IN THE COURT OF APPEALS OF THE STATE OF ALASKA

David Phillip et alia, Appellants/Cross-Appellees, v. State of Alaska, Appellee/Cross-Appellant.	)	Court of Appeals Nos.: A-11580 et alia

Lead Trial Court Case No.: 4BE-12-00580 CR

APPEAL FROM THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE BRUCE G. WARD, MAGISTRATE JUDGE

BRIEF OF APPELLEE/CROSS-APPELLANT
STATE OF ALASKA

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CONSTITUTIONAL PROVISIONS

Alaska Const. art. I, § 4. Freedom of Religion
No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

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. Sustained Yield
Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Alaska Const. art. VIII, § 15. No Exclusive Right of Fishery
No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Alaska Const. art. VIII, § 17. Uniform Application
Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

STATUTES

AS 16.05.258. Subsistence use and allocation of fish and game

(a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.

(b) The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a stock or population can be harvested consistent with sustained

yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

(1) if the harvestable portion of the stock or population is sufficient to provide for all consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) shall adopt regulations that provide for other uses of those stocks or populations, subject to preferences among beneficial uses; and

(C) may adopt regulations to differentiate among uses;

(2) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) may adopt regulations that provide for other consumptive uses of those stocks or populations; and

(C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

(A) determine the portion of the stocks or populations that can be harvested consistent with sustained yield; and

(B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and

(4) if the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses, other than subsistence uses;

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood;

(ii) the proximity of the domicile of the subsistence user to the stock or population; and

(iii) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

(c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

(3) the extent and the kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

(4) the amount and distribution of cash income among those domiciled in the area or community;

(5) the cost and availability of goods and services to those domiciled in the area or community;

(6) the variety of fish and game species used by those domiciled in the area or community;

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those domiciled in the area or community;

(10) the cultural, social, and economic values associated with the taking and use of fish and game;

(11) the geographic locations where those domiciled in the area or community hunt and fish;

(12) the extent of sharing and exchange of fish and game by those domiciled in the area or community;

(13) additional similar factors the boards establish by regulation to be relevant to their determinations under this subsection.

(d) Fish stocks and game populations, or portions of fish stocks and game populations not identified under (a) of this section may be taken only under nonsubsistence regulations.

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

(f) For purposes of this section, "reasonable opportunity" means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.

REGULATIONS

5 AAC 01.270. Lawful gear and gear specifications and operation.

(a) Salmon may be taken only by gillnet, beach seine, a hook and line attached to a rod or pole, handline, or fish wheel subject to the restrictions set out in this section and 5 AAC 01.275, except that salmon may also be taken by spear in the Holitna River drainage, Kanektok River drainage, Arolik River drainage, and the drainage of Goodnews Bay.

(b) The aggregate length of set gillnets or drift gillnets in use by any individual for taking salmon may not exceed 50 fathoms.

(c) Fish other than salmon may be taken only by set gillnet, drift gillnet, beach seine, fish wheel, pot, longline, fyke net, dip net, jigging gear, spear, a hook and line attached to a

rod or pole, handline, or lead.

(d) Each subsistence gillnet operated in tributaries of the Kuskokwim River must be attached to the bank, fished substantially perpendicular to the bank and in a substantially straight line.

(e) In that portion of the Kuskokwim River drainage from the north end of Eek Island upstream to the mouth of the Kolmakoff River, no part of a set gillnet located within a tributary to the Kuskokwim River may be set or operated within 150 feet of any part of another set gillnet.

(f) A gillnet may not obstruct more than one-half the width of any fish stream and any channel or side channel of a fish stream. A stationary fishing device may not obstruct more than one-half the width of any salmon stream and any channel or side channel of a salmon stream.

(g) Repealed 5/19/2004.

(h) The maximum depth of gillnets is as follows:

(1) gillnets with six-inch or smaller mesh may not be more than 45 meshes in depth;

(2) gillnets with greater than six-inch mesh may not be more than 35 meshes in depth.

(i) Halibut may be taken only by a single hand-held line with no more than three hooks attached to it.

(j) Subsistence set and drift gillnets operated in Whitefish Lake in the Ophir Creek drainage may not exceed 15 fathoms in length.

(k) A person may not operate more than one subsistence set or drift gillnet at a time in Whitefish Lake in the Ophir Creek drainage. A person operating a subsistence set or drift gillnet shall check the net at least once every 24 hours.

(m) Notwithstanding (b) and (j) of this section, during times when the commissioner determines it to be necessary for the conservation of chum salmon, the commissioner, by emergency order, may close the fishing season in any portion of the Kuskokwim Area and immediately reopen the season in that portion during which the following gear limitations apply:

(1) a gillnet used to take fish

(A) must be of seven and one-half inch or greater mesh or four-inch or less mesh;

(B) for a gillnet of four-inch or less mesh, may not exceed the length specified by the commissioner in the emergency order;

(C) for a gillnet of seven and one-half inch or greater mesh, may not exceed the length specified in (b) and (j) of this section;

(2) for fish wheels:

(A) a fish wheel used to take fish must be equipped with a livebox that is constructed so that it contains no less than 45 cubic feet of water volume while it is in operation;

(B) the livebox of a fish wheel must be checked at least once every 12 hours while the fish wheel is in operation, and all chum salmon in the livebox must be returned alive to the water;

(3) beach seine gear: any chum salmon taken in beach seine gear must be returned alive to the water.

(n) Notwithstanding (b) and (j) of this section, during times when the commissioner determines it to be necessary for the conservation of king salmon, the commissioner, by emergency order, may close the fishing season in any portion of the Kuskokwim Area and immediately reopen the season in that portion during which the following gear limitations apply:

(1) a gillnet mesh size may not exceed six inches;

(2) for fish wheels:

(A) a fish wheel used to take fish must be equipped with a livebox that is constructed so that it contains no less than 45 cubic feet of water volume while it is in operation;

(B) the livebox of a fish wheel must be checked at least once every six hours while the fish wheel is in operation, and all king salmon in the livebox must be returned alive to the water; and

(3) for beach seine gear: any king salmon taken in beach seine gear must be returned alive to the water.

(o) For the purposes of this section, a "livebox" is a submerged container, that is attached to a fish wheel and that will keep fish caught by the fish wheel alive.

5 AAC 07.365. Kuskokwim River Salmon Management Plan.[1]

(a) The purpose of this management plan is to provide guidelines for the rebuilding and management of the Kuskokwim River salmon fishery that will result in the sustained yield of salmon stocks large enough to meet the escapement goals, amounts necessary for subsistence, and for nonsubsistence fisheries.

(b) It is the intent of the Board of Fisheries that the Kuskokwim River salmon stocks shall be managed during June and July in a conservative manner consistent with the Policy for the Management of Sustainable Salmon Fisheries (5 AAC 39.222) and the subsistence priority.

(c) In the subsistence fishery, in the Kuskokwim River drainage, in the waters of the mainstem of the river and other salmon spawning tributaries, unless otherwise specified by the department,

(1) the subsistence salmon net and fish wheel fisheries will be open for four consecutive days per week in June and July as announced by emergency order; however, the commissioner may alter fishing periods by emergency order based on run strength and to achieve escapement goals;

(2) during subsistence closures of three consecutive days per week in June all salmon nets with a mesh size larger than four inches must be removed from the water, and fish wheels may not be operated; however, the commissioner may alter fishing periods by emergency order based on run strength and to achieve escapement goals;

(3) as the salmon run progresses upstream from Districts 1 - 2, and further upstream, the provisions of (1) of this section will be implemented in the mainstem of the Kuskokwim River and salmon spawning tributaries;

(4) the commissioner may alter the subsistence hook and line bag and possession limits specified in 5 AAC 01.295 by emergency order if the commissioner determines that inseason indicators indicate it is necessary for conservation purposes.

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[1] This is the version of the regulation in effect during the summer of 2012; the regulation has since been amended effective April 13, 2013.

(d) In the commercial fishery,

(1) the guideline harvest level for king salmon is 0 - 50,000 fish;

(2) only those waters of District 1 downstream of the ADF&G regulatory markers located at Bethel may be opened during the first commercial salmon fishing period;

(3) the commissioner shall open and close the Kuskokwim River commercial salmon fishery by emergency order; if inseason indicators of run strength indicate a run strength that is large enough to provide for a harvestable surplus and a reasonable opportunity for subsistence uses and for nonsubsistence fisheries, the subsistence fishing shall revert to the fishing periods as specified in 5 AAC 01.260;

(4) the department shall provide, to the extent practicable, at least 24 hours advance notice of the opening of Districts 1 and 2 to commercial fishing periods;

(5) Districts 1 and 2 commercial fishing periods are from 1:00 p.m. through 7:00 p.m.; when longer fishing periods are allowed, the extra time is to be divided before 1:00 p.m. and after 7:00 p.m.;

(6) in June, and until coho salmon relative abundance exceeds chum salmon relative abundance, the department shall manage, to the extent practicable, the commercial salmon fishery based on the chum salmon run strength;

(7) the guideline harvest level for sockeye salmon is 0 - 50,000 fish;

(8) when chum salmon abundance is sufficient to provide for escapement and subsistence needs, and when coho salmon relative abundance exceeds chum salmon relative abundance, the department shall manage, to the extent practicable, the commercial salmon fishery based on the strength of the coho salmon run;

(9) when the chum salmon run is projected to be inadequate to meet escapement and subsistence needs, the department shall manage the commercial coho salmon fishery to minimize the incidental harvest of chum salmon and to provide for coho salmon escapement and subsistence needs.

(10) a person may not sell salmon roe taken in Districts 1 and 2.

(e) In the sport fishery,

(1) if the commissioner restricts the fishery by emergency order for conservation

purposes, the restrictions will be based on the level of abundance;

(2) in the Aniak River drainage, the king salmon fishery is open from May 1 through July 25, with a bag and possession limit of two fish, 20 inches or greater in length, with an annual limit of two fish, 20 inches or greater in length; the sockeye, pink, chum, and coho salmon fisheries are open year round, with a combined daily bag and possession limit of three fish of which no more than two fish may be king salmon.

JURISDICTION

These are consolidated appeals from the May 2013 decisions of the district court, the Honorable Bruce G. Ward, Magistrate Judge, convicting the appellants of fishing violations. The Court has jurisdiction under AS 22.07.020(c) and Appellate Rule 202(b).

PARTIES

The appellants/cross-appellees are David Philip, Brian Ivan, Joseph Spein, Noah Okoviak, Sammy Jackson II, Kenneth Andrews, Sammy Jackson I, James Albrite, Michael Andrew, Johnny Owens, Peter Hinz, Michael T. Frye, and Patrick F. Black (collectively, "the defendants" or "the fishermen"). The State of Alaska is the appellee/cross-appellant.[2]

ISSUES PRESENTED

1. The State restricted allowable fishing gear as a conservation measure, making king salmon fishing more difficult but not impossible. The defendants presented generalized evidence that king fishing is religiously significant, but presented no evidence that any particular fishing gear is religiously significant. Did the district court err in failing to hold them to their burden of showing that the conduct for which they were cited—using gillnets with oversize mesh—was "religiously based"?

