IN THE COURT OF APPEALS FOR THE STATE OF OREGON

ROBERT A. WHITE, JR. and SHELLEY ANN WHITE,	)	Josephine County Circuit Court No. 15CV23592
Plaintiffs-Respondents,	)	Court of Appeals No. A162460
v.	)	
JOSEPHINE COUNTY,	)	
Defendant,	)	
and	)	
SISKIYOU SEEDS, LLC; and OREGONIANS FOR SAFE FARMS AND FAMILIES,	)	
Defendants-Appellants.	)	

DEFENDANTS-APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Josephine County Circuit Court, Of the State of Oregon, Honorable Pat Wolke

Party information on next page.

Defendants-Appellants' Opening Brief includes a challenge to the constitutionality of O.R.S. §633.738.

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STATEMENT OF THE CASE

I. Nature of the Proceedings and Relief Sought

This is a declaratory judgment proceeding involving state preemption of a home rule county ordinance regulating genetically engineered plants. Plaintiffs filed a lawsuit against defendant Josephine County seeking to overturn, on state preemption grounds, the County's ordinance, which the voters enacted via ballot initiative in May 2014. Plaintiffs sought declaratory relief, and to permanently enjoin enforcement of the Josephine County Genetically Engineered Plant Ordinance 2014-007 ("GE plant ordinance.") Intervenor-Defendants Siskiyou Seeds, LLC and Oregonians for Safe Farms and Families (together, "intervenors") then successfully intervened in the case.

Thereafter, plaintiffs and intervenors filed motions for summary judgment. Defendant Josephine County took no position in the matter throughout the proceeding. After a hearing on the matter in April 2016, the trial court found that ORS 633.738 preempts the GE plant ordinance, and granted summary judgment in favor of plaintiffs. Intervenors appeal, seeking reversal of the summary judgment in favor of plaintiffs, and that intervenors' motion for summary judgment be granted for lack of subject matter jurisdiction. Intervenors also seek a declaration that ORS 633.738 is unconstitutional and

that the GE plant ordinance may stand as a valid exercise of Josephine County's home rule authority.

II. Statutory Basis of Appellate Jurisdiction

The court has jurisdiction pursuant to ORS 19.205 (3).

III. Date of Entry of Judgment and Timeliness of Appeal

The order granting plaintiff's motion for summary judgment and denying intervenor-defendants' motion for summary judgment was entered on May 26, 2016. The notice of appeal was filed within 30 days of entry of the order on June 22, 2016.

IV. Questions Presented on Appeal

1. Is the mere intent to farm GE crops at some time in the future a basis to create standing under the Declaratory Judgment Act sufficient to challenge a local ordinance regulating such crops?

2. Is the preemption of local regulation over certain agricultural matters found in ORS 633.738, without any corresponding statewide regulatory scheme regarding genetically engineered crops, unconstitutionally vague?

3. Did a local government, in passing a GE plant ordinance, that regulates GE plants, inhibit or prevent a "seeds or the products of seeds" in contravention of the express prohibition of SB 863?

4. Should the *LaGrande/Astoria* analysis be applied to Josephine County, which is a constitutionally chartered home rule county, where there is a

state preemption without a corresponding regulatory scheme and involving a matter of county concern?

V. Summary of Arguments

1. Plaintiffs lack standing under the Declaratory Judgment Act.

Plaintiffs are farmers who did not farm GE crops at the time the lawsuit was filed, but they had expressed an interest in farming GE crops at some time in the future. This mere interest, coupled with no corresponding contracting party, is an insufficient basis to afford them standing under the Declaratory Judgment Act.

Therefore, the trial court erred in not granting intervenors' motion for summary judgment, and in not dismissing the action for summary judgment for lack of subject matter jurisdiction.

2. ORS 633.738 is unconstitutionally vague and creates a regulatory void.

regulatory void. Because ORS 633.738 purports to preempt local control over agricultural matters without any statewide regulation or protection for farmers from genetic contamination of non-GE crops from GE crops, the statute is unconstitutionally vague. The State Department of Agriculture has expressly stated it does not regulate most genetically engineered plants, and has no intention of doing so in the future.

Local ordinances providing protections for citizens should be upheld over state preemption in cases where to rigidly uphold the preemption would result

in "unreasonable results" such as a local government being prevented from taking any action whatsoever related to topics of local concern from shooting ranges to plants.

3. ORS 633.738 should not be interpreted as expressly preempting local governments from regulating GE plants within their jurisdictional boundaries. The GE plant ordinance regulates GE plants, and does not prevent or inhibit the production or use of "seeds or the products of seeds."

4. The *LaGrande/Astoria* home rule analysis should not be applied to Josephine County in this instance. Josephine County, a constitutionally chartered home rule county, should be allowed to regulate GE crops, in order to to protect the farmers in the county where there is a state preemption without a corresponding regulatory scheme.

LaGrande should not apply in the instant case as Josephine County is a home rule county, and the Josephine County plant ordinance involves a matter of county concern. A rigid adherence to *LaGrande* will continue to stunt the ability of local governments to become "proving grounds" for important local issues such as indoor smoking bans and GE crop restrictions.

Because there is no conflict of laws or statewide regulatory scheme, preemption should not be found to overturn the local protections found in the local GE plant ordinance.

VI. Summary of Facts

A. Facts related to the GE plant ordinance and ORS 633.738

Josephine County voters approved the Josephine County genetically engineered plant ordinance ("plant ordinance" or "ordinance," herein) by ballot initiative on May 20, 2014 with 58.25 percent of the vote. (ER-1 at 5).

The Josephine County district attorney and county clerk approved the ballot title for the plant ordinance on September 30, 2013. (*Id*. at 10). A week later, on October 8, 2013, then Oregon Governor John Kitzhaber signed SB 863 into law, as part of the contested "Grand Bargain" adopted by the 2013 special session, linking state pension legislation to local control over seeds. (*Id*. at 11).

SB 863 was later codified in ORS 633.738 (hereafter, the "seed law"). That legislation preempts local regulation of agricultural "seeds or products of seeds." (*Id*. at 20).

On September 30, 2013, the Josephine county clerk approved the ballot title for the ordinance, as initiative petition P-2013-7. (ER- 2 at 13). The deadline for objections to ballot title for the ordinance was to be filed on October 9, 2013. (*Id*. at 14).

On February 19, 2014, the Josephine County clerk approved the number of signatures for registered active voters on the petition and assigned the petition as Measure 17-58 for the May 20, 2014 Primary Election ballot. (*Id*. at 15).

The GE plant ordinance specifically prohibits the following farming practice: "It shall be unlawful for any person, corporation or other entity to: [p]ropagate, cultivate, raise, or grow genetically modified organisms in Josephine County, or to knowingly or negligently allow such activities to occur on one's land [subject to the medical and scientific research exemptions in the plant ordinance]." (ER-12).

The GE plant ordinance provides that farming operations with genetically engineered crops shall have up to twelve (12) months from the date of enactment to phase out the planting and harvesting of genetically modified organisms. (ER-14).

The Josephine County board of commissioners formally enacted the plant ordinance (as Ordinance No. 2014-07) on September 4, 2014, with farmers then growing genetically engineered crops having twelve (12) months to continue growing those crops and to make a transition plan by the enforcement deadline the following year, on September 5, 2015. (ER-2 at 23).

On July 31, 2015, the Josephine County board of commissioners issued a public notice to all farmers, persons, corporations or entities propagating, raising, or growing genetically engineered plants in the county to that effect. (ER-3 at 1).

SB 863, now codified in ORS 633.738 (the "seed law") provides that:

> [A] local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.

(ER-19).

The Oregon Department of Agriculture ("ODA") does not regulate most genetically engineered crops: "*ODA is not currently regulating most GE crops or implementing Oregon-Specific policies.* (ER-4 at 23; ER-5 at 1). ODA does not take additional steps to regulate GE crops after the federal government deregulates them, with the exception of biopharmaceuticals." (*Id*. at 3). (Emphasis in original).

Former ODA Director Katy Coba wrote a letter to Gov. Kitzhaber on June 30, 2014 stating the ODA lacks authority to deal with conflicts between growers of genetically modified and non-GMO crops. (*Id*. at 6). Dir. Coba stated the department lacks authority to develop a mapping system to coordinate what is grown where and when, explaining that state law does not require farmers to report information about their crops to ODA, making it impossible to map crops that could cross-pollinate. (*Id*. at 8).

During the 2016 regular session, HB 4041, was introduced to remove "products of seed from statute prohibiting local governments from inhibiting or preventing production of seed." (ER-21 at 11). Representative Buckley testified,

> There is no definition of what products of seed means. Is it *** hemp seed oil? Is it? What exactly is a product of seed? Is it every plant and tree that is grown in the state of Oregon? I would like to clarify that. I would like to have the statute clarify what we're discussing when we are talking about the product of seed.

(ER-24). (Testimony of Rep. Peter Buckley, House Committee on Consumer Protection and Government Effectiveness, HB 4041 Public Hearing (February 4, 2016).

B. Facts related to the Plaintiffs and standing

In January of 2015, lobbyists from Oregonians for Food and Shelter contacted plaintiffs, seeking potential plaintiffs for the lawsuit. (ER-25 and 26). On September 3rd, 2015, the day before the local GE plant ordinance could be enforced, plaintiffs sued the county seeking to overturn and stop enforcement of the local GE plant ordinance. (4/16/16 Tr at 6:9-22).

1. Leased farmlands.

In the spring of 2013, plaintiffs signed an undated lease for one hundred acres of land in exchange for $10,000 located at 22503 Redwood Hwy, Kerby, OR 97531. (ER-18). The lease renewal term is upon mutual agreement by the parties. (*Id)*.

Plaintiffs paid $10,000 in cash to Mr. Sauer in December 2013, and a second payment of $10,000 by check was made in October 2014. (ER-47 at 13; ER-6 at 15). Plaintiffs have not paid the lease for the 2015 or 2016 season, and made their last payment on October 26, 2014. *Id*.

Plaintiffs leased the 100 acres with the stated intention of rotating GE sugar beets into that land. (ER-34 at 20). At the time the lease was signed, and all times thereafter, plaintiffs have never contracted with Syngenta to grow GE sugar beets or stecklings, or any other GE crop, on the leased farmlands. (*Id*. at 17; ER-35 at 5;ER-49 at 7). Unlike traditional sugar beet crops, farmers must enter into a royalty agreement and contract with the seed patent holder in order to grow GE sugar beets. (4/16/16 Tr at 103:16-20). For the three years prior to the enactment of the ordinance on September 4, 2015 — despite being able to grow GE crops — the only crop the Plaintiffs grew on the rented farmlands was non-GE grass hay. (ER-35).

Plaintiffs have never planted or grown GE sugar beets or stecklings, or any other GE crop on the leased farmlands. (ER-35; ER-62). Plaintiffs non-GE grain and hay sales improved significantly due to the leased farmlands for the 2013 and 2014 growing season, with sales of $25,000 and $11,000.00 respectively up from $0.00 income in 2012 and $5,000.00 in 2011 for grain hay. (ER-6 at 1).

2. Residence.

Plaintiffs leased to Syngenta one acre of farmland located at plaintiffs' residence (119 Smith Sawyer Road in Cave Junction) for several years in order for Syngenta to conduct trial test plot operations. (ER- 27-28). In August of 2013, plaintiffs contracted with Syngenta to have 30 acres of land at their residence planted with sugar beet seeds, however, it is not certain if they were GE or non-GE crops. ER-42 at 23.

Plaintiffs entered into the Syngenta 2011 Regulated Materials Cooperator Agreement, for field trials, leasing one acre of land at plaintiffs' residence in exchange for $900, to be paid by April 30, 2011. (ER-40). The following years, 2012-2013 plaintiffs entered into a Syngenta Regulated Materials Trial Agreement for similar terms as above. In 2014, plaintiffs entered into Syngenta Regulated Materials Trial for similar terms as above, however, the "Sample Seed does not contain Regulated transgenic events and/or trait stacks." (ER-37-39).

Plaintiffs did not contract with Syngenta to grow sugar beets at their residence after 2014. Ex. 5 at 62:5-63:25. (ER-41-42). Plaintiffs believe that Syngenta moved operations out of Josephine County because of the GE plant ordinance. (ER-42 at 11). However, plaintiffs have offered no evidence to support this suggestion that Syngenta moved their operations because of the passage of the ordinance. Intervenors have offered evidence that shows Syngenta's sugar beet field trials ended in 2014, and no current field trials are

pending. (4/16/16 Tr at 66:17-25;67:1-10;105: 15-24).

FIRST ASSIGNMENT OF ERROR

The trial court erred in not granting intervenors' motion for summary judgment, and in dismissing the action for summary judgment for lack of subject matter jurisdiction where the named plaintiffs were farmers who had expressed an interest in growing genetically engineered ("GE") plants on their leased land, and had permitted test GE plants to be grown at their residence in the past, but had no contract or license to grow commercial GE crops at their leased land or residence, and were not actually growing commercial GE crops at their leased land or residence at the time the ordinance went into effect.

I. Preservation

Intervenor-Defendants' moved the trial court for an order of summary judgment on one issue, asserting that the plaintiffs lacked standing under the DJA. (ER-7). The trial court denied the motion, stating:

> "The intervenor's motion for summary judgment based on an alleged lack of standing is denied."

(*Id*.).

The trial court found that,

> 1. They have been farming in Josephine County since 2004. At that time, they purchased farmland that had a preexisting, but overgrown crop of Christmas trees.
> 2. They elected to remove the Christmas trees and plant grain crops.

