IN THE COURT OF APPEALS OF THE STATE OF OREGON

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon; **LISA CHERNAIK**, guardian of Olivia Chernaik; **KESLEY CASCADIA ROSE JULIANA**, a minor and resident of Lane County, Oregon, **CATHY JULIANA**, guardian of Kelsey Juliana, Plaintiffs-Appellants, v. **KATE BROWN**, in her official capacity as Governor of the State of Oregon, and the **STATE OF OREGON**, Defendant-Appellee.	CA No. A159826 Lane County Circuit Court No. 16-11-09273 J. Rasmussen **BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS**

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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I. IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici curiae are the law professors listed above. We have dedicated our careers to teaching and writing about environmental, property, and constitutional law as well as the public trust doctrine. We have an abiding interest in informing the Court about the role of the public trust doctrine concerning sovereign legal obligations to protect vital natural resources, including the atmosphere. We file this brief in support of Appellants

II. SUMMARY OF THE ARGUMENT

This case concerns nothing less than the right of Oregon children to inherit a stable atmosphere necessary to their survival. The Washington Superior Court, in a similar atmospheric trust suit, recently declared:

> [C]urrent scientific evidence establishes that rapidly increasing global warming causes an unprecedented risk to the earth, including land, sea, the atmosphere and all living plants and creatures. . . . In fact, as Petitioners assert and this court finds, their very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming by accelerating the reduction of emissions of GHG's before doing so becomes first too costly and then too late.

Foster v. Washington Department of Ecology, No 14-2-25295-1 SEA, 2015 WL 7721362, at *2 (Wash Super, Nov 19, 2015).

This case, like the Washington case, invokes the public trust doctrine, an ancient and enduring principle recognized in Oregon and in every state. Under this

principle, government holds crucial natural resources in trust for all present and future generations of citizens—the beneficiaries of the trust. As sovereign trustee of such resources, government has a fiduciary obligation to protect these natural assets for their continued benefit to the citizens. We support the youth plaintiffs' request to apply this principle to the atmosphere and enforce the trust duty to protect this public resource against "substantial impairment." *See Illinois Central Railroad v. Illinois*, 146 US 387, 455, 13 S Ct 110, 119 (1892).

Early cases applied the public trust to streambeds and the navigable waters flowing over them. Courts protected those resources under the public trust because they were a matter of "public concern," providing vital support to societal interests like fishing, navigation, and commerce. Over the last two centuries, the public trust principle has not changed: the doctrine still aims to protect resources of "public concern." This case involves public trust duties to protect the atmosphere that sustains the climate necessary for the youth plaintiffs' long-term survival.

Declaring the contours of the public trust on remand from the first reversal in this case, Lane County Circuit Court Judge Rasmussen issued an opinion that all but obliterates Oregon's public trust doctrine. Ignoring state precedents built up over the course of more than a century, Judge Rasmussen summarily disposed of the public trust's longstanding application to waters, beaches, fish, and wildlife,

and then rejected its application to the atmosphere. The lower court also dismissed the universally recognized duty of protection associated with a public trust. If Oregon is to have any meaningful public trust principles, the lower court's opinion cannot stand.

As law professors with more over 1000 collective years in law school teaching, we have a keen interest in providing an accurate understanding of the origins, purposes, and scope of the public trust doctrine in a state like Oregon with such a long history of judicial protection of public rights. Because the doctrine can be understood only with reference to its origins and evolution, we begin with that context. We then survey the cases that have applied the public trust to submerged lands, waters, beaches, and fish and wildlife. We also maintain that air is within the *res* of the public trust. We end by addressing the duty of protection that lies at the core of any trust control over public trust property.

III. ORIGINS AND EVOLUTION OF THE TRUST

A. The Public Trust Doctrine and Its Role in Modern Jurisprudence

The public trust doctrine requires government to hold vital natural resources in trust for the public beneficiaries, both present and future generations.[1] The

[1] *Illinois Central R.R. v. Illinois*, 146 US 387, 455 (1892); *Geer v. Connecticut*, 161 US 519, 525-29, 16 S Ct 600, 602-604 (1896) (detailing ancient and English common law principles of sovereign trust ownership of air, water, sea, shores, and wildlife and stating: "[T]he power or control pledged in the State, resulting from

doctrine protects reserved, inalienable property rights held by the public in crucial resources from monopolization and/or destruction by private interests. The doctrine gives force to the plain expectation--central to the purpose of organized government--that natural resources essential for survival will remain abundant, justly distributed, and bequeathed to future generations.

The public trust stands apart from police power as a source of authority and duty incumbent on the government. As a property-based counterweight to government's discretionary police power, the trust secures the people's rights to a sustained natural endowment. The principle has been affirmed by the U.S. Supreme Court many times as well as by constitutions and statutes in the U.S. and world.[2] American courts routinely recognize the ancient origins of the public trust as tracing to the beginnings of human civilization and legal systems. The essential public rights that infuse the trust were expressed in the Institutes of Justinian, which declared: "By the law of nature these things are common to all mankind —

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this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people."); *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz 356, 367, 837 P.2d 158, 169 (Ariz Ct App 1991) ("The beneficiaries of the public trust are not just present generations but those to come").

[2] *See* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (2d ed. 2015) (compiling cases from the U.S. and worldwide).

the air, running water, the sea, and consequently the shores of the sea."[3]

The trust is rooted in the original social compact that citizens make with their governments. The assumption of the public trust is that citizens reserve public ownership of crucial resources as a perpetual trust to sustain themselves and future generations. Such reserved public property rights to crucial resources are fundamental to the democratic understandings underlying all government authority. Courts have often said that privatization of essential resources "would be a grievance which never could be long borne by a free people."[4]

In the seminal public trust case, *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court confronted a legislative conveyance of Lake Michigan's shoreline to a private railroad company. 146 US 387 (1892). The Court found that the state legislature had no authority to make such a conveyance, because the lands were held in public trust; accordingly, the railroad's title was invalid. A contrary rule, the Court noted, would "place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated." *Illinois Central*, 146 US at 455. The Court made clear the trust's limitation on legislatures:

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[3] J. INST. 2.1.1. (T Sandars trans, 4th ed., 1867).
[4] *Illinois Central*, 146 US at 456 (citing *Arnold v. Mundy*, 6 NJ Law 1, 78 (NJ 1821)).

