IN THE SUPREME COURT OF THE STATE OF OREGON

Jordan Schwartz, an individual; Jonathan Moran, an individual; Serenity Vapors, LLC, a domestic limited liability company; and Torched Illusions, LLC, a domestic limited liability company,
Plaintiffs-Respondents,
Petitioners on Review,

and

Belal Yahya, an individual; and Hookah Cafe, LLC, dba King's Hookah Lounge, a domestic limited liability company,
Plaintiffs-Respondents,

v.

Washington County, a political subdivision of the State of Oregon,
Defendant-Appellant,
Respondent on Review

Oregon Court of Appeals
A183242

Oregon Supreme Court
S071235

BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

Review of the Decision of the Court of Appeals on Appeal from the Judgment of the Circuit Court for Washington County,
Honorable ANDREW R. ERWIN, Judge.

Opinion Filed: May 1, 2024
Author of Opinion: TOOKEY, P.J.
Before Judges: Tookey, P.J., and Egan, J., and DeVore, Senior Judge

February 26, 2025

Continued…

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BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

III.

INTRODUCTION

This case concerns the validity, scope, and exclusivity of Oregon's statewide, state-issued, shall-issue Tobacco Retail License in the face of a county-level prohibition on the very conduct the legislature authorized through that license.

In *Schwartz v. Washington County*, 332 Or App 342, 550 P3d 20 (2024), The Court of Appeals erroneously concluded that Senate Bill 587, which created Oregon's Tobacco Retail License and authorizes state licensees to sell tobacco products and inhalant delivery systems, does not preempt Washington County Ordinance 878 which prohibits state licensees from selling flavored tobacco products and inhalant delivery systems. This erroneous decision partially stems from the Opinion's misinterpretation of Washington County Ordinance 878 as a "restriction on certain ingredients" rather than a prohibition on licensed conduct, as well as a failure to consider the effect of an affirmative grant of a liberty interest created by a license on the traditional preemption analyses.

On review, the Court should find that Defendant did not have plenary home rule authority to enact its prohibition, Washington County Ordinance 878

exceeded the narrow grant of co-regulatory authority under Senate Bill 587, and that Washington County Ordinance 878 is preempted.

A. Questions Presented.

1. First Question on Review.

Does the legislature's grant of specific and limited powers for Local Public Health Authorities ("LPHAs") under a statewide license preempt acts that are outside of the statutorily prescribed powers?

2. Second Question on Review.

Does a statute authorizing LPHAs to enact and enforce "standards for regulating" licensed conduct authorize LPHAs to blanketly prohibit licensed conduct?

3. Third Question on Review.

Does the legislature's authorization of conduct by a statewide license preempt and conflict with local laws prohibiting the same conduct?

B. Proposed Rules of Law.

1. First Proposed Rule of Law.

Yes. The legislature's grant of specific and limited powers for LPHAs under a statewide license preempts acts exceeding the statutorily prescribed authority. LPHAs must operate within the boundaries of the powers specifically granted by the legislature when the legislature specifically prescribes limited powers.

2. Second Proposed Rule of Law.

No. A statute authorizing LPHAs to establish "standards for regulating" licensed conduct does not authorize laws blanketly prohibiting licensed conduct. LPHAs are only authorized to set parameters for engaging in licensed conduct. The legislature did not authorize total prohibitions.

3. Third Proposed Rule of Law.

Yes. When the legislature expressly authorizes conduct by a statewide license, local prohibitions conflict with the state's license. The state license establishes and expressly authorizes the scope of permissible conduct which takes precedence over conflicting local laws that interfere with the exclusivity of the state's licensure and are preempted.

C. <u>Summary of Facts</u>.

1. Oregon's Tobacco Retail License.

In 2021, the legislature passed Senate Bill 587 (ORS 431A.190–431A.220) ("SB 587") which created a statewide, state-issued, shall-issue tobacco retail license ("TRL") authorizing licensees to sell tobacco products and inhalant delivery systems ("Nicotine Products") and prohibiting unlicensed persons from selling Nicotine Products. ORS 431A.198 (creating the TRL, describing qualifications, and prescribing the application and renewal process with Oregon Department of Revenue ("DOR")); ORS 431A.202 (prescribing TRL revocation); ORS 431A.194 (prohibiting unlicensed sales); ORS

431A.190(2) (defining "Inhalant delivery system" under ORS 431A.175), (5) (defining "Tobacco products" under ORS 431A.175). Plaintiffs are TRL licensees.

The legislature imposed Oregon's TRL statewide and LPHAs were preempted from imposing local licenses subject to a limited and, here, inapplicable exception which legacied certain local licenses.[1] ORS 431A.218(7) (prohibiting local licenses "[e]xcept as provided in ORS 431A.220[.]"); ORS 431A.220.

The legislature provided narrow authority for LPHAs to enact ordinances affecting TRL licensees:

> (2) Each local public health authority may:
>
> (a) Enforce, pursuant to an ordinance enacted by the governing body of the local public health authority, **standards for regulating** the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety **in addition to the standards described in paragraph (b)** of this subsection, including **qualifications for engaging** in the retail sale of tobacco products or inhalant delivery systems that are **in addition to the qualifications described in ORS 431A.198**;

ORS 431A.218(2)(a) (emphasized). Aside from this delegated authority, the legislature provided that:

> (5) The Oregon Health Authority shall: (a) Subject to ORS 431A.220, **ensure that state standards established by state law**

1. The question of what is required to continue a local TRL under ORS 431A.220 is presently at issue in *21+ Tobacco and Vapor Retail Association v. Multnomah County* (23CV03801; A182442).

> **and rule** regarding the regulation of the retail sale of tobacco products and inhalant delivery systems **are administered and enforced consistently throughout this state**[.]

ORS 431A.218(5)(a) (emphasized).

2. Washington County Ordinance 878.

In November of 2021, Defendant enacted Washington County Ordinance 878 ("WCO 878") which, in its relevant parts, defined "Flavored Product" and prohibited the sale, offer to sell, or other distribution of flavored products. ER-162–68 (contains entire ordinance). WCO 878 prohibits the sale of all Flavored Nicotine Products.

WCO 878 defines a flavored product as:

> **Flavored Product.** Any synthetic nicotine product or tobacco product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of the product, including, but not limited to, any taste or smell relating to chocolate, cocoa, menthol, mint, wintergreen, vanilla, honey, molasses, fruit, or any candy, dessert, alcoholic beverage, herb, or spice. A public statement or claim, whether express or implied, made or disseminated by the manufacturer of a synthetic nicotine product or tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements or claims concerning such products, that a synthetic nicotine product or tobacco product has or produces a taste or smell other than a taste or smell of tobacco will constitute presumptive evidence that the product is a flavored product.

ER-165–66; WCO 878, Exhibit A, 2.20 B (original).

A "Synthetic Nicotine product" is "[a]ny product designed for human consumption where the nicotine was created and produced in a laboratory and

not derived from tobacco." ER-166; WCO 878, Exhibit A, 2.20 E.

Additionally, "Inhalant delivery system" is defined as:

> A device that can be used to deliver nicotine or cannabinoids in the form of a vapor or aerosol to an individual inhaling from the device, or a component of such a device or a substance in any form sold for the purpose of being vaporized or aerosolized by such a device, whether the component or substance is sold separately or is not sold separately. Inhalant delivery system includes, but is not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.

ER-166; WCO 878, Exhibit A, 2.20 C.

Last, WCO 878 defines "Tobacco Product" to be:

> (1) Any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; (2) Any inhalant delivery system, and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains tobacco or nicotine; or (3) Any component, part, or accessory of (1) or (2), whether or not any of these contains tobacco or nicotine, including, but not limited to, filters, rolling papers, blunt or hemp wraps, hookahs, and pipes.

ER-166; WCO 878, Exhibit A, 2.20 F.

WCO 878 prohibits the sale of Flavored Nicotine Products, providing "Flavored products restricted. No person shall sell, offer for sale, or otherwise distribute any flavored tobacco product or flavored synthetic nicotine product."

ER-166; WCO 878, Exhibit A, 2.30 B.

D. Nature of the Action.

Plaintiffs filed a single claim with six counts for declaratory and

injunctive relief under the Oregon Uniform Declaratory Judgment Act (ORS 28.010–28.160).

E. Nature of Relief Sought in Trial Court.

Plaintiffs' claim alleged six counts as grounds for a declaration that WCO 878 was unenforceable. ER-26–49. Each sought to permanently enjoin Defendant from enforcing WCO 878. ER-48. Plaintiffs' first and second counts sought a declaration that WCO 878 was preempted by SB 587.

F. Nature of Judgment Rendered by the Trial Court.

On what the Trial Court treated as cross-motions for summary judgment, the Trial Court entered a General Judgment dismissing Plaintiffs' counts four, five, and six on the merits, dismissing Plaintiffs' third count as moot due to the other rulings, and finding on Plaintiffs' first and second counts that WCO 878 was expressly and impliedly preempted by SB 587. Plaintiffs did not appeal the dismissals of counts three to six and Defendant appealed the Trial Court's rulings on Plaintiffs' first and second counts.

IV.

SUMMARY OF ARGUMENT

A. Summary of Argument in Support of First Proposed Rule of Law.

The Court should find that the legislature preempted home rule authority when it granted specific and limited authority to localities under a statewide licensing program because, absent preemption, expressly granting limited

authority to LPHAs would be a meaningless, redundant, and partial description of otherwise unlimited authority.

Defendant maintains that it has authority to partially prohibit the retail sale of Nicotine Products within its jurisdiction under *both* its home rule authority and co-regulatory authority provided in ORS 431A.218(2)(a). Defendant maintains these contradictory positions despite conceding that it is preempted from enforcing a total prohibition on Nicotine Products by SB 587. Importantly, if Defendant's home rule authority to regulate Nicotine Products is no longer plenary, then it must find support for its ordinance in SB 587.

Plaintiffs' interpretation is consistent, and Defendant's interpretation is inconsistent, with the text of SB 587 in context and supported by legislative history which shows the intent to create a basic level of statewide uniformity amongst TRL licensees.

