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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON, Plaintiff, v. MARGARET BUTLER, JAN ZUCKERMAN, KENNETH WARD, et al. Defendants.	Court Nbr 19-CR-28017 Court Nbr 19-CR-28005 Court Nbr 19-CR-27982 Court Nbr 19-CR-28019 Court Nbr 19-CR-27988 DEFENDANTS' NOTICE, OFFER OF PROOF AND MEMORANDUM IN SUPPORT OF PRESENTATION OF "CHOICE OF EVILS" DEFENSE. **104 HEARING REQUESTED**

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COME NOW the Defendants Margaret Butler, Kenneth Ward, and Jan Zuckerman, and pursuant to ORS 161.200, hereby submit the following (joint) Notice, Offer of Proof and Memorandum in Support of the "choice of evils defense." Defendants, Emily Carl and Michael Horner's motion to join this Notice, Memorandum, and Offer of Proof is forthcoming.

I. INTRODUCTION

Defendants are charged with Criminal Trespass in the First Degree (ORS 164.255) for their alleged role in challenging the material and existential threats posed by the activities of Zenith Energy Management ("Zenith") and the fossil fuel industry, as well as the failure of federal, state, and local governments to adequately address the imminent harms posed by global warming. The defendants assert that their alleged criminal act is justifiable, and therefore not criminal, pursuant to ORS 161.200. Pursuant to the Sixth Amendment of the U.S. Constitution, the trial court must allow the defendants to present a complete defense upon meeting their minimal burden required by ORS 161.200, and cannot strike all testimony and evidence in support of the choice-of-evils defense without violating their due process rights to defend against the State's accusations. Whether the defendants meet the standard imposed by ORS 161.200 must be made by the factfinding jury once the defendants have made an initial showing that they can and will present relevant evidence to substantiate the defense at trial. The state may challenge the sufficiency of that evidence upon defendants' request for a necessity jury instruction at the close of testimony.

II. FACTS

On April 28, 2019, climate activists Jan Zuckerman, Emily Carl, Kenneth Ward, Margaret Butler, and Michael Horner gathered at or near train tracks utilized by Zenith. The five defendants gathered as part of an international movement known as "Extinction Rebellion"

("XR") to: 1) disrupt or halt Zenith's essential role in the global production, movement, and burning of fossil fuels, specifically, tar sands oil; and to 2) stop or impede the imminent harms to Oregon and the world posed by global warming, with the understanding that Zenith facilitates the causes of these harms, and 3) take immediate action against these harms and the causes of such harms in light of the demonstrable failure of government and industry to take adequate and timely action as well as providing timely and sustainable reasonable alternatives.

XR is "an international movement that uses non-violent civil disobedience in an attempt to halt mass extinction and minimize the risk of social collapse."[1] Zenith is a corporation based in Houston, Texas, that is responsible for the distribution and storage of fossil fuels, including tar sands oil, in the U.S. and abroad. Zenith is infamous in Portland for its facilitation of the production and distribution of Canadian tar sands oil.[2]

After attempts at lawful advocacy and activism focused on the imminent harms of global warming, Zenith's role in the creation and exacerbation of these harms, and the threat of oil trains within Oregon, defendants reasonably believed they had exhausted all legal and reasonable means to stop the threats generated by Zenith. As a result, defendants gathered at a section of train tracks located at or near Zenith Terminals (5501 NW Front Ave.) that were, and still are, used by Zenith to import tar sands crude oil from Alberta, Canada, to Zenith's facility in northwest Portland. The oil is primarily transported by what are often called "bomb trains" due

[1] Extinction Rebellion website, "About us" section; https://rebellion.earth/the-truth/about-us/ (accessed November 29, 2019)

[2] Gordon R. Friedman, "Crude oil trains increasingly travel through Portland, alarming regulators." *The Oregonian* (https://www.oregonlive.com/news/g66l-2019/04/877e9ecf591571/crude-oil-trains-increasingly-travel-through-portland-alarming-regulators.html)

to the threat of explosions and other grave disasters.[3] Zenith then exports the oil from Portland to China, South Korea, and other overseas markets.[4] As defense experts will testify, Canadian oil derived from "tar sands" is a source of greenhouse gas ("GHG") emissions that significantly contributes to global warming. The Canadian oil sands are the world's third largest reserve of oil.[5] Production of Canadian tar sands oil generates, on average, three to five times more GHG emissions than conventional oil.[6] James Hansen, the former NASA climate scientist who first brought the imminent harms of global warming (including the causes) to the attention of the world in his testimony to the U.S. Congress in 1988,[7] explained in 2012 that the full development of Canadian tar sands would mean "game over for the climate."[8]

Based on established scientific consensus, in the face of intransigent or impotent local, state, and federal governments and corporations, defendants sought to prevent the worsening of

[3] See, e.g., 2016 oil train disaster in Mosier, OR. Tony Schick, "Petroleum Terminal Expands To Allow More Oil Trains Into Portland." Oregon Public Broadcasting. Februrary 7, 2019. https://www.opb.org/news/article/more-oil-trains-willamette-columbia-portland/

[4] See, e.g., Tony Schick, "Canadian Crude Oil is Going By Rail to Portland Before Shipping Off to Asia. Oregon Public Broadcasting. March 16, 2019. https://www.opb.org/news/article/crude-oil-rail-portland-oregon-canada-ship-china/

[5] Government of Alberta, "Oil sands facts and statistics." https://www.alberta.ca/oil-sands-facts-and-statistics.aspx (accessed December 4, 2019).

[6] See, e.g., "National Energy Technology Laboratory, An Evaluation of the Extraction, Transport and Refining of Imported Crude Oils and the Impact on Life Cycle Greenhouse Gas Emissions." DOE/NETL-2009/1362, March 27, 2009 for conventional production and weighted average. http://www.netl.doe.gov/energy-analyses /pubs/PetrRefGHGEmiss_ImportSourceSpecific1.pdf; Severson Baker, C.P & Reynolds, M., 2005. *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush*. Alberta: The Pembina Institute 2005. http://pubs.pembina.org/reports/OilSands72.pdf

[7] Phillip Shabecoff, "Global Warming Has Begun, Expert Tells Senate." New York Times, June 24, 1988. https://www.nytimes.com/1988/06/24/us/global-warming-has-begun-expert-tells-senate.html (accessed December 4, 2019).

[8] James Hansen, "Game Over for the Climate." New York Times. May 9, 2012. https://www.nytimes.com/2012/05/10/opinion/game-over-for-the-climate.html?mtrref=www.google.com&assetType=REGIWALL

existing harms brought on by global warming, future harms caused by the emission of greenhouse gases, and the imminent harms that are particular to the development of Canadian tar sands oil.

Defendants allegedly participated in creating and maintaining a blockade at the Portland Zenith terminal and intended to stop or reduce the amount of tar sands oil that would be exported and burned, thereby greatly exacerbating the planet's risk of crossing an environmental "tipping point."[9] The defendants will testify that they intended to stop the transport and export of tar sands oil through Portland in order to prevent this radical exacerbation of climate change. The blockade consisted of a small garden area with several rows of vegetables, herbs, leafy greens, and a scarecrow. Decl. Brinson ¶¶ 2-7, Def. Exhibits 101-106. The garden blockade was located partially on the train tracks leading to and from Zenith's facility. The train tracks are the primary means of transporting tar sands oil to the Zenith terminal for future export. The blockade also encompassed a section of railway tracks that, at the time of the blockade, were being used to support the expansion of Zenith's export activities. Several people, including defendants, are alleged to have been present on the train tracks and right of way.

[9] According to the International Panel on Climate Change, an environmental "tipping point," in this context, is an "abrupt and irreversible" change in a physical or ecological system. IPCC AR5 WGII (2014). "Summary for policymakers." Climate change 2014: Impacts, Adaptation and Vulnerability (Report). "Tipping points are reached when particular impacts of global warming become unstoppable, such as the runaway loss of ice sheets or forests. In the past, extreme heating of 5C was thought necessary to pass tipping points, but the latest evidence suggests this could happen between 1C and 2C." Damian Carrington, *The Guardian* "Climate emergency: world 'may have crossed tipping points' (citing Timothy M. Lenton, Johan Rockström, Own Gaffney, Stefan Rahmstorf, Katherine Richardson, Will Steffen and Hans Joachim Schellnuhuber, *Nature*, "Climate tipping points—too risky to bet against." Comment. Vol. 575 (November 28, 2019). https://www.nature.com/magazine-assets/d41586-019-03595-0/d41586-019-03595-0.pdf

Defendants were arrested and ultimately charged with criminal trespass in the first degree (ORS 164.255).

