In the Supreme Court of the State of Alaska

WILLIAMS ALASKA PETROLEUM, INC.; and THE WILLIAMS COMPANIES, INC., *Appellants*, v. STATE OF ALASKA, ATTORNEY GENERAL'S OFFICE; FLINT HILLS RESOURCES, LLC; FLINT HILLS RESOURCES ALASKA, LLC; and CITY OF NORTH POLE, *Appellees*.	Supreme Court No. **S-17772** Trial Court No. 4FA-14-01544CI Hon. Warren W. Matthews Superior Court Judge Pro Tem

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLANTS

Filed in the Supreme Court of the State of Alaska this ___ day of December, 2020.

CLERK OF SUPREME COURT

By: _____

KENNETH P. JACOBUS (6911036)
KENNETH P. JACOBUS, P.C.
310 K St., Suite 200
Anchorage, AK 99501
(907) 277-3333
JacobusKenneth@gmail.com
Counsel for amicus curiae:
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036

MOTION

New Civil Liberties Alliance (NCLA) respectfully seeks leave to file an *amicus curiae* brief in support of Appellants. The proposed *amicus curiae* brief is attached to this motion. NCLA seeks leave under Rule 212(c)(9) of the Alaska Rules of Appellate Procedure. NCLA's interest and reasons why NCLA's brief is desirable are stated below.

REASONS FOR GRANTING THE MOTION

NCLA is a nonpartisan, nonprofit organization devoted to defending civil liberties from administrative power.[1] As a public-interest law firm, NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to a trial with an impartial and independent judge, and the right to be subject only to civil and criminal penalties that are both Constitutional and that have been promulgated by Congress. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because administrative agencies have trampled them for so long.

Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States, including within the State of Alaska, is the focus of NCLA's concern. By participating in these types of cases,

---

[1] No party's counsel authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief or otherwise collaborated in the preparation or submission of the brief. No person or entity other than *amicus curiae*, its members, or its counsel made monetary contributions to the brief or collaborated in its preparation.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the Administrative State.

NCLA views this case as being particularly important. It provides the Supreme Court of Alaska with the opportunity to fulfill its fundamental and all-important duty "to say what the law is" and denounce the use of judicial deference to government litigants, who seek to usurp the role of the courts in the interpretation of statutes. NCLA believes that if this Court asserts its Constitutional authority and responsibility, it would be honoring the duty of judges, protecting the due process of law for all litigants, bolstering the confidence of the people in our legal system, and restoring the rightful place of the courts in adjudicating legal disputes.

CONCLUSION

The Court should grant NCLA leave to file an *amicus curiae* brief in this case, and direct the Court's Clerk to lodge the proposed *amicus curiae* brief as filed.

Respectfully submitted,

Date: December 23, 2020

/s/ Kenneth P. Jacobus
KENNETH P. JACOBUS (6911036)
KENNETH P. JACOBUS, P.C.
310 K St., Suite 200
Anchorage, AK 99501
(907) 277-3333
JacobusKenneth@gmail.com
Counsel for amicus curiae:
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036

In the Supreme Court of the State of Alaska

WILLIAMS ALASKA PETROLEUM, INC.; and THE WILLIAMS COMPANIES, INC., *Appellants*, v. STATE OF ALASKA, ATTORNEY GENERAL'S OFFICE; FLINT HILLS RESOURCES, LLC; FLINT HILLS RESOURCES ALASKA, LLC; and CITY OF NORTH POLE, *Appellees*.	Supreme Court No. **S-17772** Trial Court No. 4FA-14-01544CI Hon. Warren W. Matthews Superior Court Judge Pro Tem

BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLANTS

KENNETH P. JACOBUS (6911036)
KENNETH P. JACOBUS, P.C.
310 K St., Suite 200
Anchorage, AK 99501
(907) 277-3333
JacobusKenneth@gmail.com
Counsel for amicus curiae:
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Amicus Curiae the New Civil Liberties Alliance is a nonpartisan, nonprofit organization devoted to defending civil liberties from administrative power.[1] As a public-interest law firm, NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to a trial with an impartial and independent judge, and the right to be subject only to civil and criminal penalties that are both Constitutional and that have been promulgated by Congress. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because administrative agencies have trampled them for so long.

Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States, including within the State of Alaska, is the focus of NCLA's concern. By participating in these types of cases, NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the Administrative State.

NCLA views this case as being particularly important. It provides the Supreme Court of Alaska with the opportunity to fulfill its fundamental and all-important duty "to say what the law is" and denounce the use of judicial deference to government litigants, who seek to

---

[1] No party's counsel authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief or otherwise collaborated in the preparation or submission of the brief. No person or entity other than *amicus curiae*, its members, or its counsel made monetary contributions to the brief or collaborated in its preparation.

usurp the role of the courts in the interpretation of statutes. NCLA believes that if this Court asserts its Constitutional authority and responsibility, it would be honoring the duty of judges, protecting the due process of law for all litigants, bolstering the confidence of the people in our legal system, and restoring the rightful place of the courts in adjudicating legal disputes.

SUMMARY OF THE ARGUMENT

The Alaska Constitution and Code of Judicial Conduct require judges to exercise independent judgment and to refrain from bias when interpreting the law. These are foundational constitutional requirements for an independent judiciary. The Due Process Clauses of the Alaska Constitution and the Fourteenth Amendment to the U.S. Constitution both forbid judges from showing bias for or against a litigant when resolving disputes. These statements which define judicial duty are so axiomatic that they are seldom mentioned or relied upon in legal argument—because even to suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be disturbing.

Affording deference to a government litigant's statutory interpretations, however, flouts these bedrock constitutional principles. Unfortunately, we often see courts approach this question of deference by merely repeating citations and providing an incantation of legal precedent, thereby exposing the danger of uncritical acceptance of a concept that should never have earned a foothold in the first place. The constitutional problems with the court-created deference doctrine, as the discussion in this brief shows, remain as acute as ever.

Appellants ask this Court to decide whether the court below erred in concluding that the Alaska Department of Environmental Conservation's (DEC) determination (that sulfolane releases "were releases of a hazardous substance") is "entitled to judicial deference." Memorandum of Decision (Jan. 3, 2020), hereinafter referred to as "Decision" ¶ 90 [R. 033317]. The court below deferred to a determination that DEC admittedly changed over time. Decision ¶ 88, [R. 033311]. That interpretive change signifies the constitutional dangers associated with courts' deferring to an agency's interpretations of statutes.

It represents nothing short of judicial bias against one of the parties whenever the court defers to the government's legal interpretation in a case instead of relying on its own independent analysis and judgment. It is even worse in those circumstances in which the government is a party to the litigation, as it is here. Such bias is literally inescapable when deference is accorded under such circumstances.

This *amicus curiae* brief takes no position on the correct interpretation of the statute or any other issues raised on appeal. Its sole aim is to convince the Alaska Supreme Court to interpret the statute for itself and not to rely on or defer to the interpretation of an administrative agency.

ARGUMENT

Deferring to a state agency's statutory interpretations violates both the state and federal constitutions for two reasons. First, agency deference requires judges to abandon their duty of independent judgment. Second, agency deference violates the Due Process Clauses of the Alaska Constitution and the Fourteenth Amendment of the U.S. Constitution by commanding judicial bias toward one litigant—and hence against the other.

