IN THE SUPREME COURT FOR THE STATE OF ALASKA

ROBERT CASSELL, Appellant, vs. STATE OF ALASKA, BOARD OF GAME, Appellee.	)	Supreme Court No. S-18476 Trial Court No. 3AN-19-07460 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE ANDREW GUIDI, PRESIDING

AMICUS CURIAE BRIEF OF ALASKA PROFESSIONAL HUNTERS ASSOCIATION IN SUPPORT OF APPELLEE STATE BOARD OF GAME

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ALASKA CONSTITUTION

Article I

§ 23. Resident Preference. This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.

Article VIII

§ 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.

§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.

§ 3. Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 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 REGULATIONS

5 AAC 92.061. Special provisions for brown bear drawing permit hunts.

(a) In the Unit 8 general brown bear drawing permit hunt, the department shall issue permits, and a hunter may apply for a permit, as follows:

(1) the department shall issue a maximum of 40 percent of the drawing permits to nonresidents and a minimum of 60 percent to residents; each guide may submit the same number of nonresident applications for a hunt as the number of permits available for that hunt; …

(3) the department shall enter, in a guided nonresident drawing, each complete application from a nonresident who will be accompanied by a guide; the department may enter an application and issue a drawing permit for the general hunt only to a successful nonresident applicant who presents proof at the time of application that the applicant will be accompanied by a guide, as required under AS 16.05.407 or 16.05.408; ….

I. INTRODUCTION AND AMICUS CURIAE'S INTEREST IN CASE

The Alaska Professional Hunters Association ("APHA"), through undersigned counsel, respectfully submits this amicus curiae brief in support of Defendant Appellee State Board of Game. APHA is the State's association of professional hunting guides. Most of the guides are residents of Alaska. Exc. 447, 513. For hunts of brown bear, State law requires that a non-resident hunter engage a guide to ensure that the hunt for these large animals is conducted in a safe and lawful manner. AS 16.05.407. Many APHA members are hunting guides who live on Kodiak Island or are residents of other parts of Alaska and earn their living guiding non-resident hunters in the Kodiak brown bear draw hunt that is the subject of this case.[1] APHA has participated in this case in an "amicus plus" capacity under a court-approved settlement of APHA's motion to intervene. Exc. 328. APHA filed briefs and presented oral argument to the Superior Court, which adopted several points made by APHA in granting summary judgment to the Board. Exc. 494-95.

II. STATEMENT OF CASE AND STANDARD OF REVIEW

APHA concurs in Appellee's Statement of Case and Standard of Review.

III. ARGUMENT

A. Summary.

The wildlife allocation rule at issue, 5 AAC 92.061(a)(1), which guarantees

[1] Exc. 272 (summarizing Exc. 292-93); Exc. 273 (summarizing Exc. 298-300). Exc. 331-32 (summarizing Exc. 292, 294, 501-03, 516, 554, 562, 566-67, 571-72, 576, 581-82, and 586-87).

resident hunters at least 60% of all available permits in the Kodiak brown bear draw hunt (in practice, resident hunters receive two-thirds of the permits), is not an impermissible grant of an exclusive interest in a natural resource to another user group, i.e., the non-resident hunters who receive the remaining one-third of the permits. The Kodiak brown bear resource is shared, not exclusively granted. As the Superior Court held, Appellant Cassell's theory that the allocation of 100% of one-third of the permits to non-resident hunters is the "exclusive[e]" grant of a natural resource is illogical and incorrect. Exc. 495.

Significantly, Art. I § 23 of the Constitution grants the State Legislature the option, but not the obligation, to enact resident preferences. The Superior Court was correct in holding that the "Board [of Game] is not required by Article VIII § 3 of the Alaska Constitution to allocate to resident hunters more than two-thirds" of the resource. Exc. 495. Further, the Superior Court was also correct in noting that Art. VIII § 3 protects the interests of Alaskan hunting guides leading their non-resident hunter clients as well as the interests of resident hunters, because both types of Alaskans are engaged in the use of a natural resource. Exc. 495. A balanced allocation may properly consider the best interests of <u>all</u> Alaskans, as opposed to only Plaintiff Cassell's narrow interests.

As the Superior Court also observed, the federal government's ownership of the majority of the land making up this hunt further supports allocating a significant minority of the permits to non-resident hunters. Exc. 495. Non-resident hunters from other States pay taxes to support the operation of Kodiak National Wildlife Refuge. Such refuges must be managed to provide recreational opportunities,

including hunting, to the "American public," i.e. all U.S. citizens. *See* 16 U.S.C. §§ 668dd(a)(4)(H) and 668ee(2); Exc. 593 (comments of the Kodiak Refuge Manager opposing Cassell's petition to allocate more than 90% of permits to resident hunters).

Finally, the Superior Court properly noted that Cassell's legitimate remedy for seeking changes in allocation policy is before the Legislature or the Board of Game. Exc. 495. The Constitution assigns the "legislature", and by delegation the Board, the responsibility to determine which game allocations achieve the "maximum benefit" for Alaska's people. Const. Art. VIII § 2. APHA closes this brief by reviewing the competing policy contentions, which are for the Legislature and the Board to decide.

B. The Board of Game Did Not Create an Exclusive Use of a Natural Resource. Rather The Board Lawfully Shared Access to the Brown Bear Resource.

Plaintiff-Appellant Dr. Robert Cassell ("Cassell") contends that Appellee Board of Game's allocation of one-third of the permits to non-resident hunters constitutes an unconstitutional "exclusive" grant to a single user group (non-residents) of a wildlife resource of Alaska (i.e. 100% of one-third of the permits). The allocation is established by 5 AAC 92.061(a)(1). In his reply brief to the Superior Court, Dr. Cassell conceded that it is constitutionally permissible to award non-resident hunters some of the Kodiak brown bear permits, which is precisely the system currently in place. Exc. 379, 394 (n. 39), 401.

The trial court emphatically rejected Cassell's contention. It explained that Cassell was contending that "the regulation in question grants one-third of drawing

permits 'exclusively' to nonresidents" and then rejected that contention as being "particularly facile; a verbal sleight of hand." Exc. 495. It concluded that: "The regulation adopted by the Board in 1976 grants roughly two out of three drawing permits to Alaska residents, and there is not a single Kodiak brown bear permit that excludes residents." *Id.* Undisputed evidence supports this conclusion by the trial court. The Kodiak brown bear draw hunt is divided into 31 geographic units and there is a spring and fall hunt each year, so there are 62 divisions of the hunt.[2] Alaska Department of Fish and Game (ADFG) records show that resident permits are awarded in each division. Exc. 145. No division of the hunt excludes residents. All hunting grounds are open to residents.

The trial court's conclusion that the Board of Game did not violate Art. VIII § 3 of the Alaska Constitution is therefore correct and should be affirmed. The proposition that apportioning a natural resource between groups is unconstitutional is not supported by either the text of the Constitution or by any case decided in the 60 years since Statehood.

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[2] For each of the 62 divisions of the Kodiak draw hunt (defined by geographic location and season), there is a resident hunt and a non-resident hunt. For each division, there is a resident and a non-resident drawing bear code. Exc. 145, 467.

