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.

REPLY 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, August 31, 2023.

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Filed in the Supreme Court
of the State of Alaska
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Meredith Montgomery, Clerk

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INTRODUCTION

The State of Alaska holds Alaskan wildlife in trust for Alaskan residents. It is contrary to both the letter and the spirit of Article VIII of the Alaska Constitution to take hunting opportunities away from Alaskan hunters and earmark them instead for out-of-state hunters. Neither the Board of Game ("Board") nor the Alaska Professional Hunters' Association ("APHA") disputes that a substantial portion of prized and scarce Kodiak Brown Bear hunting permits is set aside exclusively for nonresidents and that doing so provides significant benefits to these nonresidents (and the guides they are required by law to hire). Likewise, neither disputes the constitutional principles invoked by Dr. Robert Cassell. Instead, the Board and APHA claim that because residents still receive a majority of the permits, there can be no real problem with the portion of permits taken away from residents and earmarked for nonresidents. The Board and APHA mix apples and oranges. The issue here is not what is *given to* residents, it is what is unconstitutionally *taken from* residents. A regulation does not need to give nonresidents 100% of the permits in order to constitute the very type of "special privilege" Article VIII prohibits.

The Board and APHA assert that granting these special privileges to nonresidents and the guiding industry actually *benefits* Alaskans, even though it deprives Alaskan residents of access to a prized hunting experience. The justifications they provide are spurious. First, they insist that the current nonresident allocation is necessary to conserve the Kodiak Brown Bear population,[1] a claim that is belied by record evidence that the

[1] Board Br. at 28-29; APHA Br. at 27-28.

Alaska Department of Fish & Game can accommodate a range of allocations. They further explicitly acknowledge that the Board intended the current allocation system to provide an economic boon to the guiding industry and intended to use it to affect the economy on a statewide basis[2]—both efforts that are well outside the Board's jurisdiction. More fundamentally, the Board and APHA refuse to acknowledge that one cannot use unconstitutional means to pursue policy gains, no matter how well-intentioned. This Court should disregard the Board's and APHA's attempts to frame the current allocation system as beneficial to Alaskans and see it for what it is: an unconstitutional effort to maintain the guiding industry's lucrative grip on Kodiak Brown Bear hunting permits.

ARGUMENT

I. THE ALASKA CONSTITUTION DOES NOT ALLOW THE BOARD TO PRIVILEGE NONRESIDENT HUNTERS AT THE EXPENSE OF RESIDENT HUNTERS.

There is no factual dispute that the Board has promulgated regulations that set aside large portions of highly coveted big game hunting permits exclusively for nonresidents. Dr. Cassell's opening brief set forth the straightforward proposition that this practice of earmarking permits for nonresidents violates the public trust and grants a special privilege to nonresidents in violation of the Alaska Constitution.[3] Neither the Board nor APHA disputes the constitutional principles invoked by Dr. Cassell and neither makes any serious effort to argue that nonresidents do not benefit greatly from this arrangement. Rather, both

[2] Board Br. at 27-28; APHA Br. at §§III.C.2, III.D.

[3] Appellant Br. at 23-24 (discussion limited to broader arguments).

the Board and APHA argue that giving nonresidents exclusive access to large percentages of permits passes constitutional muster because the majority of the permits is still issued to residents,[4] and that the Board is merely making a discretionary and innocuous allocation between resident and nonresident "user groups."[5] The Board and APHA are mistaken on both counts. The permits residents receive do not absolve the Board for taking away permits from residents and setting them aside for nonresidents, and residents and nonresidents are not the type of "user groups" the Board is constitutionally allowed to allocate between.

A. The Fact That Some Permits Remain Set Aside for Residents Does Not Render the Practice of Setting Aside Permits Exclusively to Nonresidents Constitutional.

The Board argues that the current allocation system does not grant any group exclusive access, does not create a monopoly, and does not grant a "special privilege" to any group because residents receive approximately two-thirds of the available Kodiak Brown Bear permits and are thus not entirely excluded from the hunt.[6] The Board goes as far as to characterize the status quo as "preferred access" for resident hunters.[7] The Board, however, cannot escape the simple fact that its nonresident preference gives nonresidents (and the guides they must hire by statute) a direct monopoly over a significant number of highly-coveted big game permits, all at the expense of residents.

