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.	Washington County Circuit Court Case No. 22CV04836 Appellate Court No. A179834 Supreme Court No. S071235

BRIEF OF THE STATE OF OREGON AS *AMICUS CURIAE* IN SUPPORT OF WASHINGTON COUNTY

Continued…

TONY L. AIELLO, JR. #203404
Tyler Smith & Associates, PC
181 N. Grant St., Suite 212
Canby, Oregon 97013
Telephone: (503) 496-7177
Email:
tony@rurabusinessattorneys.com

Attorney for Petitioners on Review

JOHN MANSFIELD #055390
Washington County Counsel
155 N. First Ave., Suite 340
Hillsboro, Oregon 97124
Telephone: (971) 401-6915
Email:
john_mansfield@washingtoncounty.gov

Attorney for Respondent on Review

JOSEPH A. PICKELS #194920
Brisbee & Stockton LLC
PO Box 567
Hillsboro, Oregon 97123
Telephone: (503) 648-6677
Email:
jap@brisbeeandstockton.com

Attorney for *Amicus Curiae*
21+ Tobacco and Vapor Retail Association

DAN RAYFIELD #064790
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
PHILIP THOENNES #154355
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
philip.thoennes@doj.oregon.gov

Attorneys for *Amicus Curiae*
State of Oregon

LYDIA ANDERSON-DANA #166167
Stoll Berne PC
209 SW Oak St., Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Email:
landersondana@stollberne.com

Attorney for *Amici Curiae*
African American Tobacco Control Leadership Council, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, American Medical Association, Campaign for Tobacco-Free Kids, Cascade AIDS Project, Kaiser Permanente, Oregon Coalition of Local Health Officials, Oregon Medical Association, Oregon Pediatric Society, Parents Against Vaping e-cigarettes, Truth Initiative, and Upstream Public Health

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BRIEF OF THE STATE OF OREGON AS *AMICUS CURIAE* IN SUPPORT OF WASHINGTON COUNTY

INTRODUCTION

The State of Oregon submits this brief as *amicus curiae* in support of Washington County. ORAP 8.15(8). This case is important to the Oregon Health Authority's Oregon Tobacco Retail Licensing Program. That program provides a regulatory foundation for the enforcement of standards in the retail environment, at both the state and local level, including but not limited to density restrictions, flavor prohibitions, and other sales standards that reduce youth tobacco use and improve health equity. Tobacco retail licenses are an effective, evidence-based policy approach to reduce the harmful impact of the tobacco retail environment by regulating the availability of tobacco and nicotine products, especially to underage persons. Tobacco retail licenses are an accountability framework by which license holders, in exchange for the privilege of selling the world's deadliest consumer product, agree to follow local, state, and federal regulations governing tobacco and nicotine product sales. Tobacco retail licenses also provide infrastructure for outreach, education, and enforcement to support retailers with compliance. Flavor prohibitions, density restrictions, school buffer zones, and other sales restrictions are examples of additional evidence-based policies that work in tandem with tobacco retail licensure—through the accountability provided by

licensure, those policies and others can reduce the unjust burden and shortened lifespan experienced by many Oregonians because of the targeted marketing of flavored tobacco products. Local communities are well-poised to adopt and implement those additional policies as they reflect local public health needs, retail landscapes, and public demand.

In 2021, the Oregon legislature enacted Senate Bill (SB) 587 (2021), "to improve enforcement of local ordinances and rules, state laws and rules and federal laws and regulations that govern the retail sale of tobacco products and inhalant delivery systems." Or Laws 2021, ch 586, § 2, *codified at* ORS 431A.192. To that end, the legislature created a statewide licensure system for the "retail sale of a tobacco product or an inhalant delivery system at or from a premises located in this state[.]" *Id.*, § 3, *codified at* ORS 431A.194. The legislature set statewide standards and requirements for obtaining such a license but also recognized that local governments may adopt and enforce their own standards for regulating the retail sale of tobacco and inhalant delivery systems within their jurisdictions. *Id.*, § 17(2)(a), *codified at* ORS 431A.218(2)(a).[1]

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[1] ORS 431A.218 provides that local public health authorities may:

"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

Footnote continued…

Also in 2021, the Board of County Commissioners for Washington County (the county) adopted Washington County Ordinance (WCO) 878. Pertinent here, WCO 878 provides that "[n]o person shall sell, offer for sale, or otherwise distribute any flavored tobacco product or flavored synthetic nicotine product" within the county. WCO 878, Ex A, § 2.30(B).