There are two more ways to participate. A resident permit is distributed by auction. www.adfg.alaska.gov/index.cfm?adfg=huntlicense.auctioncalendar *See* AS 16.05.343(c). More important, there is a 63rd hunt division, covering northeast Kodiak, where there is a road system, but that hunt is a registration hunt, not a draw hunt, so permits are freely available to resident and non-resident hunters over the counter. www.adfg.alaska.gov/index.cfm?adfg=kodiakbear.kodiak30 (reporting on number of bears harvested in this registration hunt).

This Court's decision in *Kenai Peninsula Fishermen's Co-op Ass'n v. State,* 628 P.2d 897, 900-01, 903-04 (Alaska 1981) is dispositive of Cassell's constitutional arguments. There, two user groups both sought access to a natural resource, and the Court concluded that the process of sharing the resource may lawfully allocate one part of the resource to one group and another part to another group. *See* 628 P.2d at 900-01, 903-04. The Court rejected an Article VIII challenge to a decision of the Board of Fisheries that granted recreational (sport) fishers the sole right to fish for a specific salmon species (Coho) during certain times (after August 15) in certain areas of Cook Inlet. *See* 628 P.2d at 900-01, 903-04. Under the resource allocation, commercial fishers could still fish in the area from June 15 to August 15, and apparently could still fish in other nearby areas, and for other salmon species. *See id*. at 900-01.

Rather than analyzing the allocation as an exclusive grant to one user group of some portion of the resource (fishing for Coho salmon in Cook Inlet after August 15 at the specified location), the Court analyzed the allocation of the natural resource more broadly, and rejected the claim that there was an exclusive grant: "To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of" the constitutional anti-exclusivity provision. *Kenai Peninsula*, 628 P.3d at 903-04 (construing the fish provisions in Art. VIII § 15, which the Court in *McDowell* later held are paralleled as to wildlife by Art. VIII § 3, 785 P.2d at 9). This decision makes it clear that sharing access to the resource by apportioning some part of it to one group (recreational fishers) and

another part to another user group (commercial fishers) is not an impermissible exclusive allocation of a natural resource to either user group.

Other caselaw further confirms the conclusion that screening for impermissible exclusive grants occurs only at the level of the resource as a whole.[3] For example, in *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989), the case Cassell most heavily relies upon, this Court invalidated under Art. VIII § 3 a statute that allocated the entire subsistence preference in both hunting and fishing to only one user group, rural residents. "We hold only that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional." *Id*. at 9 (emphasis added). Equating the constitutional law of fish resources and wildlife resources, the Court held that Art. VIII § 3 (which covers both wildlife and fish) and Art. VIII § 15 (specific to fish) both prohibit exclusive grants of a resource (wildlife or fish) to one user group. *Id.* In reaching this conclusion, the *McDowell* court analyzed the resource as a whole, an approach that dooms Cassell's arguments, as it is undeniable that the brown bear resource as a whole is shared, not allocated exclusively to one group.

Indeed, the Constitution neither prescribes nor speaks to such apportioning (sharing), but leaves those sorts of decisions to the Legislature and the Board. Art. VIII § 2, *see also*, Art. VIII §§ 1, 3-5. Tying the Board's hands in the way

[3] Also, as the State points out, the resource at issue is Kodiak brown bear, not permits, which are merely a tool to access the natural resource. Appellee Br. at 22.

Dr. Cassell suggests would accomplish little, while preventing the Board from solving important practical problems. For example, Dr. Cassell proposed to the Board that 90% of the permits be reserved for resident hunters and that resident and non-resident hunters enter a joint lottery for the remaining 10%. Exc. 6. Under Cassell's proposal, if equal numbers of residents and non-residents enter the joint lottery for the 10% of permits Cassell says should be open to non-residents, one could expect a 95% resident and 5% non-resident split over time, based on the laws of probability. That would be the same end result as more directly assigning 95% of the permits to residents and 5% of the permits to non-residents.

Thus, it is difficult to see what accepting Dr. Cassell's reading of Art. VIII § 3 would accomplish, other than to transfer to the Courts authority to decide the details of game allocations. There may be a wildlife policy distinction between (a) sharing the Kodiak brown bear resource allocation between residents and non-residents by allocating a majority share to residents and the rest to non-residents, which is the current rule which Cassell says is unconstitutional; or (b) sharing the resource between residents and non-residents through indirect allocation by joint lottery, which Cassell acknowledges would be constitutional. *See* Exc. 6. However, nothing in the Constitution compels the Legislature or Board to make one choice or the other. *See* Art. VIII §§ 1-5. The choice between, or among, allocation mechanisms, is for the Board to make, and is not dictated by any provision of the Constitution.

Adopting Dr. Cassell's interpretation of the Constitution would also remove essential problem-solving discretion from the Legislature and Board. For example, the Board could no longer reliably account for key differences between resident

hunters and non-resident hunters. Here, the evidence before the Board established that guided hunters (i.e., non-resident hunters) are much more adept than unguided hunters (i.e., resident hunters), at achieving the conservation goal of harvesting male bears, rather than female bears that are needed to maintain the population.[4] A state biologist testified to the Board that: "About 17% [of the] nonresident harvest and 36% [of the] resident harvest is female." Exc. 117, 172. Multiple Board members assigned significance to this conservation value in their recorded remarks explaining their vote to deny Cassell's petition.[5] If the permits available to non-resident guided hunters are limited in the fashion proposed by Dr. Cassell, and if those permits are subject to a joint lottery that included residents, the Board's ability to benefit from this conservation value of guided hunting will be harder to attain. The Board would not know for any given hunt how many permits would go to guided non-residents, as that number would vary in a lottery. The Board also could not account for other important differences between resident and non-resident hunters. For example, non-resident hunters must contract with a guide and plan travel to an unfamiliar Alaskan wilderness, which requires far more advance planning for participation in the hunt than resident hunters require. Grouping non-residents into a joint lottery with residents, as Cassell proposes, would eliminate the flexibility needed by the Board to address these real differences between the two types of hunters in setting hunt rules.

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[4] Exc. 269 (citing Exc. 118); Exc. 332 (summarizing Exc. 117-18, 172-77, 502, 513, 516 and providing transcript pages/line references). See point III.D.2 below

[5] See Exc. 332 (providing transcript references within Exc. 172-177.

