

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**GARY HALE, JAN WRONCY,
FOREST WRONCY-HALE,
CAROLYN ASHLOCK, WARREN
TROTTER, DAVID EISLER, and
SARAH SHEFFIELD,**

Plaintiffs-Appellants,

v.

THE STATE OF OREGON,

Defendant-Appellee.

Lane County Circuit Court
No. 16-11-12609

CA No. 1A150572

BRIEF OF *AMICI CURIAE* BEYOND TOXICS, PESTICIDE ACTION
NETWORK NORTH AMERICA, & NEAL MILLER IN SUPPORT OF
PLAINTIFFS-APPELLANTS

Appeal from the Judgment of the Circuit Court for Lane County
Honorable KARSTEN H. RASMUSSEN, Judge

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TABLE OF CONTENTS

STATEMENT OF THE CASE..... 1

- A. Nature of the action and relief sought 1
- B. Nature of the judgment sought to be reviewed, statutory basis for appellate jurisdiction, dates of entry of judgment and notice of appeal and statement of facts 2
- C. Questions presented on appeal 2
- D. Summary of argument 2

ARGUMENT..... 4

- A. The application of pesticides and pesticide drift are important issues of public health and welfare that have traditionally been subject in Oregon to common law causes of action for trespass...4
- B. The judicial inquiry under Article 1, section 10 of the Oregon Constitution is whether the legislature has deprived a citizen a remedy for a violation of fundamental rights of person or property 9
- C. By its plain terms, the Declaratory Judgments Act creates a cause of action for review of legislative enactments on constitutional grounds, and the Act is to be interpreted liberally in cases involving issues of the public interest 10
- D. Plaintiffs have alleged a justiciable controversy against the State of Oregon by seeking a judicial declaration that state statutes are unconstitutional on their face as an impermissible curtailment of a protected common law right without an adequate statutory remedy at law..... 14
 - 1. The State’s interest in defending a law passed by the State legislature is adverse to plaintiffs’ interests, and the court can grant effective relief. 14

- 2. The court should apply the rules of justiciability in a flexible manner in this case, which implicates a matter of great public concern..... 18
- 3. Judicial review in this case will provide relief that is meaningful both to plaintiffs and to the broader public 20

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases Cited

<i>Brown v. Or. State Bar</i> , 293 Or 446, 648 P2d 1289 (1982)	12
<i>Burke v. Children’s Servs. Div.</i> , 288 Or 533, 607 P2d 141 (1980)	13
<i>Cass v. State of New York</i> , 58 NY2d 460, 448 NE2d 786 (1983).....	17
<i>Cornelius v. City of Ashland</i> , 12 Or App 181, 506 P2d 182 (1973)	11
<i>Gaffey v. Babb</i> , 50 Or App 617, 624 P2d 606 (1981)	11, 16, 17, 19
<i>Hale v. Klemp</i> , 220 Or App 27, 184 P3d 1185 (2008).....	18
<i>Ken Leahy Constr. v. Cascade Gen., Inc.</i> , 329 Or 566, 994 P2d 112 (1999)	13
<i>Kendall v. Evans</i> , 472 NYS2d, 716, 100 AD2d 508 (1984)	17
<i>Klein v. Jefferson Cnty. Bldg. & Loan Ass’n</i> , 239 Ala 460, 195 So 593 (1940).....	19
<i>Loe v. Lenhard et al.</i> , 227 Or 242, 362 P2d 312 (1961)	8
<i>Oregonian Pub’g. Co. v. O’Leary</i> , 303 Or 297, 736 P2d 173 (1987)	10
<i>Payless Drug Stores Nw. v. Brown</i> , 300 Or 243, 708 P2d 1143 (1985)	17

<i>Pendleton Sch. Dist. v. State</i> , 345 Or 596, 200 P3d 133 (2009)	12, 17
<i>Recall Bennett Comm. v. Bennett</i> , 196 Or 299, 240 P2d 479 (1952)	12, 18, 19, 20, 21
<i>Sergeant's Towing, Inc. v. City of Portland, Bureau of Police</i> , 173 Or App 359, 22 P.3d 237 (2001).....	21
<i>Smothers v. Gresham Transfer, Inc.</i> , 332 Or 83, 23 P3d 333 (2001)	9, 10, 15
<i>State ex rel. Ekern v. Dammann</i> , 215 Wis 394, 254 NW 759 (1934)	