Defendants' actions on April 28th were not the only efforts they have undertaken to prevent the harms of global warming. All defendants will testify that they have engaged in sustained forms of advocacy, campaigning, educational outreach, petitioning of government officials and other legislative efforts, boycotts, litigation, and personal lifestyle choices in an attempt to avert the harms of global warming. They will also testify, along with defense experts (*infra* at 34), that such measures have been and, for several legal, political, and economic reasons, may continue to be, ineffective and inadequate to address the serious imminent harms posed by global warming upon them, their children and families, and their global community.

On April 21, 2019, a week before defendants were arrested, members of XR, including some defendants, conducted a blockade nearly identical to the April 28 blockade, wherein they sent a letter to Portland Mayor Tom Wheeler and members of the Portland City Council. Decl. Brinson ¶ 8, Def. Exhibit 107 (Letter to Portland Mayor and City Council). Defendants reaffirm the contents of the letter, which outlines defendants' reasons for the blockade. As defendants will testify, their action on April 28, 2019 was a continuation of the April 21 blockade.

The letter begins by explaining the protesters' intent to "rezone" the "industrial corridor in which [the Zenith crude oil transloading] facility is located" from an "Employment and Industry based zone to an Open Space designation." Exhibit 107 at 000007. While acknowledging that they "[did] not have the mandate of having been elected, nor […] a budget or a clear, formal mechanism for enforcing [the rezoning]," they argued that they "have the mandate of enforcing a policy that is congruent with a dangerous physical reality." *Id*. They state that "in the context of a

rapid deterioration of the physical predicates of life on earth, we no longer believe anyone who fails to take hasty measures to impact this trajectory has a meaningful claim to power." *Id*.

Defendants' reasoning, motive, and intent for taking action against Zenith are straightforward. First, they, like millions of humans around the world, recognize the existential threat to ecological systems and, therefore, society, posed by the continued extraction and burning of fossil fuels. They recognize that Zenith facilitates the underlying industrial processes that, if not halted, will actualize that threat. Likewise, all levels of government — including the City of Portland and Multnomah County — recognize the threat to society and life on this planet posed by global warming and the continued burning of fossil fuels.

The City of Portland has a long history of recognizing the threats of climate change. It was the first U.S. city to establish a Climate Action Plan.[10] The City, along with Multnomah County, announced several subsequent plans in 2001, 2009, and 2015.[11] All plans recognize the grave and imminent risks of global warming to Oregon and the world, and set out ambitious goals to reduce the emissions causing global warming.

In 2015 the City passed Resolution 37168 to "actively oppose expansion of infrastructure whose primary purpose is transporting or storing fossil fuels in or through Portland or adjacent

[10] City of Portland's "Global Warming Reduction Strategy" adopted by the City in November 1993 (https://beta.portland.gov/sites/default/files/2019-08/global-warming-reduction-strategy-nov-1993.pdf)

[11] "City of Portland/Multnomah County Local Action Plan on Global Warming" developed by the City and County in April 2001 (https://beta.portland.gov/sites/default/files/2019-08/local-action-plan-on-gw-april-2001.pdf); "City of Portland/Multnomah County Climate Action Plan — Executive Summary" developed October 2009 (https://beta.portland.gov/sites/default/files/2019-08/cap_exec_summary_2010_web.pdf); "City of Portland/Multnomah County Climate Action Plan — Summary" developed June 2015 (https://beta.portland.gov/sites/default/files/2019-07/cap-summary-june30-2015_web.pdf).

waterways." Brinson Decl. ¶ 9, Def. Exhibit 108. The resolution declared that 1) "fossil fuels pose risks to safety, health, and livability, including mobility of people;" 2) "the extraction and combustion of fossil fuels are significant sources of greenhouse gas emissions and major contributors to climate change and pollution;" 3) "extraction of fossil fuels through fracking and tar sands processing, which has become widespread throughout the Western United States and Canada, has damaging impacts to human and environmental health;" and 4) "climate change, if unchecked, will continue [to] impact human health, natural systems, and infrastructure, creating new costs for individuals, businesses, and governments." *Id*.

The resolution further recognizes that "Oregon and Washington communities have passed resolutions addressing fossil fuel transport and export, and hundreds of public officials, including governors of Oregon and Washington, state and federal agencies, tribes, health organizations, religious leaders and other community leaders, have recognized the harms presented by fossil fuels to the environment and Northwest communities." *Id*. at 000013.

In 2017, the City of Portland passed Resolution 37289. The resolution states, in part:

> "WHEREAS, the scientific consensus is clear that human activities are primarily responsible for accelerating global climate change; and
>
> "WHEREAS, changes in Oregon's climate are already being felt, with Oregon's mean temperature warming by 2.2°F during 1895-2015, and 2015 was the warmest year on record and 2016 was the wettest winter on record; and
>
> "WHEREAS, the Oregon Climate Change Research Institute has found that climate change poses a significant threat to Oregon's forestry, fisheries, water supplies and coastal resources, and impacts that are likely to include winter flooding, summer droughts, loss of shoreline, forest fires, diminished fish and wildlife habitat, retreating glaciers, decreased snowpack, increased disease vectors and invasive species, urban heat islands…"

Decl. Brinson ¶ 10, Def. Exhibit 109 ("City of Portland Resolution 37289"[12]).

The City of Portland's resolution acknowledges some of the obstacles to effectively combating climate change, including decisions by then recently-confirmed EPA Administrator Scott Pruitt[13] as well as Donald Trump, "that are setting climate policy at the national and international level back decades by pulling out of the Paris Climate Agreement, defunding environmental programs, attempting to reinvigorate the coal industry, greenlighting major pipeline projects (such as Keystone XL and Dakota Access), attacking the Clean Power Plan [which has since been eliminated], and weakening EPA's commitment to environmental justice." Def. Exhibit 109 at 000017.

In 2019, the Bureau of Planning and Sustainability for the City of Portland released a white paper outlining "Carbon Emissions and Trends" in Multnomah County, using data from 2017. Decl. Brinson ¶ 12, Def. Exhibit 111 ("Multnomah County 2017 Carbon Emissions and Trends"). The white paper is a bleak reminder of the insufficiency of current attempts to curb climate change. The first line of the report states: "We are in a climate crisis." *Id.* at 000029. The paper goes on to note:

> "Temperature rise is leading to warmer winters, decreasing snowpacks, hotter summers, and heavier storms. Scientific models predict increasing the risk of both flooding and drought, water scarcity, large wildfires, warmer stream temperatures, harmful algae blooms, life-cycle impacts for salmon, damage to recreational tourism economies, and negative human impacts from poor air quality and heat . . . . Despite our successes, our emission reduction efforts clearly need to rapidly accelerate." *Id.*

[12] Multnomah County passed a nearly identical version of the City of Portland's Resolution on June 1, 2017. Decl. Brinson ¶ 11, Def. Exhibit 110.

[13] Pruitt, who had close ties to the fossil fuel industry (corrupting monetary influence), was eventually removed from office with over 20 ongoing ethics investigations. https://www.theguardian.com/environment/2017/feb/22/scott-pruitt-emails-oklahoma-fossil-fuels-koch-brothers

These resolutions, commitments, and reports by the City of Portland and Multnomah County make it clear that: 1) global warming poses an imminent and serious threat to human and environmental health; 2) the risk of harm to human and environmental health is not only caused by, but also exacerbated by, the production and combustion of fossil fuels; and 3) the production and combustion of fossil fuels must be reduced at a rapid and severe rate to avoid and mitigate the imminent harms of global warming. The continued operation of Zenith is a direct contradiction to the resolutions and will negate, thwart, and obviate any possibility of complying with or accomplishing the clear goals of the resolutions, climate action plans, or recommendations in the Carbon Emissions and Trends report.

Despite the official recognition, all levels of government have failed to take appropriate or reasonable action against the threat. Defendants are well aware of the intransigence and impotency of governments to address the threats posed by global warming and, specifically, companies like Zenith that have caused and exacerbated the threat.

Defendants' April 21 letter notes the insufficiency of the current Portland Climate Action Plan. It "describes policy actions with no coherent relationship with the plan's emissions reduction targets" and, for those policy actions that are described, such actions are "manifestly insufficient," an assertion that will be supported by the anticipated expert testimony defendants intend to present. Def. Exhibit 107 at 000008.

Faced with the fact that the City of Portland acknowledges the threat of global warming but has failed to take adequate action, the defendants maintain, as the April 21 letter suggests, that "only two conclusions are reasonable: one, the City of Portland's government does not understand its own policies, or two, the City of Portland's government has actively issued, or consciously failed to update, policies it knows are wildly insufficient." *Id*.