I. AGENCY DEFERENCE REQUIRES JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

Agency deference compels judges to abandon their duty of independent judgment. Under the Alaska Constitution, the judiciary is a separate and independent branch of the state government, and no member of the political branches shall exercise its powers. *State, Dep't of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) ("The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution."); Alaska Code of Judicial Conduct Canon 1 ("An independent and honorable judiciary is indispensable to achieving justice in our society. … The provisions of this Code are intended to preserve the integrity and the independence of the judiciary[.]"). The separation-of-powers doctrine "limits the authority of each branch to interfere in the powers that have been delegated to the other branches." *Alaska Pub. Int. Res. Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007). Limiting each branch's authority "preclude[s] the exercise of arbitrary power and … safeguard[s] the independence of each branch of government." *Id.* Staying faithful to Alaska's separation-of-powers doctrine prevents executive-branch officials from usurping the judicial role to say what the law is, and it protects judges from violating

the doctrine by stopping them from acquiescing in the executive's statement of what the law is.

Despite these constitutional absolutes, agency deference actually commands Alaska judges to do exactly the opposite of what they are sworn to do: abandon their independence by giving controlling weight to an agency's opinion of what a statute means—not because of the persuasiveness of the agency's argument, but rather based solely on the brute fact that this administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (""The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws.' … [Agency] deference precludes judges from exercising that judgment[.]") (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring)).

This abandonment of judicial responsibility is not tolerated in any other context—nor should it be accepted by a truly independent judiciary. The Code of Judicial Conduct and the Alaska Constitution both mandate judicial independence, a requirement that cannot and should not be easily displaced. Yet agency deference allows a non-judicial entity to usurp the judiciary's power of interpretation and commands judges to "defer" to the legal pronouncements of a supposedly "expert" body external to the judiciary.

In the end, agency deference is nothing more than a command that courts abandon their duty of independent judgment and assign controlling weight to a non-judicial entity's interpretation of a statute. It is no different in principle from an instruction that courts assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *Juneau Empire* editorial page. In each of these absurd scenarios, the courts similarly would be following another entity's interpretation of a statute so long as it

is not "clearly wrong"—even if the court's own judgment would lead it to conclude that the statute means something else.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). An agency is entitled to have its views heard and considered by the court, just as any other litigant or *amicus*, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

The court below in this case deferred to DEC's change in interpretation. Sulfolane "was not on DEC's horizon" between 1985 and 2001. Decision ¶ 88 [R. 033311]. "It was not a listed hazardous substance." *Id.* "Between 2000 and 2004, DEC appears to have had a casual attitude toward sulfolane." *Id.* But, in 2004, DEC changed its interpretation. DEC, in other words, did not consider sulfolane a "hazardous substance" under AS 46.03.826(5)(A) until at least 2004,[2] making the announcement in "October of 2004," that it will regulate sulfolane as a hazardous substance and subject to soil and water cleanup guidelines. Decision ¶ 88 [R. 033312].

---

[2] "'Hazardous substance' means (A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found[.]" AS 46.03.826(5)(A).

Relying on *Native Village of Elim v. State*, 90 P.2d 1, 5 (Alaska 1999), the court below concluded that a "deferential standard applies to the DEC's determinations … because the subject matter is technical and involves both the application of the agency's expertise and a policy choice." Decision ¶ 90 [R. 033318]. Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. The *Elim* "deferential standard," however, requires far more than respectful consideration of an agency's views; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to the views preferred by the agency. That approach turns "judicial review" and "judicial independence" on their head. In fact, and in contrast to such "deference," the judicial duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them *when persuasive*, but it forbids a regime in which courts "defer" or give automatic and controlling weight to a non-judicial entity's interpretation of statutory language—particularly when that interpretation does not accord with the court's sense of the best (*i.e.*, most correct) interpretation.

II. AGENCY DEFERENCE VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDGES TO SHOW BIAS IN FAVOR OF AGENCIES

A related and more serious problem with agency deference is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court violates due process.

The U.S. Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009). Indeed, judges are required to provide "neutral and respectful consideration" of a litigant's views free from "hostility or bias." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring). The Alaska Code of Judicial Conduct Canon 2 recognizes this absolute and mandates "impartiality of the judiciary." Nonetheless, under agency-deference doctrines, otherwise scrupulous judges who are sworn to administer justice impartially somehow feel compelled to remove the judicial blindfold and tip the scales in favor of the government litigant's position. This constitutionally abhorrent practice must stop.