B. <u>Summary of Argument in Support of Second Proposed Rule of Law</u>.

The legislature provided narrow co-regulatory authority to LPHAs which limits LPHAs to enacting "standards for regulating" the retail sale of Nicotine Products and "qualifications" for TRL licensure that are "in addition to" those the state imposes. WCO 878 does neither.

In part based on erroneously interpreting WCO 878 as a "restriction on certain ingredients," the Opinion erroneously determined that WCO 878 was within Defendant's co-regulatory authority under ORS 431A.218(2)(a). On the

contrary, WCO 878 is not a restriction on ingredients, qualification, or "standard for regulating" the sale of Nicotine Products but a prohibition on conduct licensed by statute as demonstrated by examining its text, context, and legislative history.

Defendant's prohibition on licensed sales of Nicotine Products exceeds its narrow co-regulatory authority provided by ORS 431A.218(2)(a) because: (1) prohibitions are not a "standard for regulating" Nicotine Products or "qualifications" for TRL licensure; (2) the authority to "regulate" does not include the authority to prohibit totally; and (3) prohibitions on otherwise licensed conduct substitute the LPHA's standards for those enacted by the legislature contrary to multiple provisions of SB 587.

C. <u>Summary of Argument in Support of Third Proposed Rule of Law</u>.

By creating a statewide, state-issued, shall issue TRL, the legislature expressly intended to authorize conduct, extend a liberty interest to individuals, and preempt local ordinances which prohibit using its TRL.

The Opinion erroneously ignored the intention and effect of licensure, especially that a license creates a liberty interest and provides express permission to engage in otherwise unlawful conduct. This is unlike typical preemption cases where (1) the state allows a person to engage in conduct after meeting certain requirements and the locality adds to that list of requirements, (2) the state passively allows (or does not disallow) a person to engage in

conduct but the locality disallows the conduct, or (3) the statute and ordinance simply do not address the same issue.

Even under standard preemption analyses, the legislature expressly preempted prohibitions on conduct the legislature authorized in SB 587 by plainly and unambiguously providing narrow co-regulatory authority to LPHAs which cannot alter the state's statewide standards. Further, the very issuance of a license (permission) to engage in conduct provides legislative intent to preclude LPHAs from prohibiting the legislatively authorized conduct. Additionally, WCO 878 is preempted through conflict preemption because it is impossible to simultaneously apply the legislature's affirmative grant of permission to sell Nicotine Products and Defendant's prohibition. It is also impossible for Defendant to simultaneously honor the state's TRL and enforce the state's standards consistently while also enforcing a prohibition on otherwise licensed conduct.

Last, this case presents a need and cause for the Court to articulate a preemption analysis tailored to circumstances where the legislature creates a liberty interest by expressly authorizing conduct through a statewide license. Doing so would provide guidance to parties and lower courts.

V.

ARGUMENT

The Trial Court correctly held that WCO 878 is preempted by SB 587

and the Court of Appeals incorrectly reversed and remanded that decision.

The Opinion contains several errors of construction which affected its preemption analysis. Among these were its presumption that Defendant's home rule authority was unaffected by SB 587 (addressed in the first argument) and finding that WCO 878 was expressly authorized by ORS 431A.218(2)(a) as a restriction on *certain ingredients* rather than as a prohibition on otherwise licensed conduct (addressed in the second argument). Additionally, the Court of Appeals erroneously ignored the effect of a statewide, state-issued, shall-issue license in its preemption analysis; these errors led to the erroneous conclusion that WCO 878 is not preempted by SB 587 (addressed in the third argument).

A. Argument in Support of First Proposed Rule of Law.

The Court should find that when the legislature grants local governments specific and limited co-regulatory powers under a statewide licensing program that is otherwise governed entirely by state law, the legislature preempts local authority to enact laws which transgress the bounds of that express authority. Ruling to the contrary renders the express grant of specific and limited authority meaningless and redundant because a local government possessing plenary home rule authority does not require any further grant of authority.

Before the Trial Court, Defendant relied on ORS 431A.218(2)(a), not home rule, as its authority to enact WCO 878. At oral argument on appeal, Defendant changed its focus to home rule. The Opinion asserts that it does not

address Defendant's home rule authority. *Schwartz*, 332 Or App at 353. However, preemption questions inherently consider whether the legislature has made a matter one of state, rather than local, concern; that is the effect of preemption. *Rogue Valley Sewer Servs. v. Phoenix*, 357 Or 437, 454, 353 P3d 581 (2015) ("A party that challenges a home-rule city's authority as preempted by state law is required to show that the legislature 'unambiguously' expressed its intent—a high bar to overcome."). Nevertheless, Defendant simultaneously argued that it was empowered to prohibit Flavored Nicotine Products under *both* its home rule authority *and* ORS 431A.218(2)(a). *Schwartz*, 332 Or App at 356; Op. Br., 11–15, *Schwartz v. Washington County* (A179834) (March 23, 2023) (hereinafter "COA Op. Br.") (Defendant arguing that its authority to regulate Nicotine Products is "plenary" and stating that it "had inherent authority to adopt" WCO 878); Ans. Br., 14–18, *Schwartz v. Washington County* (A179834) (June 6, 2023) (hereinafter "COA Ans. Br."); R. Br., 14, *Schwartz v. Washington County* (A179834) (July 10, 2023) (hereinafter "COA R. Br.").

Oddly, Defendant maintains that it has plenary authority to enact a majority ban on Nicotine Products by banning Flavored Nicotine Products despite conceding that a total ban would be preempted. ER-501–04.[2] The

2. Oral Argument at 22:19-23:00 (available at https://oregoncourts.mediasite.com/mediasite/Channel/default/watch/29548bbf4e1c49efb11c33980c7360591d). Defendant's counsel shakes his head when

Opinion ignores Defendant's wholly contradictory positions despite them being the foundation of the Trial Court's ruling. ER-539–40.

Importantly, if Defendant's home rule authority is not plenary under SB 587, then Defendant must find its authority to enact WCO 878 in SB 587 itself.

1. Plenary Local Authority is Inconsistent with Senate Bill 587.

The legislature provided LPHAs with a narrow role under Oregon's statewide TRL. Specifically, LPHAs are limited to enacting "standards for regulating" and "qualifications for engaging in" the retail sale of Nicotine Products that are "in addition to" the state's standards and qualifications. ORS 431A.218(2)(a). To conclude that local authority is plenary despite this provision's narrow parameters would render ORS 431A.218(2)(a) a meaningless, redundant, and partial description of plenary home rule authority. *Hodges v. Oak Tree Realtors*, 363 Or 601, 610, 426 P3d 82 (2018) ("As a general rule, we avoid statutory interpretations that would render part of a statute redundant.") (citing *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 692, 318 P3d 735 (2014); ORS 174.010); *Arrowood Indem. Co. v. Fasching*, 369 Or 214, 233, 503 P3d 1233 (2022) ("When construing a statute, our task is to ascertain the legislature's intent.") (citing ORS 174.020) (hereinafter "*Arrowood*"). Plainly, there was no need to grant LPHAs limited

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Plaintiffs' counsel asserts that Defendant is arguing that it could totally ban the sale of Nicotine Products.

co-regulatory authority in SB 587 if local authority is plenary despite SB 587. Instead, ORS 431A.218(2)(a) is a limitation on LPHAs.

Additionally, the legislature required the Oregon Health Authority ("OHA") to ensure that state standards "are administered and enforced consistently throughout" Oregon. ORS 431A.218(5)(a).[3] As is plain and apparently undisputed, the scope of products to which Oregon's TRL applies is a state standard.[4] The legislature set many statewide standards in SB 587 including providing which qualifications must be met for TRL licensure, ORS 431A.198(2), the scope of products to which the TRL applies, ORS 431A.194; ORS 431A.190(2), (5), and how TRL licensees may be deprived of licensure, ORS 431A.202, among other standards in SB 587 and elsewhere in law. All state standards must be consistent statewide.

The text does not limit OHA's authority to ensuring that *OHA administers and enforces* state standards consistently—which would be an odd directive—but, more broadly, OHA is charged to *ensure* that state standards *are* administered and enforced consistently statewide irrespective of who is enforcing the standard. Indeed, since LPHAs *may choose* to "[a]dminister and enforce" state standards, it is imperative that OHA ensures consistent statewide

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3. This directive is only subject to ORS 431A.220, which is inapplicable to Defendant.

4. Defendant has argued at every stage of these proceedings that its prohibition on Flavored Products is a "standard" under ORS 431A.218(2)(a).

enforcement even when enforced by LPHAs. ORS 431A.218(2)(b). As with ORS 431A.218(2)(a), any interpretation of ORS 431A.218(5)(a) which leaves plenary home rule authority intact renders ORS 431A.218(5)(a) meaningless and redundant because OHA cannot ensure consistent statewide administration and enforcement of state standards if LPHAs can disregard state standards. *Hodges*, 363 Or at 610; ORS 174.010. This certainly includes LPHAs refusing to honor the state's TRL, which is the effect of WCO 878.

Plaintiffs' reading aligns with the legislature's intent to create uniformity. *Arrowood*, 369 Or at 233. Evidence of this intention is plentiful in SB 587, including the legislature proscribing local licensure, ORS 431A.218(7),[5] requiring that OHA ensure statewide uniformity in the enforcement of state standards, ORS 431A.218(5)(a), and requiring that any exercise of co-regulatory authority be "in addition to" the state's standards and qualifications, ORS 431A.218(2)(a). There would be no purpose for any of these provisions if the legislature did not seek uniformity which displaced home rule authority because leaving LPHAs free to contradict the legislature would ensure the

5. ORS 431A.220 applied to extremely few localities (Benton, Clatsop, Klamath, and Multnomah Counties). In addition to having a local TRL in place prior to January 1, 2021, the legislature required legacied licensure programs to have "on or before January 1, 2021… enforced standards described in ORS 431A.218(2)(a)[,]" *see* ORS 431A.220, which included "the qualifications described in ORS 431A.198[,]" ORS 431A.218(2)(a). This is a high bar, and there is presently a case against Multnomah County addressing this issue.

opposite of uniformity. The legislature's best evidence of its intention is the text, *State ex rel. Rosenblum v. Living Essentials, LLC*, 371 Or 23, 34, 529 P3d 939 (2023) (so stating), and the text insists that the baseline state standards enacted by the legislature must be uniform and uncontradicted by LPHAs despite the legislature's invitation for *some* co-regulation. There is nothing more *baseline* in a licensure statute than the conduct the license authorizes.