Plaintiffs filed suit against the county, seeking declaratory and injunctive relief. Plaintiffs alleged, among other things, that SB 587 both expressly and impliedly preempted WCO 878. The trial court agreed. The court noted that Section 17(2) authorized local public health authorities to enact standards for regulating the retail sale of tobacco products and inhalant delivery systems, in addition to the standards and qualifications set out elsewhere in SB 587. But the court concluded that WCO 878 did not seek to enforce any standards set out in SB 587, nor did the ordinance establish additional standards or qualifications for a retailer wishing to sell flavored tobacco and nicotine products. Rather, according to the trial court, WCO 878 "deletes these standards and qualifications by enacting a blanket prohibition on retail sale of flavored

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[providing that local government may adopt standards pursuant to intergovernmental agreement], 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 [settings standards for obtaining retail license]."

ORS 431A.218(2)(a).

tobacco and nicotine products in Washington County." September 19, 2022, Letter Opinion at 3 (ER-539). The court reasoned that, because SB 587 did not authorize local public health authorities to *ban* the sale of flavored tobacco and nicotine products, WCO 878 was preempted by state law. *Id.* at 4 (ER-540).

The Court of Appeals reversed. *Schwartz v. Washington County*, 332 Or App 342, 55 P3d 20 (2024), *rev allowed*, 373 Or 212 (2025). The court held that SB 587 does not preempt WCO 878, either expressly or impliedly. *Id.* at 358–60. This court allowed plaintiffs' petition for review to address whether state law preempts WCO 878.

This court should affirm the decision of the Court of Appeals because the trial court erroneously concluded that the county lacked authority to enact WCO 878 and ban the sale of flavored tobacco and synthetic nicotine products. The trial court's legal conclusion was based on a faulty premise—*viz.*, that Oregon's counties lack substantive legislative authority unless such authority is explicitly conferred on the county by a state statute. That premise is backwards. Oregon's counties, like its municipal corporations, possess authority to enact their own substantive policies. Properly framed, then, the question in this case is not whether state law granted authority to the county to enact WCO 878. Rather, the question is whether state law preempts the county—either expressly or impliedly—from banning the sale of flavored tobacco and synthetic nicotine products. It does not.

A. Oregon's counties have general authority to legislate over matters of county concern unless preempted by state law.

Contrary to the trial court's legal premise and plaintiffs' arguments on review, Oregon's counties possess substantive authority to legislate over matters of county concern. A brief overview of municipal and county home rule in Oregon is helpful for understanding that authority.

In the late nineteenth and early twentieth centuries, courts and legal scholars took the view that municipal corporations derived all power from their respective state governments. *See* 1 John F. Dillon, *The Law of Municipal Corporations*, § 9(b), at 93 (2d ed 1873) (arguing that cities lack inherent lawmaking authority); *see also Hunter v. City of Pittsburgh*, 207 US 161, 178–79, 28 S Ct 40, 52 L Ed 151 (1907) (holding that, because cities are "convenient agencies" of their states, a state can reorganize or abolish its cities at any time without offending the constitution). This court endorsed Judge Dillon's theory of local-state authority in 1882. *City of Corvallis v. Carlile*, 10 Or 139, 141 (1882). In practice, then, only the legislature had authority to incorporate a city and establish or amend a city charter.

