IN THE COURT OF APPEALS OF THE STATE OF OREGON

21+ TOBACCO AND VAPOR RETAIL ASSOCIATION OF OREGON, a domestic non-profit corporation; NO MOKE DADDY, LLC, a domestic limited liability company, doing business as DIVISION VAPOR; and PAUL BATES, an Individual,
Plaintiffs-Appellants,
v.

MULTNOMAH COUNTY, a political subdivision of the State of Oregon,
Defendant-Respondent.

Multnomah County Circuit Court Case
23CV03801

A182442

BRIEF OF *AMICI CURIAE* PUBLIC HEALTH, MEDICAL, AND COMMUNITY GROUPS

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I. INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

At issue in this case is whether Multnomah County's flavored tobacco and nicotine ban, Multnomah County Ordinance 1311 (the "Flavor Ban Ordinance"), is preempted by state law. Appellants, who were plaintiffs below, seek reversal of the trial court's judgment dismissing their challenge to the validity of the Flavor Ban Ordinance. *Amici* here are aligned with Multnomah County, which seeks affirmance of the trial court's judgment.

African American Tobacco Control Leadership Council, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, American Medical Association, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, Cascade AIDS Project, Coalition of Communities of Color, Kaiser Permanente, National LGBTQI+ Cancer Network, Oregon Medical Association, Oregon Thoracic Society, Parents Against Vaping e-cigarettes, The Center for Black Health and Equity, Truth Initiative, and Upstream Public Health (collectively, the "Public Health, Medical, and Community Groups" or "*amici*") seek leave to appear as *amici curiae*.

As is evident from the description of *amici* in their motion to appear, each of these groups works, on a daily basis, to reduce the devastating health harms of tobacco products. *Amici* include physicians who counsel their young patients and their parents about the hazards of tobacco use, organizations with formal programs to urge users to quit, and groups representing parents and families struggling to free young people from nicotine addiction. Each of these organizations has a direct and immediate interest in curbing the sale of flavored

tobacco products, as well as substantial expertise in the role those products play in enticing young people to use tobacco. Thus, *amici* are particularly well suited to inform the court of the substantial public health benefits that the Flavor Ban Ordinance provides to residents of Multnomah County, benefits that would be lost if the trial court's judgment were reversed.

II. FACTUAL AND HISTORICAL BACKGROUND

A. The 2021 Oregon Legislature Enacts Senate Bill 587.

During its 2021 session, the Oregon Legislature enacted Senate Bill 587. SB 587 mandates that retail sales of "tobacco product[s]" and "inhalant delivery system[s]" may only occur at licensed premises. ORS 431A.194.[1] Licenses must be obtained from the Oregon Department of Revenue, unless the retailer has obtained a license issued by a local jurisdiction under a licensing program established by that jurisdiction before January 1, 2021, and that jurisdiction's licensing program remains in effect. ORS 431A.198(1), (8); ORS 431A.220. As relevant here, Section 17(2)(a) of SB 587 (codified at ORS 431A.218(2)(a)) explicitly provides that each local health authority may enact and enforce

[1] Senate Bill 587 (2021) was adopted as Oregon Laws 2021, chapter 586 and is codified as ORS 431A.190 to ORS 431A.220. The law defines "Tobacco products" broadly to include cigarettes, smokeless tobacco products, "other forms of tobacco, prepared in a manner that makes the tobacco suitable for chewing or smoking in a pipe or otherwise," and tobacco vaping devices. *See* ORS 431A.190(5) and ORS 431A.218(1)(d) (incorporating the definition of "tobacco products" in ORS 431A.175); ORS 431A.475(1)(b) (defining "tobacco products"). "Inhalant delivery system[s]" include "a device that can be used to deliver nicotine or cannabinoids in the form of a vapor or aerosol" as well as components of a device and substances "sold for the purpose of being vaporized or aerosolized by a device." *See* ORS 431A.190(2), ORS 431A.218(1)(b) (incorporating the definition of "inhalant delivery system" set forth in ORS 431A.175); ORS 431A.175(1)(a)(A).

"standards for regulating the retail sale of tobacco products and inhalant delivery systems * * * in addition to the standards" established by SB 587. *See also Schwartz v. Washington Co.*, 332 Or App 342, 344-352, ___ P3d ___ (2024) (discussing applicable provisions and legislative history of SB 587).

B. Multnomah County Enacts a Flavored Tobacco and Nicotine Ban.

Consistent with SB 587, on December 15, 2022, the Multnomah County Board of Commissioners, sitting as the Local Public Health Authority of Multnomah County, adopted the Flavor Ban Ordinance. The Flavor Ban Ordinance prohibits the retail sale of flavored tobacco and nicotine products in Multnomah County. Multnomah County Code ("MCC") § 21.563(B).[2]

This litigation then followed. Appellants, plaintiffs below, are tobacco and nicotine retailers ("the Tobacco Retailers"). They sought injunctive and declaratory relief to prevent the Flavor Ban Ordinance from going into effect. Complaint, ¶¶ 1-68 [ER 2-20]. The trial court granted Multnomah County's motion for summary judgment, denied the Tobacco Retailers' motion for summary judgment, and dismissed the case with prejudice. [ER 210-227].

C. In *Schwartz v. Washington County*, this Court Rejects a Similar Preemption Challenge to Washington County's Flavored Tobacco Ban.

This appeal is the second preemption challenge to a local flavored tobacco ban adopted by a local health authority to reach this court. In *Schwartz*,

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[2] The Flavor Ban Ordinance is attached as Exhibit 1 to Plaintiff's Complaint and defines key terms, including "flavored tobacco product" and "tobacco products." MCC, § 21.560. [ER 21-24]

this court recently held that Washington County's flavored tobacco ban, which is similar in all material respects to Multnomah County's flavored tobacco ban, is not preempted by SB 587. 322 Or App at 344. The opinion in *Schwartz* was issued on May 1, 2024 – after the Tobacco Retailers filed their Opening Brief, but before Respondents filed their Answering Brief (and before *amici* filed this brief).

III. SUMMARY OF ARGUMENT

Following the court's reasoning in *Schwartz,* the Flavor Ban Ordinance is not preempted by SB 587. State preemption of local regulatory authority in Oregon occurs only when the legislature's intent to preempt is unambiguous. No such unambiguous intent to preempt local laws barring the sale of flavored tobacco products is reflected in the text or legislative history of SB 587. Indeed, that statute expressly authorizes the enforcement of local "standards for regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety" in addition to standards imposed by state law. In arguing that SB 587 preempts the Flavor Ban Ordinance, the Tobacco Retailers fail to recognize that the state licensing law restricts only the establishment of new local licensing systems for retailers, not local laws prohibiting certain products to be sold by retailers. *It is the retailer that is licensed under state law, not the product.* Under state law, if a retailer wants to sell tobacco products or inhalant delivery systems, it must have a license. But that license does not allow the sale of products that the local jurisdiction has prohibited as a serious threat to public health. Thus, nothing in SB 587

prevents Multnomah County from providing its residents with greater protection against these dangerous and addictive products than is afforded under state law. Nor does SB 587 preempt the County's local licensing law.

The trial court properly concluded that SB 587 allows localities like Multnomah County to provide their residents, particularly young people, with a greater measure of protection from the health harms of tobacco products than is afforded by state law. Specifically, the Flavor Ban Ordinance will protect the residents of Multnomah County from the following harmful products, among others:

- Menthol cigarettes, which cause increased youth initiation of smoking and its consequent health harms, increase addiction, reduce cessation, and contribute significantly to serious health disparities for African Americans;
- Flavored e-cigarettes, which have caused an epidemic of e-cigarette use and nicotine addiction among young people, with attendant adverse health consequences and progression to combustible tobacco products;
- Flavored cigars, which have substantial appeal to young people and result in significant health harms; and
- Flavored hookah, which is increasingly used by youth, with adverse health consequences.

