IN THE COURT OF APPEALS OF THE STATE OF OREGON

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon; LISA CHERNAIK, guardian of Olivia Chernaik; KELSEY CASCADIA ROSE JULIANA, a minor and resident of Lane County, Oregon; and CATIA JULIANA, guardian of Kelsey Juliana,, Petitioners-Appellants, v. JOHN KITZHABER, in his official capacity as Governor of the State of Oregon; and STATE OF OREGON, Respondents-Respondents.	Lane County Circuit Court No. 161109273 CA A151856

RESPONDENTS' ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Lane County
Honorable KARSTEN H. RASMUSSEN, Judge

Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Administrative Rules

Other Authorities

RESPONDENTS' ANSWERING BRIEF

STATEMENT OF THE CASE

Defendants-respondents John Kitzhaber and the State of Oregon accept plaintiffs' statement of the case as adequate for appellate review.[1]

Summary of Argument

Plaintiffs filed a complaint for declaratory and injunctive relief, seeking a declaration that the atmosphere is part of the public trust, and further asking the court to order that the legislative and executive branches take certain actions to preserve that trust resource. Plaintiffs appeal from the dismissal of the complaint for lack of subject matter jurisdiction pursuant to ORCP 21A(1).

The trial court dismissed the complaint on four separate grounds: (1) the requested relief is beyond the scope of the Uniform Declaratory Judgments Act (UDJA); (2) plaintiffs' claims are barred by sovereign immunity; (3) plaintiffs' claims are nonjusticiable under the separation of powers doctrine; and (4) the claims raise political questions that are constitutionally committed to other branches of government. Plaintiffs assign error to each of those grounds for dismissal. But this court need not reach plaintiffs' first three assignments of error (relating to the UDJA and sovereign immunity), because defendants'

[1] Plaintiffs include factual statements that are not in their complaint; defendants do not necessarily agree with every statement; however, any such disputes are not relevant to the issues on appeal.

justiciability arguments under the separation of powers and political question doctrines are dispositive. That is so because the court cannot grant meaningful and practical relief in this case without intruding into the province of the other branches of government. Indeed, the relief plaintiffs seek would require the court to effectively displace policy judgments that the other branches have made and would rewrite legislation that has addressed climate change.

In addition, while plaintiffs now insist that the court should nonetheless have considered its request for a bare declaration that a public trust exists in the atmosphere, that claim is unpreserved. Further, it is not justiciable, absent meaningful and practical relief that could spring from such a declaration. This court should affirm the judgment of dismissal.

ANSWER TO ASSIGNMENTS OF ERROR NO. 1-6

The trial court correctly granted defendants' motion to dismiss plaintiffs' amended complaint for lack of subject-matter jurisdiction.

Preservation of Error

Plaintiffs generally preserved these claims of error. But in their second assignment of error, plaintiffs now contend that "[i]t was clear legal error to dismiss Plaintiffs' *entire case* instead of striking some claims and allowing others to proceed." (App Br 21) (emphasis in original). And in their fourth assignment of error, they argue that the trial court erred "by relying on only part of Plaintiffs' requested relief to find that Plaintiffs' entire case violated the

separation of powers doctrine." (App Br 26). As discussed below, those claims are not preserved, and this court should decline to consider them. *See* ORAP 5.45(1) ("[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court"); *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000) (party must make argument that is specific enough to ensure that the lower tribunal can identify its alleged error in order to correct it).

Standard of Review

This court reviews the trial court's judgment of dismissal under ORCP 21A(1) for errors of law. *Krohn v. Hood River School Dist.*, 250 Or App 8, 10, 279 P3d 295 (2012).

COMBINED ARGUMENT

I. Introduction

Plaintiffs filed an amended complaint for declaratory judgment and equitable relief, alleging that defendants "have violated their duties to uphold the public trust and protect the State's atmosphere as well as the water, land, fishery, and wildlife resources from the impacts of climate change." (ER 1-2). This complaint is one of many similar legal actions across the country seeking to compel government action on climate change.[2] Plaintiffs contend that the

[2] *See* http://ourchildrenstrust.org/legal/US-Action (last accessed April 21, 2013). To the best of defendants' knowledge, the only one of those actions that has resulted in a reported decision is *Alec L. v. Jackson*, 863 F Supp

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courts may use the common-law public trust doctrine to legislate climate change policy in Oregon, and to impose that policy on the legislative and executive branches. Their novel theory seeks to impose fiduciary duties on defendants as if plaintiffs were the beneficiaries of a traditional trust, when the public trust doctrine has not previously been applied in that way. Further, plaintiffs' claims seek to extend the doctrine to the atmosphere when no Oregon case—and no reported case in any other state—has done so and when to do so would constitute a "significant departure from the [public trust] doctrine as it has been traditionally applied." *Alec L. v. Jackson*, 863 F Supp 2d 11, 13 (D DC 2012).

Specifically, plaintiffs seek a declaration that the atmosphere and other natural resources are "public trust resources" that the state has a "fiduciary obligation" to protect. Plaintiffs also ask this court to order defendants to prepare an "accounting of Oregon's current carbon dioxide emissions," and to order that defendants "develop and implement a carbon reduction plan[.]" In addition, plaintiffs seek a declaration that "best available science" requires carbon dioxide emissions to peak in 2012 and be reduced by at least six percent each year until 2050.

(…continued)
11, 17 (D DC 2012) (granting defendants' motion to dismiss on the ground that plaintiff's public trust claim "is displaced by the Clean Air Act").

(ER 17-18).

In the trial court, the parties agreed to bifurcate the case in order to address certain jurisdictional issues in an initial motion, reserving issues regarding the scope and enforcement of the public trust doctrine if the court did not dismiss the case. Thus, defendants informed the court that their motion to dismiss would not "address the existence of the public trust, the question of whether the state has met its duties under any such trust, or whether plaintiffs have effectively stated a claim that requires the state [*sic*] to decide those issues at all." (ER 21).