2. The State was projecting no harvestable surplus of king salmon in 2012, meaning that every king caught on the river would reduce the number of spawning kings

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[2] As explained in the State's Motion for Leave to File Late Notice of Cross-Appeal, the State does not wish to disturb the convictions in any way. The State cross-appealed in an abundance of caution to preserve its right to argue alternative grounds for affirmance that challenge aspects of the district court's reasoning and findings.

even farther below the number deemed necessary to sustain the population. Did the district court err in concluding that the State met its burden of showing that a religious exemption from the State's conservation measures would harm the State's compelling interest in protecting king salmon?

3. The common use clauses of Article VIII of the Alaska Constitution prohibit granting exclusive fishing privileges to closed user groups (groups not open to all Alaskans). The defendants seek an exclusive religious privilege to fish without restrictions while other Alaskans bear the burden of conservation measures. Should the district court's decision be affirmed on the alternative ground that such a religious exemption would harm the State's compelling interest in common use?

STATEMENT OF THE CASE

I. Introduction

The Kuskokwim River in western Alaska is home to one of the world's last great runs of wild king salmon. The State has a constitutional obligation to protect the sustainability of this important king salmon resource for future generations of all Alaskans.[3] "[M]igrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state."[4]

Because of perilously low king salmon numbers on the Kuskokwim in 2012, the State restricted fishing so that more fish could make it up the river to spawn. [Tr. 260-61]

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[3] *See* Alaska Const. art. VIII, sections 3, 4, 15, and 17.

[4] *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 495 (Alaska 1988) (quoting *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961)).

The State's restrictions temporarily limited the gillnet length and mesh size that subsistence fishermen could use in certain sections of the river, thus making it more difficult and less convenient for them to catch king salmon. [Tr. 266-68, 297, 401, 414] Many fishermen—including most of the defendants—still could (and did) legally catch kings despite these gear restrictions. [Tr. 265-66, 295-97; *infra* pgs. 11-12]

Although the State's gear restrictions did not prevent people from meeting their food needs by catching other fish or even from catching some king salmon, not everyone respected the restrictions. [Tr. 550-52, 263] The defendants and others violated the restrictions by fishing with oversize nets. [*Id.*] When caught and prosecuted, they asked the district court to retroactively excuse their gear violations on the grounds that they were religiously motivated to fish for kings. The court rejected this defense and convicted each of them. [Exc. 106-11] This Court should affirm the convictions to ensure that the State can continue to discharge its constitutional obligation to protect threatened fisheries.

Because the defendants presented no evidence that their religious beliefs required them to use prohibited gear instead of fishing for king salmon in compliance with the law, the Court should hold that they failed to satisfy their threshold burden for a free exercise claim. And even if the defendants satisfied their burden, the State amply satisfied its burden of showing that a religious exemption for their conduct would harm a compelling state interest. The State's biologists were projecting no harvestable surplus of king salmon in 2012, meaning that every king the defendants caught reduced the number of spawning kings farther below the number necessary to sustain the population.

Moreover, the defendants' position that "if there is only a little bit [of king

salmon], that little bit should be allocated to those with a religiously protected interest in that little bit" contravenes the common use clauses of the Alaska Constitution and the establishment clauses of the U.S. and Alaska constitutions. [At. Br. 32] King salmon are a shared resource; the State cannot purposely allocate that resource to a single religious group at the expense of non-adherents, but must instead manage it for all Alaskans.

II. Facts and proceedings

A. The State manages the Kuskokwim River king salmon fishery for sustained yield based on the best information available.

Wild salmon populations are "very cyclic" and go through "boom and bust" cycles that are influenced by many factors, not all of which are well understood. [Tr. 396, 399, 429] The king (or "Chinook") salmon population on the Kuskokwim River—"probably one of the best stronghold rivers in the world" for wild kings—is no exception. [Tr. 396; Exc. 140, 130] For example, king salmon returns on the Kuskokwim were poor from 1998–2000, "huge" from 2004–2006, and then dropped again from 2010–2012.[5] [Tr. 232-35, 325, 328, 331, 337, 348]

The Alaska Department of Fish and Game (ADFG) manages fish for "sustained yield," meaning that it aims to provide a consistently high harvest opportunity year after year without jeopardizing the long-term survival of the population. [Tr. 238-40] For anadromous fish like king salmon, ADFG must assure that each year enough fish make it from the ocean, where they spend most of their life, to the freshwater spawning grounds

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[5] Given the record-setting runs in the mid-2000s, the defendants' assertion that "the State turned a blind eye to the crisis that has been developing on the Kuskokwim River since 2000" is inaccurate. [At. Br. at 27; Tr. 331, 333]

where they reproduce. [Tr. 397, 238-40] Because "it takes fish to make fish," allowing too much human harvest, particularly in a low-abundance year, would prevent enough kings from reaching their spawning grounds and thereby threaten the long-term sustainability of the population. [Tr. 397-98]

Like all fish, king salmon can be caught by a variety of fishing methods, such as a gillnet, rod and reel, fish wheel, spear, dip net, longline, beach seine, or fish trap.[6] [Tr. 401] Fishing gear can vary in size and type: gillnets, for example, may be constructed in different materials, lengths, and net mesh sizes.[7] [Tr. 75] Some fishing methods and gear types are modern, such as nylon gillnets and aluminum boats with powerful motors, and some are historical, such as wooden fish traps, spears, and gillnets woven from tree bark or sinew.[8] [Tr. 75, 664, 609] Some methods and gear types are more effective than others, or more effective at catching particular species. [Tr. 268-69]

A very efficient modern way to catch king salmon is to deploy a long nylon gillnet with six- to nine-inch mesh from a motorized boat. [Tr. 266-69] Fish are generally caught in gillnets when their heads get stuck in the mesh around the gills, so the preferred gillnet mesh size roughly corresponds to the head size of the desired fish. [*Id.*] A larger mesh size, such as eight inches, is more effective for catching very large king salmon. [Tr. 399-401] A medium mesh size, such as six inches, is more effective for catching average-sized king salmon, but will also catch other species such as chum salmon if they are in

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6 *See, e.g.*, 5 AAC 01.270(a); 5 AAC 39.105; 5 AAC 01.010.

7 *Id.*; Ann Fienup-Riordan, *Yuungnaqpiallerput/The Way We Genuinely Live: Masterworks of Yup'ik Science and Survival*, 177-78 (2007).

8 *Id.*

the river. [Tr. 268-69, 414] And a smaller mesh size, such as four inches, is more effective for catching non-salmon species such as whitefish. [Tr. 266, 414] Thus, a person who wants to catch large kings but avoid smaller fish might prefer to use eight-inch mesh. [*Id.*] But although large-mesh gillnets may be most efficient for catching king salmon, it is possible to catch king salmon with any size net. [Tr. 266-67, 401]

Not all fishing methods and gear types are legal. The Board of Fisheries and ADFG use a variety of tools to manage fisheries, including restrictions on allowable methods and gear types in addition to restrictions on the times and places that fishing is permitted. [Tr. 244, 250, 293-94, 335, 399-400] Gear restrictions can reduce the efficiency of people's fishing efforts, thereby reducing harvest. [Tr. 244, 234, 414-15] They can also protect the demographics of the fish population; for example, prohibiting very large mesh gillnets can prevent selective targeting of very large king salmon, which are often fecund females, thereby increasing the number of eggs deposited in the gravel and the average size of fish that successfully spawn. [Tr. 400-01] Although gear restrictions are effective, the State cannot as easily implement "bag limits" for gillnetters—i.e., specific numerical caps on daily fish harvest—because it can be very difficult to control how many fish are caught in a gillnet. [Tr. 307, 318-19, 122]

Some gear restrictions are permanently in place by statute or regulation. For example, on the Kuskokwim gillnets used for subsistence salmon fishing may never be longer than fifty fathoms (300 feet) or deeper than forty-five meshes.[9] The regulations

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[9] *See* 5 AAC 01.270(b), (h).

authorize ADFG to add restrictions by emergency order based on its in-season observations of the fishery, further limiting allowable fishing methods, gear, times, or locations as necessary. [E.g., Exc. 201-03]

Each spring, ADFG uses its knowledge of salmon biology, historical and current data, and models it has developed to forecast how many king salmon will return to the Kuskokwim and choose management strategies to ensure a high enough "escapement"—i.e., number of kings that make it to the spawning grounds. [Tr. 238-40, 245-47, 251-54, 256-59, 284-86, 360-64] This is a difficult and imprecise task, and ADFG frequently reevaluates its models and its objectives, always trying to do the best it can with the information available. [Tr. 300, 302-03, 363-64, 366-67, 386-87, 388-89, 391, 409-410] In-season manager Travis Elison recalled his college professor's quip: "fisheries biology is not rocket science, it's way more complicated." [Tr. 303] Managing a "mixed stock" fishery such as the Kuskokwim, where multiple fish species may be in the river at the same time, is particularly challenging. [Tr. 316, 414-15, 267-69] When one species in a mixed-stock fishery (e.g., king salmon) is threatened, ADFG must engage in a delicate balancing act to try to restrict harvest of that species while still allowing people to harvest more abundant species (e.g., chum salmon) to meet their needs. [*Id.*]

Consistent with state law, ADFG prioritizes subsistence fishing over other types of fishing.[10] [Tr. 244, 240-41, 291-93] For this reason, subsistence is the last type of fishing to be restricted in a time of shortage. [Tr. 240-41] Within ADFG, the Division of

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10 AS 16.05.258.

Subsistence conducts research on subsistence hunting and fishing patterns and helps the State implement the subsistence priority.[11] [Tr. 92, 112, 114-18] But although subsistence fishing has priority over commercial and sport fishing, ADFG's first goal is always to ensure adequate escapement of fish to the spawning grounds to protect the future sustainability of the population. [Tr. 240-41, 243-44]

ADFG works closely and collaboratively with federal fisheries staff when managing fishing on the Kuskokwim.[12] [Tr. 402-06, 248-50] According to federal fisheries biologist Dan Gillikin, ADFG is "doing absolutely the best that [it] can do to meet all—all needs and provide for long-term sustainability of all the stocks of salmon" on the Kuskokwim. [Tr. 409, 422, 423] ADFG also works with the Kuskokwim River Salmon Management Working Group. [Tr. 247-48, 244-45, 251, 452-53] This working group was formed to provide an opportunity for local stakeholders to participate in the management process, and includes members representing elders, subsistence fishers, sport fishers, commercial fishers, and processors. [Tr. 247]

B. In the summer of 2012, the State restricted gillnet length and mesh size on the Kuskokwim River to protect the king salmon population.