Agency deference institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. Rather than exercise their own judgment about what the law is, granting "deference" instructs judges to defer to the judgment of one particular litigant before them unless it is clearly wrong. A judge who openly admitted that he or she accepts a government litigant's interpretation of a statute by default—and that he or she automatically rejects any competing interpretations that might be offered by the non-governmental litigant unless the government is clearly wrong—might be impeached and removed from the bench for exhibiting such bias and abusing judicial power. Yet that description comes perilously close to what judges actually do whenever they apply "deference" in cases where an agency appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is not "clearly wrong," or that the agency's interpretation is a product of "expertise" and "policy choice," Decision ¶ 90 [R. 033318] (quoting *Elim*, 90 P.2d at 5)—while the opposing litigant

gets no such latitude from the court and must show that the government's view is not merely wrong, but clearly so.

This was not always so in Alaska. The Alaska Supreme Court has "agree[d]" in the past that Alaska judges "owe no deference to the agency and must use [their] independent judgment on review" of "legal questions involving statutory and constitutional interpretation." *Greenpeace, Inc. v. State Office of Mgm't & Budget, Div. of Gov't Coordination*, 79 P.3d 591, 593 (Alaska 2003). There is no occasion to depart from that wise precedent here.

To the extent conflicting judicial precedent supports deference, such deference afforded to agency interpretations has strayed from its modest beginnings. *See, e.g.*, *Diaz v. Silver Bay Logging, Inc.*, 55 P.3d 732 (Alaska 2002) (a two-Justice dissenting opinion calling out the two-Justice plurality's conclusion that no deference is due to the Department of Labor's interpretations). Besides, "[a] wrong cannot be sanctioned by age and acquiescence, and transformed into a virtue. Indifference and lack of vigilance have lost some of the dearest rights to the people, but they can always be regained by energy and persistence." *Terrell v. Middleton*, 187 S.W. 367, 373 (Tex. Civ. App. 1916), *writ denied*, 191 S.W. 1138 (Tex. 1917); *see also Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 231 (N.J. 1952) ("[W]e are not impressed by the plaintiffs' argument that the practice is to the contrary, for if that is the practice, it should be terminated, not perpetuated.").

If the agency does not change its interpretation, contrary to what DEC did here, even then if "the uniform construction given to the act … ever since its passage … is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a Court of justice." *United States v. Dickson*, 40 U.S. 141, 161 (1841). Indeed, Alaska's judiciary, like its federal counterpart "has imposed upon it, by the Constitution, the

solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *Id.* at 162. Justice Clarence Thomas, dissenting from denial of certiorari in February 2020, had this to say: "In the past, I have left open the possibility that 'there is some unique historical justification for deferring to federal agencies.' … It now appears to me that there is no such special justification and that [agency deference] is inconsistent with accepted principles of statutory interpretation from the first century of the Republic." *Baldwin v. United States*, 140 S. Ct. 690, 692–93 (2020) (quoting *Michigan v. EPA*, 135 S. Ct. at 2712). This Court should apply the same longstanding principles and give no deference to DEC's interpretation.

The courts of last resort in other states have rejected deference to an administrative agency's interpretations in favor of maintaining judicial independence and separation of powers, thereby returning to the constitutional foundation of judicial review. Mississippi courts once reviewed agency interpretations of a rule or statute as "a matter of law that is reviewed *de novo*, but with great deference to the agency's interpretation." *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606 ¶ 15 (Miss. 2009), *abrogated by King v. Mississippi Military Dep't*, 245 So.3d 404 (Miss. 2018). *Mississippi Methodist* had assumed, like the lower court here, that the "duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." 21 So.3d at 606 ¶ 15. In 2018, however, the Mississippi Supreme Court rejected this rationale and "abandon[ed] the old standard of giving deference to agency interpretations of statutes." *King*, 245 So.3d at 408

("[I]n deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.").

