

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

**BRIEF OF *AMICUS CURIAE* LAW PROFESSORS
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Peter M.K. Frost, OSB No. 911843
(541) 359-3238
frost@westernlaw.org
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401

Counsel for Applicants and Proposed
Amici Curiae

Tanya M. Sanerib, OSB No.
025526
(503) 525-2722
tanya@crag.org
Christopher Winter,
OSB No. 984355
(503) 525-2725
chris@crag.org
CRAG LAW CENTER
917 SW Oak Street, Suite 417
Portland, Oregon 97205

William H. Sherlock,
OSB No. 903816
HUTCHINSON, COX, COONS,

December, 2012

(Counsel Continued on Inside Cover)

Anna Marie Joyce, OSB No. 013112
Solicitor General
DOJ Appellate Division
1162 Court Street, N.E.
Salem, Oregon 97301
(503) 378-4402
anna.joyce@doj.state.or.us

Counsel for Defendants-Respondents

DUPRIEST, ORR &
SHERLOCK, P.C.
777 High Street, Suite 200,
PO Box 10886,
Eugene, Oregon 97401
(541) 342-7020
lsherlock@eugenelaw.com

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTITY AND INTERESTS OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	4
I. The Public Trust Doctrine is an Attribute of Sovereignty.	4
II. The Air and Atmosphere are Public Trust Assets.	9
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Ariz. Ctr. for Law in Pub. Interest v. Hassell</i> , 172 Ariz 356, 837 P2d 158 (1991).....	4-5
<i>Arnold v. Mundy</i> , 6 NJL 1 (NJ 1821).	6
<i>City of Milwaukee v. State</i> , 193 Wis 423, 214 NW 820 (1927).	8
<i>City of New Orleans v. Bd. of Comm’rs of Orleans Levee Dist.</i> , 93-0690 (La 7/5/94), 640 So2d 237 (1994).	7
<i>Geer v. Connecticut</i> , 161 US 519 (1896).	4, 6, 7-8, 12
<i>Georgia v. Tenn. Copper Co.</i> , 206 US 230 (1907).....	13
<i>The Genessee Chief v. Fitzhugh</i> , 53 US 443 (1851).....	11
<i>Her Majesty v. City of Detroit</i> , 874 F2d 332 (6th Cir 1989).	14
<i>Ill. Cent. R.R. v. Illinois</i> , 146 US 387 (1892).	4, 6-7, 9, 10, 13, 15-16
<i>In re Water Use Permit Applications (Waihole Ditch)</i> , 94 Haw 97, 9 P3d 409 (2000).....	4, 6
<i>Just v. Marinette Cnty.</i> , 56 Wis2d 7, 201 NW2d 761 (1972).	8-9, 11
<i>Magner v. People</i> , 97 Ill 320 (1881).	4, 8
<i>Marks v. Whitney</i> , 6 Cal.3d 251, 491 P2d 374 (1971).....	11, 13
<i>Matthews v. Bay Head Improvement Ass’n</i> , 95 NJ 306, 471 A2d 355 (1984)	11, 12, 13
<i>Nat’l Audubon Soc’y v. Superior Court of Alpine Cnty.</i> , 33 Cal3d 419, 658 P2d 709 (1983).....	8, 11, 13
<i>PPL Montana, LLC v. Montana</i> , 565 U.S. ___, 132 S Ct 1215 (2012).	5
<i>Robinson v. Ariyoshi</i> , 65 Haw 641, 658 P2d 287 (1982).	11
<i>State v. City of Bowling Green</i> , 38 Ohio St2d 281, 313 NE2d 409 (1974)...	8, 11
<i>State v. Gillette</i> , 27 WashApp 815, 621 P2d 764 (1980).....	11

<i>State ex. rel. Town of Westerly v. Bradley</i> , 877 A2d 601 (RI 2005).	14
<i>State ex. rel. City of Minot v. Gronna</i> , 79 ND 673, 59 NW2d 514 (1953).	7
<i>United States v. Causby</i> , 328 U.S. 256 (1946).	13-14
<i>United States v. 1.58 Acres of Land</i> , 523 F Supp 120 (D Mass 1981).	6

