

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ROBERT CASSELL, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF ALASKA, BOARD OF ) Supreme Court No. S-18476  
 GAME, )  
 Appellee. )  
 )  
 \_\_\_\_\_ )  
 Superior Court: 3AN-19-07460CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE  
THE HONORABLE JUDGE ANDREW GUIDI

**BRIEF OF AMICUS CURIAE**  
**RESIDENT HUNTERS OF ALASKA**

Filed in the Supreme Court  
for the State of Alaska on  
this \_\_\_ of December, 2022.

Meredith Montgomery, Clerk  
of the Appellate Courts

By: \_\_\_\_\_  
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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
AUTHORITIES PRINCIPALLY RELIED ON.....	v
INTERESTS OF AMICUS CURIAE RESIDENT HUNTERS OF ALASKA.....	1
STATEMENT OF FACTS .....	2
A.    THE OPPORTUNITY TO HUNT KODIAK BROWN BEAR IS HIGHLY VALUED BY ALASKA RESIDENTS .....	2
B.    BOARD OF GAME POLICIES FAVOR NONRESIDENTS OVER RESIDENTS WHO WISH TO HUNT KODIAK BROWN BEAR.....	3
1.    Resident hunters must seek a permit through the lottery, and only a small percentage are drawn. No resident hunter is guaranteed the chance to hunt .....	4
2.    Approximately 35% of draw permits are reserved for nonresidents – and essentially all nonresidents who contract with a guide for a hunt are allowed to hunt in their chosen location and season .....	5
3.    Other rules increase nonresident hunters’ chances of being selected .....	7
C.    THE OPPORTUNITY TO HUNT IN THE ROAD SYSTEM IS NOT COMPARABLE TO OPPORTUNITIES AWARDED THROUGH DRAW PERMITS FOR HUNTING IN MORE REMOTE PARTS OF THE KODIAK ARCHIPELAGO .....	10
D.    THE BOARD OF GAME’S JUSTIFICATIONS FOR RESERVING OVER A THIRD OF PERMITS FOR NONRESIDENTS ARE NOT FACTUALLY SOUND ....	12
1.    Alaska resident hunters contribute greatly to the Alaska economy .	13
2.    Eliminating nonresident preferences would not destroy the professional guiding industry .....	15

3.	The risk of effects on conservation of the resource, due to uncertainty over the effects of changing the allocation of permits, is overstated .....	16
E.	KODIAK IS NOT THE ONLY PLACE WHERE THE BOARD OF GAME FAVORS NONRESIDENTS OVER RESIDENTS AND GUIDES OVER NONGUIDED HUNTERS .....	19
	ARGUMENTS.....	21
	THE ALASKA CONSTITUTION PROHIBITS GAME-MANAGEMENT PRACTICES THAT FAVOR NONRESIDENTS OVER RESIDENTS AND THAT FAVOR A PRIVILEGED FEW OVER MANY ORDINARY ALASKANS .....	21
	CONCLUSION.....	25

## TABLE OF AUTHORITIES

<u>Cases</u>	Page
<i>McDowell v. State, Department of Fish and Game</i> , 785 P.2d 1 (Alaska 1989) .....	21, 22
<i>Owsichek v. State, Guide Licensing and Control Board</i> , 763 P.2d 488 (Alaska 1988) .....	15, 24
<i>Shepherd v. State, Department of Fish and Game</i> , 897 P.2d 33 (Alaska 1995) .....	23
<i>State, Department of Fish and Game v. Manning</i> , 161 P.3d 1215 (Alaska 2007) .....	22
 <u>Constitution</u>	
Alaska Constitution, art. I, § 23 .....	22
Alaska Constitution, art. VIII, § 2 .....	21
Alaska Constitution, art. VIII, § 3 .....	1, 15, 21, 24
Alaska Constitution, art. VIII, § 15 .....	21
 <u>Statutes and Regulations</u>	
5 AAC 92.050 .....	3, 5, 8, 10
5 AAC 92.057(b) .....	19
5 AAC 92.061 .....	5, 6, 9
5 AAC 92.069(b)(3).....	19
5 AAC 92.990(a)(85).....	8
AS 08.54.610 .....	14
AS 08.54.620 .....	14
AS 08.54.630 .....	14
AS 16.05.407 .....	6, 7, 8, 11

AS 16.05.408 .....6, 7, 11

**Other Authorities**

2022-2023 Alaska Hunting Regulations, available at  
<https://wildlife.alaska.gov/index.cfm?wildliferegulations.hunting> ..... 3

2023-2024 Drawing Permit Supplement, available at  
<https://www.adfg.alaska.gov/index.cfm?huntlicense.drawsupplements> ..... 20

Alaska Constitutional Convention Papers, Folder 210, Papers Drafted by Committee  
on Resources, Memorandum (titled “Terms”)..... 21

Brown Bear Trivia, available at  
<https://www.adfg.alaska.gov/index.cfm?brownbear.trivia>..... 5

## **AUTHORITIES PRINCIPALLY RELIED ON**

### **Alaska Constitution, Article VIII, § 2**

General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

### **Alaska Constitution, Article VIII, § 3**

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

### **5 AAC 92.050. Required permit hunt conditions and procedures**

- (a) The following conditions and procedures for permit issuance apply to each permit hunt:
  - (4) permit issuance:
    - (A) the department shall issue registration permits in the order applications are received, and drawing permits on a lottery basis;
  - (5) except as provided in (6) of this subsection, a permit is nontransferable . . . .

