IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

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| 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,<br><br>Plaintiffs,<br><br>v.<br><br>MULTNOMAH COUNTY; a political subdivision of the State of Oregon,<br><br>Defendant. | Case No. 23CV03801<br><br>**MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*** |

**MOTION**

Pursuant to ORCP 14, the Public Health, Medical, and Community Groups (as defined below) seek leave to appear as *amici curiae*. *Amici* applicants seek leave to file the attached brief and to be heard at any argument on the matter to the extent that it would assist the Court.[1] Oral argument is requested regarding *amici*'s motion to appear and expected to last 15 minutes. Court reporting services are requested.

[1] *Amici* applicants' proposed brief in support of Multnomah County's Motion to Dismiss is attached as Exhibit A to this Motion.



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## UTCR 5.010 CONFERRAL

Conferral under UTCR 5.010 is not required for this motion. However, prior to filing this motion, counsel for *amici* applicants contacted counsel for Plaintiffs and counsel for Defendant. Plaintiffs object to *amici* applicants' motion to appear. Defendant consents to *amici* applicants' motion to appear.

## MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to ORCP 14, the 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 Medical Association, Oregon Pediatric Association, Parents Against Vaping e-cigarettes, Truth Initiative, and Upstream Public Health (collectively, "Public Health, Medical, and Community Groups") seek leave to appear as *amici curiae*.[2]

This case primarily concerns whether Multnomah County Ordinance No. 1311, which bans sales of flavored tobacco and nicotine products in Multnomah County, is preempted by state law. The Public Health, Medical, and Community Groups seek leave to appear as *amici curiae* to present a position as to the correct rule of law as to that issue.

The Public Health, Medical, and Community Groups believe that they can provide helpful information and guidance to the Court. Proposed *amici* consist of the following national, state, and local public health, medical, and community organizations: 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 Medical Association, Oregon Pediatric Association, Parents Against Vaping e-cigarettes, Truth Initiative, and Upstream Public Health. As is evident from the description of the groups included in the

[2] A list and description of each proposed *amici curiae* is attached as an Appendix to this Motion.



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Appendix to this motion, each of the Public Health, Medical, and Community Groups works, on a daily basis, to reduce the devastating health harms of tobacco products. These groups 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. The Public Health, Medical, and Community Groups also have a compelling interest in preserving localities' authorities to enact tobacco control measures that benefit the public health, including ordinances like Multnomah County Ordinance No. 1311 that prohibit the sale of flavored tobacco and nicotine products. Given their experience, the Public Health, Medical, and Community Groups are particularly well suited to inform the Court of the substantial public health benefits that Multnomah County Ordinance No. 1311 would provide to County residents.

In addition, the Public Health, Medical, and Community Groups' counsel has extensive background and familiarity with the applicable law regarding local governmental body constitutional and statutory authority. Over the past twenty years, their counsel has represented numerous political committees and Oregon citizens in cases involving local initiatives and measures, including cases involving preemption issues. The proposed *amici* brief and the opportunity to present at argument would provide the Court with additional information to aid it in evaluating this matter. In addition, the filing of this brief will not disrupt the briefing schedule, leaving Plaintiffs sufficient time to respond.

Trial courts have wide latitude to control their dockets and hearings in the matters before them. Well within that discretion is the authority to allow parties to appear as *amici curiae*. *See, e.g.*, *Stevens v. City of Cannon Beach*, 317 Or 131, 137, 854 P2d 449 (1993) (discussing appearance of *amici* at trial court and on appeal). It is undisputed that the Court may grant the application to appear as *amici curiae*. As Judge Wittmayer explained:



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> "The Court has inherent power to control its proceedings. In the absence of legislative or rule-based prohibitions, the Court has the power to decide if Amici is of assistance to the Court. As a general principle, the role of Amici is to present to the Court issues beyond the more narrow and limited positions of the parties. The memorandum Amici seeks to submit does exactly that."

*Doe v. Corp. of the Presiding Bishop*, Case No. 0710-11294, 2010 WL 9932503 at *2 (Mult Co Cir Ct June 18, 2010). As in that case, the Public Health, Medical, and Community Groups seek to be of assistance to the Court here.

## CONCLUSION

For the reasons set forth above, the Public Health, Medical, and Community Groups respectfully request that the Court grant their motion for leave to appear as *amici curiae.*

DATED this 28th day of March, 2023.

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# APPENDIX

## Description of *Amici Curiae*

### 1. African American Tobacco Control Leadership Council

The African American Tobacco Control Leadership Council (AATCLC) is our country's leading public health education and advocacy organization taking on Big Tobacco to save Black lives. Formed in 2008, the AATCLC is composed of a cadre of dedicated community activists, academics, public health advocates and researchers dedicated to removing menthol and flavored little cigars from the Black community.

