

IN THE SUPREME COURT 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,
Petitioners on Review*

v.

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

*Defendants-Respondents,
Respondents on Review.*

Lane County Circuit Court Case No. 161109273
CA No. A159826
Supreme Court No. S066564

**BRIEF OF *AMICI CURIAE* OREGON ELECTED OFFICIALS IN
SUPPORT OF PETITIONERS' BRIEF ON THE MERITS**

Review of the decision of the Court of Appeals on appeal from a judgment
of the Circuit Court for Lane County, Honorable Rasmussen, Judge.

Opinion Filed: January 9, 2019

Author of Opinion: Armstrong
Concurring Judges: Shorr, Garrett

Continued...

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Representative Ken Helm is the Oregon State Representative of District 34, which includes the City of Beaverton and the neighborhoods of West Haven, Cedar Hills, and Rock Creek. Representative Helm is a member of the Joint Committee on Carbon Reduction.

Representative Paul Holvey is the Oregon State Representative of District 8 in Southern Lane County, which includes Noti, Crow, Lorane, Elmira, Veneta, and Eugene. Representative Holvey is the Speaker Pro Tempore, Chair of the House Committee on Rules and a member of the House Committee on Business and Labor, the Joint Committee on Ways and Means, the Joint Committee on Ways and Means Subcommittee on Capital Construction, the Joint Committee on Ways and Means Subcommittee on Natural Resources, and the Joint Committee on Legislative Administration.

Representative Alissa Keny-Guyer is the Oregon State Representative of District 46, which includes parts of southeast and northeast Portland. Representative Keny-Guyer is the Chair of the House Committee on Human Services and Housing and a member of the House Health Care Committee.

Representative John Lively is the Oregon State Representative of District 12, which includes Springfield. Representative Lively is Chair of the Committee on Early Childhood and Family Support and a member of the

Ways and Means Subcommittee on Education and the Joint Committee on Transportation, Preservation and Modernization.

Representative Pam Marsh is the Oregon State Representative of District 5, which includes Ashland, Talent, Phoenix, the southwest corner of Medford, Jacksonville, Ruch, and spans from Applegate to the Green Springs. Representative Marsh is the Vice Chair of the House Revenue Committee and a member of the Joint Committee on Carbon Reduction, the Economic Development Committee, Ways and Means Subcommittee on General Government, and the Joint Legislative Information Management and Technology Committee.

Representative Karin Power is the Oregon State Representative of District 41, which includes the City of Milwaukie, Oak Grove, and the Sellwood, Eastmoreland, Westmoreland, and Brentwood-Darlington neighborhoods of Southeast Portland. Representative Power is a Co-Chair of the Joint Committee on Carbon Reduction.

Representative Andrea Salinas is the Oregon State Representative of District 38, which includes Lake Oswego. Representative Salinas is a member of the House Transportation Committee, the House Health Care Committee, and the House Agriculture and Natural Resources Committee.

Representative Marty Wilde is the Oregon State Representative of District 11, which includes parts of central Lane and Linn counties.

Representative Wilde is a member of the Energy and Environment Committee and the Emergency Preparedness Committees.

Senator Michael Dembrow is the Oregon State Senator representing District 23, which includes portions of SE and NE Portland and the city of Maywood Park. Senator Dembrow is the Chair of the Senate Environment and Natural Resources Committee, Co-Chair of the Joint Carbon Reduction Committee, and a member of the Senate Business and General Government Committee, the Senate Rules Committee, and the Joint Legislative Policy and Research Committee.

Senator Shemia Fagan is the Oregon State Senator representing District 24, which includes parts of Portland.

Senator Lew Frederick is the Oregon State Senator of District 22, which includes North and Northeast Portland. Senator Frederick is the co-chair of the Ways and Means Subcommittee on Education and a member of the Joint Ways and Means Committee and Joint Committee on Student Success.

Senator Jeff Golden is the Oregon State Senator representing District 3, which includes Medford, Phoenix, Talent, Ashland, Jacksonville, Ruch, and the Applegate Valley. Senator Golden is the Chair of the Senate Committee on Campaign Finance and a member of the Joint Committee on Carbon Reduction.