> The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation, which may be needed one day for the harbor, may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.

Id. at 460.

The public trust is characteristically explained as an attribute of sovereignty that government cannot shed. *See, e.g.*, *Geer*, 161 US at 527 (describing the sovereign trust over wildlife resources as an "attribute of government"). As the *Illinois Central* Court declared, "The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . . ." *Illinois Central*, 146 US at 453-60. One federal district court noted: "The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." *United States v. 1.58 Acres of Land*, 523 F Supp 120, 124 (D Mass 1981).

A 2013 landmark opinion by the Pennsylvania Supreme Court described the trust as embodying the "inherent and indefeasible" rights of citizens reserved though their social contract with government. *Robinson Twp. v. Pennsylvania*, 623 Pa 564, 642, 83 A3d 901, 948 (2013) (plurality opinion); *see also id.* at 640 (describing such rights as "of such 'general, great and essential' quality as to be

ensconced as 'inviolate.'" (quoting Pa Const, Art 1, § 25)). Although the Pennsylvania constitution contains a specific provision setting forth the public trust (Pa Const, Art I, § 27), the *Robinson* court made clear that the amendment did not create new rights, but instead enumerated pre-existing rights that the people had reserved to themselves in creating government.[5] The same reserved rights of citizens are secured by the Oregon Constitution, through Article 1's reservation of "natural rights inherent in people."[6] In *Robinson*, the court held that a statute that preempted local land use controls violated the constitutional public trust.

In 2015, the Washington court in *Foster* employed the same constitutional interpretation to rule that the state a duty to regulate greenhouse gas pollution, holding that "fundamental and inalienable rights" protected by Article 1 of that state's constitution included a right to "preservation of a healthful and pleasant atmosphere." *Foster*, 2015 WL 7721362 at *4 (quoting Wash Const, Art I, § 30, "[t]he enumeration of certain rights shall not be construed to deny others retained

[5] *Robinson Twp.*, 623 Pa at 642 ("Among the inherent rights of the people of Pennsylvania are those enumerated in Section 27 . . . ."); *id.* at 1016 n.36 ("'[T]he concept that certain rights are inherent to mankind, and thus are secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.'" (quoting *Driscoll v. Corbett*, 620 Pa 494, 511, 69 A3d 197, 208 (2013))).

[6] That article provides: "*Natural rights inherent in people.* We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority. . . ." Or Const, Art 1, § 1.

by the people."). Concluding that the Department of Ecology had a "responsibility to protect" the fundamental constitutional environmental right embedded in Article 1, the court stated:[7]

> If ever there were a time to recognize through action this right to preservation of a healthful and pleasant atmosphere, the time is now as . . . . "Climate change is not a far off risk. It is happening now globally and the impacts are worse than previously predicted, and are forecast to worsen . . . If we delay action by even a few years, the rate of reduction needed to stabilize the global climate would be beyond anything achieved historically. . . ."

Id. at *4 (quoting Dept. of Ecology, Washington Greenhouse Gas Emissions Reduction Limits, Dec. 2014).

The *Foster* court also found a constitutional public trust doctrine embodied in Article XVII of the Washington Constitution, which declares state ownership of the beds and shores of navigable waters. *Id*. at *4. Recognizing that the atmosphere and submerged lands remain inextricably connected (". . . to argue that GHG emissions do not affect navigable waters is nonsensical. . ."), the court held that Article XVII also requires government to protect the atmosphere. *Id*. The same constitutional analysis should hold in Oregon which, as explained below, owns navigable beds and waterways in trust for the people.

B. Oregon's Public Trust Doctrine and its Evolution

[7] *Foster*, 2015 WL 7721362 at *4; *see also id*. at *3 (emphasizing the state's "mandatory duty" to regulate greenhouse gas emissions as arising under Washington State Constitution and public trust doctrine.)

The public trust doctrine has a long history and a deep pedigree in Oregon, utterly ignored by the lower court, which summarily dismantled settled trust principles that Oregon courts have invoked to protect the state's resources and assure equal access for multiple generations of Oregonians since statehood. At statehood, Oregon received an implicit federal grant to the ownership of the beds of historically navigable waters pursuant to equal footing doctrine established in *Pollard v. Hagen*, 44 US 212 (1845). The 1859 Statehood (or Enabling) Act instilled the public trust doctrine, declaring, in section 2, "[N]avigable waters . . . shall be common highways and forever free." An Act for the Admission of Oregon into the Union, 11 Stat 383, ch 33 (1859). This provision was drawn from the Confederation Congress's most notable legislative achievement, the Northwest Ordinance of 1787, 1 Stat 50. The purpose of section 2 was to ensure that waterways of importance to the Oregon public would remain available for public use, not monopolized by private interests.

These public rights were recognized by, rather than created by, the Statehood Act. As the U.S. Supreme Court explained in *Martin v. Waddell's Lessee*, 41 US 367, 414 (1842), public rights in navigable water antedated the Northwest Ordinance (citing Sir Matthew Hale's treatise, *De Jure Maris* (1670), for the proposition that "the public common of piscary" belonged to the "common people of England" since the Magna Charta); *see also Robinson*, 632 Pa at 640-

41 (public trust rights are "inherent and indefeasible rights" that were "preserved rather than created by the Pennsylvania Constitution"). Moreover, as the New Mexico Supreme Court has understood, statehood act promises, which are much more difficult to change than state constitutional provisions, form a paramount source of a state's sovereignty. *State ex rel. King v. Lyons*, 149 NM 330, 334, 248 P3d 878, 882 (2011) (describing the Enabling Act as "fundamental law to the same extent as if it had been directly incorporated into the Constitution"); *see also Ryals v. Pigott*, 580 So2d 1140, 1149 (Miss 1990) (enforcing a statehood act's "forever free" language, stating that waterways are open as matter of federal law and "may not—by legislative enactment or judicial decree—be withdrawn from public use").

