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; KELSEY CASCADIA ROSE JULIANA, a minor and resident of Lane County, Oregon; and CATIA JULIANA, guardian of Kelsey Juliana, Plaintiffs-Appellants, v. JOHN KITZHABER, in his official capacity as Governor of the State of Oregon; and the STATE OF OREGON, Defendants-Respondents.	Lane County Circuit Court Case No. 16-11-09273 CA No. A151856

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Circuit Court for Lane County;
Honorable Karsten H. Rasmussen, Judge.

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I. STATEMENT OF THE CASE

"Water is one of the necessities of life and one of the most important of our great natural resources * * *." *Doherty v. Oregon Water Resources Director*, 308 Or 543, 555 n3, 783 P2d 519, 526 (1989). Acknowledging the importance of water, Plaintiffs-Appellants rely upon the case statement set out in their opening brief.

A. *Summary of the Argument*

The State-Respondents ask for resolution of only Plaintiffs' fourth, fifth, and sixth assignments of error. Response at 1-2. These assignments of error are well grounded in law and fact and warrant reversal of the trial court's decision. Plaintiffs' case was wrongly dismissed on separation of powers grounds when the trial court failed to consider Plaintiffs' case as a whole (error 4). The trial court further erred in finding that portions of Plaintiffs' requested relief would impose an undue burden and require a political determination not adopted for judicial resolution (error 5). Finally, the trial court erred in dismissing this case on political question grounds when standards exist for the court to decide whether Oregon is meeting its public trust obligations (error 6).

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B. *Response to the State's Combined Argument*

1. *By failing in its efforts to control greenhouse gas emissions, Oregon is placing public trust resources at risk.*

The State's response details certain steps that it has taken to address Oregon's emissions of greenhouse gases. Response at 9-10. The State, however, does not attempt to, nor could it, contest the 2009 conclusions of the Oregon Global Warming Commission that Oregon "will *likely fall well short of meeting its 2020 emission reduction goal*, and by extrapolation, *clearly is not on target to meet its 2050 goal*." *See* Opening Br at 12 (citing ER 13). These are unequivocal findings.

Instead of addressing the 2009 conclusions, the State discusses a 2008 planning document from the Climate Change Integration Group (CCIG). Response at 8-9. The State then ignores the 2009 report and jumps ahead to the 2011 report and the "Roadmap to 2020." *Id*. at 9. The State asserts that the Commission is charged to "find ways to achieve the existing 2020 goals, while positioning the state to achieve the 2050 goals as well." *Id.*

The Roadmap to 2020, however, was released as a non-binding interim report to be finalized after public comment. The State conducted that process in 2011, but the Roadmap to 2020 has yet to be finalized. In short, the State has lost its way.

This is evident from the State's brief, which lacks any objective indication that Oregon is succeeding at reducing greenhouse gas emissions. The State cannot show that any of its reports and processes have produced measurable and meaningful results. The State claims to have made "concerted efforts to address climate change," Response at 10, but it has no quantifiable measures of its successes (or failures) apart from the 2009 report, which it ignored in its response.

Let there be no doubt our State is failing our children and generations to come. The State's litany of concerted efforts – while genuine and well intentioned – are failing our children as well. We must be realistic about the need to look at hard numbers, and the State, in its brief, provides none.

II. REPLY TO THE RESPONSE TO FOURTH ASSIGNMENT OF ERROR

A. *Plaintiffs Preserved Their Arguments*.

The State argues that Plaintiffs did not preserve their arguments that the trial court needed to consider all of Plaintiffs' claims and could not rely on part of Plaintiffs' requested relief to dismiss this case. Response at 2-3. Plaintiffs preserved their arguments. Pls' Resp to Mot to Dismiss at 13-16, 23-25.

B. *All of Plaintiffs' Claims Must be Considered Before Dismissal on Separation of Powers Grounds*.

The State's position that 1) Plaintiffs are not beneficiaries of the public trust; and 2) that courts have not imposed an affirmative duty on the State to

protect recognized public trust resources is fundamentally wrong and at odds with the case law and constitutional provisions cited by the State. Response at 4, 11-12.