IV. ARGUMENT

Oregon law does not preempt Multnomah County's Flavor Ban Ordinance or, more generally, Multnomah County's tobacco retail licensure program. SB 587 expressly preserves the authority of local public health authorities to enact standards for regulating the retail sale of tobacco products and inhalant delivery systems that are in addition to the standards set by state law. This structure allows local governments to provide a greater measure of protection against the public health harms of the regulated products than is afforded by the State. And, as explained in Section IV.B, below, enactment of the Flavor Ban Ordinance reflects a well-reasoned policy decision to provide significant public health benefits that will accrue to the residents of Multnomah County, and particularly to its young people. The court's recent opinion in *Schwartz*, rejecting a preemption challenge to Washington County's flavored tobacco ban ordinance, fully disposes of the Tobacco Retailers' challenge here.

A. The Multnomah County Flavor Ban Ordinance Is Not Preempted.

On appeal, the Tobacco Retailers raise two interrelated assignments of error. They first argue that SB 587 preempts Multnomah County's entire tobacco retail licensing program, including the Flavor Ban Ordinance. Opening Brief at 6-21*; see also* Complaint, ¶¶ 58-67 [ER 16-18] (so alleging). Second, they argue that the Flavor Ban Ordinance itself is preempted by SB 587. Opening Brief at 21-37*; see also* Complaint, ¶¶ 44-57 [ER 13-15] (so alleging). Both arguments are based on a flawed reading of SB 587 and a misunderstanding of Oregon preemption law. *Amici* address both the issues

together, because those issues involve interpretation and application of the same statutory scheme and the same applicable law.

Three well-settled legal principles should inform the court's preemption analysis here. First, local governments have the authority "to enact reasonable regulation to further local interests in public health, safety and welfare." *Ashland Drilling, Inc. v. Jackson Cnty.*, 168 Or App 624, 634, 4 P3d 748 (2000).[3] Second, state preemption of local regulatory authority occurs only when the legislature's intent to preempt is obvious and unambiguous. "The state is deemed to have exercised its power to pre-empt a field only where the intent to do so is apparent." *Multnomah Kennel Club v. Dep't of Revenue*, 295 Or 279, 287, 666 P2d 1327 (1983).[4] There is a presumption against state preemption of local regulation and ordinances. *See, e.g., City of LaGrande v. Pub. Emps. Ret. Bd.*, 281 Or 137, 148-149, 576 P2d 1204 (1978) ("it is * * * reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by statewide law unless that intention is apparent") (footnote omitted); *Ashland Drilling*, 168 Or App at 635 ("We begin with a presumption against preemption.").

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[3] *See also City of Portland v. Gatewood*, 76 Or App 74, 79, 708 P2d 615 (1985) ("The authority of a city to enact reasonable legislation to regulate conduct which is thought to be detrimental to the public's health, safety, or morals is indisputable.").

[4] *See also AT&T Comms. of the Pac. Nw. v. City of Eugene*, 177 Or App 379, 395, 35 P3d 1029 (2001) ("it is generally required that the legislature's preemptive intentions be clearly stated"); *Ashland Drilling*, 168 Or App at 634 ("where local governments have undertaken reasonably to regulate matters of local health, safety, and welfare, such regulation will be valid unless we determine that the local regulation conflicts with state law or is clearly intended to be preempted").

Third, and consistent with the presumption against preemption, local governments "possess authority to enact substantive policies, *even in areas also regulated by state law*, so long as the local enactment is not incompatible with state law." *Gunderson, LLC v. City of Portland*, 352 Or 648, 658-659, 290 P3d 803 (2012) (emphasis added; internal quotation marks omitted). Because local jurisdictions have such authority, Oregon 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." *Or. Rest. Ass'n v. City of Corvallis*, 166 Or App 506, 511, 999 P2d 518 (2000). Accordingly, a "state statute will displace the local rule where the text, context and legislative history of the statute '*unambiguously* express an intention to preclude local governments from regulating' in the same area governed by the statute." *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or 437, 450, 353 P3d 581 (2015) (quoting *Gunderson*, 352 Or at 663) (emphasis in *Rogue Valley Sewer Servs.*); *see also State ex. rel. Haley v. City of Troutdale*, 281 Or 203, 211, 576 P2d 1238 (1978) (applying "unambiguously expressed" standard); *Gunderson*, 352 Or at 664 (same). That is a "high bar to overcome." *Rogue Valley Sewer Servs.*, 357 Or at 545.

The bar has not been overcome here. In their Complaint and before the trial court, the Tobacco Retailers alleged and argued that the Flavor Ban Ordinance is expressly preempted by Section 17(2)(a) of SB 587 (codified at ORS 431A.218(2)(a)). Complaint, ¶¶ 44-50 [ER 13-14]; Plaintiff's Response to Defendant Multnomah County's Motion to Dismiss at 24-26 [ER 103-105].

On appeal, the Tobacco Retailers shift their emphasis to arguing that the Flavor Ban Ordinance is impliedly preempted; they assert that the Flavor Ban Ordinance "irreconcilably conflicts" with SB 587 because requiring a license to sell tobacco products "is the equivalent [of] legalizing the sale of those products." Opening Brief at 26. Neither theory is persuasive.

Nothing in ORS 431A.218 unambiguously expresses a legislative intent to preempt local governments from enacting flavored tobacco and nicotine bans to protect public health. Rather, the Tobacco Retailers confuse the preemption of *new* local government retail *licensing* programs in SB 587 with the bill's express authorization of local ordinances that regulate the retail sale of tobacco products and inhalant delivery systems that are in addition to the standards set by SB 587.

The text of ORS 431A.218(2) flatly refutes the Tobacco Retailers' argument that SB 587 preempts the Flavor Ban Ordinance. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 ("there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes") (internal quotation marks omitted; citation omitted). Section 17(2) provides:

> "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;

> (b)(A) Administer and enforce standards established by state law or rule relating to the regulation of the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety if the local public health authority and the Oregon Health Authority enter into an agreement pursuant to ORS 190.110 or;
>
> (B) Perform the duties described in this section in accordance with ORS 431.413 (2) or (3)."

ORS 431A.218(2) (emphasis added).

The statute is clear. A local jurisdiction may enact "standards for regulating" the sale of "tobacco products" and "inhalant delivery systems" "in addition to" the state standards set by state law. Far from articulating an unambiguous expression of legislative intent to preempt additional local legislation more restrictive than state standards, the statute explicitly allows for such local ordinances. *See Schwartz*, 332 Or App at 356 (Section 17(2)(a) "expressly allows" local health authorities to "enforce ordinances that set standards * * * *in addition to* the standards prescribed by state law.") (internal quotation marks omitted). The text of the statutory provision does not, by its own terms, preempt local legislation. The Flavor Ban Ordinance easily fits within the ambit of ORS 431A.218(2). It establishes a standard for regulating the retail sale of tobacco or nicotine products by limiting the products that can be sold to unflavored products. As this court held with Washington County's flavored tobacco ban, Multnomah's Flavor Ban Ordinance "is a standard as authorized by ORS 431A.218(2)(a)." *Schwartz*, 332 Or App at 357.

The context of ORS 431A.218(2) similarly does not evidence an unambiguous intent to preempt local ordinances restricting retail sales of certain tobacco products and inhalant delivery systems. *See PGE v. Bureau of Labor &*

Indus., 317 Or 606, 611, 859 P2d 1143 (1993) (context "includes other provisions of the same statute and other related statutes"). As discussed above, ORS 431A.218 was section 17 of Senate Bill 587. Sections 1 through 14 of SB 587 provide for statewide licensing for "tobacco products" and "inhalant delivery systems." Section 2 has a statement of legislative intent. It provides:

> "The purpose of ORS 431A.190 to 431A.216 is 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."