As explained below, the Oregon Supreme Court has interpreted the purpose of the public trust to uphold public rights in natural resources considerably beyond the submerged lands granted to the State upon admission. Ignoring this history, the lower court held that the public trust extended only to submersible lands gained upon statehood. The decision is clearly erroneous. The state's submersible lands, waters, fish and wildlife, beaches, and the atmosphere are all subject to sovereign ownership interests held in trust for the benefit of the people of this State. The state has a fiduciary obligation to protect both public lands and the public's non-possessory usufructuary rights.

1 . 19th Century Interpretation

The Oregon Supreme Court upheld public trust rights soon after statehood. In *Weise v. Smith*, 3 Or 445 (1869), the Court affirmed that log floats on the Tualatin River did not amount to trespass on privately owned riverbed, since the river was "subject to the public use as a passage way." The *Weise* Court also extended the public right of access upland, ruling that the loggers had the right to use uplands adjacent to navigable waters when necessary for the log booms. *Id.* The same year, the Court decided that streams that were navigable only during the spring freshet were subject to public navigation rights, *Felger v. Robinson*, 3 Or 455, 457–58 (1869).

In another 19th century decision involving log floats on the Tualatin River, the Oregon Supreme Court expanded its recognition of public rights, holding that an iron smelter could not divert water so as to interfere with log floats using the river for navigation. In *Shaw v. Oswego Iron Co.*, 10 Or 371, 375–76, 382 (1882), the Court explained that, even where riparian landowners owned the riverbed, their riparian rights were "subordinate to the public easement" and "subject to the superior rights of the public to use [the water] for the purposes of transportation and trade."

A decade later, in *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892), the Oregon Supreme Court applied public navigation rights to tidal waters near

Astoria, holding that title to tidelands purchased from the state continued to be subject to the paramount right of public navigation. The U.S. Supreme Court affirmed, explaining that the state owned tidelands in its sovereign capacity in "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery." *Shively v. Bowlby*, 152 US 1, 16, 14 S Ct 548, 553 (1894) (quoting from *De Jure Maris*). Even after the state conveyed the lands to private owners, title remained "subject [] to the paramount right of navigation." *Id.* at 30. This was so because private title, "or *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing." *Id.* at 13–14, 16, 25 (citing Hale, English common law decisions, and a Virginia attorney general's opinion).

Thus, within 25 years after statehood, the Oregon Supreme Court invoked the Statehood Act's promise of public rights in navigable waters to: 1) ensure public access over privately owned streambeds; 2) recognize public access rights over private uplands adjacent to navigable waters where necessary; 3) reject private water diversions adversely affecting public rights; and 4) make clear that state conveyances to private landowners could not defeat public trust rights.

2. Expanding Public Trust Rights in the 20th Century

The Oregon Supreme Court upheld public rights to fish early in the 20th century. *Anderson v. Columbia Contract Co.*, 94 Or 171, 182, 184 P 240, 243

(1919), citing *Johnson v. Jeldness*, 85 Or 657, 661, 167 P 798, 799 (1917). The Court soon expanded the scope of public trust rights from navigation and fishery to include recreation. In *Guilliams v. Beaver Lake Club*, 90 Or 13, 30–31, 175 P 437, 443 (1918), the Court made clear that a landowner could not build a dam that would interfere with public recreational use of a nearby lagoon. The Court also affirmed the lower court's injunction against a wire fence that the landowner erected on his privately owned riverbed to prevent public fishing and recreating. *Id.* at 27-30. The Court explained that, "[w]hatever may be the title to the bed of such streams or bodies of water, [private riparian landowners] do not own the water itself, but only the use of it as it flows past their property." *Id.* at 26.

The public's navigation easement was broad enough to support a right to recreate in rowboats and to fish for trout. *Id.* at 14–15, 27–28. Among the other public uses the court recognized were "sailing, rowing, fishing, fowling, bathing, skating . . . and other public uses which cannot now be enumerated or even anticipated." *Id.* at 29 (quoting *Lamprey v. Metcalf*, 52 Minn 181, 200, 53 NW 1139, 1143 (1893)). A stream was subject to public trust rights even if not suitable for large-scale commerce, so long as it was capable of floatation by small craft. *Id.* at 18–29. According to the Court, streams are navigable for purposes of public rights if they "are capable of use for boating, even for pleasure." *Id.* at 29

(quoting *Lamprey*, 52 Minn at 200). This "pleasure-boat test" for navigable waters is now well-established and the dominant test for navigable waters under state law. *See* Harrison C. Dunning, *Waters Subject to the Public Right*, *in* 2 WATERS AND WATER RIGHTS § 32.03 (Amy L. Kelley ed., 3d ed 2014).

Nearly two decades after *Guilliams*, the Oregon Supreme Court again revisited the public trust doctrine in a title dispute case involving Blue Lake, a small popular, man-made lake near Portland with privately owned lakebeds. *Luscher v. Reynolds*, 153 Or 625, 56 P2d 1158 (1936). The Court stated that, even though the bed of Blue Lake was privately owned, the lake was open for public recreation because "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters . . . for the purpose of transportation and commerce," including recreational boating. *Id.* at 635–36. The *Luscher* Court explained its reasoning in memorable terms:

> 'Commerce' has a broad and comprehensive meaning. It is not limited to navigation for pecuniary profit. A boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber. There are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptation of such terms. . . . 'To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of . . . which cannot, perhaps, be now even anticipated.'

Id. at 635 (quoting *Guilliams*, 90 Or at 29).

By mid-20th century, then, the Oregon Supreme Court had firmly embraced recreation as among the uses protected by the state's public trust doctrine. In doing so, it also expanded the waterbodies subject to the doctrine by including all waters suitable for use by recreational watercraft. Its expanding scope was characteristic of the public trust doctrine throughout the 20th century.

3. Expanding Public Uses Upland: The Role of Custom

In *Weise*, 3 Or at 450, as discussed above, the Oregon Supreme Court recognized that public rights to use navigable waters extended to uplands where necessary to float logs. A century later, the Court expanded the public's right to use of uplands to include recreational use of ocean beaches. In *State ex rel. Thornton v. Hay*, 254 Or 584, 593–97, 462 P2d 671, 676–77 (1969), the Court used the doctrine of custom— based on the public's long, uninterrupted, and peaceable use of ocean beaches as highways of commerce—to recognize public recreational rights to uplands. The Court reaffirmed this reasoning a quarter-century later in *Stevens v. City of Cannon Beach*, 317 Or 131, 142–43, 854 P2d 449, 456 (1993), *cert den*, 510 US 1207 (1994) (applying the doctrine of custom to a landowner who purchased before the *Thornton* decision).