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[4] Board Br. at 18-20; APHA Br. at 6, 9.

[5] Board Br. at 19; APHA Br. at 15.

[6] Board Br. at 18-19.

[7] *Id.* at 19.

The State nonetheless tries to distinguish the permits given exclusively to nonresidents by arguing that unlike in *McDowell* where a "closed group" of rural residents received 100% of subsistence access, here nonresidents are not receiving 100% of the permits.[8] But the common use clause forbids monopolies and "special privileges," not just straight monopolies.[9] One group does not need to be given 100% access to be given a "special privilege." Indeed, this Court's reasoning in *McDowell* did not leave room for the possibility that so long as urban residents had *some* subsistence access, there would be no constitutional issue with setting aside some form of exclusive access to rural residents.

The State's attempt to distinguish the nonresident preference here from the exclusive guide areas struck down in *Owsichek* likewise falls flat.[10] Each permit set aside exclusively for nonresidents is directly analogous to setting aside a specific geographical area for the benefit of one guide. The fact that other geographical areas remained open to guiding, and that guides all had the ability to seek their own exclusive area, did not save the scheme struck down in *Owsichek*.

Further, as Dr. Cassell explained in his opening brief, the current nonresident preference regime gives nonresident hunters all-but-guaranteed access to a permit to hunt, while residents must roll the dice year after year with the odds stacked against them.[11] This

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[8] *Id.* at 18-19 (citing *McDowell v. State*, 785 P.2d 1, 8-9 (Alaska 1989)).

[9] *Owsichek v. Guide Licensing & Control Bd.*, 763 P.2d 488, 493, 496 (Alaska 1988) (framers intended to prohibit "exclusive grants or special privilege[s]").

[10] Board Br. at 18.

[11] Appellant Br. at 9-11.

is by definition a special privilege granted to nonresidents. Calling resident access "preferred access" simply because residents receive a greater absolute number of permits ignores that on a per capita basis, residents are severely disadvantaged when compared to nonresident hunters. There is no real question that nonresident hunters (and their professional hunting guides) enjoy specially privileged access to Kodiak Brown Bear hunting and resident hunters do not.

APHA tries a different variation on the Board's theme and argues that resident hunters still have access to the "resource as a whole" and thus this Court should simply look away from the number of permits given exclusively to nonresidents.[12] APHA's attempt to reframe the issue misses the point. Every permit represents a unique opportunity to hunt for a bear, and residents are currently excluded from nearly a third of those bears. Under the challenged regulation, nonresident applicants are all but guaranteed the opportunity to hunt Kodiak Brown Bear, while residents are left with low odds of receiving a permit.[13] This is the very definition of a special privilege.[14]

APHA further attempts to argue that even adopting Dr. Cassell's proposal would not help resident hunters' odds much, in light of the scarcity of bears; it asserts that the "marginal differences in odds cannot possibly present a constitutional issue."[15] But the

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[12] APHA Br. at 6, 9

[13] RHAK Br. at 10.

[14] *Id*. APHA also argues that all of Kodiak's hunting grounds are "open" to resident hunting and thus there is no problem (APHA Br. at 4), conveniently forgetting that for Kodiak bears, there is no hunting (legally) without a permit.

[15] APHA Br. at 33.

constitutionality of a policy granting improper "special privileges" does not turn on the precise statistical benefit conferred, or the statistical impact the policy has on others. "No harm, no foul" is not a proper constitutional analysis.[16]

Finally, the Board, tries to wipe away all concern about permit allocations, and insists that the wildlife resource is actual bears, not hunting permits, and residents retain access to the bears regardless of permit policy.[17] Nonsense. Given that one may not hunt Kodiak Brown Bear without a permit, *the permit is the resource*. Here, every permit represents an opportunity to take a bear—*i.e*., represents access to wildlife. By the Board's logic, delivering a dead bear to every individual who drew a permit would be constitutionally equivalent to allowing the individual to hunt. But hunting is not merely a means to an end. As RHAK explained in its brief, "even an unsuccessful hunt is a valued experience. Alaskan hunters appreciate the opportunity to camp and to seek a bear in the remote wilderness."[18]

B. Nonresident Hunters Are Engaged in the Same Uses as Resident Hunters but Receive a Special Privilege under the Current Allocation System.