Senator Floyd Prozanski is the Oregon State Senator representing District 4, which includes Southern and Eastern Lane County as well as Northern and Eastern Douglas County. Senator Prozanski currently serves on the Senate Judiciary Committee (which he chairs), the Senate Environment & Natural Resources Committee, and the Legislative Counsel Committee. He also co-chairs both the Task Force on Public Safety and the Justice Reinvestment Grant Review Committee.

Senator Kathleen Taylor is the Oregon State Senator representing District 21, which includes the City of Milwaukie, Oak Grove, inner Southeast Portland, and a small portion of Northeast Portland. Senator Taylor is the Chair of the Senate Committee on Workforce, Co-Chair of the Joint Ways & Means Committee on Natural Resources, and a member of the Senate Committee on Finance and Revenue and the Joint Committee on Tax Credits.

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Amici rely on Plaintiffs' questions presented and proposed rules of law.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Amici rely on Plaintiffs' statement of historical and procedural facts.

SUMMARY OF THE ARGUMENT

Oregon's public trust resources are integral to Oregonians' identity, recreational interests, and economy. These resources are substantially impaired due to climate change and will be further impaired without immediate steps to reduce greenhouse gas emissions.

The judiciary, as a co-equal branch of government with the legislative and executive branches, has a vital role to play in ensuring that the state fulfills its obligation to protect Oregon's public trust resources from climate change. The role of the judiciary is all the more important since the legislative and executive branches have yet to adequately address the dangers posed by climate change, even when given the opportunity to do so.

Oregon has a strong legacy of protecting its natural resources, and the courts have played an integral role in that history. Despite those environmental successes, climate change continues to pose an existential threat to the natural resources Oregonians depend on for their prosperity,

enjoyment, and safety. In order to ensure that Oregon's public trust resources are adequately protected, this Court should reverse the opinion from the Court of Appeals and declare that the State of Oregon has a fiduciary obligation to protect Oregon's public trust resources for present and future generations.

ARGUMENT

I. OREGON'S PUBLIC TRUST RESOURCES ARE AN INTEGRAL PART OF OREGONIANS' CULTURE AND IDENTITY AND ARE CRITICAL FOR RECREATION AND ECONOMIC PROSPERITY

Oregon's public trust resources are a critical component of Oregonians' culture and identity, recreational opportunities, and economy. These resources include the ocean, rivers, wildlife, fish, and the atmosphere. *See, e.g., State v. Dickerson*, 356 Or 822, 834-35, 345 P3d 447 (2015); *State v. Hume*, 52 Or 1, 5, 95 P 808 (1908); *Shively v. Bowlby*, 152 US 1, 11, 14 S Ct 548, 38 L Ed 331 (1892) (affirming *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892)); *Robinson Twp. v. Commonwealth*, 84 A3d 901, 913, 6243 Pa 564 (2014). These natural resources are essential for Oregon communities and residents, and yet, they are being substantially damaged as a result of climate change. This damage is diminishing recreational opportunities, harming the economy, and destroying an integral part of Oregonians' identity.

Oregon's valuable fishing industry has already been compromised by climate change, and will continue to be compromised, unless the state takes action to address climate change. According to the latest data, commercial fishing generated \$570 million in Oregon in 2017.¹ Approximately 11,000 jobs in Oregon are dependent on fishing.² The fishing industry is responsible for nine percent of all net earnings on the Oregon Coast, and in Lincoln County, commercial fishing represents 17 percent of net earnings.³ These figures do not account for industries related to fishing and processing, such as the sale of local catches and shipbuilding.⁴

Recreational fishing is also critical to Oregon's culture and economy. Almost 640,000 people fished in Oregon in 2011, which generated approximately \$640 million of in-state spending.⁵ There were over 5 million days spent recreational fishing in Oregon in 2011.⁶ Oregon's fishing industry has cultural and social significance in addition to its economic importance.

¹ The Research Group, *Oregon Commercial and Recreational Fishing Industry Economic Activity Coastwide and in Proximity to Marine Reserve Sites for Years 2016 and 2017*, Or. Dep't Fish and Wildlife i, II-4 (2018).

