

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

SPACE AGE FUEL, INC., and Oregon corporation; A & M TRANSPORT, LLC, an Oregon limited liability company; OTLEY LAND AND CATTLE, LLC, an Oregon limited liability company; OREGON BUSINESS & INDUSTRY, an Oregon nonprofit corporation; OREGON MANUFACTURERS AND COMMERCE, an Oregon nonprofit corporation; OREGON FOREST & INDUSTRIES COUNCIL, and Oregon nonprofit corporation; OREGON FARM BUREAU FEDERATION, an Oregon nonprofit corporation; and OREGON TRUCKING ASSOCIATION, an Oregon nonprofit corporation,

Plaintiffs,

v.

KATE BROWN, in her official capacity as Governor of Oregon,

Defendant.

Case No. 20CV 26872

DEFENDANT'S MOTION TO DISMISS,  
ALTERNATIVE CROSS-MOTION FOR  
SUMMARY JUDGMENT, AND RESPONSE TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT

ORAL ARGUMENT REQUESTED

ORS 20.140 - State fees deferred at filing

MOTIONS

First, pursuant to ORCP 21 A (1) and, alternatively, ORCP 21 A (8), Defendant Governor Brown moves to dismiss this action on the ground that this Court lacks jurisdiction, or that plaintiffs fail to state a claim, because plaintiffs lack standing. Second, in the event the first motion is denied, pursuant to ORCP 47, Defendant Governor Brown moves for the entry of summary judgment in her favor and, specifically, dismissal of the complaint or, alternatively, a

DEFENDANT'S MOTION TO DISMISS, ALTERNATIVE CROSS-MOTION FOR  
SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

1 declaration that the Governor acted within her authority when she issued Executive Order 20-04.  
2 Defendant requests oral argument on these motions and estimates that 60 minutes will be  
3 required for the argument. This motion is supported by the following memorandum of law and  
4 the Declaration of Stephanie Caldera ("Caldera Dec.").

5 MEMORANDUM OF LAW

6 I. Summary of Argument

7 The relief plaintiffs seek in this case is extraordinary: they ask this Court to declare that  
8 the duly elected Governor of this State does not have the authority to provide policy direction to  
9 agencies, within the scope of their existing statutory authorities. And they ask this Court to do so  
10 before the agencies receiving that direction have acted, before there has been any cognizable  
11 impact on plaintiffs' rights, and while the contours of what that agency action will actually look  
12 like are still speculative. The Court should reject this extraordinary request, for several reasons:

13 First, Plaintiffs' Complaint should be dismissed because plaintiffs lack standing to  
14 challenge Executive Order 20-04. They cannot prove any of the three elements of standing: (1)  
15 injury to a legally cognizable interest; (2) that is real or probable, not speculative or hypothetical;  
16 and (3) that can be redressed by a declaration. Plaintiffs identify no legally cognizable interest  
17 that is injured by the Executive Order because none exists. The Executive Order is not enacted  
18 law that changes or adds to statutory authority as granted by the legislature. Rather, it is a  
19 statement of policy directing agencies to exercise their existing statutory authority in particular  
20 ways. Unless and until those agencies act, no legally cognizable interest of plaintiffs' will be  
21 affected, and any alleged injury— whatever they might claim it to be— will be hypothetical or  
22 speculative and not ripe. Further, no declaration issued by this Court will limit the authority of  
23 executive agencies to implement the policy direction set by the Governor to the fullest extent of  
24 their existing statutory authority. A declaration would have no practical impact.

1 Second, the Court has, and should exercise, discretion not to enter a declaratory  
2 judgment. See O.R.S. 28.060; *League of Oregon Cities v. State*, 334 Or 645, 652 (2002). A  
3 declaratory judgment would not resolve the issue of agency authority to reduce greenhouse gas  
4 emissions, and, in any event, a better means to test agency authority exists under the Oregon  
5 Administrative Procedures Act ("APA"), following agency adoption of rules.

6 Finally, even if the Court were to address the merits of plaintiffs' motion, plaintiffs'  
7 arguments fail. The Governor plainly has the authority to provide policy direction to the  
8 executive agencies of this state, within their statutory authorities, which is what she has done  
9 here. And the legislature granted broad authority to reduce and cap greenhouse gas emissions  
10 from stationary sources and in low carbon fuel standards. For these reasons, plaintiffs' motion  
11 should be denied and defendants' motion should be granted.