### **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;
  - (2) the department shall enter, in a resident drawing, each application from a resident and each application from a nonresident accompanied by a resident relative who is within the second degree of kindred; . . . ;
  - (3) the department shall enter, in a guided nonresident drawing, each complete application from a nonresident who will be accompanied by a guide . . . ;
  - (4) the following provisions apply to a guided nonresident drawing under this section:
    - (A) an applicant for a guided nonresident drawing permit may apply for one such permit for fall hunts and one such permit for spring hunts;
    - (B) after the successful applicants have been selected by drawing, the department shall create an alternate list by drawing the remaining names of applicants for a

specific hunt and placing the names on the alternate list in the order in which the names were drawn;

(C) if a successful applicant cancels the guided hunt, the person whose name appears first on the alternate list for that hunt shall be offered the permit; if an alternate applicant cancels the guided hunt, the permit must be offered in turn to succeeding alternate applicants until the alternate list is exhausted;

(D) if a guided nonresident drawing permit is available, but the alternate list is exhausted, the permit becomes available, by registration at the Kodiak ADF&G office, to the first applicant furnishing proof that the applicant will be accompanied by a guide[.]

## INTERESTS OF AMICUS CURIAE RESIDENT HUNTERS OF ALASKA

Resident Hunters of Alaska is an organization of Alaska residents, formed in 2016 to enhance opportunities for Alaska resident hunters in accordance with responsible wildlife management so that the Alaskan hunting heritage is preserved for future generations. [R. 555] RHAK had approximately 2,500 members from all across Alaska when this suit was filed. [*Id.*] Statewide membership has since increased to approximately 3,200.

RHAK is unabashedly pro-Alaskan and aims to secure priority for Alaskan hunters over nonresidents whenever prudent game-management practices require that limits be placed on harvesting wildlife resources. RHAK's mission is supported by the Alaska Constitution, which establishes that Alaska's wildlife, in its natural state, is reserved to the people of the state for their common use.<sup>1</sup>

RHAK participated as an amicus in the superior court. [Exc. 236-61; R. 323] It presents this brief with the consent of the parties and in accordance with an order from this Court.<sup>2</sup>

As an amicus, RHAK's goals are to underscore the importance of hunting to many ordinary Alaskans, to illustrate how resident hunters are harmed by the Board of Game policy at issue in this case, and to show that some of the apparent justifications for the policy cannot be sustained.

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<sup>1</sup> See Alaska Constitution, art. VIII, § 3.

<sup>2</sup> See Order, No. S-18476, Allow Amicus Briefs & Accept Briefing Schedule (Nov. 10, 2022).



RHAK urges this Court to reverse the judgment of the superior court and to declare that the Board of Game acted unconstitutionally when it adopted regulations that allocate to nonresidents up to 40% of the draw permits for hunting Kodiak brown bear.

## STATEMENT OF FACTS

### A. THE OPPORTUNITY TO HUNT KODIAK BROWN BEAR IS HIGHLY VALUED BY ALASKA RESIDENTS.

Many Alaskans choose to live in this state because the hunting opportunities here are unrivalled in any other state. [R. 556] The variety of game is large, and, although travel to remote areas in the state is not inexpensive, living in Alaska removes the cost of having to travel to the state to begin a hunt, making hunting more feasible for ordinary people.

The Kodiak coastal brown bear is a prime example of a special opportunity to hunt that is unique to Alaska. Few places in the world still have huntable brown bear populations, and Alaska is the only state where hunters can pursue a coastal brown bear in unspoiled habitat. Hunting in remote areas of Kodiak is like going back in time to an earth of long ago, where the great bear still roams in its rugged, natural environment. [R. 556]

Hunters admire and respect the Kodiak brown bear for its size and potential ferocity, and the challenge that hunting such a dangerous animal presents. [R. 556] The memories from a successful hunt are preserved in mounts, rugs, and skulls that adorn the hunter's home. However, even an unsuccessful hunt is a valued experience. Alaskan hunters appreciate the opportunity to camp and to seek a bear in the remote wilderness.

Alaska resident hunters are unhappy that the Board of Game makes gaining a chance

to hunt a Kodiak brown bear so much easier for a wealthy nonresident, as compared to an Alaska resident. Not only are they displeased, they believe that the Board acts unconstitutionally when it grants any hunting preference to nonresidents over residents.

**B. BOARD OF GAME POLICIES FAVOR NONRESIDENTS OVER RESIDENTS WHO WISH TO HUNT KODIAK BROWN BEAR.**

This case concerns non-subsistence brown bear hunts in Game Management Unit (GMU) 8, the Kodiak Archipelago.<sup>3</sup> For management purposes, the Board of Game distinguishes the Kodiak Road System Management Area from the remainder of GMU 8. A registration permit system applies to the road system.<sup>4</sup> Hunting on the road system is not comparable to hunting in the more remote areas of the Kodiak Archipelago.<sup>5</sup>

For the trophy-sized bears that are at the heart of hunting on Kodiak, the Board of Game operates a draw permit system – essentially a random choice lottery – to select those who will be allowed to hunt a brown bear.<sup>6</sup> The details are described in the following subsections, but, in overview, the system is this: Approximately 500 permits are awarded

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<sup>3</sup> Federal authorities manage a small subsistence hunt open only to residents of the remote communities on Kodiak Island. [R. 581] The rules for the subsistence hunt are not at issue in this case.

For a full-page map of Game Management Unit 8, see 2022-2023 Alaska Hunting Regulations at 61, available at <https://wildlife.alaska.gov/index.cfm?adfg=wildliferegulations.hunting>. A smaller version is available at Exc. 125 (slide 45).

<sup>4</sup> See map cited, *supra*, n.3 (area 3); Exc. 125 (slide 45).

<sup>5</sup> See, *infra*, at 10-12.

