IN THE SUPREME COURT OF THE STATE OF ALASKA

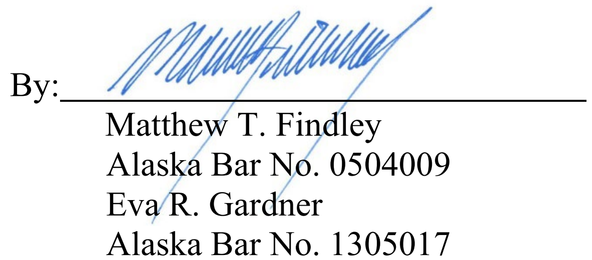
ROBERT CASSELL, Appellant, v. STATE OF ALASKA, BOARD OF GAME, Appellee.	)))))))))	**Supreme Court Case No.: S-18476** Trial Court Case No. 3AN-19-07460CI I certify that the typeface used in this document is 13 Point New Times Roman.

BRIEF OF APPELLANT

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

DATED at Anchorage, Alaska December 19, 2022.

ASHBURN & MASON, P.C.
Counsel for Appellant Dr. Robert Cassell
1227 West Ninth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 276-4331; matt@anchorlaw.com



By:______________________________

Matthew T. Findley
Alaska Bar No. 0504009
Eva R. Gardner
Alaska Bar No. 1305017

Filed in the Supreme Court
for the State of Alaska
this______ day of December, 2022.

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Meredith Montgomery, Clerk

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CONSTITUTIONAL PROVISIONS

Alaska Const. Art. 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.

Alaska Const. Art. 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 Const. Art. VIII § 3. Common Use.

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

Alaska Const. Art. VIII § 4

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.

RULES AND REGULATIONS

Alaska Administrative Code

5 AAC 92.061(a)(4)(B-D)

(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; for each season, the department shall issue a maximum of four permits to nonresident hunters accompanied by a resident relative who is within the second degree of kindred; however, the department may not issue, within

one calendar year, more than one of these permits per individual hunt, as described in the permit hunt guide published each year by the department;

(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;

(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.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal in accordance with AS 25.05.010(a). The superior court issued its decision on May 31, 2022 and entered final judgment on June 21, 2022. Dr. Cassell timely filed his notice of appeal on July 20, 2022.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant Dr. Robert Cassell presents the following issues for review:

1. Did the superior court err in concluding that the Alaska Constitution allows the State of Alaska, Board of Game to set aside hunting permits exclusively for nonresidents?
2. Did the superior court err in ruling that allocating some permits exclusively to residents justifies allocating the remainder exclusively to nonresidents?
3. Did the superior court err in ruling that economic considerations cure constitutional violations?
4. Did the superior court err in concluding that hunting guides have rights equivalent to those of Alaska residents under the Alaska constitution?
5. Did the superior court err in assuming that federal management concerns can trump the Alaska Constitution?

INTRODUCTION

Dr. Robert Cassell is a hunter and an Alaskan. For years, he has applied for a permit to hunt the famed Kodiak Brown Bear, but never received one. As a resident, his statistical likelihood of obtaining a permit in a given hunting season is extremely low. By contrast, if he were a nonresident, he would—as a mathematical near-certainty—have received a permit many times over by now. This is because the State of Alaska, Board of Game has decided to cordon off up to *forty percent* of all Kodiak Brown Bear permits, render them off-limits to the thousands of resident permit applicants, and give them exclusively to the handful of nonresidents who apply for them each year. This practice is not limited to Kodiak; the Alaska Board of Game regularly sets aside significant numbers of hunting permits to Alaska's highly sought-after big game in hunts across the state exclusively for the benefit of *nonresident* hunters.

This is wrong. It is also unconstitutional.

Ensuring the ability of Alaskans to manage and access Alaska's resources was the central compact of statehood. The Alaska Constitution, for that reason, dedicates an entire Article to memorializing the public trust doctrine and mandating that Alaska's natural resources be managed and developed "for the maximum benefit of its people" and that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[1]

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[1] Alaska Const. art. VIII, §§ 2, 3.

Granting nonresidents exclusive access to guaranteed percentages of scarce hunting permits violates both the letter and the intent of these provisions. This Court has made clear that "the provisions in Article VIII were intended to permit the *broadest possible access to and use of state waters by the general public*,"[2] and that they "share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited."[3] Indeed, in both *McDowell v. State*[4] and *Owsichek v. State*,[5] this Court struck down regulations that granted access to Alaska game only to certain subsets of Alaskans. If granting exclusive privileges to a subset of Alaskans is impermissible, granting them to *nonresidents* is even more constitutionally infirm.

The superior court waved these arguments away in a brief decision that stated, without explanation, that the sixty percent of permits set aside for Alaskans for the Kodiak hunts somehow cured any possible constitutional violation. It accepted arguments from the State and the guiding industry's Alaska Professional Hunters Association ("APHA") regarding the purported constitutional rights of guides to guide (even though many guides are not Alaska residents entitled to Article VIII rights) and the alleged trickle-down economic benefits of the guiding industry (even though the Board is not authorized to engage in economic regulation). The superior court was wrong on all counts.

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[2] *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973) (emphasis added).

[3] *McDowell v. State*, 785 P.2d 1, 6 (Alaska 1989).

[4] *Id.* (holding that the requirement that one live in a certain area to engage in subsistence fishing violates Article VIII).

[5] 763 P.2d 488 (Alaska 1988) (granting exclusive guide areas violates Article VIII).

Dr. Cassell's claim here is that while the Board is authorized to enact some form of resident preference regarding access to hunting permits, it is constitutionally barred from enacting a *nonresident* preference and prohibiting Alaskans from applying for a certain percentage of hunting permits. The fact that there exists a resident permit allocation for the Kodiak Brown Bear and other hunts does not give the Board license to take away the remaining permits from Alaskans in violation of the Constitution. Similarly, the Board cannot take shelter behind any alleged economic or conservation benefits associated with the nonresident preference. These alleged benefits cannot justify any State policy that violates the letter and intent of the Constitution. The Board cannot claim here it is simply allocating game permits between user groups any more than the Board of Fish could have claimed in *McDowell* that it was simply allocating access to subsistence fisheries between urban and rural user groups. When a Board allocation violates the Constitution, it matters not what the alleged benefits of the constitutional violation may be.

Nonetheless, the State and APHA have continually tried to frame this case as a discretionary review of how the Board allocates access to hunting permits between residents and nonresidents, arguing that because Alaskans are given access to over sixty percent of the permits there is no problem. Again, the problem is enacting a nonresident permit preference and barring Alaskans from applying for these permits. This nonresident preference is an unconstitutional allocation, and granting residents access to the remaining permits does not make up for what the Board has taken away.

Dr. Cassell brought this case to vindicate the rights of Alaska resident hunters to have full, fair access to Alaska's wildlife, as guaranteed in the Alaska Constitution, and to end the practice of granting nonresidents exclusive access to permits to hunt Alaska game. Dr. Cassell therefore respectfully requests a ruling that any set-aside of hunting permits exclusively for nonresidents (regardless of how many may be reserved for residents) violates Article VIII.