Constitutions and Statutes

42 U.S.C. § 9601 (2004).	14
Great Lakes-St. Lawrence River Basin Compact, Pub L No 110-342, 122 Stat 3739 (2008).	15
Hawaii Const, Art XI, § 1	14
Mich. Const, Art IV, § 52	14
Rhode Island Const, Art I, § 17	14

Other Sources

Michael C. Blumm & Rachel D. Guthrie, <i>Internationalization of the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision</i> , 45 UC Davis L Rev 741 (2012).	5
Michael C. Blumm, <i>The Public Trust Doctrine—A Twenty-First Century Concept</i> , 16 Hastings W-NW J Envtl L & Pol’y 105 (2010).	11
George G. Bogert, et al., <i>Bogert’s Trusts and Trustees</i> , § 582 (2d ed. rev. 2012).	8
Karl S. Coplan, <i>Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?</i> 35 Colum J Envtl L 287 (2010).	6
Justinian I, <i>Institutes</i> 2.1.1 (533) (T. Sandars trans., 1st Am. ed. 1876).	12
Joseph L. Sax, <i>The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention</i> , 68 Mich L Rev 471 (1970).	4, 5

David Takacs, <i>The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property</i> , 16 NYU Env'tl L J 711 (2008).....	6
Gerald Torres, <i>Who Owns the Sky?</i> , 19 Pace Env'tl L Rev 515 (2002)	12-13
Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C. Blumm, Patrick Parenteau, & Peter H. Sand, <i>Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law</i> , 52 Env't Magazine 5 (Sept/Oct 2010)	5-6
Charles F. Wilkinson, <i>The Public Trust Doctrine in Public Land Law</i> , 14 UC Davis L Rev 269 (1980)	9
Charles Wilkinson, <i>The Headwaters of the Public Trust: Some of the Traditional Doctrine</i> , 19 Env'tl L 425 (1989)	10
Mary Christina Wood, <i>Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift</i> , 39 Env'tl L 43 (2009).....	6

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici curiae are the law professors and scholars listed on the signature page below.¹ These individuals have dedicated their careers to teaching, researching and writing about environmental law, climate law, property law, and the public trust doctrine, including three who teach courses devoted solely or primarily to the public trust doctrine. These law professors and scholars are among the nation's leading experts on the complex legal history and evolution of the public trust doctrine. They have a strong interest in informing the Court about the role of the public trust doctrine in defining sovereign legal obligations to protect the atmosphere from the adverse effects of greenhouse gas pollution. Even more importantly, they offer a wealth of knowledge and expertise that will be indispensable to the Court in resolving the novel legal issues raised by the emerging climate crisis.

The *amici curiae* include some of the most preeminent scholars in the field of environmental and natural resource law. For instance, Professor Joseph Sax of Boalt Hall School of Law, University of California Berkeley, has been teaching and writing about these subjects for well over 40 years, and he has produced highly respected scholarship on the public trust doctrine as well as many other topics. Professor Zygmunt Plater of Boston College Law School has likewise been teaching environmental and natural resources law for over 40

¹ *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

years on seven different law school faculties. He is well-known to students of environmental and natural resources law because of his widely used casebook, and because of his outstanding scholarship on a wide variety of subjects, including the public trust doctrine.

The *amici curiae* also include several other law professors and scholars with a special interest in understanding and advancing legal regimes for the management of the public commons, including water, land, and air. Among these are such luminaries as Professor Burns Weston of University of Iowa College of Law, Professor Mary Christina Wood of University of Oregon School of Law, Professor Denise Antolini of William S. Richardson School of Law, University of Hawai'i Manoa, Professor Michael Blumm of Lewis and Clark Law School, Professor Tony Arnold of University of Louisville Brandeis School of Law, Professor Gerald Torres of University of Texas at Austin School of Law, and Professor Charles Wilkinson of University of Colorado Law School.

Together, these law faculty and the many other nationally recognized scholars in the *amici curiae* group are responsible for publishing dozens of in-depth books, chapters, and articles concerning the public trust doctrine, advising courts and governmental agencies concerning the management of public resources, and teaching thousands of law students the core principles of the public trust doctrine and how these fit within the broader scope of

environmental and natural resources law. They are thus uniquely qualified to assist this Court in considering how the public trust doctrine applies to compelling new issues involving greenhouse gas pollution and associated climate disturbances. The extensive expertise and scholarship of these law professors and their colleagues are described in more detail in the accompanying motion to appear before the Court of Appeals as *amicus curiae*.

