

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**NORTHWEST NATURAL GAS COMPANY, AVISTA CORPORATION,
and CASCADE NATURAL GAS CORPORATION,**

Petitioners,

v.

ENVIRONMENTAL QUALITY COMMISSION,

Respondent,

and

NATURAL RESOURCES DEFENSE COUNCIL,

Intervenor-Respondent,

and

**BEYOND TOXICS, CLIMATE SOLUTIONS, ENVIRONMENTAL
DEFENSE FUND, OREGON BUSINESS ALLIANCE FOR CLIMATE-d/b/a**

OREGON BUSINESS FOR CLIMATE, and

OREGON ENVIRONMENTAL COUNCIL,

Intervenors-Respondents.

No. A178216 (Control)

**OREGON FARM BUREAU FEDERATION; OREGON BUSINESS &
INDUSTRY ASSOCIATION; OREGON MANUFACTURERS AND
COMMERCE; ALLIANCE OF WESTERN ENERGY CONSUMERS;
ASSOCIATED OREGON LOGGERS, INC.; NORTHWEST PULP AND
PAPER ASSOCIATION; OREGON ASSOCIATION OF NURSERIES;
OREGON FOREST & INDUSTRIES COUNCIL; OREGON TRUCKING
ASSOCIATIONS, INC.; WESTERN WOOD PRESERVERS INSTITUTE;
OTLEY LAND AND CATTLE, LLC; and SPACE AGE FUEL, INC.,**

Petitioners,

and

NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

Intervenor-Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,

Respondent.

No. A178217

January 2023

WESTERN STATES PETROLEUM ASSOCIATION,

Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,

Respondent.

No. A178218

**AMICUS BRIEF OF ROGUE CLIMATE, VERDE, AND COLUMBIA
RIVERKEEPER**

On Judicial Review of
Administrative Rules adopted by
Respondent Environmental Quality Commission

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January 2023

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I. INTERESTS OF AMICI CURIAE

Rogue Climate, Verde, and Columbia Riverkeeper file this brief of *amici curiae* in support of respondents and intervenors-respondents to join them in asking the Court to uphold the Climate Protection Program and affirm that the legislature delegated broad statutory authority to regulate air and climate pollution to the Oregon Environmental Quality Commission (“EQC”).

Amici curiae Rogue Climate, Verde, and Columbia Riverkeeper are community-based organizations and advocates for environmental justice and climate justice in Oregon who participated in the development of the Climate Protection Program and whose interests could be affected by the outcome of this litigation. *See* Or. R. App. P. 8.15(1)(a). Below we describe *amici*’s missions, programs, and advocacy, and the ways in which they would be adversely affected by a ruling constraining EQC’s ability to regulate climate and air pollution.

A. Rogue Climate’s Mission and Programs

Rogue Climate is a 501(c)(3) nonprofit organization. Rogue Climate’s mission is to empower Southern Oregon and South Coast communities most impacted by climate change—including low-income, rural, youth, seniors, and communities of color—to win climate justice by organizing for clean energy, sustainable jobs, and a healthy environment.¹ Rogue Climate’s work focuses on

¹ Rogue Climate, *Mission*, <https://rogueclimate.org/about-us/mission-values/>.

building a just transition to clean energy and away from fossil fuels, increasing community resilience to the impacts of climate change, and developing the next generation of climate justice leaders in Southern Oregon and the South Coast.

Rogue Climate organized to prevent Pembina’s proposed Jordan Cove LNG export terminal in Coos Bay and proposed 230-mile Pacific Connector pipeline. The proposed pipeline and export terminal would have carried fracked methane gas hundreds of miles across southern Oregon before liquefying the gas and loading it onto massive tankers to carry 1 billion cubic feet of gas to Asia on a daily basis.² If built, the project would have been the largest single source of climate pollution in Oregon, dramatically undermining Oregon’s ability to fulfill its climate commitments, and threatening the Rogue, Klamath, and South Umpqua rivers, the public drinking water supplies serving more than 160,000 people, Tribal lands and cultural resources, Oregon’s public forests, and the health of Coos Bay and welfare of people whose livelihoods depend on it.³ It would also have increased the threat of wildfires and placed over 16,000 Coos County residents in the “Hazardous Burn Zone.”⁴ In 2019, DEQ denied Pembina’s application for a Clean Water Act Section

² Rogue Climate, *Stop Jordan Cove LNG*, <https://rogueclimate.org/our-work/fossil-fuels/jordan-cove-lng/>.

³ *Id.*

⁴ *Id.*

401 permit.⁵ In 2021, after years of community organizing by Rogue Climate and its partners, Pembina asked the Federal Energy Regulatory Commission to cancel its permit for the project, announcing that it had decided not to move forward with the project.⁶

Rogue Climate is also engaged in organizing and advocacy to prevent the GTN Xpress pipeline expansion project that would lock communities into expensive fossil fuel energy for decades, impact the health and safety of nearby communities, continue harmful fracking on Tribal lands, and exacerbate the climate crisis.⁷

In its energy justice advocacy, Rogue Climate works to ensure that, as Oregon transitions away from fossil fuels and towards 100% renewable energy, the new energy systems are accessible, affordable, clean, and democratically managed.⁸ The communities in Southern Oregon and the South Coast that Rogue Climate serves are some of the most “energy burdened” communities in the state, spending on average more than 6% of their income on energy. Rogue Climate

⁵ Rogue Climate, *After Years of Community Organizing, Jordan Cove LNG Export Terminal and Fracked Gas Pipeline Project Is Dead* (Dec. 1, 2021), <https://rogueclimate.org/jordancovelngisdead/>.

⁶ *Id.*

⁷ Rogue Climate, *Stop GTN XPress*, <https://rogueclimate.org/our-work/gtn/>.