In preparation for the summer of 2012, ADFG worked with federal fisheries staff to develop in-season management strategies for king salmon on the Kuskokwim River. [Tr. 245-55, 284-86, 402-03, 406-07, 452-56; Exc. 221-23] These strategies included an

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[11] AS 16.05.094.

[12] Such cooperation is vital because under current law federal agencies have dual subsistence fishery management on some portions of the Kuskokwim River. [Tr. 248-49; Exc. 219-20]

assessment tool called the "Bethel test fishery" to measure the day-by-day strength of the king salmon run, a management objective of 127,000 as the minimum number of king salmon needed to achieve the established escapement goals for several tributaries on the river, and options for reducing harvest if projected numbers fell below the chosen management objective. [Tr. 251-259, 284-86, 360-64, 404, 409-10, 424-25; Exc. 221-23] One such option to reduce harvest if necessary was the use of emergency orders to impose "rolling closures." Rolling closures impose restrictions on the type of fishing gear allowed depending on the date and location along the river. [Tr. 255, 261; Exc. 223-24] Such restrictions progress upriver along with the mass of fish they are designed to protect, ending in one section as they begin in the adjacent upriver section. [Tr. 261, 294]

ADFG and federal fisheries staff presented their management plan to the Kuskokwim River Salmon Management Working Group, which voted unanimously to approve the plan, including the option of rolling closures—or even complete closures—if necessary to achieve the chosen management objective. [Tr. 245-47, 251, 455, 254-55, 285-86, 404; Exc. 224] And the Association of Village Council Presidents and the Kuskokwim Native Association wanted ADFG to use an even *higher* management objective—in other words, to aim for more kings to reach the spawning grounds, which would have likely required even more fishing restrictions. [Tr. 285-86, 456]

At the beginning of the 2012 season, ADFG forecast a return of about 195,000 king salmon, which would have provided a decent "harvestable surplus"—that is, extra fish beyond the escapement objective of 127,000 that could be harvested without threatening sustainability. [Tr. 259-60, 411-12] But every day during the fishing season,

more information comes in, so it's "a rapidly evolving event with a day-by-day assessment." [Tr. 463] As the 2012 season progressed, based on the in-season assessment indicators, the king forecast got drastically worse. [Tr. 260-62, 410-11] Soon, ADFG was projecting *no* harvestable surplus of king salmon and escapements as low as 30,000, far below the management objective of 127,000 necessary to protect the population. [*Id.*]

Given this extremely poor outlook, in accordance with the management plan, ADFG decided to implement rolling closures through emergency orders that restricted allowable fishing gear. [Tr. 260-61] This decision was difficult, and ADFG and federal fisheries staff took it very seriously, knowing that it would pose a hardship for subsistence users. [Tr. 456-58, 283-84] Federal biologist Dan Gillikin agreed with ADFG that the restrictions were necessary given the lack of a harvestable surplus of king salmon projected. [Tr. 411-13] As federal manager Tom Doolittle explained, the king salmon resource "has a subsistence priority, but also it can't have a priority without having the resource there for the future and for future generations." [Tr. 457]

The first rolling closure restricted gillnet mesh size to four inches and net length to sixty feet, making it difficult to catch kings. [Tr. 266] This rolling closure lasted seven days, and was supported by the working group. [Tr. 261-62; Exc. 224] At the end of the seven days, the king numbers remained so poor that ADFG extended the restrictions for five more days, a decision the working group opposed. [Tr. 262, 287] At that point, the outlook was so dire that in-season manager Travis Elison asked a research biologist, "do you think this is it? Is this the year we're going to wipe out the run?" [Tr. 263-64] But at the end of the five-day extension, the numbers had improved; ADFG relaxed the mesh

size restriction to six inches because so many chum and sockeye had entered the river that a six-inch mesh net would be likely to fill up with those species without catching many kings. [Tr. 267-69] And later in the season, the restrictions were lifted and normal fishing was allowed again. ADFG's post-season preliminary estimate of king escapement was 77,000—far below the management objective of 127,000, but better than the most dire mid-season forecasts. [Tr. 264]

As an example of how the rolling closures operated, near Napakiak—a village just downriver from Bethel—subsistence fishing was allowed subject to only normal regulatory restrictions (such as the fifty fathom maximum net length) until June 13. [Exc. 209-10] On June 13, the seven-day rolling closure took effect, limiting gillnet mesh size to four inches and gillnet length to sixty feet. [*Id.*] On June 20, the next rolling closure took effect, extending these restrictions for five days. [Exc. 201-03] On June 25, ADFG relaxed the restrictions, increasing permissible gillnet mesh size to six inches and reverting back to the normal regulatory length restriction of fifty fathoms. [Exc. 206-08] And on July 18, the last of the closures expired and normal subsistence fishing resumed near Napakiak. [Exc. 211-12]

Despite the restrictions, it was possible to legally pursue and catch king salmon on the Kuskokwim in 2012, and many people—including most of the defendants—successfully did so. [Tr. 265-69, 339, 414, 466-67, 610, 654, 731, 748, 763, 777, 825, 885] People legally pursued and caught kings by fishing before or after the restrictions took effect, travelling in boats to locations upriver or downriver where the restrictions did

not apply, or using small-mesh gillnets in compliance with the restrictions.[13] [Tr. 266-68, 297, 401, 414] Some fishermen even caught more than fifty kings each—less than their usual harvest, but still a significant number. [Tr. 731, 747-48] The emergency orders thus made it more difficult, but not impossible, for people to harvest king salmon in 2012. [*Id.*] And the orders gave subsistence users ample opportunity to harvest other salmon species such as chum and sockeye, as well as other non-salmon fish species such as whitefish and pike. [Tr. 266, 414-15, 466-67, 478-79; Exc. 125]

ADFG's post-season estimates showed that subsistence users caught about 20,000 king salmon in 2012. [Tr. 265-66, 295-97] This was not because ADFG projected a harvestable surplus of 20,000 kings and decided to allow that harvest—indeed, ADFG projected *no* harvestable surplus and in hindsight probably allowed more fishing than it should have. [Tr. 283-84] But given the complexity of managing a mixed stock gillnet fishery, ADFG could not have prevented *all* harvest of kings without shutting down all fishing on the river entirely, which would have put the region's food security at risk. [Tr. 283-84, 366-67, 414-15, 466-67]

C. Some fishermen violated the restrictions; they were cited and raised a religious free exercise defense, which the district court rejected.

Although the restrictions did not prevent people from meeting their food needs or even from catching some king salmon, not everyone obeyed the emergency orders.

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[13] Where gillnet mesh size has been restricted by emergency order to protect king salmon, retaining any king salmon caught with a gillnet is still legal as long as the net used is of legal mesh size. By contrast, other types of conservation measures may specify that any king salmon that are caught must be returned to the water alive. *See, e.g.*, 5 AAC 01.270(n)(3) (specifying that when emergency orders are imposed to protect king salmon "any king salmon taken in beach seine gear must be returned alive to the water").

[Tr. 550-52, 263] Some people—including the defendants—fished with gillnets that were either too long (greater than sixty feet), had oversize mesh (greater than four or six inches, depending on the emergency order), or both. [Exc. 201-08; Tr. 585, 619, 632-33, 645-46, 660, 673, 675, 688-89, 705, 724, 739, 756, 770, 782, 800, 818, 832, 847-48, 865, 877, 894, 917-18, 931-32] Some did so in deliberate defiance of the orders, and some because they were mistaken about the measurements of their nets. [E.g., Tr. 724, 799, 554, 832] Because only a few law enforcement officers were available to patrol the Kuskokwim, many violators were never caught. [Tr. 550-52, 584, 600-01, 263] As in-season manager Travis Elison observed, "two guys with badges aren't really going to do very good against thousands of fishermen." [Tr. 263] But law enforcement was able to catch some who violated the orders, many on June 20 during an organized protest fishery. [Tr. 550, 552, 724, 739, 755, 769-79, 798, 816, 263]

In total, the State cited around sixty fishermen for violating the 2012 emergency orders on the Kuskokwim.[14] Some had fish in their nets when they were stopped, and many of the citing officers allowed the fisherman to keep one king salmon each, donating the rest to a local charity. [E.g. Tr. 601-02, 832-33] Many of the officers seized the nets of the fishermen they cited as evidence. [E.g. Tr. 601, 724; *but see* Tr. 706, 832] Some of the fishermen pled guilty,[15] and some went to trial in the fall of 2012 and were

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[14] *See infra* notes 15-17.

[15] *See* 4BE-12-634, 4BE-12-626, 4BE-12-568, 4BE-12-619, 4BE-12-561, 4BE-12-584, 4BE-12-745, 4BE-12-676, 4BE-12-677, 4BE-12-618, 4BE-12-616, 4BE-12-588, 4BE-12-596, 4BE-12-635, 4BE-12-715, 4BE-12-652, 4BE-12-730, 4BE-12-587, 4BE-12-623, 4BE-12-605, 4BE-12-620, 4BE-12-574, 4BE-12-649, 4BE-12-628, 4BE-12-653,

convicted.[16] By late 2012, twenty-five defendants remained.[17]

Some of the defendants were scheduled for trial in November 2012. One week before their trial dates, they jointly sought a continuance and indicated their intent to call expert witnesses to support a newly raised defense, contending that because of their Yup'ik religious beliefs, they were entitled to violate the fishing restrictions under the Alaska Constitution's free exercise clause. [Exc. 234-35] They filed a subsequent joint notice adding references to the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act of 1993 (RFRA), though they soon abandoned these federal arguments. [Exc. 4-5; Exc. 237]

Following motion practice over the proper means for resolving the free exercise issue, the district court held a joint evidentiary hearing in April 2013. [Exc. 74-82; Tr. 14-535] The defendants put on expert testimony about traditional Yup'ik beliefs and the significance of king salmon fishing from Dr. Chase Hensel, an anthropologist, and Robert Nick, Jr., a Yup'ik elder. [Tr. 22-227] The State put on expert testimony about fisheries biology and management and the reasons for the emergency orders from Travis Elison, the Kuskokwim area management biologist for ADFG, as well as Dan Gillikin and Tom Doolittle, the federal fisheries biologist and the deputy refuge manager, respectively, for the Yukon Delta National Wildlife Refuge. [Tr. 227-485; Exc. 54-58,

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4AK-12-75, 4AK-12-67, 4AK-12-76, 4AK-12-66, 4AK-12-74.

16 *See* 4BE-12-606, 4BE-12-607, 4BE-12-621.