The Board invokes its authority to allocate resources between user groups, such as allocating access to fish between commercial, sport, and subsistence users, and claims that

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[16] Further, APHA's own math shows a material increase in resident odds. APHA states that Dr. Cassell's system would "improve resident hunter annual odds of drawing a permit from Cassell's inferred odds of 6.6% (320 out of 5,000) to 10% (500 out of 5,000)." *Id*. at 33. This is not a "marginal difference"—it would nearly *double* a resident hunter's odds of receiving a permit.

[17] Board Br. at 22-23.

[18] RHAK Br. at 2.

here it is simply allocating between the "user groups" of resident and nonresident hunters.[19] APHA parrots the same argument.[20] One cannot analogize between allocating between different types of resource users (*e.g.*, commercial, sport, subsistence) and a decision to set aside state resources for the exclusive benefit of nonresidents. Here, resident and nonresident hunters participate in the same Kodiak Brown Bear hunts, in the same areas, for the same bears; they are all engaged in the hunts for sport, not subsistence or commercial purposes. *They are engaged in the same use*; thus the Board's allocation authority does not even come into play. The fact that some of these users are residents and others are nonresidents does not make them distinct user groups, and to the extent nonresidents are distinguishable, it is because they lack the constitutional rights of Alaskan residents and are not legally entitled to common use of the State's wildlife.

Even apart from the fact that resident and nonresident sport hunters cannot be considered distinct user groups, the Board's defense that it is "just allocating" has no limiting principle. The fact that the State of Alaska often makes allocations between user groups does not mean that every allocation decision it makes is inherently lawful. Even when the Board of Fish is exercising its legitimate statutory authority to manage fisheries, for example, constitutional limits control how it may make allocations. The Board cannot defend every decision it makes on the grounds that it has identified user groups and must allocate resources between them.

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[19] Board Br. at 19-20.

[20] APHA Br. at 15.

II. ALLEGED CONSERVATION AND ECONOMIC BENEFITS DO NOT CURE CONSTITUTIONAL VIOLATIONS

A. Conservation Goals Do Not Justify Unconstitutional Means.

Both the Board and APHA argue the nonresident preference here is necessary to ensure proper conservation of the resource. They argue the common use clause must be read within the context of Article VIII as a whole, and that Dr. Cassell disregards other constitutionally mandated management principles such as beneficial uses and sustained yield, which the Board and APHA assert require a nonresident preference in the name of conservation.[21] The fundamental problem with this reasoning is that the alleged policy benefits of unconstitutional management practices are irrelevant. The Board has wide discretion to achieve its statutory goals with many policy levers available to it – but the Constitution places certain policy choices (such as granting exclusive privileges to nonresidents to hunt Alaska game) out of bounds. This is one of the principal lessons from *McDowell*; the grant of exclusive access to subsistence fishing to rural residents violated the Constitution no matter what the benefits of such a policy were.

Further, ending the nonresident preference here does not threaten sustained yield because it does not conflict with Section 4.[22] The Board acknowledges that Kodiak Brown Bears are "scarce wildlife resources" (a concession it resisted below),[23] insisting that this

[21] Board Br. at Argument Section III; APHA Br. at Section III.D.

[22] Appellant Br. at 37-38 (noting that Section 4 authorizes "beneficial uses" only to the extent that they further the goal of "sustained yield").

[23] Board Br. at 28. *Cf.* Exc. 274 (Board called Dr. Cassell's scarcity characterization a "false assumption" and insisted that the brown bear population "is healthy and sustainable.").

very scarcity requires it to give more permits to nonresidents—a backwards conclusion that is directly at odds with this Court's comments in *Shepherd v. State*. APHA adopts a similar approach,[24] claiming that maintaining the current nonresident hunter allocation is the only way the Alaska Department of Fish and Game ("ADF&G") can conserve the Kodiak Brown Bear population and thus achieve sustained yield.[25] Under the Board and APHA's reasoning, nonresident hunters are essential to sustained yield because the requirement that nonresidents work with professional guides means fewer female bears are taken by nonresidents, and females are crucial to maintaining the bear population.[26]

But it is pure speculation to argue that increasing the number of permits issued to resident hunters, by itself, will upset the existing conservation balance. ADF&G has a wealth of policy options available to it to further conservation goals that do not violate the Constitution. Indeed, ADF&G was in fact neutral on Dr. Cassell's proposal to the Board and explained to the Board at its March 19, 2019 meeting the steps it could take to ensure the bear population remained healthy:

> [W]e'd have to adjust the number of permits . . . to hopefully not exceed our female harvest . . . we would probably more than likely undertake some pretty aggressive educational campaigns, particularly for residents, to help educate them on trying to differentiate between male and female bears to hopefully bring down that female harvest. So these are some of the tools that we would probably employ if this proposal were to pass.[27]

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[24] APHA Br. at 33

[25] Board Br. at 28-29.