STATEMENT OF THE CASE

Amicus Curiae Law Professors rely on the Plaintiffs-Appellants' statement of the case.

SUMMARY OF THE ARGUMENT

The public trust doctrine is an inalienable attribute of sovereignty that requires government to act to prevent irrevocable harm to crucial natural resources owned in trust on behalf of the people. State governments are sovereign co-trustees of the nation's atmosphere and bear the fiduciary obligation to take expedient action to protect the atmosphere from dangerous greenhouse gas pollution so that it will continue to support the survival and welfare of present and future generations of citizens. A court's role under the public trust doctrine is to require agencies to protect the trust asset over which they exercise management authority.

ARGUMENT

I. The Public Trust Doctrine Is an Attribute of Sovereignty.

The public trust doctrine holds that certain crucial natural resources are the shared, common property of all citizens, cannot be subject to private ownership, and must be preserved and protected by the government. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970). As sovereign trustee of such resources, government has a fiduciary obligation to protect these natural assets for the beneficiaries of the trust, which include both present and future generations of citizens. *See Ill. Cent. R.R. v. Illinois*, 146 US 387, 455 (1892) (“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 * * *”); *Geer v. Connecticut*, 161 US 519, 534 (1896) (“[T]he ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it 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.”) (quoting *Magner v. People*, 97 Ill 320, 334 (1881)); *In re Water Use Permit Applications (Waihole Ditch)*, 94 Haw 97, 143, 9 P3d 409, 455 (Haw 2000) (quoting *Ariz. Cent. for Law in Pub. Interest v. Hassell*, 172

Ariz 356, 367, 837 P2d 158, 169 (1991) (“The beneficiaries of the public trust are not just present generations but those to come.”).

The public trust doctrine speaks to one of the most essential purposes of government: protecting natural resource assets for the common benefit of the citizenry. As Professor Joseph Sax suggested over four decades ago, the public trust responsibility underpins democracy itself, demarcating a “society as one of citizens rather than of serfs.” *See Sax, supra*, at 484. As recently as 2012, in *PPL Montana, LLC v. Montana*, the U.S. Supreme Court recognized that the public trust doctrine “is of ancient origin” dating back to Roman civil law; that the public trust doctrine is found in state laws throughout our nation; and that federalist principles of our nation affirm the state’s rights and duties over public trust resources within their borders. *PPL Montana, LLC v. Montana*, 565 US ___, ___, 132 S Ct 1215, 1235-36 (2012). The public trust is also a central principle in legal systems of many other countries throughout the world. Professor Michael Blumm concludes in a recent article that the doctrine internationally “incorporates the principles of precaution, sustainable development, and intergeneration equity in the process.”²

² Michael C. Blumm & Rachel D. Guthrie, *Internationalization of the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 UC Davis L Rev 741, 807 (2012); *see also* Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C. Blumm, Patrick Parenteau, & Peter H. Sand, *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, 52 Env’t Magazine 5, 12 (Sept./Oct. 2010) (functional

The public trust doctrine is as an attribute of sovereignty itself. *See, e.g., Geer*, 161 U.S. at 527 (describing the sovereign trust over wildlife resources as an “attribute of government”); *Ill. Cent. R.R.*, 146 US at 455; *Arnold v. Mundy*, 6 NJL 1, 76-77 (NJ 1821); *Waihole Ditch*, 94 Haw at 131, 9 P3d at 443 (“[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority.”); *see also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?* 35 Colum J Envtl L 287, 311 (2010) (“The idea that public trust limits and powers inhere in the very nature of sovereignty is one consistent thread in public trust cases.”); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 Envtl L 43, 69 (2009) (describing the public trust as a “fundamental, organic attribute of sovereignty itself”). As a limitation on sovereignty, the trust “can only be destroyed by the destruction of the sovereign.” *U.S. v. 1.58 Acres of Land*, 523 F Supp 120, 124 (D Mass 1981). In its seminal public trust case, *Illinois Central*, the U.S. Supreme Court emphasized that, like the police power, the public trust doctrine is a foundational principle of government. It declared that legislatures may not repudiate, abridge, or surrender their trust obligation:

equivalents of public trusteeship are evident in many civil law systems); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 NYU Envtl L J 711, 746 (2008).