Attempts to curb climate change at the federal level have also failed. The actions of the federal government, particularly in recent years, are a direct cause of global warming. Decl. Brinson ¶ 16, Def. Exhibit 115 (Brief of *Amicus Curiae* Sierra Club In Support of Plaintiffs-Appellees, *Juliana et. al. v. U.S.* at 11 *et seq.* (Ninth Cir. Case No. 18-36082), filed Mar. 1, 2019. "[T]he United States federal government has pursued policies to encourage and expand the combustion of fossil fuels in this country…and [i]n doing so, the government has willfully endangered the lives and well-being" millions. *Id* at 000135. Likewise, administrative petitions and civil litigation under federal environmental statutes have failed to reduce overall emissions and atmospheric CO2. *Id.* at 000141 (chart of "Atmospheric CO2 and Temperature Trends and US Climate Policy*).* Further, novel claims in public interest civil litigation to force the government to address the imminent harms posed by global warming, such as the *Juliana, et. al. v. United States* lawsuit (asserting plaintiffs' Fifth Amendment rights to a sustainable climate free from state-created climate danger), have been met with obstruction and delay tactics by the federal government. Decl. Brinson ¶ 17, Def. Exhibit 116 (Declaration of Philip L. Gregory In Support of Plaintiffs' Motion Under Circuit Rule 27-12 to Expedite Appeal, *Juliana et. al. v. U.S.*, Ninth Cir. Case No. 18-36082), filed Jan. 2, 2019. In *Juliana*, there are currently six separate pending appeals filed by the U.S before the Ninth Circuit. In addition, the government has filed twelve motions to stay the case. The applications for stay were each accompanied by repetitive petitions for writs of mandamus. These repeated filings by the United States appear to be intended to delay the resolution of the *Juliana* case which, if successful at trial, could force the government to discontinue its promotion of fossil fuels. *Id*.

While local, state, and federal authorities have failed to take appropriate action, carbon emissions continue to escalate, further limiting the chances to literally save the planet and all life upon it. As climate scientist Dr. James Hansen has noted:

> "It's crucial that we immediately recognize the need to reduce atmospheric carbon dioxide to at most 350 ppm in order to avoid disasters for coming generations. Such a reduction is still practical, but just barely. . . [W]e need to acknowledge now that a change of direction is urgent. This is our last chance."[14]

In light of these governmental failings and continued production and burning of fossil fuels, defendants are faced with a choice: 1) passively wait for global warming to ravage the planet, destroying all or nearly all life; or 2) take *meaningful* and *effective* action to prevent the harms of global warming. Defendants chose the latter.

In addition, Defendants' actions and their necessity are not isolated from a general global movement toward civil disobedience and other forms of non-violent action to address global warming. Defendants' actions are part of a larger landscape of actions that, in the aggregate, are calculated to prevent or mitigate the harms of global warming.[15]

Defendants' reasons for taking action against Zenith are sound and compelling. While defendants' ethical or normative considerations may vary according to each defendant, there is a common foundation inherent in each of the defendants' reasoning: without immediate action to prevent the imminent catastrophic harms posed by global warming, the conditions necessary for the very possibility of ethical reasoning are diminished as the ability of the planet to support life

[14] James E. Hansen, *Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity*, 1st U.S. ed. (New York: Bloomsbury USA, 2009), ix-x.

[15] Extinction Rebellion's "Strategy" states that they aim to "mobilize" "3.5% of the population to achieve system change" using "mass 'above the ground' civil disobedience — in full public view." https://rebellion.earth/the-truth/about-us/ (accessed December 2, 2019).

diminishes. In other words, it is not merely out of a sense of moral or ethical reasoning or sentiment that defendants acted, but by a justified sense that if no action is taken, then nothing else will matter because there will not be a planet capable of sustaining human life on which anything could matter.

III. LEGAL STANDARD

A. The Sixth and Fourteenth Amendments of the United States Constitution, as Well as Article 1, § 11 of the Oregon Constitution, Guarantee the Right to a Complete Defense

Criminal defendants have a constitutional right to offer a complete defense to a jury when they meet a minimal burden of producing evidence legally sufficient to establish the defense's availability. The United States Constitution guarantees the right of criminal defendants to trial by an impartial jury. U.S. Const. amend. VI.

> "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge . . . . Fear of unchecked power . . . found expression in . . . this insistence upon community participation in the determination of guilt or innocence. It has long been settled that due process protects persons charged with criminal conduct by permitting them to present exculpatory evidence to the jury."

Duncan v. Louisiana, 391 US 145, 155-56 (1968). The Oregon Constitution likewise protects the right of criminal defendants to a fair jury trial. Or. Const. art. I § 11.

A criminal defendant must be given a "meaningful opportunity to present a complete defense," *Holmes v. South Carolina*, 547 US 319, 324 (2006), including an opportunity to "present [their] version of the facts . . . to the jury so it may decide where the truth lies[.]" *Washington v. Texas*, 388 US 14, 19 (1967). *See also State v. Davis*, 345 Or 551, 589 (2008). The opportunity, upon a

minimum showing, to present a complete defense is a fundamental element of due process. *Chambers v. Mississippi*, 410 US 284, 294 (1973).

B. Oregon Recognizes the Choice of Evils Defense (ORS 161.200)

ORS 161.200 provides: "(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> "(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> "(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."

"[A] defendant seeking to advance the choice-of-evils defense" must "present evidence of three cumulative elements: '(1) his conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for him to believe that the need to avoid that injury was greater than the need to avoid the injury that * * * the statute that he was found to have violated, seeks to prevent.'" *State v. Dewhitt*, 276 Or App 373, 390 (2016), *rev den,* 359 Or 667 (2016) (citing *State v. Boldt*, 116 Or App 480, 483 (1992)).

"A choice of evils defense is a defense of justification," *State v. Oneill*, 256 Or App 537, 539, *rev den*, 354 Or 342 (2013), and the "trial court has a screening function in determining whether the evidence is sufficient to send the choice of evils question to the jury." *State v. Marsh*, 186 Or App 612, 615, *rev den* 335 Or 655 (2003). "A defendant is entitled to a jury instruction on a defense of justification if there is *any evidence* from which jurors could infer that the required

elements of that defense are present and the proposed instruction correctly states the law." *Oneill*, 256 Or App at 539-40 (emphasis added; citing *State v. Smith*, 107 Or App 612, 615, *rev den* 335 Or 655 (2003)). *See also State v. Matthews*, 30 Or App 1133, 1336 (1977) ("If there is any evidence in the record from which the jury could infer the required elements of justification, the issue should be submitted to them."). While the trial court has discretion to allow the choice-of-evils defense based on a defendant's offer of proof, it is "not for the trial court to determine whether defendant [put forth] 'credible' evidence, but merely to determine whether defendant [put forth] 'any evidence * * * from which the jury could infer the required elements of [the defense.]" *State v. Paul*, 289 Or App 408, 414 (2017) (citing *Boldt*, 116 Or App at 484).

Because the necessity defense is highly fact-dependent, requiring an analysis of the exact harms being targeted and the defendants' motives, each element of the defense must be considered in light of the specific circumstances giving rise to the defendants' actions. As the fact-finders in the criminal justice system, the jury is entitled to make these factual judgments.

C. Courts Recognize the Constitutional Right of a Defendant to Present a Choice of Evils/Necessity Defense in Cases of Civil Disobedience and, Particularly, Cases Involving Attempts by Defendants to Prevent the Harms of Global Warming

Since the 1970s, hundreds of people representing a variety of causes have been acquitted of civil disobedience actions across the country, based on the defense of necessity.[16] Additionally,

[16] Despite the large number of successful necessity defenses, there are few reported decisions upholding the right to present the defense to the jury, for the simple reason that courts are usually not called upon to issue an opinion in such cases, and acquittals are not appealable. The following is only a selection of successful political necessity defenses: *State v. Mouer* (Columbia Co. Dist. Ct., Dec. 12-16, 1977) (protesters acquitted of trespass at nuclear site after instruction on necessity); *People v. Block* (Galt Judicial Dist., Sacramento Co. Mun. Ct., Aug. 14, 1979) (one defendant acquitted of charges from protest at nuclear plant after necessity instruction, other defendants received split verdict and charges dropped); *California v. Lemnitzer*, No. 27106E (Pleasanton-Livermore Mun. Ct. Feb. 1, 1982) (hung jury for protester at nuclear research facility after instruction on necessity, at retrial no necessity instruction but instruction on malice);

at least three courts in the United States have ruled to allow climate protest defendants to present necessity defenses in recent years. In October 2017, a Minnesota district court permitted four defendants to offer evidence regarding the necessity defense in a case involving an action against Canadian tar sands, and the Court of Appeals and Minnesota Supreme Courts declined to disturb the ruling. *State v. Klapstein*, A17-1649 (Minn. Ct. App. Apr. 23, 2018).[17] That same month, a