### 2. American Cancer Society Cancer Action Network

The American Cancer Society Cancer Action Network (ACS CAN) makes cancer a top priority for policymakers at every level of government, empowering volunteers across the country to make their voices heard to influence evidence-based public policy change that saves lives, including restrictions on the sale of flavored tobacco products. ACS CAN believes everyone should have a fair and just opportunity to prevent, find, treat, and survive cancer.

### 3. American Heart Association

The American Heart Association (AHA) is the nation's oldest and largest voluntary organization dedicated to fighting heart disease and stroke. Founded in 1924, the organization now includes more than 40 million volunteers and supporters with offices nationwide. The AHA funds innovative research, advocates for the public's health, and shares lifesaving resources.

### 4. American Lung Association

The American Lung Association is the nation's oldest voluntary health organization working to save lives by improving lung health and preventing lung disease. The American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes supporting efforts to end the sale of all flavored tobacco products at the federal, state, and local levels.

### 5. American Medical Association

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes.

### 6. Campaign for Tobacco-Free Kids

The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public

policies that prevent kids from using tobacco products, help smokers quit, educate the public about the dangers of smoking and tobacco use, and protect everyone from secondhand smoke.

**7. Cascade AIDS Project**

Cascade AIDS Project (CAP) is the oldest and largest provider of HIV services in Oregon. In addition, we run Prism Health, an LGBTQ+ health center providing comprehensive primary and behavioral healthcare. As an LGBTQ+ health organization, CAP is deeply concerned about both the disproportionate use of tobacco in the LGBTQ+ community and its impact on the community's health. At Prism Health, we offer a tobacco-cessation support group specifically for LGBTQ+ patients, and our Public Policy & Advocacy program was involved in the campaign to prohibit the sale of flavored-tobacco products in Multnomah County.

**8. Kaiser Permanente**

Kaiser Permanente is the largest private integrated health care delivery system in the United States, with more than 12.6 million members in eight states and the District of Columbia. Kaiser Permanente's mission is to provide high-quality, affordable health care services and to improve the health of our members and the communities we serve.

**9. Oregon Medical Association**

The Oregon Medical Association (OMA) is a private, not-for-profit, professional association organized for the purpose of serving and supporting physicians and physician assistants in their efforts to improve the health of Oregonians. The OMA values compassion and integrity built on expertise and evidence-based science as well as systematic problem solving to build a healthier Oregon.

**10. Oregon Pediatric Association**

The Oregon Pediatric Society (OPS), a 501c3 nonprofit organization, is the Oregon Chapter of the American Academy of Pediatrics. OPS represents more than 700 pediatricians, pediatric nurse practitioners, physician assistants, and medical students committed to promoting the optimal health and development of children and their families.

**11. Parents Against Vaping e-cigarettes**

Parents Against Vaping e-cigarettes (PAVe) is a national grassroots organization founded in 2018 by moms as a response to the youth vaping epidemic. PAVe seeks to educate about the dangers of flavored e-cigarettes and advocate for change to protect our kids.

**12. Truth Initiative**

Truth Initiative Foundation, d/b/a Truth Initiative, is a 501(c)(3) Delaware corporation created in 1999 out of a 1998 master settlement agreement that resolved litigation brought by 46 states, five U.S. territories, and the District of Columbia against the major U.S. cigarette companies. Truth

Initiative studies and supports programs in the United States to reduce youth tobacco use and to prevent diseases associated with tobacco use.

**13. Upstream Public Health**

Upstream Public Health is a nonprofit organization that acts as a catalyst to drive healthy changes in Multnomah County by working with community members and political leaders to create smart policies that allow our community to live healthier and fuller lives. Upstream, through the Tobacco-Free Coalition of Oregon, has worked to mobilize the community on many issues surrounding chronic disease in Multnomah County.

# EXHIBIT A

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

| | |
|---|---|
| 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,<br><br>Plaintiffs,<br><br>v.<br><br>MULTNOMAH COUNTY; a political subdivision of the State of Oregon,<br><br>Defendant. | Case No. 23CV03801<br><br>**BRIEF OF *AMICI CURIAE* PUBLIC HEALTH, MEDICAL, AND COMMUNITY GROUPS IN SUPPORT OF MULTNOMAH COUNTY'S MOTION TO DISMISS**<br><br>Statutory Fee: ORS 21.135(1), (2)(g) |



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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 No. 1311 (the "Flavor Ban Ordinance"), is preempted by state law. Defendant Multnomah County seeks to dismiss this lawsuit. *Amici* here are aligned with Multnomah County.

*Amici* include the following national, state, and local public health, medical, and community groups: 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 Medical Association, Oregon Pediatric Association, Parents Against Vaping e-cigarettes, Truth Initiative, and Upstream Public Health.

As is evident from the description of the *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 would provide to residents of Multnomah County.

