**IN THE SUPREME COURT OF THE STATE OF OREGON**

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| **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,<br><br>*Plaintiffs-Appellants, Petitioners on Review*<br>v.<br><br>**KATE BROWN**, in her official Capacity as Governor of the State of Oregon; and **STATE OF OREGON**,<br><br>*Defendants-Respondents, Respondents on Review.* | Lane County Circuit Court<br>Case No. 16-11-09273<br><br>CA No. A159826<br><br>S066564 |

# BRIEF OF *AMICI CURIAE* MULTNOMAH & LANE COUNTIES IN SUPPORT OF PETITIONERS ON REVIEW.

On Review of the Decision of the Court of Appeals on appeal from a Judgment of the Circuit Court for Lane County, Honorable Karsten H. Rasmussen, Judge.

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Author of Opinion: Armstrong, Presiding Judge

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## I. INTEREST OF AMICI CURIAE

*Amici Curiae* are both political subdivisions of the State of Oregon and on behalf of their residents, constituents, and natural resources, have a substantial interest in the outcome of this case because it involves the proper interpretation and scope of the ancient common law public trust doctrine, and the corresponding role and responsibilities of sovereigns under that doctrine. Specifically, the outcome of this case will significantly affect the duty of the State, and all sovereigns, in protecting public trust resources for future generations of all Oregonians, including Multnomah and Lane Counties' residents.

Multnomah County has the largest population of any county in the state, and includes a portion of the City of Portland, the largest city in Oregon. Despite the urbanized nature of the county, the natural assets and beauty of the area dominate and define the community. The Columbia River forms the northern boundary of the county and is a major natural and cultural asset, and the county includes dramatic portions of the Columbia River George National Scenic Area. The county's two major rivers, the Columbia and Willamette Rivers, both support threatened and endangered species, including federally protected spring and fall steelhead, and salmon runs. The county also has substantial rural areas with productive farm and forestlands located just outside

the urban core of the county's seven cities, which are the economic and cultural hubs for the state and the region.

Lane County encompasses 4,722 square miles and its county lands are geographically a microcosm of the state – ranging from rugged glaciated mountains in the east, through a broad valley spreading across the Willamette River, to a beautiful and rugged coastline along the western edge. It is one of two Oregon counties that extend from the Pacific Ocean to the Cascades. Lane County has 12 incorporated cities. Eugene, which is the county seat, is the largest city with a population of 167,780. Although 90 percent of Lane County is forestland, Lane County's population as of 2017 has reached 370,600.

*Amici* seeks to assist the Court in resolving this case by providing an understanding of the role of sovereigns under the public trust doctrine from the perspective of sovereign bodies, and how the doctrine is organic to government itself. The people of the State of Oregon, and Multnomah and Lane Counties, will benefit from thoughtful review by this Court of the ancient and significant public trust doctrine, and the implied duties of sovereigns under the doctrine.

## II. SUMMARY OF ARGUMENT

The U.S. Supreme Court and the courts of this state have consistently opined that the public trust doctrine includes a duty of the sovereign to protect the trust resources; without a duty, there is no trust. The requirement that sovereigns have implied duties to the trust is evidenced in origins of the public

trust doctrine, court decisions, and even oaths of office. The Court of Appeals' decision below eviscerated the long standing common law public trust doctrine in holding that sovereigns, *i.e.* the State of Oregon, have no affirmative duties under the doctrine to protect public trust resources. Furthermore, the appellate court erred when it failed to recognize that the Oregon public trust doctrine extends to more than just submerged and submersible lands, specifically, water, beaches, shorelands, fish, recreation, and wildlife. *Amici* supports Plaintiffs in urging this Court to declare affirmative duties of sovereigns under the public trust doctrine, and that "atmosphere" is a protected resources under the doctrine due to the vital interconnection of trust resources and the atmosphere. Finally, if the Court of Appeals opinion is not overturned, Oregon will be the only state to have eviscerated the doctrine and robbed its sovereign bodies of this ever important tenet of sovereignty.

