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The Fiduciary Duty of Combatting Global Climate Change

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Abstract

Ancient Roman Law codified the concept that there are certain resources that are so great and so important to human survival, that intuitively, no person should own them. Further, the government must protect these resources for the people. Today, this concept is known at the public trust doctrine. According to the contemporary doctrine, the seas, oceans, shores, and submerged lands cannot be privately owned, but shall be held in trust by the government for public use. Relying on the public trust doctrine, climate change litigants have brought a tirade of lawsuits—which have largely been unsuccessful—alleging that the government has a fiduciary duty to protect trust resources, and thus must take steps to mitigate the effects of climate change. Despite the backdrop of the current climate crisis, courts have declined to impose such an affirmative duty on the government.

This Note analyzes the viability of the public trust doctrine as a litigation tool to combat global climate change. It examines the doctrine's history and purpose dating back to ancient Roman Law. Further, this Note advocates for an expansion of the doctrine and for the establishment of an affirmative fiduciary

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duty on the government to protect the resources held in trust. Ultimately, it offers a solution to give the doctrine the necessary teeth to enact meaningful environmental change.

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INTRODUCTION

The issue of global climate change is more prevalent, threatening, and alarming than ever before.[1] The Intergovernmental Panel on Climate Change concluded that

1. *See Climate Change*, UNITED NATIONS, https://perma.cc/65CX-8GKU (last visited Sept. 27, 2024) ("From shifting weather patterns that threaten food production, to rising sea levels that increase the risk of catastrophic flooding, the impacts of climate change are global in scope and unprecedented in scale.").

temperatures are increasing at an astonishing rate,[2] causing "[w]idespread and rapid changes in the atmosphere, ocean, cryosphere, and biosphere."[3] Among some of the most startling data, the Panel's findings show that approximately 3.3–3.6 billion people currently live in areas vulnerable to the effects of climate change and that mortality rates in these vulnerable areas are fifteen times higher than less vulnerable ones.[4] Studies project sea levels will rise twelve feet in the next two centuries.[5] Further, experts predict that the melting of the Greenland ice sheet could raise sea levels more than thirty additional feet above current levels which, the United States Geological Survey notes, would flood about 25% of the U.S. population.[6]

The World Health Organization ("WHO") indicates that two billion people currently lack safe drinking water and 600 million people "suffer from foodborne illnesses" each year.[7] Human-induced temperature and precipitation changes increase the spread of vector-borne diseases, which currently result in more than 700,000 annual deaths.[8] Additionally, recent research indicates heat-related deaths in people over the age of sixty-five have risen by 70% in the last twenty years.[9] The WHO attributes these devastating impacts to the current climate crisis.[10] The organization conservatively projects that climate

2. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023 SYNTHESIS REPORT 42 (2023) ("Global surface temperature has increased faster since 1970 than in any other 50-year period over at least the last 2000 years (*high confidence*).").

3. *Id.* at 5.

4. *Id.*

5. *See* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 6 (Robert C. Clark et al. eds., 5th ed. 2015) (describing two separate reports which concluded "that the melting of the West Antarctic ice sheet is now 'unstoppable'" and projected sea levels to rise twelve feet in the next two centuries).

6. *See id.* (citing U.S. GEO. SURV., SEA LEVEL AND CLIMATE (2000)).

7. *Climate Change*, WORLD HEALTH ORG. (Oct. 12, 2023), https://perma.cc/62FJ-NAA9.

8. *Id.*

9. *Id.* (explaining that 37% of heat-related deaths are attributable to human-induced climate change).

10. *Id.* (attributing increased mortality, disease, and food and water insecurity on human-induced climate change).

change will cause 250,000 more annual deaths between 2030 to 2050 due to undernutrition, malaria, diarrhea, and heat stress.[11]

While climate change data clearly communicates the need for urgency and innovative solutions, domestic and international regulations fall short by failing to sufficiently reduce greenhouse gas emissions.[12] Scholars have described climate change as "the most significant threat to the world's environment, economic development and public health."[13] Moreover, "[a] broad scientific consensus now exists that: (a) the earth's climate is changing; (b) the changes result from human activity; (c) the changes are happening at both a faster rate and with worse impacts than previously projected; and (d) there is an imminent need for action."[14]

In response, national governments, environmental activists, entities, and interest groups have employed an array of strategies in their efforts to combat global climate change and sway government legislation. On the global scale, countries have combatted the effects of climate change by ratifying international treaties and agreeing to reduce greenhouse gas emissions.[15] On the national scale, government action is largely well-intentioned but often results in more harm than good. For example, Congress passed the Energy Independence and Security Act in 2007 to reduce carbon emissions, but it mandated a shift to biofuels that drastically increased emissions.[16] To meet American demands for biofuels, Indonesia

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11. *Id.*

12. *See* Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 733, 736 (2018) (explaining that activists have turned to litigation to fill in the gaps left by insufficient policy and regulation).

13. *See* HUNTER, *supra* note 5 at 6.

14. *Id.*

15. *See id.* ("Most countries around the world have ratified the Framework Convention on Climate Change, and most industrialized countries (except the United States) agreed to specific reductions of greenhouse gas emissions in the 1997 Kyoto Protocol.").

16. *See* Abrahm Lustgarten, *Palm Oil Was Supposed to Help Save the Planet. Instead It Unleashed a Catastrophe*, N.Y. TIMES MAG. (Nov. 20, 2018), https://perma.cc/Q2HE-L9C2.

cleared more than 100,000 acres of peatland.[17] The destruction of the Indonesian rainforests "contributed to the largest single-year global increase in carbon emissions in two millenniums, an explosion that transformed Indonesia into the world's fourth-largest source of such emissions."[18] The startling irony is that "[i]nstead of creating a clever technocratic fix to reduce American's carbon footprint, lawmakers had lit the fuse on a powerful carbon bomb that, as the forests were cleared and burned, produced more carbon than the entire continent of Europe."[19]

Acting in the national and local spheres, environmental plaintiffs have turned to climate change litigation as their latest strategy in the fight for environmental justice.[20] Recently, environmental litigants have attempted to use the public trust doctrine to impose a fiduciary duty on the government to protect certain resources.[21] Public trust scholar Professor Mary Wood stated, "[The legal strategy] perhaps is the only macro approach that can empower courts to force emissions reductions within the limited timeframe that remains before the planet crosses critical climate thresholds."[22] Another expert commented that "[t]he Public Trust Doctrine is one of the most powerful weapons in the modern environmental arsenal."[23]

This Note explores whether the U.S. government has a fiduciary duty to protect natural resources held in the public trust, and whether the public trust doctrine is a viable avenue for combatting the climate change crisis. Part I defines and

17. *Id.* ("[P]eatland forests hold 12 times as much carbon as other tropical rain forests around the world.").

18. *Id.*

19. *Id.*

20. *See* Nosek, *supra* note 12, at 736 ("[N]on-profit organizations, government officials, and concerned citizens use climate change litigation as one strategy to fill the gaps left by insufficient national and international regulation efforts.").

21. *See, e.g.*, Chernaik v. Brown, 475 P.3d 68, 76 (Or. 2020) (describing the plaintiffs' argument that the public trust doctrine imposes a fiduciary duty on the state government to protect resources held in trust).

22. Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, *in* FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 99, 102 (Ken Coghill et al. eds., 2012).

23. Bruce W. Frier, *The Roman Origins of the Public Trust Doctrine*, 32 J. ROMAN ARCHAEOLOGY 641, 641 (2019).

discusses the public trust doctrine, and provides an overview of the doctrine's history and purpose spanning back to Roman Civil Law. Part II, relying heavily on case law, analyzes how environmental plaintiffs have used the public trust doctrine and why they have not been successful in convincing courts to recognize a fiduciary duty to protect natural resources. Part II also argues that the government has a fiduciary duty to protect natural resources held in a public trust, which is evidenced by the doctrine's history and purpose. Next, this Note advocates to expand the public trust doctrine to include the air and the atmosphere because that is the most faithful interpretation of the doctrine.[24] Lastly, this Note proposes a refined test as the solution to the obstacles climate change litigants have faced.[25]

I. LEGAL FRAMEWORK

Part I lays out the basic concept of the public trust doctrine, its history, and its purpose. Part I also discusses public trust doctrine litigation in the United States and its progress leading up to and in the wake of two of the most well-known and controversial public trust doctrine cases: *Juliana v. United States*[26] and *Chernaik v. Brown*.[27]

A. *The Doctrine and Its History*

The public trust doctrine is one of the oldest and most universal common law doctrines.[28] From its origin, the doctrine has metamorphized from existing as simply "an affirmation of sovereign authority" over trust resources into an undeniable "recognition of sovereign *responsibility*" to protect resources held in trust, in both the present and the future.[29]

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24. *See infra* Part II.C.

25. *See infra* Part II.C.

26. 947 F.3d 1159 (9th Cir. 2020).

27. 475 P.3d 68 (Or. 2020).

28. *See* Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection with Private Water Law*, 39 VA. ENVTL. L.J. 135, 137 (2020) ("[The public trust doctrine] is thought to be amongst the oldest doctrines of the common law, with roots extending as far back as ancient Rome and early Britain, where it primarily protected public values of navigation, fisheries, and commerce associated with waterways.").

29. *Id.* at 138 (emphasis added).

The doctrine is rooted in the Roman Civil Law tradition and stands for the fundamental idea that there are certain resources, such as oceans, air, and submerged lands, that should be free of private ownership and should instead belong to the public.[30] The doctrine as we know it today derives from ancient Roman law known as *res communes* (common things).[31] This idea stemmed from the realization that certain resources could not be captured.[32] The law followed that, since *res communes* could not be captured, *red communes* had to be open, owned by everyone, and immune to privatization.[33] Sixth-century Byzantine Emperor Justinian wrote in the opening portions of the Institutes that "some [things] admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all. . . . Thus the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore."[34]

English common law eventually adopted *res communes*, enabling the Crown to maintain ownership of navigable waters and submerged lands for the purpose of public navigation.[35]

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30. *See* Melissa K. Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin,* 27 ECOLOGY L.Q. 135, 212 (2000) ("Ancient Roman jurists believed that the natural law concept that the waters are common to all was not subject to the changing whims of legislatures.").

31. *See* Duane Rudolph, *When Should Water Belong to the Public?*, 2019 MICH. ST. L. REV. 1389, 1409 (2019) (discussing *res communes* as the public trust doctrine's ancestor).