## 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



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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. "Inhalant delivery system[s]" are defined to encompass synthetic nicotine products. *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) (defining "inhalant delivery system" to include "a device that can be used to deliver nicotine" or "a substance in any form sold for the purpose of being vaporized or aerosolized by [such] a device"). "Tobacco products" is defined 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"). 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 "standards for regulating the retail sale of tobacco products and inhalant delivery systems * * * in addition to the standards" established by SB 587.

**B. Multnomah County's 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]

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[1] Senate Bill 587 (2021) was adopted as Oregon Laws 2021, chapter 586 and is codified as ORS 431A.190 to ORS 431A.220.

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



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Plaintiffs are tobacco and nicotine retailers as well as a tobacco and vapor retail trade association ("the Tobacco Retailers"). They seek injunctive and declaratory relief to prevent the Flavor Ban Ordinance from going into effect. The Tobacco Retailers' complaint states five counts. The first two counts allege that the Flavor Ban Ordinance is explicitly and implicitly preempted under ORS 431A.218. Complaint ("Compl."), ¶¶ 44-52. Count three alleges that the Flavor Ban Ordinance violates Article VI, section 10 of the Oregon Constitution. Compl., ¶¶ 53-57. The last two counts allege that Multnomah County's local tobacco licensure program is explicitly and implicitly preempted by ORS 431A.198 and ORS 431A.220. Compl., ¶¶ 58–67. Multnomah County has moved to dismiss the Complaint in its entirety, pursuant to ORCP 21 A(1)(h), for failure to state any viable claim. *Amici* present this brief in support of the County's Motion.

## III. SUMMARY OF ARGUMENT

The Flavor Ban Ordinance is not preempted by SB 587 – a statute that allows localities like Multnomah County to provide their residents, and particularly their young people, with a greater measure of protection from the health harms of tobacco products than is afforded by state law. More 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 and e-liquids, 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, with the result that more high school students smoke cigars than cigarettes, incurring significant health harms; and



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- Flavored hookah, which is increasingly used by youth, with adverse health consequences.

Nothing in Oregon state law deprives local jurisdictions like Multnomah County of the authority to enact ordinances that provide such health benefits. 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. Thus, it was entirely consistent with state law, including SB 587, for Multnomah County to provide its residents with greater protection against these dangerous and addictive products than is afforded under state law.

The Tobacco Retailers' remaining claims similarly fail. The Flavor Ban Ordinance does not violate Article VI, section 10 of the Oregon Constitution because SB 587 specifically allows for such local county legislation, unequivocally making the sale of flavored tobacco and nicotine products a "matter of county concern." And, Multnomah County's local tobacco retail licensure program is entirely consistent with Oregon law, not preempted by it.

## IV. ARGUMENT

As explained in detail in Section IV.B. below, 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. Before turning to the preemption analysis, *amici* here provide a description of the public health benefits that will accrue to the residents of Multnomah County, and particularly to its young people, from the exercise of this local authority through enactment of the Flavor Ban Ordinance.

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

Use of tobacco products is the leading cause of preventable death in the United States, resulting in 480,000 deaths per year.[3] The tobacco industry has long understood that almost all new tobacco users begin their addiction in their youth.[4] Indeed, ninety percent of adult smokers began smoking in their teens.[5] 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.[6] 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.[7] Indeed, at least two-thirds of youth tobacco users reported using these products "because they come in flavors I like."[8] In Oregon in 2020, over 75% of current

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[3] Office of the Surgeon Gen. (OSG), U.S. Dep't of Health & Human Servs. (HHS), *The Health Consequences of Smoking - 50 Years of Progress: A Report of the Surgeon General*, Executive Summary 2 (2014), https://www.hhs.gov/sites/default/files/consequences-smoking-exec-summary.pdf.

[4] OSG, HHS, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 508 (2012), https://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf_NBK99237.pdf.

[5] OSG, HHS, *The Health Consequences of Smoking* at 708, https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

[6] OSG, HHS, *Preventing Tobacco Use* at 535-39.

[7] 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.

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

8th and 11th grade users of tobacco and vaping products used flavored products, compared with just 22% of adults 25 years of age and older.[9] 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."[10] 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 No. 1311 Findings, § 3 ("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 expressly prohibits the sale of cigarettes with the taste of menthol, the only flavored cigarette currently permitted under federal law.[11] Menthol cigarettes are a substantial threat to public health because they increase the risk of youth initiation of smoking, increase addiction, and disproportionately harm the African American community, thus exacerbating serious existing health disparities.

**a. Menthol cigarettes increase youth initiation of smoking.**

Although the tobacco companies are well aware that almost all new tobacco users begin their addiction as kids, they also know that, to novice smokers, tobacco smoke can be harsh and unappealing. As the FDA has found, "[m]enthol's flavor and sensory effects reduce the harshness of cigarette smoking and make it easier for new users, particularly youth and young

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[9] Or. Health Auth. (OHA), *Oregon Tobacco Facts*, fig.5.4, https://www.oregon.gov/oha/ph/preventionwellness/tobaccoprevention/pages/oregon-tobacco-facts.aspx#f54 (last visited Feb. 27, 2023).

