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

REPLY BRIEF 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

April 2025

Continued…

Attorney for Petitioners on Review:
Tony Aiello, Jr., OSB #203404
Tyler Smith & Associates, P.C.
181 N. Grant Street, Suite #212
Canby, Oregon 97013
(503) 496-7177
Tony@RuralBusinessAttorneys.com

Attorneys for Respondents on Review:
Cortney Duke-Driessen, OSB #042770
Washington County Counsel
John Mansfield, OSB #055390
Sr. Asst. Washington County Counsel
Eamon McMahon, OSB #153879
Assistant County Counsel
155 N. First Avenue, Suite #340, MS 24
Hillsboro, Oregon 97124
(971) 401-6915
John_Mansfield@WashingtonCounty.gov

I.

INDEX

II.

INDEX OF AUTHORITIES

Cases Cited

Rules Cited

Oregon Revised Statutes

Oregon Rules of Appellate Procedure

Oregon Constitution

Other Citations

REPLY BRIEF OF PETITIONERS ON REVIEW

III.

INTRODUCTION

Plaintiffs reply to Defendant's Brief on the Merits ("Resp. Br."), Oregon's executive branch's Brief *Amicus Curiae* ("Oregon Br."), and the Brief *Amici Curiae* from groups styling themselves "public health, medical, and community groups" ("Pub. Grps. Br.") in support of *Schwartz v. Washington County*, 332 Or App 342, 550 P3d 20 (2024) (the "Opinion"). None of these briefs address the fact that, by enacting Senate Bill 587 (ORS 431A.190-431A.220) ("SB 587") the legislature created a statewide, state-issued, shall-issue tobacco retail license ("TRL") expressly authorizing licensees to sell tobacco products and inhalant delivery systems ("Nicotine Products"). All recite substantively the same refrain that *retailers, not products, are licensed* by the Oregon Department of Revenue ("DOR"). However, this begs the question: what are licensees *licensed* to do?

Moreover, no brief meaningfully disputes the preemptive effect of ORS 431A.218(5)(a), which requires that state standards be administered and enforced consistently statewide. Likewise, no brief explains why Washington County Ordinance 878's ("WCO 878") prohibition on Flavored Nicotine Products is a *standard* pursuant to ORS 431A.218(2)(a), but SB 587's express permission to sell all Nicotine Products is not a *standard* pursuant to ORS 431A.218(5)(a).

Defendant fails to provide the Court sufficient justification to answer Plaintiffs' questions on review in Defendant's favor. Therefore, Plaintiffs ask that the Court reverse the Opinion and affirm the Trial Court's General Judgment.

IV.

REPLY TO *ALTERNATIVE* LEGAL QUESTIONS

Instead of responding to the questions the Court agreed to review, Defendant presents *alternative* questions. Resp. Br., 2-3, 10-32. Defendant did not timely present these *alternatives* consistent with ORAP 9.10(1). Attempting to reframe the argument *after* Plaintiffs filed their Brief ("Pet. Br.") reflects bad faith procedural gamesmanship, is untimely, and should be disregarded.

A. Reply to Defendant's "First Alternative Rule of Law."

Defendant misrepresents Plaintiffs' argument as an Article VI, section 10 challenge. Plaintiffs' *preemption argument*, in part, argues that Defendant's home rule authority is limited (preempted) by SB 587, not plenary; that is not an Article VI, section 10, argument. On appeal, Plaintiffs join the Opinion in assuming that, "absent preemption, the enactment of WCO 878 was a valid exercise… under its charter." *Schwartz*, 332 Or App at 353. However, Defendant does not dispute Plaintiffs' contention that preemption removes localities' plenary home rule authority, narrowing its scope. Resp. Br., 33; *Rogue Valley Sewer Servs. v. Phoenix*, 357 Or 437, 454, 353 P3d 581 (2015).

B. Reply to Defendant's "Second Alternative Rule of Law."

Defendant asserts that SB 587 expressly authorized WCO 878. Resp. Br., 14-22. This is answered by Plaintiffs' Second Question.

C. Reply to Defendant's "Third Alternative Rule of Law."

Defendant asserts that SB 587 does not preempt WCO 878. Resp. Br., 22-32. This is answered by Plaintiffs' Third Question.

V.