2. Legislative History Supports Plaintiffs' Reading.

Plaintiffs' reading of SB 587 is supported by legislative history. Mr. Shawn Miller of the Northwest Grocery Association ("NWGA") wrote in support of SB 587:

> The Northwest Grocery Association supports SB 587, which creates a statewide tobacco licensing program which would coordinate with the existing five County licensing programs. NWGA has always been concerned with a patchwork approach of local licensing programs and would rather have a coordinated state-wide approach versus additional Counties adopting their own programs.

Testimony, Senate Committee on Health Care, SB 587, Mar 1, 2021 (statement of Shawn Miller, Northwest Grocery Association); *Schwartz*, 332 Or App at 351 (other comments by Mr. Miller, including stating that TRL licensure was a "better approach than looking at banning different products or banning locations").

Concerns regarding the "patchwork" approach, as well as the importance of the support of "major retailers" such as those comprising the NWGA were

echoed by Senator Steiner Hayward who *sponsored* SB 587:

> I would note also that a lot of the major retailers who have outlets across the state are very supportive of this bill because there's starting to be a patchwork of licensure regulation in different counties around the state and they are eager to have a single system that they can use as the baseline and they don't have to have different rules for different stores in different counties.[6]

More importantly, Plaintiffs' interpretation, bolstered by this legislative history, does not contradict the plain text. *Suchi v. SAIF*, 238 Or App 48, 55, 241 P3d 1174 (2010), *rev den*, 350 Or 231, 253 P3d 1080 (2011) ("[W]e are required not to construe a statute in a way that is inconsistent with its plain text.").

The Opinion criticized this argument, claiming that Plaintiffs "[c]herry-picked" quotations made by non-legislators or single legislators. *Schwartz*, 332 Or App at 358 (citing *State v. Kelly*, 229 Or App 461, 466, 211 P3d 932, *rev den*, 347 Or 446, 223 P3d 1054 (2009)). The Opinion failed to note that Senator Steiner Hayward sponsored SB 587. Interestingly, the Opinion did not cite any statement by a legislator on this issue and instead relied heavily on the testimony of two non-legislator witnesses whose testimony *did not* contradict Plaintiffs' interpretation of SB 587 but did contradict the plain text. *Id.* (citing statements of Rach[a]el [sic] Banks and Gwyn Ashcom).

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6. Audio Recording, Joint Committee on Ways and Means, SB587, June 6, 2021, at 1:43:31-1:43:55 (comments of Sen. Steiner Hayward) https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021061162 (accessed February 5, 2025).

With respect to Ms. Banks of OHA, her testimony requested that the legislature "not preempt local governments from enacting stronger, tailored policies that reflect community needs and values" while citing laws being considered by counties believed to be excepted from state licensure (*e.g.*, Multnomah County). *Id.* at 357, 550 P3d 20. However, Ms. Banks' testimony—if adopted or even considered by any legislator—does not contradict Plaintiffs' view that local authority is *not plenary* under SB 587 and LPHAs are limited to the authority described in ORS 431A.218(2)(a) which provides the guiderails for local ordinances. Moreover, it appears Ms. Banks' testimony was not adopted since the plain language of SB 587 requires OHA—the state agency for which Ms. Banks works—to ensure consistent statewide administration and enforcement of state standards. ORS 431A.218(5)(a). Moreover, even if Ms. Banks' testimony is persuasive, it cannot be used to contradict the plain text which supports Plaintiffs' conclusion. *Halperin v. Pitts*, 352 Or 482, 494–95, 287 P3d 1069 (2012) (disapproving use of legislative history to rewrite an unambiguous statute); *Suchi*, 238 Or App at 55; ORS 174.010.

As for Ms. Ashcom, she testified that Washington County supported a statewide TRL that "ensures local public health can pass stronger time, place, manner requirements, and enforcement mechanisms." *Schwartz*, 332 Or App at 350–51. Nothing in that statement supports Defendant's conclusion that its authority is plenary or contradicts Plaintiffs' conclusion that ORS

431A.218(2)(a) provides the parameters of permissible ordinances. Indeed, *time, place, and manner* restrictions are the exact types of local laws Plaintiffs argued are permitted under ORS 431A.218(2)(a). Moreover, it appears Ms. Ashcom's testimony was not adopted since, in addition to other limitations in ORS 431A.218, the legislature placed restrictions on LPHA-level enforcement mechanisms. ORS 431A.218(4).

The Opinion cites Ms. Ashcom further, referencing Washington County's stated intention to limit sales of Flavored Nicotine Products "to establishments that are 21 and over" and prohibit price promotions. *Schwartz*, 332 Or App at 351. However, nothing in that statement supports Defendant's claim to plenary local authority or contradicts Plaintiffs' assertion that local authority is narrow. Indeed, both proposals are textbook examples of what Plaintiffs argued is *permitted* under ORS 431A.218(2)(a). Limiting the sale of Flavored Nicotine Products to "21-and-up" establishments would be a *qualification*, not a blanket prohibition. Prohibiting price promotions would be a "standard for regulating" the sale of Nicotine Products governing *the manner* in which sales take place.

When the legislature creates a statewide, state-issued, shall-issue license under a statewide regulatory scheme and provides specific and narrow co-regulatory authority for local governments, that action unambiguously expresses an intention to preclude local laws which transgress the bounds of that express authority. *Rogue Valley Sewer Servs.*, 357 Or at 450–51.

Otherwise, the provision of narrow co-regulatory authority is a meaningless, redundant, and partial description of otherwise plenary local authority. Moreover, plenary local authority which supersedes the legislature's extension of liberty through a license contradicts the intention of creating a means by which individuals can obtain state permission to engage in the licensed conduct.

Because Defendant's authority as a LPHA is not plenary, Defendant must justify WCO 878 under SB 587, specifically ORS 431A.218(2)(a).

B. <u>Argument in Support of Second Proposed Rule of Law</u>.

The Court should conclude that ORS 431A.218(2)(a) does not authorize LPHAs to enact laws prohibiting licensed conduct because: (1) prohibitions are not "standards for regulating" Nicotine Products or "qualifications" for TRL licensure; (2) the authority to "regulate" does not include the authority to blanketly prohibit; and (3) prohibitions on licensed conduct substitute local standards for state standards contrary to multiple provisions of SB 587. Additionally, contrary to the Opinion, WCO 878 is not a restriction on ingredients which may be included in Nicotine Products. Rather, WCO 878 is a prohibition on otherwise licensed conduct—the sale of Nicotine Products—which exceeds the narrow grant of co-regulatory authority to LPHAs.

Defendant asserted that the legislature's narrow grant of authority in ORS 431A.218(2)(a) *expressly* authorized Defendant to prohibit licensed conduct. The Trial Court disagreed and specifically found that prohibiting licensed

conduct is not a "standard for regulating" Nicotine Products but, instead, erases the statewide standards. ER-548–49. The Court of Appeals sidestepped these questions entirely by concluding that WCO 878 is a restriction on certain ingredients. *Schwartz*, 332 Or App at 356–57.

1. Washington County Ordinance 878 is a Prohibition on Authorized Conduct, Not a Restriction on Ingredients.

(a) *Washington County Ordinance 878 does not prohibit certain ingredients*.

The Opinion erroneously determines that WCO 878 "largely amount[ed] to a restriction on certain ingredients" rather than—as framed by the plain text, parties, *amici*, and Trial Court—a prohibition on state-licensed conduct. *Schwartz*, 332 Or App at 356–57 (brackets supplied). This erroneous interpretation of fact and law needlessly introduced an issue of fact (addressed at length by proposed *amici*) and caused several downstream errors which informed the Opinion. The Court of Appeals reached this conclusion without presentation by the parties or *amici*, eliciting answers at oral argument,[7] or any analysis of the text or legislative history. Indeed, no portion of the text or legislative history uses the word *ingredient*.

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7. The Honorable Senior Judge DeVore's questioning asked whether LPHAs were preempted from prohibiting "impurities" or "mercury" from Nicotine Products. Oral Argument at 23:16-25:35 (available at https://oregoncourts.mediasite.com/mediasite/Channel/default/watch/29548bbf4e1c49efb11c33980c7360591d).

When interpreting a law, courts begin with the plain text in its proper context but may consider legislative history that is "useful to the court's analysis" of the text and context. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009); *State v. Moore*, 174 Or App 94, 98, 25 P3d 398 (2001) (quoting *Hillsboro v. Housing Devel. Corp.*, 61 Or App 484, 489, 657 P2d 726 (1983) ("The same rules that govern statutory construction also apply to the construction of municipal ordinances."). Courts resort to maxims of construction to resolve any remaining uncertainty. *Id.* However, courts are bound by the text the legislative body chose to articulate its intent. *Arrowood*, 369 Or at 233, 503 P3d 1233; *Lane County v. R.A. Heintz Const. Co.*, 228 Or 152, 158, 364 P2d 627 (1961) (courts may not insert what has been omitted or omit what has been inserted); *Halperin*, 352 Or at 494–95 (disapproving use of legislative history to rewrite an unambiguous statute); ORS 174.010; ORS 174.020. There is no *Gaines* analysis in the Opinion supporting this conclusion.

Beginning with the text, Defendant's definition of "Flavored Product" does not mention ingredients. ER-165–66; WCO 878, Exhibit A, 2.20 B. Instead, the definition specifically includes "[a]ny synthetic nicotine product[,]" *Id.*, which, as defined, is "[a]ny product designed for human consumption where the nicotine was created and produced in a laboratory and *not derived from tobacco*." ER-166; WCO 878, Exhibit A, 2.20 E (emphasized). Contrary to the Court of Appeals' bare conclusion, the text of WCO 878 shows no

concern for the ingredients used in the product and is instead concerned with the *flavor* of the final product. Likewise, the ban itself plainly prohibits the *sale of products* while making no mention whatsoever of ingredients used to manufacture those products. ER-166; WCO 878, Exhibit A, 2.30 B. The Opinion sharply departed from the plain and unambiguous text and supplied language which Defendant neither used nor intended to use.