[10] Regulation of Flavors in Tobacco Products, 83 Fed Reg 12,294, 12,295 (proposed Mar. 21, 2018) (to be codified at 21 C.F.R. pt. 1100, 1140, 1143) ("Advance Notice of Proposed Rulemaking").

[11] *See* 21 USC § 387g(a)(1)(A).



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adults, to continue experimenting and progress to regular use."[12] 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."[13] The FDA's Tobacco Products Scientific Advisory Committee ("TPSAC"), after an extensive study of the public health impact of menthol cigarettes, concluded in a 2011 report that menthol cigarettes increase the number of children who experiment with cigarettes and that young people who initiate using menthol cigarettes are more likely to become addicted and long-term daily smokers.[14] Menthol cigarettes function as a starter product for the young and are critical to the tobacco industry's need to recruit "replacement smokers" for the one-half of long-term smokers who eventually die from tobacco-related disease.[15]

Recent research continues to demonstrate the popularity of menthol cigarettes among youth, including in Oregon, as well as menthol's role in smoking initiation. According to the 2021 National Youth Tobacco Survey ("NYTS"), 41.1% of current high school smokers use menthol cigarettes.[16] Data from Truth Initiative's Young Adult Cohort Study, a national study of 18-34 year-olds, likewise showed that 52% of new young adult smokers initiated with menthol

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

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

[14] TPSAC, FDA, *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 136, 199-202 (2011), https://wayback.archive-it.org/7993/20170405201731/https:/www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf ("TPSAC Menthol Report").

[15] OSG, HHS, *The Health Consequences of Smoking*, Executive Summary, at 14–15.

[16] Andrea S. Gentzke et al., *Tobacco Product Use and Associated Factors Among Middle and High School Students – National Youth Tobacco Survey, United States, 2021*, 71 Morbidity & Mortality Wkly Rep 1, 21 tbl.5 (2022), https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7105a1-H.pdf.

cigarettes.[17] Initiation with menthol cigarettes was much higher among Black smokers (93.1%) compared to White smokers (43.9%).[18]

In Oregon, according to the latest data (2019-2020), 44.6% of 11th grade and 43% of 8th grade students who smoked cigarettes reported using a menthol product, compared with 21.3% of adults.[19]

The impact of menthol cigarettes in attracting kids, and keeping them addicted, has long-term, adverse health effects. 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 and alterations in the prefrontal attentional network in young adult smokers."[20] "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."[21]

The devastating health impact of menthol cigarettes is most dramatically shown by a recent study by researchers from the University of Michigan. The study estimates that, by slowing down the decline in smoking prevalence, during the 38-year period from 1980-2018, menthol cigarettes were responsible for 10.1 million extra smokers, or approximately 266,000 additional smokers every year.[22] The study also found that menthol cigarettes were responsible

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[17] 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/.

[18] *Id.*

[19] OHA, *Oregon Tobacco Facts*, tbl. 6.5.

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

[21] *Id.*

[22] 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.

for 378,000 additional smoking-related deaths during that period, or almost 10,000 deaths per year.[23]

**b. Menthol cigarettes increase addiction and reduce cessation.**

The 2020 Surgeon General's Report on smoking cessation cited numerous studies finding an association between menthol use and lower cessation rates.[24] Research analyzing four waves of data from the federal government's PATH study shows that among daily smokers, menthol cigarette smokers have a 24% lower likelihood of quitting as compared to non-menthol smokers.[25] Among daily smokers, African American 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.[26]

Data show that among middle and high school students, menthol smoking was associated with greater smoking frequency and intention to continue smoking, compared to non-menthol smoking.[27] PATH study data shows that youth menthol smokers have significantly higher levels of certain measures of dependence,[28] and that initiation with a menthol-flavored cigarette is associated with a higher relative risk of daily smoking.[29] The FDA has found both that "[y]outh

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[23] *Id.*

[24] 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.

[25] Sarah D. Mills et al., *The Relationship Between Menthol Cigarette Use, Smoking Cessation and Relapse: Findings from Waves 1 to 4 of the Population Assessment of Tobacco and Health Study*, 23 Nicotine & Tobacco Res 966, 970 (2020), https://doi.org/10.1093/ntr/ntaa212.

[26] *Id.*

[27] 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/.

[28] Sam N. Cwalina et al., *Adolescent Menthol Cigarette Use and Risk of Nicotine Dependence: Findings from the National Population Assessment on Tobacco and Health (PATH) Study*, 206 Drug & Alcohol Dependence 1, 3 (2019), https://www.sciencedirect.com/science/article/pii/S0376871619304922.