## 12 II. Background

13 On March 10, 2020, Governor Brown issued Executive Order 20-04, entitled "Directing  
14 State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions."<sup>1</sup> In that  
15 Order, the Governor "establishes science-based" greenhouse gas emission goals and "calls for  
16 the State of Oregon to reduce" its greenhouse gas emissions by a specified amount by certain  
17 dates. Executive Order 20-04, ¶ 2. To achieve those goals, the Governor directs 16 state  
18 agencies and commissions to take a variety of actions. Specifically, the Governor directs  
19 agencies to "exercise any and all authority and discretion vested in them by law" to reduce  
20 greenhouse gas emissions and "[t]o the full extent allowed by law, . . . consider and integrate  
21 climate change, climate change impacts, and the state's [greenhouse gas] emissions reductions  
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24 <sup>1</sup>Executive Order 20-04 is available at:  
25 [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-04.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf). A hard copy is also  
attached as Exhibit 1 to the Declaration of Joel Mullin, filed with plaintiffs' motion for summary  
judgment.

goals into their planning, budgets, investments, and policy making decisions.” Executive Order 20-04, ¶¶ 3 A -C .

Plaintiffs here challenge the goals identified in Executive Order 20-04, the general direction to the agencies to exercise their policy making discretion as described above, and two specific directives to the Department of Environmental Quality (“DEQ”) and the Environmental Quality Commission (“EQC”). The order directs DEQ and EQC to amend low carbon fuel standards and to cap and reduce greenhouse gases from certain sources. Those directions, though, are subject to a qualifier. The agencies are directed to “take actions necessary” to reduce emissions and adopt standards “[p]ursuant to [their] authority under [ORS 468A .265 et seq and ORS 468A .005 et seq.] and other applicable laws.” Executive Order 20-04, ¶¶ 4 A ,C .

Since the Governor issued Executive Order 20-04, DEQ has undertaken study of possible changes it could propose to existing programs and programs it could adopt in order to reduce and cap greenhouse gases under its existing authority. It has issued two reports to the Governor as requested under the Executive Order and engaged with the public through public meetings about possible program options.<sup>2</sup> Neither DEQ nor EQC has changed any program, and neither has adopted a new program since the Governor issued Executive Order 20-04. More specifically, neither agency has proposed or adopted new or amended regulations in furtherance of the Executive Order’s objectives since it was issued. See Caldera Dec. ¶¶ 2, 3.

Executive Order 20-04 is not the first executive order Governor Brown has issued addressing climate change. In 2017, Governor Brown issued Executive Orders 17-20 and 17-

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<sup>2</sup> The two DEQ reports are available at <https://www.oregon.gov/deg/Files/Docs/CapandReducereport.pdf> (Preliminary Report) and <https://www.oregon.gov/deg/Files/Documents/ghgCapRedf.pdf> (Final Report). Both reports are attached to the Declaration of Joel Mullin as Exhibits 7 and 8 respectively. A description of public meetings held by DEQ is available at <https://www.oregon.gov/deg/ghg/Pages/ghg-cap-and-reduce.aspx>. These reports and information are proper subjects of judicial notice under Oregon Evidence Code 202 (2), (4).

21.<sup>3</sup> Both Executive Orders 17-20 and 17-21 established policy goals and provided policy direction to state agencies to reduce greenhouse gas emissions and, thereby, the effects of climate change. Executive Order 17-20, among other things, directed state agencies to adopt building codes to require energy efficient construction and remodels. Executive Order 17-20, §§ 3 A ; 4 A -D . Executive Order 17-21 directed state agencies to support electrical vehicle adoption through, among other things, conducting specified rulemaking and amending building codes. Executive Order 17-21, §§ 4 A , B ; 5 D .

Plaintiffs are businesses and trade associations who seek a declaratory judgment stating that the Governor exceeded her constitutional authority by issuing Executive Order 20-04 . They filed this action on July 31, 2020 . On September 4, they filed a motion for summary judgment.