## III. ARGUMENT

This brief begins by discussing the State's duty to protect public trust resources as evidenced in the public trust doctrine's origins, U.S. Supreme Court opinions (the underpinnings of Oregon's common law public trust doctrine), and Oregon courts opinions. In order to further bolster understanding of the doctrine, *Amici* will also discuss basic trust principles, and how those principles apply to the doctrine. Next, *Amici* briefly discusses the natural resources protected under Oregon's public trust doctrine and urges this Court to

grant Plaintiff's prayer that the atmosphere be recognized as a public trust asset. Finally, *Amici* discusses the negative implications of the Court of Appeals decision if it is not overruled: (i) evisceration of Oregon's public trust doctrine and (ii) looting of sovereigns critical duty to protect public trust resources.

### A. The State Has A Duty To Protect Public Trust Resources as Evidenced in Public Trust Doctrine Origins, Court Decisions, and Oaths of Office.

As sovereign bodies, *Amici* recognizes the duty of *all* sovereigns to protect public trust resources under the public trust doctrine; this duty derives from public trust doctrine origins, court decisions, and even oaths of office. Examination of the public trust doctrine shows that the doctrine has *always* included implied duties of the sovereign.

#### 1. Public Trust Origins Establish That Sovereign's Duty To The Trust Was Always a Component of the Public Trust Doctrine.

Scholarly writings and published legal opinions trace the public trust doctrine back to early Roman law, which recognized the public's rights to essential natural resources. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl L & Pol'y F 57, 62-63 (Fall 2005) (*citing* J Inst 35 § 2.1.1 (J.B. Moyle trans 5th ed 1913)); *see also Illinois Central R. Co. v. Illinois*, 146 US 387, 436, 13 S Ct 110, 36 L Ed 1018 (1892) (certain lands are held in trust for the people); *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892), *aff'd* 152

US 1, 11, 14 S Ct 548, (1894) (state owns tidelands in its sovereign capacity and they are held in public trust for the benefit of the whole community); *Geer v. State of Conn*. 161 US 519, 523-27, 16 S Ct 600, 40 L Ed 793 (1896) (*overruled on other grounds* by *Hughes v. Oklahoma*, 441 US 322, 99 S Ct 1727 (1979)) (U.S. Supreme Court relied on ancient Roman principles in finding public trust doctrine extends to wildlife); *Brusco Towboat v. State of Oregon*, 30 Or App 509, 514-19, 567 P2d 1037 (1977) (*aff'd in part, rev'd in part on other grounds* 284 Or 627, 589 P2d 712 (1979)) (relying on English common law reiterated that the sovereign bears the responsibility to preserve public trust rights for all the people). This concept is referred to as "*jus* publicum," which refers to the government's right to own property in trust for the public benefit. *Black's Law Dictionary* 880, (8th ed 2004); *see also* Mary Christina Wood and Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore A Viable Climate System*, 45 Env L 259, 277 (2015) (discussing that such public rights are evident in ancient societies around the world). These origins are important because they show that public ownership of natural resources is an ancient and long-standing tenet of sovereignty, and since the beginning, that tenet was saddled with responsibility.

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In regard to this country, the public trust doctrine traces back to English common law where:

> "[T]itle to lands underlying tidal waters was held by the king as an element of sovereignty. After the American Revolution, each of the original colonies assumed its own sovereign powers, one aspect of which was ownership of all submerged and submersible lands underlying navigable waters."

*Brusco Towboat*, 30 Or App at 514-15 (*citing to Shively v. Bowlby,* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894); *Mumford v. Wardwell,* 73 US 423, 18 L Ed 756 (1867); *Pollard's Lessee v. Hagan et al*., 44 US 212, 11 L Ed 565 (1845)*;* and *Martin v. Waddell,* 41 US (16 Pet) 367, 410, 10 L Ed 997 (1842)). Furthermore, the US Supreme Court held in *Martin v. Waddell* that the English public trust doctrine had survived the American Revolution. 41 US at 367, 416 (1842).

The public trust doctrine can also be traced to Native American culture and governance. The core responsibility of Native American tribal governance was to preserve natural resources for future generations – this was both a religious and governing principle. Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 Va Envtl LJ 243, 265 (2007); *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L Rev 1471 (1994). Tribal leaders were custodians of the tribe's natural resources – "stewards of the plants, the animals, the waters, and the air[;]" thus, they had an inherent duty to protect and

preserve the natural resources for future generations. Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 Va Envtl LJ 243, 265 (2007). These origins reflect the longstanding principle that sovereigns have affirmative duties under the public trust doctrine – duty was central to the doctrine at its inception.