32. *See id.* at 1408–09 (describing *res communes* as "things open to all but incapable of being objects of private property, since they cannot be captured"). Rudolph's article emphasizes the distinction between roman terms *res publicae* (public affair) and *res communes* (common things). *See id.* at 1408. *Res publicae* are things that belong to the public, are open to the public by operation of law, and are usually associated with the state's military or governmental affairs. *See id.* The public trust doctrine evolved from *res communes*. *See id.* at 1418 ("Indeed, the public trust doctrine is a descendant of *res communes*, that is, such rights were simply physically incapable of being converted to private ownership." (internal quotations omitted)).

33. *See id.* at 1409 (stating that *res communes* land could not be privately owned).

34. J. INST. 2.1.1 (18).

35. *See* Willow River Club v. Wade, 76 N.W. 273, 278 (1898) (explaining that the English common law provides individuals a right to navigate water held in public trust, but once they stop for some other purpose like hunting, they abuse their privilege and become a trespasser).

Origins of the public trust doctrine were first incorporated into English jurisprudence through two relevant chapters of the Magna Carta in 1215.[36] First, Chapter Sixteen states, "No river bank shall henceforth be made a preserve, except those which were preserves in the time of King Henry, our grandfather, in the same places and for the same periods as they used to be in his day."[37] Some scholars have interpreted this provision as a limitation on the Crown, prohibiting the King from granting ownership of certain resources.[38] Second, Chapter Twenty Three states, "Henceforth all fish-weirs shall be cleared completely from the Thames and the Medway and throughout all England, except along the sea coast."[39] English courts have interpreted this provision to "provide protection from obstruction of all navigable rivers, clearing the streams for the free passage of both people and fish."[40] Read together, these chapters mean that certain resources are exempt from private ownership and the King is obligated to protect them.[41]

Post-Magna Carta, English jurisprudence continued to recognize the origins of the public trust doctrine. Lord Henry Bracton, a thirteenth-century English judge who served on the *coram rege*—later known as the King's Bench—from 1247 to 1250 and again from 1253 to 1257,[42] wrote the treatise, *De*

36. James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 19–20 (2007) (stating that the public trust doctrine first appeared in English Law through the Magna Carta).

37. MAGNA CARTA Cl. 16.

38. *See* Huffman, *supra* note 36 at 20 ("Eventually Chapter 16 would be understood as a prohibition on the king's granting of exclusive fisheries, but not until the nineteenth century.").

39. MAGNA CARTA Cl. 23.

40. Bradley Freedman & Emily Shirley, *England and the Public Trust Doctrine*, 8 J. OF PLAN. & ENV'T. L. 839, 841 (2014).

41. *See id.* ("Indeed, many courts interpreted Magna Carta as establishing the king's duty (based on his capacity as sovereign) to protect public lands."). Moreover, "because Magna Carta was essentially a restriction on the Crown, it signaled that while the Crown may have owned original title to tidal lands, it did not have discretion to dispense of these lands as it chose." *Id.*

42. *See Bracton Online*, HARV. L. SCH. LIBR., https://perma.cc/7UZL-9LTK (last visited Sept. 27, 2024). This work is well-known for its detail and for its discussion of *"ius commune*, the combination of Roman and canon law that was taught in the universities in Bracton's time." *Id.*

legibus et consuetudinibus Angliae (On the Laws and Customs of England), which attempted to articulate a comprehensive narrative of English law.[43] In this treatise, Lord Bracton described *res communes* and set forth a rule that the sea, seashore, and river banks were resources that could not be owned by one person, but were owned by the public as a whole.[44]

Centuries later, the doctrine was again recognized in early English law in Lord Chief Justice Matthew Hale's 1667 treatise, *Concerning the Law of the Sea and its Arms*.[45] Justice Hale's work focused on water and, quoting Justinian's *Institutes*, articulated that the public had a common right to the foreshore, navigable rivers, and ports.[46]

Then, notably, in 1882, the House of Lords decided the case of *Kinloch v. Secretary of State for India*,[47] which established the existence of a public interest trust and further explained:

> The term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction but also other relationships such as the discharge under the direction of the Crown of the duties or functions belonging to the prerogative and the authority under the Crown. Trusts of the former are described . . . as being 'trusts in the lower sense' trusts if the latter kind . . . 'trusts in the higher sense.'[48]

In other words, the House of Lords asserted that there is an affirmative duty by the Crown or sovereign to ensure access to common resources.[49]

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43. *See id.* ("Bracton's chief claim to fame is his association with the long treatise *De legibus et consuetudinibus Angliae* (*On the Laws and Customs of England*), which the noted legal historian F.W. Maitland described as 'the crown and flower of English jurisprudence.'").

44. *See* Freedman & Shirley, *supra* note 40, at 840 ("Bracton described the rule that the public had common rights to the sea and seashore and the right to use river banks for towing and mooring.").

45. *See id.* (describing how Hale's writing introduced Roman law concepts associated with what we now recognize as the public trust doctrine).

46. *See id.* ("Hale also introduced the Roman concept of *jus publicum* to common law in the form of a public right to have navigable rivers and ports free of nuisances.").

47. 7 App. Cas. 619 (1882).

48. Freedman & Shirley, *supra* note 40, at 842 (quoting Kinloch v. Sec'y of State for India, 7 App. Cas. 619 (1882)).

49. *Id.*

After English courts incorporated the public trust doctrine into the common law, the doctrine appeared in American jurisprudence. In 1842, in *Martin v. Lessee of Waddell*,[50] the United States Supreme Court formally recognized the public trust doctrine for the first time.[51] There, the Court addressed the question of whether the plaintiff was entitled to recover one hundred acres of submerged land.[52] Based on an 1834 survey of the land in question, the plaintiff argued that he maintained ownership of the soil underneath the water and had exclusive fishing rights to those waters.[53] The King of England originally transferred the land in question to the Duke of York to form a colony (New York), so the pivotal question for the Court was whether the King had transferred rights to the land, submerged land, and waters or just the land itself.[54] In answering the question, the *Martin* Court considered whether the English common law doctrine—the public trust doctrine—remained intact when the King transferred land to the Duke of York.[55] The Court held that the plaintiff was not entitled to the submerged lands because the public right to navigable waters and submerged lands remained intact even after King's land transfer.[56] This case is essential to the development of the public trust doctrine in the United States because it establishes a formal recognition of the doctrine, adopted from the English

50. 41 U.S. 367 (1842).

51. *See id.* at 412–13 (recognizing the public trust doctrine).

52. *See id.* at 407 (establishing the question for the court).

53. *See id.* at 408 (explaining that, if the survey was valid, the plaintiff "is entitled to the premises as owner of the soil, and has an exclusive right to the fishery in question").

54. *See id.* at 408–09 ("The point in dispute between the parties, therefore, depends upon the construction and legal effect of the letters-patent to the Duke of York.").

55. *See id.* ("The country granted by King Charles II. to the Duke of York, was held by the king in his public and regal character, as the representative of the nation; and in trust for them.").

56. *See id.* at 411 ("The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund entrusted to his care for the common benefit."). Further, "in such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community." *Id.*

common law, which at minimum applies to all navigable waters and submerged lands.[57]

Today, the public trust doctrine is described as "a legal principal establishing that certain natural and cultural resources are preserved for public use" and "held in trust."[58] Or, as one legal scholar put it, "[t]he public trust doctrine[] [is] the protagonist of much modern environmental advocacy in the United States, [and it] creates a set of public rights and responsibilities with regard to certain natural resource commons, obligating the state to manage them in trust for the public."[59] Under this doctrine, the public owns the resources held in trust, and the state acts as trustee, protecting and maintaining the resources.[60] The doctrine requires "states to manage certain natural resources for the benefit of the public."[61]

Since the doctrine's American debut in *Martin v. Lessee of Waddell*, courts have almost exclusively applied the public trust doctrine to navigable water sources.[62] In the modern surge of public trust litigation, however, many plaintiffs argue that the

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57. *See id.* at 412 (recognizing the public trust doctrine from English common law and holding that navigable waters and sea on the coasts within the jurisdiction of the British Crown are public goods). The Court quotes Hale's *Treatise de Jure Maris*, which captures the early stages of the doctrine. *See id.*

> '[A]lthough the king is the owner of this great coast, and, as a consequent of his propriety, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.'

58. *Public Trust Doctrine*, CORNELL L. SCH., LEGAL INFO. INST., https://perma.cc/M63H-YQNB (last visited Sept. 27, 2023).

59. Ryan, *supra* note 28, at 137.

60. *See* PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) (stating that "the public trust doctrine remains a matter of state law").

61. Brigit Rollins, *The Public Domain: Basics of the Public Trust Doctrine*, NAT'L AGRIC. L. CTR., https://perma.cc/N2R8-VECP (last visited Sept. 27, 2023).

62. *See, e.g., Martin*, 41 U.S. at 412–13 (affirming adoption of the public trust doctrine and holding that the public has a common law right to fish because the navigable and tidal water is held in trust by the government); Ill. C.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (stating that it is the "settled law of this country" that the public trust doctrine includes water and the underlying land).

doctrine's protections extend beyond navigable water sources and include the air and atmosphere, requiring the government to limit the use of fossil fuels.[63]

B. *Public Trust Litigation Progress in the United States*

Public trust litigation has emerged as a twenty-first century strategy to create noise around, address, and reduce the effects of global climate change, which is slowly approaching an unpredictable tipping point that would result in a catastrophic event of unimaginable damage.[64] Environmental degradation is not linear: sometimes a little bit more is not just a little bit worse, but catastrophically worse.[65] An insightful analogy for environmental degradation is "that of a blindfolded person walking toward the edge of a cliff: she is still on solid ground, and each step feels just like the last, until that one . . . final . . . step."[66]

Environmental activists have been largely unsuccessful in accomplishing change relative to other human rights initiatives.[67] In the last few decades, these advocates have turned to public trust litigation as a potential solution to their stagnant march in the fight against climate change.[68] The case

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63. *See, e.g.*, *Chernaik*, 475 P.3d at 71 (Or. 2020) (arguing that the state has a fiduciary duty to protect the natural resources held in trust against the effects of climate change).

64. *See* Nosek, *supra* note 12, at 736 ("[N]on-profit organizations, government officials, and concerned citizens use climate change litigation as one strategy to fill the gaps left by insufficient national and international regulation efforts."); WOOD, *supra* note 22, at 102 (explaining that public trust litigation can "can empower courts to force emissions reductions within the limited timeframe that remains before the planet crosses critical climate thresholds").

