way to consider the application of the political question doctrine to the instant case is to examine specific areas where the U.S. Supreme Court has invoked it: the republican form of government clause and the electoral

process;[3] Congress's ability to regulate its internal processes;[4] the process of ratifying constitutional amendments;[5] the impeachment process;[6] and foreign affairs.[7]

VI. ARGUMENT

A. The Superior Court Erred By Failing To Declare The Atmosphere Is A Public Trust Resource And Must be Protected For Present and Future Generations Under Article VIII Of The Alaska Constitution.

1. Determining Whether The Atmosphere Is A Public Trust Resource And Must Be Protected Are Questions For The Court.

Whether the atmosphere is a public trust resource and whether the State has an affirmative fiduciary obligation to protect it under the public trust doctrine as embodied in Article VIII of the Alaska Constitution are questions the answers to which depend upon how Article VIII is interpreted and construed. It is not the role of the executive or legislative branches to determine what resources are

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[3] *See e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (whether Rhode Island government violated the republican form of government clause of Art. IV, §4 of the Constitution).

[4] *See e.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969) (determining appropriateness of refusal of the House to seat Adam Clayton Powell was not a political question).

[5] *See e.g.*, *Coleman v. Miller*, 307 U.S. 433 (1937) (whether the time period for ratifying an amendment had expired).

[6] *See e.g.*, *Nixon v. United States*, 506 U.S. 224 (1993) (judiciary will not review the Senate's use of a committee to impeach a district court judge).

[7] *See e.g.*, *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (approving the constitutionality of a treaty with Great Britain concerning migratory birds); See also *Baker v. Carr*, 369 U.S. at 211 (it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"); Louis Henkin, *Is There a Political Question Doctrine?*, 85 Yale L. J. 597 (1976) (arguing against courts finding issues concerning foreign policy to be a political question).

constitutionally protected and what those protections must be. Rather, such determinations are squarely within the province of the courts and the traditional role accorded to courts to interpret law. *Marbury v. Madison*, 5 U.S. 137, 177 1803) ("It is emphatically the province of and the duty of the courts to say what the law is."); *Powell,* 395 U.S. at 548 (in finding the political question doctrine inapplicable, the Court stated that resolving the claim at issue "would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded to the courts to interpret the law . . . ."); *State v. Bowen*, 953 P.2d 888, 896 n. 12 (Alaska 1998) ("It is within the province of this court to determine constitutional issues and deprivation of constitutional rights."); *Keister v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219, 1223 (Alaska 1992) (it is for the court to decide whether the defendant violated the constitution).

Moreover, that these protections involve the public trust doctrine and the application thereof further militates against the executive or legislative branches making such decisions. It is beyond dispute that the atmosphere is a critical natural resource upon which present and future generations depend for their very existence. Exc. 42-43. Current legislatures can no more allow the destruction and diminution of the atmosphere than they are allowed to privatize it or confer exclusive rights thereto. Given the intergenerational dimension of the public trust doctrine, the judiciary must protect future generations' interest in critical sovereign resources from irreversible infringement thereof by the privatization or

destruction of said resources. *Geer v. Connecticut*, 161 U.S. 519, 534 (1896) ("[T]he ownership of the sovereign authority is in trust for all the people of the state, and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1003 (Haw. 2006) ("The duty to protect includes the duty to 'ensure the continued availability and existence of its water resources for present and future generations.'").

Accordingly, determining whether the public trust doctrine applies to the atmosphere and whether the State has an affirmative fiduciary obligation to preserve and protect it are justiciable questions and must necessarily be determined by a court.

2. The Atmosphere Is A Public Trust Resource

Not only should the superior court have determined the issue, it should have declared that the atmosphere is a public trust resource. Although the atmosphere is not specifically mentioned in the Alaska Constitution and the public trust doctrine had not previously been applied to the atmosphere, the principle underlying the doctrine warrants expansion thereof to include the atmosphere.[8]

[8] In a recent Texas district court decision, the first court to actually address whether the atmosphere is a public trust resource, the court determined that "[t]he public trust doctrine includes all natural resources of the State including the air and atmosphere." *Bonser-Lain v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-11-002194, slip op. at *1 (Dist. Ct. Tex., July 9, 2012). Like the Alaska

The public trust doctrine is not a static concept but instead must evolve to meet the changing conditions and needs of the public it was created to benefit and protect.

In its seminal decision on the public trust doctrine, the U.S. Supreme Court in *Illinois Central* held that the ownership of the navigable waters of the harbor and the lands underneath them were a "subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated . . . ." 146 U.S. at 455. Although the *Illinois Central* Court specifically addressed the alienation of land beneath navigable waters, it acknowledged that the public trust doctrine applies not to just lands under navigable waters but to other "property of a special character." *Id.* at 454. The atmosphere is just that -- it is a "property of special character."