² Or. Dep't Fish and Wildlife (ODFW), *Oregon Department of Fish and Wildlife – Agency Overview* 5 (2017)

<https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/110161>.

³ The Research Group at II-4, II-9.

⁴ *Id.* at xi.

⁵ U.S. Fish and Wildlife Service, *2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 1, 101, 109 (2011).

⁶ *Id.* at 108.

Several towns have developed cultural traditions to celebrate fishing, such as Pacific City’s annual “Dory Day Parade” and “Blessing of the Dory Fleet” to celebrate the beginning of the new fishing season.⁷ Fishing for salmon is an essential component of many Native American cultures in the region.⁸ Unfortunately, Northwest fisheries and aquatic life have already been significantly harmed by ocean acidification, climate change, and the resulting warming of the ocean and fresh waters.⁹ We are facing the devastating reality that many rivers in Oregon will soon be too warm to accommodate our treasured salmon, which face threats of significant habitat loss.¹⁰

Oregon’s beaches and coastline are major tourist attractions. The Oregon Coast draws 10 million overnight trips annually, and accounts for 17

⁷ Pacific City, *Blessing of the Dory Fleet*, <http://pacificcity.org/blessing/fleet.html> (last visited July 7, 2019).

⁸ Columbia River Inter-Tribal Fish Comm’n, *Tribal Salmon Culture*, <https://www.critfc.org/salmon-culture/tribal-salmon-culture/> (last visited July 7, 2019).

⁹ See, e.g., Meghan M. Dalton et al., *Third Oregon Climate Assessment Report*, Or. Climate Change Res. Inst. 23-26, 31, 35-39, 40 (2017); Christine May et al., 2 U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment* Ch. 24 Northwest 1036, 1045, 1048-49 (D.R. Reidmiller, C.W. Avery D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, B.C. Stewart eds. 2018); Philip W. Mote et al., *2019: Fourth Oregon Climate Assessment Report: State of the Science*, Or. Climate Change Res. Inst., Jan 2019.

¹⁰ May et al., *Northwest* at 1072.

percent of all money spent on tourism in Oregon.¹¹ Tourism along the Oregon Coast leads to 23,500 jobs and \$2.1 billion in annual revenues.¹² Oregon's rivers are also common sites of recreation and tourist attractions. For example, rafting, fishing, hiking, and jetboating on the Rogue River results in at least \$30 million of economic activity for Oregon, with most visitors coming from out of state.¹³ Climate change and its associated impacts, such as sea-level rise, are resulting in coastal erosion, flooding, the loss of beaches and wetlands, damage to coastal infrastructure, and the degradation of Oregon's rivers.¹⁴ By 2100, over \$750 million in coastal property will be jeopardized by sea level rise.¹⁵ Climate change is expected to reduce recreational activities on rivers, such as boating, due to reduced snowpack, causing less water to be available for these activities.¹⁶

Oregon's wildlife is a source of both economic activity and recreational enjoyment. Oregonians engage in wildlife-related recreation

¹¹ Or. Coast Visitors Ass'n, *2017-2019 RCTP Oregon Coast Plan*, <https://visittheoregoncoast.com/content/uploads/2017/08/2017-2019-RCTP-OREGON-COAST-PLAN-FINAL.pdf> (last visited July 7, 2019).

¹² Or. Tourism Comm'n, *Welcoming the Adventure: 2019-2021 Strategic Plan* (2019) https://industry.traveloregon.com/wp-content/uploads/2019/06/2019-2021-Strategic-Plan-Final_FINAL-2.pdf.

¹³ Ted L. Helvoigt et al., *Regional Impacts of Recreation on the Wild and Scenic Rogue River*, ECONorthwest 1, Jan 2009, https://www.oregonwild.org/sites/default/files/pdf-files/Rogue_Economic_Impact_Report.pdf.

¹⁴ Dalton et al., *Third Oregon Climate Assessment Report* at 31-34, 39.

¹⁵ *Id.* at 35.