65. *See* HUNTER, *supra* note 5, at 25. ("Synergistic effects of two or more impacts may lead to even greater harm.").

66. *Id.*

67. *See, e.g.*, Press Release, U. N. Env't Programme, Dramatic Growth in Laws to Protect Environment, but Widespread Failure to Enforce, Finds Report (Jan. 24, 2019), https://perma.cc/CYY4-ZXRT ("Despite 38-fold increase in environmental laws put in place since 1972, failure to fully implement and enforce these laws is one of the greatest challenges to mitigating climate change, reducing pollution and preventing widespread species and habitat loss . . . .").

68. *See* Frier, *supra* note 23 and accompanying text; *see also* Mission, OUR CHILDREN'S TRUST, https://perma.cc/NR4G-JC7N (last visited Sept. 27, 2024)

law discussion in Part II of this Note will focus on two critical cases: *Juliana v. United States* and *Chernaik v. Brown*. To fully understand the gravity of those decisions, however, it is essential to understand environmental activists' history with public trust litigation and to recognize their small successes along the way. By the end of this Note, it will become clear that it is only a matter of time until environmental activists succeed in their pursuit of judicial recognition. Much of their journey has been about finding the right plaintiffs, the right test, and the right request for relief.

Environmental activists' engagement with the public trust doctrine litigation began in 2011 with *Alec L. v. Jackson*.[69] There, five young citizens and two environmental groups filed suit against the heads of various government agencies, alleging that the atmosphere was a public trust resource and that the government had an affirmative fiduciary duty to mitigate the effects of global climate change for the benefit of the present and future generations.[70] Further, the plaintiffs alleged that the defendants, as the heads of government agencies, had the "primary responsibility to carry out this affirmative fiduciary duty on behalf of the federal government."[71] Notably, the plaintiffs challenged the defendants' overall failure to sufficiently reduce greenhouse gases.[72] They challenged none of the defendants' specific policies, actions, or projects.[73] Plaintiffs sought both declaratory and injunctive relief.[74] Specifically, they

("Our Children's Trust is a non-profit public interest law firm that provides strategic, campaign-based legal services to youth from diverse backgrounds to secure their legal rights to a safe climate.").

69. 863 F. Supp. 2d 11 (D.D.C. 2012).

70. *See* Alec L. v. Jackson, No. C-11-2203, 2011 U.S. Dist. LEXIS 140102, at *3 (N.D. Cal. Dec. 6, 2011) ("Plaintiffs allege that under the public trust doctrine, the atmosphere is a public trust resource, and that the United States government has an affirmative fiduciary duty as the trustee to preserve and protect the atmosphere from global warming, for the benefit of present and future generations.").

71. *Id.* at *3–4.

72. *See id.* at *4 ("Plaintiffs thus challenge Defendants' general failure to reduce the United States' greenhouse gas emissions by the amount necessary to limit the effects of global warming.").

73. *See id.* ("Plaintiffs do not challenge a specific policy or project made by Defendants, but more generally challenge the Defendants' actions permitting the federal government to contribute to global warming.").

74. *See Alec L.*, 863 F. Supp. 2d at 13.

asked the court to declare the atmosphere a public trust resource and the government a trustee with an affirmative fiduciary duty.[75] They also sought declarations that the defendants had violated their fiduciary duties and that the defendants' duty consisted of reducing carbon levels to less than 350 parts per million.[76] As for injunctive relief, the most notable request was a court order for the defendants to submit "annual reports setting forth an accounting of greenhouse gas emissions . . . annual carbon budgets that are consistent with the goal of capping carbon dioxide emissions and reducing emissions by six percent per year; and a climate recovery plan to achieve Plaintiffs' carbon dioxide emission reduction goals."[77] The court dismissed the claim because it concluded that the public trust doctrine is a "creature" of state law, not federal law, and therefore the court lacked jurisdiction.[78] The *Alec L.* court went on to determine that even if the plaintiffs had established the court's jurisdiction over the matter, the case would still have been dismissed because the plaintiffs were asking for relief that would have required the court to make decisions better left for other branches of government.[79] While this case was quickly dismissed, it remains an important starting point for public trust litigation and foreshadows some of the activists' most significant obstacles: separation of powers, standing, redressability, and the political question doctrine.

In *Bonser-Lain v. Texas Commission on Environmental Quality*,[80] a Texas state court ruled for the first time that the

75. *Id.* at 13–14.

76. *Id.*

77. *Id.* at 14. Additionally, the plaintiffs asked the court to direct all six agencies "to take all necessary actions to enable carbon dioxide emissions to peak by December 2012 and decline by at least six percent per year beginning in 2013." *Id.*

78. *See id.* at 15–16 ("'[T]he public trust doctrine *remains a matter of state law*,'" so the plaintiffs did not raise a federal question invoking the court's subject matter jurisdiction.") (citing PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012)).

79. *See* Alex L. v. Jackson, 863 F. Supp. 2d 11, 16–17 (D.D.C. 2012) (explaining that the plaintiffs are asking the court to make determinations on what constitutes an acceptable amount of atmospheric carbon dioxide and that those "determinations . . . are best left to the federal agencies").

80. 2012 Tex. Dist. LEXIS 80 (201st Dist. Ct., Travis Cnty, Tex. Aug. 2, 2012).

public trust doctrine was embedded in the state's constitution and that the public trust doctrine encapsulated all essential natural resources, including air.[81] That court explicitly rejected the defendant's argument that the public trust doctrine only extended to navigable waters and stated that "[r]ather, the public trust doctrine includes all natural resources of the State including the air and atmosphere."[82] The defendant appealed and the state appellate court vacated the trial court's judgement for lack of subject matter jurisdiction because the Commissioner had sovereign immunity that was not waived by statute or by legislative resolution.[83] This case is important for two reasons: first, it is an example of a court explicitly extending the public trust doctrine to include the air and atmosphere, and second, it illustrates the need to get the right plaintiff, defendant, test, and request for relief.

In *Butler v. Brewer*,[84] the Arizona Court of Appeals addressed the question of whether the public trust doctrine applies to the atmosphere.[85] Ultimately, that court held that while it is the duty of the judiciary to declare the scope of the public trust doctrine, the complaint had to be dismissed because it neither specified a constitutional violation nor challenged a state statute.[86] The court, relying on precedent, articulated three key principles:

> First, that the substance of the Doctrine, including what resources are protected by it, is from the inherent nature of Arizona's status as a sovereign state. Second, that based on separation of powers, the legislature can enact laws which might affect the resources protected by the Doctrine, but it

81. *See id.* at *1 (concluding that the "the public trust doctrine includes all natural resources of the State including the air and atmosphere" and "was incorporated into the Texas Constitution").

82. *Id.*

83. *See* Tex. Comm'n Env't. Quality v. Bonser-Lain, 438 S.W.3d 887, 893–95 (Tex. App. 2014).

84. 1 CA-CV 12-0347, 2013 Ariz. App. Unpub. LEXIS 272 (Ariz. Ct. App. Mar. 14, 2013).

85. *See id.* at *9 (addressing the question of whether the public trust doctrine encapsulates the atmosphere).

86. *See id.* at *7 ("Rather, we hold that while it is up to the judiciary to determine the scope of the Doctrine, Butler's complaint fails . . . because she does not point to any constitutional provision violated by state inaction on the atmosphere, does not challenge any state statute as unconstitutional . . . .").

> us up to the judiciary to determine whether those laws violate the Doctrine and if there is any remedy. Third, that the constitutional dimension of the Doctrine is based on separation of powers and specific constitutional provisions which would preclude the State from violating the Doctrine, such as the gift clause.[87]

After considering these principles, the court concluded that the judiciary has the role of determining whether the state violated the public trust doctrine.[88] Specifically, the court found that "[n]ot only is it within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the Doctrine, but the courts must also determine whether based on the facts there has been a breach of trust."[89] Additionally, the court asserted that the doctrine is not limited to water-related issues.[90] The court expressly left the possibility of extending the doctrine to air and to the atmosphere open[91] and asserted a case-by-case analysis as the proper method for courts to use.[92] This case was a critical success for public doctrine litigants because the court formally recognized the judiciary as the decision-maker for determining which resources are protected in trust and whether the government has breached its duty. The court also rejected the idea that the doctrine is limited to water-related resources, leaving the door open for the doctrine's expansion.

Public trust doctrine litigants accomplished another short-lived success in *Foster v. Washington Department of*

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87. *Id.* at *16.

88. *See id.* ("Given the above principles, we reject the Defendants' argument that the determinations of what resources are included in the Doctrine and whether the State has violated the Doctrine are non-justiciable.").

89. *Id.* at *17.

90. *Id.* at *18 ("[T]he fact that the only Arizona cases directly addressing the Doctrine did so in the context of lands underlying navigable watercourses does not mean that the Doctrine in Arizona is limited to such lands.").

91. *See id.* ("Arizona courts have never made such a pronouncement nor have the courts determined that the atmosphere, or any other particular resource, is *not* a part of the public trust.").

92. *See id.* ("Any determination of the scope of the Doctrine depends on the facts presented in a specific case.").

Ecology.[93] In that case, eight minor plaintiffs filed suit against the Washington State Department of Ecology ("the Department") asking the court to make the Department adopt a rule that would require the state legislature to take steps to decrease fossil fuel emissions.[94] The court emphasized that:

> 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. If we delay action by even a few years, the rate of reduction needed to stabilize the global climate would be beyond anything achieved historically and would be more costly.[95]

The court instructed the Department to reconsider its denial of the plaintiffs' petition for rulemaking.[96] The Department again denied the plaintiffs' petition but committed to various rulemaking actions.[97] A few months later, the state trial court affirmed the Department's denial of the plaintiffs' petition, but when the Department withdrew the rule draft a year later, the state trial court granted the plaintiffs' motion and ordered the Department to proceed with rulemaking.[98] The *Foster* court ordered the Department "to provide a recommendation to the 2017 legislature on greenhouse gas emission limits."[99] While the Washington Court of Appeals ultimately reversed the trial court's decision under the abuse of discretion standard, this case was a small victory nonetheless.

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93. No. 14-2-25295-1, 2015 Wash. Super. LEXIS 1034 (Wash Super. Ct. June 24, 2015).

94. *See id.* at *1 ("The youth petitioned the Department to adopt a proposed rule that, among other things, would recommend to the legislature limitation of greenhouse gas emissions consistent with current scientific assessments of requirements to stem the tide of global warming.").