Many other courts have acknowledged that the public trust doctrine is fluid and should evolve to meet modern societal concerns. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) ("[T]he public trust doctrine [is] not . . . 'fixed or static,' but [instead] to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'"); *Weden v. San Juan Cnty.*, 958 P.2d 273 (Wash. 1998) (the public trust doctrine has been applied as a flexible method for judicial protection of public interest); *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000) ("The public trust, by its

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Constitution, the Texas Constitution also embodies the public trust doctrine but does not expressly mention the atmosphere is a public trust resource. Nonetheless, the court held that the atmosphere was subject to constitutional protection. A copy is attached hereto as Appendix A.

very nature, does not remain fixed for all time but must conform to changing needs and circumstances."); *Center for Biological Diversity v. FPL Grp, Inc.*, 83 Cal. Rptr. 3d 588, 595 (Cal. Ct. App. 2008) (the public trust doctrine is not limited to tidelands and navigable waters); *see also National Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 719 (Cal. 1983) (applying the public trust doctrine to non-navigable streams); *District of Columbia v. Air Florida*, 750 F.2d 1077, 1083 (D.C. Cir. 1984) (the public trust doctrine has been expanded to protect additional water-related uses and to preserve flora and fauna indigenous to public trust lands).

It is also in the best interest of the sovereign and the citizens to apply the public trust doctrine to the atmosphere. Like water, land and wildlife, protecting the atmosphere is critical to maintaining social stability. As explained by the leading scholar on the public trust doctrine, Professor Joseph Sax, the doctrine is closely tied to one of the most basic concerns of the legal system, namely, the protection and maintenance of social stability. Just as the law of property rights protects stability in ownership, and the criminal law protects stability within a community, Professor Sax explains that, "[t]he central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title." Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. Davis L. Rev. 185, 188 (1980). Accordingly, the public trust doctrine requires the protection and perpetuation of

natural resources to prevent social crises that otherwise would arise due to depletion or impairment of those natural resources necessary for a stable, functioning society.

This Court has taken an expansive view of the public trust doctrine's application to certain natural resources. In *CWC Fisheries, Inc.*, the Court approvingly noted that other courts have expanded the public trust doctrine but that it was concerned in that case only with the traditionally recognized fishery interest. 755 P.2d at 1118 n. 8. In *Baxley*, the Court stated that "[t]he public trust doctrine provides that the State holds certain resources (***such as*** wildlife, minerals, and water rights) in trust for public use...." 958 P.2d at 434. (emphasis added) (citation omitted). In *Brooks*, the Court stated that, under the public trust doctrine, "the state holds natural resources **such as** fish, wildlife and water in 'trust' for the benefit of all Alaskans." 971 P.2d at 1031. (emphasis added). Finally, in *Alaska Riverways,* the Court extended purposes of the public trust doctrine beyond the traditional navigation, commerce and fisheries to include the state's ability to "regulate a riparian owner's use of adjacent state-owned lands to protect recreational and other public purposes, including 'the right to fish, hunt, bathe, swim, to use for boating, and general recreation purposes the navigable waters of the state . . . ." 232 P.3d at 1211. Accordingly, these cases are consistent with other courts' holdings that the public trust doctrine is not limited to the named natural resources or the historical application of the public trust doctrine.

Consequently, the atmosphere should be considered a public trust resource and be afforded the protections thereof for the benefit of the public.

3. The State Has An Affirmative Fiduciary Obligation To Preserve and Protect The Atmosphere

The State has an affirmative fiduciary obligation to preserve and protect the atmosphere as a public trust resource. It must be that way in order for sovereigns to preserve the trust res, i.e. natural resources, for future generations. Indeed, many courts have specifically recognized that the sovereign trustee has an affirmative obligation to take action to promote and protect trust resources when such action is necessary. *See Dist. of Columbia* 750 F.2d at 1083 ("[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."); *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) ("We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has an obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property . . . An action against those whose conduct damages or destroys such property, which is a natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs."); *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) ("[T]he trust reposed in the state is not a passive trust; it is governmental, active, and administrative . . . The equitable title to these submerged lands vests in

the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it."); *Kelly*, 140 P.3d at 1011 (The state "must not relegate itself to the role of a 'mere umpire' . . . but instead must take the initiative in considering, protecting, and advancing public rights in the resource at *every stage* of the planning and decision-making process.") (emphasis in original) (citation omitted).