Plaintiffs now contend that the state "expressly did not question the existence or scope" of the public trust doctrine in its motion to dismiss, and therefore, the trial court was not entitled to conclude that declaring "new law" regarding the public trust was outside the scope of its authority under the UDJA. (App Br 14-15). The state disagrees with that characterization. But this court need not resolve that issue, because regardless whether plaintiffs' claim falls within the scope of the UDJA, defendants' justiciability arguments are dispositive.[3] While this case presents many potential questions regarding the scope of the public trust doctrine and how it may be enforced—and while

[3] For that reason, the court also need not reach the claim in plaintiffs' third assignment of error that the trial court erred in "concluding this action is barred by sovereign immunity." (App Br 22).

there may be room for legitimate debate about how to address climate change—plaintiffs' claims first present a fundamental question about the appropriate constitutional roles of the three branches of government. The claims are simply not justiciable, because they seek relief that would require the courts to take on a role that the Oregon Constitution reserves for the legislative and executive branches. Thus, the trial court did not err in dismissing the complaint.

II. Oregon's executive and legislative branches have undertaken significant efforts to address climate change.

Global climate change has been a matter of considerable concern for Oregon's governors and legislature for many years. The existing Oregon greenhouse gas reduction goals that plaintiffs deem inadequate date back to 2004. But Oregon's efforts to address the impacts of climate change on a state and regional basis date back to long before 2004. For example, as long ago as 1988, Governor Goldschmidt created the Oregon Task Force on Global Warming. Based on that task force's recommendations, the legislature passed Senate Bill 576, which established Oregon's first carbon emissions reduction goals. 1989 Or Laws Ch 466. Later, Governor Kulongoski, along with Washington's and California's governors, formed the West Coast Governors' Global Warming Initiative.[4]

[4] For additional history and information, see the Oregon Department of Energy's online climate change portal, located at

Footnote continued…

In 2004, Governor Kulongoski appointed the Governor's Advisory Group on Global Warming.[5] Based upon the then-current scientific guidance and targets adopted by other states and countries, the Group recommended specific greenhouse gas reduction goals for Oregon for 2010 and 2020. As a long-term objective, the Group recommended that by 2050 statewide greenhouse gas emissions should be reduced to a level of at least 75 percent below 1990 levels.

In 2007, the legislature enacted HB 3543, building upon the work and recommendations made by the Governor's Advisory Group in its 2004 report. *See* ORS 468A.200(1).[6] The legislature recognized that global warming "poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon." ORS 468A.200(3).

In HB 3543, the legislature did, among other things, all of the following:

1. Adopted as official state policy each of the recommended greenhouse gas emissions reductions goals recommended in the Governor's Advisory Group's 2004 report. ORS 468A.205.

(…continued)
http://www.oregon.gov/ENERGY/GBLWRM/pages/Portal.aspx. (Last accessed May 7, 2013).

[5] The Group's report on Oregon's strategy to combat global warming is available online at http://oregon.gov/ENERGY/GBLWRM/docs/GWReport-Final.pdf. (Last accessed May 7, 2013).

[6] 2007 Or Laws ch 907, §§ 1-14 (codified, in part, as ORS 468A.200-260).

2. Created the Oregon Global Warming Commission (Commission); instructed it to recommend ways to coordinate with state and local efforts to reduce greenhouse gas emissions consistent with state goals; and authorized the Commission to recommend statutory and administrative changes, policy measures, and other actions in furtherance of the state's GHG emissions goals. ORS 468A.205-240.

3. Directed the Commission to examine cap-and-trade systems to achieve state emissions goals. ORS 468A.240(2).

4. Created the Oregon Climate Change Research Institute (Institute) to conduct research on climate change, informing the public, assisting with developing approaches to climate change, and advising the legislature and governor on climate change science. ORS 352.247.

Since the passage of HB 3543, the state has actively continued efforts to address climate change and implement the statutory greenhouse gas reduction goals. In 2008, the Climate Change Integration Group ("CCIG"), appointed by the governor, built on the work of the Governor's Advisory Group and sought to implement and improve upon the measures set out in the 2004 report. The CCIG's planning document, *A Framework for Addressing Rapid Climate Change,* January, 2008, presents the work of 21 group members representing a broad range of public and private interests, with input from a dozen state agencies and the governor's office. Among the *Framework's* purposes is to assist all facets of Oregon society to incorporate climate change into their planning processes. The *Framework* sets forth a multi-prong approach towards

climate change, divided into the following areas: (1) preparation and adaptation; (2) mitigation; (3) education and outreach; and (4) research.

The CCIG's *Framework* further called for a number of immediate actions. Among those are expanding, enhancing, and reinvigorating the already-existing mitigation efforts (*i.e.*, greenhouse gas reduction plans), and developing a comprehensive research agenda.

As required by ORS 468A.260, in 2011, the Oregon Global Warming Commission reported to the legislature regarding Oregon's progress to date towards achieving the state greenhouse gas reduction goals.[7] The Commission reported that Oregon appeared on track to achieve the 2010 goals. While the Commission acknowledged that progress towards the 2020 and 2050 goals remained "challenging," it did not conclude that those goals are beyond reach. The report, and the "Roadmap to 2020" it calls for, set forth the state's "redoubled" efforts to meet the remaining statutory goals. The Commission's "Roadmap to 2020" project involves six technical committees representing stakeholders and experts in a variety of fields. Their charge, with public review and comment, is to find ways to achieve the existing 2020 goals, while positioning the state to achieve the 2050 goals as well.

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[7] The Commission's February 2011, *Report to the Legislature*, is available online at the Global Warming Commission's website at www.KeepOregonCool.org. (Last accessed May 7, 2013).

In addition to the efforts described above, the Oregon legislature and executive branch have adopted a variety of specific measures addressing greenhouse gas emissions, including the following: a carbon dioxide emissions limit applicable to new power plants, ORS 757.524(1); low emission vehicle standards to reduce greenhouse gas emissions from cars and trucks, OAR chapter 340, division 257; a rule requiring PGE to permanently cease burning coal at its Boardman power plant—the single largest source of greenhouse gas emissions in the state—by no later than December 31, 2020, OAR 340-223-0030(1)(e)[8]; and laws mandating that gasoline and diesel fuel sold for use in most vehicles be blended with specified amounts of lower-carbon content renewable fuels, ORS 646.913 and 646.922.