Statutes and Constitutional Provisions

Or Const, Art I, § 10.....	1, 2, 3, 4, 9, 10, 15, 16
ORS 28.020.....	2, 3, 11
ORS 28.080.....	20, 21
ORS 28.100.....	17
ORS 28.110.....	20, 21
ORS 28.120.....	12, 17
ORS 30.936.....	1, 2, 4, 10, 14, 21, 22, 23
ORS 30.939.....	1, 2, 4, 10, 14, 21, 22, 23

Rules

ORCP 21 A(8).....	1
-------------------	---

Other Authorities

Bruce Gellerman, <i>Chemical Clearcuts</i> , Living on Earth (May 4, 2012)	6
Edwin Borchard, <i>Declaratory Judgments</i> (2d ed 1941).....	13
Kelly D. Mattix, Paul D. Winchester, L.R. “Tres” Scherer, <i>Incidence of abdominal wall defects is related to surface water atrazine and nitrate levels</i> 42 J Pediatr Surg 6 (2007).....	7
Ronald Munger et al, <i>Intrauterine Growth Retardation in Iowa Communities with Herbicide-contaminated Drinking Water Supplies</i> , 105(3) Environ Health Perspect 308 (1997).....	7
Soo-Jeong Lee, <i>Acute Pesticide Illnesses Associated with Off-Target Pesticide Drift from Agricultural Operations: 11 States</i> 119(8) Environ Health Perspec 1162 (2011).....	6
U.S. EPA, <i>Atrazine</i> , Toxicity and Exposure Assessment for Children’s Health (last revised 2007).....	7
Walter Houston Anderson, <i>Actions for Declaratory Judgments; A Treatise on the Pleading, Practice, and Trial of an Action for a Declaratory Judgment, From Its Inception</i> (1940)	13, 19
William Lloyd Prosser, <i>Selected Topics on the Law of Torts</i> (1953)	8

BRIEF OF *AMICI CURIAE* BEYOND TOXICS, PESTICIDE ACTION NETWORK OF NORTH AMERICA AND MR. NEAL MILLER

STATEMENT OF THE CASE

A. Nature of the action and relief sought

Beyond Toxics, Pesticide Action Network of North America, and Neal Miller (the “Amici”) rely on the plaintiffs’ descriptions of the nature of the action and provide the following limited supplements to that information.

Plaintiffs in this case filed a motion to amend their complaint setting forth a declaratory judgment action against the State of Oregon in which they allege that Oregon statutes, including ORS 30.936 and ORS 30.939, violate the Remedies Clause of the Oregon Constitution. ER 23. The statutes at issue immunize parties conducting certain farming and forestry practices, including the application of pesticides, from liability for common law causes of action for trespass and nuisance that may result from those activities. The legislature did not provide any substitute remedy at law. Plaintiffs allege that these statutes violate Article I, section 10 of the Oregon Constitution, which states that every person “shall have remedy by due course of law for injury done him in his person, property, or reputation.” ER 28-29.

The State opposed plaintiffs’ motion for leave to file the amended complaint and, in the alternative, moved for dismissal of the amended complaint pursuant to ORCP 21 A(8). ER 6. The State asserted that plaintiffs

failed to plead a justiciable controversy because a judicial declaration that the statutes are unconstitutional “will not provide a meaningful remedy to plaintiffs.” ER 11.

The trial court granted plaintiffs’ motion to amend and granted the State’s motion to dismiss and entered a judgment of dismissal. ER 22; 30.

Plaintiffs now appeal the order and judgment of dismissal.

- B. Nature of the judgment sought to be reviewed, statutory basis for appellate jurisdiction, dates of entry of judgment and notice of appeal and statement of facts.

Amici rely on the plaintiffs’ descriptions of the nature of the judgment sought to be reviewed, the statutory basis for appellate jurisdiction, the dates of entry of judgment and notice of appeals and statement of facts.

- C. Questions presented on appeal

Have plaintiffs alleged a justiciable controversy under ORS 28.020 where they seek a declaration against the State of Oregon that ORS 30.936 and ORS 30.939 violate Article 1, section 10 of the Oregon Constitution by depriving plaintiffs of their constitutionally protected rights to a legal remedy for harms done to their person or property?