FACTUAL BACKGROUND

I. GAME MANAGEMENT IN ALASKA

A. Board of Game's Role and Responsibility.

Alaska's 365 million acres hold over 1,000 vertebrate species, including 32 species of carnivores—more than any other state.[6] It also has over a dozen species of big game animals.[7] Wildlife are so important that, unlike many other states, Alaska chose to codify citizens' wildlife rights in its constitution.[8] Hunting is one of the major ways Alaskans exercise their constitutional right to enjoy and benefit from the state's wildlife resources. Alaska offers unparalleled wilderness hunting opportunities, ranging from small game such as grouse or hare, to big game such as brown bear.[9] All of Alaska's wildlife resources are managed by the Alaska Department of Fish and Game ("ADF&G"). While Alaskans think of wildlife as abundant, virtually all big game animals have seasons and bag limits. Alaska's big

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[6] Exc. 79.
[7] Exc. 81.
[8] Exc. 82.
[9] Exc. 81; Exc. 83.

game is a renewable but perpetually scarce resource that requires close and careful management.[10]

The State of Alaska Board of Game ("Board") is part of ADF&G. It was created "[f]or purposes of the conservation and development of the game resources of the state[.]"[11] The Board consists of seven members and it promulgates regulations for hunting, including regulations that establish hunting seasons, areas for taking game, bag limits, and regulating the methods and means of hunting game in Alaska.[12] The Board is charged with making allocation decisions and ADF&G is responsible for management based on those decisions.[13]

B. Board Allocation of Hunting Permits in Cases of Game Scarcity.

The Board manages different hunts in different ways. For some, such as general season hunts, the hunter merely needs to hold a hunting license.[14] For hunts involving certain wildlife populations in certain locations, however, the Board strictly limits the number of permits that can be issued. This occurs where the Board has determined that the subject animals do not exist in great enough numbers to support unlimited hunting. To ensure the animal populations are protected, the Board restricts the number of permits allowed for these species in the different game units.[15] For hunt permits that are highly sought-after, the Board has implemented a

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[10] Exc. 81; Exc. 83.

[11] AS 16.05.221(b).

[12] AS 16.05.255; *see also* 5 AAC Chapters 84, 85, 92, and 99.

[13] Exc. 85-86.

[14] Exc. 87.

[15] *See generally* 5 AAC 85.010-.085.

"drawing permit" system, where individuals apply for permits through a lottery.[16] The computerized lottery system randomly assigns each hunter a number, and the hunters provided with the lowest numbers receive hunting permits for the designated game unit.[17]

The Board decides how permits will be allocated between residents and nonresidents. It has the statutory authority to restrict nonresident hunting of big game animals "[w]henever it is necessary" "so that the opportunity for state residents to take big game can be reasonably satisfied in accordance with sustained yield principles[.]"[18]

C. Board Allocation of Drawing Permits Exclusively to Nonresidents.

The Board has a long history of dividing its limited drawing permits into two pools—one for residents, one for nonresidents—and placing high percentages of the permits in the nonresident-only pool. It does this *despite* the scarcity of these permits, *despite* substantially higher numbers of residents competing for the permits, and *despite* its express statutory mandate to ensure and prioritize resident access to big game hunts.[19]

For example, in Game Unit 21(B), the Board allocates up to 50% of moose

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[16] Exc. 88.
[17] Exc. 89.
[18] AS 16.05.256.
[19] The Board also limits the number of permits granted to nonresidents in general and places other restrictions on nonresidents, including bag limits and limited open season dates. *See generally* 5 AAC 85.010-.085.

hunting permits to nonresidents and 50% to residents.[20] In other game units, it allocates up to 25% of hunting permits to nonresidents with the remaining permits allocated to residents.[21] By statute, all nonresidents who wish to hunt big game (brown and grizzly bear, mountain goat, sheep) must hunt with a licensed professional guide.[22]

Nowhere is the practice of dedicating to nonresidents a large percentage of Alaska's scarce game hunting permits more egregious than in the Kodiak Brown Bear hunt. The Kodiak Archipelago ("Kodiak") is home to the largest bears in the world: a unique subspecies of brown bear, *Ursus arctos middendorffi,* commonly known as the Kodiak Brown Bear, that has been genetically isolated from other bears for 12,000 years.[23] Kodiak Brown Bears are generally considered to be one of the greatest trophy animals in North American hunting and are prized by sport hunters.

Game Unit 8 includes the Kodiak Brown Bear and has for many years been subject to limited hunting permit draws.[24] The Kodiak Brown Bear draw is a highly coveted permit that thousands of hunters apply for each year, and only a select few

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[20] *See* 5 AAC 92.069(b)(3).
[21] *See* 5 AAC 92.057; 5 AAC 92.069(c); *see also* 5 AAC 85.045; 5 AAC 85.050.
[22] *See* AS 16.05.407, .408. A single exception allows nonresident U.S. citizens to hunt bear in the company of an Alaska resident who is either a spouse to the nonresident or a relative within the second degree of kindred. *See* AS 16.05.407(a)(2).
[23] Exc. 90.
[24] Much of Kodiak Island is within the Kodiak National Wildlife Refuge, where the federal government awards exclusive guide use areas where only one guide is authorized to offer permit hunts. *See* Exc. 92.

are able to obtain. There are only about 3,500 Kodiak Brown Bears in existence.[25] Annually, hunters take only approximately 180 of these bears.[26]

The Board first enacted a permit limit for hunting Kodiak Brown Bears in 1968.[27] Permits were issued on a first-come, first-served basis and could be obtained by proxy.[28] Nonresidents soon were able to monopolize the best hunting areas through their guides, who waited in line for days and sometimes weeks in order to obtain a permit, while Alaska residents complained that they could not afford to stand in line for weeks in order to obtain a permit.[29] As the number of permits increased, the number of guides increased and nonresidents took a greater proportion of permits. By 1974, nonresidents were taking 75% of the permits.[30]

In 1974, the Board proposed allocating a certain percentage of permits to residents and nonresidents.[31] In determining to allocate up to 40% to nonresidents and 60% to residents, the Board considered other states that used this allocation.[32] The Board also discussed how it believed those percentages were reasonable since they reflected the average allocation given to residents and nonresidents in Alaska from 1968 to 1974.[33] However, the Board did not consider that the reason

[25] Exc. 90.
[26] Exc. 91.
[27] Exc. 94.
[28] *Id.*
[29] Exc. 94-95.
[30] Exc. 95.
[31] *Id.*
[32] Exc. 96.
[33] *Id.*

nonresidents were able to obtain such high numbers of permits was a result of the first-come, first-served policy and the ability of nonresidents to use guides as proxies to obtain the permits. The original basis of this allocation was therefore fundamentally flawed.

The 40/60 nonresident/resident allocation remains in effect today. The current version of 5 AAC 92.061 provides in relevant part:

> (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;

The limited number of permits, and the limited allocation to Alaska residents, make it difficult for Alaska residents to obtain the coveted Kodiak Brown Bear hunting permit.[34] Approximately 5,000 Alaska residents apply for a Kodiak Brown Bear permit per year, but only 6.6% receive permits.[35] For example, in the 2020 drawings, resident applications had between a 1% and 23% chance of being drawn depending on the area, with chances in most hunting areas in the single-digit

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[34] A separate registration permit system applies to hunts on the Kodiak Island road system. *See* Exc. 98. This road-based hunting, of course, is a materially different hunting experience and as a general matter, far less coveted.