<sup>6</sup> See 5 AAC 92.050(a)(4)(A) (“The following conditions and procedures for permit issuance apply to each permit hunt: the department shall issue . . . drawing permits on a lottery basis[.]”).

each year. [Exc. 120 (slide 35)] The Board divides the permits, first, between the fall and the spring hunting seasons, then among the 31 hunting areas in GMU 8; finally, the Board subdivides the total in each hunting area between resident and nonresident hunts. [*E.g.*, Exc. 145 (2019-2020 hunts); R. 585 (2020-2021 hunts), 595 (2021-2022 hunts)]

Alaskans can participate in this hunt only if they are drawn in the lottery – and, for some of the Kodiak brown bear hunts, the odds of a resident application being drawn are under 1%; for almost all Kodiak Island hunts, the odds of a successful draw are under 10% for a resident. [Exc. 163; R. 587, 613]<sup>7</sup> By contrast, for many of the Kodiak Island hunts, nonresidents effectively can purchase a guaranteed opportunity to hunt in a particular area, and, for all hunts, a nonresident’s application has a higher chance of being drawn than does a resident’s. [Exc. 163; R. 587, 613]<sup>8</sup>

- 1. Resident hunters must seek a permit through the lottery, and only a small percentage are drawn. No resident hunter is guaranteed the chance to hunt.**

The Kodiak brown bear hunt is extraordinarily popular among Alaska residents. According to the evidence presented to the superior court for the fall 2020 and spring 2021 hunts (the then-most recently announced results of permit hunt drawings for residents), 331 permits were awarded to residents.<sup>9</sup> ADF&G has estimated that approximately 5,000

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<sup>7</sup> See Exc. 145 (resident hunts on Kodiak Island are DB 201-228 and 231-258; resident hunts in the rest of the Archipelago are DB 261-263 and 291-293).

<sup>8</sup> See Exc. 145 (nonresident hunts on Kodiak Island are DB 101-128 and 131-158; nonresident hunts in the rest of the Archipelago are DB 161-163 and 191-193).

<sup>9</sup> That total includes up to 8 for nonresidents applying to hunt in the company of a resident relative. [*E.g.*, Exc. 145; R. 585] The Board’s decision to allocate residents’ permits to nonresidents hunting with a resident is discussed further, *infra*, at 7-8.

residents submit applications each year, which makes the average resident applicant's chance of being selected approximately 6%.<sup>10</sup>

The actual chance of a resident's application being selected for a Kodiak brown bear hunt varies by area. For the 2020 drawings, in some of the 28 hunting areas on Kodiak Island, an Alaska resident's application had a less than 1% chance of being drawn. [R. 613] In no hunting area did a resident's application chance of success exceed 23%, and in most areas the chance of a resident's application being drawn was in single digits. [*Id.*]<sup>11</sup>

Given these long odds, Alaskans sometimes apply year after year after year without being drawn. [R. 655-57]

**2. Approximately 35% of draw permits are reserved for nonresidents – and essentially all nonresidents who contract with a guide for a hunt are allowed to hunt in their chosen location and season.**

The story is very different for nonresidents seeking a permit. The Board regulation that has been challenged in this case authorizes the Board to reserve up to 40% of the draw permits for out-of-state residents.<sup>12</sup> In most recent years, approximately 35% have been reserved for nonresidents of Alaska, meaning residents may apply for only approximately 65% of the draw permits.<sup>13</sup>

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<sup>10</sup> See <https://www.adfg.alaska.gov/index.cfm?adfg=brownbear.trivia>. The total number of applications exceeds 5,000, because residents may submit up to six applications per species per year. See 5 AAC 92.050(a)(2)(A).

<sup>11</sup> See also R. 587 (showing similar data from the 2019 drawings).

<sup>12</sup> See 5 AAC 92.061(a)(1) (“the department shall issue a maximum of 40 percent of the drawing permits to nonresidents”).

<sup>13</sup> According to ADF&G's summary of the recent practice, approximately 320 spring permits are available annually, with 105 for nonresidents and 215 for residents; 180 fall permits are issued, with 64 to nonresidents and 116 to residents. [Exc. 120 (slide 35)] For

For the 2020 permit hunt drawing, the Board of Game set aside 176 permits for nonresidents. [R. 613] A guided nonresident may submit one application per season (i.e., one for fall and one for spring), and all applications must be accompanied by a contract with a professional guide.<sup>14</sup> For the 2020 hunts, 315 applications were received from nonresidents, giving any application a 55% chance of being drawn. [*Id.*] However, for guided nonresident hunts, the *overall* percentage of success in the drawing is misleading.

By law, nearly all nonresidents who wish to hunt a Kodiak brown bear must hunt with a licensed professional guide.<sup>15</sup> Most of the Kodiak Archipelago lies within a National Wildlife Refuge, and the guides who work within the refuge have exclusive guiding areas – meaning only one guide is allowed to take clients into the area.<sup>16</sup> For all practical purposes, where a guide has an exclusive guiding area, the nonresident permits allocated to that area are essentially allocated to the guide.<sup>17</sup> Twenty-one of the twenty-eight hunting

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more specific year-by-year numbers, see R. 614 (nonresidents’ 2018 permits; residents’ fall 2018/spring 2019 permits); Exc. 145 (nonresidents’ 2019 permits; residents’ fall 2019/spring 2020 permits); R. 613 (nonresidents’ 2020 permits; residents’ fall 2020/spring 2021 permits); R. 595 (nonresidents’ 2021 permits; residents’ fall 2021/spring 2022 permits). The reduced numbers for the 2021/2022 drawing reflect the pandemic, when many people could not travel; some permits were forfeited and some were transferred to a later season, meaning fewer new permits were available. [R. 615, 617-18]

<sup>14</sup> See 5 AAC 92.061(a)(3), (a)(4)(A); Exc. 127 (slide 49); R. 585, 595.

<sup>15</sup> See AS 16.05.407, .408. The exception, discussed further below, is for United States citizens who reside outside Alaska and who will be guided on their hunt by an Alaska relative within the second degree of kinship. A nonresident in this category must apply as a “resident.” [Exc. 145]

<sup>16</sup> See Exc. 127 (slide 50); R. 556-57, 560, 652.