In context, this interpretation makes less sense. Defendant's prohibition plainly applies to retailers, not the manufacturers who control a product's ingredients; Nicotine Products do not come with listed ingredients like a candy bar. Further, as evident from its definition of synthetic nicotine products, Defendant's prohibition expressly applies to products that were "not derived from tobacco" and, therefore, would naturally not taste like tobacco. ER-166; WCO 878, Exhibit A, 2.20 E. This is best explained by proposed *amici*. However, Defendant did not dispute that:

> Vaping Liquids are consumable liquids which consist of vegetable glycerin, propylene glycol, water, commercial food flavoring, and nicotine (if desired and at varying concentrations) or cannabidiol ("CBD") (if desired and at varying concentrations).

ER-7 (¶25) (industry terms include "vape juice" and "e-liquid"). For any synthetic nicotine product, none of the *ingredients* comprising the *product* are tobacco or taste like tobacco (or they would be tobacco products), so calling the prohibition a "restriction on certain ingredients" makes no sense. *Schwartz*, 332

Or App at 357.[8] Vaping Liquids undoubtedly meet the definition of synthetic nicotine product and are the very "substance… sold for the purpose of being vaporized or aerosolized by" inhalant delivery systems as defined in WCO 878. ER-166; WCO 878, Exhibit A, 2.20 C.

In fact, the products prohibited under WCO 878 extend to other harm reduction tobacco alternatives such as nicotine pouches (*e.g.*, Zyn pouches)[9] and Tobacco Alternatives that provide substitutes for cancer-causing tobacco leaves (*e.g.*, Black Buffalo long cut and pouches).[10] Because these products neither contain, nor are derived from, tobacco but contain natural or synthetic nicotine, they are prohibited under WCO 878.

Further, the Opinion's reasoning fails to prevent the outcome it

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8. It is akin to saying that Defendant, by banning all juices that do not taste like apple juice, is not banning orange, grape, or grapefruit juices but is restricting the ingredients used in juices. Since orange, grape, and grapefruit juices do not come from apples, they would never taste like apples and the result would be a prohibition on orange, grape, and grapefruit juice products.

9. ZYN, FAQ, US.ZYN.COM (February 7, 2025, 12:15 PM), https://us.zyn.com/questions/ ("In addition to nicotine salt, ZYN contains only food-grade ingredients. These include a granulation agent, fillers, pH balancers, sweeteners and flavorings.").

10. Black Buffalo, What are Black Buffalo Products Made of?, BLACKBUFFALO.COM https://help.blackbuffalo.com/article/zk0djk9thx-what-are-black-buffalo-products-made-of ("Our base ingredient is barn cured leafy greens from the cabbage family. Our farm-to-can process is a trade secret. But we'll say this: we found a way to make a specific variety of edible cabbage leaves behave like tobacco with added food-grade ingredients and pharmaceutical-grade nicotine.").

seemingly sought to avoid. Plaintiffs argued that, if LPHAs can prohibit the licensed sale of some Nicotine Products, then there is no reason why LPHAs cannot locally nullify Oregon's TRL entirely by prohibiting the sale of all Nicotine Products. The Court of Appeals ostensibly sought to avoid this conclusion by stating that restrictions on ingredients are allowed, implying that total prohibitions on products are not. However, under the Opinion, LPHAs can ban a single ingredient common to all Nicotine Products, *nicotine*, or a list ingredients that (as a list) are common to all Nicotine Products to achieve the same result. If the legislature intended to confer such broad authority, then requiring that local "standards for regulating" Nicotine Products be "in addition to" state standards, ORS 431A.218(2)(a)—as well as the requirement that OHA ensure consistent enforcement and administration of state standards, ORS 431A.218(5)(a)—are meaningless and redundant surplusage.

Interpreting WCO 878 as a prohibition on *certain ingredients* is not supported by legislative history. The only legislative history the parties provided refers to concerns about Flavored Nicotine Products irrespective of the products' ingredients or natural flavors. ER-147–68. Defendant was abundantly clear that its intention was to ban all Nicotine Products that do not contain tobacco when stating that its intention to, "[r]estrict all flavored tobacco and synthetic nicotine products (e.g., bubble gum, mint, menthol, mango) **regardless of age** at any retailer with only traditional (plain) tobacco products

(e.g., cigarettes, chew, cigars) remaining." ER-156 (original). In fact, WCO 878 primarily bans harm reduction tobacco alternatives and only allows the sale of more harmful products containing tobacco.

Last, reading WCO 878 as a restriction on certain ingredients presents federal preemption issues; indeed, caselaw frequently allows state and local prohibitions on Flavored Nicotine Products to be enforced because courts have determined they *are not* restrictions on ingredients. 21 USC §387p(a)(2)(A); *see generally R.J. Reynolds Tobacco Co. v. Cty. of L.A.*, 471 F Supp 3d 1010 (CD Cal 2020). To the extent the WCO 878 is a restriction on ingredients, that interpretation is contrary to the great weight of federal rulings construing similar ordinances to *not be* impermissible restrictions on ingredients and would introduce federal preemption. *Id.* at 1014–16 (citing *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F3d 428 (2d Cir. 2013)).

The Court of Appeals substantially rewrote unambiguous provisions of WCO 878 without support from the text in context, legislative history, or even argument by the parties or *amici* in conflict with ORS 174.010. Doing so sidestepped the pressing questions posed by this case which are now before the Court. This erroneous interpretation should be reversed.

(b) *Washington County Ordinance 878 prohibits otherwise licensed conduct*.

The only consistent way to read WCO 878 is that it blanketly prohibits TRL licensees from engaging in the conduct of selling Flavored Nicotine

Products which is conduct TRL licensees are authorized and licensed to engage in under Oregon's statewide, state-issued, shall-issue TRL.

SB 587 affirmatively gives permission to TRL licensees to engage in the sale of Nicotine Products, which is unlawful without a TRL. ORS 431A.194. Defendant advances a bizarre argument that a license does not authorize conduct if the conduct was legal prior to the licensure requirement. COA Op. Br., 21. Defendant's interpretation ignores the dictionary definition and legal effect of a "license" as well as the routine legislative methodology of authorizing conduct by prohibiting the conduct subject to a license authorizing the conduct. *E.g.*, ORS 9.160(1) ("Bar membership required to practice law");[11] ORS 744.053 ("Requirements to be licensed as insurance producer for class of insurance"); ORS 471.282(12) (direct shipment of alcohol); ORS 676.110(1) ("Use of title 'doctor'"); ORS 690.360(1)(a) (license to perform in a field of medical practice). This pattern is consistent with the dictionary definition of the word *license*.[12]

When DOR granted Plaintiffs their TRLs, the state gave Plaintiffs permission to engage in the retail sale of all Nicotine Products to which the

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11. Surely Defendant concedes that an attorney's license to practice law *authorizes* attorneys to engage in the conduct of practicing law even though practicing law was *legal* before the creation of the license.

12. Merriam-Webster, License, MERRIAM-WEBSTER ONLINE DICTIONARY (February 7, 2025, 1:58 PM), https://www.merriam-webster.com/dictionary/license.

TRL applies. Meanwhile, WCO 878 plainly prohibits and was intended to prohibit Plaintiffs from engaging in the very conduct authorized by their TRLs.

The plain text of WCO 878 reads that "[n]o person shall sell, offer for sale, or otherwise distribute any flavored tobacco product or flavored synthetic nicotine product." ER-166; WCO 878, Exhibit A, 2.30 B. This section does not prohibit the purchase, possession, manufacture, or shipment of Flavored Nicotine Products. This section only prohibits the conduct expressly authorized by Oregon's TRL.

Plaintiffs' interpretation is consistent with WCO 878's legislative history which shows Defendant's intention to prohibit all Nicotine Products which do not contain tobacco and taste solely like tobacco. ER-156 (quoted, *supra*). Plaintiffs' interpretation is also consistent with Defendant's arguments below. *E.g.*, ER-67, 181 (WCO 878 "bans the sale of flavored tobacco"); ER-183 (WCO 878 "bans the sale of products aimed at youths, including flavored tobacco"); COA Op. Br., 1 (WCO 878 "banned the sale of flavored tobacco to anyone in the county, regardless of age.").

There is no ambiguity concerning the state's intention to authorize the conduct of selling Nicotine Products by its statewide, state-issued, shall-issue TRL; nor is there any ambiguity concerning Defendant's intention to prohibit identical conduct by enacting WCO 878. This is the proper construction of both laws for analyzing preemption.

2. Washington County Ordinance 878 is not a "Standard for Regulating" or "Qualification".

The legislature unambiguously limited the co-regulatory authority of LPHAs to enacting "standards for regulating" Nicotine Products and "qualifications" for TRL licensure that are "in addition to" those the legislature articulates. This narrow grant of authority does not include enacting prohibitions on licensed conduct. The Court should find that prohibitions on the sale of any Nicotine Product by LPHAs are not within local authority under ORS 431A.218(2)(a).

Defendant contends that the authority conferred by ORS 431A.218(2)(a) is *plenary*, and that the legislature intended to authorize LPHAs to enact any and all ordinances related to the retail sale of Nicotine Products. However, this contention cannot be harmonized with the text. SB 587 provides LPHAs co-regulatory authority with the state, provided that any co-regulation be "in addition to"—rather than *instead of* or *in conflict with*—the state's "standards" and "qualifications" related to Nicotine Products. ORS 431A.218(2)(a). At a minimum, local ordinances cannot interfere with or infringe upon the scope, validity, or exclusivity of Oregon's TRL, including the consistent statewide enforcement and administration of state standards. ORS 431A.218(5)(a).

As rebutted below, Defendant argued, and the Court of Appeals agreed, that Defendant's co-regulatory authority is meaningless if Defendant cannot enact *this particular* prohibition. The Opinion mischaracterizes Plaintiffs'

argument to be that "the legislature had intended for SB 587 to divest political subdivisions of any ability to regulate tobacco products" or that "the legislature wished to entirely preempt local governments from regulating tobacco and synthetic nicotine products. *Schwartz*, 332 Or App at 356–57. Not only did Plaintiffs never make either argument, but Plaintiffs also thoroughly argued the opposite.