⁸ Rogue Climate, *Energy Justice*, <https://rogueclimate.org/our-work/energy-justice/>.

supported Energize programs in Klamath, Coos, Douglas, and Jackson counties to make ductless heat pump systems for heating and cooling more accessible to community members,⁹ and facilitated South Coast community conversations about floating offshore wind development to ensure that community priorities and standards are considered as potential projects are evaluated.¹⁰

Rogue Climate’s state legislative advocacy has included work in support of Oregon’s groundbreaking 100% clean energy law (HB 2021), the Energy Affordability Act (HB 2475), and the Health Homes Act (HB2842), which all became law in 2021.¹¹ Rogue Climate continues to be involved in the implementation of these bills at the Public Utility Commission (“PUC”) and other regulatory bodies, including serving on the advisory committee to assist the Oregon Department of Energy in developing program rules for the Community Renewable Energy Project grant program.¹²

⁹ See Rogue Climate, *Energize Klamath*, <https://rogueclimate.org/event/energize-klamath-3/>.

¹⁰ Rogue Climate, *Floating Offshore Wind Energy Community Conversations*, <https://rogueclimate.org/event/floating-offshore-wind-energy-community-conversations/2022-09-12/>.

¹¹ *E.g.*, *Oregon Passes Groundbreaking Legislation Requiring 100% Clean Electricity by 2040*, Rogue Climate (June 26, 2021), <https://rogueclimate.org/100-clean-energy-for-all-passes/>.

¹² Oregon Dept. of Energy, *Community Renewable Energy Grant Program Rulemaking*, <https://www.oregon.gov/energy/Get-Involved/Documents/CREP-Advisory-Committee-Members.pdf>.

In addition, Rogue Climate works on community resilience. Rogue Climate partners with community members and other local community-based organizations to support “resilience hubs” to help communities prepare for the impacts of climate change and meet community needs including disaster preparedness, job recruitment and training, and social and emotional care for community members.¹³ During the Almeda fire, Rogue Climate worked to directly support fire survivors and organized to bring community members home, partnering with many other organizations and community members to build a Fire Relief Center that served as a central hub to supply households impacted by the fire with food, supplies, and financial support; connect fire survivors to disaster case managers to help them navigate recovery resources; and foster connection and support among survivors.¹⁴

Finally, Rogue Climate invests in youth leadership, aiming to inspire and develop the next generation of climate leaders and community organizers, especially from communities most impacted by climate change.¹⁵

Rogue Climate was a member of DEQ’s Rulemaking Advisory Committee

¹³ Rogue Climate, *What Are Resilience Hubs?*, <https://rogueclimate.org/our-work/resilience-hubs/>.

¹⁴ Rogue Climate, *Almeda Fire Relief*, <https://rogueclimate.org/fire/>.

¹⁵ Rogue Climate, *Youth Leadership*, <https://rogueclimate.org/our-work/youth-leadership/>.

for the Climate Protection Program.¹⁶

B. Verde's Mission and Programs

Verde is a 501(c)(3) nonprofit organization based in Portland's Cully neighborhood, "a neighborhood with more than its share of poverty, and less than its share of environmental assets."¹⁷ Verde describes itself as "by and of low-income communities."¹⁸

Its mission is to serve these communities by building environmental wealth through social enterprise, outreach, and advocacy.¹⁹

Verde works to achieve its mission through social enterprise and outreach-advocacy. Verde's social enterprise programs build on Verde's status as a licensed general contractor that can conceive, design, and implement environmental infrastructure projects. These social enterprise programs include the Verde Heat Response Program, which distributes free portable cooling units to people who do not have working cooling systems, prioritizing people over the age of 60 or who have a medical condition that increases their risk of heat-related illness.²⁰ Verde

¹⁶ Oregon Dep't of Env't Quality, *Greenhouse Gas Emissions Program 2021 Rulemaking, Rulemaking Advisory Committee Members*, <https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/GHGCR2021ACRoster.pdf>.

¹⁷ See Verde, *About Verde*, <https://www.verdenw.org/history>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Verde, *Verde Builds*, <https://www.verdenw.org/verde-builds>.

has also been involved as a contractor in converting a former landfill into Cully Park and building green features at Nadaka Park in Gresham.²¹ Through advocacy and organizing, Verde's outreach-advocacy work connects community members, peer organizations, and policymakers to protect the environment and direct resources towards low-income communities and communities of color in response to neighborhoods' needs.²² Verde's outreach-advocacy programs include Lideres Verdes, building environmental leaders in Cully's Latinx community; Club Aves, an after-school environmental education program that builds community through the outdoors; and Living Cully, a long-term community-based strategy to address disparities in the Cully neighborhood.²³ Verde is also a member of the Coalition of Communities of Color.²⁴

Verde was a member of DEQ's Rulemaking Advisory Committee for the Climate Protection Program.²⁵

²¹ *Id.*

²² Verde, *Outreach-Advocacy*, <https://www.verdenw.org/outreachadvocacy>.

²³ *Id.*

²⁴ *Id.*

²⁵ Oregon Dep't of Env't Quality, *Greenhouse Gas Emissions Program 2021 Rulemaking, Rulemaking Advisory Committee Members*, <https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/GHGCR2021ACRoster.pdf>.

C. Columbia Riverkeeper's Mission and Programs

Columbia Riverkeeper is a 501(c)(3) nonprofit environmental organization. Its mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Columbia Riverkeeper fulfills its mission through legal advocacy and community organizing to stop pollution, fight fossil fuels, save salmon, engage communities, and clean up the Hanford nuclear site.

Columbia Riverkeeper has fought against the Zenith Energy facility, alongside activists and community groups in Portland. In 2017, Zenith quietly started receiving tar sands and crude oil, placing communities and the environment at risk. The Zenith facility is situated in the Critical Energy Infrastructure hub in Northwest Portland—located in a liquefaction zone that would be devastated in the event of an earthquake.

Columbia Riverkeeper is working to stop the proposed GTN XPress fracked gas pipeline expansion project. The proposal plans to increase the capacity of gas in an existing pipeline that runs from Canada, through Idaho, Washington, and Oregon, to California. The expansion would lock the region into over 30 years of reliance on gas at a time when state policies require reducing emissions.

