IN THE SUPREME COURT OF THE STATE OF OREGON

ROSA AURELIA PALACIOS ESPINOZA, as Personal Representative of the ESTATE OF VICTOR ANDRES ESPINOZA, Deceased, for her own benefit as the surviving spouse and for the benefit of MICAELA ARIANA ESPINOZA and MARIAM ANDREA ESPINOZA, surviving children of the deceased, Plaintiff-Appellant, Respondent on Review, v. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased, Defendant.	Supreme Court No. S062903 Court of Appeals No. A147028 Multnomah County Circuit Court No. 0909-12350
ERIKA CONSUELO MACHADO MERINO, as Personal Representative of the ESTATE OF JUAN FRANCISCO GARCIA RUBIO, Deceased, for her own benefit as the surviving spouse and for the benefit of MACARENA GARCIA MACHADO and MARIANO GARCIA SANTOLALLA, surviving children of the deceased, and ARTURO BENJAMIN GARCIA PINILLOS, surviving father of	Multnomah County Circuit Court No. 0909-12777

July 2015

the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased,

Defendant.

JULY MARLENE CHURATA FERNANDEZ, as Personal Representative of the ESTATE OF CHRISTIAN MARTIN QUEREVALU QUIROZ, Deceased, for her own benefit as the surviving spouse and for the benefit of CAMILA MILAGROS QUEREVALU CHURATA, surviving child of the deceased; and FREDDY QUIROZ DULANTO DE QUEREVALU and ROLANDI QUEREVALU SUAREZ, surviving parents of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC.,

Multnomah County
Circuit Court No. 0909-13294

an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased,

Defendant.

FLOR DE MARIA GAMBOA ALVAREZ, as Personal Representative of the ESTATE OF FERNANDO CESAR NUÑEZ DEL PRADO REYNOSO, Deceased, for her own benefit as the surviving spouse and for the benefit of CAROLINE ANTHUANET NUÑEZ DEL PRADO GAMBOA and FERNANDO JUNIOR NUÑEZ DEL PRADO GAMBOA, surviving children of the deceased, and MARGARITA SEVERIANA REYÑOSO QUISPE and RICARDO CESAR NUÑEZ DEL PRADO SAAVEDRA, surviving parents of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

Multnomah County
Circuit Court No. 0910-15153

and

BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased,

Defendant.

FLOR KATHERINE SOTO LICAN, as Personal Representative of the ESTATE OF JOSE LUIS SALDAÑA EUSTAQUIO, Deceased, for her own benefit as the surviving spouse and for the benefit of JOSEPH SALDAÑA SOTO, LUIGGI SALDAÑA SOTO, and MIGUEL ANGEL SALDAÑA SOTO, MARIA ELIZABETH SALDAÑA GUTIERREZ, and ALEXANDRA HIMENA SALDAÑA GUTIERREZ, surviving children of the deceased, and AMADEO SALDAÑA NARRO, surviving father of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased,

Defendant.

Multnomah County
Circuit Court No. 0910-15154

OLGA PAULINA CHIBA QUISPE, as Personal Representative of the ESTATE OF PETER MICHAEL LIZA CHIBA, deceased, for her own benefit as the surviving mother and for the benefit of JOSE ARMANDO LIZA NUNTON, surviving father of the deceased, Plaintiff-Appellant, Respondent on Review, v. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased, Defendant.	Multnomah County Circuit Court No. 0912-17035
BRENDA VILMA HOYLE DE CASTRO, as Personal Representative of the ESTATE OF MIGUEL MAX CASTRO GUTIERREZ, Plaintiff-Appellant, Respondent on Review, v. EVERGREEN HELICOPTERS, INC., an Oregon corporation,	Multnomah County Circuit Court No. 1002-02814

Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased, Defendant.	
GIOVANNA PATRICIA OTERO de VASQUEZ, as Personal Representative of the ESTATE OF JHON HENRY VASQUEZ LOPEZ, Deceased, for her own benefit as the surviving spouse of the deceased and for the benefit of ANGIE PATRICIA VASQUEZ OTERO, HENRY GIANPIERRE VASQUEZ OTERO,KAREN ELIZABETH VASQUEZ OTERO, and JHON HENRY VASQUEZ OTERO, surviving children of the deceased, PABLO WILFREDO VASQUEZ MEZA, surviving father of the deceased, and CATALINA LOPEZ de VASQUEZ, surviving mother of the deceased, Plaintiff-Appellant, Respondent on Review, v. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and	Multnomah County Circuit Court No. 1003-03637

BOBBI CRANN, as Personal Representative of the ESTATE OF ALAN CRANN, deceased,	)
Defendant.	)

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the
Multnomah County Circuit Court
The Honorable Jerry B. Hodson, Judge

Decision filed: October 8, 2014
Author of Opinion: Honorable Rex Armstrong
Joining in Opinion: Honorable James C. Egan & Lynn R. Nakamoto

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I. INTRODUCTION

The Oregon Trial Lawyers Association (OTLA) writes to explain why this court should not adopt the *forum non conveniens* doctrine as a matter of Oregon common law.

II. REASONS FOR REVERSAL

A. Common law *forum non conveniens* does not apply in Oregon.

Oregon has long recognized that the function of a court is to decide the cases that come before it. There is an exception to that principle, rooted in statute and the constitution, when trial in a particular court would deprive litigants of a fair trial. In addition, there are statutes that authorize transfer or stay of a case based on the convenience of parties and witnesses. In light of those enactments, this court has long recognized that there is no common law authority for a court, having jurisdiction over a case, to decline to decide that case. That alone is dispositive of the question whether this court should for the first time in its history recognize the common law applicability of the doctrine of *forum non conveniens*.