[35] Exc. 91; Exc. 129. These numbers may change depending on the actual number of applicants within specific seasons and years and the number of available permits.

percentages.[36] By contrast, *for those same 2020 hunts*, a nonresident application had a *55% chance* of being drawn.[37] This number, however, does not even convey the true success rate of nonresident applicants: many nonresident hunters do not even have to apply for the drawings because their guides, operating in exclusive guide areas, can merely show up at the permit counter and pick permits up on the spot.[38]

Nonresidents also receive unusually favorable treatment for "leftover" permits—*i.e.*, permits that an original draw winner cannot use. Resident permits cannot be redistributed or transferred, even if the draw winners know they will not be able to use them.[39] In a typical year, 44% of Alaska residents who receive a draw permit are unable to use them, but because the State does not allow those permits to be transferred or re-allocated to other residents, those permits go unused.[40] By contrast, the State maintains an alternate list for nonresidents who applied for a permit and were not drawn, and redirects any unused permits to nonresidents on that list.[41] 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.[42] In practice,

[36] Exc. 243.
[37] Exc. 244.
[38] Exc. 244-245.
[39] *See* 5 AAC 92.050(a)(5).
[40] *See* Exc. 128-129; Exc. 193 (Board of Game rejected a proposal to create an alternate list for resident hunters, so other residents could claim permits that otherwise would not be used).
[41] *See* 5 AAC 92.061(a)(4)(B), (C); Exc. 145.
[42] *See* 5 AAC 92.061(a)(4)(D); Exc. 145.

because of these generous reallocation policies for nonresidents (which are not available to residents), few nonresident permits go unused.[43]

While there are many different ways of viewing numbers, there is no question that a nonresident seeking to hunt Kodiak Brown Bear is more likely than not to obtain a permit, whereas a resident has a miniscule chance of doing so.

II. Dr. Cassell's Board Proposal to Eliminate Nonresident Allocation and Board's Rejection.

A. The Cassell Proposal.

Appellant Dr. Robert Cassell, DDS, is an Alaska resident living in Wasilla, Alaska. Dr. Cassell has a biology degree and previously worked for ADF&G as a wildlife technician.[44] Cassell is a lifelong hunter and outdoorsman and regularly participates in Alaska hunts.[45] Dr. Cassell, like thousands of Alaskans, has repeatedly applied for but never received a Kodiak Brown Bear permit.[46]

In 2018, after being rejected yet again for a permit for the season,[47] Dr. Cassell submitted a proposed regulation change ("Cassell Proposal") to the Board for consideration at the March meeting. He proposed that the Board amend the beginning of 5 AAC 92.061(a)(1) to read: "the department shall issue a minimum of 90 percent of the drawing permits to residents, with the remaining drawing

[43] *See* Exc. 129 (on average 89% of available nonresident permits are used).
[44] Exc. 73.
[45] *Id*.
[46] *Id*.
[47] Exc. 74.

permits available to residents and nonresidents on the same terms." [48] The Cassell Proposal also explained that the allocation of hunting permits exclusively to nonresidents was contrary to the Alaska Constitution's mandates that wildlife in the State of Alaska be "reserved to the people for common use" and "utiliz[ed] . . . for the maximum benefit of its people."[49]

The Cassell Proposal, if accepted, would have provided that at least 90% of all drawing permits would be set aside for Alaskans, with the remaining permits available to all, nonresidents and Alaskans alike. Put another way, it would have enabled Alaskans to have a chance at *all* the permits, rather than only 60% of them. The Cassell Proposal stated it was in line with the resident allocation percentages adopted by many other states, including Arizona, Colorado, Idaho, Kentucky, Montana, Nevada, New Mexico, Oregon, and Utah.[50]

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[48] Exc. 217-218; Exc. 74.

[49] Exc. 218.

[50] *Id.* Specifically, Arizona limits the number of nonresident big game permits to "ten percent or fewer of the total hunt permits." A.R.S. 17-332(A). Idaho limits nonresident hunting tags to ten percent. *See* Idaho Admin. Code R. 13.01.08.255; 2020 ID REG TEXT 525601 (NS), 2020 ID REG TEXT 525601 (NS). Kentucky similarly limits elk and deer hunting permits for nonresidents to 10 percent. 301 Ky. Admin. Regs. 2:132; 301 Ky. Admin. Regs. 2:178. Montana also limits nonresident hunting permits for big game to ten percent. *See* Mont. Code Ann. § 87-2-506. Nevada provides quotas on its big game hunting permits, which are generally limited to 10 percent of the quotas designated to residents. *See* Nevada 2019 Big Game Quotas, *available at* http://www.ndow.org/uploadedFiles/ndoworg/Content/Public_Meetings/Com/CR%2019-14%20-%20Big%20Game%20Quotas%20-%20FINAL(1).pdf (not provided as an exhibit due to its length); Nevada 2020 Big Game Quotas, *available at* http://www.ndow.org/uploadedFiles/ndoworg/Content/Public_Meetings/Com/2020%20Approved%20Big%20Game%20Quotas%20CR%2020-11.pdf (same). New

The Board considered the Cassell Proposal at its March 14-19, 2019 Southcentral Region meeting in Anchorage. At that meeting, the nonprofit organization Resident Hunters of Alaska ("RHAK") made a detailed presentation that highlighted the importance of the Kodiak Brown Bear hunt to residents and presented numerous facts and statistics for the Board's consideration.[51]

B. Board Rejection and Rationale.

On March 19, 2019, the final day of its meeting, the Board rejected the Cassell Proposal, with one member voting for, and five against.[52] In its deliberations, the Board appeared to agree with the statements from the State of Alaska Department of Law, provided during the comment period, that "[t]he Board has allocation authority[,]" apparently without regard to constitutional limits.[53] The Board also appeared to give significant weight to the comments of hunting guides that allocating more permits to residents would adversely affect the guiding business.

Mexico requires that a minimum of 84 percent of hunting permits go to residents. Six percent is limited to residents and nonresidents who contract with an outfitter, and the remaining 10 percent go to nonresidents. N.M. Stat. Ann. § 17-3-16. Oregon limits nonresident hunting permits to not more than five percent. Or. Admin. R. 635-060-0030. Utah limits the number of nonresident permits to approximately 10 percent of most resident big game permits. *See* Utah 2020 Big Game Odds, *available at* https://wildlife.utah.gov/pdf/bg/2020/20_bg-odds.pdf (not provided as an exhibit due to its length); *see also* Utah 2019 Big Game Odds, *available at* https://wildlife.utah.gov/pdf/bg/2019/19_bg-odds.pdf (same).

[51] Exc. 219-235.

[52] Exc. 177.

[53] Exc. 174.

One of the Board members described the Cassell Proposal as "one of the most controversial proposals" the Board had received, and expressly referenced a responsibility, citing a statute delegating authority to the Commissioner of the Department of Natural Resources, not ADF&G, to manage the state's game resources "in the interest of the economy and general well-being of the state."[54] Another Board member described the Cassell Proposal as presenting a "guide versus resident" problem, noted that there were guides who had invested substantial sums in lodges and resources, and expressed dismay at the thought that guides could come up to Alaska and have to worry about their ability to secure a livelihood.[55]

In summary, the Board's rationale for denying the Cassell Proposal appeared to be that it has authority to allocate resources however it chooses, without regard to constitutional limits, and that modifying the Kodiak Brown Bear permit allocation would have an adverse economic effect on the guiding industry, even though economic regulation is not within the Board's statutory authority.[56]

III. PROCEDURAL HISTORY.

A. The Litigation.

Dr. Cassell filed his Complaint in this suit on May 29, 2019, asserting a constitutional challenge to the Board's allocation of drawing permits to

[54] Exc. 174-175.
[55] Exc. 175.
[56] It is worth noting that on March 19, 2019, four of the Board's seven members had personal financial connections to the guiding industry.

nonresidents.[57] The case was heard on summary judgment. *Amicus curiae* Resident Hunters of Alaska ("RHAK") filed a brief in support of Dr. Cassell;[58] *amici curiae* Alaska Professional Hunters Association ("APHA")[59] and a coalition of hunting groups filed briefs in support of the Board.[60] The parties and amicus APHA argued the case before the superior court on December 20, 2021.