In sum, both the legislature and the executive branch have made concerted efforts to address climate change in Oregon, taking into account and balancing a variety of policy concerns, and those efforts continue.

III. The Public trust doctrine

Plaintiffs' claims are based on the theory that certain natural resources, including the atmosphere, are held in trust for the public under the public trust doctrine. The public trust doctrine "is of ancient origin. Its roots trace to

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[8] *See, e.g.*, 2010 Oregon DEQ greenhouse report at http:www.deq.state.or.us/aq/climate/docs/2010GHGdata.pdf (last accessed May 7, 2013).

Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country." *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1234 (2012); *see also Brusco Towboat v. State Land Bd.*, 30 Or App 509, 517, 567 P2d 1037 (1977), *aff'd as modified* 284 Or 627, 589 P2d 712 (1978) ("[t]he principle that the public has an overriding interest in navigable waterways and lands underlying them is as old as the waterways themselves, traceable at least to the Code of Justinian in the Fifth Century A.D.").

The scope of the public trust doctrine is a question of state law. *PPL Montana*, 132 S Ct at 1235 ("the public trust doctrine remains a matter of state law"). All fifty states "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 US 469, 475 (1988) (citing *Shively v. Bowlby*, 152 US 1, 26 (1894)).

Oregon courts have recognized the existence of the public trust doctrine, but have never extended it to the atmosphere.[9] Further, Oregon courts have

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[9] In addition, the Act admitting the State of Oregon to the Union in 1859 provided that "all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." Further, Article VIII, § 5 of the Oregon Constitution provides that the State Land Board "shall manage lands under its jurisdiction with the object

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never invoked the doctrine to impose an affirmative duty on the state to preserve trust assets, much less to do so by regulating in a certain way. Instead, the doctrine has been used to support the state's regulation of assets held in the public trust and to restrict the state's power to alienate lands beneath navigable waterways. S*ee e.g. Bowlby v. Shively*, 22 Or 410, 427, 30 P 154 (1892), *aff'd sub nom Shively v. Bowlby*, 152 US 1 (1894) (the state may dispose of the lands beneath navigable waterways as it sees fit, "subject only to the paramount right of navigation and commerce"); *Morse v. Division of State Lands*, 285 Or 197, 203, 590 P2d 709 (1979) (public trust doctrine did not prohibit issuance of an estuarian fill permit, because "there is no grant here to a private party which results in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize"); *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Com'n.*, 62 Or App 481, 492, 662 P2d 356, *rev den*, 295 Or 259 (1983) (recognizing the existence of the public trust doctrine, but holding that it was "unnecessary" to apply it because "the legislature has specifically addressed the rights to lands designated as oyster lands"); *Cook v. Dabney*, 70 Or 529, 534, 139 P 721 (1914) (state "had no right to convey" the bed of a navigable waterway "and so abdicate its trust designed

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(…continued)
of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."

to protect navigation"); *State v. Hume*, 52 Or 1, 5, 95 P 808 (1908) (recognizing the legislature's authority to regulate the treatment and taking of wildlife); *Lewis v. City of Portland*, 25 Or 133, 35 P 256 (1893) ("the soil so vested in the [sovereign] can only be transferred subject to the public trust").

In sum, the public trust doctrine in Oregon is a common-law doctrine that recognizes the legislature's regulatory authority over waterways and fish and wildlife and prohibits the state from alienating such public trust assets in a way that would substantially impair the public interest in those assets. Oregon courts have not considered what other trust duties might apply beyond those explicitly created by the Admission Act and Article VIII, § 8 of the Oregon Constitution, and they have never imposed an *affirmative* duty on the state in its capacity as "trustee" that is enforceable against the state by private parties. The doctrine thus emphasizes that certain assets are held in common for the benefit of the public. But the common law doctrine has not been recognized to create a trust in the traditional sense, in which courts may enforce well-defined duties to a well-defined entity.

IV. The trial court correctly dismissed plaintiffs' claims for lack of jurisdiction because relief sought that would have any practical effect would violate the separation of powers and political question doctrines.

Before the trial court, defendants argued that plaintiffs' "requested relief violates the Separation of Powers Doctrine as it requires the Court to substitute

its own standards for those standards developed through the legislative process." (ER 30). The court agreed, dismissing the complaint on the ground that "Plaintiffs' requested relief violates the Separation of Powers Doctrine[.]" (ER 37).

A closely-related reason that this court lacks jurisdiction to award declaratory or injunctive relief against defendants is the political question doctrine. That doctrine provides that certain issues or decisions are not justiciable because they have been constitutionally reserved to the political branches of government. The trial court held that "[p]laintiffs' suit presents political questions, which necessarily are decided by the political branches of government, not the judiciary." (ER 37).

For the reasons discussed below, the court could not grant meaningful and practical relief without intruding into the province of the other branches of government. In addition, while plaintiffs now insist that the court should nonetheless have considered its request for a bare declaration that a public trust exists in the atmosphere, such a claim is not justiciable, absent meaningful and practical relief that could spring from such a declaration. It follows that the trial court correctly dismissed the case.

A. The trial court correctly dismissed plaintiffs' claim because the requested relief would violate the separation of powers doctrine.

The court did not err in dismissing the complaint based on the separation of powers doctrine. That is so for two reasons: (1) the relief plaintiffs request would impose an undue burden on the legislative and executive branches; and (2) the relief would require the judicial branch to exercise executive and legislative functions.

1. The separation of powers doctrine.

Article III, § 1, of the Oregon Constitution requires the various branches of state government to exercise their functions separately, and exclusively. It provides:

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

The legislative power of the state is vested in the Legislative Assembly. *See* Or Const, Article IV, § 1. The executive power is vested in the Governor. *See* Or Const, Article V, § 1. The Oregon Constitution also describes the power of the judicial branch:

> The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. * * *

Or Const, Article VII (Amended), § 1.

