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; KESLEY CASCADIA ROSE JULIANA, a minor and resident of Lane County, Oregon, CATHY 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 the STATE OF OREGON, Defendants-Respondents,
Respondents on Review

Lane County Circuit Court No. 16-11-09273

Court of Appeals No. A159826

Supreme Court No. S066564

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

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

Opinion by Armstrong

Continued . . .

JULY 2019

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AMICI CURIAE

Pursuant to ORAP 8.15, 107 law professors and scholars from law schools across the United States and the world respectfully apply to appear before the Court of Appeals as *amici curiae*. We have taught law school for a combined total of well over 1000 years and were ably assisted in preparing this brief by Lewis and Clark Law School student, Mitch Thielemann, and Faculty Legal Assistant, Ronna Craig.

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I. Interest of Amici and Summary of the Argument

This case presents an issue of irrevocable consequence to young Oregonians: whether the state's public trustees must protect the right to a stable climate system necessary to support their survival. Scientists warn that flooding the atmosphere with continued greenhouse gas pollution will push the planet into a state not broadly habitable to human beings and other species.[1] This widely recognized "direct existential threat,"[2] worsening for decades, now poses an emergency, as looming climate tipping points are poised to trigger runaway heating beyond

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[1] *See generally* David Wallace-Wells, *The Uninhabitable Earth: Life after Warming* (2019); David Wallace-Wells, *Jared Diamond: There's a 49% Chance the World As We Know it Will End by 2050*, New York Magazine (May 10, 2019) (discussing Jared Diamond's new book, Upheaval); Jonathan Watts, *UN Assessment Report 2019, Human Society Under Urgent Threat From Loss of Earth's Natural Life*, The Guardian (May 6, 2019) (summarizing UN 2019 Assessment); *World is "On Notice" as Major UN Report Shows One Million Species Face Extinction,* UN News (May 6, 2019).

[2] *See, e.g.,* Brian Pascus, *Human Civilization Faces "Existential Risk" by 2050 According to New Australian Climate Change Report,* CBS News (June 4, 2019) ("'climate change now represents a near-to mid-term existential threat' to human civilization," quoting Australian report); *see also id*. (interview with Bill McKibben, author of *Falter: Has the Human Game Begun to Play Itself Out?* (explaining risk of human extinction from climate change, which could "devastate civilization as we know it."); Edith M. Lederer, *UN Chief: World Must Prevent Runaway Climate Change by 2020,* Associated Press (Sept 10, 2018) (quoting UN Chief stating that world faces a "direct existential threat" and must begin the shift from fossil fuels by 2020 to prevent "runaway climate change.").

humanity's control.[3] No other case in the judicial history of this state has presented higher stakes for the future of Oregon and its citizens.

Oregon already suffers widespread damage from climate disruption in the form of wildfires, extreme drought, algae blooms, water temperatures that violate Clean Water Act standards and threaten the state's world-class fisheries, ocean acidification destroying oyster farms and marine resources, and sea level rise. Yet more than a decade has lapsed since the Oregon state legislature declared climate action goals in 2007. For the last dozen years, state trustees have passively let the climate crisis steadily worsen while failing to address the state's greenhouse gas pollution.

As a sovereign, Oregon holds an inalienable public trust duty towards its citizens to protect the resources supporting their survival and welfare. It shares this role with other sovereigns, as a co-trustee of the global atmosphere. As a public trustee, the state has an affirmative fiduciary obligation to help protect and restore

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[3] *See Earth at Risk of Heading Towards "Hothouse Earth" State*, Science Daily (Aug 6, 2018) (quoting co-author of study published in the Proceedings of the National Academy of Sciences: "These tipping elements can potentially act like a row of dominoes. Once one is pushed over, it pushes Earth towards another. It may be very difficult or impossible to stop the whole row of dominoes from tumbling over. Places on Earth will become uninhabitable if "Hothouse Earth" becomes the reality."); *Secretary-General's remarks on Climate Change [as delivered]*, United Nations, (September 10, 2018), *available at* https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered (describing climate "emergency" and warning, "We are careening towards the edge of the abyss.").

the atmosphere that remains vital to all life, society, and economic activity in the state. The federal district court of Oregon has recognized a fiduciary public trust duty incumbent on the federal government to protect the climate system in *Juliana v. United States*.[4] Plaintiffs in this case ask this Court to affirm the same obligation as to state officials as trustees of the State's resources.[5]

This lawsuit seeks a judicial remedy to bring the state into compliance with the fundamental rights of youth citizens as beneficiaries of the public trust. Specifically, plaintiffs ask the court to order state trustees to devise a plan to abate this state's contributions to atmospheric greenhouse gas pollution. The remedy falls well within the tradition of judicial equitable relief granted in the past to

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[4] The case, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D Or. 2016) now on appeal to the Ninth Circuit Court of Appeals, is discussed in subsequent sections below. In addition to finding a public trust duty, the *Juliana* court decided the government violated the youth's fundamental right to due process under the U.S. Constitution, not at issue here.

[5] The case is part of a growing field of Atmospheric Trust Litigation (ATL) comprised of cases filed by citizens around the world against governments seeking to hold them accountable for climate protection. See Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit:" Climate Change, Due Process, and the Public Trust Doctrine*, 67 American U L Rev 1 (2017). Although the climate crisis is a global problem, the inability of any one sovereign to solve the entire global crisis does not relieve that sovereign of a duty to act. *Massachusetts v. EPA*, 549 US 497, 525, 127 S Ct 1438, 1458 (2007) ("Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.").

redress school segregation, discriminatory land use, treaty rights violations, prison overcrowding, unfair housing practices, and educational funding.

The matter cannot be left for another day. As a Washington trial court found in a parallel atmospheric trust litigation (ATL) case, "[i]n fact, as [youth] Petitioners assert and this court finds, their very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming by accelerating the reduction of emissions of GHG's before doing so becomes first too costly and then too late."[6]

Astonishingly, the decisions below deny that the State of Oregon has a duty to protect the life and health of its citizens against destabilizing climate conditions. The decisions essentially sanction the State's apparent willingness to "sleepwalk into disaster."[7] They question the role of the judiciary in compelling the political branches of State government to at least have a plan for securing a livable atmosphere necessary to the future habitability and political stability of this State. The lower courts chose to disregard the scope of the State's 160-year old public trust doctrine, overlooking numerous interpretations of this Court. Their holdings would transform the state's venerable and reasoned doctrine into a profound outlier

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[6] *Foster v. Washington*, No. 14-2-25295-1 SEA, at *4–5 (Wash Super Ct, Nov 19, 2015).

[7] See Anne C. Mulkern, *Climate Forecast: World is "Sleepwalking into Catastrophe,"* Scientific American (Jan 17, 2019) (quoting World Economic Forum Global Risks Report).

in public trust jurisprudence. Most alarming, the decisions, if allowed to stand, would discard the rule of law when it is most needed.

As professors who write and teach natural resources law, with over a collective 1000 years in law school teaching, we have a keen interest in providing an accurate understanding of the origins, purposes, and scope of the public trust doctrine in Oregon, a state with a long history of judicial protection of public rights. Because the lower courts in this case failed to examine the purposes of the doctrine or understand its scope, we urge this Court to reverse.