"The function of the courts is to determine controversies between litigants." *In re Ballot Title*, 247 Or 488, 493 (1967) (quoting *In re Workmen's Compensation Fund*, 119 NE 1027 (NY 1918) (Cardozo, J.); *see also Hinish v. Meier & Frank Co.*, 166 Or 482, 486 (1941) ("[The] function for which [courts] exist [is] administering justice and affording redress for wrongs committed.");

State v. Dameron, 316 Or 448, 469 (1993) (Fadeley, J., concurring) ("The primary function of the court is to decide cases.") (quoting *State v. Quinn*, 290 Or 383, 419 (1981) (Tongue, J., dissenting)).

The corollary to that function is that, where a court has jurisdiction over a case, it must decide the case. The United States Supreme Court, speaking through Justice Marshall, summarized the rule well:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. …With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. Virginia, 19 US 264, 404 (1821); *see also Kalyton v. Kalyton*, 45 Or 116, 131 (1904), *rev'd on other grounds sub. nom., McKay v. Kalyton*, 204 US 458 (1907) ("It is the duty of the court to declare the law involved in causes submitted, irrespective of the consequences that may result therefrom….").[1]

[1] The rule is of constitutional magnitude. *See* Or Const, Art I, § 10 ("[J]ustice shall be administered …completely…, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."); *State ex rel. Burlington N.R. Co. v. District Court*, 891 P2d 493 (Mont 1995) (holding *forum non conveniens* inapplicable in Montana, in part because it conflicts with a Montana state constitutional guarantee similar to Oregon's Article I, section 10).

1. The legislature is the proper body to address this issue, as it has done in the general venue statutes.

There are two exceptions to the rule. First, if a court cannot guarantee litigants a fair trial, then the court may (and sometimes must) change the venue. Since at least 1864, there has existed in Oregon a statute authorizing change of venue when prejudice would prevent the parties from receiving a fair trial. *See* ORS 14.110(b) (court may change venue when judge is a party to case, related to a party, or otherwise "directly interested" in case); ORS 14.110(d) (court may change venue when judge or potential jurors "are so prejudiced against [a] party…that the party cannot expect an impartial trial"); General Laws of Oregon, Civ Code § 44 (Deady 1845-1864) (precursor to ORS 14.110).

The statutory exception is grounded in the constitution. *See In re Murchison*, 349 US 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); *State ex rel. Ricco v. Biggs*, 198 Or 413, 433 (1953) (court must change venue in criminal case if needed to ensure fair trial under Article I, section 11, of the Oregon Constitution); *State v. Nagel*, 185 Or 486, 505 (1949) ("We assume that common law courts have inherent power, particularly in criminal cases, to order a change of venue for purposes of securing impartial trials….").

A second exception, found in ORS 14.110(c), authorizes a change of venue when "the convenience of witnesses and the parties would be promoted by such change." *See also* ORS 131.363 (court may change venue in criminal

case "[f]or the convenience of parties and witnesses").

For over a century, this court has recognized that a circuit court "is only authorized to change the place of trial" in accordance with ORS 14.110. *Commercial Nat'l Bank of Ogden v. Davidson*, 18 Or 57, 66 (1889); *see also Elliott v. Wallowa County*, 57 Or 236, 239 (1910), *overruled on other grounds by State ex rel. Douglas County v. Sanders*, 294 Or 195 (1982) ("[T]here is no authority given a circuit court to change the venue of a case except for the causes specified in [ORS 14.110]."); *Nagel*, 185 Or at 505 (same); *Ricco*, 198 Or at 447 (Lusk, J., dissenting) ("A legislative power…is the power to prescribe the venue of actions, both civil and criminal.").

Davidson was a case filed in Multnomah County. 18 Or at 66. The defendant, from Malheur County, tried to change the venue to that county, arguing that he had been tricked into coming to Multnomah County, where he had been served. *Id.* at 66-67. This court denied the venue change, stating that "nothing further need be said than that the court…is only authorized to change the place of trial" in accordance with ORS 14.110. *Id.* at 66.

In *Elliott*, a petition was filed to establish a county road over the plaintiff's land. 57 Or at 236. The county court awarded the plaintiff $225 as compensation, but the plaintiff wanted more and so appealed to the circuit court. *Id.* at 236-37. There, the plaintiff got $350, but still he was not satisfied, so he appealed to this court, arguing that venue should have been changed

because the jury was infected with county taxpayers who were prejudiced because they would have to bear the cost of the award. *Id.* at 237-38. This court affirmed, however, reasoning that there was no prejudice and "the court could not have made the change in the absence of such [prejudice], as there is no authority given a circuit court to change the venue of a case except for the causes specified in [ORS 14.110]." *Id.* at 239.

Together, the foregoing authorities stand for the proposition that in Oregon it is the duty of a court to decide the case before it except as permitted or required by statute or the constitution. Oregon courts do not have common law authority to decline to decide cases based on *forum non conveniens*, which is, "[a]t bottom…nothing more or less than a supervening venue provision." *Am. Dredging Co. v. Miller*, 510 US 443, 453 (1994).

2. The legislature is the proper body to address this issue, as it has done in the Uniform Child Custody Jurisdiction and Enforcement Act.

That conclusion is further strengthened by the existence of an express codification of the *forum non conveniens* doctrine in the Uniform Child Custody Jurisdiction and Enforcement Act. Under that statute, enacted in 1973, an Oregon court "may decline to exercise its jurisdiction at any time if the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." ORS 109.761(1). ORS 109.761(2) lists various factors a court is to consider in making its decision,

which factors are similar to the ones that foreign courts frequently consider under the common law *forum non conviens* doctrine. If a court "determines that it is an inconvenient forum…, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." ORS 109.761(3).