[26] *Id.* ; APHA Br. at 27-28.

[27] R. 460-62.

The record presented to the superior court also contains a report ADF&G delivered to the Board that showed different possible scenarios, including a scenario where increased resident hunter participation could be accommodated by adjusting overall permit numbers.[28] As an ADF&G representative explained to the Board at the meeting, ADF&G had extensive historical use and harvest data that it could use to adjust permit numbers to maintain its harvest targets.[29] In other words, ADF&G could allow more permits to be hunted by residents without jeopardizing the bear population. The Board and APHA's claim that nonresident hunting is essential to sustaining the brown bear population is thus not only speculative, but also belied by the actual record.[30]

The Court should disregard these sustained yield arguments and look back to its direction in *Shepherd* that "the state is required to maximize for state residents the benefits of state resources," that in "cases of scarcity, this can often reasonably be accomplished by

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[28] Exc. 118 (slide 31); Exc. 255 (referencing same); *see also* RHAK Br. at 17.

[29] ADF&G stated that this might initially (but not permanently) require a reduction in overall permit numbers. Exc. 173-74 ("Once we begin to monkey with some of those numbers . . . just to be conservative, we might have to reduce the number of permits until those new harvest use patterns become established.").

[30] APHA claims that the record lacks evidence rebutting the necessity of the current allocation from a conservation perspective. APHA Br. at 28. The record evidence cited above refutes this claim. To be clear, Dr. Cassell is not asking this Court to wade into a factual debate over exactly how increasing the number of resident permits would affect conservation of the Kodiak Brown Bear population. For purposes of this appeal, the relevant material fact is that ADF&G—the agency charged with conserving the bear population—informed the Board that its conservation agenda could accommodate a range of resident and nonresident allocations. In light of this fact (which is a matter of record and beyond dispute), the Board and APHA's argument that the current allocation system is necessary to maintain the bear population and promote "sustained yield" falls apart.

excluding or limiting the participation of nonresidents[,]" and that "in such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents[.]"[31] The Board agrees that Kodiak Brown Bears are scarce, hence the need to issue a very limited number of permits. It turns *Shepherd* on its head to argue that this scarcity requires the Board to take affirmative action to set aside permits for nonresidents.

B. Alleged Economic Benefits Cannot Justify Unconstitutional Management Practices.

1. The Board cannot claim authority to regulate access to Alaska game in the name of economic subsidies.

The Board and APHA both embrace the argument that economic factors are appropriate for the Board to consider when assessing access to permits to hunt Alaska wildlife.[32] Both argue that the economic benefits to the guiding industry and alleged secondary economic benefits on Kodiak mean that the nonresident permit preference is constitutional because it provides for the "maximum benefit" of Alaskans.[33] The Board also argues that taking away permits from Alaskans and giving them to nonresidents is almost *mandatory*,[34] because the fees ADF&G collects from nonresidents "support the Department of Fish and Game's management, conservation and hunter education programs."[35] In making these arguments, the Board and APHA improperly conflate

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[31] *Shepherd v. Stat*e, 897 P.2d 33, 40-41 (Alaska 1995).

[32] Board Br. at 27-28; APHA Br. at 24-27.

[33] *Id*.

[34] Board Br. at 27 ("The Board *must* consider financial benefit to Alaskans in making allocation decisions for natural resources.") (emphasis added).

[35] *Id*. at 28.

economic benefits *to the conservation program* with economic benefits *to guides and to the state generally*.