ORS 431A.192 (emphasis added). Senate Bill 587 explicitly contemplated "local ordinances and rules" *in addition to and separate from* "state laws and rules" that "govern the retail sale of tobacco products." The express intent of SB 587 was to improve the enforcement of local ordinances and rules, not to preempt them.

Senate Bill 587, section 17(6) (codified at ORS 431A.218(6)) is additional context conveying that the legislature did not intend for ORS 431A.218(2) to limit the power of local jurisdictions to adopt more stringent limitations on retail sales of tobacco products and inhalant delivery systems than those provided by state law. Subsection (6) provides that local jurisdictions may not enact new ordinances that prohibit pharmacies from making retail sales of tobacco products and inhalant delivery systems. Thus, the legislature knew how to expressly preempt specific kinds of local ordinances; it did not do so with respect to local prohibitions of flavored products.

As with the text of ORS 431A.218(2), the context of ORS 431A.218(2) does not convey an unambiguous expression of legislative intent to preclude concurrent state and local government regulation of retail sales. To the contrary, the context anticipates that both the state *and* local governments will regulate such sales.

The Tobacco Retailers improperly conflate the local regulation of "tobacco products" and "inhalant delivery systems" authorized by Section 17(2) of SB 587 with the state licensing regime and enforcement provisions established by Sections 1 through 14 of SB 587. *But it is the retailer that is licensed under state law, not the product.* Sections 1 through 14 provide for state *licensing* of "tobacco" and "inhalant delivery system" *retailers*. If a party wants to sell those products, it must have a license. However, a license does not mean any licensed retailer may sell any specific "tobacco product" or "inhalant delivery system" in any given local jurisdiction. If a locality finds that a particular product is a serious threat to public health, it is free to enact a standard that prohibits the sale of that product by licensees. A local flavor ban standard "is not preempted merely because it prohibits the sale of a product which is allowed, in certain circumstances to be sold under" SB 587. *Schwartz*, 332 Or App at 359. A state-licensed retail seller of tobacco products must conform to the state licensing standards, but it must also conform to local standards determining what products it is permitted to sell. *Id.* at 359-360.

That Senate Bill 587 restricts local *licensing* programs that did not exist prior to January 1, 2021, but not local ordinances limiting retail sales, is

apparent from the legislation itself. Section 3 (codified at ORS 431A.194) provides that any person selling tobacco products or inhalant delivery systems in Oregon must have a state or local license. Section 5 (codified at ORS 431A.198) establishes a statewide licensing program and qualification requirements for "person[s] that make retail sales of tobacco products or inhalant delivery systems." ORS 431A.198(1). Section 18 of Senate Bill 587 (codified at ORS 431A.220) provides that a local government that had an existing licensing program and standards in effect prior to January 2, 2021, may continue to enforce those standards and require licenses. Any retailer who already holds a license under an *existing* local government licensing program is not required to also obtain a state license. ORS 431A.198(8); ORS 431A.218(7). And, under Section 17(7) (codified at ORS 431A.218(7)), a local government may not require a retailer to have a local license unless that local government had a preexisting licensing program. In other words, Senate Bill 587 preempts local government retail licensing programs not already in effect, but does not preempt local government retail licensing programs that were in effect before January 2, 2021.

That intentional restriction on local governments that did not have pre-existing licensing programs to establish new tobacco product and inhalant delivery system licensing programs stands in stark contrast to the explicit statement in Section 17(2) that local government health authorities may further "enforce * * * standards for regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety" that

are "in addition to the standards" established by SB 587. ORS 431.218(2). The legislature drew a clear distinction between local government *licensing* requirements and local government regulation of retail sales. The Tobacco Retailers effectively read out of the legislation key language in Section 17(2) specifically granting local governments authority to set "standards for regulating the retails sale" of tobacco and nicotine products. That is inconsistent with the requirement that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010; *see also Bert Brundige, LLC v. Dep't of Revenue*, 368 Or 1, 4, 485 P3d 269 (2021) (quoting ORS 174.010 for principle that context includes other provisions of same legislation).

The text and context of ORS 431A.218(2) are unambiguous. When the legislature enacted Senate Bill 587, it intended to allow local governments to further regulate the retail sale of tobacco products and inhalant delivery systems. *See also Schwartz*, 332 Or App at 356 (discussing text and context of SB 587 and so concluding). Senate Bill 587 and related state laws set a base regarding licensing, but they do not limit local authority to impose further restrictions on specific products.

Given this clear intent, the scant legislative history offered by the Tobacco Retailers is particularly unavailing. *See Gaines*, 346 Or at 172 ("[a] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it."). The Tobacco Retailers predominantly rely on a statement made by a legislator during a committee

hearing concerning a proposed amendment to the bill that "the state overlay or mandate wouldn't apply as long as the locals continued their programs." *See* Opening Brief at 37 (selectively quoting statements by Senator Knopp regarding his proposed -3 amendment).[5] However, as the trial court properly pointed out, that statement conveys an intent *not* to preempt local licensure programs that predated the passage of SB 587. Opinion at 9-10, n 6. [ER 218-219]. The statement does not address local government authority to regulate the products a licensee may sell.

The relevant legislative history does not "*unambiguously* express[] an intent to preclude local governments from regulating" retail sales of tobacco products and inhalant delivery systems. *Rogue Valley Sewer Servs.*, 357 Or at 450 (internal quotation marks omitted; citation omitted). The operative language in Section 17(2) – specifically allowing local government health authorities to enforce, through ordinance, "standards for regulating the retail sale of tobacco products and inhalant delivery systems" – was part of the text of the bill as introduced. No amendments were proposed to that language, and it was not discussed at any of the hearings or work sessions on the bill.[6] The Staff

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[5]Audio Recording, Senate Committee on Health, SB 587, March 10, 2021 at 44:40 [ER 89]. The Tobacco Retailers also point to a statement made by Senator Hayward that SB 587 would limit additional local jurisdictions from adopting of local licensure programs in the future. Opening Brief at 30. That statement also is consistent with the legislation ultimately approved, which provides that local tobacco retail licensure programs, such as Multnomah County's, that predate the passage of SB 587 may continue to operate. ORS 431A.220.

[6] The text of SB 587, as introduced, and all the proposed and adopted amendments, are available on the Oregon State Legislature's website, at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB

Measure Summary for SB 587, as introduced, provides, as pertinent: "Allows local public health authority to enforce local standards for regulation of sale of tobacco products and inhalant delivery systems or enforce state standards for regulation of sale of tobacco products and inhalant delivery systems." Staff Measure Summary, Senate Committee on Health Care, SB 587, March 1, 2021, at 1.[7] That language was repeated in the subsequent Staff Measure Summary for SB 587 A. Staff Measure Summary, Senate Committee on Health Care, SB 587 A, March 17, 2021 at 1.[8] The preliminary Budget Report and Measure Summary for the Joint Ways and Means Committee for the bill, prepared shortly before SB 587 received final approval for a floor vote, was even more explicit, stating: "The bill allows local public health authorities (LPHA) to establish their own more stringent regulations for these retailers." Budget Report and Measure Summary, Joint Committee on Ways and Means, SB 587 A, June 16, 2021, at 3.[9] From the outset, Section 17(2) of SB 587 was unequivocal that the legislation would *allow*, not preempt, stricter local government regulation of retail sales of tobacco products and inhalant delivery

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587/Introduced (accessed May 9, 2024) and https://olis.oregonlegislature.gov/liz/2021R1/Measures/ProposedAmendments/SB587 (accessed May 9, 2024).

[7] Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/233052 (accessed May 9, 2024).

[8] Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/58256 (accessed May 9, 2024).