We first explain the roots of the public trust and describe its longstanding role in American jurisprudence. We then turn to this State's public trust doctrine, constitutionally embedded in the Statehood (or Enabling) Act, and the subject of numerous affirming interpretations over the years by this Court. We subsequently urge this Court to correct the trial court's errors construing the scope of the trust and affirm the doctrine's applicability to the vital natural resources of the State, as the State has acknowledged in other litigation. We then explain the affirmative fiduciary obligations inherent in the public trust and conclude by underscoring the judicial role in this time of a climate emergency.

II. The Origins of the American Public Trust Doctrine and its Role in Modern Jurisprudence

The public trust is a foundational principle of legal systems, affirmed many times by the U.S. Supreme Court and reflected in constitutions and statutes around

the world.[8] At times referred to as "the law's DNA,"[9] this principle requires government to hold vital natural resources in trust for the public beneficiaries—both present and future generations. *Illinois Central Railroad Co v. State of Illinois*, 146 US 387, 455, 13 S Ct 110, 119 (1892); *Geer v. Connecticut*, 161 US 519, 525–529, 16 S Ct 600, 603–604 (1896) (detailing ancient and English common law principles of sovereign trust ownership of air, water, sea, shores, and wildlife and stating: "[T]he power or control lodged in the State, resulting from the common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people . . . .").[10] The doctrine protects reserved, inalienable property rights held by the public in crucial resources from monopolization or destruction by private interests and gives force to the expectation—central to the purpose of organized government—that natural resources essential for survival will remain abundant, justly distributed, and passed on to future generations.

American courts, including this Court, routinely trace the public trust to the beginnings of human civilization and legal systems. *Corvallis Sand & Gravel Co*

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[8] *See* Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (Carolina Press, 2d ed 2015) (compiling cases and statutes).

[9] *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J L Pol'y 281, 283–85 (2014).

[10] The *Geer* case was overruled on other grounds by *Hughes v. Oklahoma*, 441 US 322, 99 S Ct 1727 (1979).

v. State, 250 Or 319, 335, 439 P2d 575, 582 (1967) (the principle "derives from the ancient prerogative of the Crown"). The essential public rights protected by the trust first appeared in the Institutes of Justinian, which declared: "By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea." *Justinian Institutes*, § 2.1.1 (T. Sandars ed., 4th ed 1867).[11] Because this Roman law informed legal systems worldwide, reflections of the public trust doctrine are widely evident in various countries' legal traditions–so much so that the principle might qualify as international customary law. The principle found its way into English common law through the writings of Sir Matthew Hale[12] and became part of American jurisprudence in the foundational case, *Arnold v. Mundy*, 6 NJL 1, 1821 WL 1269 (NJ 1821), a decision with reasoning soon adopted by the U.S. Supreme Court in *Martin v. Waddell's Lessee*, 41 US 367, 389–391, 16 Pet 367 (1842). The *Martin* Court clarified that public trust property was "not . . . to be interpreted by rules applicable to cases [interpreting private conveyances]" because the public trust was "founded on the institutions of a great political community, and in that light should be regarded and construed." *Id.* at 406. *Martin* therefore decided that the doctrine compelled

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[11] *See Environmental Law Foundation v. State Water Resources Control Bd*, 26 Cal App 5th 844, 856–862, 237 Cal Rptr 3d 393, 399–405 (2018) (applying public trust and describing its "ancient Roman roots.").

[12] *See* Michael C. Blumm & Courtney Engle, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to* Lamprey *and Oswego Lake,* 43 Vermont L Rev 1, 6–10 (2018) (tracing history of the public trust doctrine).

judicial recognition of "a public common of piscary" (fishery), as had been recognized for 600 years in English law. Such public right burdened the proprietors of the New Jersey colony and subsequently the state of New Jersey as successors of the British Crown. *Id.* at 412–416. The Court recognized this "high prerogative trust" or "a public trust" as "incident to the powers of government" and imposing "a duty in the government" to protect the public right of fishery. *Id.* at 413. Described by the Court as an incident of sovereignty itself, the public trust imposed duties on the state to maintain the common piscary against private monopoly, leading the Court to reject a private claim to oyster beds.

Fifty years after *Martin*, the Court reaffirmed the doctrine in the seminal public trust case, *Illinois Central Railroad Co. v. State of Illinois*.[13] There the Court declared that Lake Michigan's Chicago Harbor and its underlying land was "held in trust for the people of the state" and could not be privatized by the state legislature. 146 US at 452–453. Because public rights in the resource were inalienable, the Court invalidated a legislative grant of the harbor to a private railroad company, ruling that the state legislature lacked authority to make such a conveyance of public trust lands. Justice Field explained that a contrary rule would "place every harbor in the country at the mercy of a majority of the

[13] The *Illinois Central* opinion appears in law casebooks around the country and indeed, around the world. It is over 70 pages long. We provide a textbook excerpt of the relevant portions as Appendix A of this brief.

legislature of the state in which the harbor is situated." *Id.* at 455. The Court made clear that the trust imposed limitations on legislatures:

> The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.

Id. at 460.

The premise anchoring the public trust is that citizens reserve public ownership of crucial resources as a perpetual trust to sustain themselves and future generations. Such reserved public property rights to crucial resources remain fundamental to the democratic understandings underlying all government authority. As the U.S. Supreme Court said in *Illinois Central*, private monopolization of essential resources "would be a grievance which never could be long borne by a free people." *Id.* at 456. The public trust is characteristically explained as an attribute of sovereignty that government cannot shed. See*, e.g.*, *Geer*, 161 US at 527 (describing the sovereign trust over wildlife as an "attribute of government"); *Shively v. Bowlby,* 152 US 1, 46, 14 S Ct 548, 565 (1894) (affirming this Court's decision in *Bowlby v. Shively*, 22 Or 410, 427–428, 30 P 154, 160 (1892)) (stating that the tidelands trust "is regarded as incidental to the sovereignty of the state."). Announcing the constitutional force of the public trust doctrine, the *Illinois Central* Court declared, "[t]he state can no more abdicate its

trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . . ." *Illinois Central,* 146 US at 453. As one federal district court observed, "[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." *United States v. 1.58 Acres of Land*, 523 F Supp 120, 124 (D Mass 1981). In a 2013 case decided by the Pennsylvania Supreme Court that overturned a law passed by the state legislature to promote fracking across the state, the plurality opinion described the trust as embodying the "inherent and indefeasible" rights of citizens reserved through their social contract with government. *Robinson Township v. Pennsylvania*, 623 Pa 564, 642, 83 A3d 901, 948 (2013); *see also id*. at 640 (describing such rights as "of such 'general, great and essential' quality as to be ensconced as 'inviolate.'" (quoting Pa Const, Art 1, § 25)). Although the Pennsylvania Constitution contains a specific public trust provision (Pa Const, Art I, § 27), the *Robinson* opinion made clear that the state constitution created no new rights, but instead enumerated pre-existing rights that the people had reserved to themselves in creating government.[14] Notably, Article I,

[14] The reasoning of the *Robinson* plurality was later reaffirmed by a majority of the Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth,* 640 Pa 55, 98, 161 A3d 911, 937 (2017) (legislature's redirection of funds generated by state lands violated the public trust doctrine).

section I of the Oregon Constitution secures the same reserved rights of citizens, through its reservation of "natural rights inherent in people."[15]

Unlike the police power, which enables government, the public trust limits government and imposes affirmative management duties over trust property. Although modern statutes enacted pursuant to police power dominate many environmental issues, the public trust principle runs deeper than statutes, carrying constitutional force as described above. *See also Kootenai Environmental Alliance, Inc v. Panhandle Yacht Club, Inc*, 105 Idaho 622, 632, 671 P2d 1085, 1095 (1983) ("Mere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.").