### 2. U.S. Supreme Court Opinions – The Underpinnings of Oregon's Common Law – Have Repeatedly Recognized An Implied Duty Within the Public Trust Doctrine.

As the United States was formed and federalism took shape, the public trust doctrine was recognized and defined in this country – a basis for the doctrine's state common law development. *Pollard's Lessee, Illinois Central, Shively* and *Geer* (all discussed in more detail below) collectively support *Amici'* position that sovereigns have a duty to protect trust resources in three ways. First, these cases recognize natural resources are held in trust for use by all. Second, collectively these cases found that states have a duty to not impair the public trust interest. Third, because certain resources are held in trust by the sovereign for the benefit of all, the Court recognized there is an *inherent* and *implied* duty to protect such resources. U.S. Supreme Court decisions, alone, support Plaintiff's and *Amici*' position regarding duty and the public trust doctrine.

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In 1845 in *Pollard's Lessee*, the U.S. Supreme Court held that the states owned the streambeds within their borders and that it was critical that states retained ownership because those lands supported fishing, navigation, and commerce – activities important to the functioning of society. 44 US 212, 215, 229 (1845). Adhering to the rationale in *Pollard*, the U.S. Supreme Court held in *Illinois Central* that submerged lands under Lake Michigan were owned by the State of Illinois and held in trust for the people of the state for their common use and enjoyment; therefore, the state could not sell or give away such lands. 146 US at 453. Moreover, the Court held that an *implied* public trust came with submersible lands along navigable waterways so that the people of the state could engage in navigation, commerce and fishing. *Id.* at 452-453. Additionally, the Court held that states could convey the submersible lands to private parties, however, the land carried with it a public trust duty to not substantially impair the public trust interest. *Id*. at 453. The Court explained, "[t]he control of the State for purposes of the trust can never be lost," nor can it be abdicated. *Id*.

Two years later, the U.S. Supreme Court continued its discussion of the public trust doctrine in *Shively v. Bowlby*, a case that came out of Oregon. The Court provided a lengthy discussion of English common law and how that became the law of this country, except so far as it had been modified by charters, constitutions and statutes of the several colonies and states. *Shively*,

152 US at 14. The Court explained that under English common law, soils under navigable waters were conferred on a duke by the king – the sovereigns – and "they were intended to be a trust for the common use * * * – a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish * * *." *Id*. at 16.

The *Shively* opinion summed up title in tidelands along the Columbia river as:

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use or right. Therefore, the title and control of them are vested in the sovereign, for the benefit of the whole people."

*Id*. at 57. *Shively* affirmed that such lands are held in *trust* by the sovereign for the benefit of all.

Similarly, two years later, the U.S. Supreme Court looked at ownership rights of wildlife in *Geer v. Connecticut*, 161 US 519, 16 S Ct 600, 40 L Ed 793 (1896). The Court stated:

> "While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good."

*Id*. at 529. (Emphasis added). The Court also explained:

> "It is, perhaps, accurate to say that the 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."

*Id*. at 534 (*quoting Magner v. People*, 97 Ill 320, (1881) S Ct Ill)) (emphasis added).

Notwithstanding the Supreme Court's precedent, the Court of Appeals decision in this matter opined that Plaintiff's reliance on *Geer* is misplaced because the statement quoted from *Geer* did not comment on the nature of the public trust, "nor did it make any holding regarding affirmative duties of the states with respect to game or the public trust." *Chernaik v. Brown*, 295 Or App 584, 598, 436 P3d 26 (2019). This narrow reading of *Geer* misses the significance of *Geer* in regard to the origins and evolution of the public trust doctrine.