III. Governor Brown's motion to dismiss should be granted.

A . Legal standards for motions to dismiss for lack of jurisdiction

A motion to dismiss for lack of subject matter jurisdiction may be made at any time, and if "it appears . . . that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." ORCP 21 G (4). "Circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction." *Greeninger v. Cromwell*, 127 Or App 435, 438 (1994). When evaluating a motion to dismiss for lack of subject matter jurisdiction, the court may consider "the facts alleged in the complaint along with 'matters outside the pleading, including affidavits, declarations and other evidence[.]'" *Munson v. Valley Energy Inv. Fund*, 264 Or App 679, 694 (2014) (citing ORCP 21 A ). Standing to proceed under

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<sup>3</sup> Executive Order 17-20, entitled Accelerating Efficiency in Oregon's Built Environment to Reduce Greenhouse Gas Emissions and Address Climate Change is available at [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_17-20.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_17-20.pdf). Executive Order 17-21, entitled Accelerating Zero Emission Vehicle Adoption in Oregon to Reduce Greenhouse Gas Emissions and Address Climate Change is available at [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_17-21.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_17-21.pdf). Both orders are proper subjects of judicial notice under Oregon Evidence Code 202 (2).

1 the Oregon Declaratory Judgments Act is a jurisdictional requirement. *Beck v. City of Portland*,  
2 202 Or App 360, 365 (2005).

3 B. Legal standards plaintiffs must meet to establish standing.

4 "A party who seeks judicial review of a governmental action must establish that that  
5 party has standing to invoke judicial review." *Kellas v. Dept of Corr.*, 341 Or 471, 477 (2006).  
6 The requirements for standing are determined by looking to "the statute that confers standing in  
7 the particular proceeding that the party has initiated." *Id.* Here, plaintiffs seek a declaratory  
8 judgment under the Oregon Declaratory Judgments Act. Under that statute, a person must first  
9 show that he or she is a person whose rights, status or other legal relations are sufficiently  
10 affected by the challenged governmental action:

11 Any person . . . whose rights, status or other legal relations are  
12 affected by a constitution, statute, municipal charter, ordinance,  
13 contract or franchise may have determined any question of  
14 construction or validity arising under any such instrument,  
15 constitution, statute, municipal charter, ordinance, contract or  
franchise and obtain a declaration of rights, status or other legal  
relations thereunder.

16 ORS 28.020. The test for whether this requirement is met involves "three related but separate  
17 considerations." *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or 189, 195 (2013). First, "the plaintiff  
18 must establish that the challenged law causes 'some injury to or impact upon a legally  
19 recognized interest of the plaintiff's, beyond an abstract interest in the correct application or the  
20 validity of [the] law.'" *MT&M Gaming, Inc. v. City of Portland*, 360 Or 544, 554 (2016)  
21 (quoting *Morgan*, 353 Or at 195). Second, "a plaintiff must show that the claimed injury or  
22 impact is real or probable, not hypothetical or speculative." *Id.* at 555. Third, "the plaintiff must  
23 show that a decision by the court will in some sense rectify the injury, i.e., that it will have 'a  
24 practical effect on the rights that the plaintiff is seeking to vindicate.'" *Id.* Here, no plaintiff has

adequately alleged any of the three standing requirements necessary to invoke this Court's jurisdiction.

C. The Court lacks jurisdiction because plaintiffs lack standing.

1. Plaintiffs have no legally recognized interest affected by the Executive Order.

The first element of standing under the Declaratory Judgment Act requires plaintiffs to identify an injury to an interest that is "legally recognized," which must go beyond "an abstract interest in the correct application or the validity of a law." *Morgan*, 353 Or at 195 (quoting *League of Oregon Cities*, 334 Or at 658). For example, standing to challenge a statute depends on demonstrating the plaintiff has a legally recognized interest that is affected by the challenged statute. See *Morgan*, 353 Or at 195 ("The standing requirements of ORS 28.020 require that the challenged law must affect that party's rights, status, or legal relations.") (emphasis in original). The requisite "legal recognition can come from many sources— statutes, constitutional provisions, regulations, local ordinances, and the historical and evolving common law." *MT & M Gaming, Inc.*, 360 Or at 562. Further, a plaintiff seeking a declaratory judgment "must show how plaintiff's 'rights, status, or other legal relations are affected' by an instrument or enactment." *Gruber v. Lincoln Hosp. Dist.*, 285 Or 3, 7-8 (1979) (emphasis added). Plaintiffs here have failed to allege or prove they have experienced an injury to any legally recognized interest caused by Executive Order 20-04.

Plaintiffs are businesses and trade organizations that have alleged only that their "rights, status, or legal relations are directly affected by EO 20-04's regulation of [greenhouse gases] and the state's low carbon fuel standards." Complaint, ¶ 13. This bare conclusion fails to identify what legally recognized interests are affected or how they are affected.