[9] Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/245652 (accessed May 9, 2024).

systems. The summaries provided to legislators regarding the bill were explicit that the bill would allow for "more stringent" local regulation. No legislator questioned or challenged that language.[10] The legislative history further refutes the Tobacco Retailers' preemption argument.

The Tobacco Retailers argue that interpreting "standards for regulating" to encompass the Flavor Ban Ordinance "leads to an absurd result," because that effectively would allow a local government health authority to prohibit sales of all tobacco products. Opening Brief at 35. But the challenged Flavor Ban Ordinance does not prohibit sales of all tobacco products, only flavored products. Multnomah County, acting in its capacity as a public health authority, determined that such products present a substantial and significant threat of harm to Multnomah County residents and thus enacted a "standard for regulating the retail sale" of such products that permits only unflavored products to be sold within the County. *See also Schwartz*, 332 Or App at 357 (Washington County's flavored tobacco ban "is a standard as authorized by ORS 431A.218(2)(a)"). It is well within the County's authority to take such reasonable and measured steps to protect the public, as discussed in greater detail in Section IV.B. *infra*.

The Tobacco Retailers' argument that SB 587 preempts the entire Multnomah County retail tobacco licensing program also fails. The Tobacco

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[10] *See also Schwartz*, 322 Or App at 350 (discussing legislative history of SB 587 and providing "[a]s SB 587 worked its way through the legislative process * * * the bill was largely understood to not prevent political subdivisions from creating additional regulations regarding tobacco products and inhalant delivery systems").

Retailers argue that Multnomah County's licensing program is expressly preempted by ORS 431A.220, because the County's program does not incorporate all the requirements for a state license set forth in ORS 431A.198. Opening Brief at 7-21. That theory is flawed because there is no requirement that Multnomah County's licensure program include the requirements set forth in ORS 431A.198.[11]

As discussed above, SB 587 provides that local governments that required local licensure prior to January 2, 2021, may continue to require local licensure. ORS 431A.220. But nothing in SB 587 or any other provision of Oregon law requires that a preexisting local licensure program, such as Multnomah County's, include all the qualification requirements in ORS 431A.198. Rather, under ORS 431A.220, a preexisting local government licensing program need only to have "enforced standards described in ORS 431A.218(2)(a)." And ORS 431A.218(2)(a) does not set forth any specific standards that a local health authority must incorporate into "an ordinance enacted by the local public health authority * * * regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety." While local government standards enacted under ORS 431A.218(2)(a) "may" include standards set forth in ORS 431A.218(2)(b) and

[11]The Flavor Ban Ordinance applies to sale of flavored tobacco products regardless of whether the retailer is licensed to sell such products. The Multnomah County Code defines "Tobacco Retailer" as essentially anyone who sells tobacco products. MCC, § 21.560. All Tobacco Retailers are required to obtain a license. *Id.* §§ 21.561, 21.563(A)(1). However, the Flavor Ban applies to all retailers, regardless of whether or not they have complied with the licensure requirement. *Id.* § 21.563(B).

"qualifications" set forth in ORS 431A.198 "in addition to" the local standards in the local ordinance, there is nothing in the text of ORS 431A.218(a) that mandates that the standards in ORS 431A.218(2)(b) and qualifications in ORS 431A.198 *must* be incorporated into a local ordinance adopted under ORS 431A.218(2)(a). The language is permissive, not mandatory. The Tobacco Retailers' argument that the continuity provision in OR 431A.220 only allows for survival of local ordinances that incorporate standards and qualifications in ORS 431A.198 and ORS 431A.218(2)(b) is belied by the text of the statute.[12] The Tobacco Retailers seek to impose requirements for preexisting local licensure programs that do not exist.[13]

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[12] *See also Schwartz*, 332 Or App at 347 ("the licensure scheme that was enacted by the legislature [in SB 587] * * * includes provisions that permit cities and local public health authorities to continue their licensing programs if those programs were in place on or before January 1, 2021").

[13] The Tobacco Retailers' home rule argument fails for similar reasons. The Tobacco Retailers have alleged, and argue here, that the Flavor Ban Ordinance does not address a "matter of county concern" because "[t]he Oregon legislature has specifically authorized the statewide sale of tobacco products, flavored or unflavored" and the Flavor Ban Ordinance "interferes with the scope of the conduct authorized by SB 587." Complaint, ¶¶ 53-57 [ER 15]; Opening Brief at 38-42. While Article VI, section 10 does limit county home rule authority to "matters of county concern," it is not implicated here. The analysis as to whether local legislation "is a matter of county concern" basically entails whether a local government is improperly seeking to control the actions of other governmental bodies. *See, e.g.*, *State v. Logsdon*, 165 Or App 28, 33, 995 P2d 1178 (2000), *review denied*, 330 Or 362 (2000). Here, where the Oregon Legislature explicitly has provided local governments with the authority to adopt "standards for the retail sale" of flavored tobacco and nicotine products, and has not preempted such regulations, county ordinances consistent with that grant do not interfere with the actions of other governmental bodies. Multnomah County, acting as a local health authority, was well within its authority to adopt the Flavor Ban Ordinance. The Flavor Ban Ordinance unambiguously addresses matters of county concern.

The Tobacco Retailers' preemption claims fail. No provision of SB 587, including Section 17(2) (codified at ORS 431A.218(2)), preempts the governing body of a local health authority from enacting an ordinance to protect public health by limiting or restricting the tobacco products and inhalant delivery systems that may be sold in that jurisdiction. SB 587 does not convey any explicit or implied intent on the part of the Oregon Legislature to preempt local flavor bans; to the contrary, it conveys an explicit grant of authority for local governments to enforce "standards for regulating the retail sale" of such products. ORS 431A.218(2)(a). Multnomah County's Flavor Ban Ordinance is not preempted by SB 587, and Multnomah County's retail tobacco licensure program remains valid and operable pursuant to ORS 431A.220.

B. The Flavor Ban Ordinance Provides Multnomah County Residents Greater Protection Against the Public Health Harms of Flavored Tobacco and Nicotine Products.

The U.S. Supreme Court has declared that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 US 120, 161 (2000). Use of tobacco products remains the leading cause of preventable death in this country, resulting in 480,000 deaths per year.[14] The tobacco industry has long understood that almost all new tobacco users begin their addiction in their

[14] U.S. Food & Drug. Admin., *Health Effects of Tobacco Use*, https://www.fda.gov/tobacco-products/public-health-education/health-effects-tobacco-use (Mar 23, 2022).

youth.[15] Indeed, 90% of adult smokers begin smoking in their teens.[16] As the U.S. Court of Appeals for the D.C. Circuit recently noted, "[b]usinesses seeking to make a profit selling tobacco products * * * face powerful economic incentives to reach younger customers." *Prohibition Juice Co. v. FDA*, 45 F4th 8, 12 (DC Cir 2022).

The tobacco industry also knows that to successfully market its products to young people, flavors are essential.[17] For all tobacco products, including cigarettes, e-cigarettes, cigars, and hookah – all covered by the Flavor Ban Ordinance – flavors significantly increase the appeal of tobacco products to youth. Data from the U.S. Food and Drug Administration ("FDA") and National Institutes of Health's Population Assessment of Tobacco and Health ("PATH") survey found that almost 80% of 12-to-17 year-olds who had ever used a tobacco product initiated their use with a flavored product.[18] At least two-thirds of youth tobacco users reported using tobacco products "because

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[15] *See, e.g.*, Cheryl L. Perry, *The Tobacco Industry and Underage Youth Smoking: Tobacco Industry Documents from the Minnesota Litigation*, 153 Archives of Pediatrics & Adolescent Med 935, 936 (1999), https://jamanetwork.com/journals/jamapediatrics/fullarticle/347724.