In September 2022, Columbia Riverkeeper, its partners, and community members defeated Perennial Wind Chaser's proposal to construct a 415-megawatt

fracked gas power plant near Hermiston, Oregon. Perennial would have been one of the largest greenhouse gas emitters in Oregon; over its 30-year lifecycle, the plant would have emitted at least 30 million tons of greenhouse gas pollution.

Columbia Riverkeeper submitted comments to DEQ throughout the Climate Protection Program rulemaking, working with RAC members Rogue Climate and Verde to ensure that the CPP rules would center environmental justice and would effectively and swiftly reduce Oregon’s greenhouse gas emissions.

II. SUMMARY OF ARGUMENT

This challenge to the Climate Protection Program (CPP) represents a broad—and baseless—attack by industry²⁶ on DEQ and EQC’s authority to adopt rules regulating air pollution and greenhouse gas emissions. Although Oregon law grants EQC exceptionally broad power to regulate harmful air pollution,²⁷ the industry challengers argue that the statute should be construed narrowly to exclude greenhouse gas emissions because the legislators who conferred this authority on EQC in 1961 and 1973 lacked an understanding of the harm they caused.²⁸ They argue further that even if greenhouse gas emissions are air contaminants, the fuel

²⁶ The petitioners and intervenor-petitioner are collectively referred to herein as “industry challengers.”

²⁷ See generally ORS 468A.005 *et seq.*

²⁸ Opening Br. of Petrs. Or. Farm Bureau Federation *et al.* at 34–45.

suppliers covered by the CPP are not the ones emitting those air contaminants;²⁹ that the CPP is effectively regulating the end users of the covered fuels and that EQC is prohibited from doing so because of statutory provisions that exempt agricultural operations, residential heating, and certain other types of businesses from air laws;³⁰ and that EQC is usurping the PUC's authority to regulate the distribution of gas.³¹ They argue that, because the Oregon legislature declined to pass a cap and trade bill, the CPP is an improper attempt to do through rulemaking what advocates could not accomplish in the legislature.³²

None of these arguments carries water, for all of the reasons set forth in the respondents' and intervenors-respondents' answering briefs. But the industry challengers' arguments are alarming: If their arguments were taken to their logical conclusion, they would not only call into question the authority for the Climate Protection Program but could also upset many other well-established regulatory programs addressing climate and air pollution.

Amici agree with the respondents and intervenors-respondents that there is no question that DEQ and the EQC had the authority to enact the Climate Protection Program. Rogue Climate, Verde, and Columbia Riverkeeper were

²⁹ *Id.* at 45–46; Opening Br. of Petrs. Nw. Natural Gas Co. *et al.* at 11–29.

³⁰ Opening Br. of Petrs. Or. Farm Bureau Federation *et al.* at 26–34.

³¹ Opening Br. of Petrs. Nw. Natural Gas Co. *et al.* at 29–36.

³² Opening Br. of Petrs. Nw. Natural Gas Co. *et al.* at 43–44.

strong advocates throughout the rulemaking process for rules that would swiftly reduce Oregon's greenhouse gas emissions and deliver reductions in co-pollutants to Oregon's environmental justice communities. Although the comments drafted by *amici* and joined by a total of 25 organizations criticized the final CPP rules as not going far enough to reduce emissions and to prioritize reductions in environmental justice communities, they implicitly agreed that DEQ and EQC had the authority to adopt the CPP.³³

Upholding EQC's broad statutory authority to regulate air and climate pollution is critical to protecting Oregon's future against cascading and devastating climate disasters. There is overwhelming, global, scientific consensus that immediate reductions in greenhouse gas emissions are necessary to avoid the worst effects of climate change.

The rulemaking authority underlying the CPP is particularly important to environmental justice communities, including the communities in Southern Oregon and the South Coast represented by Rogue Climate who are most vulnerable to the impacts of climate change; the low-income communities of color in Northeast

³³ The final public comments submitted by *amici* Rogue Climate, Verde, and Columbia Riverkeeper and other community-based organizations and environmental justice advocates are available as part of the written public comments on the proposed CPP rules. See Or. Dep't of Env't Quality, *Written Public Comments, Greenhouse Gas Emissions Program 2021*, at 1388, <https://www.oregon.gov/deq/rulemaking/Documents/GHGCR2021WrittenComments.pdf>.

Portland represented by Verde who are disproportionately burdened by transportation emissions and industrial air pollution; and the communities along the Columbia River, represented by Columbia Riverkeeper, who are under a seemingly constant threat by the fossil fuel industry to site major new fossil fuel facilities there.

Below, we summarize the ways in which climate change threatens Oregon, unpack the ways in which environmental justice communities are disproportionately vulnerable to harm from fossil fuel pollution, explain why there is no question that EQC and DEQ had the authority to adopt the CPP, and illustrate the ways in which environmental justice communities rely on EQC's broad authority to regulate fossil fuel pollution and to deliver meaningful reductions of GHG emissions and co-pollutants in environmental justice communities.

III. ARGUMENT

A. Climate Change Is An Existential Threat.

The stakes underlying this litigation are high. Climate change poses myriad existential and immediate threats to Oregon and to the world.

The first installment of the Intergovernmental Panel on Climate Change's Sixth Assessment Report reflects scientific consensus that climate change is "widespread, rapid, and intensifying" and that every region of the world is

affected.³⁴ Oregon—much like the rest of the world—faces serious disruption from a changing climate, including an increase in air pollution-related illness and death; declining water supply; an increase in tree die-off and forest mortality because of increasing wildfires, insect outbreaks, and tree diseases; the loss of coastal lands due to sea level rise; an increase in ocean temperature and acidity; increased death and disease in fish like salmon, steelhead, and trout because of warmer water temperatures and altered flow regimes; and damaged and failed field crops and fruit harvests because of higher temperatures and less water available for irrigation.³⁵

There is an overwhelming, global scientific consensus that “immediate, rapid, and large-scale reductions” in greenhouse gas emissions are necessary to avoid catastrophic and irreversible impacts from climate change.³⁶ Dramatically

³⁴ IPCC Press Release (Aug. 9, 2021), https://www.ipcc.ch/site/assets/uploads/2021/08/IPCC_WGI-AR6-Press-Release_en.pdf; *see also* IPCC, Summary for Policymakers, Working Group I Report, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf.