Certainly plaintiffs have not alleged or submitted evidence that their legal obligations under Oregon law have changed as a result of the Executive Order. Their legal obligations have plainly not changed. Rather, the Executive Order directs state agencies to exercise their policy-

making authority in various ways but neither establishes legal obligations nor alters Oregon laws. See Executive Order 20-04, ¶ 3 A (“Agencies shall exercise any and all authority and discretion vested in them by law to . . .”); ¶ 3 C (“To the full extent allowed by law, agencies shall . . .”); ¶ 4 A (“Pursuant to its authority under ORS 468A.265 et seq. and other applicable laws, the EQC and DEQ shall take actions necessary to . . .”). An abstract interest in the validity of the Order itself is insufficient to satisfy standing. See Morgan, 353 Or at 195 (“There is no case for declaratory relief . . . where the plaintiff seeks merely to vindicate a public right to have the laws of the state properly enforced and administered.” (quoting *Eacret et ux. v. Holmes*, 215 Or 121, 125 (1958))); *League of Oregon Cities*, 334 Or at 658 (requiring “some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law”). Yet an abstract interest in the Order’s validity is all that appears to be at issue. See Complaint, ¶ 16 (“The parties have an active and current dispute as to the constitutionality of EO 20-04.”) Plaintiffs have failed to allege facts sufficient to demonstrate that they have a legally recognized interest that the Governor’s Order impacts.

Plaintiffs’ summary judgment materials do not assist them. Plaintiffs acknowledge that the Executive Order directs state agencies to take various actions. Plaintiffs’ Motion at 6. Then they assert that “significant state action” has occurred as a result of the Executive Order. *Id.* at 7. They point to reports DEQ prepared and submitted to the Governor, public workshops DEQ conducted, an office DEQ established, and a website DEQ setup.<sup>4</sup> *Id.* Now here, however, do

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<sup>4</sup> Plaintiffs suggest that DEQ setup the Office of Greenhouse Gas Programs, hired its manager, and setup a website as a result of the Executive Order. However, plaintiffs failed to mention that the legislature (through the Legislative Emergency Board) appropriated funds to DEQ in March 2020 specifically “to be used for rulemaking and other actions with the goal of reducing greenhouse gas emissions across all emissions sources, including point sources, natural gas emissions and transportation fuels.” Oregon Legislative Emergency Board Certificate, March 9, 2020 (available at <https://www.oregonlegislature.gov/lfo/eboard/EB%20Certificate%2003-09-2020.pdf>).



1 plaintiffs explain which of their legally recognized interests were injured or impacted by the  
2 Executive Order or how they were injured or impacted.

3 Plaintiffs also summarily contend in their motion that the Executive Order "establishes"  
4 standards that "are of immediate effect" which "the Governor intends to already have the force  
5 and effect of law." Plaintiffs' Motion at 17. Plaintiffs identify no support for those propositions.  
6 Nor do they identify any legally recognized interests or contend that such interests are somehow  
7 affected by the Executive Order. For this reason alone, plaintiffs lack standing and the Court  
8 lacks jurisdiction.

9 2. Plaintiffs cannot show any injury is real or probable.

10 Nor have plaintiffs shown that the impact to their legally recognized interest is "real or  
11 probable, not hypothetical or speculative." See *M T & M Gaming, Inc.*, 360 Or at 555. Because  
12 plaintiffs have not identified a legally recognized interest that the Governor's Order affects, they  
13 cannot show that any impact on that interest is real or probable, or that their claim is ripe.

14 Plaintiffs may argue that they will ultimately be subject to any mandated reductions in  
15 greenhouse gas emissions that state agencies may adopt as new programs or extensions of  
16 existing programs. But that argument is based on speculation about events that have not  
17 occurred. In order to be subject to new regulations, new regulations must be proposed and  
18 adopted under the procedures required by the APA. None have been. *Calderra Dec.* ¶ 2.