(a) *Washington County Ordinance 878 is not a qualification.*

As used in ORS 431A.218(2)(a) and ORS 431A.198(2)(c), WCO 878 is not a qualification which must be met prior to receiving a TRL. Therefore, those statutes allowing LPHAs to enact additional qualifications for TRL licensure are unaffected by Plaintiffs' interpretation of ORS 431A.218(2)(a). At a minimum, Plaintiffs' interpretation does not render ORS 431A.218(2)(a) and ORS 431A.198(2)(c) meaningless.

Initially, Defendant argued that WCO 878 was both a "standard" and "qualification" under ORS 431A.218(2)(a). ER-54. However, Defendant quickly abandoned that argument upon realizing WCO 878 is plainly not a qualification and, even if it was, it was invalid because Defendant had not entered an intergovernmental agreement with DOR. ORS 431A.198(2)(c); ORS 431A.212. At oral argument, Defendant did not contend that WCO 878 was a qualification. *E.g.*, ER-501. Both lower courts appeared to agree and analyzed WCO 878 as a "standard for regulating" rather than a qualification. ER-538;

Schwartz, 332 Or App at 356–57.

> The state's qualifications are provided in ORS 431A.198:
>
> (2) To be qualified for licensure under this section, a premises:
>
> (a) Must be a premises that is fixed and permanent;
>
> (b) May not be located in an area that is zoned exclusively for residential use; and
>
> (c) Must meet any qualification for engaging in the retail sale of tobacco products and inhalant delivery systems enacted as an ordinance by the governing body of a local public health authority under ORS 431A.218, provided that the department has knowledge of the qualification pursuant to an agreement entered into under ORS 431A.212.

ORS 431A.198(2).

Usually, a qualification refers to a "condition or standard that must be complied with (as for the attainment of a privilege)" akin to those specified under ORS 431A.198(2)(a)–(b).[13] Arguing that a prohibition on engaging in licensed and authorized conduct is a qualification for engaging in the same licensed and authorized conduct is nonsensical, especially when taken to its logical extent since Defendant certainly could not pass off a total prohibition on selling Nicotine Products as a qualification for being licensed to sell Nicotine Products. Regardless, nothing in WCO 878's text or legislative history remotely

13. Merriam-Webster, Qualification, MERRIAM-WEBSTER ONLINE DICTIONARY (February 7, 2025, 2:10PM), https://www.merriam-webster.com/dictionary/qualification.

demonstrates any intention to create an additional qualification for Oregon's TRL.

However, these provisions are not meaningless if the Court adopts Plaintiffs' interpretation. As Plaintiffs have repeatedly argued, there are innumerable qualifications Defendant *could* adopt which would not interfere with the scope, validity, and exclusivity of Oregon's TRL. Among these are: requiring TRL licensees to be at least 21 or older, requiring employees to be 21 or older, requiring TRL licensees to be "21-and-up" establishments, requiring TRL licensees or employees to pass a background check, additional zoning requirements, etc. Plaintiffs specifically argued that time, *place*, and manner ordinances would likely be permissible, depending on the ordinance.

The Opinion argued that ORS 431A.218(6)(a) (disallowing ordinances that prohibit licensees from being co-located with a pharmacy) serves no purpose if SB 587 divested political subdivisions of "any ability" to regulate Nicotine Products, and that Plaintiffs' reading would render ORS 431A.218(6)(a) meaningless surplusage. *Schwartz*, 332 Or App at 357. Plaintiffs' interpretation does not render that section surplusage because—absent ORS 431A.218(6)(a)—prohibiting TRL licensees from co-locating with pharmacies would be a perfectly acceptable *qualification* for applicants which does not blanketly prohibit the use of a TRL by a licensee (like WCO 878) or otherwise interfere with the scope, validity, or exclusivity of Oregon's TRL.

The same is true for the Opinion's citation to Ms. Ashcom's statements regarding Defendant's intention, at the time, to limit the sale of Flavored Nicotine Products to "establishments that are 21 and over[.]" *Schwartz*, 332 Or App at 351. Again, this ordinance would have been an acceptable qualification on licensees because it does not blanketly prohibit licensees from engaging in the full scope of conduct authorized by the TRL but provides a condition that must be met before a retailer is licensed.

WCO 878 is plainly not a qualification for TRL licensure, nor was it intended to be. Plaintiffs' interpretation gives full effect to the text and legislative history of SB 587 and, contrary to the Opinion, does not render any provision of SB 587 surplusage.

(b) *Washington County Ordinance 878 is not a "standard for regulating" Nicotine Products.*

As used in ORS 431A.218(2)(a), WCO 878 is not a "standard for regulating" the retail sale of Nicotine Products. WCO 878 is a prohibition on conduct that Oregon's TRL authorizes. Plaintiffs' interpretation does not render ORS 431A.218(2)(a) meaningless.

Oregon's state standards are expressed throughout SB 587 and elsewhere in law. Standards enacted by SB 587 include: what qualifications must be met for licensure, ORS 431A.198(2), the scope of products to which the TRL applies, ORS 431A.194; ORS 431A.190(2), (5), and how licensees may be deprived of licensure, ORS 431A.202, among others. Additionally, the

legislature has enacted numerous other standards relating to the collection of taxes, identification, and minimum purchase age, some of which are specifically cited in SB 587. *E.g.*, ORS 431A.218(2)(b).

Disputed below was the meaning of "standards for regulating" in ORS 431A.218(2)(a). Plaintiffs cannot locate another Oregon statute using that phrase. However, as noted in the Opinion, a "standard" can mean "'something that is established by authority *** as a model or example to be followed'[.]"[14] *Schwartz*, 332 Or App at 357 (quoting *Webster's Third New Int'l Dictionary* 2223 (unabridged ed 2002)). Meanwhile, caselaw has defined "'regulate' to mean 'to govern or direct according to rule" and "to bring under the control of law or constituted authority[.]" *For a Judicial Examination & Judgment of the Court As to the Regularity v. Rosenblum*, 324 Or App 221, 240, 526 P3d 798, 810 (2023) (quoting *Doe v. Medford Sch. Dist. 549C*, 232 Or App 38, 52, 221 P3d 787, 795 (2009); *Webster's Third New Int'l Dictionary* 1913 (unabridged ed 1993)).

In context, "standards for regulating" refers to establishing "a model or

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14. The Opinion's second definition—"a definite level or degree of quality that is proper and adequate for a specific purpose[,]" *Schwartz*, 332 Or App at 357—is unavailing for several reasons. Most obviously, allowing quality standards such as those raised at oral argument by Senior Judge DeVore (pertaining to toxic substances or "impurities") could implicate federal preemption. 21 USC §387p(a)(2)(A). Moreover, other courts have declined to interpret flavor prohibitions as product standards, in part to avoid federal preemption. *See generally R.J. Reynolds Tobacco Co.*, 471 F Supp 3d 1010.

example to be followed" for how to engage in the retail sale of Nicotine Products and then to "govern or direct" retailers accordingly. In other words, LPHAs may determine *how* or *the manner in which* Nicotine Product sales occur but cannot determine *whether* they can occur (a blanket prohibition). This is consistent with other mentions of *standards* in SB 587 governing *how* to engage in collecting taxes and delivery sales. *See* ORS 431A.212(3)(b) (citing ORS 323.005–.428, ("Cigarette Tax Act"), ORS 323.500–.645 (also concerning taxes), ORS 323.700–.730 (concerning delivery sales)).

Plaintiffs' definition is also consistent with the text, context, and legislative history of SB 587. There is no indication in ORS 431A.218(2)(a) or legislative history that the legislature intended to authorize LPHAs to prohibit any and all uses of the statewide, state-issued, shall-issue TRL by enacting a total ban on the sale of Nicotine Products. Indeed, Defendant has repeatedly conceded it would be preempted from doing so. ER-501–04; ER-539–40. Nevertheless, Defendant has never supported its conclusion that a partial or majority ban is permitted while a total ban is not or articulated where the line should be drawn. SB 587's text certainly does not *draw a line* prescribing *how much* product could be prohibited (*e.g.*, can all but hand rolled cigars be prohibited?). Absent any support for drawing a distinction between partial, majority, or total prohibitions, it is logical to conclude either:

(a) LPHAs may not prohibit the sale of any Nicotine Products; or

(b) LPHAs may prohibit all Nicotine Products (or any subset of Nicotine Products) in the face of Oregon's TRL.

There is no support for reaching the latter conclusion. However, Plaintiffs' reading does not render ORS 431A.218(2)(a) meaningless. LPHAs can enact a variety of laws governing *how* retail sales must occur, including: mandatory age verification, electronic age verification, employee trainings, price promotion prohibitions, product display laws, etc.

Contrary to Defendant's position, the legislature expressly provided that *state standards* must be administered and enforced consistently statewide. ORS 431A.218(5)(a). As discussed above, legislative history also supports an intent to establish uniformity. At a minimum, statewide uniformity includes the ability to receive a statewide, state-issued, shall-issue TRL and engage in all conduct it authorizes, including selling any Nicotine Product not prohibited by state law.

3. The Power to Regulate Does Not Confer the Power to Prohibit.

Despite the legislature's choice of language, Defendant contends that the phrase "standards for regulating" means *to regulate*, and that the power *to regulate* includes, *inter alia*, the power to blanketly prohibit. Plainly, an outright prohibition on the sale of Nicotine Products is not a "standard for regulating" the licensed conduct of selling Nicotine Products, but a prohibition on licensed conduct.

Defendant solely relies on the holding in *Northwest Advancement* to

support its contention that the authority to regulate includes the authority to blanketly prohibit. *See Northwest Advancement, Inc. v. State Bureau of Lab., Wage & Hour Div.*, 96 Or App 133, 772 P2d 934 (1989). Defendant misconstrues that holding. The language Defendant relies on comes from the explanation that the appellants had overstated the holding in *Peterson*. *Id.* at 138 ("Appellants rely on [*Peterson*], for the proposition that a grant of power to 'regulate' does not include the power to 'prohibit.' The holding in *Peterson*, however, is not that broad.") (citing *Or. Newspaper Pub. v. Peterson*, 244 Or 116, 451 P2d 21 (1966)). The court explained that the *Peterson* opinion "held that the power to regulate one area, pharmacy, does not by implication include the power to regulate another area, advertising." *Id*. at 139. It did not reach the broad holding Defendant asserts. Rather, in the case before it, the court held:

> [T]he legislature authorized [the Oregon Wage and Hour Commission] to *determine suitable hours* of employment for minors and to promulgate rules regulating those hours. Under that delegation of authority, WHC had the ability to determine that no suitable hours of employment exist for certain minors in certain occupations, and to promulgate rules to that effect.