[29] 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.

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."[30] Thus, as Multnomah County recognized, there is little doubt that menthol cigarettes have led millions of youth into tobacco addiction. *See* Multnomah County Ordinance No. 1311 Findings, § 5 ("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.").

**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* Multnomah County Ordinance No. 1311 Findings, § 6 ("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.[31] For example, the industry has 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.[32]

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

[31] *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.

[32] 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.

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.[33] R.J. Reynolds estimated that it reached at least half of African Americans in five cities through their street festivals.[34] As TPSAC concluded, menthol cigarettes are "disproportionately marketed per capita to African Americans. African Americans have been the subjects of specifically tailored menthol marketing strategies and messages."[35]

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.[36] 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.[37] Additionally, the study found that the estimated price of a Newport

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[33] 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 1993 Review and Recommendations*, *in* Truth Tobacco Industry Documents, http://legacy.library.ucsf.edu/tid/onb19d00.

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

[35] TPSAC Menthol Report at 92.

[36] 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.

[37] 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.



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single pack was $0.38 higher in non-Hispanic White neighborhoods than African American neighborhoods.[38]

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.[39] In 2018, *85% of African American smokers smoked menthol cigarettes*, compared to 29% of Whites.[40] 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.[41]

**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.[42] In December 2018, Surgeon General Jerome Adams issued an advisory on e-cigarette use among

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[38] *Id.*

[39] *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.

[40] Cristine D. Delnevo et al., *Banning Menthol Cigarettes: A Social Justice Issue Long Overdue*, 22 Nicotine & Tobacco Res 1673, 1674 (2020), https://academic.oup.com/ntr/article/22/10/1673/5906409.

[41] 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.

[42] Maria Cooper et al., *Notes from the Field: E-Cigarette Use Among Middle and High School Students – United States, 2022*, 71 Morbidity & Mortality Wkly Rep 1283, 1283 (2022), https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7140a3-H.pdf.

youth, declaring the growing problem an "epidemic."[43] Youth e-cigarette use remains a serious public health concern today, with over 2.5 million youth, including 14.1% of high schoolers, reporting current e-cigarette use in 2022.[44] Trends in e-cigarette use in Oregon mirror the national trends. According to the 2020 Oregon Student Health Survey, e-cigarettes are the most commonly used tobacco or nicotine product among Oregon middle and high school students.[45]

Young people are not just experimenting with e-cigarettes – they are using them frequently. In 2022, 46% of high school e-cigarette users reported using them on at least 20 of the preceding 30 days.[46] Even more alarming, 30.1% of high school e-cigarette users reported *daily* use, a strong indication of nicotine addiction.[47] Roughly 700,000 middle and high school students are vaping on a daily basis.[48]

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. *E.g.*, *Breeze Smoke, LLC v. FDA*, 18 F4th 499, 505 (6th Cir 2021); *see also Prohibition Juice Co.,* 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."[49] According to the

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[43] 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.

[44] Cooper et al., 71 Morbidity & Mortality Wkly Rep at 1283, 1285.

[45] OHA, *2020 Oregon Student Health Survey* 76 tbl.55 , https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/Documents/SHS/2020/Reports/State%20of%20Oregon.2020%20SHS.pdf.

[46] Cooper et al., 71 Morbidity & Mortality Wkly Rep at 1284 tbl.

[47] *Id.*

[48] *Id.*

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

2022 NYTS, 84.9% of current middle and high school e-cigarette users had used a flavored product in the past month.[50]

Flavored e-cigarettes and refill liquids 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.[51] 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."[52] The Surgeon General has warned that "[t]he use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe."[53]

Flavorings in e-cigarettes can pose additional health hazards. In *Nicopure,* the U.S. Court of Appeals for the D.C. Circuit relied on findings that flavors in e-cigarettes are harmful in upholding the application of the FDA's premarket review process to e-cigarettes. The Court found that:

> "Aldehydes, 'a class of chemicals that can cause respiratory irritation' and 'airway constriction,' appear in many flavored e-cigarettes, including cotton candy and bubble gum. One study found that the flavors 'dark chocolate' and 'wild cherry' exposed e-cigarette users to more than twice the recommended workplace safety limit for two different aldehydes. Like secondary smoke inhalation from conventional cigarettes, exhaled aerosol from e-cigarettes may include nicotine and other toxicants that can pose risks for non-users."

*Nicopure*, 944 F3d at 274 (internal citations omitted).

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[50] Cooper et al., 71 Morbidity & Mortality Wkly Rep at 1283.

[51] 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.