19 In their summary judgment motion, plaintiffs contend this dispute is a present, not a  
20 hypothetical, dispute by arguing—without support—that the "Governor intends [the Executive  
21 Order provisions] to already have the force and effect of law." Plaintiffs' Motion at 17. They  
22 also rely on two appellate decisions they contend are analogous. See *Advocates for Effective*  
23 *Regulation v. City of Eugene*, 160 Or App 292 (1999); *Pendleton School Dist. 16R v. State of*  
24 *Oregon*, 345 Or 596 (2009). These cases are not analogous, and plaintiffs' argument lacks merit.  
25 The plaintiffs in both cases successfully sought declaratory relief as to the meaning or validity of

the primary governing law of the governing body: the city charter (in the first case) and an amendment to the Oregon Constitution (in the second). But unlike those cases, this case does not concern the meaning or validity of enacted law. It concerns an Executive Order which, in this instance, does not have the force or effect of enacted law.<sup>5</sup> Rather, this Executive Order is a statement of the Governor's policy positions about climate change and, as relevant here, contains substantive policy direction to the state agencies she oversees.

In short, unless and until state agencies enact regulations pursuant to their statutory authority, any impacts of the Executive Order on any legally recognized interests— to the extent plaintiffs are able to identify any— are hypothetical and speculative. For this reason as well, plaintiffs lack standing, the case is not ripe, and the Court lacks jurisdiction.<sup>6</sup>

3. Plaintiffs cannot show a declaratory judgment would redress any alleged injury.

Plaintiffs cannot satisfy the third element of standing either. The declaratory judgment they seek would not “rectify the injury”— again, assuming plaintiffs identify one— or have “a practical effect on the rights that the plaintiff is seeking to vindicate.” *M T & M Gaming, Inc.*, 360 Or at 555. A declaratory judgment stating that provisions of the Governor's Executive Order exceed the scope of the Governor's constitutional authority would not in fact the legal authority of any state agency to accept and implement the policy direction identified in the Executive

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<sup>5</sup> Executive Orders can and often do have the force and effect of law. For example, when the Governor acts pursuant to constitutionally or statutorily delegated authority, her orders do have the force of law. See, e.g., *Elkhorn Baptist Church v. Brown*, 366 Or 506 (2020) (upholding Governor's Executive Orders issued under legislatively-granted emergency powers).

<sup>6</sup> For exactly the same reason that plaintiffs cannot prove the second element of standing, plaintiffs' claim is not ripe. “ORS 28.020 codifies a ripeness requirement within the declaratory judgment statute[.]” *Beck*, 202 Or App at 364; see also *Cummings Const. Co. v. Sch. Dist. No. 9, Coos Cty.*, 242 Or 106, 110 (1965) (explaining that plaintiffs failed to show they were entitled to declaratory relief because they pointed to no “existing state of facts” giving them present legal rights or threatening their legal rights). Like standing, ripeness under the Declaratory Judgment Act is a jurisdictional requirement. See *Beck*, 202 Or App at 364–68. Plaintiffs' claim is not ripe because it relies on contingent and hypothetical events, i.e. administrative rulemaking, rather than present facts.

Order. Yet that is clearly the plaintiffs' ultimate goal. State agencies are, and would remain after a decision in this case, free to act to the fullest extent of their discretionary statutory authority to regulate greenhouse gases and ameliorate the impacts of climate change. Because a declaratory judgment in this case would have no impact on the regulatory authority of the state's agencies, it would have no practical effect.

For all these reasons, the motion to dismiss should be granted and the Complaint dismissed for lack of standing.

IV. Alternatively, if the Governor's motion to dismiss is denied, summary judgment should be entered in the Governor's favor.

A. Summary judgment standards

A party is entitled to summary judgment when "the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." ORCP 47 C. Further, "[n]o genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.*

B. The court should exercise its discretion to decline to enter a declaratory judgment.

If the Court were to find that it has jurisdiction, the Court should decline to exercise it. Under the Declaratory Judgments Act, "[t]he court may refuse to render or enter a declaratory judgment where such judgment, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." ORS 28.060. "In addition, the trial court should decline to exercise its jurisdiction under [the Act] if some more appropriate remedy exists." *League of Oregon Cities*, 334 Or at 652 (emphasis in original). Here, both are true.

1 A declaration here would not terminate the controversy. As explained above, a  
2 declaration about the validity of the Governor's Executive Order would not restrict the  
3 administrative agencies' existing statutory authority that the Governor identified in the Executive  
4 Order. It is the activities of two of those administrative bodies that plaintiffs ultimately seek to  
5 limit. But plaintiffs seek no relief against the agencies themselves and they are not parties here  
6 in any event. See ORS 28.110 ("no declaration shall prejudice the rights of persons not parties to  
7 the proceeding"). A decision about the Governor's authority to issue an Executive Order would  
8 not restrict the agencies' existing statutory authority to exercise their discretion in the manner the  
9 agencies choose.<sup>7</sup>