Wisconsin also once showed "great weight deference" to agency interpretations. But Wisconsin has now reversed course as well. *See Tetra Tech*, 914 N.W.2d at 33–34 (tracing the roots of its deference doctrine to "language of persuasion" and an "acknowledg[ment] that a change in an ancient practice could have unacceptable disruptive consequences."). Where Wisconsin courts "once treated an agency's interpretation of a statute as evidence of its meaning," the "reach of the deference principle" first expanded to "something the courts could do in interpreting and applying a statute, but were not required to do." *Id.* at 36–37. Later, a 1995 decision from the Wisconsin Supreme Court "made the deference doctrine a systematic requirement upon satisfaction of its preconditions" and "[i]t accomplished this fact by promoting deference from a canon of construction to a standard of review." *Id. Tetra Tech* explained this was a misguided step in the evolution of the deference doctrine:

> Enshrining this [deference] doctrine as a standard of review bakes deference into the structure of our analysis as a controlling principle. By the time we reach the questions of law we are supposed to review, that structure leaves us with no choice but to defer if the preconditions are met.

Id. at 38.

While Wisconsin courts recognized that this deference doctrine "allowed the executive branch of government to authoritatively decide questions of law in specific cases brought to our courts for resolution," the court never "determine[d] whether this was consistent with the allocation of governmental power amongst the three branches." *Id.* at 40. After concluding that its "deference doctrine cedes to administrative agencies some of our exclusive judicial power," it "necessarily follow[ed] that when [an] agency comes to [the court] as a party in a

case, it—not the court—controls some part of the litigation. *Id.* at 49. "When a court defers to the governmental party, simply because it is the government, the opposing party is unlikely to be mollified with assurances that the court bears him no personal animus as it does so." *Id.*

Tetra Tech recognized Wisconsin's deference doctrine "deprive[s] the non-governmental party of an independent and impartial tribunal," while granting the "rule of decision" to any "administrative agency [that] has an obvious interest in the outcome of a case to which it is a party." *Id.* at 50. The court thus concluded that "deference threatens the most elemental aspect of a fair trial"—a fair and impartial decisionmaker. *Id.* By rejecting the deference doctrine, the court "merely … join[ed] with the ancients in recognizing that no one can be impartial in his own case." *Id.*

Justice Clarence Thomas recently underscored the rejection of the rationale for deference, concluding that agency deference "differs from historical practice in at least four ways." *Baldwin*, 140 S. Ct. at 694.

> First, it requires deference regardless of whether the interpretation began around the time of the statute's enactment (and thus might reflect the statute's original meaning). Second, it requires deference regardless of whether an agency has changed its position. Third, it requires deference regardless of whether the agency's interpretation has the sanction of long practice. And fourth, it applies in actions in which courts historically have interpreted statutes independently.

Id.

In short, no rationale can support a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and commands systematic bias in favor of the government's preferred interpretations of statutes. Whenever deference is applied in a case in

which the government is a party, the courts deny due process to the non-governmental litigant by showing favoritism to the government's interpretation of the law.

III. *STARE DECISIS* PROVIDES NO ROADBLOCK AND THE JUDICIAL CODE OF CONDUCT REQUIRES THE COURT TO RECOGNIZE CONSTITUTIONAL PROBLEMS WITH DEFERENCE

Alaska case law has not considered or addressed these constitutional objections to agency deference previously.[3] So, it is not true that this Court has rejected these constitutional arguments by deferring to agencies in the past. Judicial precedents do not resolve issues or arguments that they never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("Cases cannot be read as foreclosing an argument that they never dealt with."); *see also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); *Joseph v. State*, 26 P.3d 459, 468–69 (Alaska 2001) ("A case is not binding precedent if its holding is only implicit or assumed.").