[16] Office of the Surgeon General ("OSG"), U.S. Dept of Health and Human Services ("HHS"), *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General* 708 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

[17] *See* OSG, HHS, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 537-41 (2012), https://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf_NBK99237.pdf.

[18] Bridget K. Ambrose *et al*., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 J Am Med Ass'n 1871, 1871 (2015), https://jamanetwork.com/journals/jama/fullarticle/2464690.

they come in flavors I like."[19] In 2022, in both Multnomah County and the state of Oregon, over 75% of current 8th and 11th grade users of tobacco and vaping products used flavored products.[20] As the FDA has found, "the availability of tobacco products with flavors at these developmental stages attracts youth to initiate use of tobacco products and may result in lifelong use."[21] By enacting the Flavor Ban Ordinance, Multnomah County has sought to protect its residents – and particularly its young people – from the continuing scourge of flavored tobacco and nicotine products that lure millions into a lifetime of addiction and contribute so significantly to disease and death. *See* Multnomah County Ordinance ("MCO") 1311 Findings, § 3 [ER 21] ("Flavored tobacco products are popular among youth and young adults and are a key cause of the chronic use of tobacco products for all ages.").

1. The Flavor Ban Ordinance Affords Multnomah County Residents Greater Protection Against the Public Health Harms of Menthol Cigarettes.

The Flavor Ban Ordinance prohibits the sale of cigarettes with the taste of menthol (MCC §§ 21.560, 21.563), the only flavored cigarette currently permitted under federal law.[22] Menthol cigarettes are a substantial threat to

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[19] *Id.* at 1873 tbl.2.

[20] Oregon Health Authority ("OHA"), *2022 Oregon Student Health Survey – Data Tables: Multnomah County* 70 tbl.118, https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/Documents/SHS/2022/Reports/County/Multnomah%20County%202022.pdf (accessed Apr 24, 2024).

[21] Regulation of Flavors in Tobacco Products, Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 12,294, 12,295 (Mar 21, 2018).

[22] *See* 21 USC § 387g(a)(1)(A).

public health because they increase the risk of youth initiation of smoking, increase addiction and reduce cessation, and disproportionately harm the African American community, thus exacerbating serious existing health disparities.

a. Menthol cigarettes increase youth initiation of smoking.

Tobacco smoke can be harsh and unappealing to novice smokers, a fact well-understood by the industry.[23] Menthol serves to ameliorate these unpleasant sensations. According to the FDA, "[m]enthol's flavor and sensory effects reduce the harshness of cigarette smoking and make it easier for new users, particularly youth and young adults, to continue experimenting and progress to regular use."[24] Thus, young smokers are more likely to use menthol cigarettes than any other age group. According to the FDA, "[t]he disproportionate use of menthol cigarettes by youth and young adult smokers compared to older adults has been consistent over time and across multiple studies with nationally representative populations."[25] The National Survey on Drug Use and Health has similarly found that preference for menthol among cigarette smokers is inversely correlated with age.[26] Data shows that half of

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[23] OSG, HHS, *Preventing Tobacco Use* at 537-39.

[24] Tobacco Product Standard for Menthol in Cigarettes, 87 Fed Reg 26,454, 26,455 (proposed May 4, 2022) ("Menthol Proposed Rule").

[25] *Id*. at 26,462.

[26] Cristine D. Delnevo et al., *Banning Menthol Cigarettes: A Social Justice Issue Long Overdue*, 22 Nicotine & Tobacco Res 1673, 1673 (2020), https://academic.oup.com/ntr/article/22/10/1673/5906409.

youth (ages 12-17) who ever tried smoking initiated with menthol cigarettes.[27] Additionally, the Truth Initiative's Young Adult Cohort Study, a national study of 18-34 year olds, found that 52% of new young adult smokers initiated with menthol cigarettes.[28] Initiation with menthol cigarettes was much higher among Black smokers (93.1%) compared to White smokers (43.9%).[29]

Similarly, in Oregon and Multnomah County, youth who smoke are more likely to use menthol cigarettes than their adult counterparts. According to the latest data, 50.3% of 11th grade students in Oregon and 65.2% of 11th grade students in Multnomah County who smoked cigarettes reported using a menthol product (2022),[30] compared with 21.3% of adults (2020).[31]

The impact of menthol cigarettes in attracting and addicting young people has long-term, adverse health consequences. The FDA has found that "smoking cigarettes during adolescence is associated with lasting cognitive and behavioral impairments, including effects on working memory in smoking teens

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[27] Ambrose *et al*., 314 J Am Med Ass'n at 1872.

[28] Joanne D'Silva *et al*., *Differences in Subjective Experiences to First Use of Menthol and Nonmenthol Cigarettes in a National Sample of Young Adult Cigarette Smokers*, 20 Nicotine & Tobacco Res 1062, 1064 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6093322/.

[29] *Id.*

[30] OHA, *Oregon Student Health Survey (SHS) Data Portal*, https://www.bach-harrison.com/SHSDataPortal/Crosstabs.aspx (accessed Apr 24, 2024) (Run Crosstab of "MENTHOL" and "TBCIGCOMB3" questions under "cigarette" topic).

[31] OHA, *Oregon Tobacco Facts*, tbl.6.5 https://www.oregon.gov/oha/ph/preventionwellness/tobaccoprevention/pages/oregon-tobacco-facts.aspx#f54 (accessed Apr 24, 2024).

and alterations in the prefrontal attentional network in young adult smokers."[32] "Use of tobacco products," according to the FDA, "puts youth and young adults at greater risk for future health issues, such as coronary artery disease, cancer, and other known tobacco-related diseases."[33]

The devastating health impact of menthol cigarettes is most starkly shown by a recent study from researchers at the University of Michigan. The study estimates that during the 38-year period from 1980-2018, menthol cigarettes were responsible for 10.1 million extra smokers (approximately 266,000 extra smokers every year) and 378,000 additional smoking related deaths (almost 10,000 additional deaths per year).[34]

b. Menthol cigarettes increase addiction and reduce cessation.

Among middle and high school students, menthol smoking is associated with greater smoking frequency and intention to continue smoking, compared to non-menthol smoking.[35] PATH study data show that youth menthol smokers have significantly higher levels of certain measures of dependence,[36] and that

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[32] Advance Notice of Proposed Rulemaking, 83 Fed Reg at 12,295.

[33] *Id.*

[34] Thuy T.T. Le & David Mendez, *An Estimation of the Harm of Menthol Cigarettes in the United States from 1980 to 2018*, 31 Tobacco Control 564, 566 (2022), https://tobaccocontrol.bmj.com/content/early/2021/02/09/tobaccocontrol-2020-056256.info.

[35] Sunday Azagba *et al.*, *Cigarette Smoking Behavior Among Menthol and Nonmenthol Adolescent Smokers*, 66 J Adolescent Health 545, 549 (2020), https://pubmed.ncbi.nlm.nih.gov/31964612/.

[36] Sam N. Cwalina *et al.*, *Adolescent Menthol Cigarette Use and Risk of Nicotine Dependence: Findings from the National Population Assessment on*

initiation with a menthol-flavored cigarette is associated with a higher relative risk of daily smoking.[37] The FDA has found both that "[y]outh and young adults are particularly susceptible to becoming addicted to nicotine" and that "[m]enthol enhances the effects of nicotine in the brain by affecting mechanisms involved in nicotine addiction."[38] Thus, as Multnomah County recognized, there is little doubt that menthol cigarettes have led millions of youth into tobacco addiction. *See* MCO 1311 Findings, § 5 [ER 21] ("Menthol tobacco products are * * * popular among youth and young adults and are a key cause of the chronic use of tobacco products for all ages.").