B. The Superior Court's Decision.

On May 31, 2022, the superior court granted the Board's summary judgment motion and denied Dr. Cassell's, but did not engage in any independent reasoning. Rather, it issued a two-page order that "adopts the reasoning set forth in the briefs filed by the Board, by *amicus curiae* Alaska Professional Hunters' Association and Hunting Coalition."[61] The superior court's own substantive commentary occupied just three sentences:

> 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, and the balanced allocation now in place falls well within the permissible bounds set by the regulation and Article VIII §§ 2 and 4…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.[62]

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[57] Exc.1-40.
[58] Exc. 236-262.
[59] APHA sought but was denied intervention. R. 001079-80.
[60] Exc. 323-58; Exc. 359-74.
[61] Exc. 494-95.
[62] Exc. 495. Notably, the superior court disregarded and did not reach the arguments posed by the State below that Dr. Cassell did not have standing and that his claims are barred by the statute of limitation and laches. Exc.282-84. If the court had meant to adopt these arguments, it would have listed them along with the points above. It

This commentary, while cursory, revealed that the superior court had not only misconstrued Dr. Cassell's arguments, but also founded its decision on the incorrect and unfounded factual assumption that all hunting guides are Alaskan. The superior court entered final judgment on June 21, 2022.[63]

ARGUMENT

I. STANDARD OF REVIEW

A. The Constitutional Issues Decided on Summary Judgment Are Subject to *De Novo* Review.

The sole issue in this appeal is Dr. Cassell's constitutional challenge to the Board's practice of allocating a number of hunting permits exclusively to nonresidents, which was resolved by the superior court on summary judgment. This Court "review[s] a grant or denial of summary judgment de novo"[64] and applies its independent judgment to "[q]uestions of constitutional and statutory interpretation[.]"[65] The Court will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[66]

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did not. Rather, it ruled—albeit sparsely—on the merits of Cassell's claim. The State did not cross-appeal the superior court's rejection of these threshold issues and cannot resurrect them in this appeal.

[63] Exc. 496.

[64] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (quoting *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014)).

[65] *Short v. State*, No. S-18333 at 14-15 (Sep. 30, 2022) (citations omitted).

[66] *Ketchikan Gateway Borough*, 366 P.3d at 90 (quoting *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1167 (Alaska 2009)).

B. The Board Is Not Entitled to Deference.

This is not an administrative appeal from the Board's denial of the Cassell Proposal. Rather, this case presents a direct constitutional challenge to any Board regulation or decision granting nonresidents exclusive access to a pool of hunting permits for Alaska's game. Despite that, the Board and APHA repeatedly urged the superior court to extend deference to the Board's allocation decision, arguing that the court should not substitute its judgment for the Board's.[67] This argument misconstrues the nature of this suit.

Dr. Cassell has not challenged "the efficacy or wisdom"[68] of any specific allocation decision made based on the Board's expertise, such as claiming it is issuing too many permits, or that it should modify its allocation among users to a different percentage split. Rather, Dr. Cassell argues that the Board is constitutionally prohibited from *ever* giving nonresidents exclusive access to a portion of Alaska wildlife. This case thus presents a standalone challenge to the constitutional validity of the Board's practice and regulation, a matter subject to this Court's independent judgment.[69]

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[67] Exc. 266.
[68] *See Lauth v. State,* 12 P.3d 181, 184 (Alaska 2000).
[69] *Id*. The Board similarly sought to interject an Administrative Procedure Act test into the superior court's review, arguing the Legislature authorized the Board to enact 5 AAC 92.061(a)(1), and thus, its allocation regulation is consistent with its authorizing statute. Exc. 269-270. Even if true, these points are irrelevant to the constitutional claim at issue. Consistency with the enabling statute and an economic impacts analysis have no application here, where the Court is reviewing a regulation on constitutional grounds, not reviewing a specific decision by the Board.

C. No Disputed Issues of Fact Preclude this Court from Rendering Judgment on Appeal.

Summary judgment under Alaska Civil Rule 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Here, there is no dispute regarding any material fact. Indeed, only one material fact has relevance to this case: that the Board currently sets aside a portion of Alaska's scarce and prized big game hunting permits and makes those permits available exclusively to nonresidents. The rest of the arguments the parties made below (and will likely make here) regarding the Board's alleged economic and conservation agenda are irrelevant to whether the Board's practice is constitutionally permissible.

II. THE SUPERIOR COURT ERRED IN CONCLUDING THAT THE ALASKA CONSTITUTION ALLOWS THE BOARD TO SET ASIDE HUNTING PERMITS EXCLUSIVELY FOR NONRESIDENTS.

A. The Alaska Constitution Mandates That Alaska's Wildlife Resources Be Managed for the Common Use of Alaskans.

Control over Alaska's lands and resources was the driving force behind statehood.[70] When the delegates gathered in 1955 to draft the Alaska Constitution,

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[70] *See, e.g., Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47-48 (1962); *Pullen v. Ulmer*, 923 P.2d 54, 57 n. 5 (Alaska 1996); *see also, e.g.,* Gordon Harrison, Alaska Legislative Affairs Agency, Alaska's Constitution: A Citizen's Guide at 4 (Alaska Legislative Affairs Agency ed., 5th ed. 2013 available at https://akleg.gov/docs/pdf/citizens_guide.pdf (Many Alaskans concluded "that the notion of the federal government's superior vigilance as a trustee of the public interest was really a cloak for the institutional interests of bureaucrats and the economic interests of nonresident corporations exploiting those resources (principally Seattle and San Francisco salmon canning companies[.]"); HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, Act Providing for the Admission of the State of Alaska into the Union of 1957, H.R. REP. No 85-624

ensuring careful internal management of Alaska's resources for the benefit of Alaskans, not outside interests, was a key issue.[71] The delegates ultimately drafted an entire Article directing the State to carry out prudent resource management that would benefit all Alaskans. The resulting Article VIII is unique amongst state constitutions in memorializing common law public trust and anti-monopoly principles regarding management of state lands, waters, and resources.[72]

Article VIII contains the following three sections:

> § 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.

(1958) (The Statehood Act "will enable Alaska to achieve full equality with existing States, not only in a technical juridical sense, but in practical economic terms as well. It does this by making the new State master in fact of most of the natural resources within its boundaries . . . .").

[71] Victor Fischer, Institute of Soc., Econ. and Gov't Research, Univ. of Alaska, Alaska's Constitutional Convention 132-33 (1975); *see also* Gerald A. McBeath, The Alaska State Constitution at 159 (2011) (The delegates to Alaska's constitutional convention "were uniform in their belief that Alaska's natural resources had been 'locked up' and devalued by the negligent actions of the federal government and absentee owners," and that the careful development of Alaska's resources "spelled the difference between a future of plenty or of poverty" for the new state.); Richard L. Neuberger, *Gruening of Alaska*, 36 Survey Graphic 512 (1947) (prior to statehood, Alaska was seen as a "feudal barony" where "[a]bsentee corporations took away millions in fish, gold, and furs and left behind nothing in the form of social or economic benefits."), *available at* http://www.archive.org/stream/surveygraphic36survrich#page512/mode/2up).

[72] *Owsichek v. State*, 763 P.2d 488, 493 (Alaska 1988) ("We begin by examining constitutional history to determine the framers' intent in enacting the common use clause. *This was a unique provision, not modeled on any other state constitution.* Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.") (emphasis added).

§ 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.