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

[53] 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 conventional cigarettes and other combustible tobacco products, thereby undermining decades of progress in curbing youth smoking. A 2018 report by the National Academies of Science, Engineering and Medicine found "substantial evidence that e-cigarette use increases [the] risk of ever using combustible tobacco cigarettes among youth and young adults."[54] 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.[55]

Finally, although the Tobacco Retailers assert that "[v]aping has helped many smokers quit smoking," Compl. ¶ 26, 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 Science, Engineering and Medicine, have all concluded that there is insufficient evidence to recommend any e-cigarettes for smoking cessation.[56] As the FDA has repeatedly found, there also is little evidence that flavors in e-cigarettes aid in helping smokers to stop smoking. For example, in upholding a marketing denial order that the FDA issued for a flavored e-liquid, the U.S. Court of Appeals for the Fourth Circuit noted the FDA's conclusion that "[t]he literature was conflicting and inconclusive on whether flavors actually promoted switching [from cigarettes to e-cigarettes] or cessation by adult smokers." *Avail Vapor v. FDA*, 55 F4th 409, 421

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[54] 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.

[55] 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.

[56] 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 (Jan. 23, 2020); Nat'l Acads. of Sci., Eng'g & Med., *Public Health Consequences of E-Cigarettes* at 10.



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(4th Cir 2022). The FDA also recently denied marketing authorization for a menthol e-cigarette product, finding the evidence insufficient to show that "menthol-flavored e-cigarettes are more effective in promoting complete switching or significant cigarette use reduction relative to tobacco-flavored e-cigarettes among adult smokers."[57]

Thus, 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 flavorings helped mask the harshness, making the products easier to smoke.[58] 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."[59] The vice 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

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[57] FDA News Release, *FDA Denies Marketing of Logic's Menthol E-Cigarette Products Following Determination They Do Not Meet Public Health Standard* (Oct. 26, 2022), https://www.fda.gov/news-events/press-announcements/fda-denies-marketing-logics-menthol-e-cigarette-products-following-determination-they-do-not-meet.

[58] 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.

[59] 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.

would appeal to kids.[60] The FDA has determined that young people are far more likely than older smokers to prefer flavored cigars.[61]

After Congress enacted the Tobacco Control Act and its prohibition on flavored cigarettes (with the exception of menthol), the cigar industry flooded the market with a dizzying array of new, small, cheap, mass-produced cigars, many virtually indistinguishable from cigarettes,[62] with sugary flavors from candy to chocolate to lemonade and names like "Sweet Dreams" and "Da Bomb Blueberry."[63] From 2008 to 2015, the number of unique cigar flavor names more than doubled.[64] Dollar sales of flavored cigar products increased by nearly 50% between 2008 and 2015, increasing flavored cigars' share of the overall cigar market to 52.1% in 2015.[65]

The result of this reorientation of cigars toward the youth market has been predictable and disturbing. Cigar usage among high school students now exceeds cigarette usage.[66] More than 1,400 children under age 18 try cigar smoking for the first time every day.[67] The 2013-14

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[60] *Id*.

[61] 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, 79 Fed Reg 23,141, 23,146 (proposed Apr. 25, 2014) ("[S]ugar preference is strongest among youth and young adults and declines with age.").

[62] 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").

[63] *See generally* Campaign for Tobacco-Free Kids, *Not Your Grandfather's Cigar: A New Generation of Cheap and Sweet Cigars Threatens a New Generation of Kids*, 9, 14 (2013), https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/cigar_report/2013CigarReport_Full.pdf

[64] 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 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5351883/pdf/nihms852155.pdf.

[65] *Id*. at 10 tbl.2.

[66] Eunice Park-Lee et al., *Tobacco Product Use Among Middle and High School Students – United States, 2022*, 71 Morbidity & Mortality Wkly Rep 1429, 1432 tbl.1 (2022), https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7145a1-H.pdf.

[67] Substance Abuse & Mental Health Servs. Admin., HHS, *2019 National Survey on Drug Use and Health, Table 4.9A, Past Year Initiation of Substance Use among Persons Aged 12 or Older*



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PATH study found that 73.8% of youth cigar smokers smoked cigars "because they come in flavors I like."[68] The 2021 NYTS showed that approximately 160,000 middle and high school students had used a flavored cigar in the last 30 days.[69]

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.[70] It is not surprising, therefore, that in 2022, 4.4% of Black high school students reported smoking cigars, compared to 2.8% of all high school students.[71]

As the FDA has found, "[a]ll cigars pose serious negative health risks."[72] 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."[73] 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 pulmonary disease (COPD)," a higher risk of death from COPD, and "a higher risk of fatal and nonfatal stroke" compared to non-smokers.[74]

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*Who Initiated Use Prior to Age 18, Prior to Age 21, and at Age 21 or Older: Numbers in Thousands, 2018 and 2019* (Sept. 11, 2020), https://www.samhsa.gov/data/report/2019-nsduh-detailed-tables.

[68] Ambrose et al., 314 J Am Med Ass'n at 1873.

[69] Gentzke et al., 71 Morbidity & Mortality Wkly Rep at 21 tbl.5.

