

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JORDAN SCHWARTZ, an individual; JONATHAN MORAN, an individual;
SERENITY VAPORS, LLC, a domestic limited liability company; TORCHED
ILLUSIONS, LLC, a domestic limited company; BELAL YAHYA, an
individual; and HOOKAH CAFE, LLC, dba King's Hookah Lounge, a
domestic limited liability company,
Plaintiffs-Respondents,

v.

WASHINGTON COUNTY; a political subdivision of the State of Oregon,
Defendant-Appellant.

Washington County Circuit Court Case
22CV04836

A179834

BRIEF OF *AMICI CURIAE*

**AFRICAN AMERICAN TOBACCO CONTROL LEADERSHIP
COUNCIL, AMERICAN CANCER SOCIETY CANCER ACTION
NETWORK, AMERICAN HEART ASSOCIATION, AMERICAN LUNG
ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, CAMPAIGN
FOR TOBACCO-FREE KIDS, CASCADE AIDS PROJECT, KAISER
PERMANENTE, OREGON COALITION OF LOCAL HEALTH
OFFICIALS, OREGON MEDICAL ASSOCIATION, OREGON
PEDIATRIC SOCIETY, PARENTS AGAINST VAPING E-
CIGARETTES, TRUTH INITIATIVE, AND UPSTREAM PUBLIC
HEALTH**

Steven C. Berman,
OSB No. 951769
Lydia Anderson-Dana,
OSB No. 166167
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
sberman@stollberne.com
landersondana@stollberne.com

and

Johnathan Mansfield,
OSB No. 055390
Senior Assistant County Counsel
155 N First Avenue,
Suite 340, MS 24
Hillsboro, OR 97124
Telephone: (971) 401-6915
john_mansfield@washingtoncountyor.gov

Attorneys for Defendant-Appellant
Washington County

Continued

Of Counsel

Dennis A. Henigan

Connor Fuchs

Campaign for Tobacco-Free Kids

1400 Eye St., NW, Suite 1200

Washington, D.C. 20005

Telephone: (202) 304-9928

dhenigan@tobaccofreekids.org

cfuchs@tobaccofreekids.org

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

Tony L. Aiello Jr., OSB No. 203404

Tyler Smith & Associates PC

181 N Grant Street, Suite 212

Canby, OR 97013

Telephone: 503 496-7177

tony@ruralbusinessattorneys.com

Attorneys for Plaintiffs-Respondents

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I. INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

At issue in this case is whether Washington County’s flavored tobacco and nicotine ban, Washington County Ordinance 878 (the “Flavor Ban Ordinance”), is preempted by state law. The Washington County Circuit Court held that Section 17(2) of Senate Bill 587 (2021) (codified at ORS 431A.218) precludes Washington County, acting in its capacity as a local health authority, from banning the sale of certain flavored tobacco and nicotine products. Appellant Washington County seeks reversal of the trial court’s judgment. *Amici* here are aligned with Washington 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 Coalition of Local Health Officials, Oregon Medical Association, Oregon Pediatric Society, Parents Against Vaping e-cigarettes, Truth Initiative, and Upstream Public Health (collectively, “Public Health, Medical, and Community Groups”).

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 Washington 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 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,

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

“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.175(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. Washington County’s Flavored Tobacco and Nicotine Ban.

Consistent with SB 587, on November 2, 2021, the Washington County Board of Commissioners, sitting as the Local Public Health Authority of Washington County, adopted the Flavor Ban Ordinance. The Flavor Ban Ordinance prohibits the retail sale of flavored tobacco and nicotine products in Washington County. Washington County Code (“WCC”) § 2.30(B) [ER 302].² After its passage, the Flavor Ban Ordinance was sent to the voters of Washington County, via referendum petition. Washington County voters ratified the Flavor Ban Ordinance at the May 2022 primary, by a 77% to 23% margin.

This litigation then followed. Respondents, plaintiffs below, are tobacco and nicotine retailers (“the Tobacco Retailers”). They sought injunctive and

² The Flavor Ban defines key terms, including “flavored product,” “synthetic nicotine product,” and “tobacco product.” WCC, § 2.20 (B), (E), (F). [ER 301–02].

declaratory relief to prevent the Flavor Ban Ordinance from going into effect.