In short, *McDowell* and *Kenai Peninsula* require analysis of exclusive grants of natural resources at the level of the resource as a whole. As long as the Board shares the natural resource as a whole, it may constitutionally allocate one part of the resource to one user group and another part of the resource to another user group, in order to share the resource. In this case, the Board has allocated two-thirds of the natural resource (opportunity to hunt brown bear in the Kodiak draw hunt) to resident hunters. Nothing in the Constitution requires the Board to take the different approach desired by Dr. Cassell. No exclusive grants of natural resources have been made by the Board or any other government agency involved in the Kodiak brown bear hunt.[6]

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[6] Cassell insinuates that the U.S. Fish & Wildlife Service ("FWS") allows monopolistic practices, although he does not challenge the lawfulness of FWS actions. *See* Appellant Br. at 26, n.96, 36, n.113. Cassell cites *Owsichek v. State Guide Licensing and Control Board,* 763 P.2d 488, 496 (Alaska 1988) inaccurately to suggest that guides who hold federal area-by-area concessions to guide on Kodiak National Refuge are engaged in a monopolistic use of wildlife. The Court in *Owsichek* struck down under Art. VIII § 3 an old state guiding concession statute under which guides received the exclusive privilege to guide in a particular area as a permanent right that was not subject to periodic re-competition, could be freely traded for cash, and for which the government received no renumeration.

However, the *Owsichek* Court emphasized that the State could lawfully grant exclusive concessions, provided that the concessions were not permanent and were subject to periodic re-competition, that transfers of the concessions were subject to regulatory review to see if they were in the public interest, and that the government received renumeration. *Id*. at 497-98. FWS's guide concession program for Kodiak National Wildlife Refuge fully complies with all these *Owsichek* principles as APHA explained in its opening brief below. Exc. 350-52, 595, 604, 608-09, 622-23. Federal law also requires periodic re-competition, review of transfers, and renumeration to the governmental land owner. 50 CFR 36.41(e)-(h). In his reply brief below and his opening brief here, Cassell offered no rebuttal to APHA's showing of *Owsichek* compliance. There is no monopolistic use.

C. The Board of Game's Authority to Share a Resource Between User Groups by Allocating a Portion to Each Group Does Not Cease Just Because One of the User Groups Consists of Non-Residents.

The involvement of non-residents in an allocation does not deprive the Board of its authority recognized in *Kenai Peninsula, supra,* to share the natural resource by allocating a portion to one group and the remaining portion to another group.

1. The Alaska Constitution Authorizes But Does Not Compel Resident Preferences.

The Alaska Constitution authorizes but does not compel the Board to grant resident preferences. Art. I § 23. The Constitution likewise does not compel the Board to use any particular mechanism for awarding non-resident permits, when it limits but does not prohibit non-resident hunting. While Dr. Cassell invokes only § 3, §§ 1-4 of Art. VIII of the Constitution, concerning natural resources, are all pertinent:

> § 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.
>
> § 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.
>
> § 3. Common Use - Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> § 4. Sustained Yield - Fish, forests, wildlife, grasslands, and all other replenish able resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

None of these provisions refer to resident preferences or require them. Notably, the Constitution does not define key operative terms in these provisions, including "maximum benefit of its people," "common use," and "use," leaving the

Legislature discretion, which it delegates to the Board. *See* Appellee.Br. at 5 and n.12. Based on clear explanations by the framers at the Alaska Constitutional Convention, "common use" in Art. VIII § 3 is a reference to making these natural resources freely available, unimpaired by private ownership of wildlife, fish, and waters in their natural state.[7] The provision does not mandate resident preferences. In an opinion discussing Art. VIII §§ 1-4, the Court emphasized the tourist economy value to the State generated by non-resident moose hunting and viewing -- a value that would be destroyed by mandating stringent resident preferences. *Pullen v. Ulmer*, 923 P.2d 54, 59-60 (Alaska 1996) ("moose are valuable assets to Alaska, helping in attracting tourists, for example.") One could conceive of a case in which the "maximum benefit" to Alaskans could be achieved only by a very strong resident preference, perhaps a local food hunt in which few Alaskans earn a living from helping non-resident hunters, but that is not every case, and is certainly not this case, which involves trophy hunting for bear.

While Natural Resources Art. VIII §§ 1-4 do not directly address resident preferences, three other provisions in the Constitution do. Most significantly, Art. I § 23, an amendment adopted in 1988, authorizes but does not compel resident preferences, and is applicable generally to all areas of the law, including hunting:

> Art. I § 23. Resident Preference - This constitution ***does not prohibit*** the State from granting preferences, on the basis of Alaska residence,

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[7] The Proceedings of the Alaska Constitutional Convention at pages 2461-65 include extended discussion of Art. VIII § 3 – document available at: http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf (what became Art. VIII § 3 was then numbered as § 4).

> to residents of the State over nonresidents to the extent permitted by the Constitution of the United States. (Emphasis added).

The State is "not prohibited" from granting resident preferences, which means that the State is not required to grant such preference. This Court construes legislative enactments with permissive wording like that of Art. I § 23 as granting the State a power but not imposing upon the State any obligation to use that power.[8]

The other two provisions in the Constitution addressing resident preferences are Art. VIII § 14 and Art. IX § 2, both part of the original 1956 Constitution, along with Art. VIII §§ 1-4. They prohibit resident preferences in two narrow topics: access to navigable waters and property taxes.[9] These two provisions show the framers of the original Constitution knew how to, and did, address resident preferences with specificity when they wished. To the extent any conflict exists, the permissive Art. I

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[8] "Mandatory words impose a duty; permissive words grant discretion." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 100 (Thompson/West 2012); Norman Singer, *Sutherland Statutes and Statutory Construction* § 25.1 (Nov. 2020) ("Many statutes … grant powers without imposing any obligation to exercise them..."); *Roeckl v. F.D.I.C.,* 885 P.2d 1066, 1074 (Alaska 1994) ("the fact that the legislature has affirmatively chosen to permit, rather than require, the registration of assumed business names weighs heavily against accepting FDIC's invitation to fashion a judicially imposed registration requirement") (citing AS 10.35.010, which provided that businesses "may" register with the State); *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 162, n.27 (Alaska 1987) (statute provides State "may" grant submerged lands privileges, but "this" in no way requires the state to grant such privileges"); *Walden v. Dept. of Transp*., 27 P.3d 297, 302 (Alaska 2002); s*ee Forrer v. State*, 471 P.3d 569, 585, n.164 (Alaska 2020) (canons of statutory construction apply to Constitution, also citing Scalia and Garner, *supra*).

[9] *See* Art. VIII § 14 ("Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate …."); Art. IX § 2 ("The lands and other property belonging to citizens of the United States residing without the State shall never be taxed at a higher rate than the lands and other property belonging to the residents of the State.")

§ 23 is the only generally applicable provision of the Constitution that specifically addresses resident preferences, and it is also the most recently enacted of the provisions involved.[10]

Moreover, the framers of the original Alaska Constitution including Art. VIII §§ 1-4 had every reason to avoid mandating resident preferences. Binding the future Alaska legislature to exclude residents of other States from hunting and fishing would have been counter-productive for two reasons: (1) it would have limited rather than expanded the future legislature's discretion in making decisions regarding use of natural resources, including the promotion of a tourism economy, and (2) it would have risked provoking opposition in Congress to ratifying the proposed Alaska Constitution and granting statehood. The Chairman of the Alaska Statehood Committee opened the Alaska Constitutional Convention by warning that the proposed Constitution draft must pass "the three most rigid tests imaginable," the second of which was "approval of Congress."[11] A leading commentator (Gerald McBeath), cited by Plaintiff, explains that: "The need to please Congress was a compelling argument in the debate over several sections of the constitution."[12] He

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[10] *See Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011) (specific governs over the general, and the more recent over the earlier).