- D. Summary of argument

ORS 30.936 and ORS 30.939 plainly eliminate liability for certain trespass and nuisance claims resulting from application of pesticides and

pesticide drift without providing any substitute legal remedy. Article 1, section 10 of the Oregon Constitution protects individuals from legislative enactments that impinge on common law rights protecting person and property. The issue presented is whether private landowners may maintain a declaratory judgment action against the State to obtain a judicial pronouncement of whether these state statutes have abrogated their individual rights in violation of the Remedies Clause.

The answer to that question turns on the court's interpretation of the Declaratory Judgments Act, ORS 28.020, and the rules of justiciability that apply to those actions. Oregon courts have historically adopted a flexible approach to determining whether a plaintiff has alleged a justiciable controversy, particularly in matters like the one currently before the court, which impacts a broad, public interest in which amici have invested considerable time and effort. Oregon courts have fashioned and applied flexible rules of justiciability in recognition of the remedial nature of a declaratory judgment proceeding and the importance of clarifying legal rights in advance of any potential wrongs or harms that may result from parties proceeding under laws of questionable validity.

Based on the important issues of public health, safety and welfare at stake, the serious allegations of invasions to constitutionally protected rights,

and the flexible rules of justiciability, plaintiffs in this case are due their day in court. A judicial declaration of rights would undoubtedly provide meaningful relief to plaintiffs. This one case may not resolve every possible dispute regarding the validity and/or enforcement of ORS 30.936 and ORS 30.939, but Oregon courts have never adopted such restrictive and inflexible rules of justiciability. A declaration in this case that ORS 30.936 and ORS 30.939 violate Article 1, section 10 of the Oregon Constitution will provide plaintiffs with a judicial pronouncement of their rights that will inform their future efforts to protect their property and persons from chemical trespass, will likely impact the conduct of pesticide applicators, and will preclude the State from defending these statutes against constitutional attack in future proceedings. Not only is that relief meaningful to plaintiffs, but it is also highly relevant for the broader public interests at stake that are affected by the legislature's decision to insulate pesticide applicators from certain common law causes of action for trespass and nuisance.

ARGUMENT

- A. The application of pesticides and pesticide drift are important issues of public health and welfare that have traditionally been subject in Oregon to common law causes of action for trespass.

Plaintiffs in this case are private landowners - organic farmers and sustainable foresters – who intentionally manage their land in the absence of

chemical pesticides and herbicides. ER 23-29. They allege that pesticides sprayed and/or applied by neighboring property owners have drifted or migrated onto their private property and interfered with their ability to manage their organic farm, threatened the health of the plants and animals that reside on their farms, and threatened the health of their families. *Id.* Amici have applied to participate in these proceedings, because the issue of pesticide drift is not unique to the plaintiffs but is a widespread problem that impacts private property owners across the state and implicates important issues of public health, safety and welfare.

Amici have, for many years, worked with citizens in Oregon on the issue of pesticide drift and potential impacts to human and environmental health. In recent years, amici have worked with residents in the Triangle Lake region of Lane County, Oregon, who have experienced a number of medical problems subsequent to aerial spraying of pesticides carried out by neighboring forestland owners. In 2001, Dr. Dana Barr, a national expert in chemical exposure from Emory University, tested urine from 41 people, most of who lived near Triangle Lake, and her test results identified the herbicides 2,4-D and atrazine in the

urine of every single person tested.¹ The experiences of the local residents from Lane County are not unique. In 2011, the Center for Disease Control's National Institute for Occupational Safety and Health (NIOSH) released a study identifying thousands of documented cases of poisoning (i.e. acute illnesses) from pesticide drift incidents, which impacted farm workers, rural residents and children.²

Atrazine, in particular, is not only a common ingredient in herbicides used in forestry operations, but it also a toxic chemical that has recently been subject to numerous scientific studies regarding its impacts on human health. EPA's chemical summary for atrazine states that it is an endocrine disruptor that can cause increased risk of preterm delivery and intrauterine growth

¹ For more information Dr. Barr's testing process and results, see Bruce Gellerman, *Chemical Clearcuts*, Living on Earth (May 4, 2012), available at <http://www.loe.org/shows/segments.html?programID=12-P13-00018&segmentID=3> (last viewed July 10, 2012).