First Amended Complaint (“FAC”), ¶¶ 53-63 [ER 37-39].

Washington County moved to dismiss for failure to state any viable claim, pursuant to ORCP 21A(8). The Tobacco Retailers moved for declaratory and injunctive relief. On September 19, 2022, the circuit court issued a letter opinion, finding the Flavor Ban Ordinance is preempted by state law. Letter Opinion at 3-4. [ER 539-40]. The court ordered that the Flavor Ban Ordinance “is preempted by state law” and that “Washington County is permanently enjoined from enforcing” it. [ER 542]. Washington County timely appealed.³

III. SUMMARY OF ARGUMENT

Contrary to the lower court’s holding, the Flavor Ban Ordinance is not preempted by SB 587 – a statute that allows localities like Washington 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 Washington 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,

³ The Tobacco Retailers did not cross-appeal the trial court’s dismissal of their third through sixth claims. Accordingly, the only issue before this court is whether the Flavor Ban Ordinance is preempted by ORS 431A.218. *See Murray v. State*, 203 Or App 377, 388, 124 P3d 1261 (2005) (if party does not cross-appeal judgment dismissing claims, it cannot seek reversal of judgment on those claims through a cross-assignment of error).

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

Nothing in Oregon state law deprives local jurisdictions like Washington 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. In concluding that SB 587 preempts the Flavor Ban Ordinance, the lower court failed 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 Washington County from providing its residents with greater protection against these dangerous and addictive products than is afforded under state law.

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 errors in the lower court's preemption analysis, *amici* here provide a description of the public health benefits that will accrue to the residents of Washington 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 Washington 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.⁴ The tobacco industry has long understood that almost all new tobacco users begin their addiction in their youth.⁵ Indeed, ninety percent of adult smokers began smoking in their teens.⁶ 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.⁷ 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

⁴ 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>.

⁵ 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.

⁶ OSG, HHS, *The Health Consequences of Smoking* at 708, https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

⁷ OSG, HHS, *Preventing Tobacco Use* at 535-39.

(“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.⁸ Indeed, at least two-thirds of youth tobacco users reported using these products “because they come in flavors I like.”⁹ In Oregon in 2020, over 75% of current 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.¹⁰ 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.”¹¹

By enacting the Flavor Ban Ordinance, Washington 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* WCC Ordinance 878 § 1(A) (“The Board finds that * * * the tobacco industry continues to use strategies that target child[ren] including the advent of new products, like flavored products * * * .”). That the Flavor Ban Ordinance was subsequently upheld by more than three-fourths of Washington County voters

⁸ 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>.

⁹ *Id.* at 1873 tbl.2.

¹⁰ 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).

¹¹ Regulation of Flavors in Tobacco Products, 83 Fed Reg 12,294, 12,295 (proposed Mar. 21, 2018) (to be codified at 21 CFR pt. 1100, 1140, 1143) (“Advance Notice of Proposed Rulemaking”).

demonstrates that County residents understand that protection from flavored tobacco and nicotine products is critical to their health and well-being.

1. The Flavor Ban Ordinance Affords Washington 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.¹² 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 adults, to continue experimenting and progress to regular use.”¹³ 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

¹² See 21 USC § 387g(a)(1)(A).

¹³ Tobacco Product Standard for Menthol in Cigarettes, 87 Fed Reg 26,454, 26,455 (proposed May 4, 2022) (“Menthol Proposed Rule”).

and across multiple studies with nationally representative populations.”¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ 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

¹⁴ *Id.* at 26,462.

¹⁵ 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”).

¹⁶ OSG, HHS, *The Health Consequences of Smoking*, Executive Summary, at 14–15.

¹⁷ 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>.

with menthol cigarettes.¹⁸ Initiation with menthol cigarettes was much higher among Black smokers (93.1%) compared to White smokers (43.9%).¹⁹

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.²⁰

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.”²¹ “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.”²²

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

¹⁸ 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/>.

¹⁹ *Id.*

²⁰ OHA, *Oregon Tobacco Facts*, tbl. 6.5.

²¹ Advance Notice of Proposed Rulemaking, 83 Fed Reg at 12,295.