10 The Court should also decline to enter declaratory relief because a more appropriate  
11 remedy exists. Plaintiffs ultimately seek to limit EQC and DEQ regulation of greenhouse gas  
12 emissions. But plaintiffs can challenge the validity of any agency action taken in response to the  
13 Executive Order directly under the APA. To adopt legal standards that implement law or policy,  
14 administrative agencies must follow rulemaking procedures under the APA. See ORS 183.325-  
15 410 (rulemaking procedures); ORS 183.310(9) (defining rule as "any agency directive, standard,  
16 regulation or statement of general applicability that implements, interprets or prescribes law or  
17 policy"). Any person can facially challenge the validity of administrative rules under the APA.  
18 ORS 183.400(1) ("The validity of any rule may be determined upon a petition by any person to  
19 the Court of Appeals in the manner provided for review of orders in contested cases."); see  
20 *Kellas v. Dep't of Corrections*, 341 Or 471, 477 (2006) (rejecting a standing challenge and  
21 holding that "[t]he legislature intends by [ORS 183.400(1)] to authorize any person to invoke the

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23 <sup>7</sup>To the extent the Court believes a declaratory judgment would restrict the statutory authority of  
24 any executive agency of Oregon, the court lacks jurisdiction to enter relief:  
25 "The failure to join a necessary party in a declaratory judgment proceeding is jurisdictional."  
26 *Miller v. Shenk*, 272 Or App 12, 18, (2015) (citing *Wright v. Hazen Investments, Inc.*, 293 Or  
259, 264 (1982) ("[S]ince plaintiff failed to join [a necessary party], it would appear that the trial  
court was thereby deprived of jurisdiction to issue a declaratory judgment in this case.")).

1 judicial power of the court to test the validity of every administrative rule under existing  
2 statutory and constitutional law [.]”). In order to add to existing or to develop new greenhouse  
3 gas emission reduction programs, administrative agencies would need to adopt administrative  
4 rules. As plaintiffs’ submitted evidence demonstrates, formal EQC rulemaking is anticipated to  
5 occur as the third phase of program development: “DEQ will establish a formal rulemaking  
6 process that includes many opportunities for engagement and feedback, beyond the minimum  
7 APA requirements.” DEQ Preliminary Report on Program Options to Cap and Reduce  
8 Greenhouse Gas Emissions, p.14 (available at  
9 <https://www.oregon.gov/deq/FilesDocs/CapandReducereport.pdf>); see also DEQ Final Report  
10 on Program Options to Cap and Reduce Greenhouse Gas Emissions, p.15 (available at  
11 <https://www.oregon.gov/deq/FilesDocs/Docs/hoCapRedf.pdf>).<sup>8</sup> Because plaintiffs can  
12 challenge any such rules under the APA, this Court should defer to that process and decline to  
13 enter plaintiffs’ attempted anticipatory relief here.

14 Deferring here is particularly important given that no administrative rules have even been  
15 proposed. The Executive Order itself repeatedly directs the agencies to take actions that are  
16 within their existing statutory authority. Executive Order 20-04, §§ 3 A, C; 4 A, C. It remains  
17 for the agencies to determine the extent of their statutory authority and how they will exercise  
18 that authority. Until that happens and the agencies engage in rulemaking, the Court can only  
19 speculate about what the agencies will do. The bedrock of the judicial review provisions of the  
20 APA is that the courts will wait for final agency action to intervene, and will not issue  
21 anticipatory advisory opinions. This Court should not allow plaintiffs to use the Declaratory  
22 Judgments Act to take an end-run around the APA and its finality requirements.

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25 <sup>8</sup> The preliminary and final reports are also attached as Exhibits 7 and 8, respectively, to the  
Declaration of Joel Mullin filed with plaintiffs’ motion.

1 Given the availability of far more appropriate means of determining the validity of  
2 whatever actions the administrative agencies take following the Governor's Executive Order,  
3 there is no need for an ancillary and premature declaratory judgment that, as a practical matter,  
4 will not terminate the controversy. For these reasons, the Court should exercise its discretion  
5 under ORS 28.060 to decline the invitation to issue an advisory opinion regarding the  
6 Governor's authority to issue an Executive Order providing policy direction to administrative  
7 agencies. Summary judgment should be entered in favor of the Governor and the Complaint  
8 should be dismissed.