95. *Id.* at *2 (quoting WASH. DEP'T OF ECOLOGY, WASHINGTON GREENHOUSE GAS EMISSION REDUCTION LIMITS 18 (2014)).

96. *See id.* at *4.

97. *See Foster v. Dep't of Ecology*, No. 75374-6-I, 2017 Wash. App. LEXIS 2083, at *3 (Wash. Ct. App. Sept. 5, 2017) ("On August 7, it again denied the petition. . . . It stated, however, 'Ecology has begun taking the necessary steps to comply with the Governor's July 28, 2015 directive and initiate the rulemaking process.'").

98. *See id.* at *4.

99. *Id.*

It represented "the nation's first court order mandating an agency to cap and regulate carbon dioxide emissions."[100]

A more hopeful decision came in 2015 when the New Mexico Court of Appeals decided *Sanders-Reed v. Martinez*.[101] There, the court reaffirmed New Mexico state precedent that the public trust doctrine may be used as a tool to protect constitutional climate rights.[102] In that case, the plaintiffs filed suit against New Mexico and its governor, Susana Martinez, seeking a declaratory judgement "that the common law public trust doctrine imposes a duty on the state to regulate greenhouse gas emissions in New Mexico."[103] In the court's discussion about whether to expand the doctrine to include the atmosphere, it noted that while New Mexico appellate courts had not considered the question, other jurisdictions had and declined to expand it.[104] In response to the plaintiffs' argument that the public trust duty existed in the state's constitution, the *Sanders-Reed* court stated:

> We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state. However, we also conclude that New Mexico's constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine with regard to the process a person must follow in asserting his or her rights to protect the atmosphere. *In other words, one may raise arguments concerning the duty to protect the atmosphere, but such arguments must be raised within the existing constitutional and statutory framework and not*

100. OUR CHILDREN'S TRUST, 2023 IMPACT REPORT, POWERING YOUTH CLIMATE JUSTICE 7 (2023).

101. 350 P.3d 1221 (N.M. Ct. App. 2015).

102. *See id.* at 1225 (interpreting the state constitution and recognizing that there is a duty on the part of the government to protect certain natural resources).

103. *Id.* at 1222.

104. *See id.* at 1225 ("New Mexico appellate courts have not had an opportunity to consider whether common law public trust principles apply to New Mexico's atmosphere. . . . In looking to other jurisdictions, we note that some have declined to extend the public trust doctrine.").

> *alternatively through a separate common law cause of action*.[105]

While the court affirmed the lower court's grant of summary judgement for the State, it was *not* because the State did not have a duty to protect the atmosphere, but rather because courts could not "independently regulate greenhouse gas emissions in the atmosphere as Plaintiffs ha[d] proposed"[106] because doing so would implicate separation of powers concerns.[107] In fact, the *Sanders-Reed* court explicitly stated that New Mexico has an affirmative duty to protect the environment.[108]

Sanders-Reed is important because it provides an example of a court recognizing an affirmative duty by the government to protect public trust resources, including the atmosphere. Additionally, it exemplifies one of the main obstacles that public trust litigants face: the judiciary's extreme hesitancy to trespass on legislative duties. Thus, while *Sanders-Reed* may have featured the proper plaintiffs to successfully litigate this new type of public trust doctrine claim, they still failed because they asked for improper relief.[109] Further, this case illuminates that if a public doctrine litigant asks a court to make the legislature do something that involves lawmaking, the case will surely be dismissed for separation of powers implications.

Perhaps the most controversial and well-known public trust doctrine case is *Juliana v. United States.* In that case, the Ninth Circuit considered whether an Article III court might provide proper redress to a public trust plaintiff without violating the

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105. *Id.* at 1225. *But see* Held v. Montana, 2023 Mont. Dist. LEXIS 2, at *117–18 (Mont. Dist. Ct. Aug. 14, 2023) (holding that the state's regulation, which prohibited analysis and remedies based on greenhouse gases, violated the state constitution).

106. *Id.* at 1227.

107. *See id.* ("Separation of powers principles would be violated by adhering to Plaintiffs' request for a judicial decision that independently ignores and supplants the procedures established under the Air Quality Control Act.").

108. *See id.* (stating that "the State has a duty to protect the atmosphere under Article XX, Section 21 of the New Mexico Constitution").

109. *See id.* at 1227 (stating that "the courts cannot independently regulate greenhouse gas emissions in the atmosphere as Plaintiffs have proposed").

separation of powers doctrine.[110] Part II discusses *Juliana* at length, but for now it is important to recognize that the *Juliana* plaintiffs responded to the *Sanders-Reed* decision—in which the New Mexico Court of Appeals articulated the need for a constitutional cause of action[111]—by explicitly arguing that the federal government had violated their constitutional rights, "including a claimed right under the Due Process Clause of the Fifth Amendment to a climate system capable of sustaining human life."[112]

In *Held v. State*,[113] sixteen Montana plaintiffs followed *Juliana*'s lead by alleging that a state regulation violated their constitutional rights under several provisions of the Montana Constitution and the public trust doctrine.[114] The *Held* court refrained from engaging with the public trust doctrine analysis because the doctrine was already codified in the Montana Constitution.[115] Nonetheless, the court determined that the Montana Constitution guarantees a "fundamental right to a clean and healthful environment, which includes climate as part of the environmental life-support system."[116] Further, the court

110. *See* Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020) ("The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2.'").

111. *See* Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) ("In other words, one may raise arguments concerning the duty to protect the atmosphere, but such arguments must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action.").

112. *Juliana*, 947 F.3d at 1164.

113. No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2 (Mont. 1st Dist. Ct. Aug. 14, 2023).

114. *Id.* at *1.

115. *See id.* at *117 ("The Public Trust Doctrine is already codified in the Montana Constitution in Art. IX, Sec. 3." (citing Gait v. State, 731 P.2d 912, 913–14 (Mont. 1987))). Article IX of Montana's Constitution states: "[T]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." MONT. CONST. art. IX, § 1.

116. *Held*, 2023 Mont. Dist. LEXIS 2, at *129.

held that the state regulation in question violated this constitutional right.[117]

Unlike in *Held*, the *Juliana* court dismissed the complaint for lack of standing.[118] However, both *Juliana* and *Held* represent a critical step in environmental activists' trajectory in developing the perfect case, as such activists have been watching court decisions, learning from them, and adjusting their litigation strategies accordingly.[119] *Juliana* demonstrates that it is only a matter of time until all the right pieces align and public trust doctrine litigants are successful.

Chernaik v. Brown, second to *Juliana* in importance and notoriety, has motivated public trust litigants and left doors open for a way forward.[120] As with *Juliana*, this Note discusses *Chernaik* in depth in Part II, specifically analyzing both its majority and dissenting opinions and the true magnitude that they hold in the public trust doctrine context. For now, it is important only to understand that the Oregon Supreme Court affirmed the Oregon Court of Appeals' vacatur of the trial court's judgment in favor of the plaintiffs because it was not persuaded by the plaintiffs' proposed test to expand the doctrine.[121] Further, the Oregon Supreme Court refrained from imposing an affirmative duty on the government to protect the resources in the public trust after considering the nature of public trust litigation, the doctrine of judicial restraint, and *stare decisis*.[122]

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117. *See id.* (stating that the Montana regulation is unconstitutional and is permanently enjoined).

118. *See Juliana*, 947 F.3d at 1165 ("Reluctantly, we conclude that such relief is beyond our constitutional power. . . . Rather, the plaintiffs' impressive case for redress must be presented to the political branches of the government.").

119. *See* OUR CHILDREN'S TRUST, *supra* note 100 at 8–9.

120. *See* Cheranik v. Brown, 475 P.3d 68, 72 (Or. 2019) ("We hold that the public trust doctrine currently encompasses navigable waters and the submerged and submersible lands underlying those waters. Although the public trust is capable of expanding to include more natural resources, we do not extend the doctrine to encompass other natural resources as this time.").

121. *See id.* at 84 ("We do not foreclose the possibility that the doctrine could expand to include other resources in the future, but the test that plaintiffs urge us to adopt sweeps too broadly.").

122. *See id.* at 83 ("Given the abstract nature of this litigation and this court's doctrines of judicial restraint and *stare decisis*, we reject plaintiffs' argument in this case that the public trust doctrine imposes obligations on the state like those that the trustees of private trusts owe to trust beneficiaries.").

However, the *Chernaik* court explicitly left two doors open: first, the court did not foreclose the possibility of expanding the resources included within the public trust.[123] Second, *Chernaik* stated that it could be possible to impose an affirmative fiduciary duty on the government to protect the resources in the public trust.[124] This case, then, presents a clear example of the right plaintiffs asking for the right relief, but nonetheless falling short by proposing the wrong test. *Chernaik*, along with other public trust doctrine litigation, offers hope that public trust litigation will eventually succeed and result in climate justice on a local, national, and global scale.[125]

II. THE PUBLIC TRUST DOCTRINE AND THE GOVERNMENT'S FIDUCIARY DUTY

The public trust doctrine is the latest tool that environmental activists are using to combat the effects of global climate change and push both state and federal governments to engage in more aggressive climate change action.[126] This Part focuses first on the majority and dissenting opinions in *Juliana* and *Chernaik*. These cases were dismissed for lack of standing[127] and out of judicial restraint/*stare decisis*,[128] respectively. These

123. *See id.* at 84 (leaving open the possibility of an expanded doctrine encompassing "other resources" in the future).

124. *See id.* ("We also do not foreclose the possibility that the doctrine might be expanded in the future to include additional duties imposed on the state.").

125. *See, e.g.*, Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, CLIMATE JUSTICE 543, 568 (2016) (commenting that public trust doctrine litigation, including *Chernaik*, "offer hope that this common law theory will help promote climate justice within and outside the court system").

126. *See, e.g.*, *Chernaik*, 475 P.3d at 71–72 (urging the Oregon state government to take affirmative action, as their duties under the public trust doctrine, against the effects of climate change); *Juliana*, 947 F.3d at 1165–66 (requesting the public trust doctrine be expanded to the federal government).

127. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) ("For the reasons above, we reserve the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing.").