In Alaska, this Court has not specifically addressed whether a governmental trustee has an affirmative fiduciary obligation to preserve and protect public trust resources for the benefit of present and future generations of public beneficiaries. However, Alaska courts, like others, apply general principles of trust law to the public trust doctrine when defining a sovereign's duty to protect public trust assets. *See Baxley*, 958 P.2d at 434; *see also Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 738 (Idaho 1987) (importing the principles of private trust law and reasoning that they can be useful in that they specifically and precisely define a trustee's fiduciary obligations); *Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 169 ("Just as private trustees are judicially accountable to their beneficiaries for their dispositions of the res, so the legislative and executive branches are judicially accountable for their disposition of the public trust." (citations omitted)). In *Baxley*, the Court examined the intent of the public trust doctrine, noting that it "provides that the State holds certain resources

(such as wildlife, minerals, and water rights) in trust for public use" and "that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary." 958 P.2d at 434 (citing *McDowell* 758 P.2d at 16 n. 9. The Court then stated that "[w]e apply basic principles of trust law to public land trusts" but ultimately declined to address plaintiffs' argument because they failed to adequately raise it below.[9] *Id.* (citation omitted). One such principle under general trust law is that a trustee has a duty to take affirmative action to protect trust resources. *See* George T. Bogert, *Trusts* § 99, at 358 (6th ed. West Pub. Co. 1987) ("The trustee has a duty to take whatever steps are necessary . . . to protect and preserve the trust property from loss or damage."); 76 Am. Jur. 2d *Trusts* § 656 (2012).

Consequently, given the foregoing and considering the purposes of the Alaska Constitution and the public trust doctrine's intergenerational principles, the State necessarily has an affirmative fiduciary obligation to preserve and protect the atmosphere.

4. Irrespective of Whether The Atmosphere Is A Public Trust Resource, The Superior Court Still Must Consider Our Children's Complaint

Assuming arguendo that the atmosphere is not a public trust resource, the superior court still must address the other issues in Our Children's complaint

[9] The general trust law principle that the Court identified was that, when a trustee has discretion, a court will only review the trustee's acts for abuse of discretion. *Id.*

because of the damage being caused to recognized public trust resources due to the degradation of the atmosphere. As Our Children alleged in their complaint, the atmosphere is also inextricably linked with the recognized public trust resources such as water, wildlife and fish resources and that harm to the atmosphere causes harm to these resources. Exc. 49.[10] Based on the origins of the public trust doctrine and its purpose to protect essential natural resources held in common for the people, the public trust logically extends to other critical resources like the atmosphere. *See Nat'l Audubon Soc'y*, 658 P.2d at 719 ([T]he purity of the air . . . is among the purposes of the public trust."); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (linking the preservation of tidelands to the "climate of the area").

For example, as embodied by Article VIII and applied by Alaska courts, the public trust doctrine imposes upon the State an inalienable sovereign obligation to protect the public's interest in navigable waterways, underlying aquatic lands, and recreational activities related to the use of public waters. *See* e.g., Article VIII, §§ 2, 3, and 6; *Alaska Riverways, Inc.*, 232 P.3d at 1211; *CWC Fisheries, Inc.*, 755 P.2d at 1118. Since climate change is causing harm to resources traditionally protected by the public trust doctrine, the State's obligation to protect public trust resources must extend to the atmosphere, and controlling

[10] *See also* Exc. 37 ("A state's public trust responsibilities with regards to water also impose public trust duties on the entire ecological system, including the atmosphere. 'The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust.'").

GHG emissions, since that is where the harm originates.[11] *See Matthews*, 471 A.2d at 363 ("The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches."); *Nat'l Audubon Soc'y*, 658 P.2d at 721 (concluding that "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by nonnavigable tributaries."); *see also In re Water Use Permit Applications*, 9 P.3d at 445-447 (holding that diversions from groundwater which reduced surface flows were subject to regulation and protection by the state pursuant to the public trust doctrine). Just as non-navigable streams were subject to protection under the public trust doctrine in *Nat'l Audubon Soc'y*, the atmosphere should be protected here. The health of the atmosphere necessarily affects the public's interest in the traditional public trust resources protected by Alaska courts pursuant to the public trust doctrine, namely the water, shorelines, and aquatic wildlife.

In addition to containing air necessary for life, the atmosphere itself is a water resource of the State of Alaska. Indeed, it holds more water than all of the rivers on earth and effectively controls our water cycle.[12] Thus, whether

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[11] For purposes of the motion to dismiss, Our Children's allegations of harm to other public trust resources must be taken as true. *See* Exc. 37, 49-50.

[12] For purposes of this appeal, this Court may take judicial notice that, according to U.S. Geological Survey, water in the atmosphere constitutes .04 percent of all fresh water and rivers constitute .006 percent of all fresh water on Earth. USGW

conceived as an air resource or a water resource, the atmosphere is indisputably an essential natural resource of the state and an obligatory public asset for constitutional protection.