The State concedes that "[t]he principle that the public has an overriding interest in navigable waterways and lands underlying them is as old as the waterways themselves, traceable at least to the Code of Justinian in the Fifth Century A.D." Response at 11 (citation omitted); s*ee also Cook v. Dabney*, 70 Or 529, 534, 139 P 721 (1914) (state "had no right to convey" the bed of a navigable waterway "and so abdicate its trust designed to protect navigation"). The State further concedes that the "doctrine thus emphasizes that certain assets are held in common for the benefit of the public." Response at 13. Yet, the State then tries to qualify the doctrine by insisting that "the common law doctrine has not been recognized to create a trust in the traditional sense, in which courts may enforce well-defined duties to a well-defined entity." *Id*.

The State's argument that no court has declared that a state has an affirmative duty in its capacity as trustee to protect recognized public trust recourses is both incorrect and irrelevant. *See Kootenai Envtl Alliance v. Panhandle Yacht Club, Inc*, 105 Idaho 622, 632, 671 P2d 1085 (1983) ("[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust

doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.").

A ruling such as that in *Cook*, preventing the State from alienating navigable waterways, is an order preventing waste of a trust resource. If that same waterway had been sold to a private interest and the public could no longer use it for fishing or navigation, the resource would be effectively lost. The State tries to create a distinction without a difference by insisting that a court can only prevent alienation. If the waterway bed at issue in *Cook*, were sold, a court could order the State to retake it through its affirmative constitutional condemnation powers. The point is not whether the State has passive or active responsibility under the Public Trust Doctrine; it is whether the State is adequately protecting the trust resource for the benefit of its citizens.

Second, even if Oregon courts had not made prior rulings and declarations ordering the State to preserve trust resources (which is not the case), such an omission would not eviscerate a trial court's jurisdiction to hear this case absent authority that expressly circumscribes the court's function. The plain language of the Oregon Declaratory Judgment Act ("DJA") affords courts in Oregon the authority to declare the law. *See* ORS 28.010 ("power to declare rights, status, and other legal relations"); ORS 28.040 ("Any person interested * * * in the administration of a trust * * * may have a declaration of rights or

legal relations in respect thereto * * * To determine any question arising in the administration of the * * * trust"); ORS 28.120 (the act "is to be liberally construed and administered").

Likewise, the State fails to mention, much less differentiate, this Court's rulings in *Goose Hollow v. City of Portland*, 58 Or App 20 722, 726, 650 P2d 135 (1982) ("[a] complaint for declaratory relief is legally sufficient if it alleges the existence of an actual controversy relating to the legal rights and duties of the parties") or *Beldt v. Leise*, 185 Or App 572, 576, 60 P3d 1119 (2003) ("If there is a justiciable controversy [between the parties], the plaintiff is entitled to a declaration of its rights").

In sum, the State's bare reliance on the purported lack of precedent is not sufficient to defend the trial court's error in dismissing all of Plaintiffs' claims, including those that seek to protect traditional public trust assets under the DJA.

III. REPLY TO THE RESPONSE TO FIFTH ASSIGNMENT OF ERROR: SEPARATION OF POWERS

In responding to Plaintiffs' fifth assignment of error, the State ignores crucial errors in the trial court's reasoning leading to the conclusion that the separation of powers doctrine bars Plaintiffs' claims. Neither the State nor the trial court considered Plaintiffs' entire Amended Complaint, including the allegations that the Executive Branch is failing to protect water resources from the harmful effects of climate change. ER 2-6, 13, 16. Likewise, the trial

court's decision and the State's briefing focus upon only part of Plaintiffs' requested relief, ignoring the Amended Complaint as a whole. It was error to dismiss Plaintiffs' entire case on this basis.

The State argues Plaintiffs' remedy would pose an "undue burden" on the legislature by "supplant[ing]" the court's judgment for the language in the Global Warming Statute. Response at 17. Yet, that is not how the common law generally functions or what the Public Trust Doctrine requires. It is up to the Executive to protect trust resources *and* ensure compliance with the Global Warming statute. As the California Supreme Court explained in *National Audubon Society v. Alpine County*, "the public trust * * * is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." 33 Cal 3d 419, 441, 658 P2d 709 (1983).[1]

Here, the Global Warming Statute and the Public Trust Doctrine both necessitate carbon dioxide reductions. Nothing in the record indicates, however, that the public trust was considered in devising or implementing the statute. Thus, the question before the court is whether Oregon's current

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[1] The State argues that *National Audubon* only requires "consideration" of the public trust. Response at 34. That is incorrect. The state court there was only resolving state law questions posed by a federal court, not deciding remedy. 33 Cal 3d at 425, 658 P2d at 712.

reductions are sufficient to protect Oregon's freshwater, shorelines, wildlife, and atmosphere from substantial impairment. The court is well equipped (with expert aid) to make this finding and declare the law, and the Executive is well equipped to see that *both* common and statutory law are followed without undertaking legislative functions or having the court impose an undue burden. In arguing to the contrary, the State failed to provide case law supporting its argument that compliance with a common law obligation imposes an undue burden where statutory law addresses a similar issue.