128. *See Chernaik*, 475 P.3d at 83 ("Given the abstract nature of this litigation and this court's doctrine of judicial restraint and *stare decisis*, we reject plaintiffs' argument in this case that the public trust doctrine imposes

cases nonetheless represent the start of a modern trend of changing ideologies surrounding the public trust doctrine and imposing an affirmative duty on the government to protect the resources held in trust, as evidenced by recent litigation in other states.[129] Because these decisions have been pivotal in public trust doctrine litigation, extensive consideration is deserved.

A. Juliana v. United States

In *Juliana v. United States*, the Ninth Circuit tackled the question of whether the federal government violated its duties under the constitution and the public trust doctrine by encouraging and allowing the use of fossil fuels.[130] In that case, twenty-one young citizens, all members of an environmental organization, filed suit against the President of the United States and several federal agencies.[131] In their complaint, the plaintiffs asserted that the government violated their: 1) substantive due process rights under the Fifth Amendment; 2) equal protection rights under the Fifth Amendment; 3) Ninth amendment rights; and 4) public trust doctrine rights by continuing to "'permit, authorize, and subsidize' fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs."[132]

The plaintiffs presented an extensive record, making it impossible to deny the effects of climate change in relation to carbon emissions.[133] Judge Hurwitz, writing for the majority, described the current climate crisis as "approaching the point of no return."[134] Further, the plaintiffs' record conclusively

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obligations on the state like those that trustees of private trusts owe to trust beneficiaries.").

129. *See generally* Aji P. v. State, 480 P.3d 438 (Wash. Ct. App. 2021); Sagoonick v. State, 503 P.3d 777 (Alaska 2022).

130. *Juliana*, 947 F.3d at 1164.

131. *Id.* at 1165.

132. *Id.*

133. *See id.* at 1166 (describing plaintiffs' record as documenting "[f]or hundreds and thousands of years, average carbon concentration fluctuated between 180 and 280 parts per million. Today, it is over 410 parts per million and climbing"). Additionally, the opinion states, "[a]lthough carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase has come in the last forty years." *Id.*

134. *Id.* at 1166.

demonstrated that the federal government has long understood the dangers of fossil fuel use and increased carbon emissions.[135] Despite being extremely sympathetic to the plaintiffs and aware of the looming consequences of climate change, the court concluded that the lower court's holding in favor of the plaintiffs had to be reversed for lack of Article III standing.[136] The Ninth Circuit found that the plaintiffs' claims satisfied the first two standing prongs: injury-in-fact and causation.[137] However, their decision turned on the third and final prong: redressability.[138] The Ninth Circuit concluded that since the plaintiffs sought not only a cessation of fossil fuel use but also a comprehensive plan for combatting global climate change, the plaintiffs were not able to provide proper redressability because granting such relief is not within an Article III court's role.[139] The plaintiffs' requested relief fell within the duties of the other branches.[140] Even though "other branches may have abdicated their responsibility to remediate[,] the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."[141]

While the Ninth Circuit dismissed the complaint, it was not because the plaintiffs failed to assert a viable claim. Rather, the

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135. *See id.* at 1166 ("As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties.").

136. *See id.* at 1165 ("Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.").

137. *See* Juliana v. United States, 947 F.3d 1159, 1168–69 (9th Cir. 2020) (explaining that the district court correctly found that the injury-in-fact and causation requirements were met).

138. *See id.* at 1171 (recognizing that while "[t]here is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change . . . it is beyond the power of an article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan").

139. *See id.* at 1174 ("Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges."). Judge Hurwitz goes on to quote a warning from Benjamin N. Cardozo: "[A] judicial commission does not confer the power of 'a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness,' rather, we are bound 'to exercise a discretion informed by tradition, methodized by analogy, disciplined by system.'" *Id.* (citation omitted).

140. *See id.* at 1175.

141. *Id.* at 1170.

claim was dismissed because the plaintiffs asked for the *wrong* relief. The plaintiffs sought an injunction "requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions."[142] Such relief was clearly beyond the scope of what federal courts may provide. However, the Ninth Circuit's decision does not prevent other courts or the Ninth Circuit at a later time from coming to different conclusions in response to the public trust doctrine litigation. The issue for future public trust litigants, then, remains figuring out what relief a plaintiff may seek to satisfy the redressability prong of Article III standing.

Notably, Judge Staton, in her dissent, argued that the "plaintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*."[143] Further, Judge Staton argued that the redressability prong had been satisfied because in the climate change context, Article III standing's redressability requirement would not properly be measured by a federal court's ability to stop climate change in its tracks, but rather "by [its] ability to curb by some meaningful degree what the record shows to be an otherwise inevitable march to the point of no return."[144]

In other words, the "injury at issue [was] not climate change writ large; [rather, it was] climate change beyond the threshold point of no return."[145] Therefore, it should not have mattered that the court could only provide a "drop in the bucket"[146] of redress. Judge Staton argued that *every* drop matters and that "a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm."[147] She compared the scope of the issue and appropriate redressability to desegregation and statewide prison

142. *Id.*

143. *Id.* at 1182 (Staton, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.*

147. Juliana v. United States, 947 F.3d 1159, 1182 (9th Cir. 2020) (Staton, J., dissenting).

injunctions.[148] Judge Staton reasoned that Article III standing's redressability prong was satisfied because the court could have done *something*.[149]

Judge Staton also rebutted the majority's claims that providing redress in this case would have violated the separation of powers and the political question doctrine.[150] She concluded that she would have affirmed the district court's denial of the government's motion to dismiss plaintiffs' claim for lack of jurisdiction because the plaintiffs had standing, sufficiently stated their claims, and presented sufficient evidence to go to trial.[151]

B. Chernaik v. Brown

In *Chernaik v. Brown,* the Oregon Supreme Court considered whether the public trust doctrine enabled environmental activists to hold Oregon and its governor, Kate Brown, liable for their inaction in the battle against climate change.[152] Specifically, the plaintiffs asserted that the Oregon

148. *See id.* at 1176 ("Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court sanctioned, would vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province.").

149. *See id.* at 1182 (explaining that the court could meaningfully provide redressability to the plaintiffs and that "'something' is all that standing requires" (citing Massachusetts v. EPA, 549 U.S. 497 (2007))).

150. *See id.* at 1184, 1190 (explaining that "our history plainly establishes an ambient presumption of judicial review to which separation-of-powers concerns provide a rebuttal under limited circumstances"). Further, in Judge Staton's view, while it is the plaintiff's duty to show injury, causation, and redressability, it is the government's duty to show why this otherwise justiciable claim violates the separation of powers. *Id.* at 1184. Judge Staton rebuts the majorities' conclusion that climate change is a political question, pushing it out of the court's responsibility, and concludes "this action requires answers only to scientific questions, not political ones," and, in light of that standard, that "plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law." *Id.* at 1189.

151. *See id.* at 1191 ("I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial.").

152. *See* Chernaik v. Brown, 475 P.3d 68, 71 (Or. 2020) ("Relying on an expanded view of the public trust doctrine, plaintiffs—two young Oregonians, concerned about the effects of climate change, and their guardians—brought this action against the Governor and the State of Oregon. . . .").

government had a fiduciary duty to protect the resources held in public trust, which includes the atmosphere, all of the state's waters, wildlife, and wild fish.[153] The plaintiffs asserted "that the state was required to act as a trustee under the public trust doctrine to protect various natural resources in Oregon from substantial impairment due to greenhouse gas emissions and resultant climate change and ocean acidification."[154] Further, the plaintiffs asked the court "to specify the natural resources protected by the public trust doctrine and to declare that the state has a fiduciary duty, which it breached, to prevent substantial impairment of those resources caused by emissions of greenhouse gases."[155]

First, the court considered whether to expand the scope of the public trust doctrine.[156] On appeal, the plaintiffs proposed a two-factor test, which would include a natural resource within the public trust if, first, the resource is hard to hold or improve and, second, the resource has great value to the public.[157] Applying the test, the plaintiffs claimed that the atmosphere qualified as a public trust resource.[158] The *Chernaik* court ultimately rejected the plaintiffs' proposed test because it was indefinite and therefore declined to extend the public trust doctrine to include more than just navigable waters and submerged lands.[159] However, the court did not completely

153. *See id.* at 72 (stating that plaintiffs also sought affirmation that "the atmosphere and other natural resources are public trust resources" included within the state's fiduciary obligation).

154. *Id.* at 73.

155. *Id.* at 71–72.

156. *See id.* at 76 ("We begin with plaintiffs' argument that the circuit court erred in concluding that the public trust doctrine applies only to submerged and submersible state lands.").

157. *Id.* at 81 (identifying two factors as the proposed test: "(1) [the resources] are not easily held or improved and (2) they are of great value to the public for uses such as commerce, navigation, hunting, and fisheries"). If the answer to both of these questions is "yes," plaintiffs argued, the resource should be included in the public trust. *Id.*

158. *See id.* (reasoning that "the atmosphere is intricately linked with other trust assets, such as water as a factual matter" (internal citations omitted)).

159. *See id.* at 82 ("Indeed, the test that plaintiffs propose is so broad that it is difficult to conceive of a natural resource that would not satisfy it."). Further, the court "decline[d] to adopt the test that plaintiffs have urged us to

foreclose the possibility for the doctrine's expansion.[160] Like *Juliana* before it, *Chernaik* seemingly instructed that, given the proper test and proper circumstances, the Supreme Court of Oregon would have no theoretical issue expanding the scope of the public trust doctrine.[161]

Next, the court tackled the question of whether Oregon has a fiduciary duty to protect resources held in public trust.[162] Plaintiffs pointed to various cases and argued that courts have consistently defined the state's relationship to the resources as a trustee/beneficiary relationship.[163] The *Chernaik* court determined that the case law, however, "cannot be read to conclude that all common-law principles of private trust law govern the public trust doctrine."[164] *Chernaik* refrained from imposing fiduciary obligations on the state,[165] but did not "foreclose the possibility that the doctrine might be expanded upon in the future to include additional duties imposed on the state."[166]

Chief Justice Walters, writing in dissent, argued that the "court can and should determine the law that governs the other two branches"[167] and, therefore, the court "should [have] issue[d] a declaration that the state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of public trust resources."[168] Chief Justice Walters asserted that the Oregon

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use and, based on that test, to expand the resources included in the public trust doctrine well beyond its current scope." *Id.*

160. *Id.* at 82.

161. *See id.* (explaining that they are not opposed to expanding the doctrine in the future, but the plaintiff's test is not an adequate platform to do so).

162. *See* Chernaik v. Brown, 475 P.3d 68, 82 (Or. 2020) (stating that the question of the state's fiduciary obligations depends on whether the state has a fiduciary obligation under the public trust doctrine and whether substantial impairment is the appropriate standard).