²² *Id.*

for 10.1 million extra smokers, or approximately 266,000 additional smokers every year.²³ The study also found that menthol cigarettes were responsible for 378,000 additional smoking-related deaths during that period, or almost 10,000 deaths per year.²⁴

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.²⁵ 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.²⁶ 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.²⁷

²³ 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>.

²⁴ *Id.*

²⁵ 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>.

²⁶ 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>.

²⁷ *Id.*

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.²⁸ PATH study data shows that youth menthol smokers have significantly higher levels of certain measures of dependence,²⁹ and that initiation with a menthol-flavored cigarette is associated with a higher relative risk of daily smoking.³⁰ 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.”³¹ Thus, there is little doubt that menthol cigarettes have led millions of youth into tobacco addiction.

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.

²⁸ 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/>.

²⁹ 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>.

³⁰ 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>.

³¹ Menthol Proposed Rule, 87 Fed Reg at 26,464.

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.³² 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.³³

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.³⁴

³² 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.

³³ 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>.

³⁴ 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>.

R.J. Reynolds estimated that it reached at least half of African Americans in five cities through their street festivals.³⁵ 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.”³⁶

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.³⁷ 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.³⁸ Additionally, the study found that the estimated price of a Newport single pack was \$0.38 higher in non-Hispanic White neighborhoods than African American neighborhoods.³⁹

³⁵ Yerger et al., 18 (Supp 4) J Health Care Poor & Underserved at 25.

³⁶ TPSAC Menthol Report at 92.

³⁷ Nina Schleicher et al., *California Tobacco Retail Surveillance Study 2018*, at 3, 22 (2019), <https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/Reports/CaliforniaTobaccoRetailSurveillanceStudyReport-2018.pdf>.

³⁸ 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.

³⁹ *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.⁴⁰ In 2018, 85% of African American smokers smoked menthol cigarettes, compared to 29% of White smokers.⁴¹ 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 2018.⁴²

2. The Flavor Ban Ordinance Provides the Residents of Washington 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 2014.⁴³ In December 2018, Surgeon General Jerome Adams

⁴⁰ 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>.

⁴¹ 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>.

⁴² 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>.

⁴³ 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>.

issued an advisory on e-cigarette use among youth, declaring the growing problem an “epidemic.”⁴⁴ 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 2022.⁴⁵ 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.⁴⁶

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.⁴⁷ Even more alarming, 30.1% of high school e-cigarette users reported *daily* use, a strong indication of nicotine addiction.⁴⁸ Roughly 700,000 middle and high school students are vaping on a daily basis.⁴⁹

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

⁴⁴ 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>.

⁴⁵ Cooper et al., 71 Morbidity & Mortality Wkly Rep at 1283, 1285.

⁴⁶ 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>.

⁴⁷ Cooper et al., 71 Morbidity & Mortality Wkly Rep at 1284 tbl.

⁴⁸ *Id.*

⁴⁹ *Id.*

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.”⁵⁰ According to the 2022 NYTS, 84.9% of current middle and high school e-cigarette users had used a flavored product in the past month.⁵¹

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.⁵² 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.”⁵³ The Surgeon General has warned that “[t]he use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe.”⁵⁴

⁵⁰ OSG, HHS, *Smoking Cessation* at 611.

⁵¹ Cooper et al., 71 *Morbidity & Mortality Wkly Rep* at 1283.

⁵² OSG, HHS, *Know the Risks: E-Cigarettes & Young People* (2021), <https://e-cigarettes.surgeongeneral.gov/>; *see also* Ctrs. for Disease Control and Prevention (CDC), *Electronic Nicotine Delivery Systems: Key Facts*, (2016), <https://www.cdc.gov/tobacco/stateandcommunity/pdfs/ends-key-facts-oct-2016.pdf>.

⁵³ OSG, HHS, *Surgeon General’s Advisory on E-Cigarette Use Among Youth*, at 1.

⁵⁴ 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.

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).

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.”⁵⁵ 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.⁵⁶

⁵⁵ 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.

⁵⁶ Kaitlin M. Berry et al., *Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in US Youths*, 2 JAMA Network

Finally, although the Tobacco Retailers asserted in the circuit court that “[v]aping has helped thousands of smokers quit smoking,” FAC ¶ 35 [ER 34], 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.⁵⁷ 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 (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

Open 1, 7 (2019),

<https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2723425>.