17 *See* 4BE-12-627, 4BE-12-559, 4BE-12-674, 4BE-12-591, 4BE-12-583, 4BE-12-580, 4BE-12-575, 4BE-12-617, 4BE-12-567, 4BE-12-570, 4BE-12-573, 4BE-12-571, 4BE-12-569, 4BE-12-560, 4BE-12-657, 4BE-12-589, 4BE-12-595, 4BE-12-582, 4BE-12-650, 4BE-12-590, 4BE-12-629, 4BE-12-603, 4BE-12-675, 4BE-12-604, 4BE-12-602.

86-94]

After the evidentiary hearing, the district court issued a written decision rejecting the free exercise defense. [Exc. 105-11] The court applied the test outlined in Alaska's leading free exercise case, *Frank v. State*.[18] [Exc. 106-10] The court found, based on the expert testimony about Yup'ik spirituality, that "there is a religion involved." [Exc. 106-08] The court found that "fishing for Chinook salmon and fish camp activities" were "religiously based" conduct because fish camp is a place where cultural and spiritual knowledge is passed on. [Exc. 108-10] The court concluded, based on these findings, that if the individual defendants could demonstrate that they were sincere in their beliefs, they would meet their threshold burden under *Frank*. [Exc. 110; E.g., Tr. 627-28]

The court then addressed the State's burden under *Frank*. [Exc. 110-11] The court found "a compelling reason for the limitations placed by the State on the subsistence taking of Chinook salmon" and further found that "the natural consequence of allowing the unfettered taking of Chinook salmon under the religious free exercise exception" would result in "the decimation of the species by over fishing." [Exc. 110-11] The court thus concluded that "the need to police the Chinook run, to ensure its continuity for future generations of Yupik fishermen and families, overcomes the argued for free exercise exemption which otherwise would apply." [Exc. 111]

D. The district court tried and convicted each of the defendants.

After issuing the decision rejecting the free exercise defense, the district court held a separate trial for each of the twenty-four individual defendants. [Tr. 549-957] In each

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[18] 604 P.2d 1068 (Alaska 1979); *see infra* pgs. 19-21.

trial, the State put on evidence showing that the defendant had violated the law, calling as a witness the law enforcement officer who issued the citation. [E.g., Tr. 581-88] To create a complete appellate record on the free exercise defense, the court also heard testimony and made findings on the sincerity of each defendant's professed religious beliefs, even though the court had already decided to reject the defense based on the evidence presented at the earlier joint evidentiary hearing. [Tr. 543, 548]

The court found each defendant guilty and sentenced all but one to fines of $500 or less, with $250 or more suspended. [Tr. 580, 598, 615, 631, 643, 657, 669, 680, 693, 720, 736, 751, 767, 779, 795, 813-14, 828, 843, 859, 873-74, 887-88, 909, 927, 951-53] Those defendants whose nets were seized got their nets back. [*Id.*] Thirteen defendants have appealed their convictions, and the Court has consolidated their cases. On appeal, the defendants raise only the free exercise issue.[19]

STANDARDS OF REVIEW

This Court has explained that "[t]o identify the proper standard of review, one must identify the underlying issue to be resolved by the appellate court," not just the "*context* in which that issue arose."[20] Where the Court's task is "to ascertain the law or the legal test that applies to a given situation," the Court will apply the "de novo"

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[19] The defendants included two regulation-based issues in the statement of points on appeal but have abandoned these issues by not raising them in the opening brief. *See Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 6 n.14 (Alaska 2009) (holding that argument not raised in appellant's opening brief was waived).

[20] *Booth v. State*, 251 P.3d 369, 372 (Alaska App. 2011) (emphasis in original).

standard of review and will not defer to the trial court's decision.[21] But where a trial court ruling "hinges on a finding of historical fact," the Court will apply the "clearly erroneous" standard of review, affirming unless left with a definite and firm conviction that a mistake has been made after review of the entire record.[22]

ARGUMENT

I. Summary of the argument

Frank v. State provides the framework for analyzing free exercise claims under the Alaska Constitution, and requires the defendants to prove, as a threshold matter, not only that "religion is involved," but also that their violation of the law "is religiously based."[23] To satisfy this second requirement, it is not enough for these defendants to show that pursuing king salmon is a religious activity in general—they must also show that they had religious reasons for king salmon fishing in violation of the law rather than conforming their fishing to the law. The State's gear restrictions did not prohibit the defendants from pursuing king salmon; they simply made doing so more difficult and less efficient. Because the defendants demonstrated no religious significance to the restricted gear, and because they could still have pursued king salmon legally, they failed to satisfy their burden of showing a religious need to violate the law.

If, however, the Court determines that the defendants have met their threshold burden under *Frank*, the State has met its corresponding burden of demonstrating a

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21 *Id.*

22 *Id.*

23 604 P.2d at 1071-74.

compelling interest that will suffer if a religious exemption is granted for the defendants' conduct.[24] The compelling nature of the State's interest in protecting king salmon is beyond dispute. And in the complex and fast-moving fish and game management context, the rule should be simple: if ADFG, in its expert judgment, identifies a serious conservation concern that requires restrictions, the State should be able to enforce those restrictions against all users. The district court heard extensive testimony about conservation concerns; indeed, ADFG was projecting king salmon escapement far below sustainable numbers. The district court correctly found that a religious exemption from conservation measures would harm the compelling interest in protecting king salmon.

Alaska precedent does not require the State to show that its emergency orders were the "least restrictive means" of protecting king salmon.[25] Even so, none of the defendants' suggested management options constitutes a less restrictive, but equally effective, means of protecting king salmon. Neither cancelling commercial fisheries out in the bay after spawning kings had already moved upriver nor trying to stop trawlers from catching kings in a federally managed ocean fishery outside the State's jurisdiction would have eliminated conservation concerns and created a harvestable surplus of kings in 2012. And because ADFG was projecting no harvestable surplus, it could not have allowed unrestricted fishing by Tier II permit-holders even if it could have created a Tier II system on an emergency basis. Nor could the State prohibit everybody other than religiously motivated people from fishing so as to leave more kings for religiously

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24 *Id.* at 1073-74.

25 *Larson v. Cooper*, 90 P.3d 125, 132 (Alaska 2004).

motivated people to catch, because doing so would violate the establishment clause.

Finally, the district court's decision can be affirmed on the alternative grounds that the defendants' requested exemption would contravene the common use provisions of Article VIII of the Alaska Constitution. These provisions require the State to manage its fisheries for all Alaskans, and they prohibit granting exclusive fishing privileges to closed user groups not open to all Alaskans. An exclusive privilege to disregard conservation measures when a shared resource is threatened, while other Alaskans bear the burden of conservation, would harm the State's compelling interest in maintaining common use.

The Court should affirm the defendants' convictions and ensure that the State can continue to manage and protect its fisheries for future generations of all Alaskans.

II. *Frank v. State* provides the test for claims under Alaska's free exercise clause.

The defendants seek a religious exemption from the 2012 emergency orders under Alaska's free exercise clause, which has been interpreted differently from the free exercise clause in the U.S. Constitution. Under the U.S. Supreme Court's decision in *Employment Division v. Smith*, the federal free exercise clause is not implicated by a religiously neutral and generally applicable law.[26] Given the holding of *Smith*, a claim for a federal free exercise exemption from the emergency orders fails at the very outset because the orders were religiously neutral and generally applicable.[27] But because the Alaska Supreme Court has not followed *Smith*, addressing a claimed exemption under

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[26] 494 U.S. 872, 882-90 (1990).

[27] The defendants' claim under the federal Religious Freedom Restoration Act (RFRA) likewise failed at the outset because RFRA does not apply against the states. *See City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

Alaska's free exercise clause requires further analysis.[28]

The 1979 Alaska Supreme Court case of *Frank v. State* provides the basic framework for analyzing claims for religious exemptions from laws under Alaska's free exercise clause.[29] Under the test laid out in *Frank*, the Court must first ask whether a free exercise claimant has met the burden of showing that "there is a religion involved," that "the conduct in question is religiously based," and that "the claimant is sincere."[30] Once the claimant meets this threshold burden, the burden then shifts to the State to demonstrate a "compelling state interest" for its law that "will suffer if an exemption is granted to accommodate the religious practice in issue."[31]

In *Frank*, the free exercise claimant was a criminal defendant charged with killing a moose out of season. The Court determined that "there [was] a religion involved" because the defendant had killed the moose for a funeral potlatch, an important and sacred Athabascan ritual.[32] The Court also determined that "the conduct in question [was] religiously based" because fresh moose meat was necessary for a proper funeral potlatch,

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28 *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (Alaska 1994) ("[E]ven though the Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution, we are not required to adopt and apply the *Smith* test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution."); *Larson,* 90 P.3d at 132 ("We chose not to follow *Smith* . . . and instead chose to evaluate free exercise claims brought under the Alaska Constitution using the test established in *Frank.*").

29 604 P.2d at 1071.

30 *Id.*

31 *Id.* at 1071-74.

32 *Id.* at 1071-72.

and, as the Court explained, "the need to take a moose out of season arises because deaths in a village may take place at any time of year."[33] The Court further concluded that the defendant was sincere in his asserted beliefs and had thus met his initial burden.[34]

Next, the *Frank* court assessed whether the State had met its corresponding burden of showing that an exemption for the defendant's conduct would harm a compelling state interest.[35] The Court observed that although the State had a compelling interest in maintaining a healthy moose population, the trial record was "silent" on the question of whether allowing moose to be hunted out of season for funeral potlatches would jeopardize healthy moose population levels.[36] The Court concluded that given the silent record, the State had not met its burden of showing harm to its compelling interest.[37] The Court did not decide what level of evidence would have met the State's burden.

III. The district court erred in concluding that the defendants met their burden under *Frank* of showing that their fishing violations were religious conduct.

The district court correctly rejected the defendants' free exercise argument in the end, but erred in first concluding that the defendants had met their burden of showing that the "conduct in question was religiously based."[38] [Exc. 110] The district court's error

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33 *Id.* at 1073 n.7.

34 *Id.* at 1073.

35 *Id.* at 1073-74.

36 *Id.* at 1074.

37 *Id.*

38 The State raised this argument about the proper burden under *Frank* in the district court and has raised it again on cross-appeal. [Tr. 513-15] Although the district court overlooked it, this Court can adopt the State's position as an alternative rationale for affirming the district court's decision on appeal. *See Ransom v. Haner*, 362 P.2d 282, 285

was in its failure to hold the defendants to the proper burden of showing not just that religion motivated them to pursue king salmon, but also that religion required them to violate the emergency orders rather than fish in accordance with the law. The evidence demonstrated just the opposite: king salmon could be—and were—pursued and caught legally in 2012. [Tr. 265-68, 295-97] Because the district court's error was caused not by a mistaken view of the facts, but rather a mistaken view of the legal burden a free exercise claimant bears, its ruling is reviewed de novo.[39]

A. Under *Seward Chapel,* it is not enough for the defendants to show that pursuing king salmon is a religious activity in general—they must show that they could not have conformed their fishing to the law.