The Board is not charged with regulating the economy of the State of Alaska or ensuring the profitability of the guiding industry. As the Board acknowledges, the fees the State receives from nonresident guided hunters statewide amount to only $3.8 million, which is close to the $3 million it receives from resident hunters statewide.[36] The impressive dollar numbers the Board cites in its brief—such as the $57 million nonresidents spend on guide fees,[37] or the $28 million they spend on expenses like food, air transportation, and fuel—are irrelevant to the Board's statutory duty to "conserv[e] and develop[] the game resources of the state[.]"[38] Even if it were proper for the Board to consider the benefit of hunting fees to sustaining ADF&G's programs, which is not allowed under Article VIII and this Court's precedents,[39] that would not authorize the Board to engage in broad statewide economic regulation to benefit other industries unrelated to conservation, such as hotels, restaurants, and gas stations.

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[36] *Id*. at 27-28. The Board does not identify what amount is specifically attributable to nonresident hunter fees for Kodiak Brown Bear, but given the scarcity of the bears, it is presumably a small fraction of this total.

[37] *Id*. at 27.

[38] AS 16.05.221(b).

[39] *See, e.g.*, *Brooks v. Wright*, 971 P.2d 1025, 1032 (Alaska 1999) ("income generation is not the sole purpose of the trust relationship."); *Owsichek v. Guide Licensing & Control Bd.*, 763 P.2d 488, 497 n.14 (Alaska 1988) ("mere usefulness in wildlife management does not suffice to save the EGA program from unconstitutionality").

More fundamentally, by invoking the "maximum benefit of the people" the Board and APHA are elevating the general prescriptions in Article VIII Section 2 over the specific provisions regarding access to wildlife in Article VIII Section 3. The specific trumps the general.[40] In terms of wildlife management, this means that the starting point is the common use clause in Section 3, which provides specific guidance on how the Board may, and may not, provide for the "maximum benefit of the people" when granting access to the State's game resources. At a minimum here, this means not systematically excluding Alaskans from access to hunting permits in favor of nonresidents. Ultimately, the economic benefits argument proves too much because the perceived economic benefit of *any* chosen policy could trump the remaining provisions of Article VIII.[41]

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[40] *Cf. State v. Planned Parenthood of the Great Nw*., 436 P.3d 984, 996 (Alaska 2019) ("Under the interpretive canon *ejusdem generis,* when a general term follows specific terms, the general term 'will be interpreted in light of the characteristics of the specific terms, absent clear indication to the contrary.'").

[41] APHA nonetheless claims that language in *Pullen v. Ulmer* mentioning moose as a valuable tourist attraction emphasizes "the economic value of tourist hunting" and that the *Pullen* Court determined that it was proper for agencies to consider economic issues when interpreting Article VIII. APHA Br. at 25-26 (citing *Pullen v. Ulmer*, 923 P.2d 54, 59-60 (Alaska 1996)). This position has no support in *Pullen*'s text. While *Pullen* did mention *salmon* in the context of the *fishing industry*, it did not mention *moose* in the context of the *hunting industry*—rather, it stated that moose play a role in attracting *tourists*, not "tourist hunters," to the state. In fact, the word "hunt" appears nowhere in *Pullen*. *Pullen* addressed whether salmon were state property that could be appropriated via ballot initiative and the purpose of the moose discussion was to illustrate that wildlife is a state asset, held by the state in trust for its people. *Pullen*'s substantive holding is thus irrelevant to this case, where no party disputes that Kodiak Brown Bears are wildlife within the meaning of Article VIII and managed by the State of Alaska for common use.

The second mistake in this argument is that it incorrectly, and baselessly, assumes that this system of government patronage benefits *all Alaskans.* In fact, it provides economic 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.[42] Rather, the Board and APHA rely on speculative arguments that the money nonresidents pay guides somehow benefits all "the people" statewide.

Finally, the Board also argues that bears have "uses" beyond being hunted for sport, and this can include using them to further economic purposes.[43] But the economic purpose being alleged by the Board here is still *using bears for sport hunting*—it just wants those who hunt them to be from out of state and therefore forced to spend money on professional guides. Using bears as a means for delivering economic subsidies to guides is not a legitimate or constitutional "use."

2. The economic benefits to Alaskans touted by the Board are illusory.

Dr. Cassell disputes that it is appropriate for the Board to manage wildlife in an unconstitutional manner in an effort to regulate the Alaskan economy and pick economic winners. Even if this were appropriate, the economic "facts" on which the Board relies are, on their face, irrelevant, as they do not fit within the scope of the Board's authority. In its

[42] *Cf. Owsichek,* 763 P.2d at 497 (noting exclusive guide areas do not provide remuneration to the State).