Accordingly, no matter how the atmosphere is viewed, the superior court must still address Our Children's remaining claims.

B. The Superior Court Erred By Determining Our Children's Claims Were Non-Justiciable.

The superior court erred by dismissing Our Children's claims as non-justiciable. Applying the second *Baker* factor, the superior court determined there were no judicially discoverable and manageable standards to apply, reasoning that Article VIII does not create a public trust per se and the Alaska Supreme Court has rejected the wholesale application of private trust law to the doctrine. Exc. 171-74. The superior court also determined the third *Baker* factor precluded it from granting the relief Our Children requested because it would necessarily have to make a policy determination about how the State should fulfill its fiduciary duty. Exc. 174-75.

However, in reaching this conclusion, the superior court erroneously relied upon the United State District Court's justiciability analysis of the federal common law public nuisance claim presented in *Native Village of Kivalina v.*

Water Science School, How much water is there on, in, and above the Earth? http://ga.water.usgs.gov/edu/earthhowmuch.html (last visited on November 16, 2012); *Varilek v. City of Houston*, 104 P.3d 849, 852 (Alaska 2004) (citing Alaska Rule of Evidence 201 for the proposition that the courts are allowed to take judicial notice of facts not subject to reasonable dispute).

ExxonMobil Corp., 663 F. Supp.2d 863, 871 (N.D.Ca. 2009) as instructive, ignored the standards provided by the litany of case law and other legal sources involving the public trust doctrine, and misinterpreted the considerations necessary to resolve Our Children's claims. Exc. 170-71. As set forth infra, the public trust doctrine, a constitutional and property law doctrine, is fundamentally different from the nuisance principle of tort law and the inquiries that courts must make to resolve claims under each theory are not the same. Moreover, given the ancient origins of the public trust doctrine, the evolution thereof, and the judicial application of the doctrine for over a hundred years, judicially discoverable and manageable standards do exist to determine Our Children's public trust claims. Nor does determination thereof require the court to review the State's policy concerning CO2 emissions or make an initial policy determination. Thus, Our Children's claims are justiciable and should not have been dismissed.

1. The Second *Baker* Factor Does Not Preclude Judicial Review Of Our Children's Public Trust Claims.

The focus of the second *Baker* 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, rational, and based upon reasoned distinctions.'" *Alperin*, 410 F.3d at 547; *see also Lobato v. State*, 218 P.3d 358, 369 (Colo. 2009) ("[M]ost important constitutional provisions, including ones that courts have never hesitated to interpret, are written in broad, open-textured

language and certainly do not include judicially discoverable and manageable standards."). Thus, "[i]nstead of focusing on the logistical obstacles," the relevant inquiry is whether the judiciary is "capable of granting relief in a reasoned fashion" versus whether allowing the claims to proceed "would merely provide 'hope' without a substantive legal basis for a ruling." *Id.* Given the more than one hundred years of jurisprudence on the public trust doctrine, the general applicability of private trust law principles to the public trust doctrine, and the scientific standard set forth in the complaint establishing factually what is necessary to protect and preserve the atmosphere, there are judicially discoverable and manageable standards with which to review Our Children's public trust claims.

a. The Superior Court's Reliance On *Kivalina* Is Misplaced.

In determining that there were no judicially discoverable and manageable standards to use to review Our Children's public trust claims, the superior court cited to and relied upon the *Kivalina* case involving a federal common law public nuisance claim. The superior court found the *Kivalina* case to be instructive because "it specifically addresses the justiciability of a claim based on harm resulting from global warming." Exc. 170. However, when reviewing the district court decision relied upon by the superior court, the U.S. Court of Appeals for the Ninth Circuit did not adopt the district court's political question analysis or holding, but instead affirmed the decision on the grounds of displacement. *Native*

Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012). Thus, even in the public nuisance context, when faced with the opportunity, neither the Ninth Circuit nor the United States Supreme Court have found that the political question doctrine bars common law nuisance cases or more generally, cases involving climate change.[13] This Court should not do so now, as the political question doctrine is inapplicable to the case at bar. Even if the district court's decision had been affirmed on political question grounds, it is factually and legally distinguishable from this case and therefore any reliance thereon is misplaced.

In *Kivalina*, the Native Village and City of Kivalina are being forced to relocate due to erosion caused by lack of sea ice resulting from global warming. 663 F. Supp. at 868. The cost to relocate is estimated to range from $95 to $400 million. *Id.* at. 869. Accordingly, the plaintiffs brought federal common law public nuisance and state private and public nuisance claims against certain oil companies, power companies and utility providers, alleging them to be jointly and severally liable for their damages. *Id.* at 874. Addressing the plaintiffs' federal public nuisance claims, the district court noted that whether an action constituted a public nuisance depended upon if it was an "unreasonable interference with a right common to the general public" which in turn required "comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors." *Id.* Applying those principles to that case, the

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[13] *See American Electric Power Co., Inc. v. Connecticut,* __ U.S. __, 131 S. Ct. 2527 (2011)("AEP") and discussion thereof infra at Section VI, B (2)(a).