Three facets of ORS 109.761 are significant. First, the statute only recognizes the doctrine in child custody cases, implying that the doctrine is not available in other types of cases. Second, the statute authorizes the court to condition *forum non conveniens* relief as needed to achieve justice. Third, the statute limits the effect of the doctrine to *staying* the Oregon case pending resolution of the child custody dispute in the alternate forum. Under the usual common law doctrine, the Oregon case would be *dismissed*. This indicates a legislative policy that dismissal is an inappropriate means of addressing *forum non conveniens* concerns. The same legislative policy choice is also evident in ORS 14.110(c), which does not permit dismissal of cases based on convenience concerns, but only permits their *transfer* to an alternate forum.

The latter policy choices are common ones among legislatures. Those states that have enacted *forum non conveniens* statutes or rules have uniformly placed strict limitations on the doctrine and its sanction of dismissal, such as barring the doctrine's use by local defendants, barring its use against local

plaintiffs, conditioning dismissal on the defendant's consent to jurisdiction in the alternate forum and waiver of the statute of limitations defense, and giving courts discretion to (or requiring them to) stay cases instead of dismissing them or to reopen cases after dismissal if fair litigation in the foreign jurisdiction falters.[2] Given the numerous policy choices inherent in any *forum non conveniens* approach, deference to the legislature should be the court's watchword. *See Bennett v. Farmers Ins. Co.*, 332 Or 138, 149 (2001) ("[O]rdinarily, the creation of law for reasons of public policy…is a task assigned to the legislature, not to the courts.").

Even Justice Linde, who yearned for a subconstitutional mechanism to judge the fairness of jurisdiction, and specifically invoked *forum non conveniens*, looked to the legislature, not this court, to supply that doctrine:

> Once it is recognized that fairness is properly a matter of Oregon law before it becomes, in a different sense, a synonym for federal constitutional limits, a procedure to assure fairness can be provided by a statute or perhaps a rule of the Council on Judicial Procedure, or possibly by further consideration of the standards implicit in [*former*] ORS 14.035.

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[2] *See* Ala Code § 6-5-430; Ark Code Ann § 16-4-101; Cal Code Civ Proc § 410.30; Colo Rev Stat Ann § 13-20-1004; Fla R Civ P 1.061; Ga Code Ann § 9-10-31.1; Ill Sup Ct R 187; Ind R Trial P 4.4(C)-(E); La Code Civ Proc Ann Art 123; Md Code Ann, Cts & Jud Proc § 6-104(a); Mass Gen Laws ch 223A, § 5; Miss Code Ann § 11-11-3(4); Neb Rev Stat § 25-538; NY CPLR 327(a); NC Gen Stat § 1-75.12; ND R Civ P 4(b)(5); Okla Stat tit 12, § 1701.05; 42 Pa Cons Stat 5322(e); Tex Civ Prac & Rem Code § 71.051; Va Code § 8.01-265; W Va Code § 56-1-1a; Wis Stat Ann § 801.63.

State ex rel. Academy Press, Ltd. v. Beckett, 282 Or 701, 723 (1978) (Linde, J., concurring) (citations and footnotes omitted).[3]

The existence of ORS 14.110 and ORS 109.761 confirm that, absent statutory authority, or the need to comply with constitutional fair trial rights, Oregon courts do not have the power to dismiss cases because of *forum non conveniens* concerns. Oregon courts must decide the cases that come before them. Consistent with that conclusion, before the decision below, no Oregon appellate court had ever held that common law *forum non conveniens* applies in this state or required or upheld the dismissal of any case based on that doctrine. The doctrine previously had been mentioned only in *dicta* or had been held not to apply to particular cases. *See Espinoza v. Evergreen Helicopters, Inc.*, 266 Or App 24, 40 (2014) (citing cases).

[3] It is telling what version of the doctrine Justice Linde invoked:

> It should be possible for an Oregon court to dismiss a case *after allowing plaintiff time to obtain jurisdiction in a more appropriate forum (perhaps involving a stipulation by defendant as to service of process, waiver of the statute of limitations, or other safeguards for plaintiff)* irrespective of whether the Oregon court believes that its own exercise of jurisdiction would be unconstitutional.

Academy Press, 282 Or at 721-22 (emphasis added).

3. The Court of Appeals misconstrued this court's precedent.

The Court of Appeals cited four decisions of this court as expressing a contrary view. This court's decisions are not to the contrary, however.[4]

In *Reeves v. Chem Indust. Co.*, 262 Or 95, 101 (1972), this court held that an Oregon court, even if it has jurisdiction of a case, should dismiss the case if a contract between the parties contains a forum-selection clause that names another forum, and enforcement of the clause is neither unfair nor unreasonable. A forum-selection clause, however, is a form of waiver. It is not that Oregon courts have power to decline their jurisdiction; it is that the plaintiff waived her right to assert that jurisdiction in the first place. *See Burger King Corp. v. Rudzewicz*, 471 US 462, 472 n14 (1985) (noting that parties can waive the requirement of personal jurisdiction through a forum-selection clause); *Black v. Arizala*, 337 Or 250 (2004) ("Oregon courts ha[ve] authority to decline to exercise jurisdiction and to dismiss an action *to enforce a valid agreement between the parties*") (emphasis added).