³⁵ *E.g.*, U.S. Env’t Prot. Agency, What Climate Change Means for Oregon, <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-or.pdf>; Or. Dep’t of Land Conservation and Dev., *Or. Climate Change Effects, Likelihood, and Consequences Workshop: A Workshop Summary Report* (Fall 2019), https://www.oregon.gov/lcd/NH/Documents/Apx_9.1.21_OR_ClimateAssmtRpt4_2019_OPT.pdf.

³⁶ IPCC Press Release (Aug. 9, 2021), https://www.ipcc.ch/site/assets/uploads/2021/08/IPCC_WGI-AR6-Press-Release_en.pdf; *see also* IPCC, Summary for Policymakers, Working Group I Report, <https://www.ipcc.ch/report/ar6/wg1/>

curbing the use of fossil fuels—like the methane gas and transportation fuels sold by the fuel suppliers regulated under the CPP—is indisputably key to achieving those reductions.³⁷

To meet the demands of this crisis, the nations of the world in 2015 committed in the Paris Agreement to limiting the increase in global temperatures to 1.5 degrees above preindustrial levels.³⁸ The Intergovernmental Panel on Climate Change (“IPCC”) determined that global greenhouse gas emissions must reach zero by about the year 2050 in order to meet this goal.³⁹ Between 2020 and 2040, global emissions from fossil fuel combustion would need to decline by more than 75%, requiring deep cuts every year.⁴⁰ In 2019, the IPCC again sounded the alarm about the “gap” between the Paris goals and still-growing GHG emissions, declaring that worldwide emissions need to drop 7.6% every year, starting in 2020,

[downloads/report/IPCC_AR6_WGI_SPM.pdf](#); See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Mitigation of Climate Change—Summary for Policymakers*, https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

³⁷ E.g., IPCC, *The evidence is clear: the time for action is now* (Apr. 4, 2022), <https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease/> (limiting global warming will require “a substantial reduction in fossil fuel use”); IPCC, Sixth Assessment Report, <https://www.ipcc.ch/assessment-report/ar6/>.

³⁸ UN Climate Change, The Paris Agreement (2015), <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

³⁹ Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C*, <https://www.ipcc.ch/sr15/>.

⁴⁰ *Id.*

to have a reasonable chance of meeting the Paris goals.⁴¹ Climate scientists are now unanimous that the world must cut emissions in half by 2030 and reach net zero by 2050 to avoid the worst impacts of climate change.⁴²

For Oregon to do its part to reduce emissions, the state must transition from fossil fuels to clean energy and fuel sources, and do so quickly. Sector-based inventory data on Oregon's greenhouse gas emissions dating back to 1990 shows that the transportation and electric sectors are the largest sources of greenhouse gas emissions in the state.⁴³ The transportation sector alone has been responsible for more than a third of Oregon's greenhouse gas emissions every year since 1990.⁴⁴

In 2007, before there was global scientific consensus that greater and swifter reductions were needed to avoid global catastrophe, the Oregon legislature

⁴¹ E.g., Somini Sengupta, 'Bleak' U.N. Report on a Planet in Peril Looms Over New Climate Talks, *New York Times*, Nov. 26, 2019, <https://www.nytimes.com/2019/11/26/climate/greenhouse-gas-emissions-carbon.html>.

⁴² E.g., IPCC, *The evidence is clear: the time for action is now* (Apr. 4, 2022), <https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease/>; IPCC, Sixth Assessment Report, <https://www.ipcc.ch/assessment-report/ar6/>.

⁴³ Or. Dep't of Env't Quality, Oregon Greenhouse Gas Sector-Based Inventory Data, <https://www.oregon.gov/deq/ghgp/Pages/GHG-Inventory.aspx>.

⁴⁴ Data from Oregon's 1990-2019 sector-based inventory shows that the transportation sector has been responsible for a minimum of 34% of the total Oregon greenhouse gas emissions (in 1993, 1996, 1997, 1999–2002, 2008, and 2013) and up to 38% of the total Oregon emissions (in 1991, 2017, and 2018) every year since 1990. Or. Dep't of Env't Quality, *Oregon Greenhouse Gas Sector-Based Inventory: 1990 through 2018 and Preliminary 2019 Data*, available at <https://www.oregon.gov/deq/FilterDocs/ghg-sectordata.xlsx>.

established a goal of reducing greenhouse gas emissions to “at least 75% below 1990 levels” by 2050 and created the Oregon Global Warming Commission to explore ways to do so.⁴⁵ Today, Oregon is a member of the U.S. Climate Alliance, committed to implementing policies to advance the emissions reductions goals of the international Paris Agreement.⁴⁶ As part of that work, the Oregon Global Warming Commission is in the process of developing a roadmap to identify actions that can reduce Oregon’s emissions to 45% below 1990 levels by 2035.⁴⁷ The 2035 roadmap assumes that the Climate Protection Program “will be fully implemented without setbacks or delay.”⁴⁸

B. Environmental Justice Communities Disproportionately Suffer Harm from Climate Change and Fossil Fuel Pollution.

⁴⁵ ORS 468A.205(1)(c); ORS 468A.215; ORS 468A.235.

⁴⁶ *E.g.*, Office of the Governor, State of Oregon, Executive Order 20-04 (Mar. 10, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf (“WHEREAS, Oregon, as a member of the U.S. Climate Alliance, has committed to implementing policies to advance the emissions reduction goals of the international Paris Agreement”); U.S. Climate Alliance, *Governors*, <http://www.usclimatealliance.org/governors-1>; U.S. Climate Alliance, *Alliance Principles*, <http://www.usclimatealliance.org/alliance-principles>.

⁴⁷ Or. Global Warming Commission, *Roadmap to 2035: A Plan for Oregon to Meet its Greenhouse Gas Reduction Targets*, <https://www.keeporegoncool.org/tighger>.