Kivalina court stated that it would have to weigh "the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as reliability as an energy source, safety considerations and the impact of different alternatives on consumers and business at every level." *Id.* The *Kivalina* court further noted additional considerations it would have to make, such as weighing the benefits of the actions and the risk that increasing GHG emissions would in turn risk flooding in a remote Alaskan locale. *Id.* at 875. Given these considerations and the fact that the plaintiffs were seeking "to impose liability and damages on a scale unlike any prior environmental pollution case," the *Kivalina* court determined there were no standards available which it could use to reach a reasoned resolution. *Id.* at 876.

However, *Kivalina* is readily distinguishable both factually and legally from this case and therefore provides little, if any guidance, let alone justifies the superior court's reliance thereon. Plus, it was affirmed by the Ninth Circuit on other grounds, not on political question. In *Kivalina*, the plaintiffs brought state and federal public nuisance claims against certain private defendants -- oil companies, power companies and utility providers.[14] *Id.* at 869. The *Kivalina* plaintiffs did not seek declaratory or injunctive relief. *Id.* Rather, they sought to hold the private company defendants jointly and severally liable for the costs of relocation based upon their alleged contribution to the excessive GHG emissions.

[14] The *Kivalina* court declined to address the state law nuisance claims. *Id.* at 882-83.

Id. In the case at hand, Our Children did not name private companies as defendants nor do they seek to obtain monetary damages from them or anyone for that matter. Moreover, Our Children do not seek compensation for harm done. Rather, they seek declaratory and injunctive relief against the State to protect a public trust asset and prevent it from being further impaired and destroyed. As such, the two cases have no factual similarities other than involving climate change.

Legally speaking, a claim brought pursuant to the public trust doctrine is fundamentally different from a nuisance claim. From the underlying principles, to the standards used, and to the court's role to the remedies available, these doctrines are completely different. A public nuisance is a prohibited common law tort committed by a member of the public, the purpose of which is to protect the rights or interests common to the general public from unreasonable interference at the present time. *See* **Restatement (Second) of Torts** § 821B (2011); 58 **Am. Jur. 2d** *Nuisances* § 39 (2011). On the other hand, the public trust is a sovereign obligation on the governmental trustee, the purpose of which is to protect and preserve critical natural resources on behalf of public beneficiaries for current and future generations. *See McDowell, 758 P.2 at* 16 n. 9. In public nuisance claims, the standard is whether there has been an unreasonable interference which requires courts to apply a balancing test, considering policy, economic, social and equitable factors. *Kivalina*, 663 F. Supp. at 874. Whereas, with public trust claims, the

standard is 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. *See Ill. Cent. R.R. Co.*, 146 U.S. at 453 (Some use of the resource is acceptable but "substantial impairment" is not); *Geer*, 161 U.S. at 534 ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."); *Kelly*, 140 P.3d at 1003 ("The duty to protect includes the duty to 'ensure the continued availability and existence of its water resources for present and future generations.'"). Thus, in public trust cases, the questions for the court are often based in science -- what does science dictate is necessary to prevent the substantial impairment of the public trust asset itself for both present and future generations -- and based in fact -- whether the government trustee is acting in compliance with its fiduciary obligation. These are not the inquiries courts make in public nuisance cases.

Consequently, given the completely different factual scenarios, legal theories and considerations the court has to make, *Kivalina* does not provide any guidance to resolution of Our Children's public trust claims and the superior court's reliance thereon is misplaced.

b. Judicially Discoverable And Manageable Standards Exist For Determining Our Children's Public Trust Claims.

Given the ancient origins of the public trust doctrine and its long established judicial recognition, the more than one hundred years of jurisprudence

construing and applying the doctrine, the general applicability of private trust law principles, and the established scientific standard necessary to protect and preserve the atmosphere, there are sufficient judicially discoverable and manageable standards for the superior court to apply to resolve Our Children's public trust claims. To determine whether the atmosphere is a public trust resource, the State's fiduciary obligation, and if the State is in breach thereof, the superior court can look to the origin of the doctrine, the reasons for which it arose, and the resources originally thought to be within its reaches. As Our Children set forth in their opposition to the State's motion to compel, the superior court can look to ancient Roman law, which considered "air, flowing water, the sea and sea-shore" to be everybody's, to English common law which holds light, air and water must remain in common, and to the seminal American case *Illinois Central* and its "property of a special character" standard. *See* Exc. 106, 119. The superior court can also look to the cases Our Children cited which explain why including new resources or uses protected by the constitutional public trust doctrine is warranted, either in their own right or as a result of harm to a recognized traditionally recognized public trust resource. *See* Exc. 120-122. The superior court may also look to the Texas district court and that state constitution as persuasive precedent for declaring the atmosphere is a trust resource in Alaska.