[11] Proceedings of the Alaska Constitution Convention, First Day, November 18, 1955, p. 9 (remarks of Mr. Atwood). The other two "rigid tests" were approval by Alaskans and posterity. *Id*. These materials are available at: https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2001%20-%20November%2008%201955%20-%20Pages%201-16.pdf

[12] Gerald A. McBeath, *The Alaska State Constitution*, p. 133 (Oxford Univ. Press 2011).

notes that prohibiting resident preferences in property tax rates (Art. IX § 2) was a "signal" to Congress that residents of other states would be treated fairly.[13]

Another leading authority on the 1955-56 Alaska Constitution Convention cited by Plaintiff (Gordon Harrison) explains that the framers of the original Constitution discussed whether out-of-state workers would take jobs in Alaska but "did not contemplate using the constitution to put Alaskans at the head of the line. Such an idea would have been unthinkable at a time when congressmen from other states held the key to statehood."[14] This further bolsters the point above – that when Art. VIII §§ 1-4 and the rest of the original Constitution were drafted, it was too risky for the framers to insist upon resident preferences that excluded residents of other States. It was not until 1988, when Statehood had already been obtained, that a provision authorizing but not mandating resident preferences (Art. I § 23) was adopted.[15]

The permissive nature of Art. I § 23 of the Constitution is echoed in an important statute governing the Board of Game's authority to adopt resident preferences in hunting. AS 16.05.256. That statute assumes that non-resident hunting is occurring and then declares that the Board "may" (not shall) establish a "limit" on non-resident hunting in certain circumstances. This is a power, not an

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13 McBeath, p. 178.

14 Gordon Harrison, *Alaska Legislative Affairs Agency, Alaska's Constitution: A Citizen's Guide* at 10 (Jan. 2021).

15 *See id*.

obligation.[16] Here the Board has imposed limits on non-resident hunting, by capping non-residents at 40% of the permits (in practice non-residents receive one third of the permits). 5 AAC 92.061(a)(1). Finally, Art. I § 23 and AS 16.05.256 authorize drawing distinctions between residents and non-residents, undermining Cassell's contention that residents and non-residents belong in the same user group.

2. The Non-Resident Allocation Benefits Alaskans (The Guides) Engaged In a Use of Wildlife Protected By Art. VIII § 3.

There is an additional factor relevant to the non-resident allocation in this case. Both resident hunters and resident guides are Alaskans engaging in uses of natural resources within the ambit of Art. VIII § 3. State law requires that non-resident hunters hire a guide, the overwhelming majority of whom are residents of Alaska. AS 16.05.407; Exc. 447, 513.[17] The Superior Court concluded that: "The Board is not required by Article VIII § 3 of the Alaska Constitution to allocate to resident hunters more than two-thirds of the harvestable bears in the Kodiak draw hunt. *Further, Article VIII § 3 protects Alaska hunting guides as well as resident hunters ….."* Exc. 495 (emphasis added). Indeed, in *Owsichek,* a case cited by Cassell, this Court concluded that a hunting guide is himself an Alaskan engaged in a "use" of wildlife and so has standing to invoke the protections of Art. VIII § 3.

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16 *See* note 8 supra (caselaw regarding enactments that grant a power).

17 There is a limited exception for a non-resident hunting with an Alaskan resident who is a close relative.

Owsichek, 763 P.2d. at 491, n.9 and 497, n.15-16.[18] As discussed above, APHA is an association of hunting guides including those working on Kodiak.

In challenging the Superior Court's analysis, Cassell suggests that the Superior Court conjured up a constitutional right on the part of guides to see to it that enough non-resident hunters get permits that guides have a market to serve. Appellant Br. at 39. The Superior Court did nothing of the sort. The fact that both Alaskan guides and Alaskan hunters are engaged in a use of wildlife protected by Art VIII § 3 confirms that both groups' interests may properly be considered by the Board of Game and the Legislature. That consideration of both groups' interests may lead to different results in different cases. Sometimes, the Board or Legislature may allocate a significant minority of permits to non-resident hunters who hire guides, as the Board did here.[19] In other cases the Board or Legislature may choose to grant more preferences to resident hunters, as occurred in *Shepherd v. State of Fish & Game*, 897 P.2d 33 (Alaska 1995), discussed below, in which the Legislature chose to enact a statute mandating a resident preference for a food hunt

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[18] This Court reached that conclusion in *Owsichek* in the context of discussing guides serving non-resident clients, which precludes any suggestion that guides have protection under Art. VIII § 3 only in the rare situation in which their client happens to be a resident rather than a non-resident hunter. 763 P.2d at 497 and at n.16.

[19] Art. VIII § 2, which allocates wildlife based on "maximum benefit" to the people would certainly allow consideration of benefit to guides as "users" of wildlife within the meaning of Art. VIII § 3. Finally, Art. VIII § 4, which allows the Legislature and Board to allocated "preferences" to particular uses, would allow consideration of the guide's particular use of the natural resource (guiding).

of ungulate species. *See* Art. I § 23 (State "not prohibited" from granting resident preferences).

In summary, the Superior Court did not find that guides have a constitutional right to a market: merely it concluded that Alaska's guides also benefit from the protections of Art. VIII § 3. *See.* Exc. 495. The Superior Court's careful use of "not required" demonstrates that it was only holding that the Board of Game could lawfully decide to refuse to intensify an existing resident preference.[20]

The Superior Court was correct. Because both Alaskan hunters and Alaskan guides are protected by Art. VIII § 3, it follows that neither group has a constitutional right to priority over the other. Neither group can force the Board of Game or Legislature to prioritize their own group's interests and subordinate the other group's interests. Nothing in Art. VIII § 3 makes hunting a superior "use" of wildlife to guiding a hunt. The key relevance of the guides' standing under Art. VIII § 3 is that it confirms that the interests of all Alaskans engaged in a "use" of wildlife, including Alaskan guides leading non-resident clients, may properly be considered by the Board.

Cassell cites the record for the proposition that not all guides are Alaskan. But the data he cites also says that 85% of guides leading hunts in Alaska statewide are Alaska residents, Appellant Br. at 40, n.26 (citing Exc. 447), and more specific

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[20] "The Board is ***not required*** by Article VIII § 3 of the Alaska Constitution to allocate to resident hunters more than two-thirds of the harvestable bears in the Kodiak draw hunt. Further, Article VIII § 3 protects Alaska hunting guides as well as resident hunters ….." Exc. 000495 (emphasis added).

evidence in the record before the Board and the Superior Court shows that 97% of the guides leading bear hunts on Kodiak are Alaskan. Exc. 331 (citing Exc. 513).