These provisions explicitly codify the "public trust doctrine" in Alaska, which "impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people."[73] Under Article VIII and the public trust doctrine, Alaska's game resources are State-owned "assets" that can be appropriated and must be controlled "for the benefit of all of its people."[74] The Alaska Supreme Court observed that "the provisions in article VIII were intended to permit the *broadest possible access to and use of state waters by the general public*."[75] The same principle applies to game, as confirmed by Article VIII, § 3's explicit direction that "wildlife … [is] reserved to the people for common use." And while it should go without saying, the "general public" and "the people" in this context mean *Alaskans*.[76]

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[73] *Id.* at 495; *see also Herscher v. State, Dep't of Commerce,* 568 P.2d 996, 1003 (Alaska 1977) (The State acts "as trustee of the natural resources for the benefit of its citizens."); *cf.* AS 38.05.126(b) (State "holds and controls all navigable or public water in trust for the use of the people of the state.").

[74] *Pullen*, 923 P.2d at 60-61.

[75] *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973) (emphasis added).

[76] *E.g.*, *Sullivan v. Resisting Envt'l. Destruction on Indigenous Lands (REDOIL)*, 311 P.3d 625, 634–35 (Alaska 2013) (discussing Article VIII Section 1 and 3 and as benefitting "the Alaskan people."); *Shepherd v. State, Dep't of Fish and Game*,

B. Article VIII Prohibits Exclusive Grants of Alaska's Game Resources That Disadvantage Alaskans.

Article VIII prohibits "exclusive or special privileges to take fish and wildlife[.]"[77] This Court has, on multiple occasions, invalidated regulatory and statutory attempts to grant privileged access to fish and game.

For example, in *McDowell v. State*,[78] this Court addressed whether allowing a subsistence priority only to rural residents violated the Alaska Constitution. This Court first made clear that a prohibition on grants of exclusive or special privileges with respect to fish and game was one purpose of the common use clause and then concluded "grant[s] of special privileges with respect to game based on one's residence [are] also prohibited."[79] If it is unconstitutional to grant privileged access to game based on residence *within* Alaska, it is certainly constitutionally infirm to grant special privileges based on residence *outside* Alaska.

Likewise, in *Owsichek v. State*,[80] this Court addressed a constitutional challenge to a statute that authorized the Guide Licensing and Control Board to grant hunting guides "exclusive guide areas," which were geographic areas where only one designated guide could lead professional hunts and all others (except unguided licensed hunters) were excluded. In an opinion by Justice Rabinowitz, this Court

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897 P.2d 33, 40 (Alaska 1995) (state holds natural resources in trust for "*the people of the state*" to benefit "*state residents*").

[77] *McDowell v. State*, 785 P.2d 1, 6 (Alaska 1989).

[78] *Id.*

[79] *Id.* at 9.

[80] *Owsichek,* 763 P.2d 488.

held that this scheme of giving chosen guides a monopoly over certain territory violated the Common Use clause.

This Court examined the constitutional history of the Common Use clause and noted a clear intent to "prohibit 'exclusive grants or special privileges,'" and ensure "that the public retain broad access to fish, wildlife and water resources, and that these resources not be the subject of private grants."[81] It then noted that it had on multiple occasions held that the Common Use clause is intended to provide "independent protection" of the public's access to natural resources.[82] Based on these principles, the Court rejected the State of Alaska's argument that the Common Use clause gave it "a broad grant of authority to the state to manage these resources, and that it places no limitations on this authority greater than those contained in other constitutional provisions."[83] This Court concluded that:

> [E]xclusive guide areas and joint use areas fall within the category of grants prohibited by the common use clause. These areas allow one guide to exclude all other guides from leading hunts professionally in "his" area. These grants are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants in the market, such as Owsichek. To grant such a special privilege based primarily on seniority runs counter to the notion of "common use."[84]

As discussed in more detail below, the allocation of scarce game resources to nonresidents where nonresidents are required to hire guides is simply another

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[81] *Id.* at 493-94 (citing 4 Proceedings of the Alaska Constitutional Convention 2460 (Jan. 17, 1956)).
[82] *Id.* at 495-96.
[83] *Id.* at 491.
[84] *Id.* at 496.

impermissible grant of monopoly rights over Alaska's resources to nonresidents and the guiding industry.

C. Allocating Hunting Permits Exclusively to Nonresidents is Antithetical to Article VIII and the Public Trust Doctrine

1. The Alaska Constitution Allows for Game Allocations That Favor Residents.

Alaska law has long recognized that resource allocations favoring residents over nonresidents are consistent with the Alaska Constitution. Indeed, in 1988 voters added a provision to the Alaska Constitution expressly providing that "[t]his 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."[85] While the overriding purpose of this amendment was to protect "local hire" provisions from being held unconstitutional on the basis of the equal protection clause,[86] it applies with equal force in the context of applying a resident preference when allocating scarce and highly sought-after game resources.

[85] Alaska Const. art. I § 23.

[86] *E.g.,* Gordon Harrison, Alaska Legislative Affairs Agency, Alaska's Constitution: A Citizen's Guide at 10 (Alaska Legislative Affairs Agency ed., 5th ed. 2013) *available at* https://akleg.gov/docs/pdf/citizens_guide.pdf ("Convention delegates discussed the problem of nonresident contractors importing workers for jobs that could be performed by local people, but they 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.")).

This Court emphatically affirmed the constitutionality of preferring residents over nonresidents in allocating game resources in *Shepherd v. State, Department of Fish & Game*.[87] There, two Alaska big game guides challenged AS 16.05.255(d), which commanded the Board of Game to "provide that ... the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents."[88] The guides argued that the State may not discriminate against nonresident recreational hunters because residency provides no basis to distinguish between trophy hunters and those that hunt for food.[89] The Court rejected this argument because:

> [U]nder the federal and state constitutions the state has a special interest in the fish and wildlife within its boundaries and is entitled to grant allocational preferences to state resident recreational users.[90]

The Court noted that the United States Supreme Court had expressly upheld the constitutionality of a Montana regulatory scheme restricting nonresidents' rights to hunt elk, noting that traditionally, states owned or held in trust naturally occurring fish and wildlife for their own citizens and were not required to allow nonresidents to share in the harvest.[91] The Court accepted the State's argument that the resident preference served an important state interest because it "*conserve[ed] scarce wildlife resources for Alaska residents*,"[92] and noted "the preference for Alaska

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[87] 897 P.2d 33 (Alaska 1995).
[88] *Id.* at 35.
[89] *Id.* at 39.
[90] *Id.*
[91] *Id.* at 40-41 (citing *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978)).
[92] *Id.* at 43 (emphasis added).

residents with respect to natural resources is explicit in the state constitution and serves to differentiate resident from nonresident user groups."[93]

2. Article VIII Section 3 Prohibits Giving Exclusive Access to Alaska Wildlife to Nonresidents and Allows for Resident Preferences.

Given the clear edicts in Article VIII, one would expect that when confronted with scarce game resources, the Board of Game would allocate hunting access in a manner that ensured Alaskans have access to Alaska's game. But the Board has chosen the opposite approach, repeatedly choosing to mandate that nonresidents be guaranteed a certain (often high) percentage of permits at the direct expense of Alaskans. These nonresident preferences constitute an impermissible exclusive grant of Alaska's game and turn the common use and maximum benefit principles on their heads.

Granting nonresidents a guaranteed percentage of big game permits disadvantages residents by excluding them from accessing those permits, and making them available exclusively, on a privileged basis, to nonresidents. Under *McDowell* and *Owsichek*, this exclusive grant would be impermissible if given to a subset of Alaskans, *e.g.*, if a certain percentage of Kodiak Brown Bear permits were reserved solely for Kodiak residents.[94] Granting this exclusive privilege to *nonresidents* is even more constitutionally infirm. Moreover, as discussed below,

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[93] *Id.* at 44.