It is harder for people who smoke menthol cigarettes to stop smoking. The 2020 Surgeon General's Report on smoking cessation cited numerous studies finding an association between menthol use and lower cessation rates.[39] Research analyzing four waves of PATH study data shows that among daily smokers, menthol cigarette smokers have a 24% lower likelihood of quitting as compared to non-menthol smokers.[40] Among daily smokers, African American

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Tobacco and Health (PATH) Study, 206 Drug & Alcohol Dependence 1, 3 (2019), https://www.sciencedirect.com/science/article/pii/S0376871619304922.

[37] Andrea C. Villanti *et al.*, *Association of Flavored Tobacco Use With Tobacco Initiation and Subsequent Use Among US Youth and Adults, 2013-2015*, 2 JAMA Network Open 1, 12 (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2753396.

[38] Menthol Proposed Rule, 87 Fed Reg at 26,464.

[39] OSG, HHS, *Smoking Cessation: A Report of the Surgeon General* 16-17 (2020), https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf.

[40] Sarah D. Mills *et al.*, *The Relationship Between Menthol Cigarette Use, Smoking Cessation and Relapse: Findings from Waves 1 to 4 of the Population*

menthol smokers had a 53% lower chance of quitting compared to African American non-menthol smokers, while White menthol smokers had 22% lower odds of quitting compared to White non-menthol smokers.[41] Thus, menthol cigarettes not only lead to greater initiation of smoking; menthol also intensifies the addiction that maintains smoking.

c. Menthol cigarettes have led to significant health disparities for African Americans.

Menthol cigarettes have played an especially pernicious role in causing disease and death in the African American community, a fact recognized by the Multnomah County Board of Commissioners. *See* MCO 1311 Findings, § 6 [ER 21] ("Tobacco companies have created racial and ethnic health disparities due to targeted marketing of menthol tobacco products to our Black [and] African-American * * * community members, which has caused greater addiction in those communities.").

Since at least the 1950s, the tobacco industry has targeted African Americans with marketing for menthol cigarettes through magazine advertising, sponsorship of community and music events, and youthful imagery and marketing in the retail environment.[42] For example, the industry has

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Assessment of Tobacco and Health Study, 23 Nicotine & Tobacco Res 966, 970 (2020), https://doi.org/10.1093/ntr/ntaa212.

[41] *Id.*

[42] *See generally* Campaign for Tobacco-Free Kids et al., *Stopping Menthol, Saving Lives: Ending Big Tobacco's Predatory Marketing to Black Communities* 7-9 (2021), https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/menthol-report/2021_02_tfk-menthol-report.pdf.

strategically placed menthol cigarettes in magazines with high Black readership, featuring Black models. One study found that from 1998-2002, *Ebony* was 9.8 times more likely than *People* magazine to carry ads for menthol cigarettes.[43]

The industry also marketed menthol brands with popular community events, particularly those focused around music. Industry-sponsored events included R.J. Reynolds' Salem Summer Street Scenes festivals, Brown & Williamson's Kool Jazz Festival, and Philip Morris' Club Benson & Hedges promotional bar nights, which targeted clubs frequented by Black Americans.[44] R.J. Reynolds estimated that it reached at least half of African Americans in five cities through their street festivals.[45] As FDA's Tobacco Products Scientific Advisory Committee ("TPSAC") concluded in 2011, menthol cigarettes are "disproportionately marketed per capita to African Americans.

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[43] Hope Landrine *et al.*, *Cigarette Advertising in Black, Latino and White Magazines, 1998-2002: An Exploratory Investigation*, 15 Ethnicity & Disease 63, 65 (2005), https://www.ethndis.org/priorarchives/Ethn-15-01-63.pdf.

[44] Navid Hafez & Pamela M. Ling, *Finding the Kool Mixx: How Brown & Williamson used Music Marketing to Sell Cigarettes,* 15 Tobacco Control 359, 360 (2006), https://tobaccocontrol.bmj.com/content/15/5/359; Valerie B. Yerger *et al.*, *Racialized Geography, Corporate Activity, and Health Disparities: Tobacco Industry Targeting of Inner Cities*, 18 (Supp 4) J Health Care Poor & Underserved 10, 25 (2007), https://pubmed.ncbi.nlm.nih.gov/18065850/; *see also* R.J. Reynolds, *Black Street Scenes 1983 Review and Recommendations*, *in* Truth Tobacco Industry Documents, http://legacy.library.ucsf.edu/tid/onb19d00.

[45] Yerger *et al.*, 18 (Supp 4) J Health Care Poor & Underserved at 25.

African Americans have been the subjects of specifically tailored menthol marketing strategies and messages."[46]

To this day, Black neighborhoods have a disproportionate concentration of menthol cigarette advertising and cheaper pricing of menthol cigarettes. The 2018 California Tobacco Retail Surveillance Study found significantly more menthol advertisements at stores with a higher proportion of African American residents and in neighborhoods with higher proportions of school-age youth.[47] A 2021 study found that in Los Angeles County, stores located in predominantly African American neighborhoods had significantly higher odds of selling Newport cigarettes (the most popular menthol brand) than stores in Hispanic or non-Hispanic White neighborhoods.[48] The study also found that the estimated price of a Newport single pack was $0.38 higher in non-Hispanic White neighborhoods than African American neighborhoods.[49]

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[46] Tobacco Products Scientific Advisory Committee ("TPSAC"), FDA, *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 92 (2011), https://wayback.archive-it.org/7993/20170405201731/https:/www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf.

[47] Nina Schleicher *et al.*, *California Tobacco Retail Surveillance Study 2018*, at 3, 22 (2019), https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/Reports/CaliforniaTobaccoRetailSurveillanceStudyReport-2018.pdf.

[48] Sabrina L. Smiley *et al.*, *Retail Marketing of Menthol Cigarettes in Los Angeles, California: a Challenge to Health Equity*, 18 Preventing Chronic Disease (2021), https://www.cdc.gov/PCD/issues/2021/20_0144.htm.

[49] *Id.*

The tobacco industry's use of menthol cigarettes to target African Americans has paid lucrative, but tragic, dividends. In the early 1950s, 5% of African American smokers preferred menthol brands.[50] In 2018, *85% of African American smokers smoked menthol cigarettes*, compared to 29% of Whites.[51] A recent study found that among the African American community, menthol cigarettes were responsible for 1.5 million extra smokers, 157,000 smoking-related premature deaths, and 1.5 million excess life-years lost between 1980 and 2018.[52]

2. The Flavor Ban Ordinance Provides the Residents of Multnomah County with Greater Protection Against the Health Harms of Flavored E-Cigarettes.

The most dramatic surge in youth usage of flavored tobacco products has occurred with e-cigarettes, the most commonly used tobacco product among U.S. youth since 2014.[53] In December 2018, Surgeon General Jerome Adams issued an advisory on e-cigarette use among youth, declaring the growing

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[50] *See* Phillip S. Gardiner, *The African Americanization of Menthol Cigarette Use in the United States*, 6 (Supp 1) Nicotine & Tobacco Res S55, S59 (2004), https://pubmed.ncbi.nlm.nih.gov/14982709/; B.W. Roper, *A Study of People's Cigarette Smoking Habits and Attitudes Volume I*, Truth Tobacco Industry Documents (1953), https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=fhcv0035.

[51] Cristine D. Delnevo *et al*., 22 Nicotine & Tobacco Res at 1674.

[52] David Mendez & Thuy T.T. Le, *Consequences of a Match Made in Hell: The Harm Caused by Menthol Smoking to the African American Population Over 1980-2018*, 31 Tobacco Control 569, 570 (2022), https://tobaccocontrol.bmj.com/content/tobaccocontrol/31/4/569.full.pdf.