⁵⁷ 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>; Ctrs. for Disease Control and Prevention, *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.

more effective in promoting complete switching or significant cigarette use reduction relative to tobacco-flavored e-cigarettes among adult smokers.”⁵⁸

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

3. The Flavor Ban Ordinance Provides Washington 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.⁵⁹ 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.”⁶⁰ The vice president of one distributor commented, “[f]or a while

⁵⁸ 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>.

⁵⁹ 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>.

⁶⁰ 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.

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.⁶¹ The FDA has determined that young people are far more likely than older smokers to prefer flavored cigars.⁶²

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,⁶³ with sugary flavors from candy to chocolate to lemonade and names like “Sweet Dreams” and “Da Bomb Blueberry.”⁶⁴ From 2008 to 2015, the number of unique cigar flavor names more than doubled.⁶⁵ Dollar sales of flavored cigar products increased by

⁶¹ *Id.*

⁶² 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.”).

⁶³ 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”).

⁶⁴ *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

⁶⁵ 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>

nearly 50% between 2008 and 2015, increasing flavored cigars’ share of the overall cigar market to 52.1% in 2015.⁶⁶

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.⁶⁷ More than 1,400 children under age 18 try cigar smoking for the first time every day.⁶⁸ The 2013-14 PATH study found that 73.8% of youth cigar smokers smoked cigars “because they come in flavors I like.”⁶⁹ The 2021 NYTS showed that approximately 160,000 middle and high school students had used a flavored cigar in the last 30 days.⁷⁰

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.⁷¹ It is not surprising, therefore,

⁶⁶ *Id.* at 10 tbl.2.

⁶⁷ 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>.

⁶⁸ HHS, Substance Abuse & Mental Health Servs. Admin., *2019 National Survey on Drug Use and Health, Table 4.9A, Past Year Initiation of Substance Use among Persons Aged 12 or Older 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>.

⁶⁹ Ambrose et al., 314 J Am Med Ass’n at 1873.

⁷⁰ Gentzke et al., 71 Morbidity & Mortality Wkly Rep at 21 tbl.5.

⁷¹ Campaign for Tobacco-Free Kids et al., *Stopping Menthol* at 10.

that in 2022, 4.4% of Black high school students reported smoking cigars, compared to 2.8% of all high school students.⁷²

As the FDA has found, “[a]ll cigars pose serious negative health risks.”⁷³ 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.”⁷⁴ 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.⁷⁵

In sum, there is no question that the Flavor Ban Ordinance affords Washington County residents with greater protection from the adverse public health impact of flavored cigars, particularly on young people.

4. The Flavor Ban Ordinance Affords Washington 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

⁷² Park-Lee et al., 71 Morbidity & Mortality Wkly Rep at 1432 tbl.1.

⁷³ 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).

⁷⁴ *Id.*

⁷⁵ *Id.*

hookah tobacco was introduced, leading to increased popularity among young people around the world.⁷⁶ According to the 2022 NYTS, 290,000 middle and high school students are current hookah users.⁷⁷

Hookah is available in a wide variety of kid-friendly flavors. For example, Al Fakher, one of the largest hookah companies in the world,⁷⁸ sells hookah in flavors like sweet passion fruit, grape, watermelon, two apples, fierce fruit, and sour power.⁷⁹ 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.”⁸⁰

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.⁸¹ Other documented long-term effects include impaired pulmonary function, chronic obstructive pulmonary disease,

⁷⁶ 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.

⁷⁷ Park-Lee et al., 71 Morbidity & Mortality Wkly Rep at 1432 tbl.1.

⁷⁸ *Hookah Tobacco Market*, Allied Market Research, <https://www.alliedmarketresearch.com/hookah-tobacco-market-A06663> (last visited Feb. 27, 2023).

⁷⁹ *Flavor Catalogue*, Al Fakher, https://www.alfakher.com/en-us/product-listing?field_product_markets_target_id=1496 (last visited Feb. 23, 2023).

⁸⁰ Ambrose et al., 314 J Am Med Ass’n at 1871.