¹⁶ May et al., *Northwest* at 1049.

more frequently than do Americans as a whole, with almost half (45%) doing so in 2011.¹⁷ About 1.8 million people engaged in wildlife-related recreation in Oregon in 2011, spending around \$2.7 billion.¹⁸ Wildlife-related recreation is common for tourists, and in seven Oregon counties, 40 percent or more of all travel spending is associated with wildlife-related recreation.¹⁹ Wildlife watching is the most common form of wildlife-related recreation in Oregon, and is responsible for \$1.7 billion in in-state spending.²⁰ An estimated 1.4 million people watched wildlife in Oregon in 2011, including 200,000 people from out of state,²¹ and 7.3 million days were spent wildlife watching away from home in Oregon.²² Forty percent of Oregon residents watched wildlife in 2011, compared to the national average of 30 percent.²³ Wildlife viewing contributes over 40,000 jobs to Oregon's economy.²⁴

Hunting is also popular in Oregon. Nearly 200,000 people hunted in Oregon in 2011,²⁵ accounting for 2.2 million days of hunting activity.²⁶

¹⁷ U.S. Fish and Wildlife Service, at 94.

¹⁸ *Id.* at 95, 96.

¹⁹ Or. Dep't Fish and Wildlife, at 6.

²⁰ U.S. Fish and Wildlife Service, at 94, 97.

²¹ *Id.* at 111-12.

²² *Id.* at 113.

²³ *Id.* at 94.

²⁴ Or. Dep't Fish and Wildlife, at 5.

²⁵ U.S. Fish and Wildlife Service, at 101.

²⁶ *Id.* at 103.

Almost \$240 million was spent on hunting in Oregon in 2011,²⁷ which created just under 4,000 hunting-related jobs.²⁸ Engagement in wildlife is often a family affair. For example, in 2010 approximately 476,000 Oregonian children ages 6 and older participated in wildlife-related recreation.²⁹

Climate change is expected to harm wildlife, with species dependent on snow and species that are already endangered at the greatest risk of harm.³⁰ Wildlife are at an increased risk of falling victim to disease and will adapt their foraging patterns to more intense fire seasons, which have been linked to climate change.³¹ Increased drought will have a substantial effect on waterfowl.³² The geographic range of most bird species is expected to decrease, reducing hunting opportunities.³³ These effects will result in major disruptions to hunting in Oregon.

Oregon's forests and other habitats are also being significantly impacted by wildfires, which are increasingly destructive due to rising temperatures and more frequent drought conditions.³⁴ In 2018 alone, \$62

²⁷ *Id.* at 105.

²⁸ Or. Dep't Fish and Wildlife at 5.

²⁹ U.S. Fish and Wildlife Service, at 126, 127.

³⁰ May et al., *Northwest* at 1048.

³¹ *Id.* at 1050; Mote et al., *Fourth Oregon Climate Assessment Report* at 7.

³² May et al., *Northwest* at 1049.

³³ Dalton et al., *Third Oregon Climate Assessment Report* at 31-34, 39.

³⁴ May et al., *Northwest* at 1045-46.

million in private timberland and grazing land was destroyed by wildfires.³⁵ The state spends millions of dollars a year fighting wildfire. In 2018, a particularly bad fire year, the Oregon Department of Forestry had to borrow money from the state treasury while waiting for a partial reimbursement from the federal government because it was overbudget.³⁶ The state fire marshal's office incurred \$32 million in unbudgeted expenses in 2017 and 2018 from wildfire, and in total, wildfire costs exceeded \$500 million in 2018 alone.³⁷ These costs do not include millions of dollars in lost revenue from tourism and other indirect economic impacts from wildfire. For example, Travel Oregon estimated that Oregon lost \$51 million in tourism revenue in 2018.³⁸

These are just a few examples of how public trust resources are integral to Oregonians' culture, identity, recreational opportunities, and economy. Climate change is already causing significant harm to these public trust resources, and the impacts will only continue to worsen unless