REPLY ARGUMENTS

A. Reply in Support of Plaintiffs' First Proposed Rule of Law.

Rather than address Plaintiffs' preemption arguments, Defendant recites its pre-SB 587 authority, which was virtually plenary home rule authority.[1] Resp. Br., 10-13. Defendant also misrepresents Plaintiffs' argument as an Article VI, section 10, debate. *Id.*, 32-33. Instead, Plaintiffs' argument is that, by enacting SB 587—specifically ORS 431A.218(2)(a) and (5)(a)—the legislature partially preempted this plenary authority but provided LPHAs with narrower co-regulatory authority. Defendant also *strawmans* Plaintiffs' arguments, claiming that Plaintiffs believe Defendant has no co-regulatory authority whatsoever.

---

1. Defendant nonsensically asserts that, by not cross-appealing the Trial Court's Article VI, section 10, ruling, Plaintiffs waived arguments that the legislature partially preempted Defendant's plenary home rule authority. Defendant did not raise this issue below or in its Response to Plaintiffs' Petition for Review.

Aside from these misrepresentations, Defendant does not substantively rebut Plaintiffs' arguments. Defendant does not explain why it relies on ORS 431A.218(2)(a) if its authority is plenary. Nor can Defendant square its supposedly unlimited authority with SB 587's requirement that Defendant's *standards* be "in addition to" the state's standards which must be administered and enforced consistently. ORS 431A.218(2)(a), (5)(a). Moreover, Defendant fails to explain what purpose ORS 431A.218(2)(a) serves if Defendant's home rule authority is limitless. Indeed, according to Defendant, Defendant does not have to act within the confines of ORS 431A.218(2)(a), but was also authorized by ORS 431A.218(2)(a) to enact WCO 878. Defendant fails to explain this inconsistency.

SB 587 plainly demonstrates the legislature's intent to fully describe the respective roles of the state and LPHAs regarding TRL. The text shows that LPHAs are limited to the narrower co-regulatory authority provided by ORS 431A.218(2)(a) while the state's standards preempt inconsistent local standards in ORS 431A.218(5)(a).

B. <u>Reply in Support of Plaintiffs' Second Proposed Rule of Law</u>.

Because Defendant's authority is limited, WCO 878 is either authorized by SB 587 or preempted. Defendant relies on ORS 431A.218(2)(a), which allows LPHAs to enact "standards for regulating the retail sale of" Nicotine Products that are "in addition to" statewide standards, and "qualifications for

engaging in the retail sale" of Nicotine Products "that are in addition to the qualifications described in ORS 431A.198[.]" ORS 431A.218(2)(a). A blanket prohibition is neither a "standard for regulating" Nicotine Product sales nor a "qualification" for TRL.

1. *21+ Tobacco and Vapor* Redefines "Standards" Again.

Defendant and *Amici* reference a recent decision which concerned both local TRLs under ORS 431A.218(7) and ORS 431A.220, and a local Flavored Nicotine Product ban. *21+ Tobacco and Vapor Retail Association of Oregon v. Multnomah County*, 339 Or App 554, 556-57, 2025 Or App LEXIS 568 (2025). The Court of Appeals rejected the plaintiffs' preemption argument against the ban citing *Schwartz*. *Id*.[2]

In *21+ Tobacco and Vapor*, the Court of Appeals shifted from calling Flavored Nicotine Product bans *product quality standards*, to conceding that Flavored Nicotine Product bans prohibit licensed conduct:

> Prohibiting the sale of a particular type of product—even if that prohibition can be understood to 'largely amount' to a restriction **on selling** a product made with certain ingredients—**is ultimately a prohibition on the sale** of a particular type of product.

Id. at 556-57 n 2 (emphasized).[3] Nevertheless, the court determined that *Schwartz* "is not plainly wrong." *Id.* Oddly, Defendant says the Opinion's

---

2. The plaintiffs have stated their intent to seek review on both questions.

3. The *Schwartz* conclusion was that WCO 878 "largely amount[ed] to a restriction on certain ingredients." *Schwartz* 332 Or App at 357.

characterization of WCO 878 as a product quality standard is *dictum* despite it being the entire basis for concluding that ORS 431A.218(2)(a) authorized WCO 878. *Schwartz*, 332 Or App at 356-57.

However, this decision does not provide clarity; it concludes that the phrase "standards for regulating" has evolved from meaning product quality standards, *Schwartz*, 332 Or App at 357, to now including blanket prohibitions on licensed conduct, *21+ Tobacco and Vapor*, 339 Or App at 356-57 n 2. Additionally, the Court of Appeals now also includes blanket prohibitions on licensed conduct among *qualifications* for licensure under ORS 431A.198(2)(c) despite there being absolutely no text, context, or legislative history indicating that intent for the ordinances at issue, *Id.* at 574-75.