² Soo-Jeong Lee, *Acute Pesticide Illnesses Associated with Off-Target Pesticide Drift from Agricultural Operations: 11 States, 1998-2006* 119(8) Environ Health Perspec 308 (1997), <http://ehp03.niehs.nih.gov/article/attachObjectAttachment.action?uri=info%3Adoi%2F10.1289%2Fehp.1002843&representation=PDF> (last viewed July 10, 2012). The NIOSH study included data from incidents documented in Oregon from 1998-2006. Moreover, hundreds of cases from around the country involved children younger than 15 years of age. Table 1.

retardation.³ Recent studies have found an increase in birth defects, which are the leading cause of infant mortality in the U.S., among infants conceived during the period of peak atrazine use.⁴ Another study found that increased exposure to atrazine in farming communities in the Midwest nearly doubled women's risk of having babies with low birth weight and premature deliveries.⁵ Exposure to atrazine, which is just one of many different chemicals implicated by the issue of pesticide drift, is a significant issue of public health that has received extensive discussion in the scientific literature and from government agencies, and those risks relate to both acute and chronic exposure.

The science documenting the true risks to human health and the environment resulting from pesticide exposure is still maturing, and yet in

³ U.S. EPA, Atrazine, Toxicity and Exposure Assessment for Children's Health (last revised 2007), available at http://www.epa.gov/teach/chem_summ/Atrazine_summary.pdf (last viewed July 10, 2012).

⁴ Kelly D. Mattix, Paul D. Winchester, L.R. "Tres" Scherer, *Incidence of abdominal wall defects is related to surface water atrazine and nitrate levels* 42(6) J. Pediatr Surg 947-49 (2007).

⁵ Ronal Munger et al, *Intrauterine Growth Retardation in Iowa Communities with Herbicide-contaminated Drinking Water Supplies*, 105(3) Environ Health Perspect 308 308-314, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470002/> (last viewed July 10, 2012).

Oregon the common law has long provided private property owners with a legal remedy for pesticide drift. More than fifty years ago, the Oregon Supreme Court noted that application of pesticides is an extra hazardous activity. *Loe v. Lenhard et al.*, 227 Or 242, 254, 362 P2d 312 (1961). Liability for trespass resulting from the aerial application of pesticides therefore does not require a showing of intent or negligence, rather “the element of fault, if it can be called that, lies in the deliberate choice by the defendant to inflict a high degree of risk upon his neighbor, even though the utmost care is observed in so doing.” *Id.* at 250. As the Supreme Court noted, this rule results from a “judicial balancing of the utility of the defendant’s conduct with the risk of harm if it is miscarried.” *Id.* at 250 (citing William Lloyd Prosser, *Selected Topics on the Law of Torts* 183 (1953)).

The allegations in plaintiffs’ complaint for declaratory relief implicate important issues of the public interest and may affect not only the interests of private landowners and organic farmers, but also farm workers, school children and the health of rural communities more broadly. The science is improving our understanding of the threats posed to human health and the environment by both acute and chronic exposure to the myriad of chemicals involved in the aerial application of pesticides. And for decades, even before this science had progressed to this point, the Oregon Supreme Court already recognized the

hazardous nature of the activity and the potentially serious damage that could result to neighboring landowners. Amici submit this brief to provide information to the court on the importance of the broader, public interests at stake and the related rules of justiciability under the Declaratory Judgments Act.

- B. The judicial inquiry under Article 1, section 10 of the Oregon Constitution is whether the legislature has deprived a citizen a remedy for a violation of fundamental rights of person or property.

Article I of the Oregon Constitution sets forth Oregon's Bill of Rights.

Section 10 of the Bill of Rights - the Remedies Clause - provides as follows:

“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

Or Const, Art I, § 10.

In 2001, the Oregon Supreme Court issued a definitive opinion providing clarity on the purpose and intent of the Remedies Clause as well applicable standard to be used by courts. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). The Supreme Court conducted an exhaustive review of the history and purpose of the remedies clause, noting that the “requirement that remedy be by due course or due process of law was intended as a limitation on the legislature’s authority when it substituted statutory remedies for common-law remedies.” *Id.* at 112.