163. *See id.* at 76–77 (Or. 2020) (citing Winston Bros. Co. v. State Tax Com., 62 P.2d 7, 8 (Or. 1936) ([A]lthough title passed to the state "by virtue of its sovereignty, its rights were merely those of a trustee for the public.")).

164. *Id.* at 83.

165. *See id.* ("[W]e reject plaintiffs' argument in this case that the public trust doctrine imposes obligations on the state like those that trustees of private trusts owe to beneficiaries.").

166. *Id.* at 84.

167. *Id.* at 84 (Walters, C.J., dissenting).

168. *Id.*

Supreme Court should have declared an affirmative fiduciary duty on the part of the state because "the purpose of the public trust doctrine is to ensure to public's rights to use and enjoy public trust resources now and into the future, [so] the doctrine must impose an obligation to protect and preserve them."[169] Further, she reasoned that to truly fulfill the purpose of the public trust doctrine, the state *must* be obligated to do more than just refrain from selling and restricting the use of public trust resources.[170] Indeed, "[t]he state must act reasonably to prevent their substantial impairment."[171] In other words, Chief Justice Walters asserted not only that the court should impose an affirmative fiduciary duty, but that doing so would be *essential to* fulfilling the purpose of the public trust doctrine.[172]

C. *The Fiduciary Duty Under the Public Trust Doctrine*

The government has a fiduciary duty, rooted in the public trust doctrine's history and purpose, to protect and maintain the natural resources held in trust from substantial impairment, which includes navigating the effects of climate change.[173] It is only a matter of time until environmental activists litigate the perfect case to succeed on the merits and establish the fiduciary duty at law.

Two major problems arise as substantial obstacles for public trust litigants. First, the scope of the public trust doctrine has not been formally expanded beyond navigable waters and submerged lands.[174] Thus, the natural resources which the government arguably has a duty to maintain are currently limited. Second, courts do not agree on their ability to provide redress for public trust claims, which then prevents the courts from establishing an affirmative duty at law. This Part uses the

169. *Id.*

170. *Id.* at 86 ("To ensure the future use and enjoyment of public trust resources, the state must do more than refrain from selling public trust resources and restricting their use.").

171. *Id.*

172. Chernaik v. Brown, 475 P.3d 68, 86 (Or. 2020)

173. *See id.* at 84 (articulating the view that the state does have an affirmative fiduciary duty to protect and maintain the resources held in trust and the courts should declare that as the governing law).

174. *See supra* Part I.A.

doctrine's history to show that courts should expand the public trust doctrine to include the air and atmosphere. Drawing on the doctrine's history, purpose, and the dissenting opinions in *Juliana* and *Chernaik*, this Part also explains why the government has an affirmative duty to protect natural resources held in trust.

1. The Scope of the Public Trust Doctrine Should Expand to Include the Atmosphere

Courts should expand the scope of the public trust doctrine to include the air and atmosphere because it is consistent with the doctrine's origin and history.

The public trust doctrine traces back to the Roman Law doctrine *res communes*, or common things.[175] *Res communes* resources were defined by the inability to capture them, and further their immunity to privatization.[176] Roman law established the idea that certain resources cannot be privately owned, but must be shared by the public. In Rome, these resources included the air, navigable water, and seashores. It was accepted that these resources could "be enjoyed and used by everyone in their parts but not in their totality."[177] As mentioned in Part I, Justinian wrote that "some [things] admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all. . . . the *air*, running water, the sea, and consequently the sea-shore."[178] Relying strictly on the doctrine's origin and history, air and the atmosphere are therefore clearly within the doctrine's ambit.

Formally expanding the doctrine to include the air and the atmosphere would not only be the most consistent with the doctrine's history, but it would also be consistent with American jurisprudence. American courts have held that navigable waters and submerged lands are within the public trust doctrine's scope, but they refuse to extend this holding to the air and atmosphere.[179] Courts' refusal to expand the doctrine is inconsistent with how American courts have discussed the

175. *See* Rudolph, *supra* note 31 at 1409.

176. *Id.*

177. *Id.* (internal quotations omitted).

178. *See* J. INST., *supra* note 34, at 18 (emphasis added).

179. *See supra* Part I.

public trust doctrine and with the weight Roman Law carries in the American legal system.

American courts have traditionally referenced the public trust doctrine's Roman origins, specifically *res communes*.[180] For example, in *Geer v. Connecticut*,[181] Justice White's majority opinion discusses *res communes* and the idea that certain resources should be held in public trust:

> Referring to those things which remain common, or in what he qualified as the negative community, this great writer says: These things are those which the jurisdictions called res communes. Marcien refers to several kinds—*the air*, the water which runs in the rivers, the seas. . . ."[182]

Courts continue to reference *res communes* in the context of analyzing property rights and claims for ownership.[183] By doing so, they unknowingly concede that the air and the atmosphere should be protected resources under the doctrine. Public trust scholar Mary Wood touched on these ideas and confronted the Court's holding in *Illinois Central v. Illinois*.[184]

> Guided by the essential public purposes approach taken by the Supreme Court in *Illinois Central* and other public trust cases, it is only logical that the public trust should protect the atmosphere and all other natural resources that are vital to the people and society at large. No one could seriously argue that the air is not a resource of special character that

180. *See, e.g.*, Vansickle v. Haines, 7 Nev. 249, 258 (1872) ("By the Roman law, water, light, and air were *res communes*, and which were defined, things the property of which belongs to no person, but the use to all." (internal quotations omitted)); Hine v. New York Elevated R.R. Co., 7 N.Y.S. 464, 470 (N.Y. Sup. Ct. 1889) ("There are things common to every one, (*res communes*) as air, flowing water, the open sea, the sea-shore."); Dunham v. Lamphere, 69 Mass. 268, 270 (1855) ("[Resources] not divided are called public property; they were denominated *res communes*, such as air, water, the sea, fish, wild beasts."); Alec L. v. Jackson, 863 F. Supp. 2d 11, 13 (D.D.C. 2012) (referencing the public trust doctrine's Roman and English roots).

181. 161 U.S. 519 (1896).

182. *Id.* at 525 (emphasis added) (internal quotations omitted).

183. *See, e.g.*, Air-Serv Group, LLC v. Pennsylvania, 18 A.3d 448, 553 (Pa. Commw. Ct. 2011) ("While air is a material substance, air has been historically treated as *res communes*, which means things common to all; things that cannot be owned or appropriated, such as light, air, and the sea." (internal quotations omitted)).

184. 146 U.S. 387 (1892).

> serves purposes in which the whole people are interested. Atmospheric health is essential to all facets of civilization and human survival. The Roman origins of the public trust doctrine classified air—along with water, wildlife and the sea—as res communes. The *Geer v. Connecticut* decision relied on this ancient Roman classification of res communes in holding that the public trust doctrine incorporates wildlife. Courts today continue to trace the public trust doctrine to Roman origins, citing air in the group of assets that are common to mankind.[185]

Therefore, expanding the doctrine to encapsulate the air and the atmosphere is consistent with the way American courts have interpreted *res communes* and relied on Roman Law as a source of law. Roman scholars have stated,

> Courts on American soil making connections between the doctrine and Roman law date back to 1774 and, as noted, reach as high as the Supreme Court. . . . [E]arly American courts engaged Roman law, including that relevant to the PTD [public trust doctrine], as a robust source of authority, not as fancy window dressing.[186]

American law has looked to Roman Civil law as not mere guidance or "fancy window dressing," but as a concrete source of law that has dictated modern jurisprudence as we know it.[187] If we again look to Roman Civil law, like we have continuously done, it becomes obvious that courts should expand the doctrine to encapsulate the air and the atmosphere because it is the most consistent with the doctrine's origin and history. Justinian himself wrote that air along with water are *res communes* and belong to the public.[188]

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185. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T. L. 43, 81 (2009) (internal quotations omitted).

186. J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 121 (2020).

187. *Id.*

188. *See* J. INST., *supra* note 34, at 18.

2. Response to the *Cherniak* Court's Refusal to Expand the Doctrine

Courts should expand the public trust doctrine to include the air and the atmosphere because it is consistent with the doctrine's Roman Law origins and American courts have routinely referenced *res communes* to guide their decisions in the public trust context.[189] Despite this routine reliance on *res communes* and Roman Law, many courts have declined to expand the doctrine due to fear for indefiniteness.[190] However, in *Chernaik*, the Supreme Court of Oregon implied that it would be willing to expand the doctrine to include the air and the atmosphere with the right test.[191] This Section addresses a flaw in the *Chernaik* lower court's reasoning before articulating a test that would surpass the indefiniteness critique.

a. The Oregon Court of Appeals Misinterpreted the Doctrine's Origins

The Oregon Court of Appeals misinterpreted the public trust doctrine's origins. Therefore, the *Chernaik* opinion is unreliable to the extent that the Oregon Supreme Court relied on the lower court's misinterpretation. The Oregon Court of Appeals described the State's ownership as being either *jus privatum* (private things) or *jus publicum* (public things).[192] Relying on these doctrines, the court declined to extend the

189. *See, e.g.*, Geer v. Connecticut, 161 U.S. 519, 525 (1896) (referencing *res communes* and including air in its definition).

190. *See* Chernaik v. Brown, 475 P.3d 68, 82 (Or. 2020) (rejecting the plaintiffs' test because "they are insufficient because they fail to provide practical limitations").

191. *See id.* ("We do not foreclose the idea that the public trust doctrine may evolve to include more resources in the future.").

192. *See* Chernaik v. Brown, 436 P.3d 26, 31–32 (Or. Ct. App. 2019) ("The state's ownership of those lands is comprised of an interrelationship of two distinct aspects, each possessing its own characteristics." (internal quotations omitted)). First, the court describes, "the state holds full fee title in the property, called the *jus privatum*, which includes the power of alienation, *viz.*, the power to convey property interests in and use of that property for any purpose." *Id.* at 31 (internal quotations omitted). Second, the court describes, *jus publicum* as "rooted in the principle that navigable waterways are a valuable and essential resource and as such all people have an interest in maintaining them for commerce, fishing, and recreation." *Id.* (internal quotations omitted).

public interest doctrine to include the air and remanded the district court's decision.[193] However, the court completely misidentified the public doctrine's origins by failing to recognize *res communes* (common things).