⁴⁸ Or. Dep’t of Energy, Oregon Global Warming Commission Analysis Shows Oregon’s Greenhouse Gas Reduction Goal Is Within Reach (July 25, 2022), <https://energyinfo.oregon.gov/blog/2022/7/25/oregon-global-warming-commission-analysis-shows-oregons-greenhouse-gas-reduction-goal-is-within-reach>; *Roadmap to 2035: Update to Or. Global Warming Commission* (July 13, 2022), available at <https://www.keeporegoncool.org/tighger>.

The burdens of the future climate disasters that loom on the horizon will not be felt equally by all. As the EPA has acknowledged, “the most severe harms from climate change fall disproportionately upon underserved communities who are least able to prepare for, and recover from, heat waves, poor air quality, flooding, and other impacts.”⁴⁹

EPA’s analysis indicates that racial and ethnic minorities are disproportionately vulnerable to the greatest impacts of climate change,⁵⁰ including new asthma diagnoses in children due to particulate air pollution, deaths due to extreme temperatures, lost labor hours for weather-exposed workers, and the highest projected increases in traffic delays from flooding due to global sea level rise.⁵¹

The communities served by *amici* Rogue Climate, Verde, and Columbia Riverkeeper are all at serious risk of harm—and even disproportionate harm—from climate change and fossil fuel pollution.

⁴⁹ U.S. Env’t Prot. Agency, *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States* (Sept. 2, 2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable>.

⁵⁰ *Id.*; U.S. Env’t Prot. Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts* (Sept. 2021) at 6, https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

⁵¹ U.S. Env’t Prot. Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts* (Sept. 2021) at 8, https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

1. *Wildfires*

The communities represented by Rogue Climate are particularly vulnerable to devastation from climate-fueled wildfires.

Climate change causes hot and dry conditions, which in turn lead to more frequent wildfires, and larger wildfires that are harder to put out.⁵²

As drought and wildfire rip through the state on an increasingly regular basis, Oregonians have seen firsthand how Black, Indigenous, Communities of Color (BIPOC), low-income, and rural communities are often disproportionately harmed by climate change, just as they disproportionately bear the burden of other environmental harms.

In September 2020, when the Almeda fire ripped through Southern Oregon, it killed three people and destroyed roughly one-third of the buildings in Talent, Oregon, including Rogue Climate's office.⁵³ Many of the homes that burned were

⁵² U.S. Dept. of Agriculture, *Climate Change and Wildfire in Idaho, Oregon, and Washington*, USDA Northwest Climate Hubs, <http://climatehubs.usda.gov/hubs/northwest/topic/climate-change-and-wildfire-idaho-oregon-and-washington>; Office of the Governor, State of Oregon, Executive Order 20-04 (Mar. 10, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf (“WHEREAS, climate change is contributing to an increase in the frequency and severity of wildfires in Oregon, endangering public health and safety and damaging rural economies”).

⁵³ Iris M. Crawford, *Will Race, Income Inequalities Trip Up Cascadia's Fight Against Climate Change?*, InvestigateWest, Mar. 3, 2021, <https://www.invw.org/2021/03/03/will-race-income-inequalities-trip-up-cascadias-fight-against-climate-change/>

trailer homes occupied by Latinx residents, low-income people, farm workers, seniors, and immigrants.⁵⁴ Jackson County’s emergency alert system left out many communities, including Talent, while alerting residents in neighboring Ashland, a wealthier city, which was not damaged as extensively as Talent.⁵⁵

2. *Air Pollution from Industrial Sources and Transportation Emissions*

Throughout Oregon—and the nation—communities of color and low-income communities bear disproportionate risk of adverse health impacts from environmental causes as a result of government decision-making.⁵⁶ Environmental justice communities are often exposed to multiple, cumulative sources of environmental harm, which have a devastating compounding effect.⁵⁷

Communities near transportation corridors and ports are often at especially high risk for negative health impacts from air pollution. When trucks burn diesel fuel, it emits several criteria pollutants known to have serious consequences for the health of both humans and the environment. Pollution from diesel exhaust includes carbon monoxide (CO), particulate matter (PM), nitrogen oxides (NO_x), and

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ State of Oregon Environmental Justice Task Force, *Environmental Justice: Best Practices for Oregon’s Natural Resource Agencies* (Jan. 2016), https://www.oregon.gov/odot/Business/OCR/Documents/Oregon_EJTF_Handbook_Final.pdf.

⁵⁷ U.S. Env’t Prot. Agency, *Cumulative Impacts Research*, <https://www.epa.gov/healthresearch/cumulative-impacts-research>.

hydrocarbons (HC), as well as other hazardous air pollutants (HAPs) and air toxics.⁵⁸ Diesel emissions can have disastrous effects on the human respiratory, cardiovascular, and immune systems.⁵⁹ Diesel particulate matter and NO_x can also increase the prevalence and severity of allergic reactions to environmental conditions,⁶⁰ and aggravate harms for people with pre-existing conditions.⁶¹

Communities near industrial sites are generally exposed to an even wider range of air pollutants.⁶² Historically, the best predictor of where a hazardous waste site would be located has been the racial composition of the community.⁶³

The Cully community served by Verde is exposed to pollution from both nearby highways and nearby industrial sources. Cully is considered an “overburdened community” under EPA’s environmental justice guidelines.⁶⁴

⁵⁸ U.S. Env’t Prot. Agency, *About Diesel Fuels*, Mar. 1, 2021, <https://www.epa.gov/diesel-fuel-standards/about-diesel-fuels>.

⁵⁹ A. Sydbom et al., *Health Effects of Diesel Exhaust Emissions*, 17 Eur. Respiratory J. 733 (2001), <https://erj.ersjournals.com/content/erj/17/4/733.full.pdf>.

⁶⁰ *Id.*

⁶¹ Sydbom, *Health Effects* at 741.

⁶² U.S. Env’t Prot. Agency, *Stationary Sources of Air Pollution*, <https://www.epa.gov/stationary-sources-air-pollution>.