The significance of *Geer* to this discussion is that the U.S. Supreme Court has recognized since its first public trust doctrine case in 1842 (*Martin v. Waddell*, 41 US 367 (1842), and later in *Shively* and *Geer*, that certain things – those arising from nature – cannot be owned individually, but rather by the sovereign body in trust for all. As discussed above, being "held in trust" implies a duty in and of itself. It is true that the *Geer* court did not make any holding regarding affirmative duties of the states with respect to game or the

public trust, but it didn't need to when it used and quoted such language as "common ownership * * * exercised as a trust" and "it is the duty of the legislature to enact such laws as will best preserve the subject of the trust." *Geer*, 161 US at 529 and 534. Additionally, the court did say "it is the duty of the legislature to enact such laws as will best preserve the subject of the trust" – that declaration by and large is an affirmative duty. If the U.S. Supreme Court had disagreed with either of those statements in regard to ownership of tidelands and wildlife, it would have said so. In addition, if the U.S. Supreme Court had considered a trust to be "an imperfect metaphor" for the sovereign's duties to protect public assets, it is unlikely that the Court would have continued to perpetuate use of the term "trust" in its public trust decisions. In reading each of these cases, the U.S. Supreme Court has not only recognized the public trust doctrine, but also that sovereign bodies have *implied* duties to the trust resources for the benefit of the public.

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### 3. Oregon Common Law Recognizes that the Public Trust Doctrine Imposes an Implied Duty on the Sovereign.

This Court recognized the public trust doctrine as early as 1869, issuing two opinions that year asserting the public's rights in navigable waterways. *See Weise v. Smith*, 3 Or 445, 450 (1869) (stating that navigable waters are "public highways" that the public had "an undoubted right to use" for legitimate purposes of trade and transportation); *Felger v. Robinson*, 3 Or 455, 457-58 (1869) (holding public rights in State waters extend to streams that are not navigable year-round). Other cases followed, and *Amici* highlights two in particular: *Corvallis Sand & Gravel v. State Land Bd.*, 250 Or 319, 439 P2d 575 (1968) and *Brusco Towboat v. State of Oregon*, 30 Or App 509 (1977) *aff'd.* 284 Or 627 (1978).

Consistent with U.S. Supreme Court rulings, the Oregon Supreme Court has recognized the inherent duties of the sovereign to preserve public trust resources under the public trust doctrine as early as 1892 in *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892), *aff'd*, 152 US 1, 14 S Ct 548, 33 L Ed 331 (1894), later affirmed by the US Supreme Court and discussed above. This Court continued to recognize public trust duties in multiple cases throughout the 19th and 20th centuries; s*ee Corvallis & E.R. Co. v. Benson*, 61 Or 359, 121 P 418 (1912); *Cook v. Dabney*, 70 Or 529, 532, 139 P 721 (1914) (*holding* State has no right to convey property in a manner that impeded navigation); *Corvallis Sand & Gravel v. State Land Bd.*, 250 Or 319, 439 P 2d 575 (1968); *Morse v.*

*OR Div. of State Lands*, 285 Or 197, 590 P2d 709 (1979) (State not prohibited by PTD from granting permit for estuary fill); *State v. Dickerson*, 356 Or 822, 345 P3d 447 (2015); *Kramer v. City of Lake Oswego*, 285 Or App 181, 395 P3d 592 (2017). Notwithstanding these rulings, the Court of Appeals decision incorrectly concluded that Oregon public trust cases only act as a "restraint on the state" and nowhere do they impose a duty on the state to affirmatively act. *Chernaik*, 295 Or App at 600. That finding is inconsistent with legal opinions by both the U.S. Supreme Court and Oregon courts.

In *Corvallis Sand & Gravel*, the Oregon Supreme Court looked at whether the State had authority to eject Corvallis Sand & Gravel from a portion of a river bed that it was withholding from the State. 250 Or at 320-325. The Court discussed what legal rights were obtained upon admission to the Union, *id*. at 332-36, and stated:

> "[W]e said in *Winston Bros. Co. v. State Tax Com.*, 156 Or 505, 62 P2d 7, with regard to the lands underlying the navigable waters of the state, that
> '* * * although the title passed to the state by virtue of its sovereignty, <u>its rights were merely those of a trustee for the public</u>. In its ownership thereof, the state represents the people, and the ownership is that of the people in their united sovereignty, while the waters themselves remain public so that all persons may use the same for navigation and fishing. <u>These lands are held in trust for the public uses</u> of navigation and fishery, * * *. Being subject to this trust, they are Publici juris; in other words, they are held for the use of the people at large. * * *' 156 Or at 511, 62 P2d at 9."