9 C. The Governor acted within her authority as the Governor.

10 To the extent the Court addresses the merits of plaintiffs' claim, plaintiffs' requested  
11 relief should not be entered because Governor Brown acted within her authority in issuing  
12 Executive Order 20-04. Plaintiffs contend the Governor exceeded her authority because she  
13 "purport[ed] to expand the scope of authority delegated to the executive branch[.]" Plaintiffs'  
14 Motion at 10. By doing so, plaintiffs contend, she performed the "law making functions  
15 committed specifically to the Oregon legislature" in violation of separation of powers principles.  
16 Plaintiffs' Motion at 9-10. Plaintiffs' argument fails because the Governor now here purported to  
17 make new law. Rather, the Executive Order, over and over again, directs agencies to exercise  
18 their existing statutory authority to the policy ends the Governor provides. Executive Order 20-  
19 04, ¶¶ 3 A, C; 4 A, C.

20 In any event, plaintiffs' description of the legislative authority granted to DEQ and EQC  
21 is erroneous. The agencies have significantly more authority than plaintiffs admit. Yet, without  
22 action by the agencies themselves and the agencies as parties to this case, it would be  
23 inappropriate to issue declaratory relief as to the extent of the agencies' statutory authority here.

1           1.       Executive Order 20-04 is policy direction to executive agencies.

2           One of the privileges of being Governor is the ability to use the platform and tools of the  
3 office of Governor to advocate a policy agenda. One of those tools is an official executive order  
4 issued by the Governor's office. Others include major policy speeches, official proclamations,  
5 press releases, press conferences, and testimony to legislative bodies. The Governor is also  
6 empowered, as chief of the executive branch, to provide policy direction to the agencies of the  
7 state, and to use her appointment, removal, and budget request authority, as well as her bully  
8 pulpit, to ensure that agencies operate in a way that furthers the goals, priorities and values of the  
9 chief executive within the scope of their authorities. See, e.g., Oregon Const. art. V § 1; art. III §  
10 4; art. V § 15b. No source of law limits the statements the Governor may make with the tools and  
11 platform available to her. See U.S. Const. amend. I; Oregon Const. art. I § 8. Nor does it appear that  
12 plaintiffs argue otherwise. Rather, they contend that the Governor made law in Executive Order  
13 20-04 but was not entitled to do so. On this point, the premise of plaintiffs' argument is  
14 incorrect.

15          The Governor did not make law in Executive Order 20-04. Rather, she used her platform  
16 and a tool available to her to set a policy direction for agencies and for the state generally.  
17 Executive Order 20-04 is a clarion call to state agencies most directly, but also to the legislature,  
18 other governmental bodies, and the public to take action on climate change. But it is not law.  
19 For that reason, plaintiffs' argument that the Governor exceeded her constitutional authority by  
20 making law fails.

21           2.       If the court addresses legislative authority, Oregon administrative  
22 agencies have authority to regulate greenhouse gas emissions.

23          In any event, although the Court need not address the statutory authority of agencies that  
24 are not parties here and have not acted for all the reasons described above, plaintiffs are incorrect

1 that DEQ and EQC have no authority to act. The Oregon legislature has, in fact, granted DEQ  
2 and EQC authority to regulate greenhouse gases.

3 Plaintiffs argue that the 2007 Legislative Assembly limited the authority of DEQ and  
4 EQC to regulate greenhouse gas emissions. Plaintiffs' Motion at 10-13. But it did not. It  
5 simply declared a state policy to reduce greenhouse gases, and it clarified that the policy did not  
6 "create any additional regulatory authority" for any executive agency. ORS 468A .205 (1), (3)  
7 (emphasis added). Nothing in the Legislative Assembly's 2007 policy statement, however,  
8 curtailed or limited any agency's existing statutory authority. Nor does plaintiffs' convoluted  
9 argument about a bill that did not pass bear upon the interpretation of existing statutory authority.  
10 See Plaintiffs' Motion at 11-12; ORS 174 .010 ("In the construction of a statute, the office of the  
11 judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not  
12 to insert what has been omitted, or to omit what has been inserted.").

13 EQC has authority to regulate and cap greenhouse gas emissions under its existing  
14 statutory authority. ORS 468A .025 (3) grants EQC authority to adopt emission standards and cap  
15 air pollution by category of air contaminant:

16 The commission may establish air quality standards including emission standards  
17 for the entire state or an area of the state. The standards shall set forth the  
18 maximum amount of air pollution permissible in various categories of air  
19 contaminants and may differentiate between different areas of the state, different  
air contaminants and different air contamination sources or classes thereof.