Vermont v. Keller, No. 1372-4-84-CNCR (Vt. Dist. Ct. Nov. 17, 1984) (defendants acquitted of trespass in congressman's office to protest policy in Central America after extensive testimony and necessity instruction); *Michigan v. Jones et al.,* Nos. 83-101194-101228 (Oakland County Dist. Ct. 1984) (defendants acquitted of charges related to blockade of cruise missile site after necessity instruction); *People v. Jarka*, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15, 1985) (protesters acquitted after sit-in at naval training center to protest Central American policy when court gave necessity instruction that noted illegality of nuclear war); *Chicago v. Streeter*, Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct., Cook County 11, May 1985); (defendants acquitted of trespass at office of South African consul after necessity instruction); *Colorado v. Bock* (Denver County Ct. June 12, 1985) (protesters acquitted of trespass at senator's office to protest policy in Central America after necessity instruction); *Michigan v. Largrou*, Nos. 85-000098, 99, 100, 102 (Oakland County Dist. Ct. 1985) (defendants acquitted of charges related to blockade of cruise missile site, court noting absence of malice and absence of alternative methods); *Washington v. Heller* (Seattle Mun. Ct. 1985) (protesters acquitted of trespassing at the home of South African consul after necessity on instruction); *Washington v. Bass*, Nos. 4750-038, -395 to -400 (Thurston County Dist. Ct. April 8, 1987) (protesters acquitted of charges from occupation of state capitol in anti-apartheid protest after necessity instruction); *Illinois v. Fish* (Skokie Cir. Ct. Aug. 1987) (protesters acquitted of trespass at an army recruiting center after necessity instruction); *State v. McMillan*, No. D 00518 (San Luis Obispo Jud. Dist. Mun. Ct., Cal. Oct. 13, 1987) (bench trial acquitted protesters at nuclear plant on theory of necessity); *Massachusetts v. Carter*, No. 86-45 CR 7475 (Hampshire Dist. Ct. 1987) (defendants, including President Carter's daughter, acquitted of trespass and disorderly conduct in protest against CIA recruitment after necessity instruction); *Massachusetts v. Schaeffer-Duffy* (Worcester Dist. Ct. 1989) (protesters acquitted of trespass at a nuclear facility after necessity instruction); *West Valley City v. Hirshi*, No. 891003031-3 MC (Salt Lake County, Ut. Cir. Ct., W. Valley Dept. 1990) (protesters at nuclear missile plant acquitted after necessity instruction); *California v. Halem*, No. 135842 (Berkeley Mun. Ct. 1991) (defendant acquitted of distributing clean needles in response to AIDS crisis after necessity instruction); *People v. Bordowitz*, 155 Misc.2d 128 (N.Y.C. Crim. Ct. 1991) (defendants acquitted of distributing clean needles in response to AIDS crisis on necessity defense); *People v. Gray*, 571 NYS2d 851, 150 Misc.2d 852 (NYC Crim Ct 1991) (defendants acquitted on necessity defense in bench trial after protest against pollution and safety effects of new vehicular lanes).

[17] Judge Tiffany later narrowed the scope of the necessity evidence allowed at trial. Order Following Pretrial/Settlement Conference, 15-CR-16-413, at 9-11 (Oct. 3, 2018).

Washington trial court granted the necessity defense to a Veterans for Peace activist who had blocked a freight train to stop oil and coal shipments. *State v. Taylor*, Wash. Dist. Ct. Dkt 6Z0117975.

In April of 2019, the Washington Court of Appeals issued the first appellate ruling explicitly approving use of the necessity defense by a climate activist, in a case stemming from the same valve-turning protest that resulted in the Minnesota ruling. *State v. Ward*, 438 P3d 588, 592 (Wash Ct App 2019), *rev den,* 193 Wash 2d 1031 (2019). The Washington Supreme Court declined to review the decision. The defendant in that case is one of the defendants in this case, Mr. Ward.

D. For Alleged Criminal Conduct to be "Necessary" to Avoid a Threatened Injury, Defendant Must Show She Had No Reasonable Alternative Available to Her but to Commit the Crime

A defendant who desires to present a choice-of-evils defense must show that her "conduct was necessary to avoid a threatened injury." UCrJI § 1103. To show that such conduct was "necessary," a defendant must put forth some evidence that would allow a jury to find that she "had no reasonable alternative but to commit the crime: "[F]or a defendant's conduct to be 'necessary' to avoid a threatened injury, he must show that no other course of action was available to him but to 'choose an evil.'" *State v. Freih*, 270 Or App 555, 557 (2015) (quoting *State v. Miles*, 197 Or App 86, 93, 104 P3d 604 (2005)). While ORS 161.200 does not include "reasonable belief" in its text (as to this element), courts have interpreted this element as requiring that the defendant's belief in the necessity of the conduct must be objectively reasonable. *Oneill*, 256 Or App at 544.

A defendant is not required to show, categorically, that no *conceivable* other option was available to act to prevent an imminent harm. Instead, she must only show that no "*reasonable*

alternative existed." *Freih,* 270 Or App at 557. In considering the availability of reasonable alternatives, a court should not assume that any hypothetical course of action is reasonable. "Reasonable must mean more than available; *it must imply effective*."[18] "[T]he issue is not whether a lawful option exists; rather, it is whether any such alternative would effectively mitigate the forthcoming evil . . . . Doing nothing, for example, is almost always a perfectly legal alternative, as is staring into space or pondering the purpose of life."[19]

In *People v. Gray*, for example, the court held that the defendants' history of unsuccessful attempts to avoid the targeted harms demonstrated that the legal means were ineffective. 571 NYS2d 851, 860, 150 Misc.2d 852 (NYC Crim Ct 1991).Writing that the necessity defense "does not legalize lawlessness; rather it permits courts to distinguish between necessary and unnecessary illegal acts," *id.*, the court found that the "legal alternative" requirement does not preclude the justification of civil disobedience altogether, and suggested that courts should not rule out the presentation of the defense simply because there is always a logical possibility of further legal action:

> "It has been asserted that because a democracy creates legal avenues of protest, alternatives must always exist. In the opinion of this court, however, to dispense with the necessity defense by assuming that people always have access to effective legal means of protest circumvents the purpose of the defense. When courts rule as a matter of law that defendants always have a reasonable belief in other adequate alternatives, they are asserting that regardless of how diligent a party is in pursuing alternatives, no matter how much time has been spent in legitimate efforts to prevent the harm, no matter how ineffective previous measures have been to handle the emergency, the courts in hindsight can always find just one more alternative that a citizen could have tried before acting out of necessity."

[18] Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1179-80 (1987) (emphasis added).

[19] Shaun Martin, *The Radical Necessity Defense*, 73 U. Cinn. L. Rev. 1527, 1586 and n. 259 (2005).

Id. at 860-61.

E. Defendants Must Show that the Threatened Injury Was Imminent

"To show that the injury that the defendant sought to avoid was 'imminent' within the meaning of the statute, defendant [is] required to show that the threat of injury existed *at the time* that defendant committed his offense." *Freih,* 270 Or App at 557 (emphasis in original) (citing *Boldt*, 116 Or App at 483). "It is not that the injury itself must be imminent, rather the *threat of the injury* must exist at the time the offense is committed." *Paul*, 289 Or App at 413 (citing *Freih*, 270 Or App at 560). Thus, imminence may refer to harms that are certain to occur but cannot be precisely predicted, as is the case with many environmental threats. In *Burlington N. & Santa Fe Ry. Co. v. Grant*, for example, the Tenth Circuit found that a tar-like by-product of an oil refinery was an imminent hazard even though no one had yet been harmed by it. 505 F3d 1013, 1020-21 (10th Cir. 2007).

The threatened injury may be to life or property. *State v. Webber*, 85 Or App 347, 351 (1987), *rev den,* 304 Or 56 (1987). Further, it is enough to allow presentation and instruction of the defense, as to this element, if the defendant "reasonably believed that the threat would be carried out." *Boldt*, 116 Or App at 484. The reasonableness of the belief of a defendant is measured by an objective standard, *i.e.*, the belief must be objectively reasonable to a person of ordinary intelligence and understanding. *Oneill*, 256 Or App at 545-46.[20]

F. Defendants Must Show it Was Reasonable to Believe that the Threatened Injury Was Greater than the Potential Injury of the Alleged Illegal Actions

[20] *See also Powell v. Moore,* 228 Or 255, 262, 364 P2d 1094 (1961) ("The reasonable man represents the general level of community intelligence and perception and the jury, being a cross section of the community, should best be able to tell what that general level is.").

Like the previous element, this element requires a defendant to put forth any evidence that would indicate that her belief as to the extent of the harm of the alleged illegal actions and the threatened injury sought to be prevented was objectively reasonable.