⁶³ State of Oregon Environmental Justice Task Force, *Environmental Justice: Best Practices for Oregon’s Natural Resource Agencies* (Jan. 2016), https://www.oregon.gov/odot/Business/OCR/Documents/Oregon_EJTF_Handbook_Final.pdf.

⁶⁴ U.S. Env’t Prot. Agency, *EJ 2020 Glossary*, <https://www.epa.gov/environmental-justice/ej-2020-glossary> (defining “overburdened community” as “minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks.”)

Forty-seven percent of residents in this area are people of color, 35 percent are low-income, and all face higher health risks from air toxics than almost everyone else in Oregon (97th percentile).⁶⁵

3. Fossil Fuel Terminals Along the Columbia River

The communities served by Columbia Riverkeeper have been threatened repeatedly with numerous proposals to build new fossil fuel terminals along the Columbia River and fossil fuel power plants in the Columbia River Basin that would emit significant climate and air pollution for decades to come, threatening the planet and impairing the health of the surrounding communities.

For example, the Perennial Wind Chaser Station was a proposed 415-MW fracked gas power plant in western Umatilla County that would have emitted more than one million tons of Greenhouse Gases (“GHGs”) per year, making Perennial

This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities.”).

⁶⁵ See U.S. Env’t Prot. Agency, *EJScreen, EPA’s Environmental Justice Screening and Mapping Tool (Version 2.1)*, <https://ejscreen.epa.gov/mapper/>. To generate data for Cully, choose the “Reports” tab, click “Select Multiple,” and highlight census tracts 74 (41051007400), 75 (41051007500), and 76 (41051007600) then click “submit” and select “Get Printable Standard Report.”

the sixth largest stationary source of GHGs in the state.⁶⁶ Emissions from Perennial would have undermined air quality in the Columbia River Gorge, emitting as much as 59 tons of particulate matter, 19 tons of SO₂, 111 tons of NO_x, 213 tons of carbon monoxide, 34 tons of VOCs, and six tons of sulfuric acid mist each year.⁶⁷ After significant community organizing and environmental advocacy, the developer withdrew the proposal in 2021.⁶⁸

In addition, Zenith Energy's Portland Terminal is a former asphalt facility that pivoted to fossil fuel transloading in 2013.⁶⁹ In 2017, Zenith quietly started receiving tar sands and crude oil on mile-long trains from Canada and North Dakota, destined for consumption outside of Oregon.⁷⁰ After Columbia Riverkeeper and other advocates sued Zenith under the Clean Water Act, Zenith settled the litigation, and DEQ notified Zenith that it needed to obtain a new Land Use Compatibility Statement (LUCS) from Portland applicable to Zenith's new oil-by-rail operations.⁷¹ In 2021, Portland denied Zenith's application for a

⁶⁶ Columbia Riverkeeper, *Perennial News* (Apr. 15, 2021), <https://www.columbia-riverkeeper.org/news/2021/4/perennial-news>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Columbia Riverkeeper, Zenith Energy, <https://www.columbiariverkeeper.org/our-work-fighting-fossil-fuels-oil/zenith>.

⁷⁰ *Id.*

⁷¹ *Id.*

LUCS.⁷² Now, Zenith is planning to phase out its crude oil operations in the next five years.⁷³

C. DEQ and EOC Have Clear Authority to Regulate Climate and Air Pollution.

In March 2020, Governor Brown adopted Executive Order 20-04 directing executive agencies to use the full extent of their authority under existing laws to develop programs to meet specific greenhouse gas emissions reduction targets. The Order noted that, “given the urgency and severity of the risks from climate change and ocean acidification, and the failure of the Legislature to address these immediate harms, the executive branch has a responsibility to the electorate, and a scientific, economic, and moral imperative to reduce GHG emissions and to reduce the worst risks of climate change and ocean acidification for future generations, to the greatest extent possible within existing laws[.]”⁷⁴ It noted further that “existing laws grant authority to state agencies to take actions to regulate and encourage a reduction of GHG emissions in a variety of circumstances” and that the legislature

⁷² *Id.*

⁷³ *E.g.*, Monica Samayoa, *Zenith Energy to phase out crude oil at Portland terminal*, OPB, Sept. 16, 2022, <https://www.opb.org/article/2022/09/16/zenith-energy-to-phase-out-crude-oil-at-portland-terminal/>.

⁷⁴ Office of the Governor, State of Oregon, Executive Order 20-04 (Mar. 10, 2020) at 3, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf.

had acted “to provide permanent funding to the executive branch to pursue executive action on reducing GHG emissions[.]”⁷⁵

Among other provisions, the Order directed DEQ and EQC to:

- cap and reduce emissions from fuels, including natural gas, gasoline, and diesel fuel, and from “large stationary sources of GHG emissions,” consistent with the goal of reducing Oregon’s GHG emissions at least 45% below 1990 levels by 2035, and at least 80% below 1990 emissions levels by 2050;⁷⁶
- prioritize actions that will help vulnerable populations and impacted communities adapt to climate change impacts.⁷⁷

In implementing Executive Order 20-04, EQC had plenty of “existing laws” to work with. Carbon dioxide emissions and other greenhouse gas emissions fit comfortably within the scope of Oregon’s air pollution laws. First, the legislative intent to prevent pollution that is “injurious to public welfare” easily captures climate pollution, the most potentially devastating form of air pollution that exists, and which is frequently accompanied by other co-pollutants. The legislature defined “air pollution” broadly as:

the presence in the outdoor atmosphere of one or more air contaminants, or any combination thereof, in sufficient quantities and of such characteristics and of a duration as are or are likely to be injurious to public welfare, to the health of human, plant, or animal life or to property or to interfere unreasonably with enjoyment of life

⁷⁵ *Id.*

⁷⁶ *Id.* ¶¶ 2, 4.