The public trust doctrine forms the underlying justification for public recreational rights in ocean beaches. In a concurring opinion in the *Hay* case,

Justice Denecke explained the state's long history of distinguishing between *jus publicum* and *jus privatum* in public trust cases like *Guilliams* and *Luscher*, and suggested the public trust doctrine as a superior rationale for a public easement in ocean beaches, analogizing ocean beaches to navigable waters. 254 Or at 600–01. Like the *Weise* Court's recognition of public rights to uplands adjacent to navigable waters where necessary for log floats, 3 Or at 450–51, the public's easement to use Oregon's ocean beaches is best understood as a right ancillary to the public's ownership of adjacent tidelands.

4. The Statutory Public Trust

Apart from *Stevens v. City of Cannon Beach* in 1993, the Oregon Supreme Court's most recent interpretation of the public trust doctrine was thirty-five years ago in *Morse v. Div. of State Lands* (*Morse II*), 285 Or 197, 590 P2d 709 (1979), in which the Court affirmed a Court of Appeals' decision to reverse a state fill permit for the expansion of the North Bend airport. The Court of Appeals had ruled that the state's fill and removal statute aimed "to codify the [*j*]*us publicum* and to provide procedures for its orderly administration" because "[t]he legislative history [of the statute] reflects [the fact] that the legislature was aware of the historical public trust, was motivated by the same concerns that underlie the public trust, and chose language which would best perpetuate it," *Morse v. Div. of State Lands* (*Morse I*), 34 Or App 853, 862, 581 P2d 520, 525 (1978). The Supreme Court did

not disturb these determinations, although it decided that the public trust reflected in the statute did not require rejection of all fill permits for non-water-dependent uses. *Morse II,* 285 Or at 200, 203.

5. The Attorney General's 2005 Opinion

In 2005, the State Attorney General interpreted the public trust in waterways in response to questions from the State Land Board. Attorney General Opinion 8281 (April 21, 2005) ("AG Opinion"). Surveying federal cases that established the federal "title-navigability" test, the AG Opinion underscored settled precedent that the State acquired, at statehood, title to both submersible lands and the waters flowing over them in all waterways navigable at the time of statehood. *Id*. at 8. The opinion also emphasized the trust responsibility of the state in managing these waters. *Id.* at 15 ("The state's duty to protect the public interest in state-owned waterways is in the nature of a trust.").

The opinion then examined case law establishing the state's public trust doctrine in waters outside the federal test—that is, waters characterized by private ownership of the underlying submerged lands. Relying on the state's bellwether public trust cases discussed above, particularly *Guilliams* and *Luscher*, the opinion made clear that under state law, public trust property rights in water extend far beyond the federal-title category of water to include all waters that are capable of "valuable public use." AG Opinion at 20 (citing *Kamm v. Normand*, 50 Or 9, 14,

91 P 448, 450 (1907)). The Attorney General called this application of the public trust doctrine the "public use doctrine." We think that this reference to a separate doctrine could wrongly suggest a disengagement from the public trust origin and the basis of these cases. The opinion should have been clearer concerning the public trust underpinnings of the case law—evident from its public property characterization of the water. As the Supreme Court in *Kamm* stated: "The doctrine, then, which we derive from the authorities, is that a stream, to be a public highway for floatage, must be capable, in its natural condition . . . of valuable public use, and if not, it is private property." *Kamm*, 50 Or at 14, *cited in* AG Opinion at 20. Thus, the Oregon Supreme Court recognized over a century ago that waterways capable of a "valuable public use" were public property.

The AG opinion also quoted from another Oregon case, *Lebanon Lumber Co. v. Leonard*, 68 Or 147, 136 P 891 (1913), which compared the federal public trust test and the state's extension of such public trust test:

> Large streams are considered nature's highways without the aid of legislation. . . . In the admission of Oregon as a state *Congress* provided that *all navigable waters therein should be common highways and forever free to the inhabitants of the state*, and later this right in the public was recognized by the courts. . . as extending to small streams the beds and banks of which are claimed by riparian owners. . . . [S]treams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private.

AG Opinion at 21 (emphasis added, citing *Lebanon*, 68 Or at 149-50).[8]

The AG opinion then explained the extension of this rule by the *Guilliams* case, 90 Or 13 (1918), emphasizing that decision's significance in broadening public rights to all waterways that could be used for pleasure fishing and boating, not merely for commercial transport. The *Guilliams* case was clearly a public trust case, relying on the Minnesota public trust case, *Lamprey*, 52 Minn 181, discussed above, which decided that waters not navigable for title purposes (under the federal test) could still be "public waters," owned by the public, if they supported recreational uses. As previously mentioned, *Guilliams* quoted from the *Lamprey* opinion to the effect that a broad definition of navigability would prevent private monopolies of small waterbodies which would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. AG Opinion at 22, citing *Guilliams*, 90 Or at 28-29 (quoting *Lamprey*, 52 Minn at 199-200).

The 2005 AG opinion proceeded to describe the landmark *Luscher* opinion, which also relied on *Lamprey* (again quoting the significant language in *Lamprey*) to conclude that "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters of the lake for the purpose of

[8] *Lebanon Lumber* court concluded that McDowell Creek was not navigable, and therefore lacked public rights, because the court applied a narrow navigability test that *Guilliams*—five years later—expanded to include recreational boating.

transportation and commerce." AG Opinion at 23 (quoting *Luscher*, 153 Or at 635).

Thus, the AG opinion announced that all waters in Oregon capable of public use, including recreational use, are publicly owned. Ownership of state waters can be only in the nature of trust ownership, for as the *Lamprey* court explained: "[W]e have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use." 52 Minn at 198. To the extent that the opinion could misinterpreted to mean that any waters capable of public use are not owned by the state in trust, we note that such an interpretation would be unprecedented in public trust jurisprudence.[9] Many states have recognized that traditionally non-navigable waters susceptible to public use are subject to the public trust doctrine; none recognize a distinct public use "doctrine" that denies basic public trust property concepts, such as state's fiduciary duties to protect the public's rights in trust resources.