“That remedy must be by due course of law is a *directive to the courts, as the guardians of constitutional rights, to determine the constitutionality of legislatively created remedies* respecting such rights.”

Id. at 115 (emphasis added).

Following its review of the history of the Remedies Clause and the intent of the framers of the constitution, the Supreme Court announced a test to be used by a court when assessing whether legislative enactments have impinged on constitutionally protected individual rights.

“[T]he first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. * * * If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury.”

Id. at 124.

The Remedies Clause was therefore intended by the framers, as articulated by the Supreme Court, as a directive for Oregon courts to review enactments by the state legislature in protecting individual liberties. “[T]he command ‘shall’ in Article 1, section 10, is a statement prescribing how government must conduct its functions.” *Id.* at 91 (citing *Oregonian Pub’g. Co. v. O’Leary*, 303 Or 297, 301-02, 736 P2d 173 (1987)). As will be discussed in greater detail below, plaintiffs have asked that the court review and declare whether the legislature, by enacting ORS 30.936 and ORS 30.939, which

immunize pesticide applicators from certain common law trespass claims, has violated the Remedies Clause of the Oregon Constitution.

- C. By its plain terms, the Declaratory Judgments Act creates a cause of action for review of legislative enactments on constitutional grounds, and the Act is to be interpreted liberally in cases involving issues of the public interest.

Plaintiffs' amended complaint invokes the Declaratory Judgments Act, ORS 28.020. ER 28-29. The Declaratory Judgments Act, by its very terms, was implemented by the legislature to establish a right to judicial review of legislation that allegedly violates the Oregon Constitution.

28.020 Declaration as to writings and laws. Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereof.

The purpose of a declaratory judgment is remedial because it ““relieve[s] parties of uncertainty by adjudicating rights and duties before wrongs have actually been committed or damages have been suffered.”” *Gaffey v. Babb*, 50 Or App 617, 621, 624 P2d 606, 618 (1981) (quoting *Cornelius v. City of Ashland*, 12 Or App 181, 188, 506 P2d 182, *rev den* (1973)). Or as this court has referred to it, a declaratory judgment is “preventative justice.” *Id.* Indeed, the plain language of the statute reflects these purposes.

28.120 Construction and administration. This chapter is declared to be remedial. The purpose of this chapter is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

To invoke the court's jurisdiction, a plaintiff is to allege a justiciable controversy, a requirement that was recently discussed by the Oregon Supreme Court in *Pendleton Sch. Dist. v. State*, 345 Or 596, 200 P3d 133 (2009).

“Justiciability is a vague standard but entails several definite considerations. A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests. The controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue. A justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one. The court cannot exercise jurisdiction over a nonjusticiable controversy because in the absence of constitutional authority, the court cannot render advisory opinions.”

Id. at 604 (quoting *Brown v. Or. State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982)).

As the Supreme Court has explained in the past, and consistent with the charge that the Declaratory Judgments Act be construed and applied liberally, the standards for justiciability are relaxed in certain circumstances involving matters of great public interest, as compared to issues involving “ordinary relations of individuals with each other.” *Recall Bennett Comm. v. Bennett*, 196

Or 299, 316, 240 P2d 479 (1952) (quoting *State ex rel. Ekern v. Dammann*, 215 Wis 394, 254 NW 759 (1934)).

“The rule that the court will not consider a case in the absence of a justiciable, actual, or bona fide controversy * * * is subject to the exception in cases where the question involved is of great public interest. Then the rule requiring the existence of a justiciable controversy is not followed, or is relaxed. It seems that the courts have assumed that they possess inherent power to give a declaratory judgment as to matters of public concern.”

Id. (quoting William Houston Anderson, *Actions for Declaratory Judgments* § 63, 126 (1940)).

In resolving a properly plead cause of action for declaratory relief, a court is empowered to grant supplemental relief, which includes injunctive relief.