League of Or. Cities v. State, 334 Or 645 (2002), also does not help defendants. There, this court stated that a "trial court should *decline to exercise*

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[4] The Court of Appeals also relied on *Kotera v. Daioh Int'l U.S.A. Corp.*, 179 Or App 253 (2002), which affirmed the dismissal of a case based on "comity." This court has never approved of such a course. It appears the court in *Kotera* misapplied the principle of comity, which, rather than countenancing dismissal of an action, merely holds that Oregon courts will give credence to foreign law and legal proceedings where doing so does not violate Oregon public policy. *See Hilton v. Guyot*, 159 US 113, 163-15 (1895) (quoted in *Kotera*); *Bowles v. Barde Steel Co.*, 177 Or 421, 434-35, 473 (1945) (explaining the principle).

its jurisdiction under ORS 28.010 [the declaratory relief statute] if some more appropriate remedy exists. *Brooks v. Dierker*, 275 Or 619, 624 (1976)." *Id.* at 652 (emphasis added and omitted). That language was infelicitous. The issue is not really of declining jurisdiction. The issue is whether, in a given case, "declaratory relief is proper" or should be "withheld." *Brooks*, 275 Or at 624. If a more appropriate remedy exists, then "it is neither useful nor proper to issue [a] declaration," so the court should "refuse" one. *Id.* (quoting Borchard, *Declaratory Judgments* 302 (2nd ed 1941)). In other words, the rule lies in the realm of the merits of a claim, not "who should decide the claim."[5]

Finally, the decision below relied on *Beard v. Beard*, 66 Or 512 (1913), and *Horner v. Pleasant Creek Mining. Corp.*, 165 Or 683 (1940), each of which concerns the internal affairs doctrine. In each case, the defendant argued that the trial court should not have exercised jurisdiction over the case because the case concerned the internal affairs of a foreign corporation. In each case, this court affirmed the trial court's exercise of jurisdiction. This court began by stating that "the assumption of jurisdiction in such a case as this is a matter within the sound judicial discretion of the trial court." *Horner*, 165 Or at 704; *see also Beard*, 66 Or at 517 ("The doctrine that courts decline jurisdiction of controversies relating to the management of the internal affairs of a foreign

[5] This is true regardless of whether the absence of a more appropriate remedy is an element of the claim, or the existence of such a remedy is an affirmative defense. Either way, if a more appropriate remedy exists, declaratory relief will not be granted.

corporation is not strictly a question of jurisdiction, but rather of discretion in the exercise of jurisdiction."). This court went on to hold that the trial courts had not abused their discretion in refusing to dismiss the cases.

The quoted statements from *Beard* and *Horner* are *dicta*, as they were not necessary to the outcomes of those cases. That is, even *assuming* that Oregon courts possess discretion to dismiss cases concerning foreign corporations' internal affairs,[6] the trial courts in *Beard* and *Horner* did not abuse that discretion. It therefore was not necessary for this court to decide whether Oregon courts possess such discretion in the first place. Viewed correctly, *Beard* and *Horner* are little different from the Court of Appeals cases in which that court has assumed the general applicability of the *forum non conveniens* doctrine and then held that it did not require dismissal in those particular cases.[7]

In any event, *Beard* and *Horner* concerned only the internal affairs doctrine, not the *forum non conveniens* doctrine.

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[6] OTLA has not reviewed the briefs in *Beard* or *Horner*, but it is possible that this issue did not receive adversarial briefing. Query whether, if squarely presented with the issue today, this court would recognize such a common law power, especially in light of the various statutes providing that foreign business entities' internal affairs are to be governed by the law of the foreign jurisdiction. *See* ORS 63.714(1) (limited liability companies); ORS 67.046(3)(a) (limited liability partnerships); ORS 70.350(1) (limited partnerships). Significantly, no statute divests Oregon courts of jurisdiction to consider cases concerning foreign business entities' internal affairs.

[7] Thus, contrary to the decision below, the Court of Appeals was correct to describe *Horner* as "*dictum*" in *Novich v. McClean*, 172 Or App 241, 251 n4 (2001). *See also Academy Press*, 282 Or at 722 n3 (Linde, J., concurring) (noting that *Horner* only "seems to hold" that *forum non conveniens* applies in Oregon and that the doctrine is "not clearly established" in Oregon).

B. This court should continue to reject *forum non conveniens*.

Even if this court were to reconsider whether or not to recognize the common law doctrine of *forum non conveniens* in Oregon, the reasons against recognizing the doctrine outweigh the reasons in favor of it.

In *Gulf Oil Corp. v. Gilbert*, 330 US 501 (1947), the United States Supreme Court affirmed the dismissal of a case filed in one state on the ground that, under *forum non conveniens*, the case should have been filed in another state. Congress did not like that result. The next year, it enacted 28 U.S.C. § 1404(a), which, like ORS 14.110(c), authorizes interdistrict *transfers* to further "the convenience of parties and witnesses [and] the interest of justice." In other words, Congress asserted its view that transfer, not dismissal, is the correct means of addressing *forum non conveniens* concerns. That fact that Congress codified the doctrine also reflects the view that prescribing venue – which is what the doctrine does – is a matter for the legislature, not the courts. *See also Ricco*, 198 Or at 447 (Lusk, J., dissenting) ("A legislative power…is the power to prescribe the venue of actions, both civil and criminal.").

28 U.S.C. § 1404(a) superseded the Supreme Court's decision in *Gilbert*. *See Am. Dredging*, 510 US at 449 n2 (so recognizing). Accordingly, whatever the merits of *Gilbert* may have been (the dissent in that case, as well as plaintiffs' briefs in this case amply demonstrate why *Gilbert* was wrongly decided), it has no application today.