[94] *Cf. McDowell v. State*, 785 P.2d 1, 7-8 (Alaska 1995) (holding that the requirement that one live in a certain area to engage in subsistence fishing violates Article VIII).

because nonresident hunters are required to use licensed guides (many of whom reside out of state),[95] the nonresident allocation also constitutes an impermissible grant of special economic privilege and access to the guiding industry at the expense of Alaska resident hunters.[96]

3. *Shepherd* Confirms that Excluding Alaskans from Applying for Any Portion of Hunting Permits in Order to Privilege Nonresidents Violates the Constitution.

In *Shepherd*, this Court upheld AS 16.05.155(d) by approving its provisions favoring residents over nonresidents, as discussed above. The Court explained:

> 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.[97]

The State nonetheless argued below that this Court rejected Dr. Cassell's position in *Shepherd* because the Court did not declare any exclusive allocation to nonresidents unconstitutional.[98] But the constitutionality of a nonresident permit allocation was not at issue in *Shepherd*. The Court's silence on this specific point

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[95] *See infra* Section IV.C.
[96] *Owsichek*, 763 P.2d at 497, n.16 (noting that the exclusive guide areas it struck down were particularly significant given that nonresidents must hire guides in order to hunt brown bear and other big game, and therefore the exclusive areas granted an impermissible monopoly over this market). This point is addressed *infra* in Argument § IV.C.
[97] *Shepherd*, 897 P.2d at 40-41 (emphasis added).
[98] Exc. 282.

therefore means nothing. The Board's argument also turned *Shepherd* on its head, as the Court was clear that in times of scarcity, *i.e.* when permits must be issued to hunt game as opposed to allowing open access, the Board should *favor* residents. Again, under the Board's present practice of allocating up to 40% of Kodiak Brown Bear permits exclusively to nonresidents, a resident hunter has a single-digit percentage chance of obtaining a permit in a given year, whereas a nonresident has a greater-than-fifty percent chance. This allocation clearly and impermissibly favors *nonresidents* over *residents*. Any argument otherwise constitutes a backwards reading of *Shepherd*.[99]

III. THE SUPERIOR COURT ERRED IN ACCEPTING THE STATE AND APHA'S ASSERTION THAT ALLOCATING SOME PERMITS EXCLUSIVELY TO RESIDENTS JUSTIFIES ALLOCATING THE REMAINDER EXCLUSIVELY TO NONRESIDENTS

One of the fundamental flaws in the superior court's short decision was its belief that this case is about what specific percentage of permits should be granted to residents. Indeed, the court even concluded "the Board is not required . . to allocate to resident hunters more than two-third of the harvestable bears in the Kodiak draw hunt."[100] But Dr. Cassell was clear before the superior court that he was not challenging the specific percentage division between residents and

[99] To the extent the State may argue, as it did below, that *Shepherd's* guidance on applies only to subsistence hunting, that argument lacks support in *Shepherd*. Again, sport hunting was simply not an issue in *Shepherd* and, significantly, this Court did not limit its holding to subsistence. Its holding thus applies to sport and subsistence hunting alike.
[100] Exc. 495.

nonresidents or arguing for any specific resident preference.[101] Rather, he argued for a bright-line rule: that making any portion of Kodiak Brown Bear permits (or any game permits) off-limits to residents was unconstitutional.[102] The superior court's cursory order either missed or misunderstood this issue, claiming it was "facile" to assert that any permits were allocated exclusively to nonresidents because "there is not a single Kodiak brown bear hunt that excludes residents."[103] But Dr. Cassell never argued that residents are excluded from the entirety of any hunt. The issue is that residents are annually excluded from up to 40% of a harvestable resource that the Alaska Constitution reserves to Alaska residents; the fact that the Kodiak regulation guarantees up to 40% of permits to nonresidents is undisputed.

The superior court was influenced by the State and APHA's arguments that focused not on the permits that were allocated for the exclusive use of nonresidents, but instead on the 60% of Kodiak Brown Bear permits that were allocated to residents. Through this framing, they essentially argued that the Board can violate the Constitution, but "make it up" to Alaskans by guaranteeing them at least some access to the resource. But the fact that residents receive 60% of the permits, and nonresidents up to 40%, is irrelevant to the constitutional issue at hand. The point

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[101] Exc. 381.
[102] *Id.* The proposal Cassell submitted to the Board proposed a practical solution—making 90% permits available exclusively to residents, and the remaining permits available to residents and nonresidents alike—but Cassell's arguments in superior court were not tied to any specific proposed allocation.
[103] Exc. 495.

is that the Alaska Constitution does not allow the Board to set aside *any portion* of big game permits and allow only nonresidents to access them.

APHA may try to defend the practice of setting aside large portions of permits and prohibiting Alaskans from applying for them by arguing that Alaska was simply "sharing" its game resource with nonresidents and did so in a way that still granted residents majority access to the resource. Similarly, APHA may ask the Court to look away from the large swaths of permits set aside exclusively for nonresidents and instead look at the resource as a whole and recall Alaskans were still allowed access to almost sixty percent of the permits in Kodiak.[104]

This Court should disregard this sleight of hand. Granting *any* portion of permits exclusively to nonresidents has the direct impact of reducing Alaskan's ability to access their own wildlife. The fact that some access remains does not make up for what is lost. The Alaska Constitution does not reserve to Alaska residents "some access" to their natural resources, but rather holds *all* of those resources in trust for all Alaska residents. It cannot be that urban Alaskans have subsistence rights equal to their rural compatriots, but nonresidents have greater sport hunting rights than all Alaska residents with respect to harvesting big game like the Kodiak Brown Bear. The Board's nonresident preference here is a quota system that, for the Kodiak Brown Bear, excludes Alaska residents from up to 40% of the available permits, and which does not even allow Alaska residents to

[104] Exc. 347.

cooperate with each other to ensure that unused permits issued to Alaskans can be transferred to other Alaskans—while at the same time granting nonresidents that privilege.

Further, Dr. Cassell is not arguing against nonresidents applying for and receiving permits. The Board is always free to open a certain portion of permits to all, resident and nonresident alike. But it crosses a constitutional line to guarantee permit access only to nonresidents, regardless of what percentage of permits remain accessible to Alaskans.

The Board here may try a similar version of the same defense, arguing that it was authorized to allocate between user groups, and here it is simply allocating between the user groups of resident and nonresident hunters and the Board's allocation should receive deference. The problem with this argument is that it assumes that the Board may freely allocate in a way that violates the Constitution. By this logic, all that was happening in *McDowell* was allocation of subsistence access between rural and urban user groups. The bottom line is that certain allocations violate the Constitution and are impermissible, regardless of their good intentions. A "rural subsistence preference" is an improper allocation and likewise here, the nonresident preference is equally constitutionally infirm. In sum, Dr. Cassell is challenging the practice of granting a nonresident preference and setting access to fixed percentages of permits only to nonresidents. He is not otherwise addressing what resident preference the Board is required to enact.

Even if the allocation percentages were relevant, the math does not come out

on the Board's side. On its face, 60% appears to be a higher number than 40%, suggesting that residents have a greater opportunity to hunt Kodiak Brown Bears than nonresidents. This is, however, a false impression: the allocation percentages cannot hide the fact that nonresidents receive dramatically and meaningfully more favorable treatment than residents when it comes to these permits. As explained in more detail above, in the 2020 drawings, resident applications had a 1-23% chance of receiving a permit, whereas nonresident applications had a 55% chance—a number that does not even include the number of nonresidents who were able to obtain permits without going through the lottery.[105] The fact that the Board allocates 60% of the available permits to Alaska residents is thus irrelevant and misleading. Alaskans are still at a severe disadvantage relative to nonresidents when it comes to obtaining a Kodiak Brown Bear permit.