IV. JUDGE RASMUSSEN'S ERRORS

[9] Should the current Attorney General attempt to invent a separate "public use" doctrine to disclaim any trust duties, such an abdication of the state's role in ensuring public rights to trust resources was explicitly rejected in *Illinois Central*, 146 US at 454-55 (the public trust doctrine makes it "hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation.").

Judge Rasmussen's opinion ignored the rationale of the public trust and reflected confusion as to its origins and scope. Mistaking the public trust doctrine for the equal footing doctrine, the court stated, "the public trust doctrine originated when title to the lands beneath navigable waters transferred to the state." *Chernaik v. Brown*, No 16-11-09273 at 11 (Cir Ct of Or, 2nd Jud Dist May 11, 2015). Believing this transfer of title to be the source of the trust, the court then failed to recognize any resources outside of the submersible land footprint. Moreover, the opinion denied any duty on the part of the state, except concerning the alienation of submersible lands.

A. Origin of Oregon's Public Trust Doctrine

The transfer of submersible lands to the state was not the origin of the public trust but an application of the trust principle. *Pollard v. Hagen*, the Supreme Court decision that established equal footing, held that states implicitly received title to streambeds underlying navigable waters upon their admission to the Union. 44 US 212 (1845). The rationale was that public ownership of submersible lands was crucial to prevent monopolization of navigable waters, crucial arteries of commerce in 19th century America. The case applied the public trust principle that long predated this country. England's common law recognized the importance of sovereign ownership of submersible lands, and Oregon courts have understood this ancient doctrinal lineage. *See Corvallis Sand & Gravel Co. v. State*, 250 Or 319,

335, 439 P2d 575, 582 (1967) (principle "derives from the ancient prerogative of the Crown").

The same reasoning that caused the *Pollard* Court to defeat a federal grant of submersible lands to a private party caused the *Illinois Central* Court, a half-century later, to reject a state grant of submersible lands to a railroad. In both cases, the U.S. Supreme Court continued the longstanding recognition that such lands, and waters over them, were crucial to societal interests of fishing, navigation and commerce, and thus could not be alienated into private ownership. These resources must be reserved for the people in trust for current and future generations.

The lower court erred in interpreting the foundational cases, such as *Illinois Central*, to apply the sovereign trust only to submersible lands. As explained below, the rationale of *Illinois Central* requires trust protection of other assets crucial to society beyond the submersible lands. These resources include water, beaches, fish and wildlife, and air. Judge Rasmussen summarily erased public trust protection for these in one or two thinly reasoned paragraphs directed to each resource, with little reference to relevant case law. If the lower court opinion stands, the state will lose its ability to seek damages to such public property.

B. Resources Protected by the Oregon Public Trust Doctrine

1. Submerged and Submersible Lands

The State acknowledges the public trust over submerged lands along navigable rivers. Although we agree that title to such bedlands rests with the state, the public trust is not bounded by the submerged land footprint. Judge Rasmussen erred in earlier describing the public trust as "stand[ing] for the legal principle" that ownership of submerged lands rests with the state. *Chernaik*, No 16-11-09273 at 7. The public trust extends far beyond submerged lands to include crucial resources of "public concern" (the *Illinois Central* test). Oregon courts have long recognized public ownership of usufructuary right in waterways flowing over privately-owned submerged lands. *See Bowlby*, 22 Or at 416 (privately-owned tidelands are subject to "the paramount right of navigation secured to the public.").

2. Water

In two paragraphs, Judge Rasmussen repudiated a century-and-a-half of Oregon case law affirming public rights in the waters of the state. New climatic conditions will make this state's waters even more scarce and valuable than they have been in the past. Heedless of such consequences and ignoring precedent, the lower court opinion contained a one-line pronouncement: "the public trust doctrine does not encompass waters of the state." Judge Rasmussen apparently arrived at this conclusion through a misconception as to the origins of the public trust. He claimed, "[t]he public trust doctrine . . . was predicated on title transferring to the state and the fee simple interest that was included therein. . . . Unlike submerged

and submersible lands, title to navigable waters themselves did not pass to the State."

The navigable waters of the state, those that meet the federal title-navigability test, clearly vested in the state under federal law due to statehood. The U.S. Supreme Court in *Illinois Central* declared that the state could not abdicate its trust over either the submerged lands or the waters flowing over them:

> Such abdication is not consistent with the exercise of that trust which requires the government of the state to *preserve such waters* for the use of the public. . . . The state can no more abdicate its trust over property in which the whole people are interested, *like navigable waters* and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Illinois Central, 146 U.S. at 453 (emphasis added). The same rule has been long recognized by Oregon courts. See *Corvallis*, 250 Or at 333 ("the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them . . . .").

As explained in section III, Oregon courts (like courts in other states) expanded public ownership of waterways beyond those meeting the traditional federal test of title-navigability. Recognizing the importance of public uses like recreation, Oregon courts established public ownership of all waters used by the public despite private ownership of underlying submerged lands. The riparian owner had a right to use but did not own such waters and could not exclude the

public from exercising its usufructuary rights. In the *Guilliams* decision, the Oregon Supreme Court declared, "Whatever may be the title to the bed of such streams or bodies of water (and it may be conceded that such title is in the riparian proprietors) they do not own the water itself but only the use of it as it flows past their property." 90 Or at 26.

The importance of Oregon's waterways was established by the Statehood Act's declaration that all navigable waterways would be "forever free." As Oregon judges have expanded the concept of "navigability" from the English tidal test and beyond the federal title-navigability test (susceptible to ordinary commerce at time of statehood), to the public use test (including recreational interests), Oregon courts been solicitous of the needs and rights of future generations "the extent of which cannot, perhaps, be now even anticipated." *Guillams*, 90 Or at 29 (quoting *Lamprey*, 52 Minn at 200). Judge Rasmussen's unreflective denial stands in contrast to this long line of Oregon case law declaring public rights in waters.