[53] Jan Birdsey *et al*., *Tobacco Product Use Among U.S. Middle and High School Students – National Youth Tobacco Survey, 2023*, 72 Morbidity & Mortality Wkly Rep 1173, 1177 (2023), https://www.cdc.gov/mmwr/volumes/72/wr/pdfs/mm7244a1-H.pdf.

problem an "epidemic."[54] Youth e-cigarette use remains a serious public health concern today, with over 2.1 million youth, including 10% of high schoolers, reporting current e-cigarette use in 2023.[55] E-cigarettes are also the most popular tobacco product among youth in Multnomah County and across the State of Oregon.[56] In 2022, 10.8% of 11th graders in Oregon, including 9.1% of 11th graders in Multnomah County, reported using a vaping product or e-cigarette in the past month.[57]

Young people are not just experimenting with e-cigarettes – they are using them frequently. In 2023, 39.7% of high school e-cigarette users reported using them on at least 20 of the preceding 30 days.[58] Even more alarming, 29.9% of high school e-cigarette users reported *daily* use, a strong indication of nicotine addiction.[59] Roughly 530,000 middle and high school students are vaping on a daily basis.[60]

As several U.S. Courts of Appeals have recognized, flavored e-cigarettes "especially appeal to children" and are largely driving the alarming rates of youth e-cigarette use. *Breeze Smoke, LLC v. FDA*, 18 F4th 499, 505 (6th Cir

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[54] OSG, HHS, *Surgeon General's Advisory on E-Cigarette Use Among Youth* 2 (2018), https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf.

[55] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at 1173.

[56] OHA, *Oregon Student Health Survey – Data Tables: Multnomah County* at 68 tbl.113.

[57] *Id.*

[58] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at 1180 tbl.3.

[59] *Id.*

[60] *Id.*

2021); *see also Prohibition Juice,* 45 F4th at 11 ("Flavored tobacco products lie at the heart of the problem" of youth e-cigarette use.). The 2020 Surgeon General Report on smoking cessation notes that "the role of flavors in promoting initiation of tobacco product use among youth is well established * * * and appealing flavor is cited by youth as one of the main reasons for using e-cigarettes."[61] According to the 2023 NYTS, 89.4% of current middle and high school e-cigarette users had used a flavored product in the past month.[62]

Flavored e-cigarettes typically contain nicotine, which is "among the most addictive substances used by humans." *Nicopure Labs, LLC v. FDA*, 944 F3d 267, 270 (DC Cir 2019). Nicotine can also result in lasting damage to adolescent brain development.[63] According to the Surgeon General, "[n]icotine exposure during adolescence can impact learning, memory and attention," and "can also increase risk for future addiction to other drugs."[64] The Surgeon General has warned that "[t]he use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe."[65]

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[61] OSG, HHS, *Smoking Cessation* at 611.

[62] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at 1173.

[63] OSG, HHS, *Know the Risks: E-Cigarettes & Young People* (2021), https://e-cigarettes.surgeongeneral.gov/; *see also* Ctrs. for Disease Control & Prevention (CDC), *Electronic Nicotine Delivery Systems: Key Facts*, (2016), https://www.cdc.gov/tobacco/stateandcommunity/pdfs/ends-key-facts-oct-2016.pdf.

[64] OSG, HHS, *Surgeon General's Advisory on E-Cigarette Use Among Youth*, at 1.

[65] OSG, HHS, *E-Cigarette Use Among Youth and Young Adults, A Report of the Surgeon General* 5 (2016), https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdf.

Use of e-cigarettes may also function as a gateway to the use of traditional cigarettes and other combustible tobacco products, thereby undermining decades of progress in curbing youth smoking. A 2018 report by the National Academies of Sciences, Engineering, and Medicine found "substantial evidence that e-cigarette use increases [the] risk of ever using combustible tobacco cigarettes among youth and young adults."[66] A nationally representative analysis found that from 2013 to 2016, youth e-cigarette use was associated with more than four times the odds of trying combustible cigarettes and nearly three times the odds of current combustible cigarette use.[67]

Finally, despite Appellants' assertion that "[v]aping has helped many smokers quit smoking," Compl. ¶ 26 (ER-9), the leading public health authorities in the U.S., including the Surgeon General, the U.S. Preventive Services Task Force, the CDC, and the National Academies of Sciences, Engineering, and Medicine, have all determined that there is insufficient evidence to recommend any e-cigarettes for smoking cessation.[68] The FDA has

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[66] Nat'l Acads. of Sci., Eng'g, & Med., *Public Health Consequences of E-Cigarettes* 10 (2018), https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf.

[67] Kaitlin M. Berry *et al.*, *Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in US Youths*, 2 JAMA Network Open 1, 7 (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2723425.

[68] OSG, HHS, *Smoking Cessation* at 7; U.S. Preventive Servs. Task Force, *Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons: USPSTF Recommendation Statement*, 325 J Am Med Ass'n 265 (2021), https://jamanetwork.com/journals/jama/fullarticle/2775287; CDC, *Adult Smoking Cessation – The Use of E-Cigarettes*, https://www.cdc.gov/tobacco/data_statistics/sgr/2020-smoking-cessation/fact-sheets/adult-smoking-cessation-e-cigarettes-use/index.html (Oct. 25, 2023);

also repeatedly found that there is little evidence that flavors in e-cigarettes aid smokers to stop smoking. *See e.g.*, *Avail Vapor v. FDA*, 55 F4th 409, 421 (4th Cir 2022).

In sum, the Flavor Ban Ordinance will provide Multnomah County residents, particularly its youth, substantial protection from the addictive and other harmful effects of flavored e-cigarettes.

3. The Flavor Ban Ordinance Provides Multnomah County Residents Greater Protection Against the Health Harms of Flavored Cigars.

Like other flavored tobacco products, flavored cigar smoking presents substantial health risks – risks that are particularly concerning given the prevalence of cigar use among children and the tobacco industry's efforts to market cigars to youth.

Historically, cigar manufacturers designed flavored cigars to serve as "starter" smokes for youth and young adults because the flavors helped mask the harshness, making the products easier to smoke.[69] According to an industry publication, "[w]hile different cigars target a variety of markets, all flavored tobacco products tend to appeal primarily to younger consumers."[70] The vice

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Nat'l Acads. of Sci., Eng'g & Med., *Public Health Consequences of E-Cigarettes* at 10.

[69] Ganna Kostygina *et al.*, *Tobacco Industry Use of Flavours to Recruit New Users of Little Cigars and Cigarillos*, 25 Tobacco Control 66, 67, 69 (2016), https://tobaccocontrol.bmj.com/content/25/1/66.

[70] Melissa Niksic, *Flavored Smokes: Mmmmm...More Profits?*, Tobacco Retailer (Apr 2007), https://web.archive.org/web/20081121103907/http://www.tobaccoretailer.com/uploads/Features/2007/0407_flavored_smokes.asp.

president of one distributor commented, "[f]or a while it felt as if we were operating a Baskin-Robbins ice cream store" in reference to the huge variety of cigar flavors available – and an apparent allusion to flavors that would appeal to kids.[71]

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 *et. seq.*, which included a prohibition on flavored cigarettes (other than menthol). The cigar industry responded to this law by flooding the market with a dizzying array of new, small, cheap, mass-produced cigars, many virtually indistinguishable from cigarettes,[72] in flavors like Mango Lemonade, Rocky Road, and Iced Donut.[73] From 2008 to 2015, the number of unique cigar flavor names more than doubled, and dollar sales of flavored cigars increased by nearly 50%, increasing flavored cigars' share of the overall cigar market to 52.1% in 2015.[74]

The result of this reorientation of cigars toward the youth market has been predictable. The rate of cigar use among high school students now hovers

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[71] *Id*.

[72] Under the Tobacco Control Act, the essential difference between a cigarette and a cigar is that a cigar contains tobacco in the wrapper, while a cigarette does not. *Compare* 15 USC § 1332(1)(a) (defining "cigarette") *with* 21 CFR § 1143.1 (defining "cigar").