> 3. They've contracted with Syngenta for approximately 10 years to grow, on a limited basis, genetically modified crops.
> 4. They entered into a lease with Mr. Sauer to grow GM sugar beets in the spring of 2013, before Josephine County passed its GMO ordinance.
> 5. Their intent was to plant 30 acres of GM sugar beets on their own property in August of 2013, and then rotate this crop from their own property to Mr. Saurer's property in approximately March of 2014.
> 6. Mr. Sauer has been paid for the leased ground; although plaintiffs have not been able to rotate a GM crop to his property, because of the GMO ordinance. Likewise, the plaintiff's had determined that Syngenta is unwilling to contract with them because of the GMO ordinance.
> 7. Plaintiffs paid Mr. Sauer $10,000 in 2013 and $10,000 in 2014 on account of their lease. They remain obligated to Mr. Sauer for additional lease payments.
> 8. Plaintiffs did not utilize Mr. Sauer's property as intended, because of the GMO ordinance.

(*Id*).

II. Standard of review

This Court reviews the trial court's conclusion that it did not have subject matter jurisdiction over [plaintiff's] claim[s] for errors of law. *Alcutt v. Adams Family Food Services, Inc.*, 258 Or.App. 767, 776, 311 P.3d 959 (2013), *rev. den.*,355 Or. 142, 326 P.3d 1207 (2014).

ARGUMENT

I. The trial court erred in not granting intervenors' motion for summary judgment, and not dismissing the action for summary judgment for lack of subject matter jurisdiction.

A. The Applicable Law

The trial court denied intervenors' motion for summary judgment after finding that plaintiffs had standing pursuant to the Declaratory Judgment Act ("DJA"). As a preliminary procedural matter, intervenors should have used a motion to dismiss instead of a motion for summary judgment to question the trial court's lack of subject matter jurisdiction. *Spada v. Port of Portland*, 55 Or.App. 148, 150, 637 P.2d 229 (1981). Nevertheless, subject matter jurisdiction is never waived, and the parties briefed and argued it at the trial court level. ORCP 21 G(4).

Whether a party has standing depends on the particular requirements of the statute under which a plaintiff is seeking relief. *Local 290, Plumbers and Pipefitters v. Oregon Dept. of Environ. Quality*, 323 Or 559, 566, 919 P2d 1168 (1996). The determination of standing under the DJA, under which plaintiffs bring their action, is made pursuant to ORS 28.020, which provides:

> Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or

> other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Standing under the DJA is determined by a three-prong test. The first consideration requires, "there must be some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." *Morgan v. Sisters School Dist. No. 6*, 353 Or 189, 195, 301 P3d 419 (2013) (internal quotation marks omitted). "It is not sufficient that a party thinks an enactment or a decision of a government entity to be unlawful." *Id*. The plaintiff must show how the challenged law affects "that party's rights, status, or legal relations." *Id*.

The second consideration requires, "the injury must be real or probable, not hypothetical or speculative." *Id*. Justiciability requires "a dispute based on present facts, rather than on contingent or hypothetical events." *Id*. at 196.

Finally, the third consideration requires that "the court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate." *Id*. at 197. This extends beyond an advisory opinion to require "a real and substantial controversy admitting of specific relief through a decree of

conclusive character." *Id*. (internal citations omitted).

B. Farmers who do not presently farm GE crops, but merely have expressed an interest in farming GE crops at some time in the future, lack standing under the DJA.

Under the aforementioned test, the standing dispute may be reduced to 1) whether or not it is sufficient for standing purposes that plaintiffs are farmers who intend to grow GMO crops on land that plaintiffs leased for the purpose of growing GE crops at some time in the future; and 2) whether or not it is sufficient for standing purposes the fact that plaintiffs had determined that Syngenta is unwilling to contract with them in the future, because of the GE plant ordinance.

The challenged law — the Josephine County Ordinance 2014-007 ("GE Plant ordinance")— does not affect plaintiffs' "rights, status, or legal relations." *Morgan v. Sisters School Dist. No. 6*, 353 Or 189, 195, 301 P3d 419 (2013).

Under the first prong, at the trial court level plaintiffs asserted that the fact that they are farmers is enough to establish their rights were affected by the ordinance. However, the standing requirements of ORS 28.020 require that the challenged law must actually *affect* that party's rights, status, or legal relations." *Id.* Therefore, there must be an actual right, status, or legal relation affected by the declaration that the party is seeking.

For instance, construction contractors lacked standing to challenge school district construction bidding practices when they did not bid for school district construction work. *Cummings Constr. v. School District No. 9*, 242 Or. 106, 110, 408 P.2d 80 (1965).

Recently, the Oregon Supreme Court declined to find subject matter jurisdiction based on a plaintiff's mere expressed interest in future work as a petition signature collector. *Couey v. Atkins*, 357 Or 460, 355 P.3d 866 (2015).

In *Couey v. Atkins*, the only "present facts" were as follows:

> at the time of the summary judgment, plaintiff's registration to circulate petitions during the 2010 election had expired; that he had recently registered with the Secretary of State to collect signatures on a paid basis during 2012; that he fully intended to work as a paid signature collector in the future; and that, [w]hen another measure dealing with protecting the environment starts to circulate, I'd like to support it. There is no evidence that, at that time, plaintiff was actually employed as a paid initiative petition signature collector.

Id.

The *Couey* court found importance in the fact that,

> there is no evidence that there existed another measure dealing with protecting the environment. There was evidence that the chief petitioner of the earlier measure that plaintiff wanted to support intended to try to circulate another petition, but there is no evidence that the chief petitioner ever took steps to make that happen, much less that such a measure reached the stage of signature collection.

Id.

Even after giving plaintiff every beneficial inference, the *Couey* court found,

> the best that the evidence shows is that, if plaintiff obtained employment as a signature collector, and if another measure dealing with protecting the environment were filed, and if that measure garnered the requisite number of sponsors, and if that measure obtained a certified ballot title, then plaintiff "would like to support it," presumably by collecting petition signatures on a volunteer basis.

Id.

Here, plaintiffs allege that the mere fact that they are famers who merely expressed the intention to grow GE plants confers standing to challenge the GE plant ordinance. However, plaintiffs being farmers with an expressed intent to grow GE crops is insufficient.

There is no evidence that plaintiffs were growing GE crops at their residence or leased farmlands at the time the complaint was filed. (ER-34 at 20). The fact that the plaintiffs entered into a lease with the intent to grow GE crops there at some point in well into the future is also insufficient where no GE crops were ever planted prior to the filing of the complaint.

The GE plant ordinance does not affect plaintiffs' legal relations, because even after the enactment of the ordinance the plaintiffs are in the same position as before its enactment, namely farmers who had expressed intention to grow GE crops on the leased farmlands at some point in the

future despite having never planted GE crops for the three growing seasons prior to the ordinance's enactment. (ER-6).

As to the second consideration, plaintiffs are not involved in any "dispute based on present facts." *Morgan v. Sisters School Dist. No. 6*, 353 Or at 196. Plaintiffs argue that even though they never grew GE plants on the leased land, it was their intention to plant GE crops at some time in the future. (ER-6). There is nothing in the lease that requires them to grow GE plants (ER-18), and in fact their income has increased from the non-GE grain and hay crops presently grown at the leased farmlands. (ER-6).

Additionally, plaintiffs argue that Syngenta has not contracted with them because of the ordinance (ER-42); however, the present facts indicate that they never contracted with Syngenta for the leased farmlands at any point since they entered into the lease in the spring of 2013 — three growing seasons before the ordinance was enacted. (ER-6).

Furthermore, other than the plaintiffs' belief, there is no evidence in the record to suggest that Syngenta moved their operations because of the passage of the ordinance. (ER-42) Given the nature of field trial operations, it is just as likely Syngenta ended their field trials that the plaintiffs were participating in because it was completed. ER-43)

In *Couey v. Atkins*, similar "present facts" were found to be the "the

epitome of contingent and speculative facts." *Couey v. Atkins*, 357 Or 460, 355 P.3d 866 (2015). Reliance on "contingent or hypothetical events" is insufficient to confer standing. *Morgan v. Sisters School Dist. No. 6*, 353 Or at 196.

As to the third consideration, plaintiffs have no injury, because they are in the same position as they were in prior to the enactment of the ordinance, namely they remain farmers with merely an expressed intention to plant GE crops. Plaintiffs have only ever grown non-GE grass hay on the leased farmlands, and continued to do so even after the ordinance's enactment. (ER-46).

C. Plaintiffs' reliance on *Thunderbird* and *Marks* is misplaced.

At trial, Plaintiffs relied upon *Thunderbird* and *Marks* more fully discussed below, in support of their claim that a farmers' mere expression of intent to grow GE crops at some point in the future is sufficient to confer standing, however, both cases are distinguishable.

In *Thunderbird Mobile Club, LLC v. City of Wilsonville*, the plaintiff, an owner of mobile home parks, filed a declaratory judgment action against the City of Wilsonville to overturn a city ordinance regulating closures of mobile home parks. *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 460, 228 P.3d 650 (2010).

The city ordinance required that a park owner obtain a closure permit from the city and to provide increased notice of termination, to develop policies, and to create a plan to provide compensation and relocation assistance for displaced tenants. *Id*. Plaintiff listed its mobile home park property for sale, and gave notice to the tenants. *Id*.

As a direct result of that listing, plaintiff's tenants successfully lobbied the city council to adopt the ordinance at issue. *Id*. The defendant argued that the plaintiff lacked standing because the ordinance at issue had "yet to be applied to plaintiff," because the plaintiff had not "provided notice of termination of the park" or "sought to avoid ordinance requirements." *Id*. at 465.

The facts showed that no closure, efforts to avoid the ordinance or gain relief occurred, and no sales contract had been executed with conditions related to the ordinance at issue. *Id*.

The court held that "none of those are steps that plaintiff is required to take to pursue his challenges to the lawfulness of the ordinance on preemption or substantive due process grounds, so long as the facts otherwise indicate that the mere enactment of the ordinance has affected plaintiff's legal interests." *Id*.

Thunderbird illustrates a case where the facts clearly demonstrate that

plaintiff legal interests "are affected" by the ordinance because the ordinance was a direct result of his business activities that in fact triggered the ordinance's passage.

Here, plaintiffs filed the complaint one day prior to the ordinance's enactment, there are no facts that suggest that plaintiffs were the targets of the ordinance in question, or that the plaintiffs were even engaged in planting GE crops at the time the ordinance was enacted. For the three years prior to the ordinance's enactment, plaintiffs did not plant GE crops on the leased farmlands, and there was no contract to plant GE crops on the leased farmlands.

In *Marks v. City of Roseburg*, plaintiffs, former occupants of a dwelling in the City of Roseburg, filed a declaratory judgment action against the City of Roseburg to overturn a criminal ordinance prohibiting the practice of fortunetelling, palmistry, astrology, phrenology, and other similar practices for hire or profit. *Marks v. City of Roseburg*, 65 Or App 102, 670 P.2d 201 (1983). The ordinance was punishable by a fine or imprisonment or both. *Id*. at 106. Plaintiffs' source of income was palmistry, and they moved from the dwelling to avoid prosecution with a stated intent to move back to the City of Roseburg in the event the action was resolved in their favor. *Id*.

The *Marks* court addressed standing under the DJA "in the context of

a declaratory judgment action challenging the facial validity of a criminal ordinance." *Id*. The *Marks* court relied upon *Gaffey v. Babb*, in addressing the issue of plaintiffs standing. *Gaffey v. Babb*, 50 Or.App. 617, 624 P.2d 616, rev. den. 291 Or. 117 (1981). The similarities between the facts in *Marks* and *Gaffey* led the *Marks* court to conclude that "[i]t is obvious from the foregoing that the controversy is justiciable and that plaintiffs have standing." *Marks v. City of Roseburg*, 65 Or App at 105. The plaintiffs in *Marks* and *Gaffey* closed or moved their business, because of the threat of criminal violations for operating businesses that were an actual source of income, and filed actions to avoid risk prosecution under the ordinance.

The *Gaffey* court addressed the longstanding general rule "that a declaratory judgment proceeding does not lie to obtain an advisory opinion as to the construction of a criminal law. *Id*. at 625. Plaintiff owned and ran the only head shop in the city, and the passage of the ordinance was a direct result of his business activities that in fact triggered the ordinance's passage. *Id*. After the ordinances enactment, plaintiff closed his business for fear of prosecution filing the DJA shortly thereafter seeking "a determination whether he can resume business lawfully." *Id*. at 624. The *Gaffey* court placed significance on the fact that "the case does not involve a request for an advisory opinion emanating from friendly litigants who merely seek a

construction of the ordinance." *Id*. at 623.

In the present case, unlike *Gaffey*, the plaintiffs and the county are friendly litigants seeking an advisory opinion. The county filed an answer seeking an advisory opinion from the court. Furthermore, the plaintiff in *Gaffey* was actually in business, and the plaintiff in *Marks* only source of income was palmistry, prior to the enactment of the respective ordinances, which is far more than the speculative interest held by plaintiffs who have merely an expressed intention to plant GE crops.

Accordingly, *Marks* is distinguishable from the present matter. In contrast, the plaintiffs here involve present non-GE farmers who at some point in the future may grow GE crops under a lease that they claimed they entered into with the intention of growing GE crops— which they did not do for the first three growing seasons of the lease. (ER-6). In light of the differences, plaintiffs' potential reliance upon *Thunderbird* and *Marks* is misplaced.

The case is nonjusticiable, because the plaintiffs lack standing, Therefore, the trial court erred in failing to dismiss for lack of subject matter jurisdiction.

SECOND ASSIGNMENT OF ERROR

The trial court erred in declining to find that ORS 633.738 is unconstitutionally vague given that it creates a regulatory void.

I. Preservation

Intervenors opposed Plaintiffs' motion for summary judgment in briefing and oral argument, contending, among other things, that because ORS 633.738 purports to preempt local control over agricultural matters without any statewide regulation or protection for farmers from genetically engineered crops, the State of Oregon's administrative regulatory scheme is unconstitutionally vague. (ER-8).