Nonetheless, in *Piper Aircraft Co. v. Reyno*, 454 US 235 (1981), the Supreme Court relied on *Gilbert* to affirm, on *forum non conveniens* grounds, the dismissal of a case filed in an American court when, in the Court's view, the case should have been filed in a foreign court. 28 U.S.C. § 1404(a) does not apply to such cases. Similarly, ORS 14.110(c) does not apply to cases filed in Oregon state court but which, the argument goes, should have been filed in the courts of another state or country. Defendants in this case want this court to follow *Piper* and apply *forum non conveniens* to authorize dismissal of such suits. That is something this court should not do.

1. The problem of inconvenience to defendants is overstated and already addressed by federal due process requirements.

In today's world of air travel, electronic communication, and a global legal marketplace, it is not that difficult to litigate a case anywhere. *See Burger King*, 471 US at 476 (noting this phenomenon); *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 292-94 (1980) (same); *Espinoza*, 266 Or App at 49-50 (same). This court has repeatedly affirmed the propriety of Oregon courts hearing cases involving foreign parties. *See, e.g.*, *Horner*, 165 Or at 704 (Oregon court properly heard case "instituted by a resident of Washington against a Washington corporation and individual defendants who are all residents of Washington"); *State ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or 381 (1982) (defendants from several different states); *Willemsen v. Invacare Corp.*, 352 Or 191 (2012) (defendant from foreign country).

Even in the horse-and-buggy days, this court took a dim view of defendants' claims of inconvenience. In *Davidson*, for example, an 1889 case arising out of Multnomah County, the defendant was from Malheur County. 18 Or at 66-67. This court stated that:

> In any equity case where the testimony is taken by deposition it can make very little difference where the suit is brought. In this case all the counsel on both sides, who had the management of the suit after it was begun, resided in Portland, and it is very evident that its commencement there was a convenience to all parties.

Id. at 67; *see also Lander v. Miles*, 3 Or 35, 35-36 (1868) (Multnomah County Circuit Court) (court refused to change venue on convenience grounds even though the defendants' witnesses had to travel from St. Helens to Portland).

Moreover, defendants have adequate protection against inconvenience without the *forum non conveniens* doctrine. The federal constitutional requirement of due process ensures that Oregon courts will never have personal jurisdiction over a defendant unless "there exists 'minimum contacts' between the defendant and [Oregon] such that maintaining suit [here] would 'not offend traditional notions of fair play and substantial justice.'" *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 577-78 (2013) (quoting *World-Wide Volkswagen*, 444 US at 291-92). To satisfy that test where the defendant is foreign, all of the following must be true: the defendant must "purposefully" conduct activity in Oregon or "direct activity" here, the case must "arise out of or relate to" that activity, and the exercise of jurisdiction over the defendant

must be "reasonable." *Id.* at 579-80.[8]

The reasonableness factor explicitly "protects the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 US at 292. That is because "jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent." *Burger King*, 471 US at 478 (quotation marks omitted).

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen, 444 US at 292 (citations omitted). *See also Ins. Co. of N.A. v. Marina Salina Cruz*, 649 F2d 1266, 1270 (9th Cir 1981) (listing additional factors drawn from Supreme Court cases, including "the extent of the [defendant's] purposeful interjection into the forum state," "the existence of conflict with the sovereignty of the forum state," and "the existence of an

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[8] This is the test for specific jurisdiction. Where the defendant is local, general jurisdiction applies, and the defendant may be sued "on causes of actions arising from dealings entirely distinct from [its] activities" in Oregon. *Robinson*, 354 Or at 578 (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S Ct 2846, 2853 (2011)). An Oregon defendant sued in its home jurisdiction can never be said to suffer such inconvenience litigating here that a case should be dismissed. The defendant in this case is an Oregon corporation.

alternative forum"). Those factors mirror the private- and public-interest factors identified in *Gilbert* and *Piper* as relevant to the *forum non conveniens* analysis. *See Gilbert*, 330 US at 508-09; *Piper*, 454 US at 241 n6.

In other words, the convenience concern that lies at the heart of the *forum non conveniens* doctrine is fully addressed by the federal constitution. Because the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process," *Gilbert*, 330 U.S. at 507, and because no defendant is amenable to process in Oregon if litigating here would be "gravely difficult and inconvenient," *Burger King*, 471 US at 478, the federal constitution adequately protects defendants from the same inconvenience concerns that animate the doctrine. *See Asahi Metal Indust. Co. v. Superior Ct. of Cal.*, 480 US 102 (1987) (holding that no personal jurisdiction existed over a foreign defendant because the exercise of such jurisdiction would not be reasonable); *Willemsen*, 352 Or at 204-06 (discussing *Asahi*).[9]

OTLA recognizes that some judges would prefer to have a subconstitutional basis for deciding issues of fairness in jurisdiction. *See Academy Press*, 282 Or at 718 (Holman, J., concurring); *id.* at 721-23 (Linde, J., concurring). But to the plaintiff whose case is dismissed, it does not matter whether the rule of decision was a constitutional or a subconstitutional one.

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[9] True, the "reasonableness" prong of the due process test does not result in the dismissal of many cases, but that is because inconvenience is not as big a problem as some, mostly multinational corporate, defendants assert.

And "[i]t is the duty of the court to declare the law involved in causes submitted," even when that task is difficult. *Kalyton*, 45 Or at 131; *see also Bailey v. Univ. Underwriters Ins. Co.*, 258 Or 201, 232 (1971) (Tongue, J., concurring) (same); *State v. Williams*, 357 Or 1, 18 (2015) (on question of federal constitutional law, "we must determine, as best we can, how th[e] Court would rule if presented with the question before us").[10] Courts should not create common law analogues to constitutional provisions in order to avoid constitutional rulings.[11] If Oregon is to adopt the *forum non conveniens* doctrine, that adoption should come from the legislature, the branch of government entrusted with making policy decisions. *See Academy Press*, 282 Or at 722-23 (Linde, J., concurring) (noting judicial adoption of *forum non convenience* in other states, but looking to the legislature to adopt it here).