20 An "air contaminant" is "a dust, fume, gas, mist, odor, smoke, vapor, pollen, soot, carbon, acid  
21 or particular matter or any combination thereof." ORS 468A .005 (2) (emphasis added). A  
22 greenhouse gas is an air contaminant because it is "any gas that contributes to anthropogenic  
23 global warming including, but not limited to, carbon dioxide, methane, nitrous oxide,  
24 hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride." ORS 468A .210 (2). "Air  
25 pollution means the presence in the outdoor atmosphere of one or more air contaminants [.]"

26 DEFENDANT'S MOTION TO DISMISS, ALTERNATIVE CROSS-MOTION FOR  
Page 16 - SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT



1 ORS 468.005 (5). EQC may, therefore, adopt emission standards and cap greenhouse gases by  
2 source.<sup>9</sup> See ORS 468.020 (1) (providing that EQC “shall adopt such rules and standards as it  
3 considers necessary and proper in performing the functions vested by law in the commission”).  
4 Moreover, EQC has authority to issue permits by air contamination source, to set permit  
5 conditions, and to prohibit emissions without a permit. ORS 468A.040; ORS 468A.045.  
6 Therefore, plaintiffs are incorrect that EQC lacks authority to cap and reduce greenhouse gases  
7 by source.

8 Plaintiffs also argue that EQC has no authority to adopt low carbon fuel standards  
9 different from the low carbon fuel standards EQC already adopted. Plaintiffs’ Motion at 14-15.  
10 Plaintiffs contend EQC’s standards are capped at a 10 percent reduction below 2010 levels by  
11 2025. *Id.* at 14. Plaintiffs are incorrect. The Oregon legislature did not cap EQC’s ability to  
12 reduce the carbon intensity of fuels to a specific level. ORS 468A.266 (1)– (2) requires that EQC  
13 “[s]hall adopt low carbon fuel standards. . .” and “shall adopt a clean fuels program,” and both  
14 “by rule.” The legislature then gave EQC the authority— but not the requirement— to adopt  
15 other rules that include but are not limited to the schedule that plaintiffs read as a limit. ORS  
16 468A.266 (2) (“The commission may adopt rules related to the low carbon fuel standards,  
17 including but not limited to: (a) A schedule to phase in implementation of the standards. . .”).  
18 This statutory authorization is both permissive and a nonexclusive example. It is not a limit.

19 Plaintiffs’ arguments that DEQ and EQC lack authority to act in the manner the  
20 Governor’s Executive Order proposes are not well taken. But regardless, determining the scope  
21 of EQC’s and DEQ’s legislative authority would be an academic exercise, and a purely and  
22 inappropriately advisory one at that, because EQC has not, in fact, acted to regulate and reduce

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23 <sup>9</sup> An “air contamination source” is “any source at, from, or by reason of which there is emitted  
24 into the atmosphere any air contaminant, regardless of who the person may be who owns or  
25 operates the building, premises or other property in, at or on which such source is located, or the  
facility, equipment or other property by which the emission is caused or from which the emission  
comes.” ORS 468A.005 (4).

1 greenhouse gas emissions since the Governor issued Executive Order 20-04. These agencies are  
2 not parties here, in any event.

3 V. Conclusion

4 For all the reasons described above, this action should be dismissed for lack of  
5 jurisdiction, or the Court should decline to exercise its jurisdiction in this case. Alternatively, the  
6 requested declaratory relief should not be entered and, instead, the Court should declare that the  
7 Governor acted within her authority as Governor when issuing Executive Order 20-04.

8 DATED September 28, 2020.

9 Respectfully submitted,

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26 DEFENDANT'S MOTION TO DISMISS, ALTERNATIVE CROSS-MOTION FOR  
Page 18 - SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

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CERTIFICATE OF SERVICE

I certify that on September 28, 2020, I served the foregoing DEFENDANTS  
MOTION TO DISMISS, ALTERNATIVE CROSS-MOTION FOR SUMMARY JUDGMENT,  
AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and  
DECLARATION OF STEPHANIE CALDERA IN SUPPORT OF DEFENDANTS MOTION  
TO DISMISS, ALTERNATIVE CROSS-MOTION FOR SUMMARY JUDGMENT, AND  
RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT upon the parties  
hereto by the method indicated below, and addressed to the following:

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