That arrangement fundamentally changed in 1906, when Oregon voters approved two amendments to the Oregon Constitution designed to provide home rule authority to municipal corporations and to limit the legislature's

power over the structure of city government.[2] Those amendments "allow[ed] the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature." *La Grande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173 (1978). The amendments also gave cities the power "to enact substantive policies, even in areas *also* regulated by state law," subject to the state constitution and state criminal laws. *Gunderson, LLC v. City of Portland*, 352 Or 648, 659, 290 P3d 803 (2012) (emphasis added). Indeed, this court has long recognized that the home rule amendments give local governments authority to enact substantive policies without diminishing the state's authority to enact substantive policies on the same topic, and vice versa. In *La Grande/Astoria*, this court explained that Oregon's home rule system necessarily entailed concurrent regulatory authority "if local government is to have any authority to legislate on its own in matters in which the state could also act, for otherwise local powers would have to be

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[2] The voters amended Article XI, section 2, to preclude the legislature from enacting, amending, or repealing "any charter or act of incorporation for any municipality, city or town" and to grant to municipal voters the "power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon." Or Const, Art XI, § 2. The voters also amended Article IV, section 1, to reserve initiative and referendum authority "to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district." Or Const, Art IV, § 1.

narrowly confined in order to save room for potential state legislation." 284 Or at 176 (footnote omitted).

Oregon's counties also have home rule authority, but that authority came later and followed a different path. For much of the twentieth century, Oregon's counties lacked any independent legislative authority. *See* Orval Etter, *County Home Rule in Oregon*, 46 Or L Rev 251, 252–58 (1967) (describing efforts to obtain home rule for Oregon counties). In 1958, Oregon voters approved a constitutional amendment that conferred significant home rule authority on counties. As amended, Article VI, section 10, of the Oregon Constitution provided that the legislature would create a method by which the voters of any county could adopt, amend, revise, or repeal a county charter. Such a charter, in turn, "may provide for the exercise by the county of authority over matters of county concern." Or Const, Art VI, § 10.

In 1973, the legislature enacted a law meant to erase much of the distinction between home rule counties and general law counties. Specifically, the legislature conferred on all Oregon counties authority "over matters of county concern." Or Laws 1973, ch 282, § 2. The Oregon Court of Appeals later held that the law, codified as ORS 203.035, "obliterates most distinctions between the powers of general law counties and home rule counties." *Allison v. Washington County*, 24 Or App 571, 581, 548 P2d 188 (1976). Thus, "in the

absence of state preemption or a limiting charter provision, home rule and general law counties have the same legislative authority." *Id.*

Washington County adopted a home rule charter in 1962.[3] The county's charter provides it with "authority over matters of County concern, to the full extent granted or allowed by the Oregon Constitution and laws of the State[.]" Washington County Charter, ch II, § 20.

Municipal and county home rule is not coextensive. Unlike the municipal home rule provisions of the Oregon Constitution, both the county home rule provision and the statutory grant of authority in ORS 203.035 contain a substantive limitation: A county may exercise authority, independent of the state, only "over matters of county concern." Or Const, Art VI, § 10; ORS 203.035(1). There is little caselaw addressing that limitation. In one of the few examples, the Court of Appeals held that a county charter provision was invalid under Article VI, section 10, because it went beyond the "matters of county concern" limitation and attempted to govern the conduct of state officials in conducting searches and seizures. *See State v. Logsdon*, 165 Or App 28, 32–33, 995 P2d 1178, *rev den*, 330 Or 362 (2000) (holding that county

[3] *See* Washington County Charter and Code, *available at* https://www.washingtoncountyor.gov/cao/county-charter-and-code#:~:text=Washington%20County%20Charter,structure%20provided%20by%20state%20statutes (accessed April 2, 2025).

lacked home rule authority to "govern[] the conduct of state and federal officials").

In this case, plaintiffs alleged that WCO 878 violates Article VI, section 10, of the Oregon Constitution because the decision whether to permit or prohibit the sale of flavored tobacco and synthetic nicotine products is a matter of statewide concern, not county concern. But the trial court dismissed that claim after determining that plaintiffs "fail[ed] to carry the necessary proof that the county's actions in enacting WCO 878 * * * violate[d] Article VI, section 10." September 19, 2022, Letter Opinion at 2 n 6 (ER-538). Plaintiffs did not appeal the trial court's dismissal of that claim for relief and the Court of Appeals did not address that issue. Thus, the question whether WCO 878 exceeds the county's authority under Article VI, section 10, is not properly before this court.

The state therefore assumes that the county had legislative authority to enact WCO 878, pursuant to Article VI, section 10, of the Oregon Constitution and its home rule charter. The question is thus whether state law—specifically SB 587—preempts the county's decision to ban the sale of flavored tobacco and synthetic nicotine products.