The primary purpose for recognizing state ownership in submersible lands was to protect their role in securing public uses of the water flowing over them. *Cook v. Dabney*, 70 Or. 529, 532, 139 P 721, 722 (1914). As the *Illinois Central* Court said, and Oregon cases have repeated, the trust in submerged lands was meant to promote the public interest of fishing, navigation and commerce. Without a rule protecting sovereign ownership of submerged lands, there remained the

constant danger of private parties using these lands to impede public use of the waters. It hardly makes sense to recognize sovereign ownership of submerged lands in the sovereign to promote water-based navigation, fishing, and recreation, yet deny sovereign ownership of the waters flowing over them—since fishing, log floating, and rafting cannot occur on dry land. Unlike Judge Rasmussen's artificial dichotomy, Justice Field's landmark opinion in *Illinois Central* embraced both submerged lands and overlying waters as sovereignly owned, declaring:

> The *ownership of the navigable waters* of the harbor and of the lands under them, is a . . . subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated except in those instances mentioned. . . .This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.

146 US at 455-56 (emphasis added). The Oregon Court of Appeals similarly treated land and waters as a trust bundle in *Morse* stating:

> The severe restriction upon the power of the state as trustee to modify *water resources* is predicated not only upon the importance of the public use *of such waters and lands*, but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment.

Morse I, 34 Or App at 859-60 (emphasis added).

Significantly, the Oregon state legislature recognizes state sovereign ownership of water. Since 1909, the Oregon Water Code has declared that "[a]ll water within the state from all sources of water supply belong to the public." 1909 Or Laws 319, 370 (codified at § 537.110). The legislature reiterated this

declaration 100 years later, in 2009 Or Laws 3237, 3238 (codified at ORS § 537.110) ("all water within the state belongs to the public pursuant to law"). Public ownership also extends to groundwater. ORS § 537.525. In 1987, the legislature expressly recognized the public trust in water in authorizing public instream rights, declaring that establishment of an instream water right "shall not diminish the public's rights in the ownership and control of the waters of this state or the public trust therein." ORS § 537.334(2). The lower court's conclusion that the state's public trust doctrine does not include the waters of the state is not only inconsistent with these statutes, it breached the statehood promise that rivers remain "forever free."

3. Beaches and Shorelands

The state also owns in trust a public usufructuary right in Oregon's beaches and shorelands. Yet in three sentences, Judge Rasmussen summarily dismissed this longstanding right, stating, "it appears that Oregon's public trust doctrine has not traditionally incorporated lands adjacent to but not underlying navigable waters." Based on that error, he concluded, "Therefore, this Court declares that the public trust doctrine does not apply to beaches, shorelands, or islands."

As noted above, the Oregon Supreme Court has twice affirmed public

recreational rights in Oregon beaches on grounds of the public's customary use.[10] Much like the "public use" criterion used by Oregon courts to find a public trust over waterways, the doctrine of custom represents "public use" extended over time immemorial. Neither application (ancient custom or contemporary public use) can be detached from their underlying public trust foundation, because both doctrines work an encumbrance on private property; to do so, they rely on antecedent public property rights reserved by the sovereign. The *Stevens* Court specifically rule that the public rights to beaches was a "background principle" of state property law. 317 Or at 142 (citing *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1028, 112 S Ct 2886, 2900 (1992)).

The public's right to recreate on ocean beaches in Oregon is clearly a public right to use private uplands, one that evolved from the public's ancillary right to use private uplands where necessary to access navigable waters (first recognized 145 years ago when the Oregon Supreme Court in *Weise* applied the trust to private shorelands when necessary to facilitate commercial log floats. 3 Or 445). Seemingly unaware of *Weise* or its progeny, Judge Rasmussen erroneously stated that the Oregon public trust does not extend to adjacent uplands.

[10] See *supra* cases discussed on p. 3.

4. Fish and Wildlife

The state clearly owns the fish and wildlife of the state in a sovereign capacity, in trust for the people, as recently articulated by the Oregon Supreme Court in *State v. Dickerson*, 356 Or 822, 833, 345 P3d 447, 454 (2015) (citing numerous cases and noting the legislature's codification, ORS § 498.002(1), declaring that "[w]ildlfe is the property of the state").[11] In fact, by 1920, the Oregon Supreme Court had affirmed on at least five occasions that the state was sovereign owner of wildlife as trustee for the public.[12] The *Dickerson* Court held that this sovereign trust property interest allowed the state to sue for compensation for damages to wildlife. 356 Or at 832-34.

The *Dickerson* result was unremarkable, as it encapsulated consistent judicial interpretation over a century. Wildlife has been a recognized public trust asset since at least *Geer v. Connecticut*, in which the U.S. Supreme Court held that the state must exercise its authority over the common property in game animals as

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[11] The court observed, "although the trust metaphor an imperfect one as there is no trust instrument delineating the state's powers and duties, all the trust elements—a corpus (wildlife), a trustee (the state), and a beneficiary (the people) are present. *Id*. at 835.

[12] *See* Michael C. Blumm & Erica Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375, 403 (2012) (citing cases). The landmark case is *State v. Hume*, 52 Or 1, 5, 95 P 808 (1908), declaring that the state owned migrating salmon "in its sovereign capacity in trust for all its citizens. *See also Columbia River Fishermen's Protective Ass'n v. City of St. Helens*, 160 Or 654, 87 P2d 195 (1939) (upholding fishermen's right to sue for damages to salmon due to water pollution).

a trust, "representing the people . . . in their united sovereignty." *Geer,* 161 U.S. at 529; *see also Center for Biological Diversity v. FPL Group*, 166 Cal App 4th 1349, 1362, 80 Cal Rptr 3d 585, 598 (2008) (citing *Geer*); *Horne v. Dept. of Agriculture*, 135 S Ct 2419, 2431 (2015) (upholding state sovereign ownership of wildlife as a defense to takings claims, distinguishing raisins grown as an agricultural commodity from oysters which, as wild animals, are owned by states in their sovereign capacity).