While the State finds objectionable elements of Plaintiffs' requested remedy, granting those requests or fashioning other relief lies entirely within the court's broad equitable powers under the DJA. ORS 28.080 ("Further relief based on a declaratory judgment may be granted whenever necessary or proper."). Moreover, litigants do not always recover all their requested relief, and questions of remedy are often resolved only after liability has been established. Thus, dismissing a case on the basis of certain requests for relief is putting the cart before the horse.

The State raises a new argument that Plaintiffs are not entitled to a declaration under the DJA because it would not have any effect on Plaintiffs' rights unless accompanied by further relief. Response at 26-28. This new argument lacks merit. It is cast as one regarding the DJA, but pertains to Plaintiffs' standing. Standing to enforce the public trust by its beneficiaries is

generally assumed, *see National Audubon*, 33 Cal 3d at 431, n11, 658 P2d at 716 ("any member of the general public * * * has standing to raise a claim of harm to the public trust"), and Plaintiffs have standing here. ER 2-6.

Moreover, Plaintiffs can obtain meaningful relief. The separation of powers and political question doctrines are not grounds for dismissal and do not bar this Court from issuing relief. Opening Br at 27-42. Plaintiffs' eight distinct requests for relief, ER 17-18, have a clear connection to the right Plaintiffs seek to vindicate – the legal right to enforce the obligations imposed on the Executive by the Public Trust Doctrine. *See Morgan v. Sisters Sch. Dist.*, 353 Or 189, 197, __ P3d __ (2013) (declaratory relief affects a plaintiff's rights if connected to "the rights that a plaintiff seeks to vindicate").

Furthermore, even a declaration that "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust * * * and to preserve, so far as consistent with the public interest, the uses protected by the trust," *National Audubon*, 33 Cal 3d at 446-47, 658 P2d at 712, would aid Plaintiffs in obtaining greater carbon dioxide reductions. This declaration would aid in advocacy before administrative agencies and the legislature, in asking the Governor for an executive order, or in bringing future litigation. Therefore, Plaintiffs' injuries can be redressed by the issuance of declaratory relief.

As for Plaintiffs' legal claims, they are not fashioned wholly out of new cloth. Response at 18-20. Plaintiffs seek protection of trust resources long recognized by Oregon courts, in addition to the atmosphere. *See* Opening Br at 40, 16, 39. Protecting just Oregon's fresh water supply from substantial impairment due to climate change would be well within the power of the Executive, provide Plaintiffs substantial relief, and be well grounded in Oregon's Public Trust Doctrine.

This case is about Oregon citizens' ability to enforce the Executive's obligation to protect from impairment our most fundamental natural resources, which are held in trust for all Oregonians. These claims are separate from the Executive's statutory obligations and resolving them will not upset the balance of power among the branches of government. It was error to find that the separation of powers doctrine bars review of this case.

IV. REPLY TO THE RESPONSE TO SIXTH ASSIGNMENT OF ERROR: POLITICAL QUESTION

This case does not pose a political question. In arguing to the contrary, the State relies upon *Baker v. Carr*, 369 US 186, 82 S Ct 691 (1962), which sets a high bar for nonjusticiability. *Id*. at 217. This case fails to meet that high bar.

A. *The State Waived Its New Displacement Arguments*.

On pages 39-42 of its Response, the State raises wholly new "displacement" arguments for the first time on appeal. These arguments were

not raised below and are waived for purposes of this appeal. Moreover, a legislature cannot by statutory enactment displace the Public Trust Doctrine, nor has that happened in Oregon. *See, e.g.*, *Kalmiopsis Audubon Soc'y v. Division of Lands*, 66 Or App 810, 820 n11, 676 P2d 885, 891 (1984) (applying both the Public Trust Doctrine and statutory law). Finally, displacement does not bear upon the Court's consideration of Plaintiffs' assignment of error to the political question determination in this case.