The foundational 19th century decisions discussed above remain alive in the 21st century, and the Supreme Court has frequently relied on them.[16] Over time, the public trust has steadily expanded to meet the needs of modern society. Emphasizing the nature of the doctrine as "not fixed or static," but one to "be

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[15] Or Const, Art I, § 1 provides: "*Natural rights inherent in people*. We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority . . . ."

[16] See, e.g., *PPL Montana v. Montana,* 565 US 576, 604, 132 S Ct 1215, 1235 (2012) (citing *Shively v. Bowlby*, 152 US 1, 14 S Ct 548 (1894)); *Tarrant Regional Water Dist. v. Hermann*, 569 US 614, 631, 133 S Ct 2120, 2132 (2013) (quoting *Martin*, 16 Pet at 410).

molded and extended to meet changing conditions and needs of the public it was created to benefit," *Matthews v. Bay Head Imp Ass'n*, 471 A2d 355, 365, 95 NJ 306, 326 (NJ 1984), modern courts now apply the public trust to a broad array of public resources.[17]

Two landmark atmospheric trust cases have called upon these inherent fundamental public trust rights reserved by citizens to find that youth hold a constitutional right to a stable climate system. In 2015, a Washington court ruled that the state has a duty to regulate greenhouse gas pollution, holding that the "fundamental and inalienable rights" protected by Article I of that state's constitution included a right to "preservation of a healthful and pleasant atmosphere." *Foster v. Dept of Ecology*, 2015 WL 7721362 at *4 (Wash Super Ct, Nov 19, 2015) ("The enumeration of certain rights shall not be construed to deny others retained by the people," quoting Wa Const, Art I, § 30). Concluding that the State had a "responsibility to protect" the fundamental constitutional environmental right embedded in Article I, the court stated:

> If ever there were a time to recognize through action this right to preservation of a healthful and pleasant atmosphere, the time is now. . . . "Climate change is not a far off risk. It is happening now globally and the impacts are worse than previously predicted, and are forecast to worsen . . . ."

[17] *See* Blumm & Wood, above note 8, at 7.

Foster, 2015 WL 7721362 at *4 (quoting a Department of Ecology report). The *Foster* court also found a constitutional public trust doctrine embodied in Article XVII of the Washington Constitution, which declares state ownership of the beds and shores of navigable waters and states that "the State has a constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people of the State." *Id.* at *4.[18] Recognizing that the atmosphere and submerged lands remain inextricably connected (". . . to argue that GHG emissions do not affect navigable waters is nonsensical. . ."), the court held that Article XVII also requires government to protect the atmosphere. *Id.* As elaborated below, the same constitutional analysis should hold in Oregon, which owns in trust for the people navigable waterways and their beds that have been damaged by unregulated atmospheric pollution.

On November 10, 2016, the federal District Court of Oregon in *Juliana v. United States* denied the federal government's attempt to dismiss a suit brought by twenty-one youths who claimed that the government's fossil energy fuel polices violated their public trust rights. The court agreed that the public trust doctrine was an "attribute of sovereignty" that "predated the constitution" and imposed a limit on governmental authority. *Juliana v. United States,* 217 F Supp 3d 1224, 1252–

[18] The subsequent chronology of this case focused on the appropriate remedy. *Foster v. Ecology*, No. 75374-6-I, 200 Wash App 1035, (Wash Ct App Div 1, Sept 5, 2017); *Aji P v. Washington*, No 18-2-04448-1SEA, 200 Wash App 1035 (Wash Super Ct, Aug 14, 2018) (unpublished opinion) (denying new claims).

1253, 83 ERC 1598 (D Or 2016). *Juliana* interpreted the public trust to be implicit in, and enforceable through, the due process provision of the federal constitution, as it was "'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty.'" *Id.* at 1249, 1261 (citation omitted). The court expressed "no doubt that the right to a stable climate system capable of supporting human life is fundamental to a free and ordered society." *Id.* at 1250. Several courts in other countries have also found a fundamental right held by youth and citizens to a stable climate system.[19]

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[19] *See Urgenda Foundation v. State of Netherlands*, HA ZA 13-1396 (District Court of the Hague, Jun 24, 2015; *aff'd* in The Hague Court of Appeal, Oct 9, 2018) (on appeal to Supreme Court of the Netherlands) (ordering government to reduce greenhouse gas emissions by 20% below 1990 levels by 2020), http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/); *In Historic Ruling, Colombian Court Protects Youth Suing the National Government for Failing to Curb Deforestation*, Dejusticia (April 5, 2018), *available at* https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/ (Supreme Court of Colombia ordering the government to produce plan in four months to reduce Amazon deforestation contributing to greenhouse gas emissions); Blumm & Wood, above note 5, at 82 (discussing ruling from Pakistan Lahore High Court finding that climate inaction violated fundamental rights protected by public trust principle and constitution and creating administrative judicial apparatus to supervise government action in remedial phase of litigation). *See also* Melanie Burton, *Australian Court Bars New Coal Mine Project in Landmark Win for Green Lobby*, Reuters (Feb. 7 2019) (citing "dire" consequences of emissions associated with further coal development). *The Gloucester Resources Limited v. Minister for Planning,* NSWLEC 7 (Austl 2019), https://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f#_Toc431221; *see id***.** para 415 (discussing burden of climate harms on future generations). For summary and update of international decisions, *see* Laura Parker, *Kids Suing*

III. The Oregon Public Trust Doctrine

The public trust doctrine has a long history and deep pedigree in Oregon that was completely ignored by the lower courts. They failed to grasp settled principles that Oregon courts have continually invoked to protect the state's natural resources and assure public access to them for multiple generations of Oregonians since statehood.

A. Origins

As an attribute of sovereignty, the public trust came embedded in the sovereign architecture of Oregon when it entered the nation. As numerous courts have found, the public trust remains a part of the rights that the citizens reserved in creating their state government. The Oregon public trust doctrine was embraced, although not established, in the Statehood (or Enabling) Act, created to protect free-flowing navigable waters against private monopoly. That Act pledged to the Union and to Oregonians that "navigable waters . . . shall be common highways and forever free." An Act: For Admission of Oregon into the Union (Oregon Statehood Act), 11 Stat 383, ch 32, § 2 (1859). The purpose of section 2 of the Statehood Act, drawn from the Northwest Ordinance of 1787,[20] was to ensure that

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Governments About Climate: It's a Global Trend, Nat'l Geographic (June 26, 2019).

[20] 32 *Jnls Cont Cong 1774-1789* 334 (Library of Congress ed 1936) ("The navigable waters . . . shall be common highways, and forever free . . . .").

waterways of importance to the Oregon public would continue to remain available for public use, not monopolized by private interests.