Id. (brackets supplied) (emphasized). There, it was the power to determine suitable hours—not simply the power to regulate hours—that conferred the prohibition power.

Defendant's reliance on *Northwest Advancement* is misplaced because Defendant cannot cite language conferring a similar authority to, for instance,

determine suitable Nicotine Products which can be sold using Oregon's TRL and then to regulate accordingly. Instead, the *legislature* determines the Nicotine Products it authorizes its licensees to sell since it is the legislature's *permission* to sell Nicotine Products that is given through the TRL.

Further, defining "prohibit" and "regulate" identically as Defendant urges makes the many statutory uses of both redundant. *Hodges*, 363 Or at 610. Oregon's judicial and legislative branches routinely differentiate between the powers to regulate and prohibit. *See e.g.*, *Kramer v. Lake Oswego*, 365 Or 422, 446, 446 P3d 1 (2019) ("We have held in the context of the public's right to fish that the state… may regulate and even prohibit the public's right to fish"); *Hillsboro v. Purcell*, 306 Or 547, 554, 761 P2d 510 (1988) ("The relevant distinction is between outright prohibitions… on the one hand, and regulations that do not foreclose expression entirely but regulate when, where and how it can occur."); *Terry v. Portland*, 204 Or 478, 511, 269 P2d 544 (1954) ([City]… may license and regulate, or prohibit entirely"); *Portland v. Schmidt*, 13 Or 17, 22, 6 P 221 (1885) (distinguishing between the power to "license, regulate, and restrain bar-rooms and drinking-shops" and the power to "prohibit their sale generally"); ORS 166.173(1) ("A city or county may adopt ordinances to regulate, restrict or prohibit the possession of loaded firearms in public places[.]"); ORS 527.722(1) ("no unit of local government shall… take any other actions that prohibit, limit, regulate, subject to approval or in any other

way affect forest practices"); Or. Const. Art. XI, § 2. (legal voters have "the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors[.]").

Defining these terms identically would defy the judiciary's responsibility to simply "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[,]" ORS 174.010, and allows the legislature to abdicate its obligation to Oregonians tasked with following, and the judiciary tasked with interpreting, its laws to be clear in the language it chooses to articulate its intentions. *Bellshaw v. Farmers Ins. Co.*, 326 Or App 605, 616–17, 533 P3d 40 (2023) ("We therefore cannot contravene the express language of the statute simply because the final text does not precisely track the intended purpose."); *Qwest Corp v. Portland*, 275 Or App 874, 895, 365 P3d 1157 (2015) (declining to, based on legislative history, "rewrite an unambiguous statute contrary to its unambiguous plain text.") (quoting *Halperin*, 352 Or at 494–95 ("It is one thing to resort to legislative history to resolve an ambiguity in statutory phrasing… [i]t is another thing entirely, however, to resort to legislative history as a justification for inserting wording in a statute that the legislature, by choice or oversight, did not include. Legislative history may be used to identify or resolve ambiguity in legislation, not to rewrite it.")).

More fundamentally, even if the word "regulate" includes the authority to

prohibit, the legislature adopted the language "standards for regulating." ORS 431A.218(2)(a). Defendant and the Court of Appeals each inappropriately rely on one-half of the language used by the legislature, thereby omitting what has been inserted. *R.A. Heintz Const. Co.*, 228 Or at 158; ORS 174.010. Meanwhile, Plaintiffs' interpretation, which considers the entire phrase, limits LPHAs to determining the standards to which retailers will be held while engaged in the retail sale of Nicotine Products. These would largely include standards such as *how* or the *manner in which* Nicotine Products are sold, stored, or advertised, but would disallow blanket prohibitions on sales.

While the legislature certainly intended to confer some co-regulatory authority upon LPHAs, there is no indication in the text, context, or legislative history suggesting that this narrow scope of co-regulatory authority does or was intended to include the authority to locally prohibit the sales.

4. Washington County Ordinance 878 Displaces State Standards and Qualifications.

Even if the Court concluded WCO 878 was a "standard for regulating," Nicotine Products, it is still inconsistent with ORS 431A.218(2)(a) because the state has set a standard describing the scope of Nicotine Products to which Oregon's TRL applies—*i.e.*, the scope of the state's permission—and WCO 878 erases the state's standard, substitutes its own standard, and requires inconsistent enforcement and administration of Oregon's standard.

As found by the Trial Court, the "standards for regulating" and

"qualifications" authorized under ORS 431A.218(2)(a) must be "in addition to" the state's standards and qualifications as opposed to *instead of* the state's standards and qualifications. ER-548. This is not only consistent with the use of the words "in addition to" in the plain text but also the context provided by other portions of SB 587, such as the requirement that *state standards* be administered and enforced consistently statewide, ORS 431A.218(5)(a), and that the state's license—or *permission*—be exclusive, subject to an inapplicable exception. ORS 431A.218(7); ORS 431A.220.

Defendant claims that its prohibition on Flavored Products (*i.e.*, Defendant's definition of the scope of products to which Oregon's TRL applies) is a *standard* or *standard for regulating* Nicotine Products. However, the legislature has articulated this standard. ORS 431A.194 (providing that a person who has a TRL may sell Nicotine Products); ORS 431A.190(2), (5) (defining the products). This puts Defendant in an impossible position: either the scope of products TRL licensees may sell is a "standard," in which case it was set by the state, or else its prohibition is not a "standard for regulating" and not authorized under ORS 431A.218(2)(a).

The legislature plainly intended its license to apply to a broad range of Nicotine Products irrespective of flavor or other quality. In ORS 431A.175, the legislature defined inhalant delivery systems as:

[a] component of a device described in this subparagraph or a

> substance **in any form sold for the purpose of being vaporized or aerosolized by a device** described in this subparagraph, whether the component or substance is sold separately or is not sold separately.

ORS 431A.175(1)(a)(A)(ii) (emphasized).

Also in ORS 431A.175, the legislature defined tobacco products as:

> Bidis, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco and other forms of tobacco, **prepared in a manner that makes the tobacco suitable for chewing or smoking** in a pipe or otherwise, or for both chewing and smoking" and

Id. at (1)(b)(A), (B) (emphasized). The legislature also included "[c]igarettes as defined in ORS 323.010(1)" in this definition. *Id.*

The legislature defined cigarettes as "any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use and consists of or contains:"

> (a) **Any roll of tobacco** wrapped in paper or in any substance not containing tobacco;
>
> (b) **Tobacco, in any form**, that is functional in the product and that, because of its appearance, the type of tobacco used in the filler or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette;
>
> (c) **Any roll of tobacco** that is wrapped in any substance containing tobacco and that, because of its appearance, the type of tobacco used in the filler or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (a) of this subsection; or

> (d) A roll for smoking that is of any size or shape and that is made wholly or in part of tobacco, **irrespective of whether the tobacco is pure or flavored, adulterated or mixed with any other ingredient**, if the roll has a wrapper made wholly or in greater part of tobacco and if 1,000 of these rolls collectively weigh not more than three pounds.

ORS 323.010(1) (emphasized).

The legislature was plain in setting its standard and requiring that standard to be applied consistently statewide. As such, Defendant cannot substitute its judgment for the legislature's.

C. <u>Argument in Support of Third Proposed Rule of Law</u>.

The Court of Appeals utilized established preemption analyses but, due to analytical errors, reached an incorrect conclusion. In addition to erroneously interpreting WCO 878 as a restriction on ingredients, the Opinion fails to consider and give effect to state licensure as an express and affirmative grant of liberty to engage in conduct. Instead, the Opinion regards state licensure as only a restriction on liberty. Even within established preemption analyses, the correct construction demands the opposite conclusion to that reached below.

Alternatively, SB 587 and Oregon's TRL present good cause for extending or modifying the existing preemption framework because established preemption analyses do not lend themselves to analyzing the legislature's express and affirmative grant of a liberty interest (such as a license) against a local prohibition.

Broadly, preemption occurs when a local law is "'incompatible' with

state law, 'either because both cannot operate concurrently or because the legislature meant its law to be exclusive.'" *Owen v. Portland*, 368 Or 661, 667, 497 P3d 1216 (2021) (quoting *La Grande/Astoria v. PERB*, 281 Or 137, 148, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978)). In short, there are two preemption types: "conflict preemption" and "express preemption." WCO 878 is preempted under both theories.

1. Threshold Issue: The Legislature Affirmatively Authorizes the Retail Sale of Nicotine Products Through its License.

In addition to other issues of construction, Defendant and the Court of Appeals' analysis were hampered by their failure to consider the effect of state licensure on TRL licensees. Defendant repeatedly argued that SB 587 did not "legalize" selling Nicotine Products. COA Op. Br., 21 (criticizing the Trial Court's ruling as a "determination that" SB 587 "legalized flavored tobacco."); COA R. Br., 11 (SB 587 "did not 'legalize' tobacco of any kind, flavored or unflavored, but instead required that all tobacco (which was already legal) must be sold pursuant to a state-wide licensing program."). Meanwhile, the Opinion dismissed the effect of licensure entirely, stating that WCO 878 "is not preempted merely because it prohibits the sale of a product which is allowed, in certain circumstances, to be sold under Oregon's scheme for TRL." *Schwartz*, 332 Or App at 359.

Contrary to these bare conclusions, the very creation of Oregon's TRL extends a liberty interest to licensees. A license grants "permission to act" and

is "a permission granted by competent authority to engage in a business or occupation or in an activity otherwise unlawful."[15] *See Wang v. Dep't of Revenue, No. TC-MD 150422C*, 2016 Or Tax LEXIS 90, at *17 n 3 (TC June 28, 2016); *Chamber of Commerce of the United States v. Whiting*, 563 US 582, 595, 131 S Ct 1968 (2011) ("A license is 'a right or permission granted in accordance with law… to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful.'" (quoting *Webster's Third New International Dictionary* 1304 (2002))); *Columbia Riverkeeper v. United States Coast Guard*, 761 F3d 1084, 1093 (9th Cir 2014) (stating that a permit or license "has the legal effect of granting or denying permission to take some action."). By issuing a statewide, state-issued, shall-issue TRL, Oregon expressly and affirmatively grants permission to engage in the sale of Nicotine Products. Defendant and the Court of Appeals ignore this liberty interest and treat licensure as a mere registry which does not provide any positive right whatsoever.