2. Defendant Misrepresents Washington County Ordinance 878.

Defendant claims that "[i]f the flavoring ingredients were not applied to a tobacco product, they would not be subject to WCO 878." Resp. Br., 39. Apparently, Defendant does not understand its ordinance. WCO 878 plainly bans *Nicotine Products* which neither contain nor are derived from the tobacco plant. Pet. Br., 5-6, 23-25. In fact, it is not the application of flavoring ingredients but the total absence of tobacco that makes these products illegal.

3. Washington County Ordinance 878 is not a "Standard for Regulating" Nicotine Products.

Defendant represents that "ORS 431A.218(2)(a) expressly grants" LPHAs "power to enact standards that regulate tobacco sales[.]" Resp. Br., 14.

This is undisputed. Plaintiffs never argued that LPHAs have *zero authority*. Plaintiffs argue that Defendant is limited to enacting *additional* "standards for regulating" the retail sale of Nicotine Products, and that blanket prohibitions are not "standards for regulating" but *prohibitions* on the retail sale of Nicotine Products. ORS 431A.218(2)(a).

Defendant claims that ORS 431A.218(2)(a) conveys *broad power* to enact any ordinance whatsoever despite the legislature's use of a new phrase ("standards for regulating") rather than broader language employed in other statutes. *E.g.*, ORS 166.173(1) ("A city or county may adopt ordinances to regulate, restrict or prohibit the possession of loaded firearms in public places"). Defendant criticizes Plaintiffs' inability to cite Oregon caselaw interpreting the phrase while ignoring its novelty in Oregon law. However, Plaintiffs provided caselaw and dictionary citations informing Plaintiffs' reading, Pet. Br., 33-36, and other courts have adopted similar definitions. *E.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 US 246, 248, 124 S Ct 1756 (2004) (quoting Webster's Second New International Dictionary 2455) ("Today, as when § 209(a) became law, 'standard' means that which 'is established by authority, custom, or general consent, as a model or example; criterion; test.'"). Defendant provides no support for its theory that "standards for regulating" refers to any ordinance whatsoever and focuses on the word "standards" while ignoring the "for regulating" language in ORS 431A.218(2)(a).

Defendant also says that Plaintiffs' analysis leaves "out a key term" referencing the words "for purposes related to public health and safety" from ORS 431A.218(2)(a). Resp. Br., 19. Defendant assumes that the phrase "shows that TRL allows standards that are substantive, not just time, place, and manner regulations." *Id.* Defendant fails to cite any authority supporting its assertion or explain how time, place, and manner regulations are neither substantive nor capable of improving public health and safety. Certainly, ordinances restricting certain bars from selling Nicotine Products while minors are allowed (*time* restriction), requiring mandatory electronic age verification or requiring sales to be made from a 21-and-over section of the store (*manner* restrictions), and requiring TRL retailers to be 21-and-over businesses (a *place* restriction and qualification) would reduce erroneous sales. Moreover, density restrictions (a *place* restriction and qualification) would certainly "target health inequities" and "reflect community needs and values" by reducing TRL density in low-income communities or communities of color. *E.g.*, Resp. Br., 23. Defendant fails to explain how such ordinances are not *substantive* or fail to address public health.

4. Prohibitions are not "Standards for Regulating."

Defendant maintains its assertion that "standards for regulating" means *to regulate* and that *to regulate* includes the authority to *blanketly prohibit*. Defendant eschews dictionary definitions and relies solely on *Northwest*

Advancement which is neither binding nor accurately conveyed by Defendant. Resp. Br., 21 (citing *Northwest Advancement, Inc. v. State Bureau of Lab., Wage & Hour Div.*, 96 Or App 133, 772 P2d 934 (1989)).

Defendant fails to rebut Plaintiffs' analysis for why "standards for regulating," "regulate," and "prohibit" do not have the same meaning. Pet. Br., 38-40. In short, Oregon statutes routinely use "prohibit" and "regulate" in the same statute; supplying both words the same definition renders them redundant. *Hodges v. Oak Tree Realtors*, 363 Or 601, 610, 426 P3d 82, 87 (2018). Moreover, defining these words identically would defy the judiciary's duties in statutory interpretation. *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."), *rev'd on other grounds*, *Bellshaw v. Farmers Ins. Co.*, 373 Or 307, 326-27, 2025 Or LEXIS 210 (2025) (citing *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009)).