[73] *See* Campaign for Tobacco-Free Kids, *Not Your Grandfather's Cigar: Cheap and Sweet Cigars Lure America's Kids* 8-11 (Oct 4, 2023), https://assets.tobaccofreekids.org/content/what_we_do/industry_watch/cigar_report/2023_Cigar-Report.pdf

[74] Cristine D. Delnevo *et al.*, *Changes in the Mass-Merchandise Cigar Market Since the Tobacco Control Act*, 3 (2 Supp. 1) Tobacco Reg Sci 1, 4, 10 tbl.2 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5351883/pdf/nihms852155.pdf .

near the cigarette rate.[75] In November 2023, the CDC reported that 280,000 high school students currently used cigars,[76] and that 70.7% of high school cigar smokers used flavored cigars.[77]

Moreover, as with menthol cigarettes, years of research have documented greater cigar availability and more cigar marketing, including flavored cigars and price promotion, in Black neighborhoods.[78] Thus, it is not surprising that Black high schoolers smoke cigars at 2.3 times the rate of white high schoolers.[79]

As the FDA has found, "[a]ll cigars pose serious negative health risks."[80] In 2010 alone, regular cigar smoking was responsible for "approximately 9,000 premature deaths or almost 140,000 years of potential life lost among adults 35 years or older."[81] According to the FDA, "[a]ll cigar smokers have an increased risk of oral, esophageal, laryngeal, and lung cancer compared to non-tobacco users," as well as "other adverse health effects, such as increased risk of heart and pulmonary disease," "a marked increase in risk for chronic obstructive

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[75] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at 1178 tbl.2.

[76] *Id.*

[77] *Id.* at supp. tbl. 2, https://stacks.cdc.gov/view/cdc/134701 (Nov 3, 2023).

[78] Campaign for Tobacco-Free Kids *et al.*, *Stopping Menthol*, at 10.

[79] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at 1178 tbl.2.

[80] Deeming Tobacco Products to be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 81 Fed Reg 28,974, 29,020 (May 10, 2016).

[81] *Id.*

pulmonary disease (COPD)," a higher risk of death from COPD, and "a higher risk of fatal and nonfatal stroke" compared to non-smokers.[82]

Thus, there is no question that the Flavor Ban Ordinance affords Multnomah County residents with greater protection from the adverse public health impact of flavored cigars, particularly on youth.

4. The Flavor Ban Ordinance Affords Multnomah County Residents Greater Protection Against the Health Harms of Flavored Hookah.

Due to its youth appeal and the health harms of hookah use, flavored hookah poses a substantial public health threat, particularly to youth. Traditionally, raw tobacco was used in hookahs, but in the 1990s, flavored hookah tobacco was introduced, leading to increased popularity among young people around the world.[83] According to the 2023 NYTS, 290,000 middle and high school students are current hookah users.[84]

Hookah is available in a wide variety of kid-friendly flavors. For example, Al Fakher, one of the largest hookah companies in the world,[85] sells hookah in flavors like sweet passion fruit, grape, watermelon, two apples, fierce

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[82] *Id.*

[83] World Health Org., Fact Sheet: Waterpipe Tobacco Smoking & Health 1 (2015), https://apps.who.int/iris/bitstream/handle/10665/179523/WHO_NMH_PND_15.4_eng.pdf;jsessionid=CD4B4EF29B1513226BF554DF1700F5F7?sequence=1.

[84] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at 1178 tbl.2.

[85] *See, e.g.*, *Hookah Tobacco Market Size, Share, Competitive Landscape and Trend Analysis Report by Flavor, Distribution Channel and Age Group: Global Opportunity Analysis and Industry Forecast, 2021-2030*, Allied Market Research, https://www.alliedmarketresearch.com/hookah-tobacco-market-A06663 (accessed Apr 24, 2024).

fruit, and sour power.[86] The 2013-2014 PATH survey found that 88.7% of 12-17 year-olds who had ever smoked hookah used flavored hookah the first time they tried the product and more than three-quarters (78.9%) of youth hookah users reported using hookah "because they come in flavors I like."[87] In 2023, 83.7% of high schoolers and 81.3% of middle schoolers who reported current use of hookah reported use of a flavored product.[88]

Research indicates that hookah smoking is linked to many of the same adverse health effects as cigarette smoking, such as lung, bladder, and oral cancers and heart disease.[89] Even short-term hookah use is associated with acute health effects, including increased heart rate, blood pressure, reduced pulmonary function and carbon monoxide intoxication.[90]

Thus, given the youth appeal of flavored hookah and the health harms of hookah use, the Flavor Ban Ordinance will provide greater public health protection to the residents of Multnomah County.

5. Existing Youth Access Laws Are Insufficient to Protect Youth from the Harms of Flavored Tobacco and Nicotine Products.

As evidenced by the large numbers of youth who continue to access and use flavored tobacco and nicotine products, *see* Sections I.A.1–4, existing laws

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[86] *Flavor Catalogue*, Al Fakher, https://www.alfakher.com/en-us/product-listing?field_product_markets_target_id=1496 (accessed Apr. 24, 2024).

[87] Ambrose *et al.*, 314 J Am Med Ass'n at 1871.

[88] Birdsey *et al.*, 72 Morbidity & Mortality Wkly Rep at supp tbl. 2.

[89] OSG, HHS, *Preventing Tobacco Use* at 207.

[90] *Id.*

aimed at curbing youth access to these products have been insufficient. Despite these existing laws, youth are able to access tobacco and nicotine products with relative ease. In Oregon in 2022, 47.9% of 11th graders, including 48.3% of 11th graders in Multnomah County, reported that it would be easy to get e-cigarettes or other vaping products.[91] Nationally, roughly half of 10th grade students in 2022 reported that it would be easy to get vaping devices (51.9%).[92] Given that over half of Oregon 11th graders who use tobacco and nicotine products report getting the products from friends or family members,[93] it is unsurprising that youth access laws, such as those setting a minimum sales age, have been insufficient to curb youth access and use. Moreover, many retailers appear quite willing to engage in illegal sales to underage buyers. In 2022, 26% of tobacco retailers in Oregon failed to verify the age of an underage buyer during minor decoy operations.[94]

The core problem is that the industry, using flavors, has made products so attractive to youth that, if available, youth will find ways to access them. To adequately protect its residents, particularly its young people, Multnomah

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[91] OHA, *Oregon Student Health Survey – Data Tables: Multnomah County* at 79 tbl.135.

[92] *Table 16: Trends in Availability of Drugs as Perceived by 10th Graders,* Monitoring the Future (2022), https://monitoringthefuture.org/wp-content/uploads/2022/12/mtf2022table16.pdf.

[93] OHA, *Oregon Student Health Survey – Data Tables: Multnomah County* at 71 tbl.119.

[94] Chris M. Lehman, *More Than One-Quarter of Oregon Tobacco Retailers Failed a New State Inspection*, OPB (Feb 17, 2023), https://www.opb.org/article/2023/02/17/one-quarter-oregon-tobacco-retailers-fail-new-state-inspection/.

County took the necessary step of prohibiting the sale of flavored tobacco and nicotine products.

V. CONCLUSION

For the reasons set forth above, the court should affirm the trial court's judgment.

DATED this 10th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii)(A) the word count of this brief (as described in ORAP 5.05(1)(d)(i)) is 9,916 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required in ORAP 5.05(1)(d)(ii).

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 10, 2024, I filed the original of **BRIEF OF *AMICI CURIAE* PUBLIC HEALTH, MEDICAL, AND COMMUNITY GROUPS** with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court and electronically served it upon Tony L. Aiello, Counsel for Plaintiffs-Appellants; Andrew T. Weiner, Counsel for Defendant-Respondent; and via email upon B. Andrew Jones at andy.jones@multco.us, Counsel for Defendant-Respondent.

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