[43] Board Br. at 26-29.

brief, the Board provides a laundry list of nonresident hunters' spending while in Alaska,[44] but the Board is silent on the contributions of resident hunters, acknowledging only $3 million in resident hunting license and tag fees—even though, as noted, that number is close to the $3.8 million spent by guided nonresident hunters.[45] The Board paints a misleading and incomplete picture that is contradicted by evidence that was in the superior court record.

As RHAK explains in its brief, based on a 2014 ADF&G report that was in the superior court record, "resident hunters throughout the state spent over $1 billion each year in connection with their hunting activities[,]" while "[n]onresident hunters spent only 15% as much — $150 million per year.[46]" Further, as RHAK notes, many resident hunters live in Alaska because of the hunting opportunities, giving greater support to its local economies through payment of taxes and community involvement year-round.[47] When resident hunters receive a Kodiak Brown Bear permit, they purchase their hunting gear in Alaska, buy airplane tickets, charter planes and boats to reach hunting areas, spend at hotels and restaurants before and after their trip, and—if the hunt is successful—hire Alaskan taxidermist to mount their hides.[48] "In short, an independent Alaska hunter pays for all the services that nonresidents do, apart from paying for professional guiding."[49] All of this

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[44] *Id*. at 27-28.
[45] *Id*.
[46] RHAK Br. at 14 (citing R. 690).
[47] *Id.* (citing R. 556, 680-81).
[48] *Id.* at 14-15 (citing R. 558-59, 692).
[49] *Id*.

evidence was before the superior court on summary judgment and it refutes any claim that the Board must prioritize nonresident hunters in order to promote the Alaskan economy.

III. GUIDING IS NOT A CONSTITUTIONALLY PROTECTED USE BECAUSE GUIDING DOES NOT REQUIRE RESIDENT STATUS.

Echoing the superior court, both the Board and APHA urge that guiding is a constitutionally protected "use" because *Owsichek* stated that "'professional hunting guides' fall within the protection of the common use clause."[50] This is an overstatement. *Owsichek* noted that *in that case* the hunter and his guide were both "using" wildlife resources as sport hunters.[51] 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.[52] As *Owsichek* stated, "[t]he common use clause makes no distinction between use for personal purposes or use for professional purposes."[53]

APHA and the Board also argue that professional guides should receive the same consideration as residents because most of the professional guides on Kodiak are

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[50] Board Br. at 26. APHA made a similar argument. APHA Br. at 15-16.

[51] *Owsichek v. Guide Licensing & Control Bd.*, 763 P.2d 488, 497 n.15 (Alaska 1988).

[52] *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."). To the extent *Owsichek* in any way recognized the right of guides to guide— it was on an *individual basis*. Owsichek, the guide who brought suit, was an individual Alaskan who sued based on his constitutional rights under the common use clause. No nonresident guide would have had standing to bring this claim.

[53] *Id.* at 497.

residents.[54] This is coincidence, not a fact of any legal significance. Residency is a legal status, achieved on an individual basis, that comes with specific legal rights and responsibilities. A court cannot consider professional hunting guides to be an "Alaska resident user group" as a matter of law *because they are not*. Guides are a group defined by law as individuals holding a professional guiding license.[55] The guiding statutes do not require that they be Alaska residents, and it is undisputed that many guides are not Alaska residents.[56] Constitutional rights are granted to individuals based on residency. Professional hunting guides are a mixed group of residents and nonresidents, and their status as guides does not on its own entitle them to Article VIII rights.

Finally, the fact is APHA's members' interest in being able to guide a hunt has nothing to do with the issue of the Board's setting aside hunting permits exclusively to nonresidents. The guides' ability to solicit clients and lead hunts remains the same regardless of how permits are allocated because guides are always free to secure resident clients.

IV. THE FEDERAL STATUS OF CERTAIN HUNTING AREAS IS IRRELEVANT.

APHA argues that Alaska's courts must avoid interpreting the Alaska Constitution in a way that conflicts with "federal interests" and that Dr. Cassell's proposal would create such a conflict because a portion of the Kodiak Brown Bear hunt takes place within the

[54] Board Br. at 26-27; APHA Br. at 17-18.

[55] Appellant Br. at 40.

[56] *Id*.