IV. THE SUPERIOR COURT ERRED IN ACCEPTING THE STATE AND APHA'S ASSERTIONS THAT ECONOMIC CONSIDERATIONS CURE CONSTITUTIONAL VIOLATIONS.

A. The Board's Authority to Allocate Permits Is Constrained by Article VIII and the Public Trust Doctrine

Over the course of their lengthy summary judgment briefing, the State and APHA touted the alleged economic benefits of nonresident hunting and the guiding industry, arguing that these benefits justified its nonresident allocation. Even if the nonresident allocation had some economic benefits—a fact that was not

[105] *Supra* at 17.

conclusively established by any party below[106]—that would not excuse an unconstitutional resource allocation. Economic benefits cannot, and do not, trump Article VIII, §3's clear mandate that wildlife be reserved to Alaskans for common use, nor do they trump the public trust doctrine. Under these principles, when allocating scarce hunting permits, the Board must do so in a way that maximizes access to the Alaskan public and does not discriminate against Alaskans in favor of nonresidents.[107] Simply put, the Board cannot promote certain economic sectors by creating a nonresident permit preference that violates the Constitution.

The State and APHA may try and circumvent this point by arguing that the economic benefits from the nonresident preference are authorized by other constitutional provisions, such as Article VIII Section 2 by providing for "the

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[106] APHA may argue that it established these facts beyond dispute before the superior court, and thus this Court must accept the alleged economic benefits. But APHA participated as *amicus curiae* below, not as a party. While it had certain expanded rights by agreement, such as filing extra briefs and participating in oral argument, it lacked the litigant status necessary to establish a factual record. Its briefing below, and on appeal, is available to help the Court understand the issues, but it cannot cite to its trial court filings as dispositive "evidence." That aside, APHA's doomsday assertions about the alleged "devastation" of the guide industry are entirely speculative. Nonresidents are still eligible to apply for permits under a constitutional allocation scheme, guides are always free to offer their services to Alaskans, and resident hunters visiting Kodiak would necessarily contribute to the local economy by taking advantage of local amenities (lodging, food, supplies, transportation). The issue is that APHA's constituency is being directly subsidized by the current State allocation scheme and it simply does not want to have to change its business model. Ultimately, this issue is not relevant to the outcome here because any allocation of hunting permits to nonresidents is unconstitutional on its face, regardless of the impacts of ending this unconstitutional practice.

[107] *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973) ("[T]he provisions in article VIII were intended to permit the *broadest possible access to and use of state waters by the general public*." (emphasis added)).

maximum benefit of the people," and Article VIII Section 4 by making a "preference among beneficial uses."[108] None of these arguments should persuade this Court.

B. Article VIII Could Have, but Did Not, Prioritize Economics as a Valid Concern for Wildlife Management.

The Board's attempt to take shelter behind economics is first constrained by the fact that while Article VIII expressly lists economics as an appropriate concern for *other* resources, it does not mention economic considerations in its specific provisions regarding *wildlife*. This silence speaks volumes.

Article VIII is broadly titled "Natural Resources" and addresses the full range of natural resources that exist in Alaska: lands, waters, fish, wildlife, forests, grasslands, and minerals. It opens with two general sections. Section 1 is a "Statement of Policy" expressing the State's desire to encourage resource development. Section 2 addresses the legislature's "General Authority" to manage natural resources and directs it to ensure that "all natural resources belonging to the State," are managed "for the maximum benefit of its people[,]" *i.e*., Alaskans.

The other sixteen sections of Article VIII address specific types of resources. Some explicitly mention economic activities, such as Section 9, which authorizes the sale or grant of state land, and Section 12, which discusses the State's sale of mineral leases and permits. Others acknowledge citizens' personal economic interests, such as Sections 16 and 18, which require the State to pay just compensation for private land and water interests taken.

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[108] Exc. 277; Exc. 349.

Although fish and wildlife appear together in § 3 and are both reserved to the people of Alaska, the Board of Fish and the Board of Game are charged with different missions. Section 15, "No Exclusive Right of Fishery," is notable because it expressly allows the State to manage fisheries "to prevent economic distress among fishermen and those dependent on them[.]" There is no comparable section addressing economic concerns in wildlife management—instead, the only specific directives on wildlife are to reserve it to the people of Alaska for common use (Section 3) and to manage it pursuant to the sustained yield principle (Section 4).

Article VIII thus makes clear that the general policy and authority stated in Sections 1 and 2—providing for "maximum use" of resources and management of resources "for the maximum benefit of its people"—can mean different things for different resources. For certain resources, such as minerals, it means economic development of the resource is a permissibly substantial concern. For others, such as fish, it means balancing common use principles with economic considerations. For wildlife, it simply means ensuring that wildlife is reserved to and available for the people of Alaska.

This sends a clear message: while economic factors are an allowable consideration for certain enumerated types of resources, they are not included in the specific guidance provided in Section 3 that wildlife is reserved "to the people for common use." The Board is on shaky constitutional ground when it asserts that economic benefits can trump other constitutional protections when managing wildlife access.

C. Providing for the "Maximum Benefit of the People" under Article VIII Section 2 Does Not Allow the Board to Grant Exclusive Economic Benefits to Politically Powerful Groups Such as the Guiding Industry.

The Board's attempt to use economics as a cure-all also disregards that grants of exclusive privileges remains constitutionally prohibited. Throughout this litigation, the State and APHA have urged that the alleged economic benefit of setting aside permits for nonresidents provides for the "maximum benefit of the people" under Article VIII §2.[109] The argument is that nonresidents must use guides,[110] and by setting aside large numbers of permits exclusively for nonresidents, these nonresidents must pay large sums of money to the guides to hunt, and this trickles down to the rest of the Alaska economy—thereby "benefiting" Alaskans.[111] These economic justifications, even if true,[112] do not pass constitutional muster. The State cannot allocate a scarce Alaska resource to nonresidents (here the scarce resource is hunting permits for Alaska game) for the purpose of subsidizing a politically well-connected Alaska industry. This is precisely the type of policy decision Article VIII was meant to prohibit, and exactly the kind of special privilege deemed unconstitutional in *Shepherd*.

The Board's argument here assumes incorrectly, and baselessly, that this system of government patronage benefits *all Alaskans*. In fact, it provides economic

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[109] Exc. 278-279; Exc. 330-331.
[110] AS 16.05.407; *see also Owsichek v. State*, 763 P.2d 488, 497 n.16 (Alaska 1988).
[111] Exc. 277; Exc. 330-331.
[112] *See supra* n. 107.

benefits to the *guides*, but these benefits come at the direct cost of denying Alaskans access to hunting their own game resources. Further, these economic benefits are not at all distributed among "the people," like revenues from oil and gas lease sales, taxes, and royalties.[113] Rather, the State and APHA rely on speculative arguments that the money nonresidents pay guides somehow benefits all "the people." Even if there were some dissipated benefit to the Alaskan economy in general—which was not established[114]—there is nothing to support the State and APHA's assumption that this benefits individual Alaskans.