The trial court ruled that although there is no Oregon law on point, the Ohio case cited by intervenors, *City of Cleveland v. State of Ohio*, 989 N.E.2d 1072 (Ohio Ct. App. 2013) is not applicable in the instant case, because:

> "in Ohio, it is only permissible to take away a locality's power to regulate, if the state has its own replacement plan for regulation. It is not permissible to merely take away a home rule municipality's right to regulate with nothing to replace it.
>
> The Ohio Court found that the state law did not provide a body of regulation, to replace the City's ordinance; and hence was not a "general law". Because it was not a "general law", it could not preempt the Cleveland legislation.
>
> If this was Ohio, and not Oregon, this Court could say that ORS 633.738 is not a "general law". However, as plaintiff points out and

> strenuously argues that while Ohio requires a state to impose "police, sanitary or similar regulations"; there is no such requirement in Oregon. Further, plaintiff provides examples of other state statutes which preempt local regulation without any replacement regulatory scheme (e.g. rent control, drones and shooting ranges)."

(*Id*.).

II. Standard of review

A question of statutory interpretation presents a purely legal issue. *State v. Neff*, 246 Or App 186, 190, 265 P3d 62 (2011). Whether a local ordinance conflicts with a state statute—and is therefore invalid under the "home rule" provision of the Oregon Constitution, Article XI, section 2--is a question of law. *City of Portland v. Jackson*, 316 Or 143, 145, 151–52, 850 P2d 1093 (1993) (applying that standard).

In reviewing grants of summary judgment, this court reviews the trial court's ruling as if it were ruling on the motion in the first instance, to determine from a review of the record whether triable issues of fact exist. *Forest Grove Brick Works, Inc. v. Strickland*, 277 Or 81, 87, 559 P2d 502 (1977). The record is reviewed in the light most favorable to the party opposing the motion. *Stevens v. Bispham*, 316 Or 221, 223, 851 P2d 556 (1993). If no triable issue of fact is present, the appellate court determines whether the moving party is entitled to judgment as a matter of law. ORCP 47 C; see *Jones v. GMC*, 325 Or 404, 420, 939 P2d 608 (1997).

ARGUMENT

I. Because ORS 633.738 purports to preempt local control over agricultural matters without any statewide regulation or protection for farmers from genetically engineered crops, the State of Oregon's administrative regulatory scheme is unconstitutionally vague

A. The State Department of Agriculture does not regulate most genetically engineered plants

The Oregon legislature enacted the seed law in 2013 purportedly to "ensure a uniform state policy with respect to regulation of agricultural seed cultivation in Oregon and to avoid a patchwork of potentially conflicting local laws." (ER-4). However, instead of ensuring a uniform state policy, the law creates a novel vacuum with regard to genetically engineered plants, given that the Oregon Department of Agriculture has declined to regulate genetically engineered plants.

In fact, the Governor's task force report notes that the Oregon Department of Agriculture does not regulate (and has no plans to regulate) most genetically engineered crops: "*ODA is not currently regulating most GE crops or implementing Oregon-Specific policies.* (*Id)*. During the task force's work, members heard a number of reports from ODA regarding their authority and activities on GE agriculture. It was clear that ODA does not

take additional steps to regulate GE crops after the federal government deregulates them, with the exception of biopharmaceuticals." (Id). (Emphasis in original).

Moreover, ODA Director Katy Coba wrote a letter to Gov. Kitzhaber on June 30, 2014 stating the ODA has no authority to deal with conflicts between growers of genetically modified and non-GMO crops. (*Id)*. In her letter, Dir. Coba stated the department lacks authority to develop a mapping system to coordinate what is grown where and when, explaining that state law does not require farmers to report information about their crops to ODA, making it impossible to map crops that could cross-pollinate. (*Id.*).

B. A recent appellate case upheld a Lincoln County shooting range ordinance over an express state preemption to avoid "unreasonable results"

Oregon courts have not yet squarely addressed a challenge to statewide preemption legislation that fails to be accompanied by a corresponding regulatory scheme resulting in negative local impacts; therefore, it appears that this may be a case of first impression.

However, the Court of Appeals recently reconciled a Lincoln County ordinance requiring property owners to obtain a conditional use permit to operate a firearms training facility with state preemption ordinances (namely, ORS 166.170, ORS 166.171, and ORS 166.176, three statutes that

concern preemption of local firearms regulation.) *Conrady v. Lincoln Cnty*., 260 Or.App. 115, 316 P.3d 413 (2013).

The *Conrady* court noted the legislative history of the state preemption law was replete with references to the overarching problem at which the bill was aimed: the "patchwork" of local regulations facing gun owners who traveled throughout the state. See, e.g., *Doe v. Medford School Dist*. 549C, 232 Or.App. 38, 57, 221 P.3d 787 (2009) (quoting legislative history that confirms "the focus of the legislature was on avoiding a patchwork quilt of local government laws inconsistently regulating the use of firearms" and that the "carriers of [the bill] made that same point repeatedly." *Id., 316 P.3d at 415.*

The *Conrady* court turned to relevant canons of construction to determine the meaning of the statute, including the pertinent canon pointing toward a narrower construction of the shooting-range exceptions in the firearms preemption statutes, assuming that the legislature did not intend an unreasonable result. *Doe,* 232 Or App at 60 (citing *State v. Bordeaux*, 220 Or App 165, 175, 185 P3d 524 (2008), and *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996)).

The *Conrady* court declined to interpret the construction of the shooting-range exception as the legislature preempting all local ordinances

concerning the siting of shooting ranges where it did not replace those local ordinances with any statewide standards:

> "That interpretation of ORS 166.171 and ORS 166.176, coupled with the general preemptive effect of ORS 166.170, would mean that a local government could not enact or enforce an ordinance intended to prevent a business from opening a commercial shooting range next to a home, or a school, or a hospital. Property owners would be able to open backyard shooting ranges in the middle of a residential street--including in Deschutes County, where landowners who would otherwise be prevented from discharging firearms on their property could simply design and build a target-shooting range to circumvent the county's otherwise enforceable no-shooting restrictions. Those outcomes seem far afield from the concerns addressed by the legislature in 1995 and 1997 and lead us to conclude that, had the legislature actually intended those results, it would have said so explicitly in the statute itself--especially in 1997, when it restored the ability of a county to create no-shooting zones."

In the shooting range analysis, under the guise of concern over a "patchwork" of different local laws, the state purported to preempt local governments from regulating shooting ranges, but a broad interpretation of that preemption would lead to unreasonable and unintended results.[1]

Similarly, ORS 633.738, also enacted to prevent a "patchwork" of local laws, purports to preempt local governments from enacting legislation "to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed" which includes "any local laws or measures

[1] This argument of statutory construction is continued in intervenors' Third

for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed." ORS 633.738 (2).

Exceptions to 633.738(2) that allow local control currently include Jackson County, (which borders Josephine County and which county's GE Ordinance passed on the same election date as Josephine County's) (ORS 633.741) local government-owned lands, (ORS 733.738(3)) and now certain marijuana regulations (ORS 475B.340(2) and 475B.500(2)).

Similar to the shooting range analysis, a broad interpretation of ORS 633.738 would lead to absurd results, such as local governments being unable to enact any regulation to trim trees around power poles or hedges to keep a safe line of sight for traffic, control noxious weeds or enact any emergency measures to protect any local plant species that has a local pest infestation, such as sudden oak death, burning of leaves, and creeping bent grass for public health and safety, and so on.

Accordingly, intervenors contend that ORS 633.783, is, on its face and as applied to the Josephine County plant ordinance, unconstitutionally vague. Specifically, the terms "agricultural seed, flower seed, nursery seed

or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed" and "any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed" are so overbroad and vague that they provide no basis for reasonable application, in derogation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as Article I, sections 21 and 22, of the Oregon Constitution.

If not unconstitutionally vague on its face or as applied, ORS 633.738 should be interpreted as broadly as possible, similar to *Conrady* holding, to allow for local regulation to protect local farmers, at least until such time a statewide regulatory scheme is enacted to address concerns over transgenic contamination of non-GE crops by open-air pollinated GE crops.

C. A recent Ohio case is persuasive on overruling state preemption statutes lacking a regulatory scheme, as such statutes create a void, leaving local interests unprotected

Moreover, a recent Ohio case is persuasive and nearly precisely on point on this issue. Authorities interpreting other jurisdictions' statutes may be persuasive to Oregon Courts. *State v. Hirsch*, 338 Or 622, 114 P3d 1104 (2005). In *City of Cleveland v. State of Ohio*, 989 N.E.2d 1072 (Ohio Ct. App. 2013) the court of appeal overturned a state preemption statute as unconstitutionally limiting a municipality's home rule police powers where the state law set forth no regulations but only purported to limit municipal legislative power.

In the *Cleveland* case, the city of Cleveland adopted an ordinance in 2011 restricting the sale and use of industrially produced trans fats, with an effective date of enactment several years later, in 2013, effectively a phase-out period.

Shortly thereafter in 2011, the Ohio General Assembly enacted H.B. 153, amending a state statute to provide that "the director of agriculture has sole and exclusive authority in this state to regulate the provision of food nutrition information and consumer incentive items at food service operations."

The state legislation stated the regulation of the provision of food nutrition information and consumer incentive items at food service operations are matters of general statewide interest that require statewide regulation. It went on to prohibit political subdivisions from enacting, adopting, or continuing in effect local legislation relating to the provision or nonprovision of food nutrition information at food service operations and banning, prohibiting or otherwise restricting food at food service operations based on nutrition information. *Cleveland* 989 N.E.2d at 1077.

The City filed a declaratory judgment against the state of Ohio, alleging the state preemption statute represented an unconstitutional attempt to preempt the city's municipal home rule authority and that the local ordinance was a proper exercise of home rule authority. The trial court granted summary judgment in favor of the city. *Id.*

In affirming the trial court's determination of unconstitutionality of the state preemption law at issue, the court of appeal noted:

> By its own terms [the state law] preempts any regulatory action by a municipality in the realm of food content without providing for any regulation of its own. By failing to set forth any regulation of this topic, [the state law's] function is to preempt municipal legislative action and maintain a regulatory void in regard to food content.

The court noted that because Ohio has adopted no substantive legislation or rules in regard to these aspects of food nutrition information

and food content regulation, the state law can only be viewed as an attempt by the General Assembly to employ broad authority. *Id.* at 1083.

Moreover, the court of appeals noted the dubious passage of H.B.153 as a massive "junk drawer" budget bill with the food amendments tucked away in there, not vetted by the usual committee process and drafted on behalf of a "special interest group with the specific purpose of snuffing out the Ordinance." *Id.* at 1085. The facts giving rise to the birth of the preemption amendments, coupled with the lack of a nexus between the amendments and the appropriations bill, create a strong suggestion that the provisions were combined for tactical reasons; a "classic instance of impermissible logrolling." *Id.* at 1085-1086.

The parallels between the passage of Oregon's SB 863 and Ohio's H.B. 153 are similar. Akin to Ohio's law that was struck down as unconstitutionally impermissible, Oregon's Seed Law was drafted by special interests, included with other unrelated budget legislation, not properly vetted, and lacking a statewide regulatory scheme, thus creating a void that leaves local interests unprotected.

Accordingly, Intervenors suggest that this court be guided by a general interpretation of the *Cleveland* decision and similarly rule that ORS 633.738 is unconstitutional.

THIRD ASSIGNMENT OF ERROR

The trial court erred in its statutory interpretation of ORS 633.738 as applying to genetically engineered plants. Further, in doing so, the court incorrectly determined that the SB 863 expressly restricted the authority of a local government to regulate GE plants within their jurisdictional boundaries.

I. Preservation

Intervenors' preserved its arguments on appeal by presenting those arguments in its response to plaintiffs' motion for summary judgment briefing, and at oral argument on the parties' cross-motions for summary judgment. Specifically, the intervenors' response in opposition of summary judgment argued that the county's GE plant ordinance was not preempted by the seed bill. (ER-8). At oral argument on that motion, intervenors argued:

> Our position is if the Legislature meant to preempt plants, they know how to do that. They would have said the word plant. They would have said the word genes. They would have said the word organism. That is notably absent from any language in this bill. They instead used the word, they used seeds and product of a seed. Now I don't know what a product of the, of a seed is. It's certainly not a plant. I've never heard a plant referred to as a product of a seed. I've done extensive research trying to equate the two, and I frankly can't find it.

(4/16/16 Tr at 79).

The trial court found that,

> lntervenors posit that "products of seeds", actually means packaged seeds, as opposed to plants. This Court agrees with plaintiff that this would result in an absurd interpretation and result. Because this text is clear, the Court will not concern itself with the legislative history of ORS 633.738. Portland General Electric vs. Bureau of Labor, 317 OR 606.

(ER-8).

II. Standard of review

A question of statutory interpretation presents a purely legal issue. *State v. Neff*, 246 Or App 186, 190, 265 P3d 62 (2011). Whether a local ordinance conflicts with a state statute—and is therefore invalid under the "home rule" provision of the Oregon Constitution, Article XI, section 2—is a question of law. *City of Portland v. Jackson*, 316 Or 143, 145, 151–52, 850 P2d 1093 (1993) (applying that standard).

ARGUMENT

I. The trial court erred in court erred in its statutory interpretation of ORS 633.738 as applying to genetically engineered plants.

A. The Applicable Law.

This Court interprets statutes by examining the text, context, and legislative history of the statute, and, if necessary, by turning to maxims of construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042

(2009). In analyzing the statute, text and context must be given primary weight. *Id*. at 173.

In order to determine the legislature's intent, it is necessary to begin by examining the text of the statute in context. The context of the statute includes other provisions of the same statute and other related statutes." *Goodyear Tire & Rubber Co. v. Tulatin Tire & Auto, Inc*., 322 Or. 406, 414, 908 P.2d 300 (1995).