<sup>17</sup> See 5 AAC 92.061(a)(1) (“each guide may submit the same number of nonresident applications for a hunt as the number of permits available for that hunt”).

areas on Kodiak Island are mostly or entirely included in an exclusive guide use area.<sup>18</sup> In the 2018 drawings, only 6 of the 42 hunts in these areas (i.e., the spring plus the fall hunts) had an applicant who did not receive a permit. [Exc. 163] The results in other years were similar. [R. 587, 613] Further, as discussed more below, some guides direct their clients not even to bother submitting an application for a permit.<sup>19</sup> The guide and client simply pick up an unawarded permit as they start their hunt. [Exc. 127 (slide 50), 296 (Tr. 77-79)]

In all the years reflected in the record, in every hunting area in the Kodiak Archipelago, the percentage chance for a nonresident application to be selected was higher than the chance for a resident application – and typically much higher. [Exc. 163; R. 587, 613]

## **2. Other rules increase nonresident hunters' chances of being selected.**

Besides setting aside 35% of the permits for nonresidents, the Board of Game has at least three other policies that increase a nonresident's chance to acquire a sought-after permit, while decreasing residents' chances to win the right to hunt a Kodiak brown bear.

***Resident hunting permits are awarded to nonresidents who wish to hunt with a relative:*** Although most nonresidents are statutorily required to use a professional guide,<sup>20</sup> an exception allows nonresident U.S. citizens to hunt brown bear in the company of an

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<sup>18</sup> See Exc. 145 (hunting areas that fall mostly or entirely in an exclusive guide use area are designated with an asterisk).

<sup>19</sup> See, e.g., Exc. 163 (for 17 of the hunts that are partly or wholly within an exclusive guide use area, no permit applications were submitted); R. 613 (no permit applications for 12 of those hunts). But undersubscribed nonresident hunts – hunts where permits go unused – are rare. [Exc. 188-89 (Tr. 96-97)] See, *infra*, at 8-10.

<sup>20</sup> See AS 16.05.407, .408.

Alaska resident who is a relative within the second degree of kindred (often referred to as “2DK” hunters).<sup>21</sup> For Kodiak brown bear hunts, all nonresident hunting permits are reserved for nonresidents who will hunt with a licensed professional guide. [Exc. 145; R. 585, 595]

The Board of Game requires a nonresident prospective 2DK hunter to apply for a permit in a “resident” hunt. [Exc. 145, 178 (Tr. 53-54)] In recent years, the Board has allowed up to 8 resident permits for Kodiak brown bear to be awarded to nonresidents who plan to hunt with a resident relative. [Exc. 145; R. 585, 595, 614] If the resident relative also seeks to hunt, he or she must apply for and be awarded his or her own permit. [*Id.*] The practice of awarding permits to *nonresident* 2DK hunters out of the permits allotted to *residents* is unique to the Kodiak brown bear draw permit system. [Exc. 122 (slide 39), 178 (Tr. 55)]

***Resident hunters are not eligible to receive a permit that otherwise would not be used, but nonresident hunters may:*** Resident permits, with very limited exceptions, cannot be redistributed or transferred.<sup>22</sup> In a typical year, 44% of residents who receive a draw permit are unable to hunt; those permits go unused.<sup>23</sup> Resident hunters who applied

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<sup>21</sup> See AS 16.05.407(a)(2). Second degree of kindred means a parent, sibling, child, spouse, grandparent, grandchild, brother/sister-in-law, father/mother-in-law, son/daughter-in-law, stepfather/mother, stepbrother/sister, or stepson/daughter. See 5 AAC 92.990(a)(85).

<sup>22</sup> See 5 AAC 92.050(a)(5). The Board granted some atypical exceptions when hunters could not use their permits because of the pandemic. [R. 615, 617-18]

<sup>23</sup> See Exc. 129 (slide 54); see also R. 626-27 (Proposal 104); Exc. 128 (slide 52), 190-93 (Tr. 103-15 (Board of Game rejected Proposal 104, which sought to create an alternate

for a permit and were not drawn have no chance to take advantage of a last-minute opportunity that arises if another resident hunter cannot use his or her permit. By contrast, for nonresidents the state maintains an alternate list for permit applicants who were not drawn.<sup>24</sup> Further, if no names remain on the alternate list, a nonresident with a guide contract may secure one of the unused permits over-the-counter on a first-come-first-served basis.<sup>25</sup> Very few nonresident permits go unused.<sup>26</sup> [Exc. 188-89 (Tr. 96-97)]

*Nonresidents, unlike residents, may receive a “draw” permit without actually participating in a drawing:* The tables of applications and awards show that no nonresidents applied for some of the permit hunts within an exclusive guide use area [Exc. 163; R. 587, 613], but that does not mean no nonresidents will hunt in those areas. The Board’s regulations allow a guide in an exclusive use area to apply for all the permits in an area where he has exclusive guiding rights.<sup>27</sup> In practice, guides in these areas sometimes opt not to apply, and they direct their clients not to bother applying for a draw permit, because a guide with an exclusive area knows that the nonresident permits allocated to his area cannot be used by anyone other than his clients. Thus, the guide can sign a contract with a client, and, when the client arrives in Alaska to hunt, the guide takes the client to

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list for resident hunters, so other residents could claim permits that otherwise would not be used)).

<sup>24</sup> See 5 AAC 92.061(a)(4)(B), (C); see also Exc. 145; R. 585, 595.

<sup>25</sup> See 5 AAC 92.061(a)(4)(D); see also Exc. 145; R. 585, 595.

<sup>26</sup> See Exc. 129 (slide 54 (on average 89% of available nonresident permits are used)), 188-89 (Tr. 96-97 (only 10 hunts in 10 years were undersubscribed)).