This element is often conceived of as the balancing of harms. For example, the Model Penal Code requires as an element of the necessity defense that "the harm or evil sought to be avoided by such conduct [be] greater than that sought to be prevented by the law defining the offense charged." § 3.02(1)(a). The United States Supreme Court has used similar language, noting that a defendant may assert the defense "if he reasonably believed that criminal action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." *United States v. Bailey*, 444 US 394, 410 (1980) (internal quotation marks omitted). Necessity justifies criminal action "where the social benefits of the crime outweigh the social costs of failing to commit the crime." *United States v. Schoon*, 971 F2d 193, 196 (9th Cir 1991).

As a matter of law, this is typically an easy threshold for a civil disobedience defendant to meet. Harms such as nuclear war, genocide, and climate change, which significantly affect millions of people, are orders of magnitude more injurious than minor property damage. *See, e.g.,* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring it to the Jury*, 38 New England L. Rev 3, 49 (2003) ("The first prong of the defense is usually not a significant hurdle . . . .").

In *Paul*, the Oregon Court of Appeals held that the defendant was entitled to a choice-of-evils instruction where he presented evidence that someone threatened to harm his daughter if he did not comply with the other person's orders. 289 Or App at 414. The other person's orders, defendant argued, led to defendant committing acts that led to his conviction of burglary (first and second degree) and theft in the third degree. Defendant offered evidence to support his

presentation of the choice-of-evils defense that consisted of testimony from the defendant and the arresting officer, as well as audio recording from the arresting officer's patrol car, indicating that defendant believed the threat of injury to his daughter was imminent. While the court of appeals did not substantively address or weigh the competing harms, the result of the court in allowing the defense speaks for itself: the physical safety of defendant's daughter outweighed the offense to property.

IV. ANALYSIS

In addition to the facts noted above, defendants provide the following as an offer of proof as to their initial burden to assert the choice-of-evils defense to a jury; and for that jury to be provided a jury instruction regarding the defense at the close of evidence. Defendants clearly establish that there is sufficient evidence to support their right to provide evidence and testimony as to the reasonableness and necessity of their actions to jury of their peers.

A. Defendants Had No Reasonable Alternative to Attempt to Avoid the Threatened Injuries Posed by Zenith's Activities and, Generally, the Injuries Posed by Global Warming

Facing the indisputable crisis of global warming and the failure of government at all levels, as well as private industry, to take any appropriate action in response to the crisis, defendants had no reasonable alternative to their acts of non-violent resistance. Defendants have engaged in and exhausted all reasonable alternatives to address the crisis. Further, as defense experts will testify, the legal means to address the crisis, including the use of litigation and judicial review, are insufficient, because the interrelated legal, political, and economic systems of the United States are currently incapable of adequately addressing the crisis.

Consideration of legal alternatives must also take a realistic view of our existing political and economic system. As defendants' are aware and experts are expected to testify, policymaking is

captured at all levels by industry, and industry is generally compelled, by fiduciary duty or other legal mandates, to pursue financial profit over the interest of the public. Therefore, in such a situation, political activity by "average" people like defendants stands almost no chance against the clout of entities like the fossil fuel industry.

Within the government and the fossil fuel industry, the effects of fossil fuels on the health of the planet and its ability to sustain life have been known with certainty for decades.[21] As noted, *supra* at 9-12, the City of Portland and the State of Oregon have been aware of the imminent harms posed by global warming and, more importantly, the cause of those harms. Despite this knowledge, industry and governments have continued to exploit and encourage the development of fossil fuels and have engaged in decades-long campaigns of misinformation about the effects of developing and burning fossil fuels.[22]

Zenith's activities are particularly egregious. Zenith purchased its Portland terminal in December 2017. Before that, in 2017, crude exports from Oregon were valued at $2,523.[23] In 2018, the value of crude exports from Oregon was $71 million.[24] Zenith is responsible for nearly all oil exports from Oregon, due to its new terminal.[25]

[21] *See, e.g.*, Kathy Mulvey and Seth Shulman, *The Climate Deception Dossiers: Internal Fossil Fuel Industry Memos Reveal Decades of Corporate Disinformation*, Union of Concerned Scientists, July 2015. https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf (accessed November 29, 2019)

[22] Cook, J., Supran, G., Lewandowsky, S., Oreskes, N., & Maibach, E., (2019). America Misled: How the fossil fuel industry deliberately misled Americans about climate change. Fairfax, VA: George Mason University Center for Climate Change Communication. https://www.climatechangecommunication.org/america-misled/

[23] Gordon R. Friedman, "Crude oil trains increasingly travel through Portland, alarming regulators." The Oregonian. https://www.oregonlive.com/news/g66l-2019/04/877e9ecf591571/crude-oil-trains-increasingly-travel-through-portland-alarming-regulators.html

[24] *Id*.

[25] *Id*.

Defendants have devoted their lives to seeking legal remedies for environmental problems including, most importantly, global warming. Despite the efforts of defendants and millions of others to lobby, persuade, and beg policymakers to deal with global warming, the rate of greenhouse gas emissions has continued to rise and policymakers have either taken no action or merely symbolic action (or, contrary to all available evidence, simply denied any problem exists). Meanwhile, the fossil fuel industry, undeterred by social and ecological collapse, continues to obfuscate the harm caused by its products, and to lie about future threats -- profiting all the while.

Given the failures of government and industry to adequately address the imminent harms of global warming, defendants' knowledge of such failures, and defendants' exhaustive, yet failed, attempts through the sanctioned channels of change to address the harm, defendants had no reasonable alternative but to engage in their non-violent action on April 28, 2019.

Defendants exhausted all legal, presumably reasonable, alternatives to address the harms of global warming. To demonstrate that no reasonable alternatives were available to defendants, defendants will testify as to the ineffectiveness of their previous efforts to address the harms of global warming, as discussed below. Defendants will also testify about their awareness of the failures of other alternatives in the political, legal, and economic realms and how such failures informed their reasonable belief that no reasonable alternative was available besides non-violent protest action. Defendants will also testify to their awareness of and encounters with systemic obstacles inherent to the current legal, political, and economic systems that prevent legal and effective action on global warming. Defendants may also call experts (as noted below) to testify regarding these systemic obstacles and the historical success in the U.S. of nonviolent action. Defendants may call experts to discuss how environmental litigation and access to judicial review has been intentionally obstructed by the federal government in recent years and in

addition, the timeframes of such litigious efforts and potential remedies do not comport with the exigency of the climate emergency.

As noted *supra* at 19-20, a reasonable alternative is one that is effective. A legal alternative, if effective, is presumptively reasonable. However, if there is *any* evidence from which a jury could infer that such legal alternatives are ineffective, the reasonableness of ostensibly illegal ("evil") action must be assessed. If the legal alternatives available to defendants to address the harms of global warming are ineffective, such alternatives are not reasonable. Likewise, if defendants can present any evidence as to their objectively reasonable belief in the lack of alternatives because of a reasonable belief in the ineffectiveness of legal alternatives, they satisfy this element of the defense.

Defendants will show that available legal alternatives are ineffective and, therefore, not reasonable, and that extra-legal non-violent action has been effective and therefore reasonable.

As part of their offer of proof, defendants will testify that they have engaged in the following alternatives to address the imminent harms of global warming:

Ken Ward:

Since attending the first Earth Day celebration in 1970, Mr. Ward has focused on energy and climate, with the following notable efforts:

- Interned for Ecology Action for Rhode Island, with a focus on energy policy (1973-74)
- Wrote and lobbied for state legislation tying automobile efficiency to motor vehicle registration fees (1976-77)
- As Chairman of the Board for the Massachusetts Public Interest Research Group, authorized and funded a program to intervene in Massachusetts utility rate setting (1977-79)
- Oversaw a field campaign in New Hampshire, Illinois and California pushing Presidential candidates in both major parties to endorse renewable energy and energy conservation, winning a plank in the Democratic Party platform (1979-80). This resulted in the Safe Energy Campaign of 1979.