In *Seward Chapel, Inc. v. City of Seward*, the Alaska Supreme Court gave teeth to the religious claimant's threshold burden under *Frank* of showing that "the conduct in question is religiously based."[40] In that case, a pastor wanted to build a parochial school next to his church, but local zoning laws prohibited it. Analyzing the church's claim that it was entitled to an exemption, the Court recognized that building a parochial school was a religious activity and that it would be more convenient and less expensive to build the school next to the church.[41] But the Court nonetheless held that the church had not met its burden under *Frank* because the school could be built elsewhere and the church had not

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(Alaska 1961) ("[I]t is a rule of law that an appellee may urge, and the appellate court should consider in defense of a decree or judgment any matter appearing in the record, even if rejected below and even if appellee's argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.").

39 *See Booth*, 251 P.3d at 372.

40 655 P.2d 1293, 1301-02 (Alaska 1982).

41 *Id.* at 1300.

shown that building the school in the prohibited location was religiously necessary.[42]

The Court observed, by analogy, that the moose hunter in *Frank* might not have met his threshold burden if "the state's game regulations [had] not prevented [him] from providing moose meat for a funeral potlatch but had reasonably limited the areas in which a moose could be taken."[43] As the Court went on to say in *O'Callaghan v. Municipality of Anchorage Fire Marshal*, taking a moose out of season was protected religious activity in *Frank* only "because the uniquely unpredictable timing of a funeral feast made it impossible to plan ahead (by hunting in season) as the regulations require."[44]

The lesson from these cases is that the Court must examine not just whether the activity is religious in general, but whether the *specific law violation* is religiously based. It is not enough for a free exercise claimant to show that an activity—like building a parochial school, killing a moose, or fishing for king salmon—is religious as a general matter. The claimant must also show that conducting the activity "in the particular manner at issue is necessary to the exercise of his religion."[45] In other words, the claimant must show that he could not practice his religion in compliance with the law.

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42 *Id.* at 1301-02.

43 *Id.* at 1302 n.34.

44 S-9653, 2002 WL 1293001 at *5 (Alaska June 5, 2002) (unpublished). *See* Appellate Rule 214(d)(1)("If a party believes, nevertheless, that an unpublished decision has persuasive value in relation to an issue in the case, and that there is no published opinion that would serve as well, the party may cite the unpublished decision.").

45 *O'Callaghan*, 2002 WL 1293001 at *5; *cf. State v. Brave Heart*, 326 N.W.2d 220, 222-23 (S.D. 1982) (holding that free exercise claimants seeking exemption to open fire law for religious ceremonies had not met their threshold burden because "[t]here was no evidence that these ceremonies and feasts could not have been performed using a stove, sparkproof incinerator or established fireplace" as allowed under the law).

In *Seward Chapel*, building a parochial school was recognized as religious activity in general, but the specific law violation—building a parochial school in an area not zoned for it—was not. Even though compliance with zoning would have made building the school more difficult, there was no religious need to build in a particular location. In *Frank*, by contrast, killing a moose for a funeral was recognized as religious activity in general, and the specific law violation—killing a moose out of season—was also religious because the timing of the funeral created a religious need to hunt out of season. If the funeral had occurred during moose season, but the defendant had nonetheless violated fish and game laws—by, for example, using poison,[46] bait,[47] a machine gun,[48] explosives,[49] or a snare[50]—his violation would not have been religiously based because there was no religious need to use a prohibited method.

The district court erred in concluding that the defendants had satisfied their *Frank* burden with only a generalized showing that fishing for king salmon was religious activity. [Exc. 108-10] The district court should have also required them to show that their specific law violation—fishing for king salmon with an over-sized net at a time and location when such nets were prohibited—was religiously based. In other words, that they could not have complied with their religious beliefs without violating the law.

Holding a religious claimant to this higher burden under *Seward Chapel* and

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46 5 AAC 92.080(2).

47 5 AAC 92.085(4).

48 5 AAC 92.080(6).

49 5 AAC 92.080(7).

50 5 AAC 92.080(8); 5 AAC 92.085(6).

Frank makes sense as a matter of policy. Once a religious claimant meets his threshold burden, the State will be required to justify its law by reference to a compelling interest. But religious adherents, like non-adherents, should conduct their activities within the bounds of generally applicable laws—even laws like zoning restrictions that do not necessarily serve governmental interests of the highest order—if doing so is possible. Only when a religious adherent has demonstrated that complying with both law and belief is not possible has a true "Hobson's choice" been created, and only then should the government be put to the burden of justifying the application of its law.[51]

Requiring free exercise claimants to directly connect their beliefs to their need to violate a specific law is also necessary given the low bar for demonstrating that "religion is involved" as a general matter. Religion is a complex and inherently subjective topic, and even an activity that may seem more culturally than spiritually important and that is unconnected to any ritual or ceremony can be considered religious.[52] The ease with which a claimant can demonstrate that "religion is involved" counsels toward using a more searching inquiry to determine whether "the conduct in question is religiously based." Otherwise, any generalized claim that a broad activity—like hunting or fishing—has

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[51] *Seward Chapel*, 655 P.2d at 1301 (noting that the free exercise clause applies to "situations in which persons are faced with a Hobson's choice: complying with the law or abandoning the precepts of their religion").

[52] *See Swanner*, 874 P.2d at 281-82 (holding that identifying a particular religious ritual is not required); *United States v. Manneh*, 645 F. Supp. 2d 98, 108-11 (E.D.N.Y. 2008) (discussing difficulty of disentangling religion and culture). In this case, Dr. Hensel explained that king salmon is a very important food in Yup'ik culture, akin to rice in an Asian country, or beef for a cattle-rancher. [Tr. 45, 47, 33, 51-52, 71] He also testified that there are no rituals or ceremonies connected to king salmon. [Tr. 85]

religious significance would subject all laws regulating that activity to special scrutiny.[53]

B. The defendants failed to show that they could not have conformed their fishing to the law.

Because the defendants could have pursued king salmon without violating the emergency orders, they were unable to meet their burden of showing that their violations were religiously based. [*See supra* pgs. 11-12] They did not demonstrate any religious significance to the specific fishing gear that was restricted or to the times and places in which the restrictions applied. Just as the zoning law in *Seward Chapel* made building a parochial school less convenient and more expensive, the emergency orders simply made king salmon fishing less efficient and more difficult. And just as that was not enough to meet the threshold burden in that case, it is likewise not enough here.

The defendants assert that the State did not present any evidence about how they could have fished for king salmon in 2012. [At. Br. 33-34] But because this inquiry is part of the first step of *Frank*, it was the *defendants'* burden to show that they had to violate the law, not the State's burden to show that they could have complied with it. And the evidence amply demonstrated that the defendants could have pursued and caught king salmon without violating the emergency orders.

Travis Elison testified that the most eager fishers "are out there in May starting to fish," and that some kings were caught in May and June before any restrictions took effect. [Tr. 266, 297] When the four-inch restrictions kicked in, "quite a few people started fishing pretty hard with their white fish nets, and [Elison] saw quite a few people

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[53] Dr. Hensel testified that all hunting and fishing is "a sacred activity" in Yup'ik culture, not just king salmon fishing. [Tr. 71-72]

fishing with white fish nets with kings in their boats, so some were caught with that four-inch mesh." [Tr. 267] As Dan Gillikin explained, "you can catch Chinook in herring web, which is two-inch, or even smaller," and "it's not just about [mesh] size, it also depends on how the nets are hung." [Tr. 401] Some people also went "down to below the boundary line at the mouth of the river" where "they could use any mesh they wanted." [Tr. 267] People also caught kings when the river was open to six-inch mesh, which can be quite efficient for catching kings. [Tr. 267] In all, about 20,000 kings were caught, including many caught by the defendants themselves. [Tr. 297; *supra* pgs. 11-12] The defendants suggest that each village should have been allowed to catch one symbolic king, but in fact many more were caught than this, and no evidence was presented that any village or individual went completely without king salmon. [At. Br. 22; Tr. 266-67]

The evidence showed only that the *most efficient* gear for king salmon fishing is a six- to nine-inch mesh gillnet and thus that restricting mesh size made catching kings more difficult.[54] [Tr. 399-401, 268-69, 414] But so does every restriction, such as the fifty-fathom maximum gillnet length set by regulation.[55] Using six- to nine-inch mesh is thus analogous to building at the preferred school location in *Seward Chapel*—easier and more convenient, but not imbued with any independent religious significance. Indeed, nylon gillnets and powerboats are modern inventions; they are not traditional gear with

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[54] The defendants' suggestion that they be allowed to fish with dip nets would likewise have made their fishing efforts less efficient—indeed, possibly even less efficient than simply using the sixty-foot, four- or six-inch mesh gillnets that were allowed under the emergency orders. [At. Br. 35]

[55] *See* 5 AAC 01.270(b) (setting fifty fathom maximum gillnet length).

any spiritual importance. Unlike the defendant in *Frank*, who demonstrated a religious need to hunt out of season because that was when the funeral occurred, the defendants did not demonstrate any religious need to use the gear prohibited by the emergency orders.

Although a free exercise claimant need not demonstrate that his religion absolutely *requires* the conduct at issue,[56] he must demonstrate that the conduct is "deeply rooted" in religious beliefs.[57] While the defendants may have demonstrated that king salmon fishing as a general matter is "deeply rooted" in religious beliefs, even if not absolutely required,[58] they failed to make any showing that fishing with a prohibited mesh size was "deeply rooted" in their religious beliefs. No defendant testified that the specific gear he used had spiritual meaning. No expert testified that Yup'ik spirituality requires the use of a particular kind of fishing gear or method. The defendants used a range of different gillnet mesh sizes, from 4.9 to 8.5 inches. [Tr. 660, 832] Some used nets with mesh smaller than six inches, but nonetheless claim to have been practicing their religion, demonstrating that no particular mesh size is religiously required. [Tr. 619, 646, 660] And indeed, some of the defendants mistakenly thought they were fishing with a smaller mesh size than they actually were, and claimed not to know that they were violating the law. [Tr. 553-54, 575, 832] A fisherman who thinks he is using a small-mesh net cannot

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56 *See Herning v. Eason*, 739 P.2d 167, 169 (Alaska 1987) (stating that "strict necessity is not required").

57 *See Frank*, 604 P.2d at 1072-73 (holding that, even though other food could be served at a funeral potlatch and moose meat might not be strictly necessary, the desire to serve moose meat was "deeply rooted" in religious beliefs).

58 Robert Nick discussed many other subsistence foods in addition to king salmon, and acknowledged that when one food is scarce, other foods may substitute. [Tr. 170-71, 212, 177-78, 217-18, 174, 178, 198, 204, 197]

realistically be operating under a religious compulsion to use a large-mesh net.