The tourist economy benefits Alaskans receive from guided hunting certainly exist, and are recognizable under Art. VIII § 2's "maximum benefit" standard, regardless of whether one scales back that benefit to account for 85% or 97%, rather than 100%, of the guides being Alaskan. [21] The Superior Court had the benefit of the data showing that a small fraction of guides are non-Alaskan when it ruled. Exc. 447, 513. Having acknowledged that the Board may make some allocation of permits to non-resident hunters, Exc. 379, 394 (n.39), 401, Cassell fails to articulate any theory why such allocation would be constitutionally permissible only if the non-resident hunter hires an Alaskan, rather than a non-Alaskan, guide.

In short, the Board under Art. VIII §§ 1-4 can properly consider the "use" of wildlife by Alaskan guides serving non-Alaskan clients. This is an additional factor supporting the Superior Court's judgment in favor of the Board.

3. Caselaw Relied Upon by Cassell Does Not Support His Position.

Cassell's citation to *Shepherd* does not change this analysis. 897 P.2d at 40-41. *Shepherd* involved a hunt for "moose, deer, elk, and caribou by residents for personal or family consumption," and the Legislature had, as permitted by Art. I § 23, enacted a statute giving that important use "preference over takings by

[21] *See Pullen,* 923 P.2d. at 60 ("Moose are valuable assets in Alaska, helping in attracting tourists ….") The separate species conservation benefit discussed in point III.D.2 results from the guides' expertise in assisting their clients in determining bear gender. It fully applies regardless of whether a particular guide is a resident.

nonresidents." AS 16.05.255(d). A guide serving non-resident clientele sued, alleging that the resident preference statute exceeded the bounds of discretion available to the State under the U.S. and Alaska Constitutions. 897 P.2d at 35-36.

The Court in *Shepherd* cited the long line of cases affirming the discretion of state legislatures to enact resident preferences in allocating state-managed wildlife, *Id*.[22] Citing Art. VIII §§ 1-4, the Court unremarkably held that neither the federal nor the state constitution prohibited the Alaska legislature from choosing to enact a resident preference that ensures Alaskans have food to eat. "[T]he state is required to maximize for state residents the benefit of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or ***limiting*** the participation of non-residents." 897 P.2d at 40-41 (emphasis added). Here, we have a trophy hunt that has been successfully managed for more than 40 years on terms satisfactory to both the State and U.S. FWS, and there are sufficient animals to share the resource. The allocation rule lawfully limits but does not exclude non-resident hunters.

Moreover, the *Shepherd* Court further observed that grant of a resident preference "arguably is required" in some circumstances. *Shepherd*, 897 P.2d at 40-41. Because the Legislature had chosen to enact a strong resident preference statute for the hunt at issue in the *Shepherd* case, the Supreme Court had no occasion to rule on whether or when enacting a resident preference was

[22] Note that the *Shepherd* case also did not involve hunting on federal land funded by U.S. citizens from all 50 States. See point III.C.4 below.

constitutionally required. Thus, there was no occasion to consider the point that Art. I § 23 grants the authority but not the obligation to adopt or intensify resident preferences. *See Roeckl*, 885 P.2d at 1074. In short, *Shepherd* does not prohibit the Board from access to this trophy hunt by limiting non-resident hunters to one third of the permits and granting all other permits to resident hunters.

4. The Fact the Majority of the Hunt Occurs On Federal Wildlife Conservation Land Further Supports the Non-Resident Allocation.

The fact that this hunt is held primarily on federal land is another factor supporting the Superior Court's judgment that the non-resident permit allocation is constitutional. As the Superior Court concluded: "The Alaska Constitution does not prohibit allocating a share of the bear hunt to nonresidents, particularly when the hunt takes place largely on federally-owned land." Exc. 495. This conclusion is not seriously challenged by Cassell on appeal. Cassell urges the Court to not shy away from construing the Alaska Constitution in a way that conflicts with federal interests. Appellant Br. at 41. However, state constitutional provisions, like state statutes, are interpreted where textually possible to avoid conflict with superior law, such as federal law, and thus to preserve their validity.[23] Further, the provision of the Alaska

[23] "[S]tatutes are to be construed to avoid a substantial risk of unconstitutionality where adopting such a construction is reasonable …" *Kenai Peninsula Borough v. Cook Inlet Region, Inc.,* 807 P.2d 487, 498 (Alaska 1999). This includes avoiding conflict with federal statutes and thus preemption under the U.S. Constitution's supremacy clause. *See, e.g*., *Devaney v. Zucchini Gold, LLC*, 184 N.E.3d 1248, 1255 (Mass. 2022); *In re Request for Jurisdictional Opinion*, 117 A.3d 457, 463 (Vt. 2015); *State v. Mooney*, 98 P.3d 420, 425 (Utah 2004); *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 18-19 (Minn. 2002). Just as state statutes should be construed where possible to avoid conflict with federal law, so too should state constitutions.

Constitution specifically governing resident preferences has its own built-in canon of construction, explicitly directing avoidance of conflict with federal law. Art. I § 23 ("This constitution does not prohibit … [resident] preferences … to the extent permitted by the Constitution of the United States"). This Court has elaborated, in a hunting case, by cautioning that Alaska cannot enact resident preferences when doing so would be "in conflict with paramount federal interests." *Shepherd,* 897 P.2d at 4.

Surely there is a "paramount federal interest" involved in this hunt occurring largely on federal wildlife conservation land. Taxpayers from all 50 States fund the management of Kodiak National Wildlife Refuge and, as discussed below, the Federal Government must manage Refuges for the benefit of all Americans. Thus, when Dr. Cassell petitioned the Board to intensify the existing Alaska resident preference from the two-thirds level to the 90%+ level, and to mix residents and non-residents into a common lottery for the final 10% of permits, the Kodiak Refuge Manager submitted comments to the Board opposing the petition. The Manger described federal law and policy: "On federal refuge lands we are required to ensure that the allocation of hunting opportunity is fairly balanced between State-resident and non-resident hunters." Exc. 355 (quoting Exc. 593). There was a strong basis in federal law for the Refuge Manager's concern. He must manage Kodiak Refuge in way that "recognize[s] compatible wildlife-dependent recreational uses as the priority general public uses of the System through which the ***American public*** can develop an appreciation for fish and wildlife." 16 U.S.C. § 668dd(a)(4)(H) (emphasis added), *see also,* § 668ee(2) (defining "wildlife-dependent recreational uses" to

include "hunting"). The "American public" includes all U.S. citizens, not just residents of Alaska, so federal law would prohibit exclusion of non-resident hunters.[24]

In his comments to the Board of Game, the Kodiak Refuge Manager also explained that the non-resident allocation generates benefits for the brown bears, a species whose conservation is a primary reason the Refuge exists:

> This permit allocation standard [the rule Dr. Cassell challenges] has been highly successful--both by providing balanced opportunity to American hunters, and by ensuring a productive bear population that includes adequate representation of trophy-class males. Review of bear harvest data for Kodiak Refuge indicates a long-term trend of increased ratio of males including trophy-class males.

Exc. 356 (quoting Exc. 593); Pub. Law No. 96-487, § 303(5)(B)(i) (Kodiak Refuge established to provide for conservation of "brown bears" and other listed species). This appears to be a reference by the Kodiak Refuge Manager to the success guided hunters, i.e., non-resident hunters, have had in increasing the ratio of harvested males to harvested females. *See* point III.D.2 below. The Board's decision to preserve a significant minority non-resident allocation is consistent with federal objectives in the management of this federal conservation land unit.