ORS 28.080; *Ken Leahy Constr. v. Cascade Gen., Inc.*, 329 Or 566, 572, 994 P2d 112 (1999) (citing Edwin Borchard, *Declaratory Judgments* 441, 441 n 71 (2d ed 1941)). In many cases, however, a declaration of rights is adequate to resolve the dispute and uncertainty, particularly in cases involving the State and its agencies. As the Supreme Court has stated, it “will not assume that the defendant agencies of the State of Oregon will, in the absence of an injunction, refuse to follow the law as we have stated it.” *Burke v. Children’s Servs. Div.*, 288 Or 533, 548-49, 607 P.2d 141 (1980). A declaration of rights, in and of itself, often carries with it the practical effect of resolving the dispute.

- D. Plaintiffs have alleged a justiciable controversy against the State of Oregon by seeking a judicial declaration that state statutes are unconstitutional on their face as an impermissible curtailment of a protected common law right without an adequate statutory remedy at law.
1. The State's interest in defending a law passed by the State legislature is adverse to plaintiffs' interests, and the court can grant effective relief.

Plaintiffs in this case are private land owners who allege that they have been and continue to be impacted by pesticide drift caused by neighboring land owners and that those activities have and will continue to cause harm to Plaintiffs' interests in their private property and in their person. ER 24-27. The state statutes at issue in this case, by their plain language, deprive Plaintiffs of common law remedies for these types of injuries. Subject to limited exceptions, ORS 30.936 creates an immunity from "any private right of action or claim for relief based on nuisance or trespass" if resulting from a "farming or forest practice on lands zoned for farm or forest use." ORS 30.936(1) (emphasis added). ORS 30.939 then defines when the use of a pesticide shall be considered to be a farming practice. The Oregon Legislature did not provide any substitute statutory remedy at law.

This case involves a somewhat unique statutory scheme, because here the legislature has eliminated common law claims that would otherwise be available to one class of private landowners (those impacted by pesticide drift)

who are injured by the activities of another class of private landowners (those who apply pesticides). Plaintiffs are in the former class and allege that the statutes are unconstitutional on their face because the legislature has impermissibly abrogated fundamental common law rights without providing an adequate alternative remedy.

Despite the unique statutory scheme, plaintiffs' allegations and requests for declaratory relief in this case clearly set forth a dispute between parties with adverse interests. On the one hand, the State has implemented, and will presumably defend at trial, state law that extinguishes certain common law remedies for trespass and nuisance. On the other hand, plaintiffs allege that they have had their individual rights abrogated by these laws in violation of the Remedies Clause. The Supreme Court's discussion of the Remedies Clause in *Smothers* is particularly apt in this case.

The requirement that remedy be by due course or due process of law was intended as a *limitation on the legislature's authority* when it substituted statutory remedies for common-law remedies.

Smothers, 332 Or at 112 (emphasis added).

Here, citizens have raised a challenge under the Remedies Clause to the legislature's exercise of its authority. And it bears repeating that the Article 1, section 10 of the Oregon Constitution specifically charges the "courts, as the

guardians of constitutional rights, to determine the constitutionality of legislatively created remedies * * * .” *Id.* at 115.

Although plaintiffs have alleged that they are injured by these legislative enactments and have alleged violations of the Remedies Clause, the State of Oregon argued below that the court did not have jurisdiction. The State based its argument on the fact that state agencies allegedly play no role in *enforcing* the elimination of a common law remedy. As argued by the State before the trial court:

“No state agency or office enforced the immunity provision that is the center of plaintiffs’ claim. Instead, individual landowners ‘enforce’ the Act’s statutory immunity, by raising it as a defense in nuisance or trespass action, in court. A declaratory judgment against the State would not prevent private individuals from raising the Act’s immunity and collecting attorney fees under the Act.”

ER-11.

The State’s argument here is misguided, because it asserts that plaintiffs may only sue whatever party “enforces” the challenged legislation or, stated another way, raises it as a defense in the type of common law action that has been abolished by the legislature. The State failed to provide any support below for the proposition that a court cannot review the State’s enactment of legislation but rather only its enforcement of legislation. The State’s argument in this regard contradicts the very purpose of the Declaratory Judgments Act, which is to “relieve parties of uncertainty by adjudicating rights and duties

before wrongs have actually been committed or damages have been suffered.” *Gaffey*, 50 Or App at 621 (quotation omitted) (emphasis added); *see also* ORS 28.120. Here, however, the State appears to argue that Plaintiffs must first wait until they have suffered an injury as a result of a chemical trespass before filing an action that has been abolished by the legislature to test the Constitutional validity of that legislative enactment. To the contrary, the Oregon Legislature passed the challenged laws, and “there is an actual and substantial controversy between parties having adverse legal interests.” *Pendleton Sch. Dist.*, 345 Or at 604 (quotation omitted).⁶

Finally, plaintiffs have not requested an advisory opinion. As they state in their brief, facial challenges are presumed to be ripe for adjudication.