⁷⁷ *Id.* ¶ 3(C)(2).

and property throughout such area of the state as shall be affected thereby.⁷⁸

Second, the plain language of the air pollution laws makes clear that they reach carbon dioxide and equivalent emissions. They define “air contaminant” to mean “a dust, fume, *gas*, mist, odor, smoke, vapor, pollen, soot, *carbon*, acid or particulate matter or any combination thereof,”⁷⁹ and explicitly state that certain air pollution laws “do not apply to carbon dioxide emissions *from the combustion or decomposition of biomass*” except to the extent necessary to implement the Clean Air Act, implicitly affirming that injurious carbon dioxide and greenhouse gas emissions from other sources are otherwise within the scope of Oregon’s air pollution laws.⁸⁰

Furthermore, Oregon’s air pollution control laws confer broad authority on EQC to regulate air contaminants and air pollution using many different regulatory tools, including by setting permit limits and emission standards applicable to certain areas or source categories.⁸¹

⁷⁸ ORS 468A.005(5).

⁷⁹ ORS 468A.005(2) (emphasis added).

⁸⁰ ORS 468A.020(3)(a) (emphasis added).

⁸¹ *E.g.*, ORS 468A.025(1) (“By rule the Environmental Quality Commission may establish areas of the state and prescribe the degree of air pollution or air contamination that may be permitted therein, as air purity standards for such areas” taking into account a wide range of impacts caused by each pollutant); *id.*(3) (“The commission may establish air quality standards including emission standards for the entire state or an area of the state.”); ORS 468A.040(1) (“By rule the

The CPP employs these previously authorized regulatory tools, requiring covered entities to obtain CPP permits containing declining emission limits for covered fuel suppliers and individualized emission limits for covered stationary sources.⁸²

The equity provisions of the CPP—the “Community Climate Investments” (CCI) rules that prioritize investments in GHG-reducing projects in environmental justice communities and establish an Equity Advisory Committee to offer guidance to DEQ in approving CCI projects—are equally well founded on statutory authority. The legislature provided plain, explicit instructions that, “[i]n making a determination whether and how to act, [a natural resources agency must] consider the effects of the action on environmental justice issues.”⁸³

In 2020, before the CPP was developed, several of the industry challengers in this suit mounted an unsuccessful challenge to portions of Governor Brown’s

Environmental Quality Commission may require permits for air contamination sources classified by type of air contaminants, by type of air contamination source or by area of the state.”); ORS 468A.050 (“By rule the Environmental Quality Commission may classify air contamination sources according to levels and types of emissions and other characteristics which cause or tend to cause or contribute to air pollution and may require registration or reporting or both for any such class or classes.”).

⁸² See OAR 340-271-0150; OAR 340-271-0100; OAR 340-271-0300–OAR 340-271-0330.

⁸³ ORS 182.545(1); *see also* S. Con. Res. 17 (Or. 2021) (declaring the Legislative Assembly’s intent that ORS 182.545 “apply to all state agencies and all policy decisions”).

Executive Order 20-04, including paragraph 4(c), which directed DEQ and EQC to adopt a program to cap and reduce climate pollution from gas utilities, transportation fuel suppliers, and stationary sources.⁸⁴ The Circuit Court dismissed the challenge, agreeing with the State that, even in the absence of Executive Order 20-04, DEQ and EQC “could still proceed with promulgating rules regarding GHG emissions[.]”⁸⁵

Now, after the adoption of the CPP, the industry challengers have renewed their attempt to undermine EQC and DEQ’s regulatory authority altogether. It is noteworthy that the industry challengers’ arguments do not take issue with any particular design feature or provision of the CPP, but instead, repeat their attack on EQC’s authority to adopt *any* program implementing Executive Order 20-04 with respect to gas utilities, fuel suppliers, and stationary sources.

The broad authority granted to DEQ and EQC by the legislature to regulate pollution is in no way reduced by the legislature’s failure to enact legislation directly creating a GHG cap and trade program. It is simply beside the point that

⁸⁴ Complaint, *Space Age Fuel, Inc. v. Oregon*, Case No. 20CV26872 (Marion Cnty. Cir. Ct., July 30, 2020).

⁸⁵ Opinion Letter, *Space Age Fuel, Inc. v. Oregon*, No. 20CV26872 (Marion Cnty. Cir. Ct., Apr. 5, 2021); *see also* Notice of Entry of Judgment, *Space Age Fuel, Inc. v. Oregon*, No. 20CV26872 (Marion Cnty. Cir. Ct., Apr. 7, 2021).

HB 2020—a cap-and-reduce program that would have functioned differently from the CPP in several respects—did not pass the legislature.

There are of course many reasons why any particular bill may not pass. Although Rogue Climate, Verde, and Columbia Riverkeeper have all been active in advocating for strong state climate legislation, none of them supported HB 2020. Verde vocally opposed HB 2020 for its lack of sideboards sufficient to ensure that it benefitted “the people of Oregon more than big industry.”⁸⁶ As Verde’s executive director at the time noted in an opinion piece in *The Oregonian*, “[I]n practice, market-based cap and trade laws favor big business and disadvantage communities. In the first three years of California’s cap and trade program, emissions in frontline communities increased.”⁸⁷

The Court should once more reject industry’s sweeping assault on Oregon’s ability to act to reduce pollution and avoid devastating climate disasters. *Amici* agree with respondents and intervenors-respondents that the Climate Protection Program is supported by ample statutory authority.

⁸⁶ Tony DeFalco and Trevor Kaul, *Opinion: Oregon’s cap-and-trade bill is not enough*, *The Oregonian*, June 18, 2019, <https://www.oregonlive.com/opinion/2019/06/opinion-oregons-cap-and-trade-bill-is-not-enough.html>.

⁸⁷ *Id.*

D. Environmental Justice Communities Rely on DEQ and EQC's Broad Authority to Regulate Air and Climate Pollution.

A ruling in this case in the industry challengers' favor would have devastating consequences for Oregon and in particular, for Oregon's environmental justice communities.