The Opinion analyzed this case as though it concerned the preemptive effect of a statute providing a list of requirements which must be met before one can engage in conduct upon an ordinance which merely adds to the list of requirements created by the state. *Schwartz*, 332 Or App at 358–59. But the

15. *Supra*, n. 12 (defining "License").

legislature did not merely provide a list of requirements which must be met before selling Nicotine Products; instead, it created a *license* that, when issued, entitles licensees to sell Nicotine Products. The proper analysis asks what preemptive effect the state's express and affirmative grant of a liberty interest to citizens for those citizens to engage in conduct expressly authorized by a statewide, state-issued, shall-issue license has upon a local ordinance which prohibits the same conduct authorized by the state's license. The fact that SB 587 was intended to affirmatively extend permission to licensees sets this case apart from other preemption cases.

2. Senate Bill 587 Expressly Preempts Local Prohibitions on Licensed Conduct.

The legislature plainly and unambiguously stated its intention to preclude LPHAs from regulating TRL licensure in Oregon, subject to an inapplicable exception, and that its standards be administered and enforced consistently statewide. Any exercise of a LPHA's narrow co-regulatory authority under ORS 431A.218(2)(a) must be "in addition to" and not *instead of* the state's standards. As such, the legislature has expressly preempted laws which interfere with validity, scope, and exclusivity of its statewide, state-issued, shall-issue TRL.

Express preemption occurs when the legislature intends its law to be exclusive; "[a] state statute will displace the local rule where the text, context, and legislative history of the statute 'unambiguously expresses an intention to

preclude local governments from regulating' in the same area as that governed by the statute.'" *Rogue Valley Sewer Servs.*, 357 Or at 450–51 (quoting *Gunderson, LLC v. Portland*, 352 Or 648, 663, 290 P3d 803 (2012)). Courts "assume that 'the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent.'" *Id.* at 450 (quoting *La Grande/Astoria*, 281 Or at 148–49).

The legislature plainly and unambiguously stated that its TRL was intended to be exclusive, subject to one inapplicable exception. ORS 431A.218(7); ORS 431A.220. Despite noting the legislature's express intention on that point, the Opinion skips any analysis of the effect of that pronouncement. *Schwartz*, 332 Or App at 356. However, by expressly requiring the exclusivity of the state's license, the legislature plainly intended to preclude LPHAs from governing TRL licensure—*i.e.*, the permission to sell Nicotine Products. *Rogue Valley Sewer Servs.*, 357 Or at 450–51. Plainly, the legislature intended its grant of permission or *license* be exclusive, and this intent unambiguously precludes local laws which interfere with that grant of permission, *i.e.*, prohibitions on otherwise licensed conduct.

Likewise, the legislature precluded LPHAs from issuing, revoking, suspending, or refusing to issue or renew the permission created Oregon's TRL by giving that authority to DOR. ORS 431A.198; ORS 431A.202. By

prohibiting conduct licensed by Oregon's TRL, WCO 878 partially revokes the TRL (*i.e.*, Oregon's grant of permission to engage in conduct) for otherwise licensed retailers like Plaintiffs. Certainly, this would be the case for a total prohibition on the sale of all Nicotine Products, as Defendant concedes, and Plaintiffs find no support for distinguishing between a partial, majority, or total local prohibition in SB 587. Moreover, assuming DOR will not issue meaningless licenses, partial, majority, or total prohibitions on otherwise licensed conduct affects the persons to whom DOR may issue licenses (*i.e.*, the persons to whom the state may give permission) without establishing a valid qualification.

Additionally, the legislature unambiguously intended that its standards be "administered and enforced consistently throughout" Oregon, ORS 431A.218(5)(a), and intended to grant its licensees the privilege of selling all Nicotine Products to which its license applies. ORS 431A.194; ORS 431A.190(2), (5). If the legislature had not intended to bring uniformity with its licensure, ORS 431A.218(5)(a) is meaningless. The most basic level of uniformity licensees should be able to expect from a statewide license is that the conduct that is authorized by that license is uniform.

Contrary to Defendant's arguments, consistent administration and enforcement of state standards does not render ORS 431A.218(2)(a) meaningless because the state has set standards in very few areas, leaving

numerous options for local governments to enact protective strategies to promote public health. One of the few strategies that is *unavailable* to Defendant is the ability to blanketly prohibit licensed conduct.

In context, the very creation of a statewide, state-issued, shall-issue TRL unambiguously demonstrates the legislature's intent to extend a liberty interest to licensees and preclude LPHAs from interfering with that liberty interest except as expressly allowed under ORS 431A.218(2)(a). Plaintiffs' reading is further supported by the legislative history which, as addressed at length above, shows support from future licensees such as members of NWGA and at least one sponsoring legislator for the consistent statewide enforcement of a TRL. Both Mr. Miller and Senator Steiner Hayward's testimonies exhibit a legislative intent and understanding that Oregon's TRL would be consistent *at least* in authorizing TRL licensees across the state to engage in the same conduct statewide.

3. Washington County Ordinance 878 Conflicts with Oregon's License.

Since SB 587 is an express grant of permission to engage in conduct, and WCO 878 is a partial prohibition on engaging in the same conduct, the laws conflict and cannot be simultaneously applied to a licensee.

Conflict preemption preempts a local law "only to the extent that it 'cannot operate concurrently' with state law" which usually requires that "the operation of local law makes it impossible to comply with a state statute."

Rogue Valley Sewer Servs., 357 Or at 455 (citing *Thunderbird Mobile Club, LLC v. Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524, 236 P3d 152 (2010)). However, conflict preemption has also been explained as preempting local laws when it is "impossible to apply" the state and local law to the same situation. *Oregon Restaurant Association v. Corvallis*, 166 Or App 506, 510, 999 P2d 518 (2000) (analyzing *DeParrie v. Oregon*, 133 Or App 613, 893 P2d 541, *rev den,* 321 Or 560, 901 P2d 858 (1995); and *Roseburg v. Roseburg City Firefighters*, 292 Or 266, 639 P2d 90 (1981)).

Plainly, SB 587 and WCO 878 conflict because Defendant, through its prohibition, refuses to honor Oregon's exclusive TRL and prohibits using Oregon's TRL to engage in conduct authorized by the TRL. Likewise, Plaintiffs cannot be simultaneously authorized to engage in the sale of Nicotine Products and prohibited from engaging in the sale of Nicotine Products. This becomes more clear when taken to its logical extent, which is why Plaintiffs and the Trial Court found it helpful to consider whether a total prohibition would be preempted. As conceded by Defendant, a local blanket prohibition on selling Nicotine Products would plainly conflict with Oregon's TRL, but Defendant could not identify any portion of SB 587 which demonstrated *support* for a partial or majority prohibition but preempted a total prohibition (*i.e.*, where is the line drawn?).

The Opinion cites *Thunderbird Mobile Club*, stating that a "local

ordinance is not incompatible with state law simply because it imposes greater requirements than does the state" and that WCO 878 "is not preempted merely because it prohibits the sale of a product which is allowed, in certain circumstances, to be sold under Oregon's scheme for TRL." *Schwartz*, 332 Or App at 358–59 (quoting *Thunderbird Mobile Club*, 234 Or App at 474). Aside from minimizing the effect of a state license's express grant of permission, this analysis fails to consider that the legislature, in adopting a statewide TRL, did not merely impose "requirements" to which Defendant is adding but created a *permission slip* to engage in specific conduct which Defendant is disallowing. WCO 878 does not add to the list of requirements which must be met to engage in the conduct authorized by state law like the ordinance in *Thunderbird Mobile Club*; if it had, it would be expressly authorized as an additional qualification under ORS 431A.218(2)(a) and ORS 431A.198(2)(c). Instead, Defendant disallowed the conduct authorized by state law *despite state law*, which creates a plain conflict.

The Opinion also cites *Oregon Restaurant Association* to express its reluctance "to assume that the legislature, in adopting statewide standards, intended to prohibit a locality from requiring more stringent limitations within its particular jurisdiction." *Oregon Restaurant Association*, 166 Or App at 511. Again, this misinterprets SB 587 as a mere list of statewide standards as opposed to an express and affirmative grant of liberty or permission to engage

in conduct. However, even if this analysis was correct, the Opinion ignores the legislature's expressly stated intention in ORS 431A.218(5)(a) to preclude localities from imposing different (or even more stringent) requirements than the state when the state enacts a standard because the legislature required the consistent administration and enforcement of its statewide standards. The legislature underscored this intention in ORS 431A.218(2)(a) by requiring that any local standards be "in addition to" state standards rather than *instead of* state standards.

The Opinion also held that "[b]ecause a retailer can comply with both Oregon's scheme for TRL and WCO 878's prohibition… by not selling those products in Washington County, compliance with both" WCO 878 and SB 587 "is not 'impossible[.]'" *Schwartz*, 332 Or App at 359. However, this analysis ignores *Defendant's* obligation to comply with Oregon's scheme for TRL. ORS 431A.218(7); ORS 431A.220; ORS 431A.218(5)(a). Defendant is obligated to honor the state's TRL and, instead, enacted a prohibition on the same conduct the TRL authorizes thereby refusing to honor the state's grant of permission to retailers to sell Nicotine Products. It is certainly impossible for Defendant to simultaneously enforce its prohibition on licensed conduct and recognize the state's express grant of permission. *Rogue Valley Sewer Servs.*, 357 Or at 455. Again, as conceded by Defendant, counties could not totally refuse to honor Oregon's express grant of permission to TRL licensees by prohibiting the sale

of all Nicotine Products, and there is simply no support within SB 587 for analyzing a partial or majority prohibition on Nicotine Products differently.