The Oregon Supreme Court has recognized that the "fundamental genius of the constitution may be found in the creation and separation of three distinct branches of government." *Rooney v. Kulongoski*, 322 Or 15, 28, 902 P2d 1143 (1995). The court explained that

> separation is not always complete, and the roles that governmental actors are asked to play not infrequently interact in material ways. Thus, this court has recognized that the separation of powers does not require or intend an absolute separation between the departments of government.

Rooney, 322 Or at 28 (internal citations omitted).

A violation of the separation of powers principle will be found if the problem is clear. To determine whether there has been a clear violation of the separation of powers principle, the court makes two inquiries: (1) whether one department has unduly burdened the actions of another department; and (2) whether one department is performing the functions committed to another department. *Rooney*, 322 Or at 28. The two inquiries overlap to some extent. The "undue burden" inquiry attempts to address the danger of "coercive influence" between the departments. The "functions" inquiry addresses the potential for concentration of separated powers in one department. *See generally* Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 Or L Rev 443, 448 (1996).

a. Plaintiffs' remedy would impose an "undue burden" on the legislative and executive branches.

The trial court concluded that "it is hard to imagine a more coercive act upon the legislative department than to strike out a statutory provision and supplant it with the Court's own formulation." (ER 32). Yet that is exactly what plaintiffs asked the trial court to do. For that reason, the court correctly held that "[p]laintiffs' requested relief would impose an 'undue burden' on the legislative branch and thus violate the Separation of Powers Doctrine." (ER 32).

The "undue burden" inquiry focuses on the need "to avoid the potential for coercive influence between governmental departments." *Rooney*, 322 Or at 28. Whether "undue interference" occurs depends on whether the action of one branch "unduly burden[s] the capacity of [another branch] to perform its core function." A "core function," for separation of powers purposes, refers to "an area of responsibility or authority committed to that * * * department." *Oregonians For Sound Economic Policy, Inc. v. State Accident Ins. Fund Corp.*, 218 Or App 31, 49, 178 P3d 286, *adh'd to as modified*, 219 Or App 310, 182 P3d 895 (2008), citing *Rooney*, 322 Or at 28.

The governor is the chief executive of the state. *See* Or Const, Article V, § 1. In that capacity, it is his constitutional duty to see "that the Laws be faithfully executed." *Id.*, § 10. The principal responsibility for making "the

Laws" of course lies with the legislature. *See* Or Const, Article IV, § 1. However, in the course of discharging his or her executive duties, the governor is also required to keep the legislature informed as to the condition of the state, and he must recommend new laws to the legislature as he sees appropriate. *See* Or Const, Art. V, § 11. That is the constitutionally-mandated framework for addressing issues of statewide significance, and is exactly the approach that the legislature and governor have taken regarding climate change. Plaintiffs ask the court to set aside that approach and substitute its own.

The relief that plaintiffs request demonstrates the substantial burden that they ask this court to place upon the other branches of government. For example, plaintiffs seek a declaration that the state holds the atmosphere in trust for its citizens, and that it is incumbent upon the governor to take specific steps to discharge that trust obligation. Plaintiffs further request that the court declare the existence of a fiduciary obligation that compels the state to protect the atmosphere against climate change, where no terms of such a duty have previously been established. Next, plaintiffs request that the court declare that the state and governor have already failed to meet this newly declared obligation, by failing to address a specific problem (climate change) in specific ways (by an annual accounting of carbon dioxide emissions, and by regulating and reducing carbon emissions in the amounts specified by plaintiffs). (ER 17). Plaintiffs also ask the court to order defendants to develop a carbon dioxide

reduction plan according to an unlegislated standard that would be enforced by the court: "best available science." (*Id.*). Finally, plaintiffs seek a judicial order compelling the other governmental departments to address the impacts of climate change in a specific way—namely, by reducing carbon dioxide emissions in a precise amount (at least 6% per year) over a specified timeframe. (ER 18). Imposing such judicially created controls on the other branches unquestionably raises the "potential for coercive influence between governmental departments." Thus, the judicially imposed burden on the other branches of government would be unconstitutionally "undue."

Plaintiffs contend that their proposed judicial relief would not burden the other branches at all, because it leaves to the state's discretion *how* it can best achieve the exact greenhouse gas reductions that plaintiffs deem critical. (App Br 32, 36). But that argument ignores that plaintiffs seek to have the court order the task that must be accomplished and the means by which it must be accomplished. Further, plaintiffs ask the court to apply a standard of "best available science" to determine whether those efforts suffice. Even if some details are potentially left to the governor and legislature, the standards that plaintiffs would superimpose over the existing legal framework would alter the constitutionally established relationship between the executive and legislative branches, and short-circuit the political process that has led to the standards that now exist under Oregon law. Moreover, in enforcing plaintiffs' standards, the

court would have to determine what actions would have to be undertaken in the event the standards were not met, by mandating what steps the state must take to reduce greenhouse gas emissions. The exercise of such authority by the courts would unduly burden and usurp the authority and discretion of the executive and legislative branches of government.

Most significantly, plaintiffs' proposed requirements would rewrite the existing legislative goals, and effectively undo much of the process and consideration that went into enacting them. Furthermore, by establishing new court-ordered goals, the requested order would essentially foreclose future legislative processes directed towards establishing a scientifically, economically, and socially sound and balanced approach to regulating the state's greenhouse gas emissions. As the trial court concluded, it is difficult to imagine a judicial act that would be more coercive upon the legislative branch than to supplant existing statutes with the court's own formulation, and effectively preclude future legislative discretion on the same issue. Where a judicial order would have such a direct and profound effect on existing legislation and the legislative process, the "coercive influence" and resulting violation of the separation of powers requirement is clear.

b. Plaintiffs' remedy would impermissibly require the courts to perform the "function" of the executive or legislative branches of government.

With regard to the "functions" inquiry, the trial court held that

> [w]hether the Court thinks global warming is or is not a problem and whether the Court believes the Legislature's GHG emission goals are too weak, too stringent, or are altogether unnecessary is beside the point. These determinations are not judicial functions. They are legislative functions.