⁶ The Oregon Supreme Court has noted that the “Attorney General’s authority to defend the constitutionality of a statute is implicit in ORS 28.100 (requiring service on Attorney General in declaratory judgment challenge to a statute) * * *.” *Payless Drug Stores Nw v. Brown*, 300 Or 243, 248 n 5, 708 P2d 1143 (1985).

As noted by another court,

“It is settled, however, that a declaratory judgment action * * * is an appropriate vehicle for challenging the constitutionality of a statute * * *. In addition, the State is a proper party to such an action because of its obvious interest in and right to be heard on matters concerning the constitutionality of its statutes.

Kendall v. Evans, 472 NYS2d 716, 717, 100 AD2d 508 (1984) (quoting *Cass v. State of New York*, 58 NY2d 460, 448 NE2d 786 (1983)).

Opening Br. at 18-19. Plaintiffs have already been subject to the penalties imposed by the legislature in the form of attorneys' fees for seeking to defend their private property rights through a common law cause of action for trespass or nuisance. *Hale v. Klemp*, 220 Or App 27, 184 P3d 1185 (2008). And plaintiffs allege that State agencies have refused to investigate complaints of pesticide drift and that they will continue to suffer harms to their persons and property from pesticide drift. ER 24-25.

2. The court should apply the rules of justiciability in a flexible manner in this case, which implicates a matter of great public concern.

Plaintiffs here ask only that they be given their day in court to present their case to a trial judge as to whether the State of Oregon, through these legislative enactments, have violated their individual rights contrary to the Remedies Clause. Their claims, as discussed above, raise important issues of the public interest regarding the constitutionality of statutes that affect a great number of private property owners across the state.

In *Bennett*, the Supreme Court noted the important role of the Declaratory Judgments Act in resolving uncertainty with respect to Constitutional questions. ““One of the most useful fields for the Declaratory Judgment Act is to settle questions touching the constitutionality of statutes. The consequences of proceeding under void enactments is thus avoided.””

Bennett, 196 Or. at 321 (quoting *Klein v. Jefferson Cnty Bldg. & Loan Assn.*, 239 Ala 460, 464, 195 So 593 (1940)). The Court quoted with approval from *Anderson, Declaratory Judgments*, in stating that in cases involving great public interest, “the rule requiring the existence of a justiciable controversy is relaxed.” *Id.* at 317 (quoting *Anderson* at § 63, 126).

Here, the State propounds an extremely rigid and formulaic interpretation of the rules of justiciability as applied to the Declaratory Judgments Act. Although the legislature passed the very laws challenged by plaintiffs, the State argued that the trial court lacked jurisdiction because the State has no subsequent role “enforcing” those laws. The State’s argument overlooks its obvious interest in defending the enactment – and not solely the enforcement - of state statutes. And the rule suggested by the State in this case would potentially undermine the remedial purposes of the Declaratory Judgments Act, which was designed specifically to resolve constitutional uncertainty “before wrongs have actually been committed or damages have been suffered.” *Gaffey*, 50 Or App at 621.

The State would instead force plaintiffs, in this case and in other cases, to first wait until after they had been harmed under color of an invalid law before bringing a facial challenge to the law’s validity. Because the law at issue here includes an attorneys’ fees provision, the remedial nature of the Declaratory

Judgments Act is even more important at ensuring that courts have the ability to provide clarity to the public before wrongs have been committed. *Bennett*, 196 Or at 322.

3. Judicial review in this case will provide relief that is meaningful both to plaintiffs and to the broader public.

Contrary to how courts have articulated the scope of their jurisdiction under the Declaratory Judgments Act, the State takes an unduly restrictive and rigid position in this case. Relying on ORS 28.110, the State argued below that a court cannot “bind the alleged trespasser,” and therefore a declaration from a court would have no practical effect. ER 10. A declaration in this case, however, that the relevant statutes are unconstitutional would have a meaningful practical effect for plaintiffs in their efforts to protect their private property from trespass resulting from pesticide drift. This is true even though such declaration may not necessarily “bind” - or have preclusive effect upon - the next person or company to trespass on someone’s land through aerial application of pesticides.