*Id.* at 334 (emphasis added). This Court's discussion illuminates that Oregon common law recognizes that not only are certain resources held in trust for the

public, but the State's role is that of a "trustee." Contrary to what the Court of Appeals opined below, a trustee – by its very nature – inherently has duties to protect the trust resources for the benefit of the beneficiaries. To deny this is to eliminate the trust in its entirety, as evidenced by the definition of "trustee":

> One who, having legal title to property, holds it in trust for the benefit of another and *owes a fiduciary duty* to that beneficiary.

*Black's Law Dictionary* 1553 (8th ed 2004) (emphasis added). This Court's characterization of the State's role as "trustee" is clear and conclusive evidence that the State, and all sovereigns, have a duty to protect trust resources.

This reasoning continued a decade later in *Brusco Towboat*, a case whereby the Court of Appeals examined the authority of the State leasing program for submerged lands. 30 Or App 509 (1977). The court reviewed public trust origins and discussed the jus publicum aspect of state ownership. *Id.* at 514-518. Notably, the Court explained and held the following:

> "The jus publicum aspect of the state's ownership is rooted in a philosophical conception of natural law. The 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. * * * The right of the public to use the waterways for these purposes [commerce, fishing and recreation] has always been recognized at common law. *See, Shively v. Bowlby, supra,* 152 US at 14, 14 SCt 548. As representative of the people, the sovereign bears the responsibility to preserve these rights. *Shively v. Bowlby*, supra, 152 US at 11, 14 SCt 548; *Illinois Central Railroad v. Illinois*, 146 US 387, 452, 13 SCt 110, 36 L Ed 1018 (1892); *Cook v. Dabney*, 70 Or 529, 532, 139 P 721 (1914).
> * * *

> In essence, the jus publicum is a nondelegable government obligation.
> * * *
> We hold, therefore, that the state has a proprietary interest sufficient to empower it to convey to private parties leasehold interests in submerged and submersible lands underlying navigable waters. The granting, withholding and management of such leaseholds, however, as exercises of the state's proprietary rights, remain subject to the public's paramount interest in such lands and the state, as trustee of that interest, *must act* accordingly[.]

*Id*. at 517-518, 519 (emphasis added).

*Brusco Towboat* is key to understanding Oregon's common law position on the public trust doctrine for several reasons. First, it recognizes the public trust doctrine's ancient origins and even describes it as "natural law." "Natural law" is defined, in part, as "moral law embodied in principles of right and wrong." *Black's Law Dictionary* 1055 (8th ed. 2004). The Court of Appeals' use of the phrase "natural law" is revealing in that it indicates the Court viewed public trust principles as coming from a source greater than the State, and as necessary and systemic to the natural order of things.

Secondly, *Brusco Towboat* speaks to the essential nature of natural resources and holds that the state bears the *responsibility* of *preserving* the public's rights in those natural resources. Again, the Court's use of the words "responsibility" and "preserve" signal an affirmative duty of the state to protect such natural resources. *Webster's Third New Int'l Dictionary* lists the word "duty" as a synonym for "responsibility." 1935 (unabridged ed 2002). "Preserve" is defined as: (1) to keep safe from injury, harm, or destruction:

protect; (2) to keep alive, intact, or free from decay. *Id*. at 1974. Given the Oregon courts' discussions of the public trust doctrine and words chosen to describe the responsibility of the sovereign in regard to natural resources, particularly in *Brusco Towboat*, it is rational and necessary to conclude that the courts *have* recognized an affirmative duty of the sovereign to protect public trust resources. To conclude otherwise is to give entirely new meaning to the Oregon courts' 150 years of upheld public trust opinions, and ignores the plain meanings of common words used by the courts to explain this important doctrine.