This Court's recognition of the State's public trust doctrine was evident as early as 1869, in a case involving log floats on the Tualatin River. This Court ruled that the floats did not constitute a trespass over privately owned streambeds, even when operators installed log booms on private uplands where necessary for log-float navigation. *Weise v. Smith,* 3 Or 445, 450, 1869 WL 614 at *4 (1869) (stating that navigable waters are "public highways" that the public had "an undoubted right to use . . . for all legitimate purposes of trade and transportation"). That same year, this Court decided that public rights in State waters extended to streams that were not navigable year-round. *Felger v. Robinson*, 3 Or 455, 457–58, 1869 WL 616 at *2–3 (1869). This Court's expansive interpretation of Oregonians' rights to use "forever free" waterways that are "public highways" has continued since.[21]

B. The Evolution of Oregon's Public Trust Doctrine

A century ago, this Court confirmed that the Statehood Act guaranteed public access to navigable waters, preserving "the *jus publicum* including the public right of navigation and fishery." *Johnson v. Jeldness*, 85 Or 657, 661, 167 P 798 (1917).

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[21] The case law is discussed in Michael C. Blumm & Erika A. Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches,* 42 Envtl L 375, 386–94 (2012).

The very next year, in *Guilliams v. Beaver Lake Club*, 90 Or 13, 27, 175 P 437 (1918), this Court made clear that the *jus publicum* encompassed recreational uses and extended well beyond those waters meeting the federal navigability-for-title test to include all waterways capable of recreational boating. This Court explained, "we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure." *Id.* Adopting an approach that this Court should not now abandon, the *Guilliams* Court expressly rejected an interpretation that would confine the public trust to history's needs. The Court emphasized that the scope of public rights was elastic, because waterbodies capable of supporting recreational watercraft could change over time: they were "subject to the will of man." Accordingly, this Court extended public trust protection to "sailing, rowing, fishing, fowling, bathing, skating . . . and other public uses *which cannot now be enumerated or even anticipated*." *Id.* at 29 (quoting *Lamprey v. Metcalf*, 52 Minn 181, 200, 53 NW 1139, 1143 (1893)). Beyond recognizing that the trust would protect emerging modern interests, *Guilliams* extended public rights to private river beds, explaining "whatever may be the title of the bed of such stream or bodies of water, [private riparian landowners] do not own the water itself, but only the use of it as it flows past their property." *Id.* at 26. In effect, this Court, over one-hundred years ago, recognized that the public trust in public resources trumped private property claims.

This Court decided in *Guilliams* that a stream was subject to public trust rights even if it was not suitable for large-scale commerce, so long as it was capable of flotation by small craft. *Id.* at 18–19, 29 (extending to navigable streams "capable of use for boating, even for pleasure."). This Court helped lead other courts to adopt the "pleasure-boat test" for navigable waters, now the dominant state rule today. Harrison C. Dunning, *Waters Subject to the Public Right,* 2 Waters and Water Rights § 32.03 (Amy L. Kelley, ed, 3rd ed 2014).

This Court reaffirmed *Guilliams* less than two decades later in *Luscher v. Reynolds*, 153 Or 625, 636, 56 P2d 1158, 1162 (1936), upholding the public's "paramount" right to recreate in Blue Lake, a lake with privately owned submerged lands. *Luscher* announced a "broad and comprehensive reading" to construe waters subject to public rights, adopting a liberal construction that included privately owned lakebeds. *Id.* at 635.

Luscher reiterated the forward-looking focus of *Guilliams,* agreeing that "[t]o hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent to which cannot, perhaps, be now even anticipated." *Id.* (borrowing from *Lamprey v. Metcalf*, 52 Minn 181, 200, 53 NW 1139 (1893)). This Court explained that public rights are "not limited to navigation for pecuniary profit . . . [because] there are hundreds of similar, small inland lakes in this state adapted for recreational

purposes, but which will never be used as highways of commerce in the ordinary acceptation of those terms." *Id.* at 635.

Thus, both *Guilliams* and *Luscher* long ago made clear that Oregon's public trust doctrine was not a static one.

Ignoring this history, the Circuit Court in this case opined that the State's public trust doctrine extended only to submersible and submerged lands that the State gained at Statehood. That interpretation is clearly erroneous. The State's waters, air, fish and wildlife, shorelands, and beaches are all subject to sovereign ownership held in trust for the benefit of the people of Oregon. The State has a fiduciary obligation to protect both public lands and the public's non-possessory usufructuary rights in these natural resources, as we explain below.

IV. The Proper Scope of the Oregon Public Trust Doctrine

Guilliams' rejected a narrow interpretation of the Oregon public trust doctrine that could work "a great wrong upon the public for all time, the extent of which cannot . . . be now even be anticipated." *Guilliams,* 90 Or at 29. This wise advice from this Court's predecessors a century ago—judges who could not have possibly anticipated the potentially cataclysmic consequences of climate change—holds even more force today, as the world enters a climate future unknown to

humankind.[22] Judge Rasmussen issued what may be the most restrictive interpretation of the public trust in the country, propounding a view inconsistent with a fair reading of Oregon statutes and jurisprudence. Beyond misapplying the case law, the Circuit Court below used precedent to straightjacket, rather than inform, the common law's evolution as society confronts new threats, contravening this Court's wisdom expressed in the water law case, *In re Hood River*, 114 Or 112, 180–181, 227 P 1065, 1086–1087 (1924):

> The very essence of the common law is flexibility and adaptability. It does not consist of fixed rules but it is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life. . . . If the common law should become . . . crystallized . . . it would cease to be the common law of history, and would be an inelastic and arbitrary code. [O]ne of the established principles of the common law [is] that precedents must yield to the reason of different or modified conditions.

Public trust protection should not now be haphazardly withdrawn as to any vital natural resource. The *Illinois Central* Court indicated that the trust obligation extended to "property in which the whole people are interested," encompassing all natural resources of "public concern." *Illinois Central*, 146 US at 453. This focus has guided courts in greatly expanding the scope of the public trust to meet modern exigencies. *See Environmental Law Foundation v. State Water Resources Control*

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[22] Carbon dioxide levels (at 415 ppm) are higher than any level in human history and even higher than any time in the past 800,000 years. James Griffiths, *There is More CO2 in the Atmosphere Today Than Any Point Since the Evolution of Humans,* CNN (May 13, 2019) ("We don't know a planet like this.") (quoting meteorologist Eric Holthaus).

Bd, 26 Cal App 5th 844, 857, 237 Cal Rptr 3d 393 (2018) ("The doctrine is expansive. . . . [T]he concept of a public use is flexible, accommodating changing public needs.").[23] In *Juliana*, the court referred broadly to the "natural resources trust," describing the scope of the doctrine as extending to "resources important enough to the people to warrant public trust protection." *Juliana*, 217 F Supp 3d at 1254. Unquestionably, surface waters and groundwater, shorelands and tidelands, air and atmosphere, fisheries and wildlife, public lands, and the climate system all meet the "public concern" test announced in *Illinois Central*. We address these resources specifically below, but first we underscore the State's position embracing the full scope of the Oregon public trust in an ongoing case.

