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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF LANE

6 OLIVIA CHERNAIK, a minor and resident of
7 Lane County, Oregon; LISA CHERNAIK,
8 guardian of Olivia Chernaik; KELSEY
9 CASCADIA ROSE JULIANA, a minor and
resident of Lane County, Oregon, and CATHY
JULIANA, guardian of Kelsey Juliana,

10 Plaintiffs,

11 v.

12 KATE BROWN, in her official capacity as
13 Governor of the State of Oregon; and the
STATE OF OREGON,

14 Defendants.

Case No. 161109273

REPLY IN SUPPORT OF STATE'S MOTION
FOR SUMMARY JUDGMENT

ORS 20.140 - State fees deferred at filing

15 **I. INTRODUCTION**

16 The Governor and the State (collectively, "the State") file this reply in support of the
17 State's Motion for Summary Judgment to address two points¹ that plaintiffs raise in their
18 Response to the State's Motion for Summary Judgment.

19 **II. ARGUMENT**

20 **A. The Court should not issue plaintiffs' requested declarations.**

21 Plaintiffs suggest that the State "has *not* moved for summary judgment on the question of
22 whether any of these other natural resources fall within the scope of the Public Trust Doctrine."
23 Pl. Resp. at 15 (emphasis in original). Plaintiffs are incorrect. In the State's Motion for
24 Summary Judgment and Memorandum in Support, the State asked the Court not to issue the first

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26 ¹ The State also incorporates all points and authorities set out in the State's Motion for Summary
Judgment, supporting memorandum, and Response in Opposition to Plaintiffs' Motion for Partial
Summary Judgment for Declaratory Relief.

1 and second declarations requested by plaintiffs in their Amended Complaint.² State Mot. at 1;
2 State Mem. at 4. Instead, the State urged the Court to adopt the first two declarations requested
3 in the State's Motion for Summary Judgment—that is, that the common law public trust doctrine
4 does not extend to the atmosphere, and that the common law public trust doctrine does not
5 impose the particular affirmative actions associated with traditional legal trusts. State Mot. at 1-
6 2; State Mem. at 2. By issuing the first and second declarations requested by the State in its
7 Motion for Summary Judgment, the Court will be responding to the relief requested by plaintiffs
8 and acting in accordance with the Court of Appeals' instruction that "[p]laintiffs' requests for
9 'bare' declarations regarding the scope of the state's present obligations, if any, under the
10 doctrine are, therefore, justiciable." *Chernaik v. Kitzhaber*, 263 Or App 463, 479 (2014).

11 **B. The Court should not substitute its judgment for that of the political**
12 **branches.**

13 Plaintiffs argue that the courts are the only branch of government that can address the
14 challenge of climate change. In plaintiffs' view, "[e]xpecting these young citizens to go to the
15 very branches of government that are violating their rights for redress would be like the courts of
16 the civil rights era telling young African American children to lobby their legislatures or initiate
17 voter referenda to secure their rights." Pl. Resp. at 3. However, plaintiffs overlook several key
18 differences between the civil rights era cases and the present case.

19 First, the role of the courts is to interpret the law, based on federal and state constitutions,
20 statutes and regulations, precedent, and common law. The role of the courts is not to invent the
21 law. *See, e.g., Burrage v. U.S.*, 134 S Ct 881, 892 (2014) ("But in the last analysis, these always-
22 fascinating policy discussions are beside the point. The role of this Court is to apply the statute
23 as it is written—even if we think some other approach might accor[d] with good policy.")

24 ² The Court should not issue the second declaration in the Amended Complaint (Am. Compl. ¶
25 48) because (1) only some of the resources identified in that declaration are subject to the public
26 trust doctrine and (2) the public trust doctrine does not impose affirmative, fiduciary duties on
the State. The State also asked the Court to reject the remaining declarations requested in the
Amended Complaint. State Mem. at 4.

(internal quotations omitted); *Baker v. Carr*, 369 US 186 (1962) (a non-justiciable political question may be characterized by, *inter alia*, a lack of judicially discoverable and manageable standards and the impossibility of deciding the issue without making an initial policy determination of a kind clearly for nonjudicial discretion); *Rooney v. Kulongoski*, 322 Or 15, 28 (1995) (separation of powers prohibits one branch of government from performing the functions committed to another branch).

In the civil rights era cases, courts struck down legislation or invalidated state action that violated the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, *Brown v. Board of Education*, 347 US 483 (1954) (holding that segregated public schools violated the Equal Protection Clause); *Loving v. Virginia*, 388 US 1 (1967) (striking down Virginia’s anti-miscegenation law because it violated the Equal Protection Clause). In this case, in contrast, plaintiffs ask the Court to vastly expand the scope and nature of the public trust doctrine, and then to order the State to act in accordance with that newly declared meaning. Despite their attempts to construct a new public trust doctrine by conflating a variety of discrete public trusts, plaintiffs have failed to demonstrate that the public trust doctrine includes any resources other than submerged and submersible lands and overlying waters, or that it imposes affirmative, fiduciary duties on the State. Thus, there is no legal anchor for plaintiffs’ requested relief.

Moreover, in the civil rights era cases, searching judicial inquiry into the constitutionality of government action was appropriate for two additional reasons. First, much of the challenged legislation “appear[ed] *on its face* to be within a specific prohibition of the Constitution.” *U.S. v. Carolene Products Co.*, 304 US 144, 152 n 4 (1938) (emphasis added). In the present case, however, the public trust doctrine imposes no constitutional prohibition or requirement on the State. Second, “prejudice against discrete and insular minorities”—a group that included the civil rights plaintiffs—“may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *Id.* Here, plaintiffs claim to bring this lawsuit on behalf of “Plaintiffs and future generations.” Pl. Resp.

1 at 15. However, a group containing all young people, now and in the future, is not discrete,
2 insular, or a minority. Plaintiffs are not members of a discrete and insular minority that needs
3 special judicial protection because prejudice against them distorts the democratic process.

4 **III. CONCLUSION**

5 For the reasons stated above, as well as the reasons stated in the State's Memorandum in
6 Support of its Motion for Summary Judgment and its Opposition to Plaintiffs' Motion for Partial
7 Summary Judgment, the State asks this Court to issue the declarations requested in the State's
8 Motion for Summary Judgment.

9 DATED March 26, 2015.

10 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 26, 2015, I served the foregoing REPLY IN SUPPORT OF
STATE'S MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method
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