On the other hand, the conflict preemption analysis in *Oregon Restaurant Association*, which analyzed *DeParrie* and *Roseburg*, did not only look at the ability to *comply* with both state and local law and instead considered whether both laws could be simultaneously applied. *Oregon Restaurant Association*, 166 Or App at 510. Here, both the state's affirmative grant of permission and the county's prohibition cannot be simultaneously applied because, if the local prohibition applies, then the affirmative grant of permission cannot apply. One cannot simultaneously have permission to engage in conduct and be prohibited from engaging in the same conduct, and there is no evidence in SB 587 that the legislature intended LPHAs to be able to nullify the state's license in whole or in part. Again, this analysis is aided by considering a hypothetical prohibition on all Nicotine Products, which would totally nullify the state's express grant of permission to sell Nicotine Products under the TRL. Both laws could not be simultaneously applied to a person. Instead, either the local prohibition supersedes the state's express grant of permission or the state's grant of permission preempts the local prohibition.

Because the Court of Appeals failed to consider the effect of a license as an express grant of permission, rather than a list of requirements, the Opinion missed the obvious conflict between SB 587 and WCO 878. Further, the

Opinion failed to consider Defendant's obligation to honor Oregon's TRL and the impossibility of simultaneously and consistently honoring, enforcing, and applying a statewide, state-issued, shall issue TRL while also enforcing a prohibition on otherwise licensed conduct.

4. The Effect of State Licensure on Preemption Analysis.

Although the Court can hold that WCO 878 is preempted by SB 587 without re-examining its preemption tests, existing preemption analyses do not clearly lend themselves to analyzing the state's decision to expressly authorize and license conduct—or *extend liberty*—in the same way that they apply to the state's decision to place limitations upon or restrict conduct. Plaintiffs propose a more straightforward analysis for the Court to adopt for situations where the legislature expressly authorizes conduct through a license, permit, or similar device.

(a) *This case does not fit usual preemption analyses*.

Most preemption cases, including those considered below, consider: (1) situations where the statute does not address the same issue as the challenged ordinance; (2) the state's passive allowance or *non-disallowance* of conduct alongside a locality's disallowance of the same conduct, or (3) the state's allowance of conduct after meeting certain requirements and the locality's addition to that list of requirements. None of these situations resemble the situation at issue in this case, which considers the state's affirmative grant of

permission and liberty to an individual to engage in conduct and the locality's disallowance of identical conduct. This requires the Court to either clarify its existing analyses or else articulate a more straightforward analysis for these situations.

Beginning with statutes that do not address the same issue as the challenged ordinance, *Owen* considered an ordinance "requiring landlords to pay relocation assistance to displaced tenants in certain circumstances" simply did not address the same issue as, and was therefore not preempted by, ORS 91.225 which preempted local enactments controlling "the rent that may be charged for the rental of any dwelling unit." *Owen*, 368 Or at 663. In other words, the statute did not address the same issue as the ordinance meaning the ordinance was not preempted. *See also Rogue Valley Sewer Servs.*, 357 Or at 453.

However, unlike the ordinances at issue in *Owen* and *Rogue Valley*, the SB 587 has addressed the same issue presented by WCO 878, which is whether to allow the retail sale of Nicotine Products. The legislature chose to expressly authorize those sales.

Next, *Oregon Restaurant Association* considered a local prohibition on smoking in any enclosed public space alongside the state's prohibition on "smoking in a public place except in smoking areas designated according to rules that the Oregon Health Division adopts[.]" *Oregon Restaurant*

Association, 166 Or App at 508–09 (the statute at issue provided "that the regulations that it authorizes 'are in addition to and not in lieu of any other law regulating smoking.'"). There, the laws were not inconsistent because, in prohibiting smoking in some locations, the legislature did not intend "to create a positive right to smoke in all public places where it did not expressly forbid smoking." *Id.* at 510. In other words, the state only *passively* allowed smoking in the areas where it did not prohibit smoking but it did not preempt localities from prohibiting smoking in other areas. Notably, both the state and local laws at issue were blanket *prohibitions*, not licenses, making it impossible for them to conflict.

This case is unlike the ordinance at issue in *Oregon Restaurant Association* because Oregon, in enacting its TRL, did not passively allow the retail sale of Nicotine Products by not prohibiting it (as was the pre-SB 587 status quo) but *affirmatively* licensed and authorized the sale of Nicotine Products by licensees. Moreover, the legislature provided that *local laws* must be *in addition to*, and not instead of, state laws, flipping the analysis. ORS 431A.218(2)(a).

Last, *Thunderbird Mobile Club* considered a local ordinance regulating "the closure of mobile home parks by requiring the park owner to obtain a closure permit from the city and to compensate displaced tenants" alongside the state's requirement that "a mobile home park landlord who wished to convert

the park to a different use" must "provide tenants with a one-year notice of termination, or at least 180-days notice of termination, together with 'space acceptable to the tenant to which the tenant can move' and payment of moving expenses, or $ 3,500, whichever is less." *Thunderbird Mobile Club*, 234 Or App at 460. There, the question was whether the state's allowance of conduct provided that a landlord meets a list of requirements, and the city's addition to that list of requirements, conflicted, which they did not.

Unlike the ordinance at issue in *Thunderbird Mobile Club*, WCO 878 does not add to the state's list of requirements a retailer must meet to sell Nicotine Products but blanketly prohibits the retail sale of certain Nicotine Products. In *Thunderbird Mobile Club*, it would be like the city prohibiting landowners from closing mobile home parks to convert the land to another use notwithstanding the state providing a license to do so.

This case does not fit any of these scenarios; instead, it most closely fits the hypothetical briefly considered in *Oregon Restaurant Association* which forecasted that the legislature's creation of a *positive right* to engage in conduct preempts local efforts to prohibit that conduct. Specifically, the Court of Appeals opined that, "[t]he Act prohibits smoking in certain locations; it does not contain the slightest hint that the legislature intended to create a positive right to smoke in all public places where it did not expressly forbid smoking." *Oregon Restaurant Association*, 166 Or App at 510. However, the legislature

has provided more than a hint that it intended to create a positive right to sell Nicotine Products through SB 587 but unquestionably created that *positive right* through the state's statewide, state-issued, shall-issue TRL. That is the very purpose of a license. As such, it stands to reason that the legislature intended to preempt local efforts to rescind this positive right and that local prohibitions conflict with that positive right.

Based on the differences between this case and the numerous other preemption cases Oregon's appellate courts have considered, Plaintiffs ask that the Court adopt Plaintiffs' proposed simplified analysis for addressing laws which prohibit conduct covered by statewide licenses and permits, or else provide guidance as to how the traditional analyses apply to licensure cases.

(b) *Plaintiffs' proposed test when state licenses are at issue*.

The Court should adopt a different test for when the state affirmatively authorizes conduct and creates the *positive right* by creating a license, permit, or other express authorization. This test should more closely mirror the test utilized in *Tyler*, which provides that "[w]hen a statute permits actions that an ordinance prohibits, or prohibits actions that an ordinance permits, the legislature has preempted the ordinance." *E.g.*, *State v. Tyler*, 168 Or App 600, 604, 7 P3d 624 (2000).

The Opinion specifically rejected this analysis, citing the *Thunderbird Mobile Club* rejection of the *Ashland Drilling* ruling which suggested that the

Jackson test for determining preemption of criminal ordinances applies to civil ordinances. *Schwartz*, 332 Or App at 360; *Thunderbird Mobile Club*, 234 Or App at 475–77 (critiquing *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 4 P3d 748 (1998)) (citing *Portland v. Jackson*, 316 Or 143, 850 P2d 1093 (1993)). However, this analysis is incorrect and not binding on the Court.

Instead, as articulated in *Tyler*, this test applies to civil or criminal ordinances and is simply shorthand for the conflict analysis addressed above. *Tyler*, 168 Or App at 603 (citing *La Grande/Astoria*, 281 Or 137). What was rejected from the *Ashland Drilling* test was the presumption of preemption. *Thunderbird Mobile Club*, 234 Or App at 475–76. In short, as also stated in *Tyler*, courts are directed to assume that the legislature did not intend to displace a local civil ordinance but did intend to displace a local criminal ordinance. *Tyler*, 168 Or App at 604. But nothing in that requirement precludes a court from concluding that a statute which expressly authorizes conduct through a license, permit, or other authorization preempts a local ordinance which prohibits the same conduct. *Id.*

When a statewide, state-issued, shall-issue license through which the legislature intended to extend a liberty interest to licensees is involved, it is reasonable to conclude that the legislature intended to preempt local ordinances which prohibit use of that license or otherwise prohibit conduct which the license expressly permits. Therefore, if the local ordinance prohibits conduct

that is expressly permitted by a license, permit, or similar device created by statute, the local ordinance conflicts with, and is preempted by, the state's licensing statute.

V.

CONCLUSION

The ruling below was based on several erroneous interpretations of SB 587 and WCO 878. The most obvious is that WCO 878 is simply not a restriction on certain ingredients but a prohibition on the sale of Flavored Nicotine Products which is expressly authorized by Oregon's TRL.

On Plaintiffs' first proposed rule of law, the Court should find that the legislature has preempted home rule authority when it grants specific and limited co-regulatory power under a statewide licensing program. Allowing Defendant to assert plenary authority despite the legislature's narrow grant of co-regulatory power renders the statutory limitations meaningless.

On Plaintiffs' second proposed rule of law, the Court should find that WCO 878 exceeds the narrow co-regulatory authority provided to LPHAs under ORS 431A.218(2)(a). The authority of LPHAs to enact "standards for regulating" the retail sale of Nicotine Products allows the LPHA to determine *how* or the *manner in which* licensed sales may take place if they do not conflict with state standards which must be applied consistently; ORS 431A.218(2)(a) does not authorize prohibitions on otherwise licensed conduct.

Last, on Plaintiffs' third proposed rule of law, the Court should find that WCO 878 is preempted by SB 587 because the legislature's grant of a liberty interest and insistence on statewide uniformity for state standards expressly preempted local laws to the contrary which also conflict with the state's licensure. Additionally, this case presents a compelling opportunity for the Court to clarify or alter its preemption framework when assessing the legislature's express authorization of conduct through a statewide licensing system.

Respectfully submitted,

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