Stare decisis therefore presents no obstacle to analyzing these constitutional objections and declaring agency deference unconstitutional. And in all events, a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of judicial opinions that never considered the constitutional problems briefed here. *See Graves v. New York*, 306 U.S. 466, 491–

[3] *Amicus curiae* is unaware of any cases addressing these precise constitutional objections.

92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (*Stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution.").

Assuming for argument's sake that *stare decisis* applies, it is well-settled that "*stare decisis* is a practical, flexible command." *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996). This Court:

> [O]verrule[s] a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent. A decision may prove to be originally erroneous if the rule announced proves to be unworkable in practice. Additionally, a prior decision may be abandoned because of 'changed conditions' if 'related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application.'

Id. (quoting *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1175–76 (Alaska 1993) (cleaned up)).

Amicus curiae respectfully asks the Court to refuse to grant deference to DEC's statutory interpretation. Hence, even if it ultimately reaches the same interpretive conclusion as DEC, the Court should repudiate agency deference on constitutional grounds in its opinion to make clear that the Court reached its decision independently.

The Court should give serious consideration to the above option—if only to avoid the potential hazard agency deference presents to lower courts in Alaska. The Code of Judicial Conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: …

the judge has a personal bias or prejudice concerning a party." Alaska Code of Judicial Conduct Canon 3(E)(1)(a); *see also* AS 22.20.020(a)(9) ("A judicial officer may not act in a matter in which … [t]he judicial officer feels that, for any reason, a fair and impartial decision cannot be given."). Though agency deference involves an institutionally imposed bias rather than personal prejudice, the resulting partiality is inescapable, for the doctrine requires judges systematically to favor an agency's interpretations over those offered by opposing litigants. And judges cannot excuse this bias by invoking their duty to follow precedent, for there is no "superior-orders defense" available in the Code of Judicial Conduct. These fundamental constitutional questions will continue to haunt judges until this Court addresses them.

"Deference" to an administrative agency's interpretations of statutes puts lower court judges in an impossible situation; it is an assault on their duty of independence, their oath, the separation-of-powers doctrine, and the unbiased due process of law that courts owe to each and every litigant who appears before them. Deference thus compels them to betray the core responsibilities of judicial office. It is long past time for conscientious judges to call out the ways in which this deference has misled the judiciary—and to advocate a return to the judicial independence, unbiased judgment, and due process of law that Alaska's Constitution requires.

If the Court is not prepared to reject "deference" across the board, although we believe that it should, the Court must at least recognize the deep unfairness that results from deferring to the interpretation that is proffered by the real party in interest in this litigation (the DEC). This Court should recognize the denial of due process inherent in deferring to one party at the expense of another and reject that approach regardless of whose interpretation the Court adopts.

CONCLUSION

The Court should declare agency deference unconstitutional. The Court should decline to defer to DEC's interpretation and instead provide a *de novo* interpretation of AS 46.03.826(5)(A). Even if the Court's interpretation ultimately agrees with DEC's analysis, it should only reach that conclusion independently and should call out the constitutional defects of "deferring" to the agency's interpretations in its opinion.

Respectfully submitted,

Date: December 23, 2020

/s/ Kenneth P. Jacobus
KENNETH P. JACOBUS (6911036)
KENNETH P. JACOBUS, P.C.
310 K St., Suite 200
Anchorage, AK 99501
(907) 277-3333
JacobusKenneth@gmail.com
Counsel for amicus curiae:
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036

In the Supreme Court of the State of Alaska

WILLIAMS ALASKA PETROLEUM, INC.; and THE WILLIAMS COMPANIES, INC., *Appellants*, v. STATE OF ALASKA, ATTORNEY GENERAL'S OFFICE; FLINT HILLS RESOURCES, LLC; FLINT HILLS RESOURCES ALASKA, LLC; and CITY OF NORTH POLE, *Appellees*.	Supreme Court No. **S-17772** Trial Court No. 4FA-14-01544CI Hon. Warren W. Matthews Superior Court Judge Pro Tem

