

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. 16-11-09273

CA No. A159826

S066564

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**BRIEF OF AMICUS CURIAE MULTNOMAH COUNTY IN SUPPORT  
OF PETITIONER'S PETITION FOR REVIEW**

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Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Lane County, Honorable Karsten H. Rasmussen, Judge.

Opinion Filed: January 9, 2019

Author of Opinion: Armstrong, Presiding Judge

**AMICUS CURIAE INTENDS TO FILE A BRIEF ON THE MERITS**

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## **I. INTEREST OF *AMICUS CURIAE***

Multnomah County is a political subdivision of the State of Oregon, has the largest population of any county in the state, and includes a portion of the City of Portland, the largest city in Oregon. Multnomah County intends to present a position as to the correct rule of law that does not affect a private interest of its own.

Multnomah County, on behalf of its residents and constituents, has a substantial interest in the outcome of this case because it involves the proper interpretation and scope of the ancient public trust doctrine, and the corresponding role and responsibilities of sovereigns under that doctrine. Specifically, the outcome of this case will significantly affect the duty of the State in protecting public trust resources for future generations of all Oregonians, including Multnomah County residents.

Multnomah County believes its views will assist the Court in resolving this case by helping provide an understanding of the role of sovereigns under the public trust doctrine, and how the doctrine is organic to government itself. The people of the State of Oregon, and Multnomah County, will benefit from thoughtful review by the Oregon Supreme Court of the ancient and significant public trust doctrine.

## **II. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS**

Multnomah County adopts Plaintiff-Petitioner's statement of historical and procedural facts.

## **III. QUESTION PRESENTED AND PROPOSED RULE OF LAW**

Multnomah County adopts Plaintiff-Petitioner's questions presented and proposed rule of law.

## **IV. REASONS TO ALLOW REVIEW**

This Court should grant review of Petitioner's case for the four reasons discussed below. If review is granted, Multnomah County intends to file a brief on the merits.

First, this Court should allow review because this case presents a significant issue of law regarding the application and proposed modification of the public trust doctrine – an ancient and enduring common law principle. ORAP 9.07(1)(g) (whether the case presents a significant issue of law, including the application or proposed modification of a principle of common law). The Court of Appeals decision applies and presents a position on the public trust doctrine that is inconsistent with longstanding public trust doctrine principles and Oregon case law. In particular, the Court of Appeals held that the State has no affirmative duty under the public trust doctrine to protect public trust assets, modifying years of case law. *See Illinois Central R.R. v. Illinois*, 146 US 387, 455, 13 S Ct 110, 36 L Ed 1018 (1892) (public trust resources are

held by the State, by virtue of its sovereignty, in trust for the public); *Geer v. Connecticut*, 161 US 519, 525-29, 16 S Ct 600, 40 L Ed 793 (1896) (recognition of ancient and English common law principles of sovereign trust ownership of air, water, sea, shores, and wildlife); *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892), *aff'd by Shively v. Bowlby*, 152 US 1, 16, 14 S Ct 548, 38 L Ed 331 (1894) (holding that state owned tidelands in its sovereign capacity are held in public trust for the benefit of the whole community). That reversal of longstanding case law, including the case law of this Court, warrants further review by this Court.

Second, this Court should allow review because many people - current and future Oregonians - are affected by the decision, which makes this an issue of great public importance. ORAP 9.07(3) (whether many people are affected by the decision and whether the consequence of the decision is important to the public). The viability and future of Oregon's natural resources and the critical role sovereigns play in protecting those natural resources for public use, are at stake in this case.

Third, this Court also should allow review because the Court of Appeals opinion is in error in multiple ways. ORAP 9.07(14)(a) (whether the Court of Appeals decision is in error because it results in a serious or irreversible injustice or in a distortion or misapplication of a legal principle). The Court of

Appeals either ignored or glossed over Oregon's history and case law recognizing and upholding the public trust doctrine. *See Anderson v. Columbia Contract Co.*, 94 Or 171, 184 P 240 (1919) (upholding public rights to fishing); *Guilliams v. Beaver Lake Club*, 90 Or 13, 175 P 437 (1918) (ruling that a landowner could not build a dam that would interfere with public recreational use of lagoon and that private riparian landowners do not own the water itself, but only the use of it as it flows by); *Luscher v. Reynolds*, 153 Or 625, 56 P2d 1158 (1936) (holding that a private lake was open for public recreation, regardless of the ownership of the lake bed); *State ex rel. Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969) (recognizing public recreational rights to uplands).

The Court of Appeals disregarded the ancient origins and evolution of the public trust doctrine, stating that the origins and evolution are not applicable because they do not come from Oregon common law. Dismissing the origins and evolution of the public trust doctrine is as detrimental to its understanding as dismissing the origin and evolution of this country's form of government. One cannot fully comprehend the public trust doctrine and its significance without first recognizing its origins and evolution.

Of the earlier court opinions the Court of Appeals did rely on, none of them could have contemplated the current science and climate crisis. This Court's ability to review and correct law does not cease due to an absence of

common law cases directly on point, rather it signals the urgency of this Court's thoughtful and complete review of the law and public interests at stake.

Next, the Court of Appeals erred by basically taking the "trust" out of the public trust doctrine; without a trust, there is no public trust doctrine. The basic framework of a trust creates a fiduciary relationship where a trustee holds title to the property of another for the benefit of the beneficiary. *See Black's Law Dictionary* 1546 (8th ed 2004). Under the public trust doctrine, sovereigns (acting as trustees) hold the natural resources (the trust property) in trust for current and future generations (the beneficiaries) to use. Inherent in that attribute of sovereignty is a *duty* to protect the trust assets. It follows that without a duty there is no protection of the trust assets; if sovereigns have no duty to protect the trust assets, then their role in the public trust is non-existent, or de minimus at best.

Additionally, the Court of Appeals decision strips sovereigns of one of their most critical attributes of sovereignty that will result in irreversible harm to current and future Oregonians and Oregon's vital natural resources. Courts, most notably the United States Supreme Court in *Illinois Central* have recognized that the sovereigns responsibility for the trust cannot be severed, stating:

"The control of the State for the purposes of the trust can never be lost \* \* \*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 \* \* \* than it can abdicate its police powers in the administration of government and the preservation of the peace.”

*Illinois Central*, 146 US at 452-53; *see also United States v. 1.58 Acres of Land*, 523 F Supp 120, 124 (D Mass 1981) (recognizing that public trust obligation is government and administered jointly by state and federal governments by virtue of their sovereignty).

The fourth and last reason this Court should grant review is because the case is free from procedural and factual disputes. ORAP 9.07(7) (whether the case is free from factual disputes or other obstacles that might prevent the Supreme Court from reaching the legal issue).

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## V. CONCLUSION

The outcome of this case will significantly affect the duty of sovereigns, specifically the State, in protecting public trust resources for future generations of all Oregonians, including Multnomah County residents. The outcome of this case will also speak to the legal interpretation and scope of the ancient public trust doctrine under Oregon common law. For these reasons and the reasons discussed above, Multnomah County, on behalf of its residents and constituents, respectfully requests that this Court allow review in this case.

Respectfully submitted this 8th day of March, 2019.

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the word-count limitation in ORAP 9.05(3)(a) and the word-count of this brief is 1,417 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05.

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## CERTIFICATE OF FILING AND SERVICE

I certify that on March 8, 2019, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE MULTNOMAH COUNTY IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System. I certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, at the participants' email addresses as recorded this date as indicated below:

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