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

[71] Park-Lee et al., 71 Morbidity & Mortality Wkly Rep at 1432 tbl.1.

[72] 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).

[73] *Id.*

[74] *Id.*

In sum, 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 young people.

#### 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.[75] According to the 2022 NYTS, 290,000 middle and high school students are current hookah users.[76]

Hookah is available in a wide variety of kid-friendly flavors. For example, Al Fakher, one of the largest hookah companies in the world,[77] sells hookah in flavors like sweet passion fruit, grape, watermelon, two apples, fierce fruit, and sour power.[78] 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."[79]

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.[80] Other

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[75] 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.

[76] Park-Lee et al., 71 Morbidity & Mortality Wkly Rep at 1432 tbl.1.

[77] *Hookah Tobacco Market*, Allied Market Research, https://www.alliedmarketresearch.com/hookah-tobacco-market-A06663 (last visited Feb. 27, 2023).

[78] *Flavor Catalogue*, Al Fakher, https://www.alfakher.com/en-us/product-listing?field_product_markets_target_id=1496 (last visited Feb. 23, 2023).

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

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

documented long-term effects include impaired pulmonary function, chronic obstructive pulmonary disease, esophageal cancer and gastric cancer.[81] As a result of exposure to the dangerous chemicals in hookah smoke, research shows that even short-term hookah use is associated with acute health effects, including increased heart rate, blood pressure, reduced pulmonary function and carbon monoxide intoxication.[82]

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 IV.A.1–4, existing laws aimed at curbing access to tobacco products by young people have been insufficient. Despite existing laws, youth are able to access tobacco and nicotine products with relative ease. In Oregon in 2020, 47.9% of 11th graders reported that it was easy to get e-cigarettes.[83] Nationally, in 2022, roughly half of 10th grade students reported that it would be easy to get cigarettes (47.5%) and vaping devices (51.9%).[84] Given that over two-thirds (67.5%) of Oregon youth who use tobacco and nicotine products report getting the products from social sources, such as older friends and family members,[85] 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, according to recent data, many

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[81] Ziad M. El-Zaatari et al., *Health Effects Associated with Waterpipe Smoking*, 24 (Supp 1) Tobacco Control i31 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345795/pdf/tobaccocontrol-2014-051908.pdf.

[82] *Id.*

[83] OHA, *Oregon Tobacco Facts*, tbl. 7.5.

[84] *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.

[85] OHA, *Oregon Tobacco Facts*, tbl. 7.5.

retailers are quite willing to engage in illegal sales to underaged buyers. In 2022, 26% of tobacco retailers in Oregon failed to verify the age of an underage buyer during minor decoy operations.[86] 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 County took the necessary step of prohibiting the sale of flavored tobacco and nicotine products.

### B. The Multnomah County Flavor Ban Ordinance Is Not Preempted by ORS 431A.218.

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).[87] 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).[88] 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

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[86] 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/.

[87] *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.").

[88] *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").

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.").

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. 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.

The text of ORS 431A.218(2) flatly disposes of the Tobacco Retailers' preemption argument that ORS 431A.218(2) 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). Subsection 17(2) explicitly provides that local health



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authorities may enact ordinances that establish standards *in addition to* the minimum state standards established in SB 587. 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. "Regulate" "means 'to govern or direct according to rule[;] * * * to bring under the control of law or constituted authority[.]'" *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 308, 981 P2d 368 (1999) (quoting *Webster's Third New Int'l Dictionary*, 1913 (unabridged ed 1993)); *see also Doe v. Medford School Dist. 549C*, 232 Or App 38, 52, 198 P3d 926 (2008) (quoting and applying same definition of "regulate"). 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. 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.

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.



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*Amici* acknowledge that a Washington County circuit court judge has concluded that Washington County's Flavor Ban Ordinance is preempted by ORS 431A.218. *Schwartz, et al. v. Washington Cnty.*, Case No. 22CV04836 (Wash Cty Cir Ct Sept 19, 2022). Washington County has appealed the trial court's decision in *Schwartz*, and the case is now before the Oregon Court of Appeals. *Schwartz et al. v. Washington Cnty.,* Case No. A179834. *Amici* respectfully submit that the Washington County court's decision was erroneous. This Court, of course, is not bound by a decision by a judge in a different county considering a different ordinance. Here, the circuit court's decision in *Schwartz*, given its flawed analysis, offers no useful guidance.

The court in *Schwartz* erred by improperly conflating 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. *See Schwartz* Opinion. The court wrote "it's hard to understand how that same licensing scheme would in turn authorize a partial ban when products have been duly licensed by the same legislative scheme that would prevent a complete ban." *Schwartz* Opinion at 3-4. But it is the retailer that is licensed under state law, not the product. Sections 1 through 14 provides 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. Contrary to the court's interpretation in *Schwartz*, such a local standard does not "delete" the state standards for retail licensing. 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.