³⁵ Claire Withycombe, *Growing wildfire costs get governor's attention*, East Oregonian, Dec 20, 2018, available at https://www.eastoregonian.com/news/northwest/growing-wildfire-costs-get-governor-s-attention/article_bc55c430-04c3-11e9-aafc-3362e026cb88.html.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

immediate, science-based action is taken to reduce greenhouse gas emissions.³⁹

II. THE OREGON JUDICIARY HAS A CRITICAL ROLE IN ADDRESSING THE URGENT CRISIS OF CLIMATE CHANGE

The judiciary is a co-equal branch of government with the legislature and the executive. *See Smith v. Washington Cty.*, 180 Or App 505, 518 n.8, 43 P3d 1171 (2002), *rev den*, 334 Or 491 (2002); *Comley v. Emanuel Lutheran Charity Bd.*, 35 Or App 465, 475, 582 P2d 443 (1978). Oregon’s constitutional structure gives discrete roles to the different branches. *See Or Const*, Art III, § 1. “The rule of law, which is a foundation of freedom, presupposes a functioning judiciary,” *N.Y. State Bd. of Elections v. Lopez Torres*, 552 US 196, 212, 128 S Ct 791, 169 L Ed 2d 665 (2008) (Kennedy, J. concurring), one that when necessary grants relief against the other branches of government when they violate a party’s legal right.

Oregon’s legislature has not passed legislation to put Oregon’s climate and energy policy in line with atmospheric carbon dioxide levels of 350 parts per million, the maximum level to sustain safe atmospheric

³⁹ *See generally* Dalton et al., *Third Oregon Climate Assessment Report*; May et al., *Northwest*; Mote et al., *Fourth Oregon Climate Assessment Report*.

conditions and to prevent runaway global warming.⁴⁰ Members of Oregon’s legislature have been trying to pass climate legislation for over a decade. Climate bills were introduced in 2009, 2015, 2016, 2017, 2018, and 2019, yet none passed.⁴¹ On matters of such grave import and urgency, Oregon’s courts, in addition to the political branches, have a critical role to play in ensuring that the State is fulfilling its obligation to protect Oregonians’ natural resources and constitutional rights.⁴²

⁴⁰ See James Hansen et. al., *Assessing “Dangerous Climate Change”: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLoS ONE 1, 5 (2013).

⁴¹ OLIS, 2009 Regular Session, SB 80, Measure History; OLIS, 2015 Regular Session, HB 3470, Measure History; OLIS, 2016 Regular Session, SB 1574, Measure History; OLIS, 2017 Regular Session, SB 557, Measure History; OLIS, 2017 Regular Session, HB 2135, Measure History; OLIS, 2018 Regular Session, SB 1507, Measure History; OLIS, 2018 Regular Session, HB 4001, Measure History; OLIS, 2019 Regular Session, HB 2020, Measure History.

⁴² Other state courts have similarly acted to protect legal rights when their states’ legislatures had failed to do so. *See, e.g., Southern Burlington Cty NAACP v. Mount Laurel Tp.*, 92 NJ 158, 212, 456 A2d 390, 417 (1983) (“We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So, while we have always preferred legislative to judicial action in this field, we shall continue-until the Legislature acts-to do our best to uphold the constitutional obligation [present].”).

Here, it is vital that the Court correct the Court of Appeal's holding that the State does not have a fiduciary duty to protect public trust resources, a ruling that conflicts with both U.S. and Oregon Supreme Court precedent. *See, e.g., Geer v. Connecticut*, 161 US 519, 534, 16 S Ct 600, L Ed 793 (1896); *State v. Dickerson*, 356 Or at 835. In order to ensure that Oregon public trust resources are protected from substantial impairment due to climate change, this Court must clarify that the State has an obligation to protect such resources for present and future generations. Absent such a ruling, we can expect that the State will continue to come up short in its efforts to protect Oregon's essential public trust resources.

As defendants concede, "global climate change poses risks to the health of all Oregonians," Excerpt of Record ("ER") 32, and failure to take appropriate action may result in "the collapse of the earth's natural systems leaving a planet that is largely unfit for human life." ER 31. Global climate change is a time-sensitive matter. Effects will be "irreversible" if greenhouse gas emissions are not reduced in the short-term. For example, the Intergovernmental Panel on Climate Change has found that at current rates of emission increases, global temperatures could reach 1.5°C above pre-industrial levels by 2030.⁴³ A 1.5°C increase may be enough to lead to

⁴³ Myles Allen et. al., *Summary For Policy Makers, in IPCC Special Report: Global Warming of 1.5°C* 1, 4 (2018).