(ER 34). The trial court's analysis is correct.

Plaintiffs' requested relief would cause the court to perform the "functions" of the other branches, in particular those of the legislature. The separation of powers principle prohibits the court from undertaking that role.

As discussed above, the legislature enacted HB 3543, adopting specific greenhouse gas emissions goals for the state to achieve by 2010, 2020, and 2050. ORS 468A.205(1). The legislature arrived at those goals as a result of the legislative process, with input from the governor, exactly as the Oregon Constitution contemplates. Plaintiffs seek an order that would substitute their own goals—such as a six-percent reduction in greenhouse gas emissions annually until 2050—based upon their own policy choices, which they urge the court to adopt and enforce as its own. That is lawmaking, and it is a function constitutionally reserved to the legislature, beyond the court's function and reach.

In support of their request for injunctive relief, plaintiffs contend that "the judiciary is well-suited to order the executive to prepare a plan to comply with the Public Trust Doctrine obligations[.]" (App Br 36). But their reliance on *Brown v. Plata*, 131 S Ct 1910 (2011), in support of that proposition is

misplaced. *Brown* was a class action lawsuit alleging "serious constitutional violations in California's prison system." *Id.* at 1922. In that case, the court ordered a plan to correct those violations, recognizing that courts have an obligation to "enforce the constitutional rights" of all persons. *Id.* at 1928. When state and local authorities fail in their obligations to protect those rights, the court's equitable authority may be invoked. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 US 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable power to remedy past wrongs is broad").

Thus, *Brown* stands for the unremarkable proposition that one of the functions of the courts is to enforce individuals' constitutional rights, and the courts may use their equitable powers to enforce those rights if state and local authorities have failed to do so. *Brown* has no application in a case such as this, where there is no constitutional right to be protected, and no suggestion that the state has, in the past, failed to remedy an acknowledged constitutional violation.

Plaintiffs also contend that they are merely calling on the court to employ "traditional trust remedies." (App Br 36). Yet the public trust is not a traditional trust, and the trustee is not a traditional trustee. The kind of trust cases on which plaintiffs rely (*e.g., Wood v. Honeyman*, 178 Or 484, 169 P2d 131 (1946)) involve private trusts, and do not involve a court requiring the

executive or legislative branches of government to regulate a public trust asset in a specified manner. Plaintiffs offer no authority for the court to do so.

Thus, the requested relief does not fall within the court's traditional functions. Plaintiffs would have the court effectively draft its own statute, and substitute court-ordered requirements for those already established by the legislature. That relief would require the court to make policy choices on behalf of the state, and not simply adjudicate plaintiffs' rights under already-determined law. By causing the court to substitute its own judgment for that of the legislature, the requested relief would require the court to perform the lawmaking functions of that other branch, in violation of separation of powers principles.

2. The relief plaintiffs request is not merely "complementary."

Plaintiffs attempt to make their claims sound less intrusive by contending that their request for specific, court-ordered greenhouse gas reduction requirements would merely result in obligations "concurrent" or "complementary" to those established through the legislative process. (App Br 30-36). According to plaintiffs, their requested relief is "merely cumulative" and would not strike out the work of the legislative branch. (App Br 34). But that is not the case. The legislature has made policy determinations about regulating greenhouse gases. Even though compliance with plaintiffs'

requested standards would also presumably meet the existing goals, the two are not "concurrent." The standard that the court is urged to adopt would be different and more stringent. Thus, even if the state achieved the statutory goals, it would not satisfy plaintiffs' requested standard. As a result, as a practical matter, the court's order would "strike out" the existing standards. In doing so, the court would effectively legislate—indeed, the court would change existing legislation—which it may not do. *Cf, e.g.*, *State ex rel Holland v. City of Cannon Beach*, 153 Or App 176, 180, 956 P2d 1039 (1998) (declining to extend statutory time limits, noting court's "task is to interpret and apply the statute the legislature enacted, not to extend the underlying policy of the statute in ways that the legislature did not see fit to do").

Plaintiffs cite *Brown v. Transcon Lines*, 284 Or 597, 588 P2d 1087 (1978), for the proposition that defendants' common law duties are "cumulative to" statutory obligations. But the *Brown* court simply found that the legislature did not intend to abrogate previously existing common law remedies for wrongful termination when it enacted new statutory remedies for discriminating against employees for filing a workers compensation claim. Accordingly, plaintiff could still pursue his common law remedy, and was not limited to the legislatively adopted process. Here, by contrast, the legislature specifically addressed climate change by adopting legislation regarding greenhouse gas emission standards. The court cannot rewrite that legislation.

3. That plaintiffs seek declaratory as well as injunctive relief does not render their requested relief any less intrusive on other branches.

In their fourth assignment of error, plaintiffs contend that the trial court erred in failing to consider the amended complaint "as a whole" when it concluded that their claims would violate the separation of powers doctrine. (App Br 26–29). Plaintiffs point in particular to the complaint's request for a declaration that certain resources are trust resources and that the state has a fiduciary obligation to protect those resources from the impacts of climate change. (App Br 29).

If plaintiffs are understood to suggest that the inclusion of a request for mere declaratory relief makes their complaint less objectionable, they are mistaken. Claims that give rise to separation of powers concerns presumably always involve questions that courts are equipped to answer on a general level. If that were not the case, then the objection would be that the claim for relief did not fall within the court's general power, rather than that the separation of powers prohibited the relief. Thus the operative question is whether, if granted, an otherwise routine form of relief would cause the judiciary to step too far into another branch's area of responsibility or authority. Here plaintiffs are not merely requesting an abstract declaration of law, as they imply. Instead, they seek a specific determination that will affect how the executive (and likely

legislative) branches prioritize certain resources, and an order that they act accordingly.

If plaintiffs mean to suggest that the trial court could have ignored the portions of the complaint requesting specific relief and declined to dismiss the portion of the complaint asking for a declaration, there are two problems with that argument. First, plaintiffs did not request that the trial court entertain portions of their requested relief if the court could not address them all. Plaintiffs' goal was not a bare declaration, but that the court require the state to adopt plaintiffs' plan in its entirety. That argument is therefore not preserved.