That Senate Bill 587 restricts local *licensing* programs that did not exist prior to January 1, 2021 (unlike Multnomah County's program), but not local ordinances limiting retail sales, is apparent from the legislation itself. Section 3 (codified at ORS 431A.194) provides that any



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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 does preempt local government retail licensing programs not already in effect.

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 *Schwartz* court's opinion effectively reads out of the legislation key language in Section 17(2) specifically granting local governments authority to set "standards for regulating the retail sale" of tobacco products and inhalant delivery systems. 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).



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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. 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.

And the relevant legislative history does not "*unambiguously* express[] an intention to preclude local governments from regulating" retail sales of tobacco products and inhalant delivery systems. *Rogue Valley Sewer Servs.*, 357 Or at 450. 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.[89] The Staff 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.[90] 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,

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[89] 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/SB587/Introduced (accessed Feb 9, 2023) and https://olis.oregonlegislature.gov/liz/2021R1/Measures/ProposedAmendments/SB587 (accessed Feb 9, 2023).

[90] Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/233052 (accessed Feb 9, 2023).



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March 17, 2021 at 1.[91] 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.[92] From the outset, Section 17(2) of HB 587 was unequivocal that the legislation would *allow*, not preempt, stricter local government regulation of retail sales of tobacco products and inhalant delivery 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. The legislative history further refutes the Tobacco Retailers' preemption argument.

The Tobacco Retailers' express and implied 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 "apparent 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 Section 17(2). The *Schwartz* court erred when it held otherwise.

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[91] Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/58256 (accessed Feb 9, 2023)

[92] Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/245652 (accessed Feb 9, 2023).



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### C. The Tobacco Retailers' Remaining Claims Also Fail.

The Tobacco Retailers allege two additional theories, neither of which is viable. First, they allege 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."[93] Complaint, ¶¶ 53-57. While Article VI, section 10 does limit county home rule authority to "matters of county concern," it is not implicated here. Multnomah County, acting as a local health authority, was well within its authority to adopt the Flavor Ban Ordinance. 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. The Flavor Ban Ordinance unambiguously addresses matters of county concern.

The Tobacco Retailers next allege that Multnomah County's entire tobacco retailer licensing program is preempted by ORS 431A.220, because Multnomah County's licensing program does not incorporate all the requirements for a state license set forth in ORS 431A.198. Compl., ¶¶ 58-67. The flaw with that theory is that there is no requirement that Multnomah County's licensure program include the requirements set forth in ORS 431A.198.

As discussed above, SB 587 provides that local governments that required local licensure prior to January 1, 2021 can continue to enforce those standards and require licensure. ORS

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[93] The Tobacco Retailers misstate the scope of SB 587, which did not "specifically authorize the statewide sale of tobacco products." Rather, SB 587 requires retail sales of "tobacco products" and "inhalant delivery systems" to occur only at licensed premises. *See* ORS 431A.194.

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) provides that local health authorities "may" enforce the standards in ORS 431A.198. The language is permissive, not mandatory. The Tobacco Retailers seek to impose a requirement for preexisting local licensure programs that does not exist.

## V. CONCLUSION

For the reasons set forth above, and those in the County's brief, this Court should grant Multnomah's County's Motion to Dismiss the Complaint.

DATED this _____ day of March, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing BRIEF OF *AMICI CURIAE* on the following named person(s) on the date indicated below by electronic filing via the State of Oregon's website, hand-delivering, e-mailing, or mailing (as indicated below) to each true copies thereof, and if mailed, contained in a sealed envelope, with postage prepaid, addressed to said person(s) at the last known address of each shown below and deposited in the United States Post Office on said day at Portland, Oregon:

| | | |
|---|---|---|
| Tony L. Aiello, Jr.<br>Tyler Smith and Associates, PC<br>181 N. Grant Street, Suite 212<br>Canby, OR 97013<br><br>***Attorneys for Plaintiffs*** | [ ]<br>[ ]<br>[ ]<br>[ ]<br>[✓]<br>[✓] | By Hand Delivery<br>By Overnight Delivery<br>By Facsimile Pursuant to ORCP 9 F<br>By U.S. Mail with postage prepaid<br>Electronically by OJD E-File & Serve<br>By E-Mail Pursuant to ORCP 9 G:<br>Tony@RuralBusinessAttorneys.com |
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I hereby certify that I caused to be served the foregoing MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* on the following named person(s) on the date indicated below by electronic filing via the State of Oregon's website, hand-delivering, e-mailing, or mailing (as indicated below) to each true copies thereof, and if mailed, contained in a sealed envelope, with postage prepaid, addressed to said person(s) at the last known address of each shown below and deposited in the United States Post Office on said day at Portland, Oregon:

| | |
|---|---|
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DATED this 28th day of March, 2023.

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