Third and finally, *Brusco Towboat* restates that the sovereign body has nondelegable obligations to protect natural resources for the people, because the sovereign is in a position of "trustee" and, therefore, *must act* accordingly. *Brusco Towboat*, 30 Or App at 517-19. Again, the definition of "trustee" is "One who, having legal title to property, holds it in trust for the benefit of another and *owes a fiduciary duty* to that beneficiary. *Black's Law Dictionary* 1553 (8th ed. 2004). Intrinsic to the definition of "trustee" is "duty," and under *Brusco Towboat* and *Illinois Central*, that duty cannot be abdicated or given away. Based on the language used in *Corvallis Sand & Gravel* and *Brusco Towboat*, *Amici* asks that this Court uphold the 150 years of Oregon case law and declare that sovereigns have an affirmative duty to protect public trust resources for the benefit of current and future generations.

### 4. Basic Trust Principles Require Affirmative Duties of Trustees to Trust Assets; Without a Duty There is No Trust.

By way of background, basic trust principles and framework are helpful in comprehending the public trust doctrine and its implications of duty. Generally, a trust creates a fiduciary relationship where a trustee holds title to the property of another for the benefit of the beneficiary. George G. Bogert *et al.*, *Bogert's Trusts and Trustees* § 1 (2016). A "fiduciary relationship" is defined as "A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship." *Black's Law Dictionary* 1315 (8th ed 2004).

Private trustees have several fiduciary duties to the beneficiaries of the trust. Trustees' duties include, but are not limited to: administering the trust, affording loyalty to the beneficiary of the trust, refraining from delegating the trust, acting only in the best interest of the trust beneficiary, and preserving property. *Restatement (Second) of Trusts* §§ 169-183 (June 2019 Update).

There are similarities between private and public trusts. Like a private trust, the public trust doctrine places assets (natural resources) in the hands of the trustee (the sovereign at all government levels) to protect against loss and maximize trust productivity for future use by the beneficiaries (generations to come). Additionally, both private and public trust trustees are encumbered with fiduciary duties. Specifically, the trustee has a duty to protect and preserve the

asset, a duty to protect the asset from waste, and a duty of loyalty to the beneficiaries. Laitos *et al., Natural Resources Law* at 623; *see generally* Bogert *et al., Bogert's Trusts and Trustees* § 582. Duty is central to the trust framework, because without a duty to protect or maximize the trust assets, there is simply no trust. *See Restatement (Third) of Trusts* chapter 15 and section 70 (June 2019 Update).

Before the Court of Appeals, the State argued that "trust" in the public trust doctrine is not synonymous with a trust over property or money, thus, fiduciary duties under ordinary trust law do not apply. *Chernaik v. Brown*, 295 Or App 584, 596, 436 P3d 26 (2019). The State is wrong. There are multiple similarities between a trust over property and/or money and the public trust doctrine. By comparison, a trust over property or money includes: (a) placement of trust property/assets (property or money), (b) into legal ownership of another (trustee), (c) to protect or maximize the trust asset (affirmative duty), (d) for the benefit of the beneficiary. The same is true under the public trust doctrine: (a) placement of trust resources (submerged and submersible lands, water, etc.) (b) into legal ownership of the sovereign (trustee) (c) for protection of the trust assets (affirmative duty), (d) for use by current and future generations (beneficiaries).

Additionally, the Court of Appeals' characterization of a "trust" as "an imperfect metaphor to capture the idea that the state is restrained from

substantially impairing" public trust resources, signifies that the court did not properly apply (i) the basic trust framework, and (ii) the public trust doctrine itself. *Id*. at 600.

### B. Sovereigns Have a Duty To Protect Submerged and Submersible Lands, Water, Fish, Wildlife, Tidelands And That Duty Should Include a Duty to Protect the Atmosphere.

The Court of Appeals erred when they ruled that the Oregon public trust doctrine extends only to submerged and submersible lands. *Chernaik*, 295 Or App at 594. Oregon judicial opinions have recognized that the public trust doctrine in Oregon extends to water, fish, shore lands, beaches, air and wildlife. *See State v. Dickerson*, 356 Or 822, 833, 345 P 3d 447 (2015) (discussing several cases recognizing that fish and wildlife are owned by the state in its sovereign capacity); *Felger v. Robinson*, 3 Or 455, 457-58 (1869) (holding that public rights in State waters extended to stream that were not navigable year-round); *Anderson v. Columbia Contract Co.*, 94 Or 171, 184 P 240 (1919) (upholding public rights to fishing); *Luscher v. Reynolds*, 153 Or 625, 56 P2d 1158 (1936) (holding that a private lake was open for public recreation, regardless of the ownership of the lake bed); *State ex rel. Thornton v. Hay*, 254 Or 584, 462 P 2d 671 (1969), (finding custom was a basis for recognizing public rights to recreate on Oregon ocean beaches). *Amici* will defer to Plaintiffs for a more thorough discussion of these cases, but wanted to note the significance of the lower courts' error and urge this Court to correct it.