In 2018, the State filed a complaint against Monsanto Company for widespread damage caused by PCB contamination across the state's natural environment. The State explicitly brought the action "in its sovereign capacity as trustee *for all natural resources within its borders*, which it holds and protects for the benefit of all Oregonians." Complaint at 4, para 9, *State of Oregon v. Monsanto Co*, Mult Co Circuit Court No. 18-cv-00540 (Jan 4, 2018) (emphasis added). Throughout the complaint, the State Attorney General asserted the State's public trust ownership and responsibility towards all natural resources in the State:

> The State holds in trust for the public the bed and banks, and waters between the bed and banks, of all waterways within the State. *By virtue of its public*

[23] Cal App 3 Dist, *rev den* (Nov 28, 2018).

> *trust responsibilities, all such lands are to be preserved for public use* in navigation, fishing and recreation. *The State is also the trustee of all natural resources—including land, water, wildlife, and habitat areas*—within its borders. As trustee, *the State holds these natural resources in trust for all Oregonians—preserving, protecting, and making them available to all Oregonians to use and enjoy* for recreation, commercial, cultural, and aesthetic purposes.

Id. at 5, para 10 (emphasis added). *See also, e.g.*, *id.* at 7, para 21 (iterating state's "role as trustee of public trust resources, including fish and wildlife."); *id.* at para 86 ("The State . . . owns or holds in trust for the benefit of the public" public lands, navigable and tidally influenced waters, and "remaining surface and groundwater, from all sources of supply and prior to capture"); *id.* at 33, para 87 ("in its capacity *as trustee of all natural resources* situated within its borders, the State has the authority to protect and preserve for the benefit of the public, those natural resources, including public waters, from impairment and harm.") (emphasis added); *id.* at 42, para 111 (presence of PCBs "further interferes with the interests of the general public in the preservation of Oregon's natural resources–including fish, wildlife, and habitat–which the State is *obligated to hold in trust* for the benefit of, and for use by, members of the general public.") (emphasis added; a third amended complaint filed by the state on July 9, 2019, contains the same language).

The State Attorney General's position in the *Monsanto* case accurately restates the State's inalienable role as public trustee of all natural resources within

Oregon. It also glaringly conflicts with the Attorney General's position in this case –that the trust reaches to only streambeds and "title-navigable" waters.[24] By propounding an ill-considered and unfounded legal position in this case, the Office of the State Attorney General is jeopardizing the public's ability to recover damages in both the *Monsanto* case and in potential future litigation, itself notably abdicating responsibility over public trust resources. *See Illinois Central*, 146 US at 452-453, 455-456. ("Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public.")

The Oregon public trust doctrine protects the public's interest through the state's sovereign ownership of water, fish and wildlife, shorelands, beaches, and the atmosphere, as explained below. The Court of Appeals refused to review the part of Judge Rasmussen's holding that eviscerates the scope of the public trust. Leaving this deeply flawed ruling in place would make Oregon an outlier in public trust jurisprudence. We urge this Court to correct the Circuit Court's errors.

A. Water

The trial court refused to find water as a trust resource, repudiating a century of Oregon case law and Oregon statutes. As mentioned above, this Court's 1918

[24] The State acknowledged in this case that "title navigable" waterways themselves—not just riverbeds and lakebeds—are trust resources, although the Court of Appeals refused to address the legal grounds for this concession. *Chernaik v. Brown*, 295 Or App 584, 594–95, 436 P3d 26, 32 (2019).

Guilliams decision recognized sovereign ownership of all waters used by the public despite underlying private ownership of submerged lands. *Guilliams,* 90 Or at 26 ("Whatever may be the title to the bed of such streams or bodies of water . . . [private owners] do not own the water itself but only the use of it as it flows past their property."). In 1892, the US Supreme Court expressly recognized public ownership of water. *Illinois Central,* 146 US at 455–456 ("The ownership of the navigable waters and of the land under them, is a . . . subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated . . . .").

The Oregon legislature announced public ownership of water in the Oregon Water Code of 1909, declaring "[a]ll water within the state from all sources of water supply belong to the public," Or Laws 1909, chapters 319, 370 (1909). The legislature reiterated state sovereign ownership of water a century later. Or Laws 2009, chapters 3237, 3238 (codified at ORS § 537.110) (2009); see also ORS § 537.334(2) (1987) (authorizing public instream rights that "shall not diminish the public's rights in the ownership and control of the waters of this state or the public trust therein."). State ownership clearly extends to groundwater. ORS § 537.525. The lower court's exclusion of water from Oregon's public trust doctrine not only repudiates these statutes, it also breaches the statehood promise that the state's waterbodies remain "forever free." 11 Stat 383 (1859).

B. Fish and Wildlife

The State clearly owns the fish and wildlife within its boundaries in a sovereign capacity, as recently held by this Court in *State v. Dickerson,* 356 Or 822, 833, 345 P3d 447, 454 (2015) (citing numerous cases and the legislature's codification in ORS § 498.002(1) that "[w]ildife is the property of the state"). In fact, by 1920 this Court had affirmed on at least five occasions that the state was sovereign owner of wildlife as trustee for the public.[25]

The *Dickerson* result, ignored by the Circuit Court, was unremarkable, as it encapsulated a settled understanding of the public trust in wildlife as far back as the U.S. Supreme Court's decision in *Geer v. Connecticut,* in which the Court held that the state must exercise its authority over common property in game animals as a trust, "representing the people . . . in their united sovereignty." *Geer,* 161 US at 529. *See also Center for Biological Diversity v. FPL Group*, 166 Cal App 4th 1349, 1362, 80 Cal Rptr 585, 598 (2008) (citing *Geer*); *Horne v. Dept of Agriculture*, 135 S Ct 2419, 2431 (2015) (upholding state sovereign ownership of wildlife as a defense to takings claims).

The trial court seemed to view wildlife regulation by the State as incident to its police power. That position is clearly inconsistent with *Dickerson*, which held

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[25] *See* Blumm & Doot, above note 21, at 403 (citing the cases, including the landmark of *State v. Hume*, 52 Or 1, 5, 95 P 808, 810 (1908) (State owns migrating salmon "in its sovereign capacity for all its citizens").

that the State's sovereign trust property interest enabled the State to sue for compensation for damages to wildlife. *Dickerson,* 356 Or at 832-34.

C. Beaches and Shorelands

The State owns in trust a public usufructuary right in Oregon's beaches and shorelands, yet the Circuit Court declared that the public trust doctrine does not apply to beaches or shorelands. This Court has twice affirmed the public's recreational right to use Oregon beaches on grounds of custom. *State ex rel Thornton v. Hay*, 254 Or 584, 593–597, 462 P2d 671, 676–677 (1969); *Stevens v. City of Cannon Beach*, 317 Or 131, 142–143, 854 P2d 449, 456 (1993) *cert den* 510 US 1207 (1994).

The public trust doctrine is the underlying justification for the public's recreational rights in beaches. In a concurring opinion in *Hay*, Justice Denecke explained the State's long history of distinguishing between the *jus publicum* (public rights) and the *jus privatum* (private rights) in public trust cases like *Guilliams* and *Luscher* and suggested that the public easement in privately owned beaches was, like navigable waters, a sovereign public trust right. *Hay,* 254 Or at 600–601. Like this Court's recognition in *Weise* of the public's right to use private uplands adjacent to navigable waters for log floats, the public's usufructuary right to use Oregon's beaches is best understood as a right that is ancillary to the public's ownership of adjacent tidelands. *Weise*, 3 Or at 450–451.