The superior court can also look to general principles of private trust law for guidance. As set forth in *Baxley*, the State holds certain resources in trust and

owes a fiduciary duty to manage such resources for the common good of the public. 958 P.2d at 434. Thus, those standards concerning a trustee's fiduciary duty may be considered. Although the *Baxley* Court declined to address the plaintiffs' public trust claims, it did further note that courts apply basic principles of trust law to public land trusts and identified one such principle concerning a trustee's discretion. *Id.*

This Court's decision is *Brooks* also is helpful, albeit not for the proposition that there are no standards to apply for which the superior court cited it. On the contrary, *Brooks* actually provides guidance for courts addressing public trust doctrine issues. In *Brooks*, the plaintiffs sought to remove a ballot initiative, arguing that the public trust doctrine gave the state exclusive authority over wildlife management and asserting that private trust law should be applied wholesale to the doctrine. 971 P.2d at 1026, 1030-32. The *Brooks* Court denied plaintiffs' claims. *Id.* at 1031-33. In doing so, the *Brooks* Court identified that a purpose of the public trust doctrine was not to grant the legislature ultimate authority over natural resources but rather to prevent the state from giving out exclusive grants or special privileges. *Id.* at 1031. Thus, the *Brooks* Court noted the State acts as trustee not so much to avoid public misuse of these resources but as to avoid the state's improvident use or conveyance of them.[15] *Id.* Such

[15] By failing to regulate GHG emissions and allowing the atmosphere to be impaired and diminished, the State is essentially giving away special privileges at

statements provide guidance on how the State is to act, what its focus should be, and what it can and cannot do as trustee of the public trust. Further, even though the *Brooks* Court held Article VIII did not create a trust *per se* and that the wholesale application of private trust law principles to the public trust doctrine is inappropriate as the superior court noted, it nevertheless recognized that certain trust principles have been engrafted in Article VIII and that the applicability of trust law depends on both the type of trust created and the intent of those creating the trust. *Id.* at 1031-32. As such, the *Brooks* Court recognized that private trust principles can be applied but that the wholesale application thereof is inappropriate. Consequently, the *Brooks* decision does not support the superior court's decision that there are no judicially discoverable and manageable standards and, in fact, militates towards finding there are such standards.

Furthermore, Our Children also provided the scientific standard that defines the State's fiduciary obligation with respect to public trust resources. As noted supra, the standard in public trust claims is what is necessary to protect and preserve the functionality and integrity of the public trust asset and prevent substantial impairment and therefore is based in science and facts. Thus, the questions for courts in public trust cases concerning the diminution and impairment of a public trust resource is what does science dictate is necessary to protect the functionality of the asset from substantial impairment for both present

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the expense of the public trust resource for present and future generations of public beneficiaries.

and future generations of the public beneficiaries and whether the governmental trustee is acting in compliance therewith. *CWC Fisheries*, 755 P.2d 1118-19; *Caminiti v. Boyle*, 732 P.2d 989, 994 (WA 1987). Our Children alleged in their complaint that the best available science dictates that emissions must be reduced 6% per year from 2013 to 2050 in order to return the carbon dioxide levels to below 350 ppm. Exc. 37-42. As such, Our Children provided the superior court with the scientific standard necessary to determine whether the State is fulfilling its obligations under the public trust doctrine.

Consequently, the superior court erred by determining there were no judicially discoverable and manageable standards to use to review Our Children's claims.

2. The Third *Baker* Factor Does Not Preclude Judicial Review Of Our Children's Public Trust Claims

The third *Baker* factor requires courts to determine whether it would be impossible for the judiciary to decide the case "without an initial policy decision of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. A political question under this factor will exist "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." *EEOC*, 400 F.3d at 784. This factor focuses on preventing a court from "removing an important policy determination from the Legislature." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 438

F.Supp.2d 291, 297 (S.D.N.Y. 2006). The court need not make such policy determinations to resolve Our Children's public trust claims.

a. The Superior Court's Reliance On *Kivalina* And *American Electric Power* Is Misplaced.