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[10] *See also Cohens*, 19 US at 404 ("Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.").

[11] In any event, because the due process analysis largely mirrors the prevalent common law *forum non conveniens* analysis, there is nothing to be gained from adopting the doctrine as a subconstitutional basis for decision. *See Rico-Villalobos v. Guisto*, 339 Or 197, 205-06 (2005) (where state statute was "coextensive" with state constitutional provision, court decided case based on "the proper construction of that constitutional provision"). Again, every case that has assumed the authority of an Oregon court to dismiss a case on *forum non conveniens* grounds has held that the court either correctly refused to dismiss the case on those grounds or erred in doing so.

2. The problem of harassment of defendants is overstated, and dismissal is an inappropriate remedy for it.

The doctrine is not concerned with convenience alone, moreover. Instead, it is a remedy for inconvenience caused by harassment. That problem is overstated, and it can be remedied with a variety of tools short of dismissal.

> The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction…[by] those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

Gilbert, 330 US at 507.[12]

The premise of *Gilbert* is that plaintiffs' harassment of defendants by suing them in inconvenient places is a real world problem – such a significant problem, in fact, that courts must fashion a remedy for it. Common sense and experience refute that premise. Plaintiffs' forum choices are almost always driven by their desire to obtain a complete remedy for their injuries. Detractors may label that "forum shopping," but it is not harassment, and no court should shy away from applying the law of its jurisdiction to the parties who come

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[12] The parties here devote substantial attention to the question of what degree of "deference" a foreign plaintiff's choice of forum should receive. Because the *forum non conveniens* doctrine focuses on inconvenience *to the defendant*, however, inconvenience to the plaintiff should be irrelevant, except insofar as it implies an intent to harass the defendant through choice of a forum that is not convenient for either party. The implication may be stronger for a foreign plaintiff than a local one, all else equal. But if there is no actual harassment, and both parties are simply inconvenienced, there is no reason to dismiss the case, given the purpose behind the *forum non conveniens* doctrine.

before it, where personal jurisdiction exists over the defendant. Oregon courts should be proud, not embarrassed, if Oregon law is more protective of injured persons than the law of any particular foreign jurisdiction. And courts should be wary of defendants who claim "harassment" through forum shopping and then seek to engage in reverse forum shopping themselves.[13]

Even if one assumes that the narrow problem of harassment through inconvenience exists and must be remedied, one would think a narrow remedy is in order, such as a monetary penalty, a protective order, or a stay of the case pending resolution in a more convenient forum. The doctrine, however, calls for *dismissal* outright, without consideration of lesser sanctions. That is not how Oregon courts do business.

Oregon courts have the "'inherent' authority to impose sanctions to protect the integrity of the judicial process from…abuse." *Rooney v. Kulongoski*, 322 Or 15, 20 (1995) (so noting); *see also In re Harris*, 334 Or 353, 363 (2002) (similar). But "[d]ismissal is the most drastic of sanctions, to be reserved for the most severe violations" of court orders and rules. *Pamplin v. Victoria*, 138 Or App 563, 567 (1996); *see also id.* ("[T]he sanction of

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[13] In *Piper*, the Court stated: "*Gilbert* held that dismissal may be warranted where a plaintiff chooses a particular forum…solely in order to…take advantage of favorable law." 454 US at 249 n15. *Gilbert* held no such thing. Indeed, if forum shopping were the problem *forum non conveniens* is supposed to solve, then the relative favorableness to the plaintiff of the law in the forum and foreign jurisdictions should be a significant factor in the analysis. *Piper* held to the contrary, however. *Id.* at 247 (that factor "should ordinarily not be given conclusive or even substantial weight").

dismissal should be imposed 'only when necessary to preserve the integrity of the judicial system, or in some other extreme circumstance.") (quoting *Hahm v. Hills*, 70 Or App 275, 280 (1984)); *Pamplin v. Victoria*, 319 Or 429, 434 (1994) (dismissal as sanction for discovery violation permissible only upon "a finding of willfulness, bad faith, or fault of a similar degree").

Because dismissal is so severe, it "should be a punishment of last, rather than first resort." *Pamplin*, 138 Or App at 567. A court "must explore other options before imposing" it, options that are proportional to the violation. *Id.* There are a wide variety of tools short of dismissal that a court can employ to deal with the problem of a plaintiff's harassing a defendant by forcing it to litigate in an inconvenient forum.

The usual sanction in Oregon for abuse of the judicial process is a monetary penalty, generally payment of the opposing party's costs and fees. *See* ORS 20.105(1) (authorizing that sanction for disobeying court order and making frivolous argument); ORCP 17 D(4) (same for making false certification); ORCP 46 B(2), C, D (same for violation of discovery rules). Significantly, ORCP 17 C(2) authorizes sanctions against a party or attorney who files a complaint "for any improper purpose, such as to harass." Yet ORCP 17 D limits the permissible sanction for that conduct to "monetary penalties" payable to the opposing party and court. There is no reason why *forum non conveniens*, which also concerns harassment, should permit a harsher

sanction than ORCP 17. To the degree that litigating in Oregon is inconvenient for a defendant in the sense that it increases the defendant's litigation expenses, a court can order the plaintiff to shoulder that increase if the plaintiff filed suit in Oregon in order to harass the defendant.