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 and the preservation of the peace. * * * Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.

Ill. Cent. R.R., 146 US at 453, 460. Thus, the Court recognized that the trust doctrine imposed governmental duties as well as governmental authority.

The public trust doctrine assumes constitutional force as an inherent attribute of sovereignty. By analogy, courts have made clear that the police power is an essential constitutional element, whether explicitly expressed or not. *State ex. rel. City of Minot v. Gronna*, 79 ND 673, 698, 59 NW2d 514, 531–32 (1953) (“The police power is an attribute of sovereignty inherent in the states of the American union, and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society. The constitution supposes the pre-existence of the police power, and must be construed with reference to that fact.”) (citations omitted) (internal quotation marks omitted). *See also City of New Orleans v. Bd. of Comm’rs of Orleans Levee Dist.*, 93-0690 (La 7/5/94), 20, 640 So2d 237, 249 (1994) (“The principle of constitutional law that a state cannot surrender, abdicate, or abridge its police power has been recognized without exception by the state and federal courts.”).

The essence of the trust responsibility is the sovereign fiduciary duty to protect the public’s crucial assets from irrevocable damage. *See Geer*, 161 U.S.

at 534 (quoting *Magner v. People*, 97 Ill 320, 334 (Ill 1881)) (“[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.”). *See also State v. City of Bowling Green*, 38 Ohio St2d 281, 283, 313 NE2d 409, 411 (1974) (“[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit * * * to protect the corpus of the trust property.”); *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”). Under well-established core principles of trust law, trustees have a basic duty not to sit idle and allow damage to the trust property. As one 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 (2d ed. rev. 2012). *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.”); *Just v. Marinette Cnty.*, 56 Wis2d 7, 16, 18, 201 NW2d 761, 768 (Wis 1972) (emphasizing an “active public trust duty” on the part of the state, including the duties “to eradicate the present pollution and to prevent further pollution” and

“to protect and preserve” the natural resource held in trust). Notably, these obligatory fiduciary duties differ from the permissive nature of administrative discretion under statutory law. By sitting idle in the face of calamitous planetary ecological crisis, state governments are abdicating their constitutional responsibilities as sovereign trustees to protect the climate for today’s citizens and for future generations.

II. The Air and Atmosphere Are Public Trust Assets.

The history, principles, and intent of the public trust doctrine compel this Court’s recognition of the atmosphere as one of the crucial assets of the public trust. The public trust doctrine requires the state to protect those ecological resources necessary for public survival and welfare. Stemming from the “public character of the property,” *Ill. Cent. R.R.*, 146 US at 456, these resources are owned in common by the people and must be maintained, protected, and preserved by the state for the public interest. The resources that fall within the protective scope of the public trust are traditionally those that “are so central to the well-being of the community that they must be protected by distinctive, judge-made principles.”³ Rather than restrictively delimiting the covered assets, courts have articulated principles that have guided the evolution of public trust property over time.

³ Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 UC Davis L Rev 269, 315 (1980).

In *Illinois Central*, the U.S. Supreme Court established the analytical framework with its seminal characterization of public trust assets as those that present “a subject of public concern to the whole people of the state.” 146 US at 455. Describing public trust assets as “public property, or property of a special character,” the Court said they “cannot be placed entirely beyond the direction and control of the state” and, for the sake of public welfare, should not be subject to private ownership. *Id.* at 454. Courts look to the needs of the public in defining the scope of the trust resources.

In the late 1800s, at the time of *Illinois Central*, the natural resources deemed to be of greatest threat and in scarcest supply were principally water-based resources implicating fishing, navigation, and commerce interests at the economic heart of a westward expanding American economy. The specter of corporate privatization of the Chicago Harbor led Justice Field in *Illinois Central* to characterize submerged lands as “a subject of concern to the whole people” clothed with sovereign trust interests compelling protection. *Id.* at 455.