B. SB 587 does not preempt WCO 878.

In *La Grande/Astoria*, the court held that "a general law addressed primarily to substantive social, economic, or other regulatory objectives of the

state prevails over contrary policies preferred by some local governments if it is clearly intended to do so[.]" *La Grande/Astoria*, 281 Or at 156. Cases since *La Grande/Astoria* have further clarified when state law "prevails over"—that is, preempts—contrary local laws. Indeed, "[t]he analytical process for determining whether state law preempts a local law in Oregon is well established[.]" *Owen v. City of Portland*, 368 Or 661, 667, 497 P3d 1216 (2021). State law can preempt local law either expressly or impliedly. *Id.* at 667–68. In this case, state law does neither.

1. SB 587 does not expressly preempt WCO 878.

State law expressly preempts local law when the "text, context, and legislative history of the statute '*unambiguously* expresses an intention to preclude local governments from regulating' in the same area that is governed by the statute." *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450–51, 353 P3d 581 (2015) (quoting *Gunderson*, 352 Or at 663) (emphasis in *Rogue Valley*).

SB 587 does not expressly preempt WCO 878. Pertinent here, the legislature provided that a local public health authority may "[e]nforce, 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 other standards set out in SB 587. ORS 431A.218(2)(a). That

language does not unambiguously express an intention to preclude local governments from enacting a ban on the retail sale of flavored tobacco and synthetic nicotine products. On the contrary, SB 587 explicitly recognizes that local governments have authority to regulate for public-health purposes beyond what state law requires.

Further, if the legislature wanted to preempt local bans on the sale of flavored tobacco and synthetic nicotine products, "it knows how clearly to do so." *AT&T Communications v. City of Eugene*, 177 Or App 379, 394, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002). But the legislature did not use the language of preemption that the legislature typically uses when it intends to preclude local governments from regulating something. *See, e.g.*, ORS 166.170(1) (providing that authority to regulate the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or ammunition "is vested solely in the Legislative Assembly"); ORS 323.030 (providing that state tax on the sale of cigarettes was "in lieu of all other state, county or municipal taxes on the sale or use of cigarettes"); ORS 473.190 (providing that "[n]o county or city of this state shall impose any fee or tax" relating to the production, distribution, or sale of liquor); ORS 801.038 (providing that "[a] city, county or other local government may not enact or enforce any" law regulating the use of cell phones in vehicles).

Context supports that interpretation of Section 17(2). In other parts of SB 587, the legislature unambiguously preempted local governments from doing certain things, such as prohibiting the sale of tobacco in a pharmacy and establishing their own retail licensing scheme for sellers of tobacco and synthetic nicotine products. ORS 431A.218(6)(a) ("A city or local public health authority may not adopt an ordinance that prohibits a premises that makes retail sales of tobacco products or inhalant delivery systems from being located at the same address as a pharmacy"); ORS 431A.218(7) (expressly preempting local governments from enacting retail sales license unless the local government established the license system by ordinance no later than January 1, 2021). The legislature's failure to include any comparable language preempting local bans on the retail sale of a certain category of products, such as flavored tobacco, suggests that it did not intend to preempt any such bans.[4]

[4] Along similar lines, plaintiffs argue that SB 587 and the state's retail licensing program *authorizes* all tobacco sales, meaning—they argue—that a local government is necessarily preempted from banning something that state law authorizes. (Pet BOM 44–49). As explained in the next section on implied preemption, that is not how home rule authority works: Local laws absolutely can prohibit conduct that state law allows. The question is whether compliance with state and local law is impossible. And in any event, SB 587 does not authorize the sale of tobacco products. The inverse is true—a state retail license is a prerequisite to exercising the privilege of selling tobacco products at retail, and it authorizes the state to revoke that privilege if a licensee fails to follow applicable federal, state, and local laws.