In Roman Law, common resources fell in one of the following three categories: 1) *res nullius*, 2) *res communes,* and 3) *res publica.*[194] *Res nullius* "refer[ed] to property not owned by anyone, and therefore available to individuals to reduce to private ownership (*res privata*) through labor."[195] *Res communes* "appli[ed] to resources *owned commonly* for mutual benefit, such as a river . . . which individuals may use for specific purposes so long as they do not harm the [resource] for use by others and the public at large."[196] And *res publica* "refer[ed] to resources intended *for use by all*, such as a public square, park, or commons."[197] *Res communes* is distinct from *res publica* because the former is about common ownership and the latter is about common use. The Oregon Court of Appeals failed to consider the doctrine's defining characteristic—common ownership by the people—when it analyzed the public trust doctrine through *res publica* and not *res communes*. Therefore, the court misinterpreted the trust's Roman origins, which impacted the Oregon Supreme Court's opinion. The court should have recognized *res communes* and held that air and the atmosphere are resources protected by the public trust.

b. The Test for the Public Trust Doctrine's Expansion

In *Chernaik*, the Oregon Supreme Court rejected the plaintiffs' test for expanding the public trust doctrine but left

193. *See id.* at 36 (vacating and remanding the district court's decision).

194. *See* Robert W. Adler, *Natural Resources and Natural Law Part I: Prior Appropriation*, 60 WM. & MARY L. REV. 739, 802 (2019) (describing the categories of legal relationships between the public and natural resources held in common by that public).

195. *See id.* (explaining that "[t]his could apply to homesteading of unused land, capture of wildlife, or mining of fugitive minerals" (internal citations omitted)).

196. *Id.* (emphasis added).

197. *Id.* (emphasis added).

the door open for the court to consider other tests in the future.[198] The plaintiffs' proposed test consists of two prongs:

> (1) Is the resource not easily held or improved? (2) Is the resource of great value to the public for uses such as commerce, navigation, hunting and fishing? According to the plaintiffs, a "yes" answer to each question would mean that the resource should be included under the doctrine as a public trust resource.[199]

The court argued that, while these are important factors, the test provides no practical limitations and would lead to protection of almost every natural resource under the public trust.[200] The court expressly left the door open for other plaintiffs to bring narrower tests by maintaining their right to expand the doctrine in the future.[201]

A narrower, more specific test that would overcome the *Chernaik* court's concerns would be to first ask whether the resource is easily capturable and then whether it is the type of resource that is so unique that no person should own it for the purposes of commerce and human survival. If both prongs are satisfied, the public trust doctrine should be expanded to include the resource. This test is similar to the plaintiffs' test in *Chernaik* and has the same general intentions but is more specific, which imposes the practical limitations that the *Chernaik* court deemed necessary.[202]

The first prong is more specific because it looks at whether a resource is easily "capturable" rather than "easily held or improved." "Easily held or improved" is not workable because it captures seemingly endless number of resources, whereas "capturable" creates more specific, clear, and workable

198. *See Chernaik,* 475 P.3d 68, 84 (Or. 2020) (declining to extend the doctrine to include the any resources other that navigable water and submerged lands). Additionally, the court did not "foreclose the possibility that the doctrine could expand to include other resources in the future, but the test that plaintiffs urge us to adopt sweeps too broadly." *Id.*

199. *Id.* at 81.

200. *See id*. at 82 ("Indeed, the test that plaintiffs propose is too broad that it is difficult to conceive of a natural resource that would not satisfy it.").

201. *See id.* at 81–82 (noting explicitly that the "public trust doctrine may evolve to include more resources in the future").

202. *See See* Chernaik v. Brown, 475 P.3d 68, 81–82 (Or. 2020) (expressing concern for the lack of practical limitations).

guardrails. Additionally, using the "capturable" standard is consistent with Justinian's original articulation and purpose behind the doctrine. In fact, the distinguishing feature of *res communes* resources were that they were very difficult, if not impossible, to *capture*.[203] With this historical context, it becomes obvious that the first inquiry must be whether or not the resource at issue is easily capturable. Applying the first prong to air, the answer is clearly yes. Air is hard, if not impossible to capture. You cannot put a fence around the air and claim it as yours. Therefore, the first prong of the newly articulated test is satisfied.

The second prong looks at whether the resource in question is the *type* of resource that is so unique that no person should own it for the purposes of commerce and human survival. This second portion of the test derives from the underlying themes in Justinian's second book governing the law on things.[204] In his very opening pages, Justinian writes, "Some [things] admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all. . . . Thus the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore."[205] There is an undeniable sense that there are certain things that are bigger than mankind, some things that no person should own because that is the way it was supposed to be, because natural law demands it.[206] The second prong of this proposed test asks the court to engage with a case-by-case inquiry to determine whether the contested resource is the *kind* of resource that is bigger than mankind or whether there is something obvious about the contested resource that indicates it should not and cannot be owned. If the resource fits in that category, it satisfies the second prong, and the courts should

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203. *See* Rudolph, *supra* note 31, at 1409 (explaining that *res communes* resources are defined based on the inability for one to capture them (emphasis added)).

204. *See* J. INST., *supra* note 34, at 18.

205. *See* J. INST., *supra* note 34, at 18. The quotation above is in the opening portion of the Second Book governing things. *Id.* Thus, it acts as an underlying principle and overarching theme that governs the law of things—there are certain things that no person should own, and they belong to the people. *Id.*

206. *See id.* (expressing the underlying theme that there are certain resources that no person should own).

expand the doctrine to include that resource. Rooting the inquiry in commerce and survival interests provides structure, narrows the inquiry, and is consistent with the sixteenth-century English interpretation of the public trust doctrine.[207]

In sum, courts should hold that the public trust doctrine extends to the air and the atmosphere. Although the *Chernaik* court rejected the plaintiffs' test, courts should use a more specific and historically-rooted test. Applying this test to the air and the atmosphere, both prongs are sufficiently satisfied, and the doctrine should extend to encapsulate them.

3. Courts Should Hold that the Government Has an Affirmative Fiduciary Duty

Courts should hold that the government has an affirmative fiduciary duty to protect and maintain the resources held in public trust because doing so is consistent with both the doctrine's history and its development throughout American jurisprudence. Not only have American courts consistently referred to the public trust doctrine as consisting of a trustee/beneficiary relationship,[208] but the obligation of the state to have an affirmatory duty is consistent with the purpose of the public trust doctrine.[209]

The purpose of the public trust doctrine is to protect and maintain crucial natural resources, held in trust, in the interest

207. *See* Freedman & Shirley, *supra* note 40, at 1–3.

208. *See, e.g.*, Winston Bros. Co. v. State Tax Comm'n., 62 P.2d 7, 9 (Or. 1936) ("[A]lthough the title passed to the state by virtue of its sovereignty, its rights were merely those of a trustee for the public."); Kramer v. City of Lake Oswego, 446 P.3d 1, 3–4 (Or. 2019) (concluding "that, if Oswego Lake is among the navigable waterways that the state holds in trust for the public, then neither the state nor the city may unreasonably interfere with the public's right to enter the water from the abutting waterfront parks"); Greer v. Connecticut, 161 U.S. 519, 534 (1896) (stating that "ownership of the sovereign authority is in trust for all the people of the state"). Further, the Supreme Court stated that "by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state." *Greer*, 161 U.S. at 534.

209. *See* Ryan, *supra* note 28, at 137–38 (explaining the public trust doctrine's purpose as ensuring common ownership by the people).

of current and future citizens.[210] It is derived from the idea that there are certain resources that are so important that they cannot be owned by a single person, but must be owned commonly, by the people, for public use.[211] The *Chernaik* court wrongly interpreted the purpose of the public trust doctrine as a concept of perpetual property rights.[212] As a result of this interpretation, the court declined to recognize an affirmative fiduciary obligation on the part of the state.[213] However, even as that court refrained from declaring such a duty, it unknowingly conceded that part of the state's responsibility *is* to protect the natural resources held in trust.

> Plaintiffs' suggestion of a wholesale importation of generalized private trust principles to govern the state's obligations under the public trust doctrine could result in a fundamental restructuring of the public trust doctrine and impose broad new obligations on the state, beyond the recognized duty that the state *has to protect* public trust resources for the benefit of the public's use of navigable waterways for navigation, recreation, commerce, and fisheries.[214]

A duty to protect is an affirmative duty, and the court should have declared it as such. The court's simultaneous recognition of the duty to protect natural resources held in a trust and refusal to impose an affirmative duty is a complete contradiction.[215] This duty is so obvious and fundamental that that court's opinion appeared inorganic because it skirted around the edges, refusing to acknowledge what it knew was there. The *Chernaik* court seemed resistant due to fear of

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210. *See* Ariz. Ctr. L. Pub. Int. v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) ("The beneficiaries of the public trust are not just present generations but those to come.").

211. *See* Ryan, *supra* note 28, at 137.

212. *See* Chernaik v. Brown, 475 P.3d 68, 79 (Or. 2020) ("[T]he state may not sell or dispose of or grant the right to make any use of [the beds of navigable streams] which would impair or impede navigation." (internal quotations omitted)).

213. *See id.* at 83 ("Given the abstract nature of this litigation and this court's doctrines of judicial restraint and *stare decisis*, we reject plaintiffs' argument in this case that the public trust doctrine imposes obligations on the state like those that trustees of private trusts owe to trust beneficiaries.").

214. *Id.* (emphasis added).

215. *Id.*

imposing limitless obligations on the state,[216] which would surely result in (well-deserved) litigation.

Furthermore, while the *Chernaik* court declined to formally impose an affirmative fiduciary duty on the part of the state, it did not eliminate the existence of an implicit duty that is still influencing state and court behavior.[217] The duty is implicit in the purpose of the doctrine. Though the *Chernaik* court refused to declare an affirmative fiduciary duty, it does not follow that the duty is not present or that the state does not act with its duty in mind.[218]

However, there remains an enforceability issue. Without formal recognition, cases will continue to be dismissed on the theory that there is no fiduciary duty on the part of the state to protect and maintain resources held in trust.[219] Further, when a court is eventually brave enough to declare an affirmative duty on the part of the state, this obligation will only go so far. Many states have refused to extend the scope of the public trust doctrine to include resources other than navigable waters and submerged and submergible lands.[220] While the *Chernaik* court did not foreclose the idea of expanding the scope of the public trust doctrine in the future, they ultimately maintained the status quo.[221]

Even if the courts declare an affirmative fiduciary duty, it will only extend to the narrow class of resources traditionally held in trust: navigable waters, submerged, and submergible lands. This would impose an affirmative duty to navigate certain effects of climate change, including ocean acidification

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216. *See id.* at 81–82 (expressing concern of practical limitations in the plaintiff's argument for expanding the public trust doctrine and imposing a fiduciary duty on the state).