<sup>27</sup> See 5 AAC 92.061(a)(1).



pick up the necessary permit over-the-counter.<sup>28</sup> This system allows the guide to be certain that he will have a client ready to hunt each permit authorized for his area.<sup>29</sup>

**Summary:** In short, a wealthy nonresident can virtually guarantee he will receive a permit to hunt a Kodiak brown bear after he enters a contract with a professional guide. Although regulations direct that draw permits be awarded “on a lottery basis,”<sup>30</sup> for wealthy nonresidents, obtaining a Kodiak “draw permit” often does not actually involve a drawing or lottery. The system established by the Board of Game allows privileged nonresidents to purchase a guaranteed opportunity to hunt, whereas all Alaska residents must take their chances in a drawing.

**C. THE OPPORTUNITY TO HUNT IN THE ROAD SYSTEM IS NOT COMPARABLE TO THE OPPORTUNITIES AWARDED THROUGH THE DRAW PERMITS FOR HUNTING IN MORE REMOTE PARTS OF THE KODIAK ARCHIPELAGO.**

As noted earlier, ADF&G administers an entirely separate program for hunting brown bears in the small road system area near the City of Kodiak.<sup>31</sup> This is a registration

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<sup>28</sup> See Exc. 127 (slide 50); see also Exc. 188-89 (Tr. 96-97), 296 (Tr. 77-79) (both explaining the process that allows some hunts to *appear* undersubscribed when in fact they are not).

<sup>29</sup> Additionally, according to ADF&G, some guides in some years choose not to have clients hunt all the permits available for the guide’s exclusive use area. ADF&G believes the guides have a conservation motive – i.e., in some years some guides conclude that too many permits have been authorized for the number of trophy bears that the guide believes are available in the area. See Exc. 189 (Tr. 98-100). ADF&G has never explained why it is comfortable with guides making bear-harvest decisions that are inconsistent with the game-management plan the professionals at ADF&G developed.

<sup>30</sup> 5 AAC 92.050(a)(4)(A).

<sup>31</sup> See Exc. 125 (slides 45, 46), 145 (map shows the eastern portion of Kodiak Island outside the draw permit areas).

hunt, with no limit on the number of permits. [Exc. 98, 125 (slides 45, 46)] Residents and nonresidents may receive permits on an equal, unlimited basis, but nonresidents may hunt only in the company of a 2DK relative or a professional guide. [Exc. 98]<sup>32</sup>

The purpose of the road system hunt differs from hunts in the rest of the Archipelago. Outside the road system, Kodiak brown bear hunting is quintessentially a trophy hunt. [Exc. 100-01] Along the road system, bear hunting serves chiefly to minimize conflicts between people and bears in the most heavily settled part of the island. [Exc. 125 (slide 45), 186-87 (Tr. 87, 89)] Trophy bears are less common in this area, since the best bear habitat is elsewhere, and, with unlimited permits for a small area, the competition in the road system area is more intense. [Exc. 187 (Tr. 90-91); R. 655, 660 (n.6)]

An average of 219 Alaska residents obtain a registration permit each year, but only 54% of the permits are hunted. [Exc. 125 (slide 46)] Many of the permits are obtained by people who live in the City of Kodiak; of these, many do not actively hunt, but, with a permit, they are authorized to shoot a bear if they see one as they drive in the area to and from work or stores or to access other recreational opportunities. [Exc. 186 (Tr. 87-88), 295 (Tr. 75-76); R. 557] Some registration permits are obtained by Alaskans who reside off of Kodiak Island and who do not win a draw permit or who lack the time or physical ability to hunt in the more remote areas; they can come to Kodiak Island to hunt the road system, but the success rate is not high: fewer than 9% of Alaska residents who hunt in the

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<sup>32</sup> See AS 16.05.407(a), .408(a).

road system area succeed in harvesting a bear. [Exc. 125 (slide 46), 187-88 (Tr. 92-94); R. 557]

The number of registration permits obtained by nonresidents is increasing. [R. 624] Although that number remains small compared to the number of Alaska residents (28 nonresidents in an average year versus 219 residents), a much higher percentage of the nonresidents who obtain these permits actively hunt the area. [Exc. 125 (slide 46)] Nonresidents enjoy a substantially higher success rate than resident hunters, since most nonresidents hunt with a professional guide. [*Id.*] A few nonresident 2DK hunters also obtain registration permits when they come to stay with a local relative, especially when they come to hunt deer in a season that overlaps with the brown bear season; their success rate is low.<sup>33</sup> On average, despite the larger number of registration permits issued to residents, nonresidents hunting the road system harvest as many bears on the road system as residents do. [Exc. 125 (slide 46)]

A proposal to eliminate the competition from nonresidents in the road system area was rejected by the Board of Game in 2019. [R. 623-24 (Proposal 102); Exc. 186-88 (Tr. 86-95)]

**D. THE BOARD OF GAME'S JUSTIFICATIONS FOR RESERVING OVER A THIRD OF PERMITS FOR NONRESIDENTS ARE NOT FACTUALLY SOUND.**

As a matter of law, even a sensible policy cannot save an unconstitutional allocation practice. Still, it is useful briefly to examine the facts that demonstrate why the Board's

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<sup>33</sup> See Exc. 125 (slide 46 (during the 5 years between 2015 and 2019, 12 2DK hunters received a registration permit and one of them successfully harvested a bear)); see also Exc. 188 (Tr. 93-94); R. 557.

policy reasons do not justify favoring nonresidents over residents and a few professional guides over many ordinary Alaskans.

Board of Game members offered two main policy grounds for rejecting Cassell's proposal to end the practice of reserving permits for nonresidents. First, Board members stressed that reducing nonresidents' share of the permits would have an adverse economic impact on Kodiak's professional hunting guides, and, they believed, on the overall economy in Kodiak. [Exc. 175-76 (Tr. 41, 45, 46)] Second, Board members responded favorably to comments by ADF&G that any change in the allocation *could* result in changes in the number of bears harvested, and overall permits therefore *might* need to be reduced until game managers could see the actual effects of the change. [Exc. 175-76 (Tr. 41, 47, 48)] Board members voiced similar concerns about the possible effects on the number of permits that might be available in the future as a basis for rejecting another proposal presented at the same meeting that also would have increased hunting opportunities for residents. [Exc. 190-93 (Tr. 103-15)]

The State and the amici on its side endorsed these arguments. [*E.g.*, Exc. 278-79, 282, 330-32, 341, 352-55, 363-67] But the facts are more complicated than any of them acknowledge.