Further, Oregon courts enjoy wide latitude in shaping discovery to ensure that all parties have reasonable access to evidence. *See* ORCP 36 C (relating to protective orders). Most document discovery today is conducted by e-mail, CD-ROM, and other location-neutral mechanisms, so distance is no problem. For depositions and the rare view of the premises, the trial court can require the plaintiff to help defray the defendant's travel costs. The court can also require the plaintiff to produce certain witnesses not otherwise amenable to subpoena. And if litigating in Oregon truly deprives a defendant of access to evidence, the court can exclude certain evidence the plaintiff might seek to offer, deem certain facts, claims, or defenses as established, or strike part or all of the plaintiff's claims or defenses. *See* ORCP 46 B(2), C, D (listing those sanctions for discovery violations).[14]

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[14] Under the prevailing *forum non conveniens* analysis, inconvenience to a defendant is measured almost entirely by ease of access to evidence. *See Piper*, 454 US at 241 n6 (listing "the private interests of the litigants," which include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive") (quoting *Gilbert*, 330 US at 508).

If a court found those options insufficient to remedy the problem of harassment or inconvenience in a particular case, it could order that the case be stayed while the plaintiff files suit in a more convenient forum and litigates the matter there. *See* ORCP 46 B(2), C, D (listing stay of an action as a sanction for discovery violations); ORS 109.761(3) (indicating that stay of an action is a preferred means over dismissal of addressing *forum non conveniens* concerns). That way, if there are any problems litigating the case in the other forum (for example, if the defendant reneges on a promise not to raise a statute of limitations defense there), the Oregon court can resume litigation without creating additional hurdles or complications for the plaintiff (such as running into the statute of limitations, having to move to set aside a judgment, or

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The last factor is the only one that does not relate to evidentiary access; it relates primarily to speed and cost. As noted in the text, cost is an issue that courts can address in manners other than dismissal. And delay should not be a concern in Oregon, where cases generally must be tried within a year of filing. UTCR 7.020(5).

Further, it is notable that, although *Gilbert* mentioned as an additional private-interest factor "questions as to the enforcibility of a judgment if one is obtained," 330 US at 508," *Piper* did not repeat that factor. Perhaps that is because that issue goes to a *plaintiff's* convenience, not a defendant's. At any rate, it is an improper factor in Oregon given this court's holding in *Kalyton*: "It is the duty of the court to declare the law involved in causes submitted, irrespective of the consequences that may result therefrom[; even if a decree is impossible to enforce, the court will leave] the enforcement of the decree to the person in whose favor it was rendered." 45 Or at 131; *see also Beard*, 66 Or at 518 (citing that holding favorably in context of internal affairs doctrine).

The enforceability of any counterclaims a defendant might bring is irrelevant because counterclaims are not compulsory in Oregon. *See State ex rel. English v. Multnomah County*, 348 Or 417, 433 (2010) (so recognizing).

incurring additional filing fees).

In sum, it is difficult to see how dismissal, a sanction "reserved for the most severe violations" of court orders and rules, *Pamplin*, 138 Or App at 567, could be a just remedy for the overstated problem caused by a plaintiff's "harassing" a defendant by prosecuting a case in a forum that is "inconvenient" to the defendant. That remedy is not authorized by ORCP 17, which also concerns harassment, and it is not proportional to the plaintiff's "violation," especially in light of other remedies available to the court.

3. The problem of inconvenience to courts and citizens is not a legitimate problem at all.

There is a third justification asserted for the *forum non conveniens* doctrine: convenience to courts and interested citizens. *See Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 US 518, 524 (1947) (noting that the doctrine also rests on "considerations affecting the court's own administrative and legal problems"); *Gilbert*, 330 US at 508-09 (referring to the needs of "the people of a community"). That justification cannot support the doctrine in Oregon.

In *Gilbert*, the Court stated:

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 US at 508-09. Similarly, Justice Reed stated in dissent in *Koster*:

> In some cases, which may at the expense of analysis be grouped under the doctrine of *forum non conveniens*, the convenience of the court may be important. In such cases the crowded condition of the court's calendar and its lack of familiarity with the law of another state may be weighty factors. But in those cases neither the defendant nor the plaintiff is a resident of the forum state. Such cases have the support of policy which hesitates to give an advantage to parties who do not bear the expense of supporting the courts of the forum.

330 US at 534 (Reed, J., dissenting) (citations omitted).

It is an extraordinary thing to say that courts have the power to dismiss cases simply because those cases are inconvenient for courts to hear. Hearing cases is the very purpose for the courts' existence; it is their function. If courts could dismiss cases simply because of docket congestion, for example, then there would be no limit to the doctrine's reach. *Forum non conveniens* would require dismissal of purely local cases, involving Oregon residents and Oregon events, as much as it would require dismissal of cases involving foreign parties

and foreign events. No case would be safe from dismissal on the ground that it had unduly added to the court's docket. Courts should not dismiss cases simply to reduce their workload.

Nor is the need to apply foreign law an appropriate reason for dismissing a case. Under Oregon's choice of law rules, Oregon law applies unless the proponent of foreign law specifically identifies a material difference between Oregon law and the relevant foreign law. *See Spirit Partners, LP v. Stoel Rives LLP*, 212 Or App 295, 301 (2007) (illustrating proposition); *W.L. May Co. v. Philco-Ford Corp.*, 273 Or 701, 705 n1 (1975) (same). Accordingly, in the rare case where foreign law must be applied, the court will be well apprised of exactly what that law is, at least with as much certainty as can be had with Oregon law, which, like all law, requires some level of interpretation in every case. Fear of, or distaste for, applying foreign law is therefore not a valid reason for an Oregon court to wash its hands of jurisdiction it possesses. *See Kalyton*, 45 Or at 131 ("It is the duty of the court to declare the law involved in causes submitted…."); *Williams*, 357 Or at 18 (Oregon court must decide foreign law "as best we can").