- As Executive Director of the Rhode Island Public Interest Research Group, lobbied for resource and energy conservation legislation, including building efficiency standards (1981-82)

- As Executive Director of the New Jersey Public Interest Research Group, directed multiple energy conservation, anti-fossil fuel, and pro-renewables programs, including the first state-level climate change educational project in the United States (1983-1997)

- As Co-Founder, Board Member, and Chair of the National Energy Policy Committee, coordinated state climate programs under grants from Pew and Energy Foundations

- As Deputy Executive Director of Greenpeace USA, helped release the seminal "Carbon Logic" report (1997-1999)

- As Co-Founder of the Jamaica Plain Green House, renovated and lived in an abandoned neighborhood store, aiming for a passivhaus standard, in a low income, low carbon impact demonstration project (2006-2009)

- As Executive Director of Aperion Institute for Sustainable Living, trained public school teachers on the climate SMART curriculum and ran a building weatherization program and a demonstration low carbon impact center (2007-2009)

- Helped launch 350.org, a major climate advocacy organization (2009-onward)

- Testified as the only prominent environmentalist in opposition to the Obama Clean Power Plan, on the basis that it is insufficient (2013)

- Lobbied the Federal Executive branch to urge for action on climate change. Decl. Brinson ¶ 18, Def. Exhibit 117 (October 10, 2016 Letter)

Margaret Butler:

Ms. Butler will testify that, since becoming involved with Jobs with Justice (JwJ) in 1991, she has observed the link between economic and environmental justice and has sought to address the social harms caused by environmental injustice, including those harms caused by global warming. She was JwJ's Executive Director from 1996 through 2013. During that time, she:

- Attended marches to protest government and corporate inaction on global warming

- Wrote letters to local, state, and federal representatives urging them to take action on global warming; and
- Engaged the labor community through several public education events about the impact of global warming on the working class

After Ms. Butler retired from her positions within the labor movement in 2017, she focused her efforts on combating the climate crisis. These efforts included:

- Joining the Climate Jobs Committee (2018)
- Attending climate marches and protests
- Supporting and collecting signatures for the passage of the Portland Clean Energy Initiative
- Voting for candidates that appeared to have some fidelity to the environment; and
- Continued in her educational outreach.

Ms. Butler will testify that she learned from a February 2019 article in The Oregonian about Zenith's activities and proposed expansion. Ms. Butler will testify that she was confused and upset over Zenith's activities. She will testify about her knowledge and understanding of Portland's Climate Action Plan and the apparent contradiction between Zenith's activities and that Plan. She will testify that she attended a protest on March 13, 2019 at Portland City Hall. At this protest, Ms. Butler will testify that she heard Councilor Chloe Eudlay speak. She will testify that her understanding, based in part on the messages of Councilor Eudlay, was that the City was largely impotent to prevent Zenith's activities. Ms. Butler will testify that she later attended a public forum regarding Zenith. Ms. Butler will testify that after attending the forum, which included remarks from City officials, she understood that, while City officials opposed Zenith's activities, there was nothing legal that the City could do to prevent those harmful activities. Ms. Butler will testify that she joined XR because the urgency heralded by climate science was incongruous with the inaction

of the government and industry and she believed that the tradition of non-violent resistance offered the only alternative to such inaction.

Michael Horner

Mr. Horner will testify that he has spent his life dedicated to the service of others — first in the military, then in various movements for world peace, then building prosthetic devices for children while simultaneously rebuilding and recycling such devices for children in warzones and refugee camps, and finally in various environmental causes. Mr. Horner will testify that over the last seven years he has focused exclusively on attempting to halt the harms of the climate crisis. He will testify that his reasoning for focusing on climate change is simple: without a stable climate, there is nothing else. He will testify to his knowledge, awareness, and understanding of the climate crisis, including the harms currently occurring as well as imminent harms. He will testify that he taken countless legal actions to address the climate crisis, including:

- Lobbying and letter-writing to policy makers;
- Volunteering with the No Coal Export Speakers Bureau with the Sierra Club;
- Protesting the movement of equipment through Portland that was destined to facilitate the export of Canadian Tar Sands oil (2013);
- Protesting the proposed Liquified Natural Gas terminal in Coos Bay (ongoing);
- Supported the medical volunteers at the protest against the Dakota Access Pipeline in North Dakota;
- Engaged in art and theater performances to raise awareness of the climate crisis; and
- Voting for candidates who claimed or promised to meaningfully address the climate crisis.

Jan Zuckerman

Ms. Zuckerman will testify that she has been involved in environmental advocacy for over 20 years. She will testify regarding her countless efforts to stop global warming, including the following:

- In 1995, she co-founded the Environmental Middle School (now the "Sunnyside Environmental School). This school is a focus option public school with an emphasis on environmental education and civics.

- Served as a mentor for the Sunnyside Environmental School 8th grade climate change cohort for the last 5 years. In this role, she and her students testified at the Portland City council regarding a proposed propane terminal, the Fossil Fuel and Oil Train Resolutions, and the 100% Clean Energy Resolution. She and her students also attended several hearings in Oregon and Washington regarding global warming, participated in rallies and marches, and visited the Oregon State Capitol to lobby for clean air, clean energy, against fracked gas projects, and other environmental issues.

- Assisted in the making of a prominent informational film regarding the proposed Liquified Natural Gas terminal in Coos Bay, OR: "LNG: Just Another Dirty Fossil Fuel."

- Designed and implemented "Energy Teach-Ins" at Sunnyside that focused on the science of energy, energy resources, and climate change.

- Serving as a mentor with HELP (High School Environmental Project) in the Portland Public School system.

- Serving as a mentor with the Portland Youth Climate Council. The Council was formed with the City of Portland's 100% Renewable Energy Resolution to advise the City on climate issues.

- Member of the Portland Public Schools Climate Justice Committee. In this capacity, she helped write the Climate Justice Resolution. The resolution was unanimously adopted by PPS school board in the Spring of 2016. She served on the committee as it implemented resolution 5272 from 2016 through the present.

After serving as a public school teach for 30 years, Ms. Zuckerman became involved in several additional forms of public advocacy including:

- Participating in the Climate Action Coalition, Stop Fracked Gas PDX, Stop Zenith Collaborative, 350pdx, Sierra Club, and Extinction Rebellion

- Organized and participated in several conferences and workshops that served to educate the public on climate change;

- Joined an acting troupe that performed at schools, churches, and other public places to raise awareness over the impacts of fracked gas projects in the U.S. northwest
- Regularly attended hearings and forums regarding Zenith's operations in Portland; and
- Organized community meetings regarding Zenith's operations in Portland

Ms. Zuckerman will testify that, after exhaustive attempts to get the City of Portland to take legal action to porrect the health and safety of Portland residents, she decided to participate in civil disobedience on April 28, 2019.

Emily Carl

Ms. Carl will testify that she became aware of the facts of global warming in June of 2018, including the imminent harms posed by global warming the Oregon and the planet. She will testify that she learned of past efforts to thwart the primary cause of global warming, i.e., the production and burning of fossil fuels, the failure of those efforts, and the legal, political, and economic barriers to the success of those efforts. She will testify that, despite these failures, the undertook the following efforts to address the emergency of global warming and environmental destruction:

- Planted over 4,000 trees with Friends of Trees and Put Down Roots in Tualatin
- Planned, executed, and hosted multiple educational community forums through Portland State University's Environmental Club (December 2018-present)
- Telephoned thousands of people for Environment Oregon, a citizen-based environmental advocacy organization, and explained current climate research (February 2019)
- Worked as a sustainability coordinator for Chartwells working towards eliminating plastics (March 2019-present)
- Carpooled to Salem to talk with her local and state government representatives about choosing sustainable practices (March 2019)
- Called local and state government representatives to advocate for sustainable practices; and

- Attended several protests and demonstrations calling for an end to the production and burning of fossil fuels.

Despite the previous exhaustive efforts of defendants, fossil fuel extraction, greenhouse gas emissions, and inadequate government and industry responses continue. The very fact that Zenith continues to facilitate the development and production of tar sands oil and is attempting to expand operations in Portland despite elected officials resolving to ban such expansion is evidence of the failure of the state and industry to adequately address the harms of global warming.

But the localized inadequacies of Zenith, Portland, or the State of Oregon are almost unremarkable in light of the national failures. In June 2019, one of the more ambitious (albeit, deemed inadequate by a majority of climate scientists) U.S. policies to curb anthropogenic climate change, the Clean Power Plan, was repealed by the Environmental Protection Agency. The repeal of the Clean Power Plan followed closely on the announcement and subsequent measures of the Trump Administration to withdraw from the Paris Agreement, the most ambitious measure to date to curb global warming (although even if policies stemming from the Paris Agreement were implemented by signatory countries, planetary temperatures would still rise by an average of 3.0 °C by 2100.[26]).