Consistent with *Illinois Central*, over time courts have expanded the reach of the public trust doctrine to protect other categories of public resources as their integrity has come under threat.⁴ In the 19th century, courts expanded public navigation rights from tidal waters to inland waters that were navigable-

⁴ Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 Env'tl L 425, 465-66 (1989) (noting expansion of the public trust doctrine).

in-fact. *See Genessee Chief v. Fitzhugh*, 53 US 443, 457 (1851). *See also* Michael C. Blumm, *The Public Trust Doctrine – A Twenty-First Century Concept*, 16 Hastings W-NW J Env'tl L & Pol'y 105 (2010) (describing evolution of the trust). As the New Jersey Supreme Court noted, the doctrine of the public trust is not “‘fixed or static,’ but one to be ‘molded and extended to meet changing conditions and needs of the public it was created to benefit.’” *Matthews v. Bay Head Improvement Ass’n*, 95 NJ 306, 326, 471 A2d 355, 365 (1984) (citation omitted); *see also Marks v. Whitney*, 6 Cal.3d 251, 259, 491 P2d 374, 380 (1971) (“In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.”). Courts have mobilized the doctrine to respond to new sets of societal concerns, including ecological and recreational interests. *See, e.g., Nat’l Audubon Soc’y*, 33 Cal3d at 434-35, 658 P2d at 719. In the process, they have recognized public trust assets beyond the navigable waterways at issue in *Illinois Central* to protect resources as diverse as non-navigable tributaries, groundwater, wetlands, dry sand areas, and wildlife.⁵

⁵ *See, e.g., Nat’l Audubon Soc’y*, 33 Cal3d at 437, 658 P2d at 721 (non-navigable tributaries); *State v. City of Bowling Green*, 38 Ohio St2d at 282, 313 NE2d at 411 (state holds wildlife in trust “for all citizens”); *State v. Gillette*, 27 WashApp 815, 820, 621 P2d 764, 767 (1980) (food fish held in trust “for the common good”) *Matthews*, 95 NJ at 325, 471 A2d at 365 (dry sand area); *Robinson v. Ariyoshi*, 65 Haw 641, 675-76, 658 P2d 287, 311 (1982) (groundwater); *Just*, 56 Wis2d at 18-19, 201 NW2d at 769 (wetlands).

Despite the sheer novelty of climate change as an imminent threat to human survival—and ultimately, to civilization itself—the notion of air as a public trust resource is as old as the ancient foundations of our legal system. The Roman originators of the public trust doctrine classified air—along with water, wildlife, and the sea—as “res communes,” or “things which remain common.” *Geer*, 161 US at 525 (“These things are those which the jurisconsults called ‘res communes’ * * * the air, the water which runs in the rivers, the sea, and its shores. * * * [and] wild animals.”). *See also Matthews*, 95 NJ at 316-17, 471 A2d at 360 (quoting Justinian, Institutes 2.1.1 (533) (T. Sandars trans., 1st Am. ed. 1876)) (“The genesis of [the public trust doctrine] is found in Roman jurisprudence, which held that ‘[b]y the law of nature’ ‘the air, running water, the sea, and consequently the shores of the sea,’ were ‘common to mankind.’”).

Roman law recognized that “[i]ndividual control of some resources would run counter to what the Romans conceived of as their natural purpose, and this property could not therefore be subject to private ownership.”⁶ In *Geer*, the U.S. Supreme Court relied on this ancient Roman law classification of “res communes” to find the public trust doctrine applicable to wildlife. 161 US at 523-525. Just a few years later, the Court similarly recognized the states’ sovereign property interests in air and found such interests supreme to private

⁶ Gerald Torres, *Who Owns the Sky?*, 19 Pace Envtl L Rev 515, 529 (2002).

title. In *Georgia v. Tennessee Copper Co.*, the Court upheld an action by the State of Georgia against Tennessee copper companies for transboundary air pollution, declaring that “the state has an interest independent of and behind the titles of its citizens, in all the earth *and air* within its domain.” 206 US 230, 237 (1907) (emphasis added). State courts have likewise discussed “the purity of the air” and the climate as part of the public trust.⁷