The only demonstrated significance of a larger mesh size was its efficiency as a tool for catching more king salmon more easily. Accordingly, this case is analogous to a hypothetical in which instead of hunting a moose out of season, the *Frank* defendant had used a prohibited method to kill the moose—such as a helicopter[59]—making his hunt easier. Absent any religious significance to the helicopter, this is insufficient to meet the threshold burden under *Frank* and *Seward Chapel*. A free exercise claimant asserting a religious need to hunt or fish must show more than just that the law prevented him from using the easiest and most convenient method of doing so.

The Court should therefore hold that the district court erred in concluding that the defendants met their threshold burden under *Frank*, and should affirm the district court's rejection of their free exercise defense without considering the State's burden.

IV. The district court correctly concluded that the State met its burden under *Frank* of showing that the compelling interest in protecting king salmon would suffer if the defendants were exempted from the restrictions.

After a free exercise claimant has met the threshold burden, the State must justify its law by reference to a compelling state interest. The defendants concede that the State has a compelling interest in protecting the king salmon run for future generations. [At. Br. 11] Accordingly, the Court's task under *Frank* is to examine "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice in issue."[60] Contrary to the defendants' argument, the State need not satisfy a "least

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59 5 AAC 92.080(3).

60 *Larson*, 90 P.3d at 132 (quoting *Frank*, 604 P.2d at 1073).

restrictive means" test.[61] The rule in this context should be simple: if ADFG in its expert judgment identifies a serious conservation concern meriting restrictions on access to fish or game, it can apply and enforce its restrictions against everyone. By contrast with the record in *Frank*, which was "silent" as to conservation concerns, the record in this case contains extensive evidence of grave concerns.[62] The district court did not clearly err in finding that a religious exemption from ADFG's conservation measures would harm the State's compelling interest in protecting king salmon. [Exc. 110-11]

A. The State need not satisfy a "least restrictive means" requirement to meet its burden under *Frank*.

The Alaska Supreme Court does not require the State to prove that a law furthers a compelling interest by the "least restrictive means" in order to defeat a claimed religious exemption.[63] [At. Br. 14, 17, 20-21] Instead, once the State identifies a compelling interest—something that is not in dispute here—the "appropriate question" under *Frank* is "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice in issue."[64] The Court has at times phrased this differently by saying that the State must show that its compelling interest is "not otherwise served."[65] But the Court has expressly declined to recognize a "least restrictive means" requirement or elaborate on what degree of "fit" the State must demonstrate

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61 *See id.*

62 *Frank*, 604 P.2d at 1074.

63 *Larson*, 90 P.3d at 132.

64 *Id.* (quoting *Frank*, 604 P.2d at 1073).

65 *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001).

between its compelling interest and its law.[66]

Even if the Court looks to pre-*Smith* federal free exercise cases for guidance, as the *Frank* court did, such federal cases did not uniformly impose a "least restrictive means" requirement. Indeed, when the Religious Freedom Restoration Act (RFRA) was enacted to impose such a requirement by statute after the *Smith* decision, the U.S. Supreme Court observed that this requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify."[67] As the Third Circuit has explained, "[w]hile prior cases touched on one or more of the aspects of the RFRA test, these elements—substantial burden, compelling interest, least restrictive means—did not constitute a comprehensive standard, let alone a uniform or established test."[68]

A "least restrictive means" requirement would be particularly unworkable in the context of in-season management of a threatened fishery. If ADFG were to allow too much fishing in a low-abundance year, the king salmon run could be permanently decimated. [Tr. 397-98] Indeed, the Kuskokwim region has experienced historical

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66 *Larson*, 90 P.3d at 132 (observing that "*Frank* and our subsequent Alaska free exercise cases have not explained exactly what degree of fit is required between the interest and the means used to achieve it to satisfy the second part of the *Frank* analysis" but declining to elaborate). One possible alternative to a "least restrictive means" test that the Court declined to address in *Larson* was a "narrow tailoring" test. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) ([T]he requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.") (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).

67 *City of Boerne*, 521 U.S. at 535; *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1312 (2007) ("[I]t is widely acknowledged that the version of strict scrutiny that the Court employed in Free Exercise Clause cases prior to *Employment Division v. Smith* was essentially a balancing test.").

68 *Adams v. C.I.R.*, 170 F.3d 173, 176 (3d Cir. 1999).

periods of serious shortage. [Tr. 180-81, 411] ADFG does not have the luxury of experimenting with a series of less restrictive options to see if one works—when the fishery is threatened, ADFG may have only one chance to get it right. By contrast, in the unemployment benefits context—the source of two of the three federal cases the defendants rely on—the government can always tweak its programs if too many people start drawing benefits.[69] [At. Br. 14-17] If ADFG believes an emergency management action is necessary based on the information available, ADFG needs to have the power to take that action and to enforce it by prosecuting violators even if, with the luxury of hindsight and time, a court could come up with a less restrictive alternative.[70]

The Alaska Supreme Court has recognized that in some circumstances, courts should defer to state officials' judgments about what will harm compelling state interests rather than subjecting those judgments to the judicial second-guessing of a "least restrictive means" test. In *Larson v. Cooper*, the Court recognized, in analyzing a prisoner's free exercise claim, that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict-scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems

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69 *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

70 *Cf. Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 234 (1989) (Stevens, J., concurring) ("A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation.") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)).

of prison administration."[71] The Court noted that "[c]ourts are generally ill-positioned to second-guess prison administrators' judgment" that allowing certain activities "would jeopardize the state's compelling interest in security."[72]

A similarly deferential view of the State's burden under *Frank* is appropriate in the fisheries management context. The fishermen's arguments on appeal rely on criticism of the State's management, but just as courts are "ill-positioned to second-guess" prison officials' judgments about what is necessary to maintain security,[73] they are "ill-positioned to second-guess" state and federal managers' judgments about what is necessary to protect a threatened fishery. Indeed, "[c]ourts are singularly ill-equipped to make natural resource management decisions."[74] In *State v. Kluti Kaah Native Village of Copper Center*, the Alaska Supreme Court recognized that the "procedural and substantive limitations of a trial setting" would make it difficult for a court to assess threats to a moose population.[75] The Court quoted with approval a judge's observation that "the court should not—for lack of expertise—make the fine scientific wildlife management decisions that are called for by state and federal law. In short, the fish and

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71 *Larson*, 90 P.3d at 133.

72 *Id.*; *see also Tabbaa v. Chertoff*, 509 F.3d 89, 106 (2d Cir. 2007) (rejecting free exercise challenge to actions of border patrol, observing that "in the circumstances present in this case—in which border officials potentially faced a highly significant security issue based on the intelligence they received—we believe that some measure of deference is owed to [border patrol's] administrative decisionmaking").

73 *Larson*, 90 P.3d at 133.

74 *Native Vill. of Elim v. State*, 990 P.2d 1, 8 (Alaska 1999).

75 831 P.2d 1270, 1274 (Alaska 1992).

game management ought to be done by the fish and game managers."[76] Likewise in this context, this Court should defer to ADFG's expertise in fisheries management rather than substituting its judgment with a "least restrictive means" test.[77]

None of the pre-*Smith* federal cases that the defendants cite in discussing the "least restrictive means" test involve a context even remotely like this one, in which criminal defendants violated emergency restrictions and now argue, after the fact, that the agency with expertise in that area should have done things differently. [At. Br. 14-17] Fisheries management actions—particularly in-season actions—cannot be perfectly calibrated but can always be second-guessed in hindsight.[78] Yet they must be clearly and broadly enforceable to have any power or effect in protecting the resource. Allowing criminal defendants to employ an after-the-fact "least restrictive means" test to such actions would

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[76] *Id.* at 1274 n.7 (Alaska 1992) (quoting unpublished trial court decision).

[77] *Cf. Charles v. State*, 232 P.3d 739, 745 (Alaska App. 2010) ("Managing game for subsistence and other competing uses is a complex task that requires considerable expertise."); *Trustees for Alaska, Alaska Ctr. for Env't v. Gorsuch*, 835 P.2d 1239, 1249 (Alaska 1992) ("In light of the complexity of the subject matter, we will defer to DNR's conclusion that these measures will be adequate to restore wildlife habitat."); *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174 (Alaska 1987) ("We have no authority to substitute our own judgment for the Board of Fisheries', particularly since highly specialized agency expertise is involved."); *Weaver Bros., Inc. v. Alaska Transp. Comm'n*, 588 P.2d 819, 821 (Alaska 1978) (Where a matter concerns "administrative expertise as to either complex subject matter or fundamental policy formulations, deference should be given to an administrative determination if it has a reasonable basis in law and in fact."); *Alaska Pub. Utilities Comm'n v. Chugach Elec. Ass'n, Inc.*, 580 P.2d 687, 694 (Alaska 1978) *disapproved of on other grounds by City & Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979) ("Such deference is given because the agency is in a better position to make such a determination than a court because of the agency's specialized knowledge in a field.").

[78] *See Stepovak-Shumagin Set Ass'n v. State, Bd. of Fisheries*, 886 P.2d 632, 647 (Alaska 1994) ("[M]anagement of a fishery is not an exact science. There is much speculation involved.").

seriously compromise their enforceability.

In line with *Frank*, the Court should simply ask whether the State's compelling interest in protecting the king salmon population "will suffer if an exemption is granted to accommodate the religious practice in issue,"[79] not whether the emergency orders were the "least restrictive means" of protecting the king salmon population.

B. The State's compelling interest in protecting king salmon would suffer if the claimed exemption were recognized.

After hearing and weighing all of the evidence, including extensive expert testimony about fisheries management, the district court concluded that allowing unfettered fishing under a religious exemption would have harmed the State's compelling interest. [Exc. 111] The defendants have not demonstrated that this factual finding was clear error.[80] Allowing a religious exemption for the defendants' conduct—in other words, allowing everybody who asserts Yup'ik spiritual views to fish without restrictions in a time of conservation concern—would harm the State's compelling interest in protecting king salmon. Indeed, given the dire projections in 2012, allowing *anybody* to fish without restrictions would have done at least some harm to this compelling interest.

Unlike in *Frank*, where the record was "silent" as to conservation concerns, the record in this case contains extensive evidence of serious conservation concerns that satisfy the State's burden.[81] When ADFG projects king salmon returns far below its escapement objective, the best way to further its compelling interest would be to prohibit

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79 *Larson*, 90 P.3d at 133.

80 *Booth*, 251 P.3d at 372.