Second, as discussed below, a claim for such a declaration would not be justiciable under the UDJA, because it could not affect the rights of the parties.

B. Plaintiffs' request for a declaratory judgment is not justiciable under the UDJA because a mere declaration that the atmosphere is a public trust resource would have no practical effect on plaintiffs' rights.

Although ORS 28.010 gives courts the authority to declare "rights, status, and other legal relations," a plaintiff's claim must be justiciable in order to entitle that plaintiff to relief. *See DeMartino v. Marion County*, 220 Or App 44, 49-50, 184 P3d 1176 (2008); *Berg v. Hirschy*, 206 Or App 472, 475, 136 P3d 1182 (2006) ("for a court to entertain an action for declaratory relief, the complaint must present a justiciable controversy"); "[T]o seek relief under the Uniform Declaratory Judgments Act, a plaintiff must establish that his or her

'rights, status, or other legal relations' are 'affected by' the relevant instrument." *Morgan v. Sisters School District #6*, 353 Or 189, ___ P3d ___ (2013).[10] And in order for a justiciable controversy to exist, "the court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate." *Morgan*, 353 Or at 197. Stated differently, the declaratory relief sought by a plaintiff, "if granted, must redress the injury that is the subject of the declaratory judgment action." *Id.*

Plaintiffs appear to rely on *Pendleton School District 16R v. State*, 345 Or 596, 200 P3d 133 (2009), for the proposition that a court has the "authority" to issue the requested declaratory judgment. (App Br 21); *see* 345 Or at 610 ("the courts may grant a declaratory judgment that the legislature failed to fully

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[10] ORS 28.020 provides:

> Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In virtually all of the Oregon cases decided under the UDJA, plaintiffs have sought declarations of their rights under a writing, whether it be a contract, deed, legislative enactment, or constitutional provision. And in this case, plaintiffs could have sought a declaration of "rights, duties, and other legal relations" under ORS 468A.200 to ORS 468A.260, the statutory scheme enacted by the legislature to address climate change.

fund the public school system, if that is the case."). But *Pendleton* may be distinguished from the present case. In *Pendleton*, the question before the court was whether Article VIII, §8 of the Oregon Constitution "imposes a duty on the legislature to fund the public school system at a specified level every biennium[.]" *Id.* at 606. The court held that claim justiciable, because it presented "a set of present facts regarding the interpretation of a constitutional provision; it is not simply an abstract inquiry about a possible future event." *Id.* In other words, the court's declaration about the obligation to fund public schools would have a practical effect on future legislatures, because they would be required to carry out that constitutional directive.

That is contrary to the present case. Plaintiffs' request for a declaration that certain natural resources are contained within the public trust is not justiciable, because that declaration, in and of itself, would have no practical effect on plaintiffs' rights. Both the separation of powers and political question doctrines prevent the courts from ordering the requested relief. Because plaintiffs cannot obtain a remedy, their claim is nonjusticiable, and the trial court did not err in granting defendants' motion to dismiss.

C. The circuit court correctly dismissed plaintiffs' claims for lack of jurisdiction because they present a nonjusticiable political question.

1. The political question doctrine.

The political question doctrine is a variation on the separation of powers concept. As discussed below, the doctrine is not well-developed in Oregon, but federal court analysis provides guidance. Under federal separation of powers jurisprudence, the political question doctrine prevents judicial review of certain executive and legislative actions, particularly where, as here, there is a lack of judicially discoverable standards to exercise, and where the court's review would require a discretionary policy determination.

Although the doctrine has not been well developed in Oregon, it has long been recognized. *See Putnam v. Norblad*, 134 Or 433, 440 293 P 40 (1930) ("It is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provision."). In *Putnam*, the court acknowledged that it was "not always easy to define the phrase 'political' question, nor to determine which matters fall within its scope[.]" *Id.* However, the Court concluded that as to:

> duties which require the exercise of judgment or discretion to perform, or to matters political or governmental in their nature, all the authorities agree that the executive is clearly independent of the other co-ordinate departments of government, and is not subject in any manner to their direct supervision or control.

Id. at 443, *quoting State ex rel Taylor v. Lord*, 28 Or 498, 523, 43 P 471 (1896).

Neither the *Putnam* decision, nor any subsequent decision of the Oregon Supreme Court, makes it clear whether that view of the political question doctrine extends more, less, or the same freedom from judicial scrutiny as the separation of powers principle standing alone. *See e.g., Lipscomb v. State by and through Bd. of Higher Education*, 305 Or 472, 477 n 4, 753 P2d 939 (1988) (stating that the "phrase 'policy question' would be preferable to 'political question' to describe decisions beyond judicial determination.").

In any event, a review of how federal courts apply the principle under the federal Constitution may be instructive, either to support an independent political question principle, or to augment the rationale supporting the separation of powers analysis. *See Monaghan v. School District No. 1, Clackamas County*, 211 Or 360, 364-65, 315 P2d 797 (1957) (reviewing drafters' views on separation of powers requirement of federal Constitution, as well as federal court decisions interpreting them).

The central principle under the federal political question doctrine remains the same as that in the Oregon decisions—certain matters that are committed to the political branches simply are not subject to review by the courts. For example, in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F Supp 2d

863, 871 (N D Cal 2009), *aff'd on other grounds*, 696 F 3d 849 (9th Cir 2012), the court explained:

> The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary. *Corrie [v. Caterpillar],* 503 F.3d [974,] 980 [(9th Cir 2007)]. "The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch." *Koohi v. United States,* 976 F.2d 1328, 1331 (9th Cir. 1992). "A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 785 (9th Cir. 2005).