Finally, the legislative history supports that interpretation of SB 587. During a committee hearing, Senator Knopp explained that the legislature could have preempted existing local licensing programs. But "some of the entities who currently have those [local licensing programs] may have gone even a little further than what the current state law would be." Thus, "instead of preempting them, I came up with an idea to basically flip that. And make them, in terms of the local ordinances, the ones that stay and that the state overlay or mandate wouldn't apply as long as the locals continued their programs." Audio Recording, Senate Committee on Health Care, SB 587, March 10, 2021, at 44:50-45:46 (statement of Senator Tim Knopp), https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021031098 (accessed April 2, 2025). Importantly, however, Senator Knopp's statements regarding preexisting local licensing programs never suggested that the legislature intended to preempt local *standards*, whether the local government enacted such standards before or after the effective date of SB 587.[5]

[5] Plaintiffs point to other remarks in the legislative history as support for their preemption argument, but those remarks, like Senator Knopp's, speak to consistency of licensing and not the preemption of local standards. *See* Written Testimony, Senate Committee on Health Care, SB 587, March 1, 2021 (testimony of Shawn Miller) (expressing support for "statewide tobacco licensing program which would coordinate with the existing five County licensing programs" because of concern with a "patchwork approach of local

Footnote continued…

Other witness testimony supports the argument that the legislature did not intend to preempt local governments from enacting their own standards regarding the sale of tobacco and synthetic nicotine products, including bans on the sale of flavored products. Rachael Banks, Director of the Public Health Division of the Oregon Health Authority, argued that "a strong tobacco license system does not preempt local governments from enacting stronger, tailored policies that reflect community needs and values." Banks also noted that some counties had already enacted their own tobacco licensure programs and explained that "Multnomah County has been discussing a ban on flavored tobacco products." Written Testimony, Senate Committee on Health Care, SB 587, Feb 17, 2021 (testimony of Rachael Banks). And Gwyn Ashcom, the Washington County Tobacco Prevention Coordinator, testified in support of a statewide tobacco retail licensure system while also noting that the county would move to enact "additional protective strategies such as flavor restrictions and the prohibition of redemption of tobacco coupons and price promotions."

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licensing programs"); Audio Recording, Joint Committee on Ways and Means, SB 587, June 16, 2021, at 1:43:33-1:43:45 (statement of Senator Elizabeth Steiner Hayward) (explaining that "major retailers who have outlets across this state" are "very supportive" of a statewide licensing program because "there's starting to be a patchwork of licensure regulation in different counties around the state"), https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021061162 (accessed April 2, 2025).

Ashcom explained that both a statewide licensure system and the county's "additional strategies * * * are necessary parts of an effective, comprehensive program to reduce the number of children who become addicted to tobacco." Written Testimony, Senate Committee on Health Care, SB 587, March 1, 2021 (testimony of Gwyn Ashcom).

In sum, SB 587 does not "unambiguously" preempt local governments from banning the retail sale of flavored tobacco and synthetic nicotine products. *Rogue Valley Sewer Services*, 357 Or at 454. First, the legislature did not use language of express preemption in reference to local bans on the sale of flavored tobacco. Second, the legislature's decision to expressly preempt other things, such as local prohibitions on tobacco sales at pharmacies and local licensure requirements enacted after January 1, 2021, shows that the legislature knows how to preempt local law when it wants to and in fact did so in SB 587. Finally, the legislative history confirms that the legislature did not contemplate the preemption of local government standards related to the retail sale of tobacco and synthetic nicotine products. To the contrary, the legislature was aware that some local governments had already enacted their own standards and were considering bans on the sale of flavored tobacco and synthetic nicotine products.

2. SB 587 does not impliedly preempt WCO 878.

State law impliedly preempts local law when the two are in conflict. "Conflict," as that word is used in the context of preemption, does not just mean that state and local law regulate in the same area, or even that local law imposes different standards than does state law. *See La Grande/Astoria*, 284 Or at 176 (recognizing that "local government [must] have * * * authority to legislate on its own in matters in which the state could also act, for otherwise local powers would have to be narrowly confined in order to save room for potential state legislation"). Rather, state and local law conflict when compliance with both is "impossible." *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524 (2010). Thus, just because the state has "occupied the field" in a substantive area does not necessarily mean that local laws on the same subject conflict with state law.[6] *Id.* (explaining that "the occupation of a field of regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city"). Moreover, local