**1. Alaska resident hunters contribute greatly to the Alaska economy.**

Nonresident bear hunters commonly pay over \$20,000 to a professional hunting guide.<sup>34</sup> For this, the guide provides food, shelter, local transportation, and guide services

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<sup>34</sup> See Exc. 99; R. 667-68, 671 (Guide Samuel Rohrer charged \$23,500 per customer for a guided bear hunt in 2019.).

that often include both the registered guide and assistants in the field, who can cook, skin an animal, and carry loads. [R. 558-59, 667-68] In light of the large payment per hunter, it may appear that nonresident hunters invest more into the local economy than resident hunters do.

The initial impression is misleading. First, the guide and his assistants need not be Alaskans<sup>35</sup> – and statistics show that a good number are not. [Exc. 440] Second, an independent study commissioned by ADF&G in 2011, and reported in 2014, determined that resident hunters throughout the state spent over \$1 billion each year in connection with their hunting activities. [R. 690] Nonresident hunters spent only 15% as much – \$150 million per year. [*Id.*]

Beyond that, resident hunters, by definition, live in Alaska. Many resident hunters choose to live in Alaska in part because of the hunting opportunities offered to those who live here. [R. 556, 680-81] Resident hunters pay property taxes in Alaska and, in some communities, sales taxes. They support local nonprofits. They buy groceries, household goods, gasoline, and recreational gear all year round, not only when they enjoy the likely once-in-a-lifetime opportunity to hunt a Kodiak brown bear. When they are lucky enough to get drawn for a Kodiak bear permit, they buy airplane tickets to Kodiak, and then charter planes and boats and other transportation services on Kodiak to reach their hunting areas. They often splurge on hotels and restaurants before and after their hunts. [R. 558] In short, an independent Alaska hunter pays for all the services that nonresidents do, apart from

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<sup>35</sup> See AS 08.54.610, .620, .630 (listing qualifications for a registered guide-outfitter's license, class-A assistant guide license, and assistant guide license).

paying for professional guiding. Additionally, unlike nonresidents, resident hunters buy their gear in Alaska before they hunt, and some hire an Alaskan taxidermist to mount their hides. [R. 558-59, 692]

Certainly, with the requirement that nonresidents hire a professional guide, a typical nonresident hunter of Kodiak bear spends more on average for that hunting trip than his resident counterpart – but the focus on the individual hunter obscures the bigger picture and unfairly diminishes the contributions that resident hunters make to this state’s economy.

RHAK agrees with Dr. Cassell that economic considerations legally cannot trump the requirement of Article VIII, section 3 that wildlife resources must be reserved to “the people for common use,” and thus may not be subject to exclusive grants and privileges favoring one group of Alaskans over another, much less nonresidents over residents.<sup>36</sup> But even if it were legitimate for the Board to consider the economic contributions of nonresident hunters, the full facts, as just discussed, do not support a conclusion that nonresident hunters contribute more to Alaska’s economy than do resident hunters.

**2. Eliminating nonresident preferences would not destroy the professional guiding industry.**

Professional guides certainly benefit financially from having permits reserved for nonresidents, but they could adapt and still earn a good living if all favoritism to nonresidents in the allocation of permits were eliminated. For example, the three master

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<sup>36</sup> See *infra* at 24-25, discussing *Owsichek v. State, Guide Licensing and Control Board*, 763 P.2d 488 (Alaska 1988); see also At. Br. 34-37.

guides who submitted affidavits in support of the Alaska Professional Hunters' Association's intervention all acknowledged that they have other sources of income, although they averred that guiding nonresident bear hunts is their most profitable operation.<sup>37</sup>

As a matter of law, concern for the income of a few can never supplant the constitutional common use rights of the many. And, as above, even if protecting the rights of resident and nonresident guides to make a living were a legitimate concern, the facts do not establish that the current small group of licensed guides could not continue to support their families if the practice of reserving permits for nonresidents is held unconstitutional.

**3. The risk of effects on conservation of the resource, due to uncertainty over the effects of changing the allocation of permits, is overstated.**

In response to Dr. Cassell's proposal to allocate 90% of the Kodiak brown bear draw permits to residents and to allow residents to compete equally with nonresidents for the remaining permits, ADF&G was officially neutral. [Exc. 116 (slide 28)] However, in presenting information to the Game Board, ADF&G representatives focused on what might happen if the allocation between residents and nonresidents changed. [Exc. 118 (slides 31-32), 173-74 (Tr. 33-37)]

ADF&G's historical records establish that participation rates differ for nonresidents and residents who are awarded draw permits: 89% of nonresidents hunt their permits, but

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<sup>37</sup> See R. 658-59 (Chervenak Affidavit at ¶ 2), 663 (Munsey Affidavit at ¶ 3), 667-68 (Rohrer Affidavit at ¶ 4) (reflecting that these guides offer guided hunts for deer and mountain goat, guide fishing and wildlife viewing trips, and earn money through non-guiding activities such as commercial fishing and construction).

only 56% of residents do. [Exc. 117 (slide 29)] On average, guided nonresident hunters are more successful at harvesting a bear than are resident hunters: the success rate, respectively, is 62% for nonresidents, compared to 38% for resident hunters. [*Id.*] Also, the percentage of male versus female bears taken differs: the total bear harvest by nonresident hunters averages 17% female (80 total sows in 5 years, or 16 sows per year on average), whereas resident hunters' harvests are 36% female (129 total sows in 5 years, or 26 sows per year on average). [Exc. 117 (slide 30)] The number of sows harvested per year is significant from a game-management perspective. [Exc. 130 (slide 56), 174 (Tr. 37)] Both nonresidents' and residents' harvests are within ADF&G's management goal that the harvest should be at least 60% male. [Exc. 130 (slide 55)]