Defendant also overstates the *Northwest Advancement* holding, opting to explain *its interpretation* to the Court while omitting the opinion's language.[4] Resp. Br., 21. Defendant claims that "the delegation to the WHC of the power to regulate in a particular area did allow the WHC to prohibit youth

4. The Opinion does not rely on *Northwest Advancement*.

employment in certain situations" and that the case affirmatively held that "the power to regulate in an area does include the power to eliminate at least some of the conduct in question." *Id*. (without quotation from the case). This is directly contradicted by the text of the opinion. Pet. Br., 36-38; *Northwest Advancement*, 96 Or App at 139.

Regardless, the case is not binding, and Plaintiffs provide ample reason to conclude that "regulate," "prohibit," and "standards for regulating" have different meanings.

C. Reply in Support of Plaintiffs' Third Proposed Rule of Law.

1. Licenses Expressly Authorize Conduct.

The Opinion, Defendant, and *Amici* discount the effect of state licensure. The Opinion concludes that Oregon's TRL "merely permits license holders to sell" Nicotine Products but does not give licensees any right to do so. *Schwartz*, 332 Or App at 359.[5] *Amici* contends that SB 587 "does not authorize the sale" of Nicotine Products, Oregon Br., 12 n 4, and that "[n]othing in SB 587 expressly authorizes licensees to engage in specific conduct[,]" Pub. Grps. Br., 37-38. Defendant contends that Plaintiffs' have not "proven that the grant of a licenses under ORS 431A.198 is an affirmative right to do anything other than sell tobacco products according to the terms of the TRL." Resp. Br., 41-42.

---

5. In *21+ Tobacco and Vapor*, the Court of Appeals considered and rejected the argument without explanation. 339 Or App at 557 n 2.

Indeed, *Amici* argue that "*it is the retailer that is licensed… not the product.*" Pub. Grps. Br., 33 (original). This begs the question, what are retailers licensed, *viz.*, expressly authorized and permitted, to do?

Neither the Opinion nor any brief addresses the dictionary definition or plain legal effect of government-issued licenses. Pet. Br., 44-46. A license *authorizes* its licensees to do *something*—here, sell Nicotine Products—and WCO 878 prohibits that licensed conduct. Moreover, neither the Opinion nor any brief addresses the logical extent of their arguments. Namely, there is no reason why LPHAs cannot totally proscribe Nicotine Products—thereby nullifying state licensure and preventing DOR from issuing licenses—if their arguments were adopted, nor is there any *line* drawn in SB 587 distinguishing total and partial bans (*i.e.*, how much can be banned?).

However, Defendant offers an interesting comparison between Oregon's TRL and driver's licenses. Resp. Br., 35-36. Defendant likens WCO 878 to speed limits, stating that Oregon enacts requirements for driver's licenses but localities create the *rules of the road—i.e.*, *how* vehicles may be driven. This is, essentially, Plaintiffs' argument. Pet. Br., 34-35. However, that is not what WCO 878 does. SB 587 is akin to creating a class C driver's license allowing licensees to drive any class C vehicle. ORS 431A.218(2)(a) allows LPHAs to create *rules of the road—i.e.*, when, where, and how, not *whether*, Nicotine Products may be sold (stored, displayed, etc.). *Id.* However, WCO 878 is more

like a law prohibiting class C driver's license holders from driving any class C vehicle in Washington County except gray four-door sedans even though yellow coupes, red pickups, and green SUVs are all class C vehicles which class C driver's license holders are expressly authorized to drive.

2. Express Preemption.

Express preemption occurs when "'the legislature meant its law to be exclusive.'" *Owen v. Portland*, 368 Or 661, 667, 497 P3d 1216 (2021). Express preemption only occurs "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*, 357 Or at 450-51.