D. The Atmosphere

The trial court opined that the atmosphere is not a public trust asset, because he assumed that the public trust doctrine originated in the transfer of lands beneath navigable waters from the federal government to the state at statehood. His focus on formal "title" was misplaced, as the public trust did not originate in a grant of submerged and submersible lands. Instead, the trust originated in ancient law predating this nation as an incident of sovereignty, as made clear both in the U.S. Supreme Court's decision in *Martin*,[26] and in this Court's decision in *Corvallis Sand & Gravel Co v. State*, 250 Or 319, 333, 439 P2d 575, 581 (1967) ("When, therefore, Oregon was admitted into the Union it acquired title to the submerged lands not by grant from the United States, but by virtue of its sovereignty.") Just as the State clearly owns waterbodies overlying submerged land without a formal conveyance of title, the State has trust obligations in the overlying atmosphere.

Trust ownership of the air is a concept traceable to Rome. The Justinian Code proclaimed that "these things are by natural law common to all: air, flowing water, the sea, and consequently the shores of the sea . . . ."[27] See *Environmental Law Foundation v. State Water Resources Control Bd*, 26 Cal App 5th 844, 856 (2018) ("From ancient Roman roots, the English common law has developed a

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[26] See above text following note 12.

[27] See Carolyn Kelly, *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to Juliana Supports the Possibility of a Federal Atmospheric Trust Doctrine*, 27 NYU Envtl L J 183 (2019).

doctrine enshrining humanity's entitlement to air and water as a public trust."). In *Geer*, the Supreme Court relied on Roman law's classification of *res communes* to conclude that wildlife was a public trust resource. 161 US at 523–25. The same sovereign ownership applies to the atmosphere, as the Court clearly recognized in *Georgia v. Tennessee Copper Co* when it declared, "the state has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain" and awarded Georgia state injunctive relief for transboundary air pollution caused by copper smelters. *Georgia v. Tennessee Copper Co*, 206 US 230, 237, 27 S Ct 618, 619 (1907).

The trial court dismissed the atmosphere as a public trust resource also on his reasoning that it was "not acquired or traded for economic value and hence it is not a commodity," *Chernaik v. Brown,* No 16-11-09273, 2015 WL 12591229 at *11, n 7 (Or Cir Ct, May 11, 2015). But in fact, in the modern world, there is considerable economic trade in the atmosphere, including carbon emissions credits and other programs aimed at controlling acid rain, nitrogen oxide, and interstate emissions. *See, e.g.,* Bruce R. Huber, *How Did RGGI Do It? Political Economy and Emissions Auctions*, 40 Ecology L Q 59 (2013) (discussing a carbon-trading program among nine Northeastern states).

The trial court evidently viewed the atmosphere as empty, uncontrolled, valueless space—not something that "can be measured or divided and used." But

in actuality, governments have measured, allocated, and regulated the atmosphere for years. Like the navigable waters of the 19th century (and today), the atmosphere constitutes a major economic resource supporting extensive navigation and commerce (through flights), both classic trust interests. For years, airspace has been subject to a highly ordered system of national and international navigation regulation. Absent public ownership of navigable airspace, this critical resource could have been monopolized by private parties. In *US v. Causby*, the Court avoided that result by upholding public ownership of airspace, stating, "[t]o recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *US v. Causby*, 328 US 256, 261, 66 S Ct 1062, 1065 (1946), So it is not surprising that, given the crucial public interest in the air and atmosphere, federal statutory law recognizes air resources as part of the public trust *res* for which the federal government, states, and tribes may obtain natural resources damages.[28]

Apart from its own primary value, the atmosphere plays a key ancillary role for virtually all public trust resources. By controlling the planet's climate, the atmosphere is a linchpin for the health of all other public trust resources like water, fish and wildlife, oceans, shorelands and beaches. Just as public rights in beaches

[28] See, e.g., section 101(16) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601(16).

are ancillary to public trust rights in tidelands and the sea, the public's right to a stable atmosphere is ancillary to public trust rights in tidelands, the ocean, fish and wildlife, and waterways. As the Washington court in *Foster* concluded when that State argued that the trust should not be applied to the atmosphere, "[t]he navigable waters and the atmosphere are intertwined and to argue [for] a separation of the two . . . is nonsensical." *Foster,* 2015 WL 7721362 at *4. That court found that the State's failure to take aggressive action curbing greenhouse gas emissions posed a real and present danger to trust resources: "current science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, [and] endangering the bounty of our navigable waters." *Id.* The *Juliana* court adopted the same reasoning when it held that atmospheric protection is crucial to sustaining ocean and shoreline trust resources. *See Juliana*, 217 F Supp 3d at 1274-1276.

V. The Affirmative Fiduciary Duty Imposed on the State by the Public Trust Doctrine

Perhaps the most egregious error of the Court of Appeals was its failure to recognize the State's duties under the public trust doctrine. The lower court essentially redefined a trust, ignoring the most basic construct of law that has been applied by courts since the beginning of this nation. There is simply no trust without a fiduciary duty requiring the trustee to protect the wealth, the *corpus*, of the trust. See *Juliana*, 217 F Supp 3d at 1253–1254.

> The natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to "protect the trust property against damage or destruction." George G. Bogert et al., *Bogert's Trusts and Trustees* § 582 (2016). The trustee owes this duty equally to both current and future beneficiaries of the trust. Restatement (Second) of Trusts § 183 (1959).

Juliana, 217 F Supp 3d at 1254.

The public trust doctrine is not the functional equivalent of the state's police power. Although both are inherent in sovereignty, the police power enables state legislative authority on matters affecting health and welfare. The public trust, by vesting the sovereign with a trustee's ownership and control over public property, operates as a restraint against government through fiduciary obligations that are enforceable by the citizen beneficiaries. These fiduciary obligations ensure both public use of trust assets and the perpetuation of the trust corpus for the benefit of future generations. Because future generations are, without exception, recognized beneficiaries of the public trust, an inextricable fiduciary obligation of that trust is to protect and sustain the natural wealth for their inheritance. As the federal district court made clear in *Juliana*, "the natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to protect the trust property against damage or destruction." *Id.* (internal quotation marks omitted). The sovereign trustee "has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust." *Id.* Such duty is inalienable and not discretionary, as "no government can

legitimately abdicate its core sovereign powers." *Id.* at 1252–1253 (citing *Stone v. Mississippi*, 101 US 814, 820 (1879)). To hold otherwise would, in the words of the *Illinois Central* Court, leave the natural wealth of a state "at the mercy of a majority of the legislature of the state." *Illinois Central*, 146 US at 455.

The state argues that it has no "active" duty to protect the climate system: it claims discretion to simply sit back and let this catastrophe unfold. Apart from the sheer difficulty of imagining a *duty to protect* that is utterly passive[29]—for the state never elaborates on what that could logically mean—the state's position certainly flies in the face of settled caselaw, discussed below, that imposes an active duty of protection on public trustees. Since the earliest public trust jurisprudence, numerous courts have recognized the sovereign fiduciary duty to actively protect the public's crucial assets as the *sine qua non* of the public trust. The *Illinois Central* Court envisioned an active role for the state as trustee, noting that the public trust "can only be discharged *by the management and control of property* in which the public has an interest" and stating, "Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it." 146 US at 453, 460 (emphasis added). In *Geer*, the Supreme

[29] We also note that the State's role is hardly passive. For example, Defendants affirmatively damage the public trust corpus by continuing to promote fossil fuel use through transportation policy, ongoing permit decisions that increase greenhouse gas pollution, and energy policy.