81 *Frank*, 604 P.2d at 1074.

all fishing to make sure as many kings make it to the spawning grounds as possible. Even allowing one person to catch one king does a small amount of harm to the State's compelling interest. Although the State does not have fish-by-fish precision in its management, the more fishing the State allows when its projections are far below its objective, the more its compelling interest suffers. [Tr. 300] In 2012, ADFG was not projecting any harvestable surplus of kings. [Tr. 282, 384, 411-12] Of course, the State did not actually prohibit all fishing by the defendants or anyone else, given its concerns for food security in the region and for managing other fish populations. [Tr. 283-84] But allowing even more fishing would have harmed the State's compelling interest. [*Id.*]

The exemption the Court must consider is not a limited exemption for some kind of ceremonial fishing or an exemption for every village to catch one symbolic king. Rather, as the district court correctly recognized, it is an exemption for the defendants' actual conduct: normal, unfettered fishing for winter supplies. [Exc. 111] The defendants assert that "[t]hey have never suggested that the exercise of their religious practices requires 'unfettered' fishing." [At. Br. 11] But given the criminal posture of this case, unfettered fishing is precisely the issue before the Court. If this case had arisen in a different manner—for example, if the fishermen had asked ADFG for some kind of limited exemption or sued the State for permission to catch one king per village with dipnets—the Court would be tasked with evaluating a narrower exemption. But when a defendant breaks the law and seeks retroactive absolution, the Court must evaluate an exemption for the type of conduct the defendant actually engaged in.

None of the defendants claimed to be fishing for one symbolic king salmon or for

some narrow and well-defined religious purpose (like the funeral potlatch in *Frank*) that would have limited the amount of their harvest. Indeed, the belief system they described at trial would seem to mandate that they harvest as many kings as they want for winter supplies without regard to conservation concerns. As amicus ACLU summarizes the defendants' beliefs, "[r]efusing to take game when it is available will offend the animal and make it think it is not needed." [ACLU Br. at 12] And as amicus AVCP quotes one anthropologist as observing, "Yup'ik people held that the more game they consumed the more they would have." [AVCP Br. 13] What the defendants did, and what they assert a religious need to do, is much different from taking one animal for a ceremony. Because these defendants engaged in normal, unfettered fishing for winter supplies, the question for the Court is whether allowing such fishing would have harmed the State's compelling interest. The defendants' analogies to more limited religious exemptions in other contexts—like Alaska's exemption for funeral potlatches or Wisconsin's exemption for Ho-Chunk religious ceremonies—are inapposite. [At. Br. 19]

Similarly, the defendants' effort to downplay the impact of a religious exemption relies on an artificially narrow view of its scope. Although Dan Gillikin said he would not have had a biological concern with allowing twenty-two men to fish briefly with large gear, he also recognized that there was no harvestable surplus of kings and that allowing a substantial chunk of the population in the area an unrestricted fishing opportunity would have posed a biological concern. [Tr. 417, 413] Fisheries science may not be precise enough for a biologist to express a definitive opinion about the impact of a couple dozen people fishing, but that does not mean that recognizing a religious exemption

would not harm the State's compelling interest. The question is not just an exemption for a couple dozen people, but an exemption for any person with Yup'ik spiritual beliefs. More than half of the population in the area—particularly in the villages—identifies as Yup'ik and may share the asserted beliefs of the defendants. [Tr. 65]

For these reasons, the district court did not clearly err in finding that a religious exemption would harm the State's compelling interest in protecting king salmon.

C. Even if a "least restrictive means" test applies, the State had no viable and effective alternatives.

Even if a "least restrictive means" test applies, the management actions proposed by the defendants were not viable alternatives to the emergency orders. [At. Br. 4, 7-8, 21-30] The emergency orders were the least restrictive means of furthering the State's compelling interest—indeed, if anything, they were not restrictive enough.

State law already prioritizes subsistence fishing over other fishing when there is a harvestable surplus, but as discussed above, ADFG was not projecting any harvestable surplus of kings in 2012.[82] [Tr. 282, 384, 411-12] Given the dire projections, the "least restrictive means" of furthering the State's compelling interest in protecting the king fishery would have been to prohibit *all* fishing to make sure as many kings made it to the spawning grounds as possible. Accordingly, the management actions that the State took in 2012 were actually *less* restrictive (and thereby less effective) than the least restrictive means. If any fault can be identified by Monday-morning quarterbacking the State's 2012 management, the fault was that ADFG was not restrictive enough, not that it was too

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82 *See* AS 16.05.258.

restrictive of the defendants' fishing activities. [Tr. 283-84] ADFG's post-season estimate of king escapement was 77,000—far below the objective of 127,000. [Tr. 264] The defendants are incorrect that the State had a less restrictive option whereby it could have allowed them to engage in more fishing without falling even further below the escapement objective and harming the compelling interest in protecting the fishery.

Completely shutting down the three commercial fisheries that the defendants identify might have been a reasonable action ADFG could have taken, but it was not a viable *alternative* to the emergency orders. [At. Br. 21-23] These fisheries take place after most spawning king salmon have already moved far up the river. [Tr. 312, 272-73, 299, 316] The District 1 fishery (Kuskokwim River), which targets Kuskokwim-bound chum and sockeye, did not open until July 13. [Tr. 312] About 365 Kuskokwim kings were incidentally caught in the District 1 fishery in 2012. [Tr. 312-13] The District 4 fishery (Quinhagak) did not open until late June. [Tr. 272-73, 299, 316] The vast majority of the fish caught in the District 4 fishery are bound for the Kanektok and Arolik Rivers, not the Kuskokwim. [Tr. 138-39, 272, 274, 302] About 67 Kuskokwim kings may have been incidentally caught in that fishery in 2012. [Tr. 274-75, 302] The District 5 fishery (Goodnews Bay) is far from the Kuskokwim and largely inside another bay, and although it caught about 2,000 kings in 2012, they were not likely Kuskokwim kings. [Tr. 309-10, 312] Shutting down these fisheries to protect the few hundred late Kuskokwim kings that they may have intercepted would not have retroactively created a harvestable surplus of kings nor eliminated the need for the prior emergency orders. [Tr. 275, 299, 302]

Taking action to stop Bering Sea pollock trawlers from incidentally catching king

salmon as bycatch was similarly not a viable alternative to the emergency orders. [At. Br. 28-30] Although a small percentage of kings caught as bycatch in the Bering Sea are Kuskokwim-bound,[83] the State does not have jurisdiction over the waters of the Bering Sea where the trawlers operate. [Tr. 370-72] The State does not control the North Pacific Fishery Management Council, which regulates king salmon bycatch out in the ocean. [Tr. 443] The ADFG Commissioner has a seat on the council and some members are appointed from a list submitted by the Governor, but this does not give the State control over the council's decisions.[84] [Tr. 376, 443] And even if the State had somehow possessed the power to shut down Bering Sea trawlers in June 2012 when ADFG became aware that the Kuskokwim king salmon run was in trouble, closing that fishery would not have helped. [Tr. 444, 446-47] By that time, that year's spawning kings had already entered the river and were no longer in the ocean where the trawlers operate, so shutting down the trawlers would have made no difference to 2012 escapement and would not have created a harvestable surplus of kings. [*Id.*] The defendants' apparent position that

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83 The defendants cite a NOAA study published in March 2013, long after the events in this case took place. [At. Br. 28 n.129; Exc. 147-91] For obvious reasons, ADFG could not have used this information in making management decisions in 2012. Also, the study does not appear to differentiate bycatch numbers from the Kuskokwim, specifically, as opposed to other Western Alaska river systems. [Exc. 167] The defendants did not put on any expert in fisheries management or biology who could have explained the meaning, significance, and reliability of the study to the court. [Tr. 431-42]

84 *See* 16 U.S.C. § 1852(a)(1)(G), (b)(1)(A), & (b)(2)(C). The State has used its very minor role on the council to support king bycatch limits—the defendants believe the limits are not low enough, but in the past, there were no limits at all. [At. Br. 29 & n.134] *See* North Pacific Fishery Management Council, *Bering Sea Chinook Salmon Bycatch*, npfmc.org, http://www.npfmc.org/salmon-bycatch-overview/bering-sea-chinook-salmon-bycatch/ (last visited Dec. 31, 2013).

the State's failure to take an earlier action should preclude it from taking a later action—even if that later action is the only option left—is contrary to sound public policy.

Finally, a "Tier II" permitting system was also not a viable alternative to the 2012 emergency orders. [At. Br. 23-28] A Tier II system would distinguish among subsistence users based on criteria like long-term dependence on the resource. [Tr. 101-04, 119-28] With such a system in place, ADFG could allow only Tier II permit-holders to fish rather than all Alaska residents. [Tr. 101-04, 119-28] But crafting a Tier II system is a complex task—involving processing and scoring thousands of permit applications—that could not realistically be accomplished in the middle of a fishing season on an emergency basis. [Tr. 101-04, 110-11, 119-28, 275-79, 473-74] And the defendants would not even necessarily qualify for Tier II permits—that would depend on what scoring criteria the Board of Fisheries chose and how many permits became available. [Exc. 119-21, 279, 60-62] The defendants may believe that a Tier II system would be a good idea or even that it is required by statute, but as this Court has recognized, "individuals are not free to break laws simply because they believe their conduct should be legal."[85] [At. Br. 23, 25]

Moreover, even if a Tier II system had been in place in 2012 and the defendants held Tier II permits, ADFG could not have allowed them to fish unrestricted. [Tr. 282-83] To allow any user group to fish unrestricted, ADFG would have to have first been projecting a surplus that the group could safely be allowed to harvest; ADFG projected no such surplus in 2012. [*Id.*] The defendants argue that the State identified a "surplus" of

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85 *Charles*, 232 P.3d at 745.

20,000 kings and "had a duty to first allocate that limited supply to selected users" like them. [At. Br. 27] But the State did not project a harvestable surplus of 20,000 kings. [Tr. 282-84, 411-13] The State knew that some kings would be caught despite the emergency orders, and in the end 20,000 of them were, but there was never a surplus. [Tr. 282-84] Every single king that was caught put the State farther under its escapement objective, which it ultimately missed by 50,000 fish. [*Id.*] As Travis Elison explained, ADFG "allowed too much harvest of king salmon, allowed too much opportunity compared to what the law says," but "management's not perfect" and "it's difficult when you're managing a subsistence fishery" because "if people can't fish for a month straight, there's serious problems with food security and such." [*Id.*]

D. The free exercise clause does not require the State to prohibit fishing by non-religious people in order to save more king salmon for religious people, and doing so would violate the establishment clause.

Finally, the defendants suggest that, as a potential "less restrictive means," the State should have prohibited everyone other than religiously motivated people from doing any fishing, so as to leave more king salmon for religiously motivated people. They argue that "if there is only a little bit, that little bit should be allocated to those with a religiously protected interest in that little bit." [At. Br. 32] But ADFG projected no harvestable surplus at all. [Tr. 282-84] And even assuming the 20,000 kings that were caught despite the restrictions could be considered a "surplus" that the State "allocated" among all Alaskans, deliberately re-allocating that resource to religious adherents at the expense of non-adherents is not required by free exercise and would violate the establishment clauses of the U.S. and Alaska Constitutions.