Neither Defendant nor the Opinion meaningfully address ORS 431A.218(5)(a) which unambiguously expresses the legislature's intention to preclude localities from enacting standards which *vary* from the state's:

> (5) The Oregon Health Authority shall: (a) Subject to ORS 431A.220, ensure that state standards established by state law 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). This is meaningless if LPHAs can enact standards which vary from state standards because it makes consistent statewide administration and enforcement by OHA impossible. Indeed, "[w]here the text is clear, then we generally presume that the text reflects the legislature's policy goals and that

those goals are best carried out by applying the statute as it is written." *Bellshaw*, 373 Or at 326-27 (citing *Gaines*, 346 Or at 17; *Halperin v. Pitts*, 352 Or 482, 496, 287 P3d 1069 (2012); ORS 174.010). Moreover, though courts are "reluctant to assume that the legislature, in adopting statewide standards, intend[s] to prohibit a locality from requiring more stringent limitations within its particular jurisdiction" *Oregon Restaurant Association v. Corvallis*, 166 Or App 506, 511, 999 P2d 518 (2000), that is *exactly* what the legislature required. ORS 431A.218(5)(a).

The Opinion ignores ORS 431A.218(5)(a). *Schwartz*, 332 Or App 342. Defendant only offers a two-paragraph response that does not refute Plaintiffs' textual reading. Instead, Defendant misrepresents Plaintiffs' argument to be that "'uniformity' is the only goal served by the TRL" and appeals to ORS 431A.192 ("Purpose"). Resp. Br., 42. Again, Plaintiffs do not contend that the legislature intended to impose uniformity in *all aspects* of Nicotine Product sales; ORS 431A.218(5)(a) only affects those areas where state law or rule provides a standard. One area among many where state law expresses a *standard* is by directing DOR to issue TRLs which expressly authorize licensees to sell Nicotine Products, irrespective of flavor. That interpretation does not prevent LPHAs from creating *additional standards* under ORS 431A.218(2)(a) when they do not require inconsistent enforcement of state law or rule, including interfering with the exclusivity or scope of Oregon's TRL.

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

Defendant relies on its divination of *legislative intent* rather than SB 587's text to reach its bare conclusions. Resp. Br., 22. As further addressed below, neither Defendant nor the Opinion consider statements from *legislators* but instead rely on written public testimony from non-legislator witnesses for which there is no corresponding evidence that the legislature or any legislator relied on, or agreed with, that testimony. Indeed, the Opinion relies on the Oregon Coalition of Local Health Officials and County Commissioners statement that they "agreed to one preemption in the bill" to support its conclusions. *Schwartz*, 332 Or App at 352. Defendant echoes this assertion, boldly and incorrectly stating that SB 587 "has only one specific area of preemption" and that "[a]ll other subsections of ORS 431A.218 are permissive[.]" Resp. Br., 34 (citing ORS 431A.218(7)). However, the plain text of ORS 431A.218 evidences at least four other preemptions. ORS 431A.218(3)(a) (limitations on local fees and the localities' uses of fee moneys); ORS 431A.218(4) (preempting civil penalties exceeding $5,000); ORS 431A.218(5)(a) (uniform enforcement of state standards); ORS 431A.218(6)(a) (preempting local qualifications prohibiting TRL co-location with pharmacies).

As addressed below, relying solely on public testimony is flawed, especially when the text demonstrates that the testimony *was not* relied upon.

3. Conflict Preemption.

Defendant insists that this case fits the usual conflict preemption analyses perfectly *even though* no caselaw addresses affirmative extensions of liberty through licensure. Likewise, Defendant complains that Plaintiffs do not cite caselaw for what it calls a "positive right" doctrine. On the contrary, Plaintiffs addressed, and Defendant ignores, the indication of that concept in *Oregon Restaurant Association*, which Plaintiffs thoroughly address and ask Oregon's highest Court to adopt. Pet. Br., 57-58. Regardless, the absence of such specific caselaw is unsurprising since—from Plaintiffs' review—there has never been a case where a locality prohibited conduct expressly authorized by a state license without express authority to do so. *Compare* ORS 475C.950 (allowing localities to "prohibit or allow the establishment" of certain marijuana-related businesses); Or. Const. Art. XI, §2 ("Formation of corporations; municipal charters; intoxicating liquor regulation").

Defendant also complains that Plaintiffs do not cite caselaw saying that a license entitles licensees to sell every version of the product they are licensed to sell. Again, it is unsurprising that such a specific holding in favor of, or against, Plaintiffs' position does not exist since the issue is novel. Had that question been plainly answered, the Court may not have accepted review to answer it. *See* ORAP 9.07(5). However, it is reasonable to conclude that the authority issuing the license, and thereby granting the permission, has the sole authority

to determine the scope of its permission. This does not create, as Defendant misrepresents, a *nebulous unbounded liberty interest*. There are innumerable limits LPHAs can place on licensees; the *one* Plaintiffs assert LPHAs cannot impose is a blanket prohibition on licensed conduct that essentially acts as a license revocation (in whole or in part).