Court declared, "[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state." *Geer*, 161 US at 534.

Under well-established principles of trust law, trustees may not sit idle and allow damage to trust property. As a leading treatise explains, "[t]he trustee has a duty to protect the trust property against damage or destruction." George G. Bogert, et al., *Bogert's Trusts and Trustees* § 582 (2001); *see also City of Milwaukee v. State,* 193 Wis 423, 214 NW 820, 830 (1927) ("The trust reposed in the state is not a passive trust; it is governmental, active, and administrative, require[ing] the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it."). Scores of modern public trust cases– completely ignored by the Court of Appeal[30]—have emphasized that the public trust duty of protection is active.

In thes Mono Lake case, *National Audubon Society v. Superior Court*, the California Supreme Court imposed on the state a public trust duty of "continuous supervision and control" over navigable waters and underlying lands stating, "the public trust is more than an affirmation of state power to use public property for public purposes. 33 Cal 3d 419, 425–426, 658 P2d 709 (1983). It is an *affirmation*

[30] The court disregarded these multiple cases on the basis that they are not Oregon common law. As law professors teaching in this area, such judicial blinders give us pause. While these other decisions are not binding on the Oregon courts, their reasoning is instructive.

of the duty of the state to protect the people's common heritage [in trust resources]." *Id.* at 441 (emphasis added); see also *Environmental Law Foundation*, 26 Cal App 5th at 857 (extending protection to groundwater, stating "[t]he public trust doctrine . . . imposes an affirmative duty on the state to act on behalf of the people to protect their interest in navigable water.").

The Hawai'i Supreme Court announced that the trust "requires the government of the State to preserve [trust resources] for the uses of the public," *In re Water Use Permit Applications*, 94 Hawai'i 97, 128, 136, 9 P3d 409, 440, 448 (2000), and imposes "an affirmative duty to protect" trust waters from developments. *Kelly v. 1250 Oceanside Partners,* 111 Hawai'i 205, 209, 140 P3d 985, 989 (2006) (interpreting both the Hawai'ian Constitution and the common law). Government may not act as a "mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resources at every stage" in the process. *In re Water Use Permit Applications*, 9 P3d at 455.

The Pennsylvania Supreme Court ruled that the public trust "imposed [a] fiduciary duty to manage the corpus of the . . . public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, *inter alia*, preventing and remedying the degradation, diminution and depletion of our public natural resources." *Pennsylvania Environmental Defense Foundation v.*

Commonwealth, 640 Pa 55, 100, 161 A3d 911, 938 (2017). See *Robinson Township*, 623 Pa at 656 (plurality opinion) ("The . . . obligation peculiar to the trustee is . . . to act affirmatively to protect the environment . . . ."); *id.* at 657 ("As trustee, the [government] has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether . . . through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties.").

The Michigan Supreme Court held that "the state, as sovereign, has an obligation to protect and preserve [trust resources] for the public . . . [and] cannot relinquish this duty," *Glass v. Goeckel*, 473 Mich 667, 678–679, 703 NW2d 58, 64–65 (2005).

The Nevada Supreme Court explained that "the public trust is…an affirmation of the duty of the state to protect the people's common heritage" of trust resources, and the state has a "special obligation to maintain the trust for the use and enjoyment of present and future generations." *Lawrence v. Clark County*, 127 Nev 390, 397, 405, 254 P3d 606, 611, 616 (2011).

Numerous other courts recognize affirmative trust obligations on states. See, *e.g.*, *Alliance to Protect Nantucket Sound, Inc v. Energy Facilities Siting Board*, 457 Mass 663, 676, 932 NE2d 787, 799 (2010) ("The public trust doctrine expresses the government's long-standing and firmly established obligation to

protect the public's interest in the tidelands"); *Rock-Koshkonong Lake Dist v. State Dept of Natural Resources*, 350 Wis 2d 45, 86, 833 NW2d 800, 821 (2013) ("The state's public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty."); *Parks v. Cooper*, 676 NW2d 823, 841, 2004 SD 27 (SD 2004) (". . . the public trust doctrine imposes an obligation on the State to preserve water for public use."); *Arizona Center for Law in the Public Interest v. Hassel*, 172 Ariz 356, 366–367, 837 P2d 158, 169–170 (Ariz Ct App 1987) ("The duties imposed upon the state [are] the duties of a trustee and not simply the duties of a good business manager."); *Owsicheck v. Guide Licensing & Control Bd*, 763 P2d 488, 495 (Alaska 1988) (recognizing "a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people").

The Court of Appeals' decision below, denying any fiduciary obligations to protect trust resources, represents an aberrant departure from these widely recognized state duties. No other state court has renounced public trust obligations in this manner.

Apart from the need to correct the Court of Appeals' erroneous legal determination, we wish to point out that even the State's narrowest legal construction of fiduciary responsibility makes state trustees accountable for acting to prevent climate disaster. The State attempts to prune the public trust of all

fiduciary duties except one it believes is not at issue in this case: the duty not to alienate submerged lands. But, notably, even that duty is abrogated by the State's failure to address pollution causing climate change. The Oregon Global Warming Commission has warned that soaring temperatures in the state will inevitably reduce snowpack and evaporate surface water[31]—thus lowering the river levels, diminishing the surface water over which the public has an uncontested right of use and enjoyment, impairing the navigability of some waterways, and transforming the very character of submerged lands into exposed drylands. The inevitable change in the high water mark that delineates the *jus publicum* from the *jus privatum* on such waterways will trigger new legal battles over state ownership of these lands. Thus, even under the State's narrow construction of fiduciary duty, state trustees must seek to abate the climate change harm that will foreseeably encroach on the public's recognized use of waterways and streambeds. The State's continued perpetuation of fossil fuel emissions jeopardizes those very navigable waters that the Statehood (or Enabling) Act proclaimed must be "common highways and forever free" and available for public use. 11 Stat 383, ch 32, § 2 (1859). Two courts have found a public trust duty to protect the climate system in

[31] See Oregon Global Warming Commission, 2018 Biennial Report to the Legislature, https://static1.squarespace.com/static/59c554e0f09ca40655ea6eb0/t/5c2e415d0ebbe8aa6284fdef/1546535266189/2018-OGWC-Biennial-Report.pdf

order to protect the public's trust ownership of streambeds or shorelands. See *Juliana*, 217 F Supp 3d at 1276; *Foster*, 2015 WL 7721362 at *4.

Even more germane to the future that Oregon youth face, unabated climate catastrophe would cause such widespread damage to all resources of the state–with attendant death, destruction, property loss, economic collapse, extinctions, food and water shortages, natural disasters, human migrations, and chaos—that it is perhaps more fitting to look beyond the constitutional duty to protect streambeds and overlying water and acknowledge that failure to act to secure a stable climate system would effectively relinquish sovereign control over the crucial resources needed by future legislatures to govern and protect society, contravening the basic rule of *Illinois Central*: "The legislature could not give away nor sell the discretion of its successors. . . ." *Illinois Central*, 146 US at 460. The position taken by the State in this case does just that.