217. *See id.* at 83–84 (articulating the fact that there is still a duty to protect the resources which are affirmatively held in trust).

218. *Id.*

219. *See, e.g.*, *id.* at 83–84 (dismissing the case because the court did not find that a fiduciary duty exists).

220. *See id.* at 81–83 (refraining from extending the scope of the public trust doctrine to include wildlife, fish, and the atmosphere). The court maintained that the public trust doctrine only included navigable waters, submerged and submergible lands. *See id.* at 82.

221. *Id. at* 84.

and rising sea levels, which surely matters.[222] As Judge Staton wrote in dissent in *Juliana*, "[W]e are perilously close to an overflowing bucket. These final drops matter. *A lot*. Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm."[223]

In sum, the government does not have a formally recognized fiduciary duty to protect and maintain resources held in public trust.[224] However, the duty exists at the margins, evidenced by the doctrine's history and purpose. Until this affirmative duty is recognized, there is a significant enforceability issue and claims will continue to get dismissed.[225] The lack of recognition should not deter litigants from filing suits because eventually a court will muster the courage to declare that an affirmative duty exists. Once the affirmative duty is recognized, the duty will only extend to the resources held in trust.[226] The doctrine's traditional scope could nevertheless have a significant impact on the fight against climate change and should be utilized.[227] Judge Nakamato, writing for the majority in *Chernaik*, described the doctrine as flexible and changing with society.[228]

> As a common-law doctrine, the public trust doctrine is not necessarily fixed at its current scope. It is within the purview of this court to examine the appropriate scope of the doctrine and to expand or to mold it to meet society's current needs, as we have done in the past.[229]

The *Chernaik* majority did not foreclose on the possibility of expanding the scope of the public trust doctrine in the future, but refrained from doing so because they were not convinced by

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222. *See, e.g.*, HUNTER, *supra* note 5 (explaining the significance of small steps in the context of climate change).

223. Juliana v. United States, 947 F.3d 1159, 1182 (9th Cir. 2020) (Staton, J., dissenting).

224. *See* Chernaik v. Brown, 475 P.3d 68, 84 (Or. 2020) (declining to impose an affirmative duty on the state).

225. *See id*. at 81–83 (describing justiciability issues).

226. *See id.* at 83–84 (discussing the scope of the public trust doctrine).

227. *See Juliana*, 947 F.3d at 1182 (Staton, J., Dissenting) (stating that even a drop in the bucket will help in the fight against climate change).

228. *Chernaik*, 475 P.3d at 78.

229. *Id*.

plaintiffs' test.[230] If presented with the right test, one that establishes practical limitations, the court would be open, if not willing, to extend the scope of the public trust doctrine to include other natural resources.[231]

As the *Chernaik* and *Juliana* courts point out, public trust litigation faces a series of additional obstacles: (1) the issue of separation of powers;[232] (2) the issue of standing, specifically the redressability prong;[233] and (3) the issue of the political question doctrine.[234] Even if the courts declare an affirmative duty and extend the doctrine, a plaintiff still faces major obstacles to overcome. Judge Staton's and Judge Watson's dissenting opinions in *Juliana* and *Chernaik*, respectively, are illustrative for overcoming these obstacles. First Judge Staton, attacking the separation of powers argument, stated that

> the majority laments that it cannot step into the shoes of the political branches . . . but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to

230. *See id.* at 81–82 (agreeing that plaintiffs' two factors were relevant considerations, but holding they were insufficient because they failed to provide practical limitations).

231. *See id.* at 82 (explaining that the court did "not foreclose the idea that the public trust doctrine may evolve to include more resources in the future," but they declined to adopt plaintiffs test "to expand the resources included in the public trust doctrine well beyond its current scope").

232. *See id.* at 83 (stating that because the court declined to declare an affirmative fiduciary duty and extend the public trust doctrine to include other natural resources they did not have to address the separation of issues problem); *see also* Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020) (explaining that even if the redressability prong is satisfied, the redress the plaintiffs seek is "beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan"). Further, the court wrote that while "the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes." *Id. a*t 1175.

233. *See* Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020) (expressing skepticism that the redressability prong is satisfied, but even if it is fulfilled, noting that the redress the plaintiffs seek is beyond the scope of the Article III courts).

234. *See id.* at 1173 (citing Rucho v. Common Cause, wherein the United States Supreme Court ruled that "partisan gerrymandering claims presented political questions beyond the reach of Article III courts").

> intervene where the political branches run afoul of our foundational principles.[235]

In other words, providing redress for public trust doctrine claims is not a violation of separation of powers, but rather is part of the judicial branch's *duty* to intervene.

Chief Justice Walters similarly argued that it is the court's duty to review and ensure the acts of the other two branches comply with the constitution, statutory law, and common-law doctrines, including the common law public trust doctrine.[236] Therefore, review of the public trust doctrine and the responsibility of deciding what the law *is*, is well within the role of the judiciary.[237] Chief Justice Walters wrote:

> Courts . . . must not shrink from their obligation to enforce the rights of all persons to use and enjoy our invaluable public trust resources. How best to address climate change is a daunting question with which the legislative and executive branches of our state government must grapple. But that does not relieve out branch of its obligation to determine what the law requires.[238]

Both Judge Staton and Chief Justice Watson point out that it is well within the role of the judiciary to review the acts of the other branches and determine what the law is. That is exactly what the courts would be doing in the case of the public trust doctrine. The courts are not tasked with creating and implementing a plan to cease climate change, and plaintiffs should not ask for that because doing so will almost ensure dismissal.[239] Rather, courts should determine what the law *is*

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235. *See id. a*t 1183–84.

236. *See* Chernaik v. Brown, 475 P.3d 68, 89 (Or. 2020) (Walters, C.J., dissenting) ("[T]he courts can review the acts of the legislature and the Governor not only for compliance with the constitution and statutory law, but also for compliance with common-law dictates, including the common-law public trust doctrine."). Further, that "[i]t is, after all, a core function of *this* branch to determine what the public trust requires, and, in exercising that authority, this court may determine that a legislative action which violates the principles of the public trust doctrine is invalid." *Id.* (emphasis in original).

237. *See generally* Marbury v. Madison, 5 U.S. 137, 167 (1803) (establishing the doctrine of judicial review).

238. *Chernaik*, 475 P.3d at 93.

239. *See Juliana*, 947 F.3d at 1174–1175 (rejecting the plaintiff's argument because of separation of powers concerns).

surrounding the public trust doctrine and then *review* the other branch's action (or inaction) to determine if it complies with the law. Specifically, the courts should declare what resources are held in the public trust and that there is an affirmative fiduciary duty on the part of the state to maintain and protect public trust resources.

Next, as Judge Staton articulates, there is not a standing issue because the redressability prong can be satisfied. The majority in *Juliana* found that the first two prongs were satisfied but dismissed the case due to the redressability prong.[240] Judge Staton correctly asserted that there is not a redressability problem because the court is perfectly able to provide meaningful redress that will help alleviate the plaintiffs' claims.[241] In circumstances as widespread as global climate change, similar to desegregation, small moves make a big difference.[242] In fact, small moves are almost always necessary. The key to satisfying the redressability prong is for the plaintiff to ask for the *right thing*. Public trust doctrine plaintiffs should not ask the court to create a plan or make the legislature create a plan to stop global warming. As we see in *Juliana*, even if the court finds that the injury-in-fact and causation prongs of the standing requirement are satisfied, the claim will likely be dismissed because the plaintiffs seek something out of the court's reach.[243] Instead, the plaintiffs should ask for declaration of the law and for the review of the other branches' actions to determine whether it complies with the law. Such requests would avoid the issue of redressability and would likely withstand the standing scrutiny.

Lastly, Judge Staton addressed the political question obstacle by distinguishing a scientific question from a political

240. *See id.* at 1174 (holding that the Article III redressability requirement was not satisfied).

241. *See id.* at 1182–84 (Staton, J., dissenting) (explaining that the court is more than able to provide redressability, and something as small as a court order postponing remedial measures both satisfies the redressability prong and significantly helps the plaintiffs).

242. *See id.* at 1182 (stating that even a "drop in the bucket" will help in the fight against climate change).

243. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) (explaining that the redressability prong cannot be satisfied since the plaintiff requested the court to instruct the legislature to make a plan).

question.[244] Ultimately, Judge Staton concluded that the issues presented in *Juliana* and in the issue of global climate change present scientific questions rather than political questions, and are thus justiciable.[245]

The state has an affirmative duty to protect the natural resources held in trust. For the public trust doctrine to serve as a viable and extensive tool for environmental activists and the general fight against climate change, the courts must formally declare that an affirmative duty exists and expand the scope of the doctrine to include other natural resources, such air and the atmosphere. This daunting task is not unattainable, but there does need to be the *right* plaintiff with the *right* test to pave the way. The plaintiff will then have to surpass the scrutiny of separation of powers and standing requirements.

In conclusion, using the public trust doctrine as a weapon in the fight against climate change is a challenging but not impossible task. The public trust doctrine falls short, not because it *could not* work, but because it cannot work *right now*.

CONCLUSION

Some resources are so vast and so important to human survival that no person can own them. These resources are immune to privatization because they are owned collectively by the public for common use. It is the government's duty to protect these resources for generations to come. Courts should hold that the government has a fiduciary duty to protect and maintain public trust resources. Courts have declined to recognize an affirmative fiduciary duty out of separation of powers and justiciability concerns, but recognition is consistent with the doctrine's purpose, history, and evolution as demonstrated throughout American jurisprudence.

Second, courts should expand the public trust doctrine to encapsulate the air and the atmosphere. The two-part test proposed in this Note provides a way forward for courts to expand the doctrine and give it the teeth it needs to enact meaningful change. Expansion of the public trust doctrine to

244. *Id.* at 1185–89 (applying factors informed by Supreme Court case law to determine whether this case presents political questions).

245. *See id.* at 1189 ("In sum, resolution of this action requires answers only to scientific questions, not political ones.").

include these resources—and recognition of the government's affirmative duty to protect and maintain public trust resources—has the potential to completely transform government action, climate change litigation, and the world that generations to come will live in.