D. This Court Has Rejected "Income Generation" as a Central Purpose of the Common Trust.

The next problem with the Board's "economics justify all" approach is that this Court rejected it in *Brooks v. Wright*,[115] when it dismissed the notion of applying private trust law to the "public trust" created by Article VIII. The Court there first recognized that "[t]he public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary."[116] The Court went on to state that "the wholesale application of private trust law principles to the trust-like relationship described in

[113] *Cf. Owsichek* 763 P.2d at 497 (noting exclusive guide areas do not provide remuneration to the State). *See also infra* at Argument §*VI* (addressing State's argument regarding federal funding).
[114] *See supra* n.107.
[115] 971 P.2d 1025 (Alaska 1999).
[116] *Id.* at 1031-32.

Article VIII is inappropriate and potentially antithetical to the goals of conservation and universal use."[117] Specifically, the Court noted:

> For instance, private trusts generally require the trustee to maximize economic yield from the trust property, using reasonable care and skill. But 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.[118]

Under the Court's ruling in *Brooks*, therefore, "maximiz[ing] economic yield" and "income generation" are not paramount concerns for certain resources addressed in Article VIII, including wildlife.

Wildlife is in the public trust, and the State cannot constitutionally allocate scarce wildlife to nonresidents to maximize revenue for a specific (and politically popular) Alaska industry. Ultimately, the economic benefits argument proves too much—if accepted, the perceived economic benefit of *any* chosen policy could trump the remaining provisions of Article VIII.

E. Managing for "Preferences Among Beneficial Uses" is Limited to Achieving a "Sustained Yield".

Finally, the Board cannot claim it is managing "among beneficial uses" because this provision in Article VIII is limited to obtaining a "sustained yield" and in any event, the Board is allocating only *among sport hunters,* not between uses.

Article VIII Section 4 provides:

[117] *Id.* at 1033.
[118] *Id.* at 1032 (internal citations omitted).

> 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.

As a matter of textual interpretation, the reference to "beneficial uses" is limited to applying the sustained yield principle. This is a conservation principle, not an economic one.

Moreover, the allowance for "preferences among beneficial uses" allows for allocations *between user groups*, *e.g.* sport, commercial and subsistence fishers, or in the wildlife context, trophy hunting and subsistence hunting.[119] Here, the resident and nonresident hunters seeking drawing permits are almost all sport hunters—in other words, they are all engaged in the same use. There is thus no allocation between user groups to be addressed here.[120]

V. THE SUPERIOR COURT ERRED IN CONCLUDING THAT HUNTING GUIDES HAVE RIGHTS EQUIVALENT TO THOSE OF RESIDENTS UNDER THE ALASKA CONSTITUTION

The superior court concluded the Alaska Constitution protects guides,

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[119] *See Kenai Peninsula Fisherman's Co-op Ass'n, Inc. v. State*, 628 P.2d 897, 903 (Alaska 1981); *McDowell v. State*, 785 P.2d 1, 8 (Alaska 1989) (where the Court defined the State's role in establishing preferences among beneficial uses of fish and game under Article VIII § 4 in terms of the State's ability to "make allocation decisions between sport, commercial, and subsistence *users*") (emphasis added); *Meier v. State Board of Fisheries*, 739 P.2d 172, 174 (Alaska 1987) (noting the Board of Fisheries' "duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users").

[120] *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102–03 (Alaska 2015), (in the common use context, the Court has "consistently defined 'user groups' in terms of the nature of the resource (i.e., fish or wildlife) and the nature of the use (i.e., commercial, sport or subsistence)." (*citing Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game,* 838 P.2d 798, 801 (Alaska 1992)).

accepting APHA's argument that under *Owsichek*, guiding a hunt is a constitutionally protected "use."[121] This conclusion is a startling misreading of *Owsichek* and creates a new protected class that can now claim constitutional rights to economic subsidies from the State. Even worse, this new protected class is not limited to Alaskans, as not all guides are Alaska residents.

APHA is correct that *Owsichek* noted that a hunter and their guide were both "using" wildlife resources as sport hunters.[122] But this does not mean that hunting guides have a constitutionally protected interest in guiding nonresident hunters who are required by law to hire them. Rather, it means that guides can claim they are using the resource in the same way as the sport hunters they are guiding, nothing more.[123] As *Owsichek* stated, "[t]he common use clause makes no distinction between use for personal purposes or use for professional purposes."[124] APHA's members' interest in being able to guide a hunt has nothing to do with the issue of setting aside permits exclusively to nonresidents. The guides' ability to solicit clients and lead hunts would remain the same even if the Board had adopted Dr. Cassell's proposal, as guides are always free to secure resident clients. But it is constitutionally inappropriate for the Board to favor nonresident hunters to the exclusion of Alaskans, solely to funnel nonresident clients to guides—many of

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[121] Exc. 347-349; Exc. 495.
[122] *Owsichek*, 763 P.2d at 497 n.15.
[123] *Id.* ("The work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause.").
[124] *Id.* at 497.

whom reside out of state.

Indeed, the superior court's finding was directly contrary to a basic undisputed fact: *not all guides are Alaskans.* Yet before the superior court, APHA repeatedly used the term "resident guides" to make its arguments, contending that the Board's allocation scheme was intended to protect the constitutional rights of "resident guides."[125] But there is *no residency requirement* to become a licensed guide in Alaska. Indeed, many licensed guides live out of state.[126] Thus, the superior court's broad-brush finding that guides are a protected group under Article VIII has the legal effect of giving nonresidents the same constitutional protections as Alaskans. This makes no sense and is contrary to the plain text of the Constitution and this Court's precedents.

VI. FEDERAL LAW AND MANAGEMENT CANNOT TRUMP THE STATE CONSTITUTION.

The superior court's decision noted that a large portion of hunting in Kodiak takes place on federal land.[127] APHA argued below that the United States government, which manages the Kodiak National Wildlife Refuge, has expressed support for Alaska's nonresident permit allocation system and that the Court and the State should defer to this federal preference out of comity.[128] This Court, however, emphatically rejected this notion in striking down the rural subsistence preference in

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[125] *E.g.*, Exc. 329, 334, 336, 340.
[126] Exc. 447.
[127] Exc. 495.
[128] Exc. 355-356.

McDowell v. State.[129] There, the State's subsistence statute was written to comply with provisions of the federal Alaska National Interest Lands Conservation Act.[130] Nonetheless, the Court found this violated the Alaska Constitution and rejected any pleas to abide by federal policy preferences.[131] The bottom line is that federal management choices must yield to the provisions of the Alaska Constitution.[132]

Similarly, the State argued below that the Board has "discretionary policy authority" to prioritize revenue-generating uses of wildlife over resident uses.[133] It cited the federal Pittman-Robinson Act, which provides matching funds to the State for hunting license fees to support conservation, and opined that "the Board is certainly entitled, if not required," to make judgments on behalf of all Alaskans regarding what will be to their benefit.[134] Notably, it provided this opinion without any legal citation—likely because there is none available. Article VIII does not reserve wildlife "to the state for maximal conservation revenue generation;" it reserves it "to the people for common use." The Board lacks authority to ignore this clear constitutional direction and prioritize conservation revenue from federal sources over actual resident use.

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[129] 785 P.2d 1, 6 (Alaska 1989).
[130] *Id.* at 3.
[131] *Id.* at 7-8.
[132] Dr. Cassell seeks a ruling that prevents the Board from applying exclusive nonresident preferences. The Court need not wade into how this rule would apply on federal lands and how one determines jurisdiction in these circumstances.
[133] Exc. 278-279.
[134] Exc. 278.

CONCLUSION

Dr. Cassell respectfully requests that this Court vacate the superior court's decision and rule that 5 AAC 92.061 is invalid and contrary to the Alaska Constitution.