VI. The Supervisory Judicial Role in a Climate Emergency

Propounding the narrowest construction of the public trust—despite its constitutional charge to represent the people of Oregon—the State seeks to ossify a principle that demands agility as society confronts eclipsing environmental threats. The State urges this Court to take a wallflower role, leaving unrestrained power and discretion to the very branches of government that have helped push this climate crisis to the point of all-out emergency. Not only have the agencies failed

to comprehensively regulate greenhouse gas emissions over the course of decades, but the Oregon State Senate abdicated both its trust responsibility and its police power in the waning days of the last legislative session when a group of Senators fled the state to preclude passage of a climate bill for lack of a quorum—in direct repudiation of the Supreme Court's clear instruction that "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central*, 146 US at 453.

A trust without judicial enforcement is not a trust at all, but a mere "precatory admonition."[32] If Oregon courts fail to fulfill their constitutional role in this climate emergency, they would embrace judicial "nihilism"—"[d]enying [their] own expansive power, cower[ing] before catastrophe."[33] Increasingly, judges themselves urge courts to step up to prevent all-out climate disaster. Delivering a "Wake Up Call for Judges," Ninth Circuit Judge Alfred Goodwin observed that an "enfeebled" judicial branch contributes to a "wholesale failure of

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[32] *Stix v. Commissioner*, 152 F2d 562, 563 (2nd Cir 1945). See also Melissa K. Scanlan, *The Role of the Courts in Guarding Against Privatization of Important Public Environmental Resources*, 7 Mich J Envtl & Admin L 237, 280 (2018) ("The judiciary's role in nature's trust is to guard the public interest and ensure the political branches are accountable trustees.").

[33] R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 Notre Dame L Rev 295, 329 (2017).

the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits."[34] Hawai'i Supreme Court Justice Michael Wilson asserted, "As the archetypal peril of earth with collapsing ecosystems approaches, legal narratives limiting judicial review [of] carbon-caused global warming will become anachronisms."[35] As retired Oregon federal magistrate Thomas Coffin explained:

> Climate change is not only a threat to the present generation but an even greater and existential threat to our posterity. The question presented is whether the Courts have a role in providing a forum for litigation wherein those injured by climate change may seek relief against parties allegedly causing or contributing to this phenomenon. My answer is: How could they not? These are the civil rights cases of the 21st Century. Civil rights cases have historically invoked the authority of all three branches of government, with each having an important and vital part in promoting and protecting the rights and liberties of the people.[36]

As law teachers, we believe it is imperative and urgent that courts intervene in the climate emergency, because the system of environmental statutory law has proven inadequate to protect the fundamental rights of young people to inherit a

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[34] Alfred T. Goodwin, *A Wakeup Call for Judges*, 2015 Wisc L Rev 785, quoted in *Juliana*, 217 F Supp 3d at 1262.

[35] Michael D. Wilson, *Climate Change and the Judge As Water Trustee*, 48 Envtl L Rep 10235, 10240 (2018).

[36] Thomas M. Coffin, *American Courts in Climate Emergency* , International Union for the Conservation of Nature (July 16 2019), *available at* https://www.iucn.org/sites/dev/files/content/documents/2019/american_courts_in_climate_emergency.pdf. *See also* Denise Antolini, *US Courts Face the Climate Crisis: The Role of Judges in Climate Litigation*, IUCN (July 16, 2019), *available at* https://www.iucn.org/news/world-commission-environmental-law/201907/us-courts-face-climate-crisis-role-judges-climate-litigation.

planet on which they can survive. It is of course quite true that the political branches vested with duty and expertise should protect the climate system—but their inaction in the face of decades of scientific warning shows no signs of changing before the world plunges over the climate cliff.

Quite simply, to have any hope of avoiding tipping points, the political branches must begin to expeditiously work on greenhouse gas pollution abatement now. The remedy requested here is characteristic of institutional litigation presenting fundamental rights. Using the same basic remedial formula applied in many other cases, the trial court would require defendants to develop a plan to bring the state's actions into compliance with plaintiffs' fundamental rights—in this case, a plan to abate carbon pollution at a rate calculated to meet the state's share in restoring the climate system as informed by the best available science. This judicial supervisory role employs "structural injunctions" commonly used in cases involving civil rights, treaty rights, education funding, prisoners' rights, unfair housing, and discriminatory zoning situations.[37] By supervising, rather than devising, the policy, the courts observe their constitutionally appointed role. Far from encroaching on the political process, judicial supervision provides a structure within which the public trustees will finally do the work they should have been

[37] See Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age*, chapter 11 (2014) (describing the judicial role in public trust cases).

doing all along.[38] "Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government." *Juliana*, 217 F Supp 3d at 1263. Courts in other countries are holding governments accountable for emissions reduction using a similar remedial structure.[39]

But the lower courts in this case eschewed *any* role, relegating Oregon's third co-equal branch of government to a mere spectator of catastrophe. Such judicial passivity is by no means neutral. As "today's political failures may foreclose possible natural worlds," causing damage that is "irreversible on any conceivable timescale," judicial abdication of the courts' constitutional role enables the climate violence perpetuated by the other branches.[40] Quite simply, it leaves unchecked a deadly hazard to young Oregonians.

VII. Conclusion

If there remains a habitable planet at the end of this century, it may well be because courts across the world rose to their constitutional role to enforce the rights of young people as beneficiaries of the atmospheric trust before climate tipping points rendered the law itself altogether moot. Amicus law professors urge this Court to act swiftly and join other courts around the country and the world in

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[38] See Katrina Fischer Kuh, *Judicial Climate Engagement*, 46 Ecology LQ, forthcoming (July 17, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421500.
[39] See above note 19.
[40] Weaver & Kysar, above note 33, at 306.

requiring the political branches of government to take remedial action before this climate crisis spirals completely out of humanity's control. For the reasons stated above, this Court should uphold the youths' fundamental public trust right to a climate system capable of sustaining human life by reversing the Court of Appeals.

Respectfully submitted this 31st day of July, 2019.

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Appendix A: Excerpt from *Illinois Central Railroad*

Illinois Central Railroad Co. v. Illinois
Supreme Court of the United States
146 U.S. 387 (1892)

Field, J. The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations, the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period, and renew it at its pleasure; and the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is by the act converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor, and to grant to it the title and interest of the state to certain lands adjacent to the shore of Lake Michigan, on the eastern front of the city, and place the harbor under its control; giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. It was urged that the title of the act was not changed to correspond with its changed purpose, and an objection was taken to its validity on that account. But the majority of the court were of opinion that the evidence was insufficient to show that the requirement of the constitution of the state, in its passage, was not complied with.

The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in

trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. …

But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

* * *

A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.

The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than 1,000 acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor, but embracing adjoining submerged lands, which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly, if not quite, equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly 25 per cent. of the lake carrying trade, as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to 22,096, with a tonnage of over 7,000,000; and in 1890 the

tonnage of the vessels reached nearly 9,000,000. As stated by counsel, since the passage of the lake front act, in 1869, the population of the city has increased nearly 1,000,000 souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining,

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.

* * *

In Newton v. Commissioners, 100 U. S. 548, it appeared that by an act passed by the legislature of Ohio in 1846 it was provided that upon the fulfillment of certain conditions by the proprietors or citizens of the town of Canfield the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment,—neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do

whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

As counsel observe, if this is true doctrine as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

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