Furthermore, *Amici* supports Plaintiff's prayer that the Oregon public trust doctrine be declared to extend to the atmosphere. *Amici* has listened to the science and recognizes the interconnectivity of Oregon's public trust resources and atmosphere. *Amici* are already experiencing the impacts of an impaired atmosphere through longer fire seasons, more frequent extreme weather events, and in Multnomah County's case, an increase in the number of days the county must open warming and cooling shelters for our community's most vulnerable residents. Recognizing its duty to protect public trust resources, Multnomah County has adopted policies that attempt to reduce or prevent negative impacts to the natural environment. *See* City of Portland and Multnomah County 2015 Joint Climate Action Plan (available at https://multco.us/file/42549/download); Multnomah County Resolution Nos. 2010-159 (Adopting a Green Meeting and Event Policy), 08-035 (Adopting the US Cool Counties Climate Stabilization Declaration), and 04-019 (Adopting Sustainability Principles) (*all documents are available at* https://multco.us/board/documents-view) . *Amici* supports this Court in granting Plaintiffs' prayer that atmosphere be declared an Oregon public trust asset.

### C. The Court of Appeals Decision Obliterates the Public Trust Doctrine in Oregon and Robs Sovereigns of Their Critical Duty to Protect Natural Resources.

*Amici* urge this Court to overturn the Court of Appeals decision because failure to do so has the effect of obliterating the public trust doctrine in Oregon

and robs sovereigns of one of their most important tools and responsibilities. Oregon has a long-standing reputation as being a "green" state. If the Court of Appeals decision was left standing, that reputation would become a fiction because Oregon would be on the only state with an eviscerated public trust doctrine that is misaligned with the doctrine's origins and U.S. Supreme Court opinions.

Also, if the lower courts' decisions are not overturned, sovereign bodies, like *Amici*, will be robbed of their important sovereign responsibility to protect public trust resources because that responsibility will no longer be legally mandated. Opponents may argue that sovereigns will still have the free will to adopt policies relating to public trust resources as they choose, but without a legally recognized duty to do so, *Amici* fears that free will alone will not have enough force or momentum to protect Oregon's public trust resources from further damage and decline in light of the looming climate change crisis – until recently, a scenario sovereigns and courts could not have imagined. As science tells us, there is only a small window of time in which governments can take measures to protect natural resources from the negative impacts of climate change. S*ee* Intergovernmental Panel on Climate Change, *2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Inventories* (May 2019), https://www.ipcc.ch/report/2019-refinement-to-the-2006-ipcc-guidelines-for-national-greenhouse-gas-inventories (accessed July 22, 2019) (reporting on

recent study results that show the window of time to reduce global net anthropogenic CO2 emissions is fleetingly short). This Court's recognition of the inherent and implied duties of the sovereign under the public trust doctrine is necessary to help meet that deadline and preserve Oregon's vital natural resources.

Furthermore, when elected officials acting on behalf of sovereigns take an oath of office that includes a promise to uphold the public trust doctrine. When a public official takes an oath of office, the public official makes a promise to uphold all laws of Oregon, including the public trust doctrine. An oath of office is a legally binding pledge "reserved for human activities of the highest order." John A. Rohr, *Public Service, Ethics, and Constitutional Practice* 70-71 (1998). For example, Oregon Governor Brown took the following oath of office:

> "I, Kate Brown, do solemnly swear, or affirm that I will support the Constitution of the United States, and the Constitution of the State of Oregon, and that I will faithfully discharge the duties of Governor according to the best of my ability."