“irreversible loss of the Greenland ice sheet,” and the subsequent sea-level rise which would inundate Oregon’s beaches and coastline.⁴⁴ The IPCC found that:

Warming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence). The impacts of 1.5°C of warming would disproportionately affect disadvantaged and vulnerable populations through food insecurity, higher food prices, income losses, lost livelihood opportunities, adverse health impacts and population displacements (medium evidence, high agreement). Some of the worst impacts on sustainable development are expected to be felt among agricultural and coastal dependent livelihoods, indigenous people, [and] children and the elderly⁴⁵

Devastating climate impacts are already occurring in Oregon. Additional warming of 1.5°C, which is “not considered safe,” could occur within just 11 years. The corresponding violation of Plaintiffs’ rights to the benefit of public trust resources will worsen, absent substantial and immediate reductions in greenhouse gas emissions. As a co-equal branch, the judiciary has the authority, and indeed, the responsibility, “to say what the law is,” *Marbury v. Madison*, 5 US 137, 177, 2 L Ed 60 (1803), and protect Plaintiffs’ rights, for the good of all Oregonians.

⁴⁴ *Id.* at 7.

⁴⁵ Joyashree Roy et. al., *Sustainable Development, Poverty Eradication and Reducing Inequalities*, in *IPCC Special Report: Global Warming of 1.5°C* 445, 447 (2018).

Oregon's constitutional structure creates three co-equal branches of government, each endowed with authority concomitant with its role. For the judiciary to protect the rights of the Plaintiffs would be the fulfillment of its responsibility within our system of separate powers. The other branches continue to allow substantial impairment of Oregon's public trust resources, which are vital to our economy and culture. It falls on this Court to mandate that protection, which is urgently needed to avoid the worst effects of anthropogenic climate change and the devastation of natural resources which make Oregon, Oregon.

III. THE OREGON COURTS HAVE HISTORICALLY PLAYED AN IMPORTANT ROLE IN PROTECTING THE ENVIRONMENT

Oregon has a long history of conserving and protecting the environment. Oregon was the first state to pass a "Bottle Bill" to encourage recycling,⁴⁶ to ban CFC spray cans which destroy the ozone layer,⁴⁷ to ban

⁴⁶ See Jennie Bricker, *Water Everywhere*, Or Bar Bull, Feb-Mar 2019 at 17, 20.

⁴⁷ David Doniger & Michelle Quibell, *Back from the Brink: How NRDC Helped Save the Ozone Layer*, Natural Resources Defense Council, Sept 2007, at 3-4.

mercury thermometers,⁴⁸ to pass comprehensive air pollution legislation,⁴⁹ and to provide state-wide funding for bicycle lanes.⁵⁰ The Governor's office is now developing a 100 year plan to protect water access.⁵¹ In addition to these legislative and executive actions, Oregon courts have had an important role in stewarding and protecting some of Oregon's most essential natural resources. *See, e.g., State ex rel. Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969). Oregon's judiciary complements the other two branches of government in environmental protection. It has the "obligation to determine what the law is," *Pendleton School Dist. 16R v. State*, 345 Or 596, 609 (2009), and to require government action on pressing matters, such as climate change, when the law requires it. *See Marbury*, 5 US at 177.

Oregon courts have historically been stalwart defenders of Oregon's natural heritage. For example, in *Hume v. Rogue River Packing Co.*, the Court found that the government could not grant an exclusive right to fish in

⁴⁸ Stephanie Farquhar et. al., *Precautionary Approaches for Health and the Environment: Making the Case for a Toxics Reduction Strategy at Multnomah County and City of Portland*, Sustainable Dev Comm'n 5 (2004).

⁴⁹ Arthur Stern, *History of Air Pollution Legislation in the United States*, 32 J Air Pollution Control Ass'n 44, 44 (1982).

⁵⁰ Or. Dep't Transp., *Oregon Bicycle and Pedestrian Plan* 49 (2016) <https://www.oregon.gov/ODOT/Planning/Documents/OBPP.pdf>.