Unlike the combined lottery that Cassell proposes, which would mix residents and non-residents into a single lottery for the sliver of permits Cassell proposes be

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[24] *See also*, Alaska Statehood Act, Pub. Law No. 85-508, § 6(e) (deferring the new State's assumption of responsibility to manage the fish and wildlife of Alaska until the State in 1959 showed that it was prepared to conduct that management "in the broad national interest," which the State would not be doing if it excluded citizens of other States from meaningful opportunities to hunt on their federal lands).

available to non-residents, the Board's allocation rule, in effect since 1976, both ensures that U.S. citizens from all States have a reasonable opportunity to hunt on their special Alaska federal lands and ensures that the species conservation values achieved by guided hunting (primarily non-resident hunting) are preserved. Exc. 593. This Court should resist Cassell's invitation to construe the Alaska Constitution in a way that would conflict with such substantial federal interests, *Shepherd*, 897 P.2d at 40 (resident preferences cannot be imposed contrary to "a paramount federal interest"); *Bald v. RCA Alascom,* 569 P.2d 1328, 1331 (Alaska 1977) (state law cannot "frustrate" federal law).[25] The Superior Court's ruling on the federal lands issues was correct.

D. The Board Lawfully Considered Economic and Species Conservation Values In Applying the "Maximum Benefit" Test of Art. VIII § 2.

Dr. Cassell says economic benefits to Alaskans from non-resident hunting cannot be considered by the Board in applying the "maximum benefit" test of Art. VIII § 2. He says the species conservation benefits from guided non-resident hunting,

[25] By authorizing but not obligating the State to enact resident preferences, Art. I § 23 wisely allows the State Legislature and the various State agencies to make realistic case-by-case judgments regarding: (1) whether an intense resident preference is really in the best interests of Alaskans in a particular situation, and (2) the prospects for prevailing in any preemption litigation with federal agencies that are involved, here FWS. Where state management of wildlife on national wildlife refuges has come into conflict with federal management, the State has fared poorly in preemption litigation. *E.g., Safari Club Int'l. v. Haaland*, 31 F.4th 1157, 1167-69 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 1002 (2023) (upholding FWS decision to preempt state hunting law on the Kenai National Wildlife Refuge).

recognized by the Board in denying Cassell's petition, are too speculative to be considered. He is wrong on both counts.

1. Economic Benefit to Alaskans from Non-Resident Hunting.

Cassell cites *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999), a voter initiative case, in an effort to force the State to disregard the economic benefit to Alaska businesses from use of wildlife by non-resident hunters (here in hunts led by resident guides). Appellant Br. at 36-37. However, *Brooks* does not support Cassell. This Court held that the State manages wildlife as a public rather than private trustee, and observed that the State therefore is charged with maximizing benefit "to ***all*** Alaskans" for the long term, including "to provide for future generations" -- a goal not always served by the short-term strategy of taking the wildlife and selling it to the highest bidder. 971 P.2d at 1032 (emphasis added) ("Article VIII requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide for future generations, and that income generation is not the sole purpose of the trust relationship.").

The transcript of the proceedings in which the Board rejected Cassell's Petition shows a painstaking effort by the Board to do what *Brooks* directs the Board to do - find the solution that best benefits "all" Alaskans" in the long term, 971 P.2d at 1031. "All Alaskans" includes Alaskans who do not themselves hunt but benefit from the tourist economy generated by non-resident hunting. The Board acted after a careful weighing of the interests of Alaskans living on Kodiak Island, Alaskans elsewhere (who might want to come to the Island to hunt, and might also benefit

from similar hunting or fishing-based tourism economies in their part of Alaska), and also the special conservation values promoted by guided hunting, which conserves the bear population for future use by Alaskans.[26]

Nothing in *Brooks* prevents consideration of the long-term economic benefit to Alaskan businesses from use of wildlife in determining how to manage wildlife for the "maximum benefit of its people" over the long-term. *See* Art. VIII § 2. An economic benefit is undeniably a benefit. Nothing in *Brooks* requires that the Board weigh the interests of resident hunters over that of other Alaskans who directly and substantially benefit from non-resident hunting.[27] As this Court said in *Pullen:*

> Moose are valuable assets in Alaska, helping in attracting tourists, for example. Furthermore, if other wildlife populations also plummeted, the state's finances would obviously be affected as one of the primary tourism attractors disappeared. Finally, if the state's salmon population precipitously declines, the fishing industry would be devastated, causing even more harm to Alaska's economy and revenue base.

923 P.2d at 60; Appellee Br. at 27 (citing economic studies on the tourist economies). Having just emphasized the economic value of tourist hunting and fishing, the *Pullen* Court immediately analyzed the "maximum benefit" test in Art. VIII § 2, as well as Art. VIII §§ 3-4. *Id.* at 59-60. This juxtaposition made it plain that the Court considered it proper that the Legislature and State agencies evaluate

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[26] Exc. 331 (citing Exc. 174-76); Exc. 332 (citing Exc. 172-177).

[27] Plaintiff Cassell's reliance on *Brooks* is further undermined by the absence of any dispute in that case between resident Alaskan hunters and other Alaskans operating businesses catering to non-resident hunters. The case arose in the very distant context of deciding whether the Legislature's responsibility to manage wildlife as a trustee precluded allowing placement on the ballot of a citizen initiative to ban the use of snares in trapping wolves. *Brooks*, 971 P.2d at 1026, 1030-33.

economic issues when applying Art. VIII §§ 2-4. The economic evidence here is well documented. *See* n.1 above (APHA member guide earn a living leading non-resident clients on brown bear hunts and other Kodiak business also benefit from this tourist economy).[28]

Cassell asserts that the Constitution allows the State to give weight to economic impacts when allocating *fish* resources, but prohibits the same considerations when allocating *Kodiak brown bear* resources. Appellant Br. at 34. Article VIII does not support Cassell's interpretation. Article VIII §§ 3-5 specifically addresses the utilization, development, and allocation of *both* fish and wildlife resources. All three sections (including § 3, on which Cassell bases his claims) explicitly mention *both* fish and wildlife and treat fish and wildlife entirely in parallel.[29] Section 2 provides the governing standard for allocating "all natural resources,"

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[28] Dr. Cassell suggests that the Superior Court should not have considered economic or other evidence submitted by APHA because it is an amicus curiae, rather than a full party. Appellant Br. at 32, n.106. He forfeited that objection by not moving to exclude the evidence in the Superior Court, which could then have considered the matter before ruling. Moreover, Cassell's court-approved procedural settlement with APHA provided that "APHA will have the same opportunities for briefing … as the State," said nothing about restrictions on the materials APHA could submit with its briefs, and provided for automatic conversion of APHA from amicus to intervenor status in certain circumstances, thus giving APHA a role in the development of the trial court record. Exhibit A to Joint Motion to Accept Plaintiff's Stipulated Agreement, ¶¶ 1, 2, 3 (filed Feb. 3, 2020) (in trial court record, not in Exc.). Moreover, much of APHA's submissions consisted of transcript excerpts, public comments, and advisory committee reports drawn from the same Board of Game record which Cassell and the State extensively cited, including on economic issues. See Exc. 498 (exhibit list to APHA opening trial court brief - exhibits 3, 4A, 4B, 4C, 4D, 5, and 9 were from the Board proceeding); Exc. 272-74 (State citations). *See also*, Exc. 277, 426 (citing Exc. 440-57).