CERTIFICATE OF SERVICE AND BRIEF FORMAT

Pursuant to Appellate Rule 513.5(c)(2), I hereby certify that the "Motion for Leave to File Brief *Amicus Curiae* of the New Civil Liberties Alliance in Support of Appellants," and the proposed "Brief *Amicus Curiae* of the New Civil Liberties Alliance in Support of Appellants" in S-17772 is proportionately spaced, with a type face of 13-point Garamond.

I certify that a copy of the Motion and proposed Brief *Amicus Curiae* and this certificate were mailed and emailed on December 23, 2020, to:

Counsel for Petitioners/Appellants:

SHOOK, HARDY & BACON L.L.P.
Tristan L. Duncan, MO Bar No. 39525
Mathew L. Larsen, MO Bar No. 60168, CA Bar No. 227810
2555 Grand Blvd.
Kansas City, MO 64108
Phone: (816) 474-6550

Email: tlduncan@shb.com
Email: mlarsen@shb.com

TINDALL BENNETT & SHOUP, P.C. (*local counsel*)
David H. Shoup, AK Bar No. 8711106
508 West 2nd Avenue, 3rd Floor
Anchorage, AK 99501
Phone: (907) 278-8533
Email: shoup@tindall-law.com

***Counsel for Respondents/Appellees*:**

Steven E. Mulder
Laura Fox
State of Alaska – Department of Law
OFFICE OF ATTORNEY GENERAL
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501
Steve.mulder@alaska.gov
Laura.fox@alaska.gov
Attorneys for State of Alaska

Jan M. Conlin
Mathew R. Korte
CIRESI CONLIN LLP
225 S. 6th St., Suite 4600
Minneapolis, MN 55402
JMC@ciresiconlin.com
MRK@ciresiconlin.com
Attorneys for Flint Hills Resources Alaska, LLC

James N. Leik (*local counsel*)
Eric B. Fjelstad
PERKINS COIE, LLP
1029 W. 3rd Ave.
Suite 300
Anchorage, AK 99501
JLeik@perkinscoie.com
Attorneys for Flint Hills Resources Alaska, LLC

Zane D. Wilson
CSG, INC.
714 4th Avenue, Suite 200
Fairbanks, AK 99701

zane@alaskalaw.com
Attorneys for City of North Pole

Dated this 23rd day of December, 2020

KENNETH P. JACOBUS, P.C.
Attorney for *Amicus Curiae* New Civil Liberties Alliance

By *<u>/s/ Kenneth P. Jacobus</u>*
Kenneth P. Jacobus
ABA #6911036

In the Supreme Court of the State of Alaska

WILLIAMS ALASKA PETROLEUM, INC.; and THE WILLIAMS COMPANIES, INC., *Appellants*, v. STATE OF ALASKA, ATTORNEY GENERAL'S OFFICE; FLINT HILLS RESOURCES, LLC; FLINT HILLS RESOURCES ALASKA, LLC; and CITY OF NORTH POLE, *Appellees*.	Supreme Court No. **S-17772** Trial Court No. 4FA-14-01544CI Hon. Warren W. Matthews Superior Court Judge Pro Tem

PROPOSED ORDER

The Court having considered the New Civil Liberties Alliance's Motion for Leave to File a Brief Amicus Curiae in Support of Appellants, and good cause appearing,

IT IS HEREBY ORDERED that leave to file an *amicus curiae* brief is GRANTED to the New Civil Liberties Alliance; and

IT IS FURTHER ORDERED that the Clerk of Court lodge the proposed *amicus curiae* brief submitted by the New Civil Liberties Alliance as filed.

_____

For the Alaska Supreme Court