The United States Supreme Court has identified six factors for the courts to use in determining whether a suit raises a nonjusticiable political question. *Baker v. Carr*, 369 US 186, 82 S Ct 691 (1962). Of those six factors, two are relevant here.[11] Those two factors, which reflect questions that would inherently require courts to move beyond areas of judicial expertise, are: (1) a lack of judicially discoverable and manageable standards for resolving the

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[11] The other four factors are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2)"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (3)an unusual need for unquestioning adherence to a political decision already made; and (4)the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 US at 217.

question; and (2) the impossibility of deciding the issue without making an initial policy determination of a kind clearly for nonjudicial discretion.

Contrary to plaintiffs' suggestion, respondents do not raise the political question doctrine simply because the issue is "politically charged." (App Br 42). Rather, this case presents a political question because plaintiffs' requested remedies would wholly substitute a judicial process for the comprehensive executive and legislative processes that led to the existing state goals.

2. The case is nonjusticiable because judicially discoverable standards for adjudicating the claims do not exist.

Despite plaintiffs' request that the court require precise greenhouse gas reductions, their complaint lacks the sort of judicially discoverable standards necessary to resolve this issue. Plaintiffs' recitation of common law trust formulations fails to provide these legal tools for two reasons.

First, even if the court declared a trust obligation, it would be left asking what trust standards to apply. Although some courts have found limited trust obligations over other natural resources other than the atmosphere, they have articulated the resulting duties in various ways, few of which neatly track the duties of the traditional trustee. For example, in *Illinois Cent. R.R. Co. v. Illinois*, 146 US 387 (1892), the United States Supreme Court held that the State of Illinois held title to lands submerged beneath its navigable waters in trust for its citizens, and as a result, the legislature could not wholly abdicate its duty to

preserve those lands for the public by ceding all control over the lands to a private railroad. *Id.* at 452-53. However, the Court did not dictate how the state was to fulfill its trust duties, or whether its exercise of those duties would—or even could—be measured by ordinary trust principles. The court merely held that the state could not place trust lands entirely beyond its direction and control. *Id.* at 453-54.

As discussed above, Oregon courts have prohibited the wholesale alienation or "substantial impairment" of certain public trust assets. But no Oregon court has considered what other trust duties might apply. In support of their argument, plaintiffs contend that "court after court has delineated the scope of the [public trust] obligation, including identification of those essential natural resources that must be protected for the benefit of the public." (App Br 20). But the scope of the public trust doctrine is a question of state law, and none of the cases cited by plaintiffs has precedential value in Oregon. Further, none of the cases involve a request for judgment declaring the parties' rights under an undeveloped common-law claim. *See Baxley v. State*, 958 P2d 422, 434 (Alaska 1998) (action challenging constitutionality of statute, declining to address public trust claim); *In re Water Use Applications (Waihole I)*, 9 P3d 409, 445-56 (Hawaii 2000) (contested case hearing involving disputed water right claims, interpreting public trust doctrine as embodied in state constitution); *Just v. Marinette Co.*, 201 NW 2d 761 (Wis. 1972) (action

seeking declaration that shoreline zoning ordinance was unconstitutional); *Marks v. Whitney*, 491 P2d 374, 378 (Cal. 1971) (court "may take judicial notice of public trust burdens in quieting title to tidelands"); *Friends of Van Cortlandt Park v. City of New York*, 750 NE 2d 1050, 1053 (NY 2001) (parkland is "impressed with a public trust," and cannot be "alienated" without legislative approval); *Nat'l Audubon Society v. Superior Court of Alpine Co*., 658 P2d 709 (Cal. 1985) (suit to enjoin city water diversions).[12] None of those cases seeks to impose on a state a freestanding, judicially-created duty to take certain actions to protect public trust resources.

The issues before the court here do not require it to fully explore the contours of the public trust doctrine now. But the examples noted above illustrate why simply asserting common law trust duties is no substitute for the "judicially discoverable and manageable standards" that must exist to raise a justiciable question. As a result, this case is not justiciable.

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[12] In *National Audubon Society*, the California Supreme Court held that the state's obligation was merely "to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." 658 P 2d at 728 (noting that state might, as a practical necessity, sometimes have to approve uses that could foreseeably harm the public trust); *see also id.* at 723 (public trust doctrine did not prevent state from choosing from among competing trust uses). Thus, the trust duty recognized in *National Audubon* was one of process, and not one that imposed absolute objectives as plaintiffs' lawsuit seeks.

The second reason that this case lacks judicially discoverable standards is that it would require the court to engage in a largely unguided weighing of competing public interests. In other words, even if the court found that the state, as trustee, should be held to some recognized standard of care, it would nonetheless lack the "legal tools" necessary to determine whether the state or governor had satisfied that standard. Say, for example, the court concluded that the applicable standard was "reasonable prudence." The assessment of what may or may not be "reasonably prudent" where the atmosphere is concerned would inevitably involve numerous and competing policy considerations. These would include such questions as which measures should be required, how quickly they should be implemented, who should bear the burdens and costs of greenhouse gas reductions, and how the risks and uncertainties should be allocated. In fact, the legislature has presumably already considered these and many other issues in enacting the state's existing greenhouse gas reduction goals. And while the court could choose plaintiffs' policy considerations as the paramount ones—thereby substituting its own judgments for those of the two political branches—nothing in the complaint provides the courts with a principled, rational basis for making that choice.

3. The case is nonjusticiable because the court cannot decide the issue without making an initial policy determination of a kind clearly for nonjudicial discretion.

The other relevant *Baker* factor similarly compels the conclusion that plaintiffs' claims raise a nonjusticiable political question. This factor considers whether the court can decide the case before it "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 US at 217. Stated another way, would resolution of the dispute require the court to "'make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis[?]'" *Native Village of Kivalina,* 663 F Supp 2d at 876 (citing *EEOC v. Peabody W. Coal Co*., 400 F3d 774, 784 (9th Cir 2005)). For the reasons that follow, applying this factor reveals that plaintiffs' complaint raises only a nonjusticiable, political question, and for that independent reason, it should be dismissed.