During the CPP rulemaking, *amici* argued that the CPP rules did not go far enough to ensure reductions in Oregon's greenhouse gas emissions from methane, gasoline, diesel, and stationary sources and did not do enough to reduce fossil fuel pollution in Oregon's most vulnerable communities. While *amici* would have preferred a different version of the CPP, there is no doubt that Oregon needs to take action now to give its most vulnerable communities a better chance of survival. A ruling that EQC cannot act to reduce climate pollution from the covered entities without specific legislative authorization will translate into several more years without significant GHG emission reductions from these sectors, losing critical time that we cannot spare.

While imperfect, the Climate Protection Program has the potential to deliver meaningful reductions in greenhouse gas emissions and co-pollutants in environmental justice communities. According to the emissions caps in the CPP rules and DEQ's modeling, the CPP provisions applicable to fuel suppliers will reduce Oregon's GHG emissions from the regulated entities to 50% below the baseline (average emissions from 2017–2019) by 2035 and 90% below the baseline

by 2050.⁸⁸ These reductions in GHGs from the use of fracked gas and transportation fuels can be expected to produce the additional benefit of reductions in other co-pollutants that disproportionately harm the health and welfare of overburdened communities.⁸⁹

In addition, if the CPP is implemented as intended, a huge influx of funding for Community Climate Investments will first and foremost benefit the Black, Indigenous, People of Color, low-income, and rural communities that are most susceptible to harm from climate change and overburdened by air pollution. CPP rules allow regulated entities to meet a percentage of their compliance obligation by purchasing CCI credits that fund projects to reduce greenhouse gas emissions and other air pollution in environmental justice communities, to mitigate the impacts of climate change on environmental justice communities, and to help

⁸⁸ See Or. Dep't of Env't Quality, *Or. Env't Quality Comm'n Special Meeting, Greenhouse Gas Emissions Program 2021 Rulemaking: Climate Protection Program* (Dec. 16, 2021), https://www.oregon.gov/deq/EQCdocs/121621_ItemA.pdf. The fuel supplier caps—15 million metric tons of CO₂e in 2035 and 3 million metric tons of CO₂e in 2050—are approximately equivalent to 58% of 1990 sector levels in 2035 and 11.5% of 1990 sector levels in 2050. In 1990, Oregon's total GHG emissions were approximately 57.74 million metric tons of CO₂e, of which GHG emissions from transportation fuels and residential, commercial, and industrial natural gas use totaled 25.97 million metric tons of CO₂e. Oregon Greenhouse Gas Sector-Based Inventory: 1990 through 2018 and preliminary 2019 data, <https://www.oregon.gov/deq/FilterDocs/ghg-sectordata.xlsx>.

⁸⁹ U.S. Env't Prot. Agency, *The Multiple Benefits of Energy Efficiency and Renewable Energy, Part One*, § 1.2.2 (Emissions and Health Benefits), <https://www.epa.gov/statelocalenergy/part-one-multiple-benefits-energy-efficiency-and-renewable-energy>.

environmental justice communities achieve a just transition to clean energy.⁹⁰ The rules also create mechanisms intended to give environmental justice communities a meaningful say in how CCI funds are used by establishing an Equity Advisory Committee that includes people with lived experience in environmental justice to assist DEQ in reviewing proposed uses of CCI funds and in outreach to environmental justice communities.⁹¹

If the Court were to accept the industry challengers' view of EQC's authority under Oregon's air pollution laws, a ruling in this case could have devastating implications for other regulatory programs that aim to reduce the air pollution that disproportionately affects environmental justice communities. The

⁹⁰ See OAR 340-271-0900(1)(a)–(e) (purposes of community climate investments are to provide an alternative compliance mechanism for covered entities, reduce greenhouse gas emissions by an average of at least one MT CO₂e per CCI credit, to “[r]educe emissions of other air contaminants that are not greenhouse gases, particularly in or near environmental justice communities in Oregon,” to “[p]romote public health, environmental, and economic benefits for environmental justice communities throughout Oregon to mitigate impacts from climate change, air contamination, energy costs, or any combination of these,” and to “[a]ccelerate the transition of residential, commercial, industrial and transportation-related uses of fossil fuels in or near environmental justice communities in Oregon to zero or to lower greenhouse gas emissions sources of energy in order to protect people, communities, and businesses from increases in the price of fossil fuels”); OAR 340-271-0020(18) (defining “environmental justice communities” as “communities of color, communities experiencing lower incomes, tribal communities, rural communities, coastal communities, communities with limited infrastructure and other communities traditionally underrepresented in public processes and adversely harmed by environmental and health hazards, including seniors, youth and persons with disabilities”).

⁹¹ OAR 340-271-0950.

same authority that undergirds the CPP provides the foundation for many other important programs that protect Oregon's air quality.⁹² An unduly narrow interpretation of Oregon's air pollution laws would jeopardize the health and welfare of the communities represented by Rogue Climate, Verde, and Columbia Riverkeeper.

IV. CONCLUSION

Affirming the legality of the Climate Protection Program is critically important for Oregon to have a shot at avoiding the most devastating impacts of climate change. Upholding EQC's broad authority under the air pollution laws is also of particular importance to the environmental justice communities who are disproportionately harmed by fossil fuel pollution and most likely to be harmed by climate change. *Amici* join respondents and intervenors-respondents in asking the Court to rule in their favor.

⁹² See, e.g., Notice of Proposed Rulemaking, May 27, 2022, Air Quality Permitting Updates 2022, at 21, <https://www.oregon.gov/deq/rulemaking/Documents/aqp2022pnp.pdf> (proposing rules to strengthen Oregon's air permitting program and address environmental justice concerns based in part on the authority of ORS 468.020; ORS 468A.025; ORS 468A.040; ORS 468A.050; ORS 468A.135); Notice of Proposed Rulemaking, June 25, 2021, Landfill Gas Emissions 2021, at 7, <https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/lfg2021pnp.pdf> (proposing rules to address the effects of climate change by reducing methane gas emissions from landfills and aligning standards with the federal rules and rules of neighboring states based on the authority of ORS 468.020; ORS 468A; ORS 468A.025; ORS 468A.040; ORS 468A.050; and ORS 468A.135).

DATED: January 6, 2023.

Respectfully Submitted,

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