The court interprets words in the statute to have "their plain, natural, and ordinary meaning," unless the legislature has expressly defined a word for purposes of the statute. PGE, 317 Or at 611-12. "When particular terms are not statutorily defined, we give them their plain, natural, and ordinary meaning unless the context indicates that the legislature intended some other meaning. Context includes related statutes and prior versions of the statute." *Simpson v. Dep't of Fish & Wildlife*, 242 Or. App. 287, 298, 255 P.3d 565, 570 (2011) (internal citations omitted).

The court avoids interpreting a statute so as to produce an absurd result, when faced with determining which of two or more plausible meanings the legislature intended. *Schutz v. La Costita III, Inc*., 256 Or App 573, 583 (2013). "In such a case, the court will refuse to adopt the meaning

that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole." *Id*.

B. A broad reading of "product of agricultural seed, flower seed, nursery seed or vegetable seed," to mean "plant" is not supported by the text, context, or legislative history.

The parties do not dispute that the county's GE plant ordinance regulates GE plants. Nor do the parties dispute that ORS 633.738 contained an express preemption clause that preempted local governments from regulating seeds and the products of seeds.

The parties do dispute whether or not all "plants" and "organisms" fall within the meaning of "agricultural seed, flower seed, nursery seed or vegetable seed" or a "product of agricultural seed, flower seed, nursery seed or vegetable seed." In plain words, the dispute is whether or not ORS 633.738 preempts the local regulation of all plants, and organisms.

The legislature has not defined three critical terms 1) "product of agricultural seed, flower seed, nursery seed or vegetable seed" and 2) "inhibit" or "prevent" and 3) "production" or "use of." The plain, natural, and ordinary meaning of product is, "something produced by physical labor or intellectual effort **:** the result of work or thought" or "something produced naturally or as the result of a natural process." *Webster's Third New Int'l Dictionary* 1810 (unabridged ed 2002). Inhibit means "to prohibit

from doing something." *Id*. Prohibit means, "to forbid by authority or command." *Id*. Use means, "the act or practice of using something." *Id*. "Production" means "something that is produced naturally or as the result of labor and effort." *Id*.

Notwithstanding the above definitions, the legislature has by reference defined "agricultural seed, flower seed, nursery seed and vegetable seed." ORS 633.511 to 633.750. Agricultural seed is defined as, "fiber, forage and grass crop seed and any other kind of seed or bulblet commonly recognized in this state as agricultural seed or as lawn or turf seed, and mixtures of any of such seeds, as may be determined by the Director of Agriculture." ORS 633.511(1).

Flower seed means, "seeds of herbaceous plants grown for their blooms, ornamental foliage or other ornamental parts, and commonly known and sold in this state under the name of flower or wildflower seeds." 633.511(6).

Vegetable seed means, "the seed of those crops usually grown in Oregon in gardens or on truck farms or for canning and freezing purposes and generally known and sold under the name of vegetable seed." ORS 633.511(17).

[N]ursery seed means, "any propagant of nursery stock as defined in ORS 571.005." ORS 571.005 defines nursery stock as,

> Nursery stock includes all botanically classified plants or any part thereof, such as floral stock, herbaceous plants, bulbs, buds, corms, culms, roots, scions, grafts, cuttings, fruit pits, seeds of fruits, forest and ornamental trees and shrubs, berry plants, and all trees, shrubs and vines and plants collected in the wild that are grown or kept for propagation or sale. Nursery stock does not include:
>
> (a) Field and forage crops.
> (b) The seeds of grasses, cereal grains, vegetable crops and flowers.
> (c) The bulbs and tubers of vegetable crops.
> (d) Any vegetable or fruit used for food or feed.
> (e) Cut flowers, unless stems or other portions thereof are intended for propagation.

ORS 571.005.

"Sell" or "Sale" means, "to offer, expose or hold for sale, have for the purpose of sale, or to solicit orders for sale, or to deliver, distribute, exchange, furnish or supply." ORS 571.005(7).

A broad and sweeping definition of "product of seed" to mean "plant" leads to the absurd result of the state preempting all local regulations that inhibit or prevent noxious weeds, vegetation, and other local laws of general application that regulate plants, trees, burning of leaves, and creeping bent grass for public health and safety.

The legislative history is absent any direct indication that the

legislature intended to expressly preempt local governments from regulating plants. Furthermore, the state law fails to regulate plants in any manner.

Ostensibly, local regulations that prevent or inhibit the sale or use of marijuana (marijuana is a plant, and a product of a seed) would be included in such a broad sweeping definition of "products of seed." See e.g., CJMC 5.04.070(C). Local regulations that prevent or inhibit use smoking indoors (tobacco is a plant, and a product of a seed) would be preempted.[23] (ER-23). See e.g., CEMC 6.225.

Similarly, the following ordinances that prevent or inhibit the overgrowth of vegetation and trees as a public nuisances, and/or public or other public health, aesthetic, and safety concerns would be preempted. See e.g., CEMC 6.010; SHMC 8.12.090; CTMC 93.05. Local regulations inhibiting conditions that attract rats by requiring certain storage requirements of all food for domestic animals (Seed and Feed for animals is

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[2] The legislative history includes a letter from the Independent Party of Oregon (IPO) that supports that interpretation. Specifically, the IPO's letter references and incorporates the ODA rules. Letter, SB 863, Oct 2, 2013 (submitted by Attorney Daniel Meek on behalf of IPO) (ER-23).

[3] Oregon Department of Agriculture rules include "tobacco" as a product of agricultural or flower seed, thus within the SB 863 prohibitions. ORS 633.520 imposes requirements on the labeling of agricultural and flower seed. The ODOA rule (OAR 603-056-0105) implementing that statute specifically includes tobacco, "as provided in ORS 633.510(1)," as a regulated agricultural or flower seed.

a plant, and a product of a seed) would be preempted. CEMC 6.015. Local regulations inhibiting the use of fire to burn of leaves and other vegetation. CEMC 6.200; SHMC 2882 § 2, 2003. Local regulations regulating the use of rural retail stands, and wineries. JCZO 17.40 (8)-(9).

Intervenors' search of Oregon law and legislative history reveals that nowhere in Oregon law is this particular wording used; nor is there evidence of the use of a similar term, such as, "agricultural, flower or vegetable seed products." In fact, nowhere in any similar ordinance passed by other state legislatures does the term arise. Nat'l Conference of State Legislatures, *State Legislation Addressing Genetically-modified Organisms*, GMO Legislation Summary Blog, http://www.ncsl.org/research/agriculture-and-rural-development/state-legislation-addressing-genetically-modified-organisms-report.aspx (last visited Oct. 24, 2016).

The legislative history reveals the confusion and uncertainty as to the meaning of "products of seed." (ER-24). (Testimony of Rep. Peter Buckley, House Committee Consumer Protection and Government Effectiveness, HB 4041 Public Hearing (February 4, 2016) ("There is no definition of what products of seed means. Is products of *** seed hemp seed oil? Is it? What exactly is a product of seed? Is it every plant and tree that is grown in the state of Oregon?")). Floor letters submitted by the Senator who introduced

the bill contains no reference to "plants," and instead emphasizes the importance of the regulation of "agricultural seeds." Floor Letters, SB 863, Oct 2, 2013 (submitted by Senator Sal Esquivel, and Senator Bill Hansell) (ER-22).

ORS 633.738 was incorporated under the general laws related to seeds. In the event that the legislature intended to regulate plants, they would have put it under ORS Chapter 632, Production, Grading and Labeling Standards for Agricultural and Horticultural Products. ORS Chapter 632. ORS 632.900 defines "Horticultural and agricultural products" as,

> (1) Includes articles of food, drinks, dairy products, forage products, livestock products, poultry products, apiary products, vermiculture products, nursery stock as defined in ORS 571.005 and seeds, bulbs and tubers that are not nursery stock, grown or produced in this state.
> (2) Does not include bakery products and alcoholic liquors.

ORS 632.450 defines "Horticultural products" as, "all horticultural products, including nursery stock as defined in ORS 571.005, except horticultural products that are canned, bottled, frozen, dried, candied or brined."

ORS 632.705 defines, "egg product" as,

> the white, yolk, or any part of eggs, in liquid, frozen, dried, or any other form, used, intended or held for use, in the preparation of, or to be a part of or mixed with, food or food

> products, for human consumption, excepting products that contain eggs only in a relatively small proportion or historically have not been in the judgment of the department considered by consumers as products of the egg industry.

ORS 632.705.

In light of the context and the fact that the legislature chose to include SB 863 in a section solely related to seeds, as opposed to the section related to agricultural and horticultural products, a more plausible meaning of "product of agricultural seed, flower seed, nursery seed or vegetable seed" means materials directly refined from the seeds, such as oil from canola seed or meal from corn seed.

An alternative reading that gives effect to the statute as a whole, ORS 633 Grades, Standards and Labels for Feeds, Soil Enhancers and Seeds, borrow a definition of "product" from the statute. ORS 633.311(25) defines "product" as, "a readily distinguishable, individually labeled substance." ORS § 633.311(25). Applying this definition to "products of seed" means an individually labeled package of seeds as opposed to a handful of loose seeds. Other state seed bills support this reading. See e.g., Wash. Rev. Code 15.49.005-15.49.950 (provides uniformity and consistency in the packaging of agricultural, vegetable, and flower seeds);VT Stat. Tit. 6 Sec. 644 (statewide GE seed labeling scheme that requires the manufacturer to

specify the identity and relevant traits or characteristics of such seed, plus any requirements for their safe handling).

When the definition of "product of seed" is read in the context of its surrounding provisions, it clear that, as a state with one of the biggest seed farming economies, the purpose of that chapter of the Oregon statutes is to provide a regulatory scheme that assists and protects the seed industry, which is distinct from the agricultural industry.

Therefore, in light of the text of ORS 633.511(1), (6), and (17), of ORS 571.005(5), and ORS 632, and the history of SB 863, it is clear that the legislature did not intend to classify plants as either "agricultural seed, flower seed, nursery seed or vegetable seed" or a "product of agricultural seed, flower seed, nursery seed or vegetable seed." As a result, the legislature did not intend the preemption in SB 863 to reach plants.

For all of the above reasons, intervenors request this court dismiss the trial court's grant of summary judgment to plaintiffs and find ORS 633.738 to be unconstitutionally vague.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in applying the *LaGrande/Astoria* analysis to Josephine County, which is a constitutionally chartered home rule county, where there is a state preemption without a corresponding regulatory scheme involving matters of county concern.

I. Preservation

Intervenors opposed Plaintiffs' motion for summary judgment, in briefing and at oral argument, contending, among other things, that because Josephine County is a chartered home rule county under Article VI, section 10 of Oregon's constitution, that the *LaGrande/Astoria* precedent should not apply in the instant case. *LaGrande/Astoria v. PERB*, 281 Or. 137, 156, 576 P.2d 1204, aff'd on reh'g, 284 Or. 173, 586 P.2d 765 (1978).

(ER-8).

The trial court ruled that,

> "Perhaps a higher court than this Court may elect to abandon the Supreme Court precedent of LaGrande with respect to this case or some future case on the basis that a home rule counties' ordinances should be treated with more deference than, non-home rule counties, Needless to say, this Court is not a "higher court".

(*Id*.).

II. Standard of review

A question of statutory interpretation presents a purely legal issue. *State v. Neff*, 246 Or App 186, 190, 265 P3d 62 (2011). Whether a local ordinance conflicts with a state statute—and is therefore invalid under the "home rule" provision of the Oregon Constitution, Article XI, section 2—is a question of law. *City of Portland v. Jackson*, 316 Or 143, 145, 151–52, 850 P2d 1093 (1993) (applying that standard).

ARGUMENT

I. *LaGrande* should not apply in the instant case as Josephine County is a home rule county and the Josephine County plant ordinance involves a matter of county concern

A. Cities and counties derive their home rule authority differently and thus should be analyzed under different standards

Josephine County is a chartered home rule county under Article VI, section 10 of Oregon's constitution. While cities derive their home rule authority from Article XI, section 2, chartered home rule counties are governed by a different provision of the Oregon constitution. Indeed, it wasn't until 1958 - fifty-two years after cities obtained home rule authority - that chartered county home rule became part of Oregon's constitution.[4]

[4] A successful ballot initiative extended the privilege of home rule to counties, enacting by referendum article VI, section 10.

To date, nine counties, including Josephine County, have home rule charters.[5] Oregon's remaining twenty-seven counties derive their home rule authority by statute. ORS 203.035. Oregon courts have not generally distinguished between chartered and general home rule counties. *See e.g. Allison v. Washington County*, 24 Or App 571, 581, 548 P2d 188 (1976).

Oregon's seminal home rule case, *LaGrande/Astoria*, created a distinction between state preemption of municipal laws related to "substantive social, economic, or regulatory" matters and those related to the "structure and procedures of local agencies." *LaGrande/Astoria v. PERB*, 281 Or. 137, 156, 576 P.2d 1204, aff'd on reh'g, 284 Or. 173, 586 P.2d 765 (1978). In *LaGrande/Astoria* the court circumscribed the authority of home rule cities, holding that a state law would preempt a city law only when "if [the state law] is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form." *Id*.

Despite the fact that counties and cities derive their home rule authority from different constitutional provisions, Oregon courts have consistently applied the same legal standard articulated in *La*

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[5] Benton, Clatsop, Hood River, Jackson, Josephine, Lane, Multnomah, Umatilla, and Washington

Grande/Astoria.[6] *See*, e.g., *Ashland Drilling, Inc. v. Jackson Cnty*., 168 Or. App. 624, rev. denied, 331 Or. 429 (2000); *Buchanan v. Wood*, 79 Or. App. 722, rev. denied, 302 Or. 158 (1986); *Pac. Nw. Bell. v. Multnomah Cnty*., 68 Or. App. 375, rev. denied, 297 Or. 547 (1984).[7]

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[6] Since *LaGrande/Astoria*, the Oregon Supreme Court has not squarely applied the *LaGrande* test to an instance where a county ordinance, rather than a city ordinance, conflicts with a statute.