[6] Oregon's home rule preemption analysis, then, does not encompass a "field preemption" doctrine like the one adopted by the Supreme Court in some Supremacy Clause cases. *See, e.g., Arizona v. United States*, 567 US 387, 399, 132 S Ct 2492, 183 L Ed 2d 351 (2012) (Congress's "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive * * * that Congress left no room for the States to supplement it' or where there is a 'federal interest * * * so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 67 S Ct 1146, 91 L Ed 1447 (1947)) (ellipses in *Arizona*)).

laws that impose stricter standards than state laws do not necessarily conflict with those state laws. *See id.* (holding that city ordinance did not conflict with state laws on selling mobile home parks even though ordinance imposed extra requirements on such sales); *see also State ex rel. Haley v. City of Troutdale*, 281 Or 203, 211, 576 P2d 1238 (1978) (holding that state building code did not impliedly preempt local building code, notwithstanding fact that local code was more stringent than state code, because compliance with "local requirements [is] compatible with compliance with the state's standards"). The question, thus, is whether compliance with both SB 587 and WCO 878 is impossible.

As noted, SB 587 established a statewide licensure system for the retail sale of tobacco and synthetic nicotine products. ORS 431A.194. The legislature specified which premises would be qualified to obtain a license to sell tobacco and synthetic nicotine products. ORS 431A.198. Finally, the legislature provided that a local public health authority could establish and enforce standards for regulating the sale of tobacco and synthetic nicotine products for purposes related to public health and safety, in addition to any standards set out in state law and standards entered into by agreement with the Oregon Health Authority. ORS 431A.218(2)(a).

WCO 878, in turn, provides that "[n]o person shall sell, offer for sale, or otherwise distribute any flavored tobacco product or flavored synthetic nicotine product" within the county. WCO 878, Ex A, § 2.30(B). The ordinance also

prohibits the sale of tobacco and synthetic nicotine to any person under the age of 21; prohibits the sale of tobacco and synthetic nicotine at a discount using coupons or other price promotions; prohibits the sale of packages containing fewer than 20 cigarettes; prohibits the sale of tobacco and synthetic nicotine via self-service display; and prohibits the sale of tobacco and synthetic nicotine from any moveable kiosk, truck, or van. WCO 878, Ex A, § 2.30(A), (C), (D), (E), and (F).

WCO 878, therefore, sets standards related to the retail sale of tobacco and synthetic nicotine products and outright bans the sale of flavored tobacco and synthetic nicotine products. Those requirements differ from the requirements set out in SB 587 and further restrict the conduct of individuals and businesses wishing to sell tobacco and synthetic nicotine products within the county. But that does not mean that compliance with state law and local law is impossible. As the Court of Appeals aptly observed: "Because a retailer can comply with both Oregon's scheme for [retail licenses] and WCO 878's prohibition on the sale and distribution of flavored tobacco and flavored synthetic nicotine products in Washington County 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.

C. The trial court erroneously concluded that state law preempts WCO 878.

Considering the foregoing, the trial court erred in concluding that "the decision to disallow licensed retail sale of [flavored tobacco and synthetic nicotine products] must come from the state, not county by county" meaning that WCO 878 "is preempted by state law and therefore unenforceable." September 19, 2022, Letter Opinion at 4 (ER-540). First, the county has independent home rule authority to ban the sale of flavored tobacco and synthetic nicotine products, and that authority need not "come from" the state. Second, the text, context, and legislative history of SB 587 does not demonstrate that the legislature unambiguously intended to preempt any local law that banned the sale of flavored tobacco and synthetic nicotine products. *Rogue Valley Sewer Services*, 357 Or at 450–51. Finally, SB 587 does not impliedly preempt such a ban because compliance with both SB 587 and WCO 878 is not "impossible." *Thunderbird Mobile Club*, 234 Or App at 474.

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CONCLUSION

This court should affirm the decision of the Court of Appeals.

Respectfully submitted,

DAN RAYFIELD #064790
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

/s/ Philip Thoennes

PHILIP THOENNES #154355
Senior Assistant Attorney General
philip.thoennes@doj.oregon.gov

Attorneys for *Amicus Curiae*
State of Oregon