⁸¹ OSG, HHS, *Preventing Tobacco Use* at 207.

esophageal cancer and gastric cancer.⁸² 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.⁸³

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 Washington 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.⁸⁴ Nationally, in 2022, roughly half of 10th grade students reported that it would be easy to get cigarettes (47.5%)

⁸² 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>.

⁸³ *Id.*

⁸⁴ OHA, *Oregon Tobacco Facts*, tbl. 7.5.

and vaping devices (51.9%).⁸⁵ 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,⁸⁶ 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 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.⁸⁷ 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, Washington County took the necessary step of prohibiting the sale of flavored tobacco and nicotine products.

B. The Washington 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

⁸⁵ 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>.

⁸⁶ OHA, *Oregon Tobacco Facts*, tbl. 7.5.

⁸⁷ 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/>.

(2000).⁸⁸ 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).⁸⁹ 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.”).

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

⁸⁸*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.”).

⁸⁹*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”).

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. Rather, it appears that the trial court confused 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 in addition to the standards set by SB 587.

The text of ORS 431A.218(2) flatly refutes the trial court’s holding that Section 17(2) of SB 587 (codified at 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). Section 17(2) explicitly provides that local health 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.

The trial court 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. The trial 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.” Opinion at 3-4 [ER 539-40]. 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 trial court’s interpretation (Opinion at 3), 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, 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 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 trial 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 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. 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 below 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 relied on a statement made during a committee hearing by an Oregon Legislative and Policy Research Office Health Care Analyst and a Staff Measure Summary regarding the proposed amendments that ultimately led to Section 18. Plaintiffs’ Response to Washington County’s Motion to Dismiss at 4-6. However, as the Tobacco Retailers acknowledge, those statements clarify that Section 18 was intended to address only local government licensing programs. *See id.* at 6 (Tobacco Retailers asserting that the legislative history shows that Section 18 was intended to apply “specifically to standards for retail license”).

The remaining 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.⁹⁰ 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 1.⁹¹ 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 1.⁹² 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

⁹⁰ 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).

⁹¹ Available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/233052> (accessed Feb 9, 2023).

⁹² Available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/58256> (accessed Feb 9, 2023).

3.⁹³ 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’ 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). Washington County’s Flavor Ban Ordinance is not preempted by Section 17(2). The trial court erred when it held otherwise.

V. CONCLUSION

For the reasons set forth above, this Court should reverse the trial court’s judgment that Washington County Ordinance 878 is preempted by ORS 431A.218.

⁹³ Available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/245652> (accessed Feb 9, 2023).

DATED this 30th day of March, 2023.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Lydia Anderson-Dana

Steven C. Berman, OSB No. 951769

Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500

Portland, OR 97204

Telephone: (503) 227-1600

Facsimile: (503) 227-6840

Email: sberman@stollberne.com
landersondana@stollberne.com

and

Of Counsel

Dennis A. Henigan

Connor Fuchs

Campaign for Tobacco-Free Kids

1400 Eye St., NW, Suite 1200

Washington, D.C. 20005

Telephone: (202) 304-9928

Email: dhenigan@tobaccofreekids.org
cfuchs@tobaccofreekids.org

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

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 9148 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).

DATED this 30th day of March, 2023.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Lydia Anderson-Dana
Steven C. Berman, OSB No. 951769
Lydia Anderson-Dana, OSB No. 166167
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com
landersondana@stollberne.com

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

CERTIFICATE OF FILING AND SERVICE

I certify that on March 30, 2023, I filed the original of **BRIEF OF *AMICI CURIAE* AFRICAN AMERICAN TOBACCO CONTROL LEADERSHIP COUNCIL, AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, CAMPAIGN FOR TOBACCO-FREE KIDS, CASCADE AIDS PROJECT, KAISER PERMANENTE, OREGON COALITION OF LOCAL HEALTH OFFICIALS, OREGON MEDICAL ASSOCIATION, OREGON PEDIATRIC SOCIETY, PARENTS AGAINST VAPING E-CIGARETTES, TRUTH INITIATIVE, AND UPSTREAM PUBLIC HEALTH** 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 Johnathan E. Mansfield, Attorney for Appellant; and Tony L. Aiello, Jr., Attorney for Respondents.

DATED this 30th day of March, 2023.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Lydia Anderson-Dana
Steven C. Berman, OSB No. 951769
Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com
landersondana@stollberne.com

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