[7] Despite the fact that home-rule counties are governed by a different provision of the Oregon constitution than cities, the Oregon Court of Appeals has assumed, without any extensive analysis, that the *City of La Grande* framework applies to counties as well. E.g., *GTE Nw. Inc. v. Or. Pub. Util. Comm'n*, 179 Or. App. 46, 52 n.4, 39 P.3d 201, 205 n.4 (2002); see also *GTE Nw.,* 179 Or. App. at 64–65, 39 P.3d at 211 (Armstrong, J.,concurring); *Pac. Nw. Bell Tel. Co. v. Multnomah County*, 68 Or. App. 375, 378 n.2, 681 P.2d 797, 798 n.2 (1984) ("The parties did not brief or argue whether there is any substantive difference between county and city home rule charter provisions in the constitution. . . . For the purposes of this opinion, we assume that there is not."). This is a curious assumption in light of the textual differences between article XI, section 2, and the county home-rule provision—article VI, section 10. *Buchanan v. Wood*, 79 Or. App. 722,731 n.1, 720 P.2d 1285, 1290 n.1 (1986) (Joseph, C.J., dissenting) ("I do not necessarily agree that *LaGrande/Astoria v. PERB* has anything to do with a county home rule charter under Article VI, section 10.") (citations omitted). See Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, Or. Law Rev., Vol. 89, 939, note 119.

B. A rigid adherence to *LaGrande* has stunted the ability of local governments to become "proving grounds" for important local issues

LaGrande was decided on a bare majority, and the legal landscape has changed enough since that time to witness some of the stagnant policy consequences resulting from that case and its progeny.

Oregon's home rule provisions enable local governments to serve as "proving grounds" for policies that have not yet won acceptance at the state and national levels. Once a local jurisdiction's new policy proves to be successful or effective at addressing a social or local issue, other jurisdictions generally follow suit, as was the case with city indoor smoking bans across the country.

However, in recent years, special interest groups have with some frequency encouraged the legislature to broadly preempt local regulatory authority on significant matters of public policy.

Such broad preemptions, without any underlying statewide regulatory scheme, stunt the ability of local governments to serve as "proving grounds" for new social and economic polices. See *Sims v. Besaw's Café*, 165 Or App. 180, 200 n.3, 997 P.2d 201, 213 n.3 (2000)(Linder, J., concurring); Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, Or. Law Rev., Vol. 89, 939, 940.

Intervenors suggest that Justice Togue's dissent in *LaGrande*, warning of the unintended consequences of the majority's analysis, has borne truth over time. Justice Tongue predicted that the majority's decision would allow the legislature to "transfer to the cities the cost of expensive social programs"—which indeed happened with PERS to some extent. *La Grande I*, 281 Or at 158 (Tongue, J., dissenting). See *City of Eugene v. State Pub. Employees Ret. Bd.,* 339 Or 113, 117 P3d 1001 (2005), *on recons.,* 341 Or 120, 137 P3d 1288 (2006).

C. Because there is no conflict of laws or statewide regulatory scheme, preemption should not be found to overturn the local protections found in the GE plant ordinance

A more suitable analysis for the present case lies in that from *State ex rel Haley v. City of Troutdale*, 281 Or 203, 211, 576 P2d 1238 (1978), wherein the court held that the state legislature could have prohibited local governments from adopting stricter building codes; the court was reluctant to infer a preemptive intent when the two sets of regulations *were not inherently incompatible*, unless the statute unambiguously expressed the intent to preempt local regulations. *Haley*, 281 Or at 211 (emphasis added).

Read together, *La Grande I* and *Haley* afford broad power to the legislature to override local ordinances if it chooses to do so, but they caution against assuming that the legislature has actually made the choice to

preempt. Unless the local law is irreconcilable with the state law, or the legislature has clearly expressed its intent to displace local regulation, there may be room for both state and local regulation.

In the present case, the state regulation of GE crops and farming practices is not inherently incompatible with the Josephine County GE plant ordinance, namely because there simply exists no state regulation whatsoever on that topic. There is no conflict of laws when there is only one law (the local ordinance) regulating an area. Although the seed law purports to be an express preemption of local regulation, intervenors submit that it is not an effective preemption for lack of a regulatory scheme.

Similar to a stricter local building code, the citizens in Josephine County voted to have stricter local plant protections for farmers given this region's unique topography with narrow valleys, climate, growing conditions and farmer concerns regarding genetic contamination.

Accordingly, the plant ordinance should stand, as it is not incompatible with any substantive state law or regulatory scheme, and Josephine County should be allowed to serve as a "proving ground" on the important social issue of genetically engineered crops.

CONCLUSION

For the reasons set forth above, summary judgment should be reversed and judgment entered for intervenors as a matter of law, and a declaration made that the Josephine County GE plant ordinance is upheld and ORS 633.738 is unconstitutional.

INDEX TO EXCERPT OF RECORD

POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves two politically hand-picked "hobby farmers," unable to demonstrate actual injury or standing, attempting to overturn the will of the clear majority of voters in Josephine County. The voters approved the Josephine County Genetically Engineered Plant Ordinance ("Plant Ordinance" or "Ordinance," herein) by ballot initiative on May 20, 2014. Voters in neighboring Jackson County (in the same watershed and pollenshed as Josephine County) adopted a similar Plant Ordinance on the same date.[1]

The ballot title for the Plant Ordinance was approved by the Josephine County District Attorney and County Clerk on September 30, 2013. Ex. 1. A week later, on October 8, 2013, then Oregon Governor John Kitzhaber (who has since resigned for ethical breaches) signed SB 863 into law, as part of the contested "Grand Bargain" adopted by the 2013 special session, perplexingly linking state pension legislation to local control over seeds. Pl. Mot. Sum. J. Ex. 3. As Governor Kitzhaber explained:

> The random factor, the free radical, was the GMO bill, which I would be the first to acknowledge has nothing to do with the purposes for which I originally called the session . . . I wish I could tell you there was a rational reason for it to be in there, but there isn't."[2]

SB 863, authored by Plaintiffs' attorney, was later codified in ORS 633.738 (hereafter, the "Seed Law"). That legislation purports to preempt local regulation of agricultural "seeds or products of seeds."

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[1] Mail Tribune article titled "GMO Ban Passes" found at http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20140521/NEWS/405210325

[2] Oregonian article titled "GMO bill a political necessity, Oregon Gov. John Kitzhaber says (2013 special session), found at http://www.oregonlive.com/politics/index.ssf/2013/09/gmo_bill_a_political_necessity.html

agriculture, environment, public health, economy, and private property from the physical, environmental, and monetary damages linked to genetically modified organisms[.]"

Section 2 of the Plant Ordinance, attached to Pls. Compl. at Ex. 1, p. 1.

The Plant Ordinance specifically prohibits the following farming practice: "It shall be unlawful for any person, corporation or other entity to: [p]ropagate, cultivate, raise, or grow genetically modified organisms in Josephine County, or to knowingly or negligently allow such activities to occur on one's land [subject to the medical and scientific research exemptions in the Plant Ordinance]." *Id.* at 3.

The Plant Ordinance provides that farming operations with genetically engineered crops shall have up to twelve (12) months from the date of enactment to phase out the planting and harvesting of genetically modified organisms. Compl. at Ex. 1, p. 4, § 7(E).

On September 30, 2013, the Josephine County Clerk approved the Ballot Title for the Ordinance, as Initiative Petition P-2013-7, with any objections to be filed October 9, 2013. Ex. 1.

On February 19, 2014, the Josephine County Clerk approved the number of signatures for registered active voters on the petition and assigned the petition as Measure 17-58 for the May 20, 2014 Primary Election ballot. Compl. at Ex. 2, p.1.

The Measure passed with a strong majority of bi-partisan support, with 58.25 percent of voters approving the Measure, despite the opposition spending of nearly $1 million in a PAC registered against both Josephine and Jackson Counties' Measures. Middleton Decl., p. 5 at ¶ 26. The Jackson County Genetically Engineered Plant Ordinance was similarly passed the same day. Pls. Ex. 4 at 2.

The Josephine County Board of Commissioners formally enacted the Plant Ordinance (as Ordinance No. 2014-07) on September 4, 2014, with farmers then growing genetically engineered crops having twelve (12) months to continue growing those crops and to make a transition plan by the enforcement deadline the following year, on September 4, 2015.

On July 31, 2015, the Josephine County Board of Commissioners issued a Public Notice to all farmers, persons, corporations or entities propagating, raising, or growing genetically engineered plants in the county to that effect. Compl. at Ex. 4, p. 1.

B. ORS 633 was enacted in an attempt to preempt local regulation of seeds

In 2013, then Governor Kitzhaber called an "emergency" session of the legislature and introduced a collection of five (5) bills as part of a controversial "Grand Bargain" indicating he would sign all of them or none of them. Four of the bills were PERS or tax legislation, aimed to balance the state budget. In 2015, the Oregon Supreme Court overturned the budget bills, and the 2015 Legislature revised the tax measure, leaving SB 863 as the one last vestige of the otherwise moribund "Grand Bargain."[4]

SB 863 was the unlikely companion to the emergency budget crisis session. That bill, now codified in ORS 633.738 (the "Seed Law") provides that:

> [A] local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.

The above prohibition does not apply to any local measure that was: (1) Proposed by initiative petition and, on or before January 31, 2013, qualified for placement on the ballot in a county; and (2) Approved by the electors of the county at an election held on May 20, 2014. [2013 s.s.1 c.4 §4]

Senator Alan Bates and Rep. Peter Buckley personally testified against an earlier version of the bill (then SB 633) before the Senate Committee and asked that Jackson County be exempted from

[4] http://www.statesmanjournal.com/story/news/politics/2015/04/30/supreme-court-overrules-state-pers-cuts/26633481/

the bill in light of the pending Ordinance to prohibit GE crops. While Josephine County did not have the benefit of similar representation at the Senate Committee, the concerns for Jackson and Josephine farmers, given the same narrow valleys, climate, growing conditions, and farming operations, are inextricably linked. Senator Bates explained to the committee:

> We have a large number of organic farmers in the Rogue River Basin area and they cannot sell their products if they are contaminated with GMO- they can't do it…. We are concerned what this [GMOs] will do to our valley from the point of view of loosing those markets and putting these people out of business… You have before you probably 250 different business in the valley that do not want this happen that's why we have a ballot measure to try to block it from coming in.[5]

Rep. Buckley similarly argued:

> Two other points I'd make, one is the right to farm. Members I would submit that you do not have a right to farm in a way that damages the crop of another farmer, and GMO has that potential in the Rogue Valley, and we are asking for your support to allow us to vote for our own future on that.[6]

Notwithstanding Plaintiffs' assertion that the statewide legislation purports to "ensure a uniform state policy with respect to regulation of agricultural seed cultivation in Oregon and to avoid a patchwork of potentially conflicting local laws" (Mot. for Sum. J. at p. 2:21-23), in fact the law creates a novel vacuum with regard to genetically engineered plants, given that the Oregon Department of Agriculture has refused to regulate genetically engineered plants. Unlike the statewide regulation of marijuana, (to which the Seed Law also presumably applies) where the Oregon Liquor Control Commission has been actively engaged in rulemaking, there are no such meaningful statewide efforts whatsoever to regulate genetically engineered plants.[7]

In fact, on Page 6 of executive summary of Governor's Task Force Report, the Report notes that the Oregon Department of Agriculture does not regulate (and has no plans to regulate) genetically

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[5] Audio tape: Oregon Legislature, Senate Committee on Rural Communities and Economic Development, Public hearing on Senate Bill 633 (Mar. 12, 2013) ("SB 633 Senate hearing"), *available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=2077) at 27:00 minutes.

[6] *Id*. at 30:40 minutes.

[7] OLCC Marijuana Regulation available at http://www.oregon.gov/olcc/marijuana/Pages/default.aspx

engineered crops: "*ODA is not currently regulating most GE crops or implementing Oregon-Specific policies.* During the task force's work, members heard a number of reports from ODA regarding their authority and activities on GE agriculture. It was clear that ODA does not take additional steps to regulate GE crops after the federal government deregulates them, with the exception of biopharmaceuticals." Ex. 2 at 6. (Emphasis in original).

Moreover, ODA Director Katy Coba wrote a letter to Gov. Kitzhaber on June 30, 2014 stating the ODA has no authority to deal with conflicts between growers of genetically modified and non-GMO crops. Ex. 3. In her letter, Director Coba states the department lacks authority to develop a mapping system to coordinate what is grown where and when, explaining that state law does not require farmers to report information about their crops to ODA, making it impossible to map crops that could cross-pollinate. *Id*.

Given its controversial nature and lack of comprehensive regulatory scheme in this arena, leaving local farmers unprotected from genetic contamination, current efforts, such as the recently introduced HB 4122 and HB 4041, have been underway to overturn or amend the Seed Law.[8]

C. Plaintiffs, who have not actually "farmed" genetically engineered crops, are hand-picked political representatives of a statewide lobbying group

Plaintiff Robert White earns a good living in construction, and has never made a profit from farming other than the one year (invoiced a week after the Plant Ordinance election) he received a check for $30,000 from Syngenta without a corresponding contract (see below section about the Syngenta payments and contracts):

> Q Can you tell us what your income is annually from your construction job?
> A Anywheres from 70 to a hundred twenty.
> Q Thousand dollars a year?
> A Yes.
> Q So that's the income that supports your family, yes?
> A Yes.

[8] http://www.fooddemocracynow.org/blog/2016/feb/11-0

grain hay.[10] *Id.* at 56:5-57:3. Furthermore, according to tax returns provided by the Plaintiffs, the grain hay sales improved significantly due to the rented farmlands for the 2013 and 2014 growing season, with sales of $25,000 and $11,000.00 respectively up from $0.00 income in 2012 and $5,000.00 in 2011 for grain hay. Ex. 6.