King salmon are a limited state asset held in trust for the benefit of all Alaskans,[86] and the free exercise clause does not require the State to allocate this asset based on religious considerations. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[87] Although the free exercise clause may prevent the State from prohibiting religious practices when those practices have no effect on others, the free exercise clause does not require the State to subsidize religious practices by allocating a limited resource to religious adherents at the expense of non-adherents.[88]

The Court in *Frank* rejected the idea that a simple religious exemption would violate the establishment clause, but accepting the defendants' argument here would involve much more extensive state entanglement in religion.[89] The religious exemption in *Frank* simply required the State to stand aside and allow the defendant to take a moose because the moose population was not threatened. The Court was not faced with a suggestion that the State should actively restrict non-religious hunters in order to leave

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86 *See Pullen v. Ulmer*, 923 P.2d 54, 61 (Alaska 1996) (agreeing with the position that "naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people").

87 *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring).

88 *Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452-53 (1988) (rejecting a claim that the free exercise clause prohibited the government from allowing logging in a religiously significant area on public land, explaining that accepting this claim would result in "the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion"); *Attakai v. United States*, 746 F. Supp. 1395, 1403 (D. Ariz. 1990) (holding that free exercise does not allow a claimant "to impose a religious servitude on the property of the government").

89 *Frank*, 604 P.2d at 1074-75.

more moose for religious hunters. By contrast, the defendants' suggestion that the State affirmatively redistribute king salmon based on religious considerations involves just the sort of "sponsorship, financial support, or active involvement of the sovereign in religious activity" that violates the establishment clause.[90] The establishment clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion."[91] Restricting the activities of non-religiously-motivated Alaskans for the express purpose of assisting in the religious practices of other Alaskans is "active involvement" in religion, not simply "neutrality in the face of religious differences."[92] Accordingly, it is not a viable "less restrictive means" of protecting king salmon.

For these reasons, this Court should affirm the district court's conclusion that the State met the necessary burden under *Frank*—whether under a "least restrictive means" test or not—to defeat the claimed religious exemption.

V. The district court decision may also be affirmed because the State's compelling interest in Article VIII common use principles would suffer if the defendants were exempted from the restrictions.

This Court should also affirm the district court's decision because Article VIII, Sections 3, 15, and 17 of the Alaska Constitution—which require the State to manage

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90 *Id.* at 1074 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

91 *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

92 *Id.*; *cf. Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) ("Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause."); *Inupiat Cmty. of Arctic Slope v. United States*, 548 F. Supp. 182, 188 (D. Alaska 1982) *aff'd*, 746 F.2d 570 (9th Cir. 1984) (holding that "the First Amendment may not be asserted to deprive the public of its normal use of an area" and "a free-exercise claim cannot be pushed to the point of awarding exclusive rights to a public area").

fisheries for the common use of all Alaskans—preclude the special fishing privileges the defendants seek. Because common use is itself a "compelling state interest" that would be harmed by an exemption, the State can meet its *Frank* burden on this alternative theory.[93]

A religious exemption from a generally applicable law has different implications when the law regulates access to a finite, common resource (e.g., a fishing restriction) than when the law regulates merely individual conduct (e.g., an illicit drug prohibition). One person's religious exemption from a drug prohibition may give that person a special privilege to use drugs, but that privilege does not directly impact the interests of other Alaskans. A religious exemption from a fishing restriction, on the other hand, grants exclusive access to a finite asset of the State, thereby impacting other Alaskans' interest in that common asset.[94] A special fishing privilege thus comes at the expense of other Alaskans in a way that a special drug use privilege does not. The defendants' position that the State must reserve its scarce shared fisheries for one group of Alaskans runs counter to Sections 3, 15, and 17 of Article VIII.

Article VIII of the Alaska Constitution explicitly tasks the State with managing and protecting its fisheries for all Alaskans, not for specific groups. Article VIII was

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93 Although the State raised this theory before the district court, the district court did not reach it in its decision. [Tr. 516-18] This Court may nonetheless affirm on this alternative theory because "[a]n appellate court may uphold the trial court's judgment on any legal theory supported by the record—even one that the trial court expressly rejects." *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 956-57 (Alaska 2004); *see also Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 758 (Alaska 1983) ("This court has repeatedly held that it may affirm a judgment of the superior court on different grounds than those advanced by the superior court and even on grounds not raised by the parties in the superior court."); *Ransom*, 362 P.2d at 285 (*supra* note 38).

94 *See Pullen*, 923 P.2d at 61 (*supra* note 86).

"intended to permit the broadest possible access to and use of" the State's fish and wildlife "by the general public."[95] Section 3 provides that fish and game "are reserved to the people for common use." Common use is "a highly important interest running to each person within the state."[96] Section 3 "impose[s] upon the state a trust duty" to manage fish and wildlife "for the benefit of all the people."[97] And the "minimum requirement of this duty is a prohibition against any . . . special privileges."[98] Section 17 further emphasizes this principle by providing that resource laws "shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." The constitutional history of these sections "reveals an anti-monopoly intent to prohibit 'exclusive grants' and 'special privilege[s]'" regarding fish, wildlife, and waters, "as was so frequently the case in ancient royal tradition."[99]

The constitutional delegates were so concerned about protecting these common use principles in the fisheries context that they also wrote Section 15 of Article VIII, which makes explicit that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Section 15 was modeled on the pre-statehood White Act.[100] In *Hynes v. Grimes Packing Company*, the U.S. Supreme

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95 *Owsichek*, 763 P.2d at 492 (quoting *Wernberg v. State*, 516 P.2d 1191, 1198–99 (Alaska 1973)).

96 *Id.* at 492 n.10 (quoting *State v. Ostrosky*, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting)).

97 *Pullen*, 923 P.2d at 60 (quoting *Owsichek*, 763 P.2d at 495).

98 *Owsichek*, 763 P.2d at 496.

99 *Id.*

100 *McDowell v. State*, 785 P.2d 1, 6-7 (Alaska 1989).

Court interpreted the White Act to prohibit exempting Alaska Native residents of the Karluk Reservation from a general ban on commercial salmon fishing in the area.[101] In *McDowell v. State*, the Alaska Supreme Court analogized to *Hynes* and held that just as a special fishing privilege for Alaska Native residents ran counter to the White Act, a special fishing privilege for rural residents ran counter to the anti-exclusionist principles behind Section 15.[102] Although Section 15 allows limited entry permit systems that distinguish among Alaskans in certain circumstances, it allows this only for narrowly drawn economic and conservation reasons.[103]

A religious fishing exemption would run afoul of Sections 3, 15, and 17 because it would create a "closed class" of specially privileged users just like the rural preference that the Alaska Supreme Court struck down in *McDowell*.[104] Sections 3, 15, and 17 "have varied ramifications [but] they share one meaning: 'exclusive or special privileges to take

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101 337 U.S. 86, 122 (1949).

102 785 P.2d 1, 6-7 (Alaska 1989); *see also State v. Kenaitze Indian Tribe*, 894 P.2d 632, 638-39 (Alaska 1995) (holding based on *McDowell* that rural preference for Tier II subsistence priority violated Sections 3, 15, and 17 of Article VIII).

103 Under Section 15, the State may "limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State." *See Ostrosky*, 667 P.2d at 1189 (discussing 1972 amendment); *Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1266 (Alaska 1988) (recognizing "tension between the limited entry clause of the state constitution and the clauses of the constitution which guaranty open fisheries" and stating that "to be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation").

104 *See Kenaitze Indian Tribe*, 894 P.2d at 638 (stating that Sections 3, 15, and 17 "afford protection against the creation of a 'closed class' of fish and game users").

fish and wildlife are prohibited.'"[105] The defendants argued below that religion is not a "closed" class like race because any person "could adopt Yup'ik spirituality sincerely, just like a non-Christian or a Buddhist raised in a Christian household could become Christian." [Tr. 527] But the *McDowell* court rejected similar reasoning as "unpersuasive" when faced with the argument that a rural preference does not create a closed class because urban residents could move to rural areas and get the preference.[106]

Because anti-exclusionist principles of common use are enshrined in Sections 3, 15, and 17 of Article VIII, the State has a "compelling state interest" in managing its fisheries for the benefit of all Alaskans and not creating special fishing privileges. Under Alaska's *Frank* test, the State can overcome a free exercise claim if a compelling state interest "will suffer if an exemption is granted to accommodate the religious practice in issue."[107] In this case, common use "will suffer" if a closed subset of Alaskans is given priority access to the State's scarce fisheries resources at the expense of other Alaskans.

Although *Frank* authorized a religious exemption from a moose hunting restriction, which implicates principles of common use, *Frank* is distinguishable for three reasons. First, Article VIII's most explicit prohibition on special privileges—Section 15—applies only to fisheries and thus did not apply to the hunting in *Frank*. Second,

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105 *Id.* (quoting *McDowell*, 785 P.2d at 9).

106 *McDowell*, 785 P.2d at 7-8.

107 *See Larson*, 90 P.3d at 132 ("*Frank* explained that the appropriate question, after a court determines that the claimed exemption implicates a compelling government interest, is 'whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice in issue.' This test adequately addresses the closeness of the fit between the state's interest and the means used to achieve it.").

Frank was decided in 1979, before the seminal cases such as *McDowell* that have interpreted and expounded upon the meaning of Sections 3, 15, and 17. The *Frank* court was not faced with, and did not rule on, the implications of the common use clauses.

And most importantly, exempting the conduct of the defendant in *Frank* caused much less harm to common use principles than would exempting the conduct of these defendants. The defendant in *Frank* shot a single moose out of season for a specific religious ceremony at a time of no conservation concern.[108] The defendants in this case, by contrast, fished without regard for gear restrictions despite serious conservation concerns, and without any specific ceremonial purpose that would have limited the amount of their harvest. Although they mention the idea of allowing each village to catch one symbolic king salmon, none of these defendants were trying to do that—they were trying to catch their normal year's harvest, which for some would number in the hundreds. [Tr. 826] Allowing the defendants an exemption to engage in such fishing while other Alaskans bear the burden of conservation measures would do much more violence to the ideals of common use than allowing a *Frank*-style exemption for people who require one animal for a specific ceremony at a time of no conservation concern. For these reasons, *Frank* does not preclude the State's argument that the defendants' claimed religious exemption is incompatible with the common use clauses of Article VIII.

Because granting the defendants exclusive religious fishing privileges would harm the State's compelling interest in managing its finite fisheries resource for the common

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[108] *Frank*, 604 P.2d at 1074 ("All the record reveals is that there was but one funeral potlatch in Minto in 1975, and that one moose was needed for it.")

use of all Alaskans, the Court should affirm the district court's decision.

CONCLUSION

For the foregoing reasons, the Court should affirm each of the convictions.

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