[29] *See* p. 10 above for full quotations of these provisions.

including both fish and wildlife, which is the "maximum benefit" test, as modified by the "sustained yield" caveat in § 4.[30] In addition, § 1 opens Art. VIII without differentiating between fish and wildlife through providing that it "is the policy of the State to encourage … the ***development*** of its resources by making them available for maximum use consistent with the public interest" (emphasis added). The ordinary meaning of "development" of the state's natural resources includes economic issues. Thus, in seeking the "maximum benefit of its people" when allocating natural resources pursuant to Art. VIII, the State certainly may, and very likely must, consider economic issues.

2. The Species Conservation Benefit of Guided Hunting.

As discussed above, in denying Cassell's petition to increase the existing resident preference from two-thirds to nine-tenths, the Board cited species conservation benefits resulting from guided non-resident hunting in addition to the economic benefit to Alaskans generated by that activity.[31] Shortly before the Board voted to deny Cassell's petition, an ADF&G biologist made a thorough presentation on the species conservation benefit of guided non-resident hunting, Exc. 117-118, 172-74. Swoboda explained why females are particularly needed to ensure the

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[30] Moreover, as discussed in point III.B above, the Court in *McDowell* in applying the anti-exclusivity provisions of Art. VIII equated the treatment of fish under Art. VIII § 15 with the treatment of wildlife and fish under Art. VIII § 3, declining to draw any constitutional distinctions between fish and wildlife for purposes of analyzing a claim alleging an exclusive grant of the use of a natural resource. 785 P.2d at 9.

[31] Exc. 332 (providing page/line citations within Exc. 172-177).

long-term health of the species. *See Id*.[32] Perhaps realizing that species conservation is undeniably a value cognizable under Art. VIII §§ 2, 3 and 4, Cassell contends that the species conservation benefit is speculative and unproven. Not so. ADF&G biologist Swoboda explained in his presentation to the Board, only 17% of harvest by non-residents was of female bears, while a full 36% of the harvest by residents was of female bears. Exc. 117, 132. The Board appropriately gave weight to this information.[33] This and other evidence before the Board on the species conservation value of guided hunting (i.e., non-resident hunting) was submitted to the Superior Court in the briefing of the summary judgment motions. Exc. 269 (citing Exc. 118), Exc. 332 (providing page/line citations within Exc. 172-77), Exc. 117-18, Exc. 172-175. Accordingly, the rules of summary judgment required Cassell to contest that evidence through the submission of countering evidence, as opposed to mere denials. *See* Rule of Civil Procedure 56. However, Cassell submitted no countering evidence.

E. The Existence of Debate Regarding Policy Issues, Including Statistical Issues Regarding the Odds of Drawing a Resident Permit, Does Not Render the Present Rule Unconstitutional

Many of Dr. Cassell's arguments merely suggest ways the current allocation rule could be amended or improved by further action of the Legislature or Board. These suggestions do not create constitutional issues.

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[32] Bears are not monogamous so one male bear can impregnate multiple females, making individual males less important to the long-term health of the bear population than individual females. Also, males are cannibalistic. *See* Exc. 516.

[33] *See* note 5 above.

The Constitution in Art. VIII § 2 assigns the task of allocating Alaska's natural resources to the "legislature," by directing that 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." (Emphasis added). This Court should therefore refrain from reading into the Constitution unwritten limitations on the discretion of the Legislature and the Board, to which the legislature has delegated the allocation function, because doing so would involve the Courts in wildlife and fish allocation policy matters the Constitution assigns to the Legislature. As the Superior Court correctly observed: "Cassell can reasonably disagree with the particular allocation made by the Board, and he is free to urge the Legislature and/or Board to change that allocation, but he has failed to show why this court should make this decision." Exc. 495.

For the same reason, the Court should refrain from wading into the debate over statistical points and counter-points that might be pertinent to an allocation debate at the Board or Legislature, but do not give rise to constitutional claims in this Court. This is especially so here because Cassell in his lawsuit asserts only constitutional claims (Exc. 8-11) and he expressly disclaimed any request for statutory judicial review. Thus, a plaintiff's limited ability to secure a deferential judicial review of agency policy judgments in a statutory judicial review proceeding is not available to Cassell in this case. Appellant Br. at 17 ("This is not an administrative appeal from the Board's denial of the Cassell Proposal"). As Cassell admitted to the Superior Court in his summary judgment briefing, "Administrative Procedures Act Standards are Inapplicable." Exc. 381.

While there may be a debate on policy issues, including statistics regarding a resident hunter's odds of drawing a Kodiak brown bear permit, that debate does not present a material issue of fact in this narrow lawsuit alleging a violation of the Constitution, both because the Constitution assigns determination of allocation issues to the Legislature, Art. VIII § 2, which delegated those determinations to the Board, and because a policy-directed factual debate could not generate a valid constitutional claim even if the debated facts were resolved in Cassell's favor. Indeed, Cassell admits that no genuine material issues of disputed fact exists that would require that a trial be held. Appellant Br. at 18.[34]

Moreover, the policy debate about the odds a resident hunter has of drawing a Kodiak brown bear permit is hardly the one-sided debate that Cassell suggests. The odds that Cassell calculates are undeveloped, incomplete, and simply inaccurate.

First, Cassell utilizes an unnaturally short time period as the basis of his calculation of odds. This non-food trophy hunt for the world's largest bears is not the type of wilderness hunt a hunter would engage in annually, but rather is, at most, an infrequent wilderness adventure. Indeed, a hunter who harvests a Kodiak brown bear must by law wait four years before applying for another permit for this hunt. Exc. 99 (bag limit in State FAQ). Cassell's arguments regarding the odds of drawing a permit within one year are therefore inapt. *See* Appellant Br. at 9 ("Approximately

[34] Further, Cassell overlooks that Defendant Board of Game would be equally entitled to a trial under Rule 56 were the Court to find for some reason that Cassell's dubious policy arguments have raised a genuine issue of material fact.

5,000 Alaska residents apply for a Kodiak brown bear permit each year, but only 6.6% receive permits."). Even if that calculation of annual odds were complete, which as discussed below it is not, the odds would still markedly improve for a hunter who applies for a longer, and thus more relevant, period. While the odds of each individual application yielding a permit stay roughly constant over time, as a hunter submits more and more applications over time, the chance of at least one of the applications drawing a permit steadily increases. (By way of illustration, if you roll a dice many times, your odds of getting at least one "6" are greater than if you roll just once).