In sum, the Plaintiffs suffered no financial harm because over the time period when they entered into the agreement the Plaintiffs substantially increased their farm income by growing grain hay on the 100 acres. The Plaintiffs never grew and never contracted to grow GE sugar beets or stecklings on the rented farmlands; therefore, they never lost any income or profits because of the enactment of the Plant Ordinance.

3. Plaintiffs' financial injury is speculative and hypothetical

a. Plaintiffs have endured no financial loss related to "lease" payments

Plaintiffs have not presented concrete evidence of a financial injury related to their inability to use the rented farmlands for their purported purpose. The Plaintiffs do not have a valid lease, and in the event that the Court finds the agreement valid, the Plaintiffs have not paid the lease for the 2015 or 2016 season, so the Plaintiffs have not suffered any financial loss related to the rented farmlands.

b. Plaintiffs' income improved based upon income from hay sales at the rented farmlands

The Plaintiffs' farm income improved substantially through hay sales after the agreement was entered. Ex. 6. The Plaintiffs never received any income or incurred expenses related to GE sugar beets from the rented farmlands. R. White Dep. at 56:5-57:3. The Plaintiffs have only ever grown grain hay on the rented farmlands, and they will be able to continue to do so after the ordinance. Plaintiffs admitted the market for GE beets has been declining due to consumer demand for non-GE

[10] While uncertain, Plaintiffs deposition testimony is that they entered into the "lease" in the spring of 2013 (Ex. 4 at 43:19-22), so there three possible spring to fall harvests in 2013, 2014, and 2015.

1. They have been farming in Josephine County since 2004. At that time, they purchased farmland that had a preexisting, but overgrown crop of Christmas trees.
2. They elected to remove the Christmas trees and plant grain crops.
3. They've contracted with Syngenta for approximately 10 years to grow, on a limited basis, genetically modified crops.
4. They entered into a lease with Mr. Sauer to grow GM sugar beets in the spring of 2013, before Josephine County passed its GMO ordinance.
5. Their intent was to plant 30 acres of GM sugar beets on their own property in August of 2013, and then rotate this crop from their own property to Mr. Saurer's property in approximately March of 2014.
6. Mr. Sauer has been paid for the leased ground; although plaintiffs have not been able to rotate a GM crop to his property, because of the GMO ordinance. Likewise, the plaintiff's had determined that Syngenta is unwilling to contract with them because of the GMO ordinance.
7. Plaintiff's paid Mr. Sauer $10,000 in 2013 and $10,000 in 2014 on account of their lease. They remain obligated to Mr. Sauer for additional lease payments.
8. Plaintiffs did not utilize Mr. Sauer's property as intended, because of the GMO ordinance.

Comparing these facts with those in Marks vs. City of Roseburg, supra, and Thunderbird Mobile Club LLC vs. City of Wilsonville, supra, the plaintiffs have demonstrated that their conflict with the ordinance is not academic or speculative and that the determination in this case will have a practical effect on them. The intervenor's motion for summary judgment based on an alleged lack of standing by plaintiffs is denied.

II. Constitutional Issues

Intervenors assert that ORS 633.738(2) is unconstitutional because it results in a regulatory void. That is so because without Josephine County's ordinance, all regulation would be left with the State of Oregon and the intervenors present evidence that the Oregon Department of Agriculture does not have present plans to regulate GM crops.

Although there are no Oregon cases on point, intervenors cite: City of Cleveland vs. State of Ohio, 989 N.E. 2nd 1072 for that proposition. In that case, the City of Cleveland enacted a local regulation of industrially produced trans-fat. Before the ordinance went into effect, the State of Ohio passed legislation preempting such local regulation, declaring that:

> "The regulation of the provision of food nutrition information and consumer incentive items at food service operations and how food services operations are characterized are matters of general statewide interest that require state wide regulation...".

Ultimately the Ohio Court of Appeals found the state regulation unconstitutional because it replaced the City's regulation, with no regulation. Like Josephine County, the City of Cleveland

> "There is no dispute that the Legislature expressly intended state reservation of regulatory powers over agricultural seed, flower seed, nursery seed or vegetable seed, and the product of those seeds."

However, intervenors then suggest a number of routes that this Court can avoid that obvious conflict. They are as follows:

a. "Product of seeds" does not include "plants".

Intervenors posit that "products of seeds", actually means packaged seeds, as opposed to plants. This Court agrees with plaintiff that this would result in an absurd interpretation and result. Because this text is clear, the Court will not concern itself with the legislative history of ORS 633.738. Portland General Electric vs. Bureau of Labor, 317 OR 606.

b. Disregard of "LaGrande" precedent.

Perhaps a higher court than this Court may elect to abandon the Supreme Court precedent of LaGrande with respect to this case or some future case on the basis that a home rule counties' ordinances should be treated with more deference than, non-home rule counties. Needless to say, this Court is not a "higher court".

c. Lack of rational basis for cutoff date; or area of regulation

This is a legislative prerogative. Intervenors assert that it is unconstitutional for the legislature to arbitrarily set a cutoff date for preemption; and to limit the exemption to just Jackson County as opposed to the "...the greater Rouge (sic) River Valley geographic region". Again, the power to set or remove cutoff dates, or to define geographic areas is with the Oregon State Legislature; and not with this Court.

III. Conclusion

Plaintiffs have standing to challenge BM-1758. Therefore, intervenor's motion for summary judgment is denied. ORS 633.738 preempts BM-1758. Therefore plaintiff's motion for summary judgment is granted. Mr. DiLorenzo should draw up a consistent judgment.

Very truly yours,

Pat Wolke
Circuit Court Judge

PW:ah

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF JOSEPHINE

ROBERT A. WHITE, JR. and SHELLEY ANN WHITE, Plaintiffs, v. JOSEPHINE COUNTY, Defendant, SISKIYOU SEEDS, LLC and OREGONIANS FOR SAFE FARMS AND FAMILIES, Intervenor-Defendants.	Case No. 15CV23592 **GENERAL JUDGMENT**

This matter came before this Court for hearing on April 14, 2016, before the Honorable Pat Wolke. Plaintiffs appeared though their attorney, John DiLorenzo. Defendant appeared though its attorney, Wally Hicks. Intervenor-Defendants appeared by and through Stephanie Dolan and Melissa Wischerath of their attorneys. The Court, having heard the arguments of counsel and having reviewed the pleadings and evidence submitted herein by plaintiffs and defendant-intervenors, and good cause appearing therefor,

IT IS HEREBY ADJUDGED by the Court that Plaintiffs have JUDGMENT against Defendant and Defendant-Intervenors:

1. Declaring that Josephine County ordinance No. 2014-007 ("Ordinance") is invalid and unenforceable because it is pre-empted by ORS 633.738(2); and

///

DWT 29626355v1 0060591-000025

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

2. Enjoining defendant Josephine County from taking any action to enforce the Ordinance.

Signed: 5/26/2016 10:59 AM

Circuit Court Judge Pat Wolke

Submitted by:

John DiLorenzo, Jr., OSB #802040
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Section 1. Title

This Ordinance shall be known as the Josephine County Genetically Engineered Plant Ordinance

Section 2. Purpose and Findings

(A) The purpose of this Ordinance is to:

a. Maintain and protect seed sovereignty and local control, free from outside corporate interests and unnecessary and overreaching preemption by the state and federal governments, of this County's agriculture, environment, public health, economy and private property rights as they pertain to genetic contamination from genetically engineered plants;

b. Prohibit any person, corporation or entity from propagating, raising, or growing genetically engineered plants in Josephine County; and

c. Enable Josephine County to enforce the genetically engineered plant ban and recover the costs of such enforcement.

(B) This Ordinance supports the health, welfare and economic viability of the citizens of Josephine County, who desire to:

a. Maintain and protect their inherent sovereign right to grow crops from natural seeds, in order to sustain their families and communities as they have already successfully done for generations;

b. Protect the County's agriculture, environment, public health, economy and private property from the physical, environmental and monetary damages linked to genetically modified organisms; and

c. Support the right to farm and garden in this County, as the citizens of Josephine County assert that the propagation, cultivation, growing and dispersal of genetically modified organisms are not reasonable or prudent farming practices and instead threaten the health, welfare and economic viability of that inherent right to farm and garden.

Section 3. Definitions.

(A) "DNA" means "deoxyribonucleic acid," which is the genetic material that is present in every cell of an organism and is the "blueprint" for the organism's development.

(B) "Genetic contamination" means the dispersal or spread of altered genetic information from genetically engineered organisms into the genomes of organisms in which such genes are not present in nature, such as by cross-pollination.

(C) "Genetically engineered" or "genetically modified" means modification of living plants and other organisms by genetic engineering, and "genetically modified organisms" or "GMOs" means any living organism that possesses a novel combination of genetic material produced through the use of modern biotechnology techniques. Examples of genetic engineering and modification include, but are not limited to: altering or amending DNA using recombinant DNA technology such as gene deletion, gene doubling, introducing a foreign gene, or changing the position of genes, and includes cell fusion (including protoplast fusion), microencapsulation, macroencapsulation, gene splicing,) or hybridization techniques that overcome natural physiological, reproductive or recombination barriers, where the donor cells/protoplasts do not fall within the same taxonomic species and in a way that does not occur by natural multiplication or natural recombination. "In vitro nucleic acid techniques" include but are not limited to recombinant DNA or RNA techniques that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organism such as microinjection, macro-injection, chemoporation, electroporation, microencapsulation and liposome fusion, and any other technology or technique that results in an organism that contains genes from more than one species, or genes that are not naturally occurring. For purposes of this Ordinance, genetically engineered or modified organisms do not include organisms created by traditional selective breeding, fermenting, conjugation, normal in vitro fertilization or hybridization, or to microorganisms created by moving genes or gene segments between unrelated bacteria.

(D) "Natural seeds" or "natural organisms" means seeds or organisms that do not possesses a novel combination of genetic material obtained through the use of modern biotechnology and have not been genetically modified or engineered. Natural seeds or organisms include those seeds or organisms created by traditional selective breeding or hybridization methods.

(E) "Organism" means any living thing.

Section 4. Reservation of Authority to Regulate Genetically Modified Organisms.

Josephine County hereby reserves the authority to regulate genetically modified organisms. This authority is construed to allow regulations and amendments, or delayed provisions, implementation, or enforcement of this law without limitation in time. Future laws that may preempt local regulations of genetically modified organisms, or any future regulation or amendments occurring under the authority provided by this Ordinance, shall not be construed to retroactively apply to affect the authority in this ordinance.

Section 5. Prohibition.

It shall be unlawful for any person, corporation or other entity to:

(A) Propagate, cultivate, raise, or grow genetically modified organisms in Josephine County, or to knowingly or negligently allow such activities to occur on one's land, except as provided in Section 6 below.

(B) Intentionally or negligently cause or allow any genetically modified organisms or materials from within or outside of the jurisdiction of Josephine County to substantially enter, drift or be dispersed into and within Josephine County, in such a way as to risk genetic contamination of natural organisms within the jurisdiction of Josephine County. Josephine County may enforce such violations to the extent possible pursuant to applicable laws.

Section 6. Exceptions to Prohibition.

(A) State or federally licensed medical research institutions, medical laboratories, or medical manufacturing facilities engaged in licensed medical production, or medical research involving genetically modified organisms are exempt from this Ordinance provided that such activities are conducted under secure, enclosed indoor laboratory conditions with the utmost precautions to prevent release of any part of genetically engineered organisms, especially but not limited to pollen, to the outside environment.

(B) Educational or scientific institutes, including but not limited to Oregon State University Extension, working with genetically engineered organisms are exempt from this Ordinance provided that such activities are conducted under secure, enclosed indoor laboratory conditions with the utmost precautions to prevent release of any part of genetically engineered organisms, especially but not limited to pollen, to the outside environment.

(C) Any institution listed in (A) or (B) above that intentionally or negligently allows release of any part of genetically engineered organisms into the outside environment is in violation of this Ordinance and subject to enforcement as set forth herein.

Section 7. Code Enforcement Officer, Disclosure, Phase-In and Transition.

(A) Code Enforcement Officer. The Josephine County Board of Commissioners may designate one or more persons to administer and enforce the provisions of this Ordinance, herein referred to as the Code Enforcement Officer.

(B) Upon enactment, the Code Enforcement Officer shall make reasonable efforts to provide initial notification of this ordinance to farming operations within Josephine County.

(C) Every person, corporation or entity cultivating, raising and growing genetically modified organisms, including those institutions set forth in Section 6 above, must disclose to the Code Enforcement Officer within thirty (30) days of enactment of this Ordinance the location and description of existing or planned genetically engineered crop(s) or materials involved, in order to develop a transition plan to phase out such organisms.

(D) The Code Enforcement Officer shall make reasonable efforts to notify farming operations of technical assistance and resources that may be available to assist with the transition from genetically engineered to natural organisms.

(E) Farming operations with genetically engineered crops shall have up to twelve (12) months from the date of enactment to phase out planting and harvesting of genetically modified organisms.

(F) Actions required of the Code Enforcement Officer in this section are intended to assist farming operations with compliance and assistance. Failure to receive notification does not waive or otherwise affect requirements for compliance with the provisions of this Ordinance.

Section 8. Enforcement and Remedies.

(A) Notification. The Code Enforcement Officer shall notify any person, corporation or entity that may be in violation of this Ordinance that any organisms in violation of this Ordinance are subject to confiscation and destruction, in accordance with due process.

(B) Response. Any person, corporation or entity that receives notification under subsection (B) shall have fifteen (15) days to respond to such notification with evidence that such organisms are not in violation of this Ordinance. Time for response may be shortened upon a showing of current, ongoing and/or imminent harm or risk of genetic contamination.