As noted supra, the superior court found the *Kivalina* court's justiciability analysis instructive since the case concerned GHG emissions, particularly with respect to the third *Baker* factor regarding whether resolution of a claim would require the court to make an initial policy determination. Exc. 170-71. The superior court also cited the *AEP* decision for the proposition that courts are required to consider competing interests such as energy needs and potential economic disruption when addressing claims involving GHG emissions. Exc. 174-75.[16] Citing *AEP* and *Kivalina*, the superior court reasoned that questions about solutions to far-reaching environmental issues are best left to agency expertise. Exc. 174-75. However, both *Kivalina* and *AEP* involved federal common law public nuisance claims which, as noted supra, are fundamentally different doctrines that require courts to make entirely different inquiries and considerations. As noted by both the *Kivalina* and *AEP* courts, resolving the plaintiffs' federal common law public nuisance claims required the courts to consider such things as the social utility of an activity with the gravity of the harm

[16] *AEP*, like *Kivalina*, involved a federal common law public nuisance challenge against certain fossil-fuel-fired power plants for their contributions to global warming. The AEP plaintiffs also filed state tort law claims for nuisance. *AEP*, 131 S. Ct. at 2529.

it inflicts, available alternatives and their respective impacts, reliability of energy sources, safety, impacts on consumers and businesses, and competing interests, etc. *See Kivalina,* 663 F. Supp.2d at 874-875; *AEP*, 131 S.Ct. at 2539. In the instant case, any policy decisions to be made, such as weighing energy transmission optimization, renewable energy implementation, or oil and gas conservation alternatives, would still be made by the executive and legislative branches in determining how best to take action consistent with preventing substantial impairment of the trust resource.[17] Consequently, *Kivalina* and *AEP* do not support the superior court's determination that it must make an initial policy determination to resolve Our Children's public trust claims.[18]

b. The Superior Court Need Not Make Initial Policy Determinations To Resolve Our Children's Public Trust Claims.

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[17] Our Children are not asking the superior court to make decisions amongst the myriad of policy recommendations to achieve the scientific mandate such as those the State's Climate Change Sub-Cabinet Mitigation Advisory group made. *See* Exc. 19-21.

[18] The *AEP* Court concluded that the Clean Air Act displaced federal common law public nuisance claims concerning GHG emissions. *AEP*, 131 S. Ct. at 2540. However, the *AEP* Court explicitly left open for consideration the question of whether state common law claims may be used to address climate change, 131 S. Ct. at 2540. The *AEP* Court also did not disturb the Second Circuit's ruling in *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 332 (2nd Cir. 2009) that common law nuisance claims related to climate change did not present non-justiciable political questions. In *Connecticut*, the Second Circuit found it impossible to identify any specific textual commitment of climate change questions to the political branches that would preclude resolution by the judiciary, highlighting that in a common law nuisance case "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own -- the judiciary. *Id.* at 325.

Our Children assert that the atmosphere is a public trust resource and that the State has an affirmative fiduciary duty to preserve and protect the atmosphere for the current and future generations of public beneficiaries. As set forth supra, determining whether the atmosphere is a public trust resource and whether the State has an affirmative fiduciary obligation to protect it under the public trust doctrine as embodied in Article VIII requires interpreting the Alaska Constitution which is squarely in the province of the court. *See* supra Section V, A (1). Our Children also assert that, in order to protect and preserve the atmosphere, i.e. to preserve and protect the functionality and integrity of the atmosphere for current and future beneficiaries, the best available science dictates that CO2 levels in the atmosphere must be reduced to below 350 ppm. Accordingly, the relevant inquiry for the superior court, in light of what the science says is necessary to protect and preserve the atmosphere, is whether the State is fulfilling its fiduciary obligation. Answering this question does not require the superior court to make policy determinations.

Nevertheless, the superior court determined otherwise. The superior court first noted that no other court has recognized the atmosphere as a public trust resource. However, as noted supra, this statement is no longer true given the recent decision from the only court that has actually addressed whether the atmosphere is a public trust resource declaring that it was. *See* Appendix A, *Bonser-Lain,* slip op. at *1. Regardless, the superior court stated that, even if it

did find the atmosphere was a public trust resource, it would still have to determine whether the State breached its fiduciary obligation to protect and preserve the atmosphere which "*necessarily* involves a public policy determination about how the State should 'fulfill' its fiduciary duty." (emphasis in original) Exc. 174. Citing *AEP* and *Kivalina*, the superior court further reasoned that "science is not the only consideration" and instead it must consider competing interests such as energy needs and potential economic disruption." Exc. 174-75. Stating that the courts are ill-equipped to make such policy determinations, the superior court concluded that resolution of Our Children's claims necessarily required policy decisions and therefore were non-justiciable. *Id.*