The considerations under this *Baker* factor overlap to some degree with the previous factor. That is because the weight that the court must give competing policy interests is inherently a matter for the legislature to decide. As explained above, the legislature's decision to adopt the existing greenhouse gas reduction goals in HB 3543 was the product of advisory group recommendations (the product of myriad economic, environmental, and social considerations), as well as extensive submissions and testimony from a wide

swath of public and private sectors. Plaintiffs' suit asks the court to disregard that political process, and to impose its own ideas of how society—through its government—must respond to the problem of global warming. Plaintiffs seek a declaration, in effect, that the legislature's carefully balanced resolution of this incredibly complex policy question is *wrong*, and that only the court can strike the proper balance. In fact, the relief plaintiffs request would effectively preclude *any* balancing, and would simply permit one consideration to trump all others. There can be no serious question that the attempt by plaintiffs to substitute their own greenhouse gas reduction goals for those established by HB 3543 would wrest the policy decision away from the legislature, and hand it to the court to decide. Because plaintiffs' suit would require the court to "make [this] policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis[,]" this factor also requires dismissal of the amended complaint. *See EEOC*, 400 F 3d at 784.

Plaintiffs' request for declaratory relief also implicates this *Baker* factor in more concrete ways. For example, plaintiffs seek a declaration requiring the state to apply the "best available science" to its greenhouse gas reduction efforts. (ER 17-18). However, standards such as "best available science" are well-known statutory standards that fall among a range of options that the *legislature* might choose from. *See e.g.*, 16 USC § 1536 (a)(2) (Endangered Species Act, "best scientific and commercial data available");

33 USC § 1311(b) (Clean Water Act, "best available technology that is economically achievable."). Such statutory standards serve a number of functions, such as distributing the costs and burdens of environmental regulation, and allocating the risk of scientific error between human society and the natural environment, or between components of each. The proper allocation of such costs, burdens, and risks is fundamentally a question for the legislature, or delegated by the legislature to the executive branch, and is not a question for the courts. While Oregon courts of course interpret such statutory standards, they do so based on the scope of discretion the legislature delegates to the executive branch. *See generally, Springfield Education Assn. v. School Dist.*, 290 Or 217, 621 P2d 547 (1980) (discussing review of agency interpretation of statutes based on whether statutory terms are "exact," "inexact," or "delegative."). Thus, the standard that the state must meet in addressing the challenges of climate change necessarily involves an "initial policy determination of a kind clearly for nonjudicial discretion." *See Baker*, 369 US at 217. For this additional reason, the court lacks authority to award plaintiffs the relief they request.

Plaintiffs contend that "courts have addressed global warming before without finding that the issue required an initial policy decision clearly reserved for nonjudicial discretion." (App Br 42). But that is not the point. Defendants do not contend that courts are inherently unable to address any and all issues

related to global warming. Of course courts address such issues, but they do so within a framework set by prior legislative decisionmaking. That is what the court did in *Massachusetts v. EPA*, 549 US 497 (2007), relied on by plaintiffs. There the court considered a petition for federal Clean Air Act rulemaking filed under the federal Administrative Procedures Act. The court applied the standards in the Clean Air Act and required the administrative agency to issue such rules. But the court did not impose its own or anyone else's standards, as plaintiffs ask the court to do here.

Nor does *Connecticut v. American Electric Power Company* support plaintiffs' contention, as they assert. (App Br 40, 41). In that case, the Second Circuit found that plaintiffs' complaint stated a claim against private industry defendants under federal nuisance law, and concluded the claim was not barred by the political question doctrine. *Connecticut v. American Electric Power Company*, 582 F3d 309, 332 (2nd Cir 2009). But the Second Circuit did not require government officials or bodies to regulate, or to regulate in a certain manner, as plaintiffs ask the court do here. Moreover, the United States Supreme Court reversed, determining that the enactment of the Clean Air Act displaced any common law cause of action. *American Electric Power Co. v. Connecticut*, 131 S Ct 2527 (2011).

Plaintiffs contend that their complaint does not require the court to impermissibly adjudicate political questions because the legislature has already

determined that greenhouse gas emissions should be addressed. (App Br 38.) But that is precisely the point. The legislature has already implemented the policy; it is not for the courts to do so. *Cf. Northwest Natural Gas Co. v. Oregon Public Utility Commission*, 195 Or App 547, 556, 99 P3d 292 (2004) ("[W]hen legislative ***expressions of policy are offered as context, courts must be cautious not to *** allow agencies or other parties to achieve through a court's interpretation policy objectives that the enactment as promulgated was not meant to or failed to embody"), *citing DLCD v. Jackson County*, 151 Or App 210, 218, 948 P2d 731 (1997)).

Thus, in a case nearly identical to this one brought against the EPA, the federal court dismissed the case on the ground that Congress had charged the EPA with the function that the plaintiffs asked the court to serve:

> These are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the 'primary regulator of greenhouse gas emissions. The emissions of greenhouse gases, and specifically carbon dioxide, are subject to regulation under the Clean Air Act * * * Thus, a federal common law claim directed to the reduction or regulation of carbon dioxide emissions is displaced by the Act.

Alec L. 863 F Supp 2d at 17 (citations omitted). *See also Native Village of Kivalina v. ExxonMobil Corp, et al,* 696 F 3d 849 (9th Cir 2012) (common law nuisance remedy displaced by Clean Air Act regulation of greenhouse gas emissions, relying on *Connecticut v. AEP*). Similarly, here, the Oregon

legislature has determined its own plan for reducing greenhouse gases and has charged the executive branch with regulating it.

In this case, the proposed declarations and orders would require defendants to forego any balancing between competing statewide interests, which played an important role in formulating the existing emissions goals. In short, plaintiffs ask the court to do much more than simply declare the law and offer solutions—they ask the court to dictate the policy choices of the executive and legislative branches, both as to the content of the matters they must consider, and the manner in which the resulting decisions are made. Thus, plaintiffs' proposed relief would reach far beyond the court's proper bounds.

CONCLUSION

The judgment dismissing plaintiffs' complaint for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 13, 2013, I directed the original Respondents' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, , and electronically served upon William H. Sherlock and Tanya M. Sanerib, attorneys for appellants and Elisabeth A. Holmes, attorney for *Amicus*, using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,607 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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