Second, Cassell's calculations are inaccurate because he overlooks that each resident hunter is entitled to submit up to six applications to the Kodiak brown bear draw hunt each year, but many resident hunters choose to use some of their six applications on other attractive hunts. Exc. 89 (state information sheet urges hunters to "apply for a maximum of six hunts per species and apply for the same hunt more than once").[35] The ADF&G data in the record concerns per-application chances of success.[36] Cassell fails to account for the improvement in odds the

[35] While residents can apply six times a year for the Kodiak brown bear hunt, non-residents can apply only once. Exc. 144 (referenced by Exc. 163). This is another resident preference that is significant in interpreting published per-application odds.

[36] Exc. 145 identifies drawing bear division codes for each of the 62 divisions of the Kodiak brown bear draw hunt (each division has one code for residents and one code for non-residents). Exc. 163 provides the per-application odds of success for each of those codes, and urges resident hunters to file multiple applications to increase the chance of success. A caveat at the top of Exc. 163 directs the reader to Exc. 144, which clears up confusion by clarifying that resident hunters, but not

hunter achieves by filing multiple applications in a year to participate in the draw hunt. The ADF&G data shows that the per-application odds of success for resident hunters vary based on which of the 62 divisions of the draw hunt are being applied for, but the median per-application odds for resident hunters are 4%, while the average is 6.4%.[37] Using the median figure more favorable to Cassell, under the laws of probability, a median per-application odds-of-success of 4% translates into a 22% chance of drawing a permit in any single year if the hunter files his six applications for the Kodiak draw hunt, and a 71% chance of drawing a permit if he continues to do that for five years.[38]

Third, Cassell notably does not discuss how little difference it would make to a resident hunter's odds of drawing a permit if Cassell somehow succeeded in reducing or entirely eliminating the non-resident allocation. Cassell states that there

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non-resident hunters, can file more than one application a year for this brown bear hunt.

[37] *See* Exc. 145 (drawing bear areas 201-228, 231-258, 261-263, and 291-293 are resident drawings for Kodiak bear hunt – totaling 62 drawings) and Exc. 163 (resident hunter odds per application of drawing a permit in those 62 drawing areas vary by area from 1% to 28% -- entering that data into a spreadsheet reveals that the median is 4% and the average is 6.4%). *See* Appellant.Br. at 9-10 (citations to same underlying State data). Cassell emphasizes statistics on appeal, but presented no expert testimony below.

[38] At 4% median odds of success per hunt application, the odds of a resident hunter not drawing a permit on a single application (lottery entry) is 0.96. The odds of not drawing a permit despite submitting six applications in a year are 0.96^6, which is 0.783, a 21.7% chance of drawing a permit. Over a five year period, 30 applications can be submitted, so the odds of not drawing a permit are 0.96^{30}, which is 0.294, a 70.6% chance of drawing a permit. *See* Peck, Olsen, and DeVore, *Introduction to Statistics & Data Analysis*, pp. 362-63, Example 7.5 (3rd ed. 2008), available at: https://www.spps.org/cms/lib/MN01910242/Centricity/Domain/859/Statistics%20Textbook.pdf and https://www.mometrix.com/academy/multiplication-rule-of-probability/

are about 500 permits for this hunt awarded each year, that two-thirds of those permits (about 320 a year) go to resident hunters, and 5,000 resident hunters apply (including those who don't use all six of their annual applications for this hunt). *See* Appellant.Br. at 9. Thus, using Cassell's calculation, with only 500 total permits available, even the extreme step of eliminating all non-resident hunting would only modestly improve resident hunter annual odds of drawing a permit from Cassell's inferred odds of 6.6% (320 out of 5,000) to 10% (500 out of 5,000). If any non-resident hunting continues, and Cassell, as discussed above, concedes that some level of non-resident hunting may lawfully continue, the marginal improvement in resident hunter odds is even less. Thus, eliminating non-resident hunting from Kodiak or elsewhere would eliminate the substantial economic and species conservation benefits to Alaskans and the State itself flowing from non-resident guided hunting, all in exchange for what would at most be a small increase in resident hunters' odds in the lottery. Such marginal differences in odds cannot possibly present a constitutional issue.

Fourth, the odds of drawing a permit are affected on both the resident and non-resident sides by the substantial cost advantages resident hunters enjoy over non-residents, largely as a result of State law, which is itself a resident preference. The State does not require residents to hire a guide for this wilderness hunt of a dangerous animal and charges residents very low fees for hunting licenses and tags, while non-residents pay far higher fees for licenses and tags. *See* AS 16.05.407. Exc. 278, 314-315, 364-366, 374. Further, residents of the State are closer to Kodiak Island than non-residents, and so have lower travel costs. Thus,

many residents enter the lottery for what is, for residents, a relatively low-cost hunting opportunity. Conversely, few non-residents can afford the high costs (roughly $30,000) to participate in the hunt (primarily the mandated cost of hiring a guide), and so relatively few enter the non-resident lottery. Exc. 353 (citing Exc. 554), 589. Thus, the resident preference as to cost of hunting is itself a major reason the resident odds of drawing a permit are lower. Further, the benefit to Alaskans from non-resident hunting (Kodiak tourist economies, species conservation benefits of guided hunting) are directly related to and flow from the higher non-resident costs (hiring a guide, higher license and tag fees), which in turn drive much of the difference in resident and non-resident odds.

Any remaining difference in odds between residents and non-residents in drawing a permit for this hunt is a result of a factor entirely beyond the Board's control. Some non-State landowners, specifically FWS and some Alaska Native Corporations have decided to allow onto their land only one guide per geographic area. FWS and other owners like working with one guide who commits to protecting the land and has a long-term stake in satisfying the landowner's desire for good resource conservation practices.[39] For the divisions of the Kodiak brown bear draw hunt occurring solely on FWS land or on the land of a private owner who has similarly determined to work with one guide per area, non-residents only apply for a permit after they have hired a guide, and the guide only accepts as many clients as

[39] As discussed in note 6 above, FWS awards guide concessions on a competitive basis, for limited periods of time, in a manner fully compliant with this Court's decision in *Owsichek*. 763 P.2d at 497-98. *See* 50 CFR 36.41(e)-(g).

there are non-resident permits available. That result is a system that requires the non-resident hunter to be diligent enough to book a hunt years in advance, before other non-resident hunters book the remaining available spots. Exc. 353. For hunts on those lands, non-resident hunters turned away by a guide after all available spots are taken are omitted from the non-resident lottery statistics, because they never enter the non-resident lottery, yet they still are hunters unable to obtain a permit. The State has chosen to allow multiple guides to work the same areas of its land, so the non-resident permit system uses a full lottery-based system for hunt divisions on State lands.

Finally, a discussion of policy issues, and even the existence of grounds for reasonable disagreement, does not establish a constitutional violation warranting judicial intervention. As discussed above, Art. VIII § 2 vests the authority to resolve policy differences in the Legislature, which has delegated that authority to the Board.

IV. CONCLUSION

The judgment of the Superior Court in favor of Defendant State Board of Game should be affirmed.

Respectfully submitted this 12th day of June, 2023.

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