The notion of the atmosphere as a quintessentially public resource subject to government stewardship is a settled feature of American law. Like waterways, air lends itself to navigability, which presents a classic trust interest articulated in the original public trust decisions of this nation. *See Ill. Cent. R.R.*, 146 US at 452 (“It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein * * *”). Absent public ownership of navigable airspace, this critical resource could have been the subject of private monopolies. In *U.S. v. Causby*, the U.S. Supreme Court warned, “[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.*”

⁷ *Nat’l Audubon Soc’y*, 33 Cal3d at 435, 658 P2d at 719 (“purity of the air” protected by the public trust); *Marks*, 6 Cal.3d at 259-60, 491 P2d at 380 (recognizing tidelands as public trust environments “which favorably affect the scenery and climate of the area.”); *Matthews*, 95 NJ at 317, 471 A2d at 361 (quoting Chief Justice Kirkpatrick) (stating that the “common property available to all citizens” includes “the air, the running water, the sea, the fish and the wild beasts”).

328 US 256, 261 (1946) (emphasis added). Not surprisingly, given the crucial public interest in air, numerous state constitutions and codes explicitly recognize air as part of the *res* of the public trust.⁸ Moreover, federal statutory law already includes air as a trust asset for which the federal government, states, and tribes can gain recovery of natural resource damages.⁹

Much like water resources, the air and atmosphere are public resources extending beyond the boundaries of any single state. The fact that air resources are not confined within the borders of a single state does not excuse individual states from taking steps to protect the air for the benefit of their citizens. On the contrary, transboundary air pollution with regional or global adverse effects creates a shared obligation for each and every state to take steps to protect the air and atmospheric resources that they share in common. This same shared duty has already been recognized in the water context. For instance, in 2008, eight states within the Great Lakes Basin—Illinois, Indiana, Michigan,

⁸ See, e.g., *Her Majesty v. City of Detroit*, 874 F2d 332, 337 (6th Cir 1989) (citing a Michigan statute that codifies the public trust to include “air, water and other natural resources” and Mich Const, Art IV § 52, stating, “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people.”); Haw Const, Art XI, § 1 (“All public natural resources are held in trust by the State for the benefit of the people,” and “the State and its political subdivisions shall conserve and protect Hawaii’s * * * natural resources, including land, water, air, minerals and energy resources * * *”); R.I. Const, Art I, § 17 (duty of legislature to protect air), interpreted as codification of Rhode Island’s public trust doctrine in *State ex. rel. Town of Westerly v. Bradley*, 877 A2d 601, 606 (RI 2005).

⁹ See 42 USC § 9601 (CERCLA) (2006) (defining air as among the natural resources subject to trust claims for damages).

Minnesota, New York, Ohio, Wisconsin, and the Commonwealth of Pennsylvania— entered into a congressionally-approved compact for the management of their shared surface water and groundwater resources (“Great Lakes Compact”). Great Lakes-St. Lawrence River Basin Compact, Pub L No 110-342, 122 Stat 3739 (2008). In the Great Lakes Compact, these eight states acknowledged that the surface water and groundwater resources of the Great Lakes region “are precious public natural resources shared and held in trust by the States” which are “interconnected and part of a single hydrologic system,” and that the signatory states “have a *shared duty* to protect, conserve, restore, improve and manage the renewable but finite Waters of the Basin for the use, benefit, and enjoyment of all their citizens, including generations yet to come.” *Id.* § 1.3.1(a)-(b), (f) (emphasis added).

Never before has the nation’s climate system been threatened. But throughout history, law has evolved as courts respond to unforeseen, often urgent, circumstances. The same fiduciary principles that have informed all historic public trust cases apply with force to protect the atmosphere. As the U.S. Supreme Court said in applying the public trust to an unprecedented set of circumstances in *Illinois Central*,

We cannot, it is true, 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 corporation. 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.

146 US at 455. Although conditions change with time, the basic task and the principles that inform judicial discretion remain constant. This Court possesses solid legal rationale upon which to base recognition of the atmosphere as a vital and appropriate asset falling within the scope of the public trust doctrine.