Yet the lower court opinion abolished the anciently recognized wildlife trust in a mere paragraph, without citing *Geer* or *Dickenson*. The opinion affirmed the trust, acknowledging that "title of migratory fish and game 'is held by the state, in its sovereign capacity in trust for all citizens,'" (quoting *State v. Hume*, 52 Or 1, 5, 95 P 808, 810 (1908)). The opinion then acknowledged that wildlife regulation as a "legitimate exercise of the police power," noting that the police power is distinct from the public trust doctrine.

Of course, government has both public trust duties and police power authority over wildlife. See *Geer*, 161 US at 534 ("Aside from the authority of the state, derived from the common ownership of game, and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a

police power to that end"). In fact, the distinction between the public trust and police power provides the rationale in all public trust cases because the public trust imposes fiduciary duties on government trustees in managing the people's assets in the trust. *See id*. at 529 ("[T]he power or control lodged in the state, resulting from…common ownership [in game], is to be exercised…as a trust for the benefit of the people . . . ."). These duties allow the public to enforce the trust "when the public agencies fail to discharge their duties." *Center for Biological Diversity*, 166 Cal App 4th at 1366.[13]

Judge Rasmussen took the recognized distinction between the public trust and police power and proceeded to wipe out the public trust half of the equation, stating: "Based on that acknowledged distinction (which the Court finds to be appropriate) between the State's police power and the public trust doctrine, and considering the narrow scope of the public trust doctrine, this Court declares that the public trust doctrine does not apply to fish and wildlife." *Chernaik*, No 16-11-09273 at 10. This part of the opinion was clear error and requires correction.

[13] The *Dickerson* court relied on the distinction between the public trust and the police power to uphold the state's ability to sue for compensation for damages to wildlife, underscoring that the state's interest in wildlife is broader than its police power, involving a "legal interest" in the wildlife itself, "a property interest that is recognized by law." *Dickerson,* 356 Or at 454.

5. The Atmosphere

Judge Rasmussen concluded that the atmosphere is not a public trust asset on three flawed grounds. First, perpetuating a mistake throughout the opinion, he assumed that "the public trust doctrine originated when title to the lands beneath navigable waters transferred to the state." He then observed that "the State has not been granted title to the atmosphere." The court's focus on title was entirely misplaced. As previously noted, the public trust doctrine did not originate in a grant of submersible lands. Instead, it originated in ancient law predating this nation.

The "grant" of submersible lands is accessory to the same sovereign interest that is the basis for the atmospheric trust. Although the lower court was preoccupied with formal title, the State never received formal express title to its submersible lands. The courts inferred "title," as an incident of sovereignty. C*orvallis,* 250 Or at 333 ("When, therefore, Oregon was admitted into the Union, it acquired title to the submerged lands not by grant from the United States, but by virtue of its sovereignty.") While the state clearly owns the navigable waters overlying submerged lands, *Morse I,* 34 Or App at 859-60, no "title" was conveyed to that resource. Sovereign ownership of both streambeds and waters came as a result of courts declaring that trust ownership was necessary to carry out sovereign functions.

Title in submersible lands evolved to accommodate public and private interests in the same property. Courts developed a framework of a combined title representing private interests (*jus privatum*) and public property interests (*jus publicum*). *See Morse I*, 34 Or App at 859-60; *Corvallis*, 250 Or at 334. States gained sovereign ownership of both at statehood and could convey *jus privatum* to private parties only in certain limited instances. Private ownership remained subject to *jus publicum. Id.*

In the case of water, wildlife, and air, however, the sovereign "title" is *jus publicum*, a public ownership concept traceable to Rome. In *Geer*, the U.S. Supreme Court relied on this ancient Roman law classification of "*res communis*" to find the public trust doctrine applicable to wildlife. 161 US at 523-525. The same analysis applies to air, an indisputable part of *res communes.* Sovereign ownership of air was clearly expressed by the U.S. Supreme Court in *Georgia v. Tennessee Copper Co.*, 206 US 230, 237, 27 S Ct 618, 619 (1907), declaring, "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain" (upholding a suit by Georgia against copper companies for transboundary air pollution).

Judge Rasmussen rejected the trust over the atmosphere because he did not view it as "'exhaustible and irreplaceable' in nature," a description used in the *Morse* case, where the court declared:

> The severe restriction upon the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands, but upon the *exhaustible and irreplaceable nature of the resources and its fundamental importance to society and to our environment*. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.

Morse I, 34 Or App at 859-60. The reasoning of *Morse* is applicable to the atmosphere, threatened by runaway climate disruption. But Judge Rasmussen distinguished the atmosphere from the water resources in *Morse*, saying that the atmosphere is not "exhaustible and irreplaceable" and "is not the type of resource that 'can only be spent once.'" But how is a streambed such a resource? Obviously, the *Morse* Court did not use those words to suggest that streambeds and waters were susceptible to being "spent once" and wiped off the face of the Earth; instead, the Court meant that the public's use would be irrevocably impaired without trust protection of those resources. The same holds true of the atmosphere.

Judge Rasmussen also wrongly concluded that "the atmosphere is not acquired and sold or traded for economic value and hence is not a commodity." *Chernaik*, No 16-11-09273 at 11, n. 7. In fact, the modern world involves considerable economic atmospheric trade, including carbon emissions credits and other tradable units that are part of market-based programs designed to control acid rain, nitrogen oxide, and interstate emissions. *See, e.g.*, Bruce R. Huber, *How Did*

RGGI Do It? Political Economy and Emissions Auctions, 40 Ecology LQ 59 (2013) (discussing the carbon-trading program among nine northeastern U.S. states).