Kodiak National Wildlife Refuge.[57] This argument misses the mark because Dr. Cassell is arguing that wherever the State has authority to manage access to wildlife, it cannot impose a nonresident preference and allocate any percentage of hunting permits exclusively to nonresidents. The fact that there may be areas where the State does not have wildlife management authority is entirely irrelevant to the present case.

Further, principles of federal comity cannot justify violating the Alaska Constitution. This Court made this clear in striking down the rural subsistence preference in *McDowell v. State*.[58] There, the State's subsistence statute was written to comply with provisions of the federal Alaska National Interest Lands Conservation Act.[59] Nonetheless, the Court found this violated the Alaska Constitution and rejected any pleas to abide by federal policy preferences.[60] The bottom line is that federal management and policy choices must yield to the provisions of the Alaska Constitution.[61]

Finally, neither the State nor APHA identifies how Dr. Cassell's interpretation of Article VIII of the Alaska Constitution is at odds with any federal law. APHA insists that there is a canon of federal avoidance in Alaska,[62] but identifies no support for its argument

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[57] APHA Br. at 20-23.

[58] 785 P.2d 1 (Alaska 1989).

[59] *Id.* at 3.

[60] *Id.* at 7-8.

[61] 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.

[62] APHA Br. at 20-21.

that there is any actual conflict with any federal interests—big or small—to be avoided. The legal authorities APHA cites all address the canon of *constitutional* avoidance, not a general canon of *federal* avoidance. For example, APHA claims that the Alaska Constitution "explicitly direct[s] avoidance of conflict with federal law,"[63] but cites Article I Section 23, which authorizes the State to enact a resident preference within the limits of the *federal Constitution*.[64] There is a substantial and legally significant distinction between federal *interests* and the federal *Constitution*, and it is absurd to suggest that Alaskan's guaranteed constitutional rights must be subordinated to mere federal policy preferences.

Again, APHA has not pointed to any conflict with the federal constitution or a federal statute. Its argument rests on speculation that such an interest may exist: "Surely," APHA writes, "there is a 'paramount federal interest' involved in this hunt occurring largely on federal wildlife conservation land."[65] Notably, APHA does not cite any federal statute or constitutional provision prohibiting a resident preference or mandating a

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[63] *Id*.

[64] Art. I § 23 ("This constitution does not prohibit … [resident] preferences … to the extent permitted by the Constitution of the United States"). APHA's other citations have similar issues. *See* APHA Br. at 20 n.23 (citing *Kenai Peninsula Borough v. Cook Inlet Region, Inc*., 807 P.2d 487, 498 (Alaska 1999) (requiring statutes to be construed "to avoid a substantial risk of *unconstitutionality*.") (emphasis added); *Devaney v. Zucchini Gold*, *LLC*, 184 N.E.3d 1248, 1255 (Mass. 2022) (interpreting Massachusetts law to require avoidance of conflict with federal *laws* such as Fair Labor Standards Act, if possible); *In re Request for Jurisdictional Opinion*, 117 A.3d 457, 463 (Vt. 2015) (interpreting Vermont law to require avoidance of conflict with federal *constitution* when possible); *Martin v. City of Rochester*, 642 N.W.2d 1, 18 (Minn. 2002) (interpreting Minnesota law to require avoidance of conflict with federal *laws* such as Medicaid statutes).

[65] APHA Br. at 21.

nonresident preference; APHA cites 16 U.S.C. § 668dd(a)(4)(H), which expresses an intention for the Refuge to help Americans appreciate fish and wildlife.[66] A federal law stating a general desire for a Refuge to be open to the public does not create any federal statutory or constitutional conflict that should affect this Court's construction of the Alaska constitutional rights at issue here.

CONCLUSION

For all the reasons stated above, Dr. Cassell respectfully reiterates his request that this Court vacate the superior court's decision and rule that 5 AAC 92.061 is invalid and contrary to the Alaska Constitution.

[66] APHA also points to a letter sent in by the Kodiak Wildlife Refuge manager, but the letter makes cursory statements regarding resident and nonresident access and does not constitute a legal authority. *Id.* (citing Exc. 593). Indeed, there is no indication that this one individual's statement has the imprimatur of the federal government and even if it did, the Alaska Constitution trumps federal policy preferences, a point that the Board and groups like APHA usually agree with.