B. *Judicially Discoverable Standards Exist to Decide This Case*.

This case does not pose a political question because there are standards to apply to resolve Plaintiffs' claims. As the State acknowledges, Response at 32-33, Oregon Courts and the U.S. Supreme Court all recognize the Executive's obligation to prevent alienation and substantial impairment of trust resources. Opening Br at 40, 16, 39. While the State discusses at length how difficult it would be to impose a hypothetical "reasonable prudence" standard, the facts and law before the Court can illustrate how the Public Trust Doctrine's standards apply here.

The State has projected that by mid-century Oregon will have 50 percent less snow pack and significant decreases in summer stream flows and water supply. ER 10. Assume that means 50 percent less fresh water in the State. Assume too that measures implemented by the State curtail this loss so that Oregonians only lose one-third of their fresh water supply. Based upon these

facts, the court must decide whether this loss of water is a substantial impairment of the public trust obligation to provide sufficient fresh water to farmers, fisheries, vineyards, and recreationalists. If not, then the Executive failed to meet its public trust obligations.

As this example illustrates, there are standards to apply. The State's concern, however, is focused upon what happens next. Looking to public trust case law, as one court explains:

> Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a 'close look' at the action to determine if it complies with the public trust doctrine and * * * examine, among other things, such factors as the degree of effect of the project on public trust uses, * * * the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource * * *.

Kootenai Envtl Alliance, 105 Idaho at 629-630, 671 P2d at 1092-93; Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 Envtl Law 375, 396, 404 (2012) (discussing Oregon's affirmative duties to protect water and wildlife). Of course, traditional trust cases also provide guidance for remedying the State's trust violations, Opening Br at 24-25, and ultimately, the State, not the Court, will

decide how to remedy violations. Thus, sufficient standards exist to resolve this case.

C. *No Policy Determination Is Necessary To Decide This Case*.

The other *Baker* factor does not support finding that this case presents a political question. The State fails to mention that this factor has not been used by the U.S. Supreme Court to find a political question. *See* Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, The Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 Ohio NUL Rev 523, 538-39 (2008).

The crux of the State's argument is the lack of statutory law to apply in this case somehow results in the need for an initial policy determination not meant for a court. Response at 38-39. The policy determination to protect essential natural resources for all members of society was made long ago. The State's efforts to distinguish the *Massachusetts v. EPA*, 549 US 497 (2007), case on statutory grounds also fail for this reason.

Nor is the State correct that the U.S. Supreme Court found the Clean Air Act displaced common law. Response at 39. The Court found the Act displaced one *federal* common law public nuisance claim, but made no ruling on any state common law. *American Elec Power Co v. Connecticut*, __ US __, 131 S Ct 2527, 2540 (2011). In fact, the Clean Air Act includes a savings clause, providing it does not "restrict any right which any person * * * may

have under any statute or *common* law * * *." 42 USC § 7640(e) (emphasis added).

As for the need to balance competing interests, Response at 36-37, the Public Trust Doctrine empowers the sovereign to ultimately decide how to balance use and preservation of trust resources in light of competing interests. *National Audubon*, 33 Cal 3d at 425, 658 P2d at 712. The questions raised by this case do not require a re-making of the political decisions already made. They require the Executive, in carrying out those decisions, to prevent substantial impairment of Oregon's water, beaches, and wildlife.[2]

V. CONCLUSION

Jurisdiction exists to resolve this case and the important and timely issues it raises. Plaintiffs, Oregon youth and their mothers, call upon this Court to correct the trial court's legal errors and reverse and remand this case for further proceedings.

Respectfully submitted on June 3, 2013,

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[2] Despite the State's arguments on the best available science, Response at 37-38, this request for relief does not turn this case into a political question. Plaintiffs are not asking for a new statutory standard, but suggesting a measuring stick for existing public trust standards.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
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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 3,293 words.

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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)(f).

Dated: June 3, 2013

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 3, 2013, I filed PLAINTIFFS-APPELLANTS' REPLY BRIEF with the Appellate Court Administrator via the eFiling system, which will serve this brief by Efile on Stephanie L. Striffler and Inge D. Wells counsel for Defendants-Respondents and Elisabeth A. Holmes counsel for *Amicus*.

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