Taking all these statistics together, if the allocation of permits shifted from the current 35% nonresident to 10% nonresident, and all else remained the same, statistically the total annual harvest of bears likely would decrease somewhat, and the average annual number of sows harvested would remain the same. [Exc. 118 (slide 31)] A reduced overall harvest could result in an increase in the number of permits to be awarded, ideally along with some additional hunter education to increase the proportion of male bears taken in future hunts.<sup>38</sup>

Rather than emphasize the predictable consequences, based on historical records, of changing the allocation between residents and nonresidents, ADF&G provided the Board of Game with a series of hypotheticals, showing what would happen if an increased

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<sup>38</sup> See Exc. 118 (slide 32), 174 (Tr. 40 (discussing hunter education programs)).



percentage of resident hunters who receive a permit participate in the hunt or if resident hunters increased their success rate but did not alter their percentage take of female bears. [Exc. 118 (slides 31-32), 173-74 (Tr. 33-37)] These scenarios show a hypothetical possibility of exceeding the desired take of female bears, which then could result in having to decrease the number of permits offered. [*Id.*] ADF&G offered no explanation for why, after the “consistent pattern” established over the previous five years, allocating additional permits to residents likely would alter either residents’ rate of participation or the success rate of their hunts. Indeed, with fewer guided nonresidents taking the trophy bears, the resident take of boars rather than sows could be expected to increase. Nor did ADF&G discuss why hunter education could not be used to decrease the proportion of residents’ harvest that is female. ADF&G representatives seemed to feel that they had established a system that was predictable and worked well to achieve the desired harvest, and therefore they were reluctant to contemplate any change. [Exc. 173-74 (Tr. 33-37)]<sup>39</sup>

The successful management of the Kodiak bear population should be cause for celebration, and not a reason to fear change. If the Board of Game were to conclude that a slight upward or downward adjustment in the number of permits awarded is warranted while the consequences of a change in allocation are studied, the Board has the flexibility to do that, as shown by its response to the upheaval in expectations resulting from the coronavirus. [R. 616-19] Fear of the unknown is not a rational justification for refusing

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<sup>39</sup> ADF&G used similar hypotheticals and conveyed a similar desire not to change anything when discussing another proposal presented at the March 2019 Game Board meeting. *See* Exc. 131-32 (slides 57-59), 191 (Tr. 105-08).

to change a policy, particularly when professional wildlife managers have skills and tools to adapt to change.

**E. KODIAK IS NOT THE ONLY PLACE WHERE THE BOARD OF GAME FAVORS NONRESIDENTS OVER RESIDENTS AND GUIDES OVER NONGUIDED HUNTERS.**

Although this lawsuit focuses on the Board of Game’s policies regarding permits to hunt brown bear in GMU 8, Kodiak is not the only place where the Board of Game allocates permits exclusively to nonresidents, reducing or eliminating Alaskan residents’ rights to participate in certain hunts.

For example, in a portion of GMU 21(B), moose hunts where the antlers may be kept are allowed only by draw permits, and fully half of those draw permits are allocated to nonresidents.<sup>40</sup> Reflecting the Board’s partiality to professional guides, up to 75% of the nonresident permits may be awarded to guided nonresidents. [R. 608]<sup>41</sup>

In three game management units – GMUs 12, 13(C), and 20(D) – a regulation requires that 10% of drawing permits for sheep hunts be issued to nonresidents, and at least 50% of the nonresident permits must be issued to nonresident applicants who intend to hunt with a professional guide, rather than with a 2DK relative.<sup>42</sup> Other regulations authorize the Board of Game to issue draw permits to nonresidents up to a specific percentage of the total<sup>43</sup> – and the Board has chosen to set aside permits for nonresidents

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<sup>40</sup> See 5 AAC 92.069(b)(3).

<sup>41</sup> See *id.*

<sup>42</sup> See 5 AAC 92.057(b)(1).

<sup>43</sup> See 5 AAC 92.057(b)(2)-(5).

in these areas, as well as in others.<sup>44</sup> The 2023-2024 Drawing Permit Supplement confirms that the practice continues.<sup>45</sup>

Upholding the Board's policy in this case could open the door to numerous other policies to favor nonresidents over residents, and guides over independent hunters, for hunts across the state.

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<sup>44</sup> See generally R. 596-600, 603, 606, 608-09, 611-12 (all reflecting draw permit hunts with some number reserved for nonresidents).

<sup>45</sup> See 2023-2024 Drawing Permit Supplement at pages 3, 4, 7, 10, 12, 14-19 (all reflecting draw permit hunts with some number reserved for nonresidents), available at <https://www.adfg.alaska.gov/index.cfm?adfg=huntlicense.drawsupplements>.

## ARGUMENTS

### **THE ALASKA CONSTITUTION PROHIBITS GAME-MANAGEMENT PRACTICES THAT FAVOR NONRESIDENTS OVER RESIDENTS AND THAT FAVOR A PRIVILEGED FEW OVER MANY ORDINARY ALASKANS.**

The Alaska Constitution, article VIII, section 3, provides explicitly that, “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” The constitution’s drafters explained: “The expression ‘for common use’ implies that these resources are not to be subject to exclusive grants or special privileges as was so frequently the case in ancient royal tradition.”<sup>46</sup>

Other sections of the constitution also express the framers’ intent that lands and natural resources must be managed for the benefit of all Alaskans, without granting special privileges either to nonresidents or to a few specially-privileged residents. For example, Article VIII, section 2 states: “The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people.” “Its people” plainly refers to Alaskans, not nonresidents, and “people” means the collective many, not an elite few. Article VIII, section 15 explicitly prohibits the creation of any “special privilege” to use the waters of the state, while also authorizing creation of a limited entry fishing-permit system to protect the resource. In *McDowell v. State, Department of Fish and Game*, this Court confirmed that the drafters of the constitution intended the same rule to apply to other state resources, such as wildlife,