In Multnomah County, the Chair of the County Board of Commissioners and all four Commissioners take the following oath:

> "I, [Commissioner's name], do solemnly swear that I will support the Constitution of the United States of America, the Constitution of the State of Oregon, the Home Rule Charter and the laws of the County of Multnomah, and will faithfully and honorably conduct myself in the Office of Multnomah County Commissioner for District [No.], to which I have been elected, to the best of my ability."

Promises made when taking an oath of office are directly related to public trust principles in a few ways. First, with an oath of office comes responsibility not only for expressed powers, but also implied powers. For example, implied powers include non-codified police powers, the exercise of eminent domain, and the public trust doctrine. Like all expressed powers of the sovereign, a sovereign cannot abdicate its responsibility for implied powers. The U.S. Supreme Court said so in *Illinois Central*:

> "The State can no more abdicate its trust over private property in which the whole people are interested, like navigable waters and soils under them, * * * than it can abdicate its police power in the administration of government and the preservation of the peace."

146 US at 453. The U.S. Supreme Court has recognized the public trust doctrine duties as an aspect of sovereignty, yet the lower courts' opinions appear to disregard this and in doing so rob Oregon sovereigns of a critical responsibility and implied power.

Second, although not expressly stated in the Constitution, the public trust doctrine is implied in the Constitution. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 Envtl L 425, 425, 429-31, 441 (1989); *see also* Gregory A. Thomas, *Conserving Aquatic Biodiversity: A Critical Comparison of Legal Tools for Augmenting Streamflows in California*, 15 Stan Envtl LJ 3, 35 (1996). *Amici* defers to Plaintiffs Opening Brief to explain the link between the Oregon Constitution

and public trust doctrine, but found it important to recognize here. Consequently, when a public official promises to uphold the Constitution to the best of her ability and to protect, preserve, and defend the Constitution, the public official is promising to protect, preserve, and defend the public trust as an aspect of American constitutional law. A public trust scholar described the doctrine "as the state upon which 'all constitutions and laws are written.'" Wood and Galpern, 45 Env L at 274 (*quoting* Gerald Torres, *The Public Trust: The Law's DNA*, Keynote Address at the University of Oregon School of Law (Feb. 23, 2012)).

As a sovereign body who has accepted all powers and duties that come with public office, *Amici* appreciates that current and future generations depend on sovereign bodies to actively protect the public trust resources; the public, in their individual capacities, is powerless to manage public trust resources. A function and purpose of sovereignty is to create and enforce order that communities depend on - the public trust doctrine is one tool with which to do so. It is certain that disorder would result in a society where vital natural resources such as water, fish, and wildlife have been allowed to be damaged, or even depleted. Some believe it is this notion – the prospect of an orderly and secure society – that led people to "form a 'contract' with the government, eagerly consenting to the right of government to make the rules necessary to preserve harmony" in society. Kenneth F. Warren, *Administrative Law in the*

*Political System* 409 (Abridged 3rd ed 1997) (discussing the purpose of forming governments under social contract theory). Sovereigns have a duty to the people to maintain order, an important element of that order is preserving public trust resources for use by current and future generations.

## IV. CONCLUSION

The public trust doctrine is an ancient and consistently upheld legal doctrine that is more relevant today than ever. The public trust doctrine inherently requires affirmative duties of the sovereign; without such there is no trust. The origins of the doctrine and the plethora of Oregon and U.S. Supreme Court cases discussed above illuminate the necessity – and implication – of affirmative duties by the sovereign to protect the trust resources. Current and future generations depend on the sovereign to actively protect the trust resources since such resources are vested in the sovereign for the benefit of the whole people. As representatives of the people, the sovereign bears the responsibility to preserve public trust rights secured under the trust. For the reasons set forth here, *Amici* ask this Court to rule in alignment with 150 years of case law and declare that sovereigns have affirmative duties under the public trust doctrine. *Amici* also encourage this Court to declare atmosphere a natural resource held in trust for the benefit of all Oregonians.

# CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 9.05(3)(a) and the word-count in this brief is 6,351 words.

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.

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## CERTIFICATE OF FILING AND SERVICE

I certify that on July 30, 2019, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* MULTNOMAH & LANE COUNTIES IN SUPPORT OF PETITIONERS ON REVIEW** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System. I certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, at the participants' email addresses as recorded this date as indicated below:

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