(C) If the notified party does not provide such evidence, or if there is probable cause to believe genetically engineered plants are present, the Code Enforcement Officer may take necessary actions required by law (such as obtaining a search warrant) to obtain access to the property and obtain samples of materials, in accordance with due process.

(D) Determination. Upon receipt of any evidence under subsection (D), the Code Enforcement Officer shall consider such evidence and any other evidence that is presented or which is relevant to a determination of such violation. The Code Enforcement Officer shall act in good faith to make such determination as soon as possible, and before any genetic contamination may occur. If genetic contamination has already occurred or cannot be prevented before the determination is completed, Code Enforcement Officer shall make efforts to abate and prevent further contamination.

(E) Remedies. In addition to any remedies and penalties provided that may be available by law, the following remedies and penalties may be imposed:

a. Any organisms that are the subject of violation of this Ordinance may be confiscated, quarantined, and destroyed before any genetic contamination may occur. If genetic contamination has already occurred, the contaminated organisms may be confiscated, quarantined, and destroyed, in accordance with due process.

b. Administrative and abatement costs associated with the confiscation and destruction of organisms may be imposed on responsible parties (namely the person(s), corporation(s) or other entities responsible for the violation). If

contamination has already occurred, costs for remediation of contamination may be imposed on responsible parties.

c. In imposing administrative and abatement costs on the responsible parties, the Code Enforcement Officer shall take into account the amount of actual and reasonably foreseeable damage, and the degree of willfulness, reckless disregard or negligence of the person, corporation or entity involved.

(F) Any individual citizen of Josephine County shall have standing to assert any rights secured by this ordinance that have been violated or are threatened with violation, and may seek injunctive and/or compensatory relief from a court of competent jurisdiction.

Section 9. Severability.

To the extent any provision of this Ordinance is deemed invalid by a court of competent jurisdiction, such provision will be removed from the Ordinance, and the balance of the Ordinance shall remain valid.

========== End of Ordinance ==========

BEFORE THE BOARD OF COUNTY COMMISSIONERS FOR JOSEPHINE COUNTY
STATE OF OREGON

In the Matter of Assigning an Ordinance Number to the Josephine County Genetically Engineered Plant Ordinance	)))	ORDER NO. 2015-013

WHEREAS, the voters of Josephine County, Oregon, approved at the election of May 20, 2014, the Josephine County Genetically Engineered Plant Ordinance; and

WHEREAS, a Josephine County Ordinance number needs to be assigned to the Josephine County Genetically Engineered Plant Ordinance; now, therefore

IT IS HEREBY ORDERED that the Josephine County Genetically Engineered Plant Ordinance as approved by the voters of Josephine County on May 20, 2014, attached as Exhibit A, shall be assigned Ordinance No. 2014-007.

DONE and DATED this 29 day of April, 2015.

JOSEPHINE COUNTY
BOARD OF COMMISSIONERS

K. O. Heck, Chair

Cherryl Walker, Vice-Chair

Absent at Signing

Simon G. Hare, Commissioner

JOSEPHINE COUNTY
BOARD OF COMMISSIONERS
PUBLIC NOTICE
REGARDING
JOSEPHINE COUNTY GENETICALLY ENGINEERED PLANT ORDINANCE
No. 2014-007

TO: ALL FARMERS, PERSONS, CORPORATIONS OR ENTITIES PROPAGATING, RAISING, OR GROWING GENETICALLY ENGINEERED PLANTS IN JOSEPHINE COUNTY

You are hereby notified that the voters of Josephine County, Oregon, pursuant to a citizen initiative measure, approved at the election of May 20, 2014, the Josephine County Genetically Engineered Plant Ordinance, which was assigned Ordinance Number 2014-007, by the Board of Commissioners.

Ordinance No. 2014-007 prohibits the propagation, raising or growing of genetically engineered plants (also known as "GMO" crops) in Josephine County after the phase-out period consisting of the 12-months following enactment, which will end on September 4, 2015.

ANY GROWING OF GENETICALLY ENGINEERED PLANTS/CROPS IN JOSEPHINE COUNTY AFTER SEPTEMBER 4, 2015, WILL BE IN VIOLATION OF ORDINANCE 2014-007.

Anyone currently growing genetically engineered plants/crops is required to contact Josephine County Sheriff Dave Daniel at (541) 474-5123 to notify the county and provide the following information: name, contact information, description of genetically engineered crop type, crop location, proposed phase-out plan to be completed before the September 4, 2015, deadline, and whether any technical assistance for the transition is requested.

A copy of the ordinance may be obtained by contacting the County Board of Commissioners at (541) 474-5221.

Failure to receive notice does not waive compliance with the law.

JOSEPHINE COUNTY
BOARD OF COMMISSIONERS
K.O. Heck, Chair
Cherryl Walker, Vice Chair
Simon G. Hare, Commissioner

Lease agreement for 22503 Redwood Hwy

Lessor: Jack Sauer

Lessee: Robert and Shelly White

I/We are in agreement to lease 100 acres from Jack Sauer located at 22503 Redwood Hwy, Kerby Or. Lessee will be responsible for harvest of crops and irrigation. Lessee will also maintain any equipment used that is owned by lessor such as pump, siphons and etc. Fertilizer, and rotation crops are responsibility of lessee. Payment of $10,000.00 shall be due by December of that year. Property shall be leased until both parties agree upon cancellation of lease.

Robert White

Shelly White

Jack Sauer

77th OREGON LEGISLATIVE ASSEMBLY--2013 Special Session

Enrolled
Senate Bill 863

Sponsored by JOINT COMMITTEE ON SPECIAL SESSION

CHAPTER .....

AN ACT

Relating to preemption of the local regulation of agriculture; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 and 3 of this 2013 special session Act are added to and made a part of ORS 633.511 to 633.750.

SECTION 2. (1) As used in this section, "nursery seed" means any propagant of nursery stock as defined in ORS 571.005.

(2) The Legislative Assembly finds and declares that:

(a) The production and use of agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed are of substantial economic benefit to this state;

(b) The economic benefits resulting from agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state make the protection, preservation and promotion of those industries a matter of statewide interest that warrants reserving exclusive regulatory power over agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed to the state; and

(c) The agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state will be adversely affected if those industries are subject to a patchwork of local regulations.

SECTION 3. (1) As used in this section:

(a) "Local government" has the meaning given that term in ORS 174.116.

(b) "Nursery seed" means any propagant of nursery stock as defined in ORS 571.005.

(2) Except as provided in subsection (3) of this section, a local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.

(3) Subsection (2) of this section does not prohibit a local government from enacting or enforcing a local law or measure to inhibit or prevent the production or use of agricultural

seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed on property owned by the local government.

SECTION 4. Section 3 of this 2013 special session Act does not apply to any local measure that was:

(1) Proposed by initiative petition and, on or before January 31, 2013, qualified for placement on the ballot in a county; and

(2) Approved by the electors of the county at an election held on May 20, 2014.

SECTION 5. This 2013 special session Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 special session Act takes effect on its passage.

Passed by Senate October 2, 2013

.....
Robert Taylor, Secretary of Senate

.....
Peter Courtney, President of Senate

Passed by House October 2, 2013

.....
Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2013

Approved:

.....M.,....., 2013

.....
John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M.,....., 2013

.....
Kate Brown, Secretary of State

78th OREGON LEGISLATIVE ASSEMBLY--2016 Regular Session

House Bill 4041

Sponsored by Representative BUCKLEY (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Removes products of seed from statute prohibiting local governments from inhibiting or preventing production of seed. Modifies exemption to that statute.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to local governments; amending ORS 633.738 and 633.741; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 633.738 is amended to read:

633.738. (1) As used in this section:

(a) "Local government" has the meaning given that term in ORS 174.116.

(b) "Nursery seed" means any propagant of nursery stock as defined in ORS 571.005.

(2) Except as provided in subsection (3) of this section, a local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed [*or products of agricultural seed, flower seed, nursery seed or vegetable seed*]. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed [*or products of agricultural seed, flower seed, nursery seed or vegetable seed*].

(3) Subsection (2) of this section does not prohibit a local government from enacting or enforcing a local law or measure to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed on property owned by the local government.

SECTION 2. ORS 633.741 is amended to read:

633.741. ORS 633.738 does not apply to any local measure that [*was*] **is**:

(1) Proposed by initiative petition and[*, on or before January 31, 2013,*] qualified for placement on the ballot in a county; and

(2) Approved by the electors of the county at an election [*held on May 20, 2014*].

SECTION 3. This 2016 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2016 Act takes effect on its passage.

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

From the desk of Lyn Saltzman

OREGON FARM BUREAU

Locally Grown and GROWING STRONG

SB 863 – Preempts Local Governments from Regulating Farmers' Seed Choices and Genetically Engineered Crops

SB 863 would ensure that agriculture seed and seed products are only regulated at the state and federal levels, preempting additional regulations by local municipalities. This would prevent a potential patchwork of 36 different county regulations, and over 400 city regulations on agricultural seed. Plant breeding, including genetic engineering (GE) is an extremely complex process and counties lack the financial and scientific resources to regulate these products.

What is agriculture biotechnology?

This technology is perhaps the single most important innovation that's helping our farmers be the most productive and efficient producers in the world. Modern agriculture biotechnology refers to genetic modification using recombinant DNA (rDNA) methods to bring together genetic material from multiple sources. It enables them to grow more crops using fewer costly inputs, while significantly improving agriculture's impact on the environment and helping cope with the biggest challenges we face from nature and from a growing world population.

Genetic modification is not new in agriculture. Modern biotechnology is just the latest in a long progression aimed at improving plants and animals for the benefit of mankind, starting with domestication of crops and livestock and including selective breeding and more recent gene modification techniques.

The primary commercial biotech crops grown today are corn, soybeans and cotton, as well as other crops such as alfalfa, sugarbeets, canola, papaya, squash and sweet corn. ***In the U.S. over 50% of cropland and 90% of major export commodities are grown with seeds improved through modern biotechnology.***

Agriculture products derived from modern biotechnology are the most thoroughly reviewed and strictly regulated in history. Since 1986, the U.S. has regulated plants improved through biotechnology under the Coordinated Framework for the Regulation of Biotechnology. Three federal agencies share regulatory responsibilities:

- The **U.S. Department of Agriculture**
- The **Environmental Protection Agency**
- The **Food and Drug Administration**

The overwhelming scientific consensus on the safety of modern biotechnology is unequivocal. The U.S. government, the World Health Organization, the American Medical Association, and the National Academy of Science all agree that food derived from biotechnology is just as safe as, and in some cases safer than, any other food.

Support SB 863

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www.oregonfb.org

SECOND ADDITIONAL STATEMENT OF INDEPENDENT PARTY OF OREGON AGAINST "PREEMPTION OF LOCAL LAWS REGULATING AGRICULTURE"

October 2, 2013

Daniel Meek
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The Independent Party of Oregon (IPO) offers this supplement to its previous statements opposing the bill to preempt local laws regulating seeds or plants.

SB 863 is identical to SB 633A from the 2013 regular session, except that it adds new sections (1) excluding from its prohibition the terms of any local ballot measure that is approved by electors at a county election held on May 20, 2014, and (2) declaring an emergency so that no referendum on SB 863 can be called by the voters.

It is curious that it has been cast as the "GMO bill," since it contains no mention of "genetic" or "modified" or "organism." Instead, it sweeps very broadly, precluding all non-state-level governments from inhibiting the production or use of any "seed or product of seed," including agricultural, flower, nursery, or vegetable seeds or products thereof. Obviously, plants are "products of seed," as are things that are made from plants, such as cigarettes and alcohol.

SB 863 would preclude a wide variety of local regulations on plants. It would nullify local laws regulating smoking in public places, because tobacco is the "product of seed."[1] Nor could local governments run education programs to discourage tobacco use, because that would also "inhibit . . . use of . . . products of . . . agricultural seed."

---

1. Oregon Department of Agriculture rules include "tobacco" as a product of agricultural or flower seed, thus within the SB 863 prohibitions. ORS 633.520 imposes requirements on the labeling of agricultural and flower seed. The ODOA rule (OAR 603-056-0105) implementing that statute specifically includes tobacco, "as provided in ORS 633.510(1)," as a regulated agricultural or flower seed.

House Committee on Consumer Protection and Government Effectiveness
February 4, 2016
Public Hearing on HB 4041, HB 4065 and HB 4090
Testimony of Representative Peter Buckley, House district 5
Internet Video at 10:20 to 12:52

Representative Buckley: Thank you Madame Chair, members of committee, I am Representative Peter Buckley representing south Jackson County in the legislature. I was sorry to see Rep Nearman cause so much confusion on that last bill. I hope this one is more straightforward. Madame Chair, committee members, I am bringing this bill forward. Ever since the whole argument happened over SB 833 in 2013, I have been trying to call attention to the language that we put into the statute concerning products of seed. The language in the bill states that only state government can regulate the products of seed. There is no definition of what products of seed means.
Is products of is it seed hemp seed oil? Is it? What exactly is a product of seed? Is it every plant and tree that is grown in the state of Oregon? I would like to clarify that. I would like to have the statute clarify what we're discussing when we are talking about the product of seed. This bill basically is not about seeds. This bill does not impact what a farmer can or cannot grow, what seeds a farmer can or cannot plant? It talks about changing the language in statute to make it clear that a city can have a tree policy? Or a county can make a choice if it needs to on an agricultural issue that is important to that county. So I am hoping that the committee will listen to testimony on this bill and consider the legal issues involved. We are already seeing cases brought to court to contest the legislation that we passed. SB 863 was supposed to bring clarity, but it has brought a level of confusion, and we are going to see more and more legal conflicts as local governments and individuals seek to protect their own rights and interests. There are no changes in this bill to the states regulation of seeds. Emphasize that again, the bill only seeks to remove a term that should never have been included in a bill claiming to regulate only seeds. A term that was never defined in statute. Again, Madame Chair, members we're seeing lawsuits. There is a lawsuit right now in southern Oregon on this. We're going to see more and more lawsuits as this undefined line comes into contention as people say well we want to have this sort of regulation in our city on trees and someone will be able to say well you can't do it. If you want to do this with your urban forest, you can't do it because only the state can do it. So I would love to get some clarification on that. I appreciate your consideration of this bill. Thank you Madame Chair.