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<sup>46</sup> Alaska Constitutional Convention Papers, Folder 210, Papers Drafted by Committee on Resources, Memorandum (titled “Terms”) (quoted in *McDowell v. State, Dep’t of Fish & Game*, 785 P.2d 1, 6 (Alaska 1989)).

so that, under the Alaska Constitution, outside of the limited entry permit system for commercial fishing, “special privileges to take fish *and wildlife* are prohibited.”<sup>47</sup>

Over the decades, this Court’s decisions have given teeth to the constitutional guarantee of common access to the wildlife and avoidance of special privileges. *McDowell*, for example, invalidated a statute that gave preference to rural Alaskans over urban Alaskans for the opportunity to take fish and game for subsistence purposes.<sup>48</sup> The opinion explains succinctly: The “grant of special privileges with respect to game based on one’s residence is . . . prohibited.”<sup>49</sup> This Court reiterated and expanded on this principle in *State, Department of Fish and Game v. Manning*.<sup>50</sup> *Manning* invalidated a regulation that used community statistics, rather than a wholly individualized scoring system, to define eligibility to participate in a subsistence hunt.<sup>51</sup> If granting privileges to some resident Alaskans based on their specific community of residence is constitutionally prohibited, it should follow that granting privileges to nonresidents based on their community of residence also is unconstitutional.

The Alaska Constitution expressly authorizes the state to grant privileges to residents over nonresidents.<sup>52</sup> Recognizing this, this Court, in *Shepherd v. State*,

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<sup>47</sup> *McDowell*, 785 P.2d at 6 (emphasis added); *see id.* at 9.

<sup>48</sup> *See id.* at 9.

<sup>49</sup> *Id.*

<sup>50</sup> 161 P.3d 1215 (Alaska 2007).

<sup>51</sup> *See id.* at 1217-19, 1223-24.

<sup>52</sup> *See* Alaska Constitution, Art. I, § 23.

*Department of Fish and Game*,<sup>53</sup> upheld a statute that required the Board of Game to favor residents over nonresidents when necessary to restrict the total harvest of animals taken for personal consumption.<sup>54</sup> In language that broadly addressed the constitutional requirements for managing access to resources in this state, this Court observed:

The State of Alaska devotes substantial resources to the protection and management of fish and wildlife. As the trustee of those resources for the people of the state, *the state is required to maximize for state residents the benefits of state resources*. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of nonresidents. In such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents, except when such preferences are in conflict with paramount federal interests.<sup>55</sup>

The principles of these cases should control the current case, where the Board of Game has granted a special privilege to nonresidents by limiting residents' ability to participate in the Kodiak brown bear hunt. This preference for approximately 175 nonresidents each year, who are granted permits that residents may not even apply for, is also a preference for the 16 professional guides who have exclusive guide use areas on Kodiak.<sup>56</sup> Both the preference for nonresidents over residents and the choice to protect the income-earning opportunities of a few professional guides over the hunting rights of many Alaskans violate the Alaska Constitution. Such preferences are prohibited by the cases that forbid special privileges and that require prioritizing the rights of residents over

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<sup>53</sup> 897 P.2d 33 (Alaska 1995).

<sup>54</sup> *See id.* at 35, 39-44.

<sup>55</sup> *Id.* at 40-41 (emphasis added).

<sup>56</sup> *See* R. 560 (map names guides who hold exclusive use areas).

nonresidents when both seek access to a limited natural resource.

Principles established in *Owsichek v. State, Guide Licensing and Control Board*<sup>57</sup> are also instructive, though the holding does not apply on the federal lands involved in this case. In *Owsichek*, this Court held that the state guide licensing board acted unconstitutionally when it created exclusive guiding areas where only one professional guide could lead hunts, because such exclusive grants and special privileges violate the common use clause in Article VIII, section 3 of the Alaska Constitution.<sup>58</sup> The licensing board defended its policy on the ground that it needed to protect the investment of guides who had long enjoyed their exclusive areas, and had constructed lodges and other facilities to support their businesses.<sup>59</sup> This Court rejected that argument. Granting exclusive rights to a few guides, this Court determined, is incompatible with the fundamental principle established in the Alaska Constitution that the state's game must be managed for the public good, not for the benefit of a few private individuals.<sup>60</sup> Because the state is charged with managing wildlife for the benefit of all Alaskans, this Court held that the economic interests of a few may not be given precedence over the interests of the many.<sup>61</sup>

That principle applies in this case. The exclusive guide use areas authorized on federal lands are legal, but that does not immunize the Alaska Board of Game's adoption

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<sup>57</sup> 763 P.2d 488 (Alaska 1988).

<sup>58</sup> *See id.* at 496.

<sup>59</sup> *See id.* at 496-97.

<sup>60</sup> *See id.* at 497-98.

<sup>61</sup> *See id.* at 496-98.

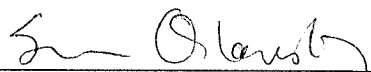
of policies that favor nonresidents and their guides (who also may be nonresidents) at the expense of limiting residents' ability to apply for hunting permits. A policy that grants preferences to nonresident hunters and that favors the economic interests of a handful of guides blatantly violates the clear constitutional principle that forbids giving a special privilege to a few people.

### CONCLUSION

This Court should hold that the reservation of permits for nonresidents, to the exclusion of resident hunters, violates the Alaska Constitution. This Court should reverse the superior court's judgment in favor of the State and direct the entry of judgment in favor of Robert Cassell.

Respectfully submitted, this 29 day of December 2022.

REEVES AMODIO LLC

  
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