However, whether the State violated its affirmative fiduciary obligation to protect and preserve a public trust resource is not dependent upon policy determinations. Our Children are not asking the superior court to determine who the State should allow to emit GHGs or by how much. Our Children are not asking the superior court to dictate that one industry or a particular set of players bear the brunt of climate mitigation. Rather, the superior court's responsibility is that it must uphold the law, which in this case is the State's fiduciary duty to protect and preserve the trust asset. That duty is a judicial decision different from any policy decision that would need to be made by a political branch. As noted supra, the court's inquiry in this case should focus on what is necessary to protect and preserve the functionality and integrity of the atmosphere and prevent

substantial impairment thereto, thereby directing the court's inquiry toward science and facts and away from policy. Then, the only remaining question for the superior court to consider is whether the State is fulfilling its fiduciary obligation to protect and preserve the trust asset. As such, these decisions do not require policy determinations. Moreover, given Our Children's assertion in their complaint that the best available science dictates that CO2 in the atmosphere must be reduced below 350 ppm in order to protect and preserve the atmosphere and that the State is doing nothing to control GHG emissions, the answer to the superior court's inquiry is obvious -- the State has breached its fiduciary duty.

Consequently, the superior court erred by determining Our Children's claims could not be resolved without first making policy determinations.

VI. CONCLUSION

For the foregoing reasons, Our Children respectfully request that the Court reverse the superior court's dismissal of their public trust claims.

DATED this 16th day of November 2012 at Eagle River, Alaska.

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Brad De Noble

Brad D. De Noble
Alaska Bar No. 9806009

APPENDIX A

CAUSE NO. D-1-GN-11-002194

ANGELA BONSER-LAIN, KARIN ASCOT, as next friend on behalf of TVH and AVH, minor children, BRIGID SHEA, as next friend on behalf of EAMON BRENNAN UMPHRESS, a minor child, Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant.	§	201st JUDICIAL DISTRICT

FINAL JUDGMENT

On the 14th day of June, 2012, came to be heard Defendant Texas Commission on Environmental Quality's First Plea to the Jurisdiction and the merits of the above-referenced cause. Plaintiffs and Defendant appeared through counsel.

After considering the pleadings, briefs, the administrative record, argument of counsel and the applicable law, the Court finds that Defendant's Plea to the Jurisdiction should be denied.

On the merits of the suit, the Court finds that Defendant's conclusion that the public trust doctrine in Texas is exclusively limited to the conservation of the State's waters and does not extend to the conservation of the air and atmosphere is legally invalid. Rather, the public trust doctrine includes all natural resources of the State including the air and atmosphere. The public trust doctrine is not simply a common law doctrine but was incorporated into the Texas Constitution at Article XVI, Section 59, which states: "The conservation and development of all of the natural resources of this State, ... and the preservation and conservation of all such natural resources of the State are each and all

hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."

The Court further finds that the protection of air quality has been mandated by the Texas Legislature in the Texas Clean Air Act, which states, "The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants .... (b) It is intended that this chapter be vigorously enforced and that violations of this chapter ... result in expeditious initiation of enforcement actions as provided by this chapter." *See* Health & Safety Code § 382.002. The Texas Legislature has provided Defendant with statutory authority to protect the air quality by stating: "Consistent with applicable federal law, the commission by rule may control air contaminants as necessary to protect against adverse effects related to: (1) acid deposition; (2) stratospheric changes, including depletion of ozone; and (3) climatic changes, including global warming." *See* § 382.0205.

The Court also finds that Defendant's conclusion that it is prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act (FCAA), Section 109 is legally invalid. Defendant relies upon a preemption argument that the State of Texas may not enact stronger requirements than is mandated by federal law. The Court finds that the FCAA requirement is a floor, not a ceiling, for the protection of air quality, and therefore Defendant's ruling on this point is not supported by law. *See* 42 U.S.C. § 7604(e); *see also, Gutierrez v. Mobil Oil Company, et al.*, 798 F. Supp. 1280, 1282-84 (W.D. Tex. 1992) (J. Nowlin) ("[T]he Clean Air Act expressly permits more stringent state regulation. ... In the Clean Water Act and the Clean Air Act, Congress did not intend to preempt state authority. Congress intended to set minimum standards that

states must meet but could exceed. ... states have the right and jurisdiction to regulate activities occurring within the confines of the state.")

However, in light of other state and federal litigation, the Court finds that it is a reasonable exercise of Defendant's rulemaking discretion not to proceed with the requested petition for rulemaking at this time.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant's Plea to the Jurisdiction is DENIED, and that Defendant's June 22, 2011 final decision in Docket No. 2011-0720-RUL denying Plaintiff's petition for rulemaking is AFFIRMED.

It is also **ORDERED** that each party bear its own costs. All relief requested that is not expressly herein granted is DENIED.

This judgment resolves all claims of all parties and is intended to be final and appealable.

SIGNED this 2nd day of August, 2012.

Gisela D. Triana
Judge, 200th District Court
Travis County, Texas