Next, Defendant asserts that TRL licensees can comply with both laws. Defendant ignores Plaintiffs' correct contention that SB 587 and WCO 878 cannot be simultaneously *applied* because retailers either have or do not have permission to sell Nicotine Products. Pet. Br., 53. This is especially true when the Court considers a total prohibition. Defendant resents taking its arguments to their logical conclusion because they fall apart. Were WCO 878 a *total ban*, TRL licensees could certainly just *not sell* Nicotine Products—they would not, however, be Nicotine Product retailers and their TRL would be meaningless. Moreover, a total ban would prevent DOR from issuing TRLs; WCO 878's majority ban prevents DOR from issuing licenses for most Nicotine Product sales. *Contra*, *21+ Tobacco and Vapor*, 339 Or App at 374-75.[6]

Additionally, Defendant misstates SB 587 and claims that TRL licensees can use their license to sell *plain tobacco* in Washington County and any

6. Prohibiting Nicotine Product sales is plainly not a qualification for a license to sell Nicotine Products. Likewise, nothing in WCO 878 claims to be a qualification.

Nicotine Product in other localities. However, a TRL is required for each *premises*. ORS 431A.190(4); ORS 431A.198; ORS 431A.210. Therefore, a TRL issued for Washington County is essentially useless.

Last, Defendant claims it can enforce SB 587 and WCO 878. Defendant cannot, however, simultaneously honor the express grant of permission Oregon has given TRL licensees and enforce WCO 878.

4. Legislative History.

Defendant and the Opinion rely extensively and nearly exclusively on written public testimony submitted by non-legislators to divine their interpretations of legislative intent which contradict SB 587's plain text and diminish the effect of the statewide, state-issued, shall-issue license. *E.g.*, *Schwartz*, 332 Or App at 358; *21+Tobacco and Vapor*, 339 Or App 554. However, there is no indication that any legislator agreed with (or even read) this testimony, excepting Mr. Shawn Miller's statements which SB 587 sponsor Senator Steiner Hayward echoed, Pet. Br., 16-17, or that this testimony evinces legislative intent. Worse, the OLIS website states, "[t]he views and opinions expressed in the Public Testimony submitted are those of the submitter and **do not reflect the official policy or position of the Oregon Legislature**." (APP-3) (emphasized).[7] The Opinion erroneously relies on testimony that the

7. Oregon State Legislature: Oregon Legislative Information, *Testimony on SB 587, 81st Leg., Reg. Sess. (Or 2021)*,

legislature specifically states does not reflect its intent. This does not mean that public testimony is worthless; its value is determined by evidence of legislative reliance. Here, the testimony relied on by Defendant and the Opinion is one-sided unlike the back-and-forth discussion in *Bellshaw*, 373 Or at 320-21.

Further, courts cannot ignore a statute's text even if the text does not capture what the legislature intended, and "[d]isregarding clear text in search of 'purpose' is perilous." *Id.* at 326-27 (citing, *inter alia*, *Halperin v. Pitts*, 352 Or 482, 496, 287 P3d 1069 (2012)). Seeking legislative intent from written public testimony for which there is no evidence of legislative reliance—and no shortage of conflicting interpretations—presents an even greater peril because it allows courts to cherry-pick testimony or weigh how "correct" public testimony is by appealing to the majority, *Schwartz*, 332 Or App at 358, while casting aside contrary testimony. *State v. Kelly*, 229 Or App 461, 466, 211 P3d 932, *rev den*, 347 Or 446, 223 P3d 1054 (2009).

VI.

CONCLUSION

Plaintiffs have provided the Court with ample and thorough justification for deciding the questions presented by this case in Plaintiffs' favor and reversing the Court of Appeals' Opinion. As such, Plaintiffs ask that the Court

---

https://olis.oregonlegislature.gov/liz/2021R1/Measures/Testimony/SB587 (accessed Apr. 21, 2025).

reverse the Court of Appeals' decision and affirm the General Judgment of the Trial Court.

Respectfully submitted,

DATED: April 22, 2025,

Tyler Smith & Associates, P.C.

By: /s/ Tony L. Aiello, Jr.
Tony L. Aiello, Jr., OSB #203404
Of Attorneys for Petitioners on Review
181 N. Grant Street, Suite 212
Canby, Oregon 97013
(P) 503-496-7177; (F) 503-212-6392
Tony@RuralBusinessAttorneys.com