Moreover, although the lower court apparently viewed the atmosphere as empty, uncontrolled, valueless space—not "a thing [that] can be measured or divided and used"—that is a view contradicted by modern reality. In fact, governments have measured, allocated, and regulated the atmosphere for years. Like the "navigable" rivers of the 19th century, the atmosphere constitutes a major natural resource that supports air navigation, a classic trust interest. For years, airspace has been subject to a complex and highly ordered system of national and international navigation. It hardly needs stating that airspace must be defined and bounded so as to avoid airplane crashes and other damaging events. Absent public ownership of navigable airspace, this critical resource could have been the subject of private monopolies. In *U.S. v. Causby*, 328 U.S. 256, 261, 66 S Ct 1062, 1065 (1946), the U.S. Supreme Court avoided that result by upholding public ownership of airspace, stating, "[t]o recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." Not surprisingly, given the crucial public interest in the air and atmosphere, federal statutory law recognizes air resources as part of the *res* of the

public trust for which the federal government, states, and tribes can obtain natural resource damages.[14]

The atmosphere plays a key ancillary role for virtually all trust resources traditionally recognized under the public trust. By governing the planet's climate system, the atmosphere is a natural linchpin for nearly all other resources, including water, fish, wildlife, oceans, and beaches. Just as public rights in beaches are ancillary to the public trust rights in the sea, the public's right to a healthy atmosphere is ancillary to public trust rights in ocean and freshwater resources (as well as fish and wildlife). As the *Foster* court concluded when the state argued that the trust should not be applied to the atmosphere, "The navigable waters and the atmosphere are intertwined and to argue a separation of the two . . . is nonsensical." *Foster,* 2015 WL 7721362 at *4. That court noted that the state's failure to take aggressive action curbing greenhouse gas emissions posed a real clear and present danger to trust resources: "[C]urrent science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, [and] endangering the bounty of our navigable waters."[15] *Id.*

[14] *See, e.g.,* 42 USC § 9601 (Comprehensive Environmental Response Compensation and Liability Act).

[15] *See also Foster,* 2015 WL 7721362 at *1 (citing Department of Ecology report stating, "The sea level is rising on most of Washington's coast, ocean acidification has increased, and there's long-term warming. Glaciers and spring snowpack have declined and the timing of stream flows has changed

Judge Rasmussen denied trust protection of the atmosphere on the basis that "Oregon's common law and its general principles have long been settled." Long-settled principles in Oregon in fact compel recognition of the atmosphere as a public trust asset. But the opinion discarded this precedent, viewing the cases as fixed and static, and not informative of modern exigencies. As Justice Holmes famously wrote, the law must answer to "[t]he felt necessities of the time." Oliver Wendell Holmes Jr., *Lecture on Common Law at Lowell Institute* (Nov. 23, 1880). As the Oregon Supreme Court stated long ago:

> The very essence of the common law is flexibility and adaptability.... If the common law should become . . . crystallized . . . it would cease to be the common law of history, and would be an inelastic and arbitrary [c]ode. . . . [O]ne of the established principles of the common law . . . [is] that precedents must yield to the reason of different or modified conditions.

In re Hood River, 114 Or 112, 180-81, 227 P 1065, 1086–87 (1924). *See also Matthews v. Bay Head Imp. Ass'n*, 471 A2d 355, 365 (NJ 1984) ("[W]e perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'").

When the U.S. Supreme Court held in *Illinois Central* that the title to the railroad was invalid, it had no precise precedent, admitting, "We cannot, it is true,

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many rivers. And, climate extremes like floods, droughts, fires, and landslides are already affecting Washington's economy and environment.").

cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporations. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. . . . The trust with which they are held, therefore, is governmental, and cannot be alienated. . . . " 146 US at 455. Although the modern climate crisis was unimaginable when ancient governments and the Supreme Court first acknowledged the public trust over essential natural resources as a sovereign obligation, the rationale and purpose behind the trust demand trust protection of the atmosphere.

C. The Public Trust Doctrine Imposes an Affirmative Duty to Prevent Substantial Impairment of Trust Resources

The lower court also erred by dismantling government's affirmative duty to protect resources held in trust. Claiming he could not "rewrite the public trust doctrine to impose fiduciary duties," Judge Rasmussen displayed a fundamental misunderstanding of trust law. There simply can be no trust without fiduciary duties. The sovereign fiduciary duty to protect the public's crucial assets from irrevocable damage remains the *sine qua non* of the public trust, as scores of courts have recognized. *See, e.g., Geer*, 161 US at 534 ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its

beneficial use in the future to the people of the state."); *Robinson*, 623 Pa at 656 ("As trustee, the [government] has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g. because of the state's failure to restrain the actions of private parties"); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 33 Cal3d 419, 441, 658 P2d 709, 724 (1983) (describing the public trust as "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands"); *Foster*, 2015 WL 7721362 at *3 ("Therefore, the State has a constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people of the State.").

Under well-established principles of trust law, trustees may not to sit idle and allow damage to the trust property. As a leading treatise explains, "[t]he trustee has a duty to protect the trust property against damage or destruction." George G. Bogert, et al., *Bogert's Trusts and Trustees*, § 582 (2011); *see also City of Milwaukee v. State*, 193 Wis 423, 214 NW 820, 830 (1927) ("The trust reposed in the state is not a passive trust; it is governmental, active, and administrative [and] . . . requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it."); *Robinson*, 623 Pa at 657 ("The . . . obligation peculiar to the trustee is . . . to act affirmatively to protect the

environment. . . .”). Through its inaction in the face of a calamitous ecological crisis, government defendants abdicate their sovereign public trust responsibility to protect the climate system for today’s citizens and for future generations.

V. CONCLUSION

The atmosphere is a quintessentially public trust resource that governments have a fundamental duty to protect. Unprecedented, irrevocable harm looms from atmospheric pollution. The public trust doctrine—with its enforceable fiduciary obligations—counsels that the issue cannot be left entirely to the discretion of the political branches which have ignored the climate threat for decades. The State’s inaction in the face of pending climate calamity is an abdication of public trust responsibility to the youth of Oregon. This Court should uphold Oregon citizens’ fundamental rights by correcting the lower court’s mistakes.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

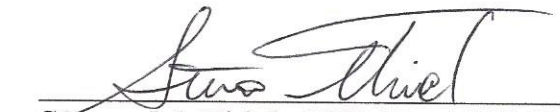
I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 10,000 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

DATED this 26th day of February, 2016

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 25, 2016, I filed BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS with the Appellate Court Administrator via the eFiling system, which will serve this motion by Efile on:

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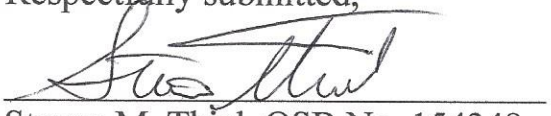

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