Defendants are well aware of and will testify regarding their understanding of the failure of governments to act and the outright hostility expressed by some policy-makers to any measures

[26] Rogelj, Joeri; den Elzen, Michel; Höhne, Niklas; Fransen, Taryn; Fekete, Hanna; Winkler, Harald; Schaeffer, Roberto; Sha, Fu; Riahi, Keywan; Meinshausen, Malte (30 June 2016) *"Paris Agreement climate proposals need a boost to keep warming well below 2 °C." Nature.* 534 (7609): 631–639; Victor, David G.; Akimoto, Keigo; Kaya, Yoichi; Yamaguchi, Mitsutsune; Cullenward, Danny; Hepburn, Cameron (3 August 2017). *"Prove Paris was more than paper promises". Nature.* 548 (7665): 25–27. See also, Mark Dwortzan (22 April 2016) *"How much of a difference will the Paris Agreement make?". MIT News,* April 22, 2016. Archived from the original on November 21, 2017.

to prevent climate catastrophe. Understanding that formally legal measures have utterly failed to prompt policymakers to take reasonable measures to address the imminent threats posed by global warming, defendants took the next, most reasonable, alternative: non-violent direct action. The unwillingness and inability of governments to protect ecological and social systems from global warming, as well as the legal and economic compulsion of the fossil fuel industry to continue its disastrous course, render the legal means available to defendants as historically *unreasonable*. Defendants, with the historical context of other seemingly intractable issues such as those addressed by the Civil Rights movement and the movements for women's suffrage, took such non-violent direct action knowing that such action has proved successful in the past.

The defense may call the following experts to testify regarding the lack of available alternatives to defendants and the effectiveness of civil disobedience:

- Dr. Tom H. Hastings (Portland State University) (Decl. Brinson ¶ 13, Def. Exhibit 112, CV of Dr. Tom H. Hastings)

  Dr. Hastings is a professor at Portland State University where he teaches several classes related to conflict resolution, including classes on "peace studies," "participating in democracy," and "intro to nonviolence." Dr. Hastings will testify to the effectiveness of civil disobedience and the lack of available alternatives to defendants, including the systemic political, legal, and economic obstacles that render current legal options ineffective and unreasonable as means to address global warming.

- Nick Caleb (Center for Sustainable Economy) (Decl. Brinson ¶ 14, Def. Exhibit 113, CV of Nick Caleb)

  Mr. Caleb is a staff attorney at the Center for Sustainable Economy and a former Environmental Policy Analyst for the City of Portland. He will testify regarding the lack of legal and reasonable alternatives available to defendants.

- Elizabeth Brown (CV of Elizabeth Brown is forthcoming)

Elizabeth Brown was the associate director of Our Children's Trust (OCT). OCT represents plaintiffs in *Juliana et. al. v. United States*. Brown will testify regarding the role of the U.S. government in promoting fossil fuels and the failure of administrative petitions and civil litigation to address climate change.

B. Global Warming is a Current Harm and Imminently Threatens Future Harm to Ecological and Social Systems of Oregon, the U.S., and the World

As documented by scientific consensus endorsed by the vast majority of world governments, including the United States, the burning of fossil fuels and resulting emissions of greenhouse gases, including carbon dioxide (CO2), cause global warming. Defense experts will testify that these emissions have led and are leading to deleterious effects on human health, the environment, and the economy. Defendants will testify to their understanding of the harms generated by greenhouse gas emissions. *See, e.g.,* Decl. Brinson ¶ 20-22, Def. Exhibits 118 (video of Kenneth Ward), 119 (video of Emily Carl), and 120 (transcript of exhibits 118 and 119). CO2 is a naturally occurring molecule that is a by-product of organic processes. Prior to the development of fossil-fuel burning technologies, the average level of CO2 in the earth's atmosphere was 280 parts per million (ppm).[27] Since the Industrial Revolution, however, this level has risen rapidly as previously buried CO2 has been burned in the form of coal, gas, and oil. The average level of atmospheric CO2 in October 2016 was 401.57 ppm.[28] As of November 3, 2019, the average level of atmospheric CO2 was 409.9 ppm. *Id.*

Higher levels of CO2 interact with water vapor and other greenhouse gases to trap warmth in the earth's atmosphere. In this way, CO2 works as a "thermostat" for the earth, producing higher temperatures as its prevalence increases. *Id.* Recent science demonstrates that climatic "positive

[27] Andrew Lacis, *CO2: The Thermostat that Controls Earth's Temperature*, NASA Goddard Institute for Space Studies (Oct. 10, 2010), http://www.giss.nasa.gov/research/briefs/lacis_01/.
[28] National Oceanic and Atmospheric Administration, *Recent Monthly Average at Mauna Loa CO2*, http://www.esrl.noaa.gov/gmd/ccgg/trends/.

feedback loops" exacerbate the warming effects of CO2: for example, as climate change causes ice to melt, the resulting water traps more heat, magnifying the effects of global warming.[29] Because of such feedback loops and the earth's long retention of released CO2, the warming effects of any given emission last up to a thousand years.[30]

A CO2 concentration of 350 ppm is widely recognized as the maximum that the earth's atmosphere can sustain before feedback loops trigger unprecedented and disastrous warming. *See* Hansen et al., *Target Atmospheric CO2: Where Should Humanity Aim?* 2 Open Atmos. Sci. 217, 217 (2008) ("If humanity wishes to preserve a planet similar to that on which civilization developed and to which life on Earth is adapted, Paleoclimate evidence and ongoing climate change suggest that CO2 will need to be reduced . . . to at most 350 ppm."); Lacis, *supra* 34. At 409.9 ppm, the atmosphere is now well beyond that limit. If CO2 levels remain above 350 ppm at the end of the present century, the result would be "an environment far outside the range that has been experienced by humanity, and there will be no return within any foreseeable generation." Hansen, *Tipping Point,* at 9.

According to the United Nations Intergovernmental Panel on Climate Change (IPCC), an international group of scientists tasked with assessing the science and risks of global warming whose work is endorsed by 195 nations, there is now 40% more CO2 in the atmosphere than in pre-industrial times, primarily due to fossil fuel emissions.[31] Ice core sampling, a method of

[29] James Hansen, *Tipping Point: Perspective of a Climatologist* (2009) *in* Wildlife Conservation Society, *State of the Wild 2008-2009* at 9.
[30] Environmental Protection Agency (EPA), *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act* 17 (December 9 2009) at 16.
[31] IPCC, *Climate Change 2013: The Physical Science Basis: Summary for Policymakers. Contribution of Working Group I to the Fifth Assessment Report of the IPCC* (2013) at 11.

measuring atmospheric makeup over time, shows current CO2 levels "unprecedented in at least the last 800,000 years." *Id.* As a result, global temperatures rose around 0.85°C from 1880 to 2012.[32] 2016 was the hottest year on record through that date (1.2°C above preindustrial levels), breaking the record for 2015, while 16 of the 17 hottest years ever have come in this century.[33] The UN recently suggested that 2010 through the end of 2019 will likely mark the hottest decade on record.[34] In order to reduce CO2 levels to 350 ppm by 2100 and avoid rapidly accelerating warming, global emissions must be reduced by at least 15% annually beginning in 2020.[35] In sum, the level of CO2 in the atmosphere already exceeds the limit beyond which swift and unprecedented warming will occur if serious reductions in further emissions are not introduced.

Dr. Hansen has noted that "continued high [carbon dioxide] emissions from fossil fuel burning will . . . impose profound and mounting risks of ecological, economic and social collapse." Declaration of Dr. James E. Hansen in Support of Plaintiffs' Complaint for Declaratory and Injunctive Relief at 3, *Juliana v. U.S.*, 2016 U.S. Dist. LEXIS 156014 (D. Or., filed Aug. 12, 2015) (Civil Action No. 6:15-cv-1517-TC). Rapid reduction of carbon dioxide emissions, according to Hansen, is "urgently needed to reduce the atmospheric [carbon dioxide] concentration to no more than 350 [parts per million]." *Id.* There remains a "real, but highly time-limited, opportunity to rapidly phase-down [carbon dioxide] emissions, restore energy balance, and stabilize the climate system." *Id.* The opportunity for action is shorter than

[32] *Id.* at 5
[33] Sewell Chan, *2016 Likely to Top 2015 as Hottest Year on Record, Scientists Say*, N.Y. Times (Nov. 14, 2016), http://www.nytimes.com/2016/11/15/science/2016-hottest-year-on-record.html?_r=0.
[34] UN News. "Decade ending in 2019 likely to be hottest on record." December 3, 2019; https://news.un.org/en/story/2019/12/1052661
[35] Hansen et al., *The Scientific Case for Avoiding Dangerous Climate Change to Protect Young People and Nature* (Mar. 23, 2012), http://arxiv.org/pdf/1110.1365.

previously known: recent research by Dr. Hansen indicates that the rapid melting of the Antarctic and Greenland ice sheets is exacerbating climate change at a faster pace than anticipated, suggesting that warming of even 2°C — which current emissions trends would easily surpass — could lead to multi-meter seal level rise. Hansen et al., *Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2 ℃ global warming could be dangerous*, Atmos. Chem. Phys. 16, 3761-3812 at 3800 (2008).

With CO2 emissions already above safe levels, global warming has affected and continues to negatively impact the health of the natural environment, human health, and the economy. As the United States Supreme Court noted in *Massachusetts v. E.P.A.*, 549 U.S. 497, 499 (2007):

> "The harms associated with climate change are serious and well recognized. The Government's own objective assessment of the relevant science and a strong consensus among qualified experts indicate that global warming threatens, *inter alia*, a precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences, and an increase in the spread of disease and the ferocity of weather events."