CONCLUSION

The public trust doctrine plainly applies to protect the nation's air and atmosphere, both of which are crucial resources needed for the survival and welfare of present and future generations. Government co-trustees thus owe a fiduciary obligation under the public trust doctrine to take immediate action to abate dangerous greenhouse gas pollution that threatens the air, atmosphere, and climate system.

DATED this 17th day of December, 2012.

Respectfully submitted,

/s PETER M.K. FROST

Peter M.K. Frost, OSB No. 911843

Counsel for Applicants,
Amici Curiae Law Professors

On behalf of:

Denise E. Antolini, Professor & Associate Dean for Academic Affairs, William S. Richardson School of Law, University of Hawai'i, Manoa

Craig Anthony (Tony) Arnold, Boehl Chair in Property and Land Use, Professor of Law & Affiliated Professor of Urban Planning, and Chair of the Center for Land Use and Environmental Responsibility, University of Louisville Brandeis School of Law

Deepa Badrinarayana, Associate Professor of Law, Chapman University School of Law

Michael Blumm, Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School

Maxine Burkett, Associate Professor of Law and Director, Center for Island Climate Adaptation and Policy, William S. Richardson School of Law, University of Hawai'i, Manoa

Timothy P. Duane, Professor of Environmental Studies, University of California, Santa Cruz and Visiting Professor of Law, Seattle University School of Law

Alyson C. Flournoy, UF Research Foundation Professor & Alumni Research Scholar, University of Florida Levin College of Law, University of Florida Levin College of Law

Jacqueline Hand, Professor of Law, University of Detroit Mercy Law School

Oliver Houck, Professor of Law, Tulane University Law School

Ryke Longest, Clinical Professor of Law and Director, Duke Environmental Law and Policy Clinic, Duke University School of Law

Kevin Lynch, Assistant Professor, Environmental Law Clinic, University of Denver Sturm College of Law

James R. May, Professor of Law and Co-Director, Environmental Law Center, Widener University

Patrick C. McGinley, Judge Charles H. Haden II Professor of Law, West Virginia University College of Law

Patrick Parenteau, Professor of Law and Senior Counsel, Environmental and Natural Resources Law Clinic, Vermont Law School

Zygmunt Jan Broël Plater, Professor of Law, Boston College Law School

Joseph L. Sax, James H. House and Hiram H. Hurd Professor of Environmental Regulation, Emeritus, Boalt Hall School of Law, University of California Berkeley

James Gustave Speth, Professor of Law, Vermont Law School

David Takacs, Associate Professor of Law, University of California, Hastings College of the Law

Gerald Torres, Bryant Smith Chair in Law, University of Texas at Austin School of Law

Burns H. Weston, Bessie Dutton Murray Distinguished Professor of Law Emeritus, Senior Scholar, UI Center for Human Rights (UICHR) and Co-Director, Commons Law Project (CLP), The University of Iowa

Charles Wilkinson, Distinguished Professor and Moses Lasky Professor of Law, University of Colorado Law School

Mary Christina Wood, Philip H. Knight Professor of Law and Faculty Director, Environmental and Natural Resources Law Program, University of Oregon School of Law

**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 4,656 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)(f).

DATED this 17th day of December, 2012.

Respectfully submitted,

/s PETER M.K. FROST

Peter M.K. Frost, OSB No. 911843

Counsel for Applicants,
Amici Curiae Law Professors

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 17, 2012, 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:

Anna Marie Joyce
Solicitor General
DOJ Appellate Division
1162 Court St NE
Salem, OR 97301
anna.joyce@doj.state.or.us
Of attorneys for Defendants-Respondents

Tanya M. Sanerib
Christopher Winter
CRAG LAW CENTER
917 SW Oak Street, Suite 417
Portland, OR 97205
tanya@crag.org

Counsel for Plaintiffs-Appellants

William H. Sherlock
HUTCHINSON, COX, COONS,
DUPRIEST, ORR & SHERLOCK, P.C.
777 High Street, Suite 200,
PO Box 10886,
Eugene, OR 97401
lsherlock@eugenelaw.com

DATED this 17th day of December, 2012.

Respectfully submitted,

/s PETER M.K. FROST

Peter M.K. Frost, OSB No. 911843

Counsel for Applicants,
Amici Curiae Law Professors