⁵¹ *See* Or. Dep't Agriculture, *Draft: Preparing a Secure, Safe & Resilient Water Future for All Oregonians* (2018), [https://www.oregon.gov/ODA/AboutUs/Documents/Board%20of%20Agriculture/11-18/10.1.2018-WaterVision%20\(005\).pdf](https://www.oregon.gov/ODA/AboutUs/Documents/Board%20of%20Agriculture/11-18/10.1.2018-WaterVision%20(005).pdf); *see also* Stacey Dalgaard, *A 100-Year Vision for Water*, Or Env'tl Council (2018).

the Rogue River. 51 Or 237, 246, 92 P 1065 (1907). Any such grant would violate the Oregon constitution. *Id.* at 249. The Court relied on the public trust doctrine, finding that the Rogue is navigable, and therefore “a public highway.” *Id.* at 246. It follows that “the grant to one of an exclusive right to fish would not only create a monopoly in one citizen by taking from others a right of citizenship, but would destroy by the same act a right of property vested in each.” *Id.* at 259. The Court in *Hume* utilized Oregon’s constitutional tradition to protect its citizens’ historic right to fish in public waters.

Oregon’s courts have also used traditional common law devices such as torts to protect the environment. In *Lunda v. Matthews*, a cement plant was polluting the land of a nearby property owner, causing, *inter alia*, “physical discomfort and mental distress,” 46 Or App 701, 704, 613 P2d 63 (1980), and forcing the owners to remain inside during the day, *id.* at 707. Not only did the Court award damages, *id.* at 704, 711, but it also issued an injunction against the plant, requiring that it change what hours it operates, *id.* at 711, reasoning that the plant’s actions amounted to a trespass, *id.* at 705. *Lunda* is just one example of the Oregon courts exercising their equitable powers in a manner that protects essential natural resources for all Oregonians. *See also Smith v. Wallowa Cty*, 145 Or App 341, 344, 929 P2d

1100 (1996) (affirming an injunction against an asphalt plant whose operation had caused pollution and health effects among nearby residents).

In *State ex rel. Thornton v. Hay*, this Court relied on Oregonians' historical practice of using the dry-beach to find that the state could prevent a private property owner from building fences to stop the public from accessing the beach. 254 Or at 585, 595. Citing traditions dating back to the pre-colonial period, *id.* at 588, the Court found a "custom" substantial enough to create a legally enforceable right in the general public. Even though "custom" had not previously been a source of legal right in Oregon, *see id.* at 597, the Court nonetheless used the doctrine to protect public beach access. As a result of *Hay*, Oregon has comparably strong protections for public beach access, and "the custom doctrine as applied to beach rights" has been revived in other states.⁵²

Oregon courts' have repeatedly upheld the actions of the state government in fulfilling their duty to preserve natural resources. For example, in *Boise Cascade Corp. v. Bd. of Forestry*, the state had sought to limit the plaintiffs' logging activities because of the presence of spotted owls in the area. 216 Or App 338, 340, 174 P3d 587 (2007), *rev den*, 344 Or 390 (2008), *cert den*, 555 US 828 (2008). The plaintiffs challenged the state's

⁵² Steven W. Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches*, 77 Or L Rev 913, 913-15 (1998).

actions on the grounds that they amounted to a taking. *Id.* The Oregon Court of Appeals found that there was no violation of the Takings Clause, *id.* at 355, thus maintaining the state government's freedom to take action necessary for the preservation of Oregonian treasured wildlife, such as the spotted owl.

Environmental protection has never historically only been the purview of the legislative or executive branches. Oregon would not be one of the nation's leading states for environmental protection if not for the active role its judiciary has played. The judiciary must continue in its role as an independent interpreter of the law, correct the erroneous decision by the Court of Appeals, and make clear that the State of Oregon has a fiduciary obligation to protect Oregon's public trust resources. Absent such a ruling, the natural resources that Oregon has done so much to protect over the years, which are already being impaired by climate change, will be lost to future generations.

CONCLUSION

This Court should reverse the Court of Appeals and hold that the State of Oregon has a fiduciary duty to protect all of Oregon's public trust resources, including the waters of the state, fish and wildlife, and the atmosphere, from climate change.

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Respectfully submitted,

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