Finally, the "citizen preference" factors are inappropriate and not a proper subject of judicial inquiry. How does a court know that the citizens of one forum care more about a case than the citizens of another forum? Should the court conduct a poll? Or compare the level of news coverage in each

forum? What kind of evidence should the court receive? What kind of evidence can it take judicial notice of? What if the citizens who, in the court's view, *should* care more about the case do not? Is their "interest" in the case lessened thereby? In this case, for instance, the helicopter crash occurred in Peru, but an Oregon defendant is alleged to have committed its negligence in Oregon. How should the court determine where the controversy is "localized"? This is not a line of inquiry that courts are well-equipped to address, nor is it one that falls within the proper scope of the judicial function. *See City of La Grande v. PERB*, 284 Or 173, 185 (1978) (recognizing that "legal decisions will be made by identifiable criteria…. They will not depend on the court's reweighing the benefit-cost ratios of competing social demands, which is the very substance of politics."); *Burnette v. Wahl*, 284 Or 705, 712 (1978) ("Courts have no omnipotence in the field of planning, particularly social planning…."); *id.* at 715 ("[T]rial courts are ill equipped to do social engineering….").

Even the solicitude that Justice Reed expressed for local taxpayers who do not want to finance litigation between foreigners is inappropriate. Such a concern should be addressed to the legislature, not the courts. *See Weyerhaeuser Timber Co. v. State Tax Comm'n*, 223 Or 280, 292 (1960) ("The merits of [taxpayer's] argument [regarding who gets a tax windfall and who gets penalized] are better addressed to the legislature, which makes tax policy,

than to the courts, which may merely review the actions of the [State Tax] Commission…."); *In re Estate of Jenkins*, 224 Or 144, 164 (1960) (same). In any event, this case does not involve purely foreign parties, as did the example that Justice Reed gave. Defendant is an Oregon corporation.

For all of these reasons, the doctrine of *forum non conveniens* is not a good fit for Oregon, even if this court were inclined to consider adopting it.

C. If this court were to adopt *forum non conveniens*, it should adopt only a narrow version of it.

Alternatively, if this court does adopt a common law version of *forum non conveniens*, then OTLA urges the court to adopt only a narrow version of it. Specifically, this court should hold that the doctrine applies as follows:

- The doctrine applies only in "rare" cases, *Gilbert*, 330 US at 509, as it is "an exceptional tool to be employed sparingly," *Espinoza*, 266 Or App at 43 (quoting *Carijano v. Occidental Petroleum Corp.*, 643 F3d 1216, 1224 (9th Cir 2011), *reh'g en banc den*, 686 F3d 1027 (2012), *cert den*, 133 S Ct 1996 (2013))

- The doctrine does not require that the case be filed in the optimal forum, *Espinoza*, 266 Or App at 43

- The court must find as fact that the plaintiff actually *harassed* the defendant by its choice of forum, in that the plaintiff had an improper motive and the forum is gravely inconvenient to the defendant, *Gilbert*, 330 US at 507

- The defendant bears the burdens of proof and persuasion on the issues of harassment and inconvenience, *Espinoza*, 266 Or App at 43

- Inconvenience must be analyzed with regard to the importance of the evidence the defendant claims not to have easy access to, not merely the quantity of it, *Espinoza*, 266 Or App at 49-50

- The doctrine does not apply if either the plaintiff or the defendant is an Oregon resident or citizen, *supra* n2

- The fact that the plaintiff is not an Oregon resident or citizen is irrelevant, except insofar as it permits an inference, all else equal, of an intent to harass the defendant through choice of a forum that is not convenient for either party

- It is irrelevant whether the law of Oregon or the foreign jurisdiction is more favorable to the plaintiff or defendant, *i.e.*, both forum shopping and reverse forum shopping are irrelevant

- It is irrelevant whether an Oregon judgment will be more difficult to enforce than a judgment from the foreign jurisdiction, *Kalyton*, 45 Or at 131; *Beard*, 66 Or at 518

- The "public interest" factors identified in *Gilbert* and *Piper* are irrelevant

- The foreign jurisdiction must offer an adequate remedy for the plaintiff's injury, *Espinoza*, 266 Or App at 43

- The defendant must stipulate to service of process in the foreign jurisdiction, waiver of the statute of limitations to the extent it applies beyond the date the plaintiff filed the Oregon case, and other reasonable safeguards for the plaintiff, *supra* n2; *Academy Press*, 282 Or at 721-22 (Linde, J., concurring), which stipulations must be incorporated into the court's order

- Rather than dismissing the case, the court will stay the case until its resolution in the foreign jurisdiction, to ensure that the defendant complies with its stipulations, *supra* n2; ORS 109.761(3); ORCP 46 B(2), C, D

- Alternatively, if trial courts may dismiss cases under this doctrine, trial courts may do so only after explaining why lesser sanctions will not suffice to remedy the problem, *Pamplin v. Victoria*, 138 Or App at 567

III. CONCLUSION

The policy question whether Oregon should recognize the doctrine of *forum non conveniens* beyond its borders and the context of child custody cases is one properly committed to the legislature, not this court. For the reasons stated above, this court should hold that the doctrine does not apply under Oregon common law. Alternatively, if this court holds to the contrary, this court should reverse the decision below and remand for further proceedings.

DATED: July 2, 2015.

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I certify that (1) the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f); (2) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (3) the word-count of this brief as described in ORAP 5.05(2)(a) is 7,948 words.

I further certify that on July 2, 2015, I filed the foregoing document with the State Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manner(s):

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