Most importantly, a declaration in this case would result in an announcement by the court as to whether the State has violated the constitutionally protected rights of plaintiffs as well as other members of the public impacted by pesticide drift. Although that pronouncement may not have preclusive effect upon alleged trespassers in future litigation, a judicial

pronouncement would certainly be meaningful to plaintiffs and would help to ameliorate the “risk of proceeding under void enactments” identified by the Supreme Court in *Bennett* as a primary benefit of a declaratory judgment action.⁷ With a declaration of rights from the trial court in hand, plaintiffs would have greater certainty in deciding how to protect their families and their private property if faced with future incidents of pesticide trespass. A ruling from the trial court would likely have an impact on the activities of pesticide applicators knowing that the judiciary has announced that the common law rights of private landowners cannot be extinguished by ORS 30.936 and ORS 30.939.⁸ A ruling against the State would also foreclose the possibility in any

⁷ The State relied below on *Sergeant’s Towing, Inc. v. City of Portland, Bureau of Police*, 173 Or App 359, 22 P2d 237 (2001), in arguing that relief would not be meaningful because the decision would not bind other pesticide applicators that were not joined. ER-11. *Sergeant’s Towing*, however, weighs heavily in favor of Plaintiffs in this case. That case involved a claim brought by four of the 34 towing operators with contracts with the City of Portland. The court exercised jurisdiction and rejected the City’s arguments that all other towing operators must be joined pursuant to ORS 28.110. 173 Or App at 241. The Court noted that the other 31 operators could choose to litigate the issue on their own, *id.* at 240, but nevertheless resolved the claims set forth by the four plaintiffs. *Sergeant’s Towing* therefore puts to rest any argument that the every pesticide applicator in the state should have been joined pursuant to ORS 28.110 and also weighs heavily in favor of the court finding that a justiciable controversy exists in this case.

⁸ In fact, a holding from this court would provide certainty to plaintiffs, pesticide users, the State, and the public.

future trespass action that the State could intervene on behalf of a pesticide applicator to defend the statutes against a constitutional challenge, because the State would be bound a judicial declaration in this case.⁹ And a judicial pronouncement would also clearly benefit the public, for reasons similar to those just stated, as it would be the first time that a court has announced whether ORS 30.936 and ORS 30.939 are unconstitutional.

The relief requested in this case is highly meaningful both for plaintiffs, who seek to uphold their individual constitutional rights, and for the broader public. They have a right to seek judicial review of statutes that allegedly deprive them of fundamental rights without adequate remedy at law. The mere fact that a court's eventual ruling would not have preclusive effect on every pesticide applicator in the state does not deprive the court of jurisdiction to provide plaintiffs with a declaration of their individual rights under the constitution.

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⁹ To the extent the State suggests that plaintiffs could or should seek a declaratory judgment against a pesticide applicator, then it must concede that relief in this case would be meaningful, because the decree announced by the court here would bind the State and preclude it from intervening to defend the constitutionality of state statutes in subsequent proceedings.

CONCLUSION

The Remedies Clause protects the individual rights of property owners, prohibiting the State legislature from abrogating common law remedies without adequate statutory replacements. Those constitutional rights, however, are meaningless without the practical ability to enforce them through the judicial system. Since their passage, ORS 30.936 and ORS 30.939 have created great uncertainty for landowners impacted by pesticides across the State of Oregon. Amici therefore respectfully request that the court provide plaintiffs with their day in court, holding that plaintiffs have alleged a justiciable controversy against the State and reversing and remanding the decision below.

DATED this 11th day of July, 2012

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on July 11, 2012, I filed the foregoing **BRIEF OF AMICI CURIAE OF BEYOND TOXICS, PESTICIDE ACTION NETWORK NORTH AMERICA, & NEAL MILLER IN SUPPORT OF PLAINTIFFS-APPELLANTS** via the court's eFiling system. Pursuant to ORAP 16.45(b)(4), I certify that on July 11, 2012, I executed service of the foregoing brief on the following parties by eService.

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