The EPA has called the case for the connection between global warming and such injuries "overwhelming," noting that "climatic changes are already occurring that harm our health and welfare." E.P.A., Proposed Endangerment Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886, 18904 (April 24, 2009).

The most serious harms to ecological and social systems from global warming arise from sea level rise as a result of melting ice. The global sea level has risen eight inches since 1880.[36] The 2016 collapse of a large swathe of the West Antarctica ice sheet is directly linked to global

[36] Union of Concerned Scientists, *Global Warming Science and Impacts: Sea Level Rise and Global Warming* (April 30, 2014), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/infographic-sea-level-rise-global-warming.html.

warming and could cause further sea level rise at a more rapid pace than originally predicted — a meter by 2100 and 15 meters by 2500 without emissions reductions.[37]

In North America, global warming has caused higher temperatures and more frequent bouts of extreme hot weather.[38] This has resulted in increased drought, more frequent wildfires, and a rise in forest infestations. *Id.* In the Northern Hemisphere, spring now arrives 10 days earlier than it did 50 years ago, leading to earlier snowpack melt, drier forests, and more frequent fires.[39] The United States has experienced increases in heavy precipitation and severe storms, including more frequent hurricanes and floods.[40] This has caused vulnerabilities in agricultural production, water supplies, and human health. *Id.* In the western United States, temperatures have risen on average 1.9°F since 1970, lengthening the wildfire season from five months to over seven months and causing over a 75% increase in annual fires bigger than 1,000 acres.[41] Such effects cause disruption of ecosystems, biological resources useful for humans, and agriculture.[42] Many of the physical changes to ecosystems caused by climate change, including the extinction of plant and

[37] Robert M. DeConto & David Pollard, *Contribution of Antarctica to past and future sea-level rise*, Nature 531, 591-597 at 591 (March 31, 2016), http://www.nature.com/nature/journal/v531/n7596/full/nature17145.html.
[38] Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Impacts, Adaptation, and Vulnerability: Chapter 26: North America. Contribution of Working Group II to the Fifth Assessment Report of the IPCC* (2014) at 46.
[39] Union of Concerned Scientists, *Global Warming Science and Impacts: Early Spring's Domino Effect* (May 12, 2010), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/springs- domino-effect.html.
[40] IPCC, *Climate Change 2014* at 46.
[41] Union of Concerned Scientists, *Global Warming Science and Impacts: Western Wildfire and Impacts* (July 23, 2013), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/.
[42] IPCC, *Climate Change 2014: Synthesis Report* 13-16 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf.

animal species, the melting of the polar ice caps, ocean acidification, sea level rise, and changing climate zones, are irreversible on a human timescale. *Id.* at 16.

The effects of global warming on Oregon are particularly serious. The Oregon Climate Change Research Institute's "Fourth Oregon Climate Assessment Report: State of climate science: 2019," (legislatively mandated by HB 3543) (OCAR 4) outlines several of the imminent threats to Oregon if global greenhouse emissions continue as projected.[43] The report consists of an analysis of peer-reviewed scientific studies issued in 2017 and 2018.

It notes that harms resulting from global warming are already occurring and that the extreme weather events of 2015 may "provide an enlightening glimpse into what may be more commonplace under a warmer future climate. Record-low snowpack led to water scarcity and large wildfires that negatively affected farmers, hydropower, drinking water, air quality, salmon, and recreation. Warmer than normal ocean temperatures led to shifts in the marine ecosystem, challenges for salmon, and a large harmful algal bloom that adversely affected the region's fisheries and shellfish harvests." OCAR4 1039.

The Pacific Northwest has warmed approximately 2°F since 1900. OCAR4 1041. Based on all future projections and scenarios, the region is expected to continue warming. *Id*. The rate of this warming depends on the rate of current and future greenhouse gas emissions. *Id*. The OCAR4 notes a cascading effect of harms to virtually every natural system and, consequently, every industry that depends on those systems as a result of the increasing temperatures. For

[43] "This report represents a convergence of evidence of the risks that Oregon is facing, and will face in a changing climate, drawing from the past three Oregon Climate Assessment Reports, the 4th US National Climate Assessment, and other peer-reviewed literature, and other analyses performed by the Oregon Climate Change Research Institute (OCCRI) and research partners." Mote, P.W., J. Abatzoglou, K.D. Dello, K. Hegewisch, and D.E. Rupp, 2019: Fourth Oregon Climate Assessment Report. Oregon Climate Change Research Institute. occri.net/ocar4

instance, "negative impacts on Northwest fisheries associated with ocean warming, acidification, and harmful algal blooms are expected to increase. This could lead to extensive fisheries closures across all of the region's coastal fisheries with severe economic and cultural effects on commercial and substance shellfish industries." OCAR4 at 1045. The report also finds that there are particularly high risks of harm to indigenous communities, farmworkers, and low-income populations in the northwest due to global warming.

The defense may call the following experts to testify regarding the imminent threat to ecological and social systems posed by global warming, including the causes of global warming, Canadian tar sands, and the impact of entities such as Zenith on global warming.

- Dr. Deke Gundersen (Pacific University). Decl. Brinson ¶ 15, Def. Exhibit 114 (CV of Dr. Deke Gundersen)

  Dr. Gundersen is the Department Chair of the Environmental Studies department at Pacific University. He is an expert in the assessment of threats to endangered and threatened fish in large river systems and environmental science and the science of global warming. He will testify that global warming poses an imminent threat to ecological and social systems, including threats specific to Oregon.

C. It was Reasonable for Defendants to Believe that the Threatened and Imminent Injuries Posed by Global Warming and the Business-as-Usual Approach of Fossil Fuel Companies such as Zenith Energy Was and is Greater than the Potential Injury of the Defendants' Actions

As noted above, and as defendants will testify, the imminent harms attributable to global warming threaten to upend the entirety of global ecological and, necessarily, social systems. The harm of trespass, on the other hand, is a mere transient "harm" to objects and property that are at the heart of causing the imminent harms defendants seek to prevent.

When weighed against the "harm" of trespass, the greater harm is the destruction of the planet, including localized effects to Oregon. Under any existing philosophical or jurisprudential

approach to assessing injury and harm, the harm of trespass is less than the harm of social and ecological collapse. Because the harms of global warming outweigh in severity, scope, and duration to any harm caused by the temporary trespass of defendants, defendants correctly chose the "lesser evil" of trespass in an attempt to stop or curb the imminent harms of global warming by targeting Zenith, a key link in the distribution, movement, and, ultimately, burning of fossil fuels (and, particularly, tar sands oil).

V. CONCLUSION

No issue poses a greater threat to the health and survival of the planet and its people than global warming. Alfred Goodwin, former Chief Judge for the Ninth Circuit, has noted that "[t]he current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits." Alfred T. Goodwin, *A Wake-Up Call for Judges,* 2015 Wis. L. Rev. 785, 785-86, 788 (2015). Courts should exercise their duty to protect the rights and interests implicated by the climate crisis by, at the very least, permitting defendants that attempt to preserve such rights and interest to present a complete defense to an impartial jury.

The role of the judiciary in preserving the right to a complete defense is implicated most strongly in cases such as the one at hand, where defendants avail themselves of the legal system in order to justify actions taken on behalf of the public good. Defendants, all of whom are dedicated defenders of the climate and their communities, chose a reasonable course of action in the face of the climate crisis and the harms this crisis pose.

For the above reasons, defendants urge this court to uphold defendants' right to a complete defense and to present evidence of the choice-of-evils defense to a jury of their peers.

This matter is set for a trial readiness hearing on February 20, 2020, and trial on February 24, 2020 through February 28, 2020.

Respectfully submitted this 15th day of January 2020.

Civil Liberties Defense Center

/s/ Cooper Brinson
Cooper Brinson, OSB #153166

Certificate of Service

I hereby certify that I served the within NOTICE, OFFER OF PROOF, AND MEMORANDUM IN SUPPORT OF CHOICE OF EVILS DEFNSE and Defense Exhibits 101-117, and Exhibit 120 on the 15th of January 2019, by electronically transmitting a certified true copy thereof, certified by me as such, addressed to:

Leslie Wu: Leslie.WU@mcda.us
Deputy District Attorney, Deputy District Attorney

Defense Exhibits (video) 118 and 119 sent to the court via U.S. mail and sent via U.S. mail to:

Multnomah District Attorney's Office
Attn. Leslie Wu
1021 SW Fourth Ave., Room 600
Portland, OR 97204

By:
/s/ Cooper Brinson
Cooper Brinson
Attorney at Law, OSB #153166