Q When did you first meet Paulette and under what circumstances?
A I met Paulette approximately a year ago.
Q So that would be the beginning of 2015?
A Yeah, approximately there.
Q Is that a yes?
A Yes.
Q And who is Paulette Pyle?
A She works for OFS.
Q Which stands for?
A Oregon Food and Shelter.
Q And what kind of organization is that, do you know?
A I'm not real familiar with their organization, exactly. I just briefly got to know Paulette so far, so I don't have a lot of information from her.
Q And where does she work or live?
A Albany.
Q And how did you meet her?
A She contacted me.
Q And how did she get your name?
A I'm not sure who she got it from. Probably another local farmer.
Q And she talked to you about filing this

lawsuit?

A Yes.

Q What did she tell you?

It's okay. She was looking for a plaintiff?

A Yeah, she was just looking for somebody to stand up for it; and I, I -- the first time I met her I said I would be willing to stand up; but I'd have to talk it over with my wife.

Q And this was about a year ago, beginning of 2015 --

A Approximately.

Q Okay. That's the first time that you encountered her --

A Yes.

Q -- and talked about filling out this lawsuit.

And how soon -- and she put you in touch with Mr. DiLorenzo?

A Yes.

Q And when did you first contact him?

A He -- John had contacted me first, and I'm not exactly sure date, but --

Q After you talked to --

A After I talked to Paulette, yes.

A Yes. You can see it on here.
Q Where can we see it?
A (Indicating.)
Q Okay. Let the record reflect that the witness has drawn a rectangle to the very left by the -- is that your home right there?
A Yes.
Q By the home site, indicating where the fences that Syngenta put up were located.
MR. DiLORENZO: Can I see that for a moment?
MR. HICKS: Okay, okay.
BY MS. DOLAN:
Q So that's one acre out of -- your farm is 58.3 acres?
A Yes.
Q And what did you physically do to farm the GE sugar beets?
A My, my portion was to do the ground prep, irrigation.
Q Uh-huh. But not planting the seeds?
A No.
Q Not digging up the stecklings for over winter?
A No.

Q Not replanting the stecklings?
A No.
Q Syngenta comes onto your property and has workers do all that work, correct?
A Correct.
Q So mostly your farm, you lease part of your land to Syngenta to do the farm work; correct?
A No, I actually prep everything for them.
Q You prep it for them, and then lease the land for them to do the farming?
A Yes.
Q Did you ever have to do any of the spraying with chemicals?
A No.
Q They come in and do all that?
A Yeah.
Q Is that a yes?
A Yes.
Q And you didn't harvest any of it?
A No.
Q So the first time you grew GE crops you had a contract with Syngenta, you're thinking 2005, 2006, like 10 years ago?
A Correct, yes.
Q Was it similar to the most recent contracts

hay but would have likely grossed 36 for GE sugar beet during 2015 and '16.

Q And gross means profit, correct, income minus expenses?

A Correct.

Q Actually, that's not right, I got that backwards.

A Gross is --

Q Gross is total.

A Before, yeah.

Q Total revenues.

MR. DiLORENZO: So, counselor, are you referring to netted as opposed to gross?

MS. DOLAN: Will you strike the question, please.

MR. DiLORENZO: Okay.

BY MS. DOLAN:

Q I want to turn to what's been marked as Exhibit 1 to your wife's deposition. This is the lease agreement for 22503 Redwood Highway.

And, again, for convenience sake, and for this line of questioning, I'm going to refer to this document as the lease, even though Intervenors dispute that it is an actual lease; but it's more convenient to call it the lease. Do you understand?

A Yes.
Q Is that your -- do you recognize that document?
A Yes.
Q Is that a yes?
A Yes.
Q Is that your signature?
A Yes.
Q Okay. When was that document signed?
A I'm not sure of the date on the signing.
Q Is there a reason there's no date on there?
A I -- no, no, there's no reason. I don't know.
Q Who, who was there when you signed it and what were the circumstance?
A My wife and Jack Sauers.
Q And where were you?
A We were at his home.
Q Do you remember what the season was?
A I'd say -- I don't exactly remember. Springtime would be the best of my knowledge of it.
Q And what year?
A I'm not even exactly sure.
Q Springtime. So it wasn't last spring, was

it, 2015?

A No, it would have been approximately '13, 2013.

Q Okay.

A Spring.

Q Spring. Before the ban or after the ban?

A Before.

MS. DOLAN: Do you want to take a break?

THE VIDEOGRAPHER: This is the end of Tape 1. The time is 3:58.

(Recess taken.)

THE VIDEOGRAPHER: This is the beginning of Tape 2. The time is 4:13.

You may continue.

BY MS. DOLAN:

Q Mr. White, I'm going to go back to Exhibit 6, which is the aerial view of the plot map where you outlined that rectangular area where the Syngenta fences were.

Did that fence ever move, or was it always in that location?

A Syngenta, their seed plot, their one acre plot stayed in that area the whole time.

Q So every year it would be in that one, one-acre plot?

A So we start in -- we plant approximately August to February would be the growing cycle of them.

Q And, and then in February they'd be planted in this lot and other lots around?

A They generally do it in March. There's usually some time in between getting them dug and into the fields to where they are going. Weather can predict, they can't get out there sometimes.

Q Sure. So in March they're replanted throughout, generally would you say one acre plots?

A Generally. They do have some bigger plots.

Q In 2013, was this the first time that you had given, leased the land for the nursery --

A Yes.

Q -- stage. And when the sugar beets are in these smaller plots, do they go to seed?

A Yes.

Q How long does that take?

A It's late summer when they're harvesting them. August, somewhere around there.

Q And how does that happen?

A Syngenta would come in, combine the seed.

Q So they'd go to seed first, and then Syngenta comes --

A Yeah, the seeds will be on the plants. They'll cut the plants down, let it dry; and then the combine would come in and pick up the plants and shake the seed out of them.

Q Thank you. Back to the lease.

So you were thinking this would have been in the spring of 2013 that you signed that?

A Yes.

Q And who's idea was it?

A Mine.

Q And why? Why did you want to do this?

A I wanted to lease this ground for a rotation ground for sugar beets.

Q Can you explain that?

A Beings that you have a four-year rotation, Syngenta wants to do 30 to possibly 50 acres of sugar beets. They need a rotation ground to move to each year.

Q Uh-huh.

A So we're talking, with Ross, that we would have ground and eventually have enough ground to maybe have them in a full-time rotation with one of our fields.

Q So 30 acres at your farm on Smith Sawyer Road, and then more acreage around?

A Not necessarily at the same time.
Q Uh-huh.
A You can't --
Q Right.
A It would be separated out so that you can move the fields and produce this, this crop for Syngenta year after year.
Q So when you and Ross -- and this is Ross --
A Kodlack.
Q -- Kodlack from Syngenta, you were just checking the possibility of this plan. When was that discussion?
A We had discussions early in 2013.
Q Were those discussions before or after you signed that lease?
A Before.
Q Did you have a contract with Syngenta when you signed that lease?
A No.
Q So your intention in leasing the hundred acres was what, exactly?
A To use that hundred acres to rotate GMO sugar beets into.
Q And how long have you known Jack Sauer?
A I've known Jack for approximately 20 years

then he was fine with that.

Q He was understanding?

A Yes, he's understanding of us working it out.

Q And, again, I apologize if we've gone over this, but how did you intend to devote this leased land to growing GE crops?

A How -- well, for one, I intended the sugar beets to go in there.

Q Uh-huh.

A For two, as the rotations come out of sugar beets, going into a round-up-ready alfalfa.

Q So as of the spring 2013, you intended for GE sugar beets to be planted when?

A As of the spring of -- in August of 2013.

Q 20 --

A -- 13.

Q 13, so your intention was by August 2013 you would be leased land to Syngenta for how many acres?

A 30 acres.

Q Okay. And what are you growing there now?

A Grass hay.

Q And these 100 acres at 22503 Redwood Highway, they're not adjacent to your farm, correct?

A No.
Q About how far are they?
A Approximately six to eight miles.
Q Excuse me. Do you remember what else you talked about with your wife and Mr. Sauer about this arrangement to lease these 100 acres described on Exhibit 1?
A One of the main things was the irrigation system has a very well, a very good irrigation system.
We talked to Mr. Sauers about growing GMO sugar beets.
Q Uh-huh.
A Make sure that he didn't have any issues with it, himself.
Q And what did he say?
A He, he was up to whatever we wanted to grow there.
Q So I want to turn to the contracts.
Would you mark this, please.
(Exhibit 17 was marked.)
MR. DiLORENZO: Counselor, could you give us a Bates number?
MS. DOLAN: Yes, 000030 through 33.
MR. DiLORENZO: Okay.

A January 23rd, 2014.
Q And did you sign that document?
A No, it don't appear that I've signed this document.
Q So do you think you had a written contract for 2014?
A Yes.
Q Do you think this was a copy of it that just wasn't signed, or do you think you had a different contract for 2014?
A Most likely this was a copy that just wasn't signed.
Q And on Page 1 of the actual agreement, what does it say at the top?
A Material Trial Agreement.
Q And can you read what it says where that box is checked?
A (Reading): Sample seed does not contain regulated transgenic events or trait stacks.
I don't know what exactly that means.
Q Do you understand that this contract is not for GMO seeds?
A No, I don't understand that, but...
Q So you don't know whether it was for GE sugar beets or non-GMO sugar beets?

A I don't know. I don't know -- I would imagine this is the contract for 2014.

MR. DiLORENZO: Are we guessing, or are we --

THE WITNESS: We're guessing.

BY MS. DOLAN:

Q It's the one you produced to us with your name on the front.

A Well, it's not the signed contract that I had signed with Syngenta, no, but...

Q Do you know the difference between regulated and nonregulated sugar beets?

A No, I don't.

Q So did you notice that the contracts before 2014 said, were regulated crops, and this is the first year that was for nonregulated crops?

A I didn't notice that, no.

Q Can you please turn to Exhibit A of that agreement. I know it's a lot of pages.

A All right.

MR. DiLORENZO: I'm sorry, Counsel, what page are you on?

MS. DOLAN: We're on Exhibit A which is stamped, I think that's 18 there at the bottom; is that right?

THE WITNESS: Yes.

MR. DiLORENZO: Thanks.

BY MS. DOLAN:

Q What is the growing area for the 2014 contract?

A (Reading): Growing area shall be defined as one acre described as legal land and description or GPS coordinates 119 Smith Sawyer Road, Cave Junction, Oregon.

Q And that's for your home slash farm, correct?

A Correct.

Q And not for any of the lots leased from Mr. Sauer?

A Correct.

Q And there's nowhere in there does it say 30 acres, does it?

A No.

Q So in that -- can I look at the cover letter on that Exhibit 24.

Can you tell us what, who the letter is from dated January 23rd, 2014, and what the last paragraph says?

A The letter is from Charles Martin, Field Operation Manager. And the last (reading):

Transplanting season is planned to begin the third week of February. I look forward to a successful 2014 production season.

Q Okay. So did that happen? Did that one acre get planted in the third week of February 2014?

A I can't recall.

Q Do you have anywhere in your possession, or do you recall signing any contract for 30 acres?

A Yes.

Q Do you have it in your possession?

A No, I don't.

Q But you remember such a thing?

A Yes, I remember signing a contract for 30 acres.

Q Do you know if it was for regulated or nonregulated GE crops?

A I'm, now that I see this one, I'm not positive.

Q So the price on this 2014 contract was $900, correct, per acre?

A Correct.

Q Same as in the previous years?

A Correct.

Q For non, for regulated --

A Correct.

Q -- crops, correct? Yes?
A Correct.
Q Do you have any understanding, or did you talk with Charles or Ross about Syngenta's trial operations?
A Their -- no, I don't have --
Q Like how they were growing different crops for different traits and hybrids and kind of experimenting in the area?
A Yes.
Q What did they tell you?
A I didn't have a lot of information about them. But at one time I know we talked about round-up-ready stuff, and if we were opposed to any of that stuff. And we told them whatever, that stuff's fine; but we never had gotten into too much detail on the different varieties that they were growing. I know they do several different.
Q And did they talk to you about how long these trials generally last?
A No.
Q Did you know that the trials came to an end in Josephine County?
A No.
Q So going to 2015, we don't have a contract

between you and Syngenta.

Was there one in January 2015?

A No.

Q Why not?

A Because of the GMO ban.

Q Did you not pursue a contract or did they not pursue a contract?

A We talked about one. Our sugar beets were twice as good as the ones that they've grown elsewhere.

So, but with the ban coming into effect, they weren't going to plant anything at this time down here.

Q They weren't going to plant any GE sugar beets?

A Correct.

Q And that's the only kind of sugar beet you wanted to grow?

A That's the only thing that I basically thought I grew for them.

But I obviously had other ones there that I didn't...

Q It's possible, isn't it, that the 30 acres that you were growing were non-GE?

A Very unlikely.

Q What makes you say that?
A 90 percent of my stuff that I did with them was GE.
Q Before the bans came into the picture?
A Yeah.
Q So do you understand that they shifted from GE to non-GE in this area?
A I'm not sure what they did in that time period. I'm not sure what they had done.
MR. DiLORENZO: Can we take a little break? Has he answered your question?
MS. DOLAN: Well, if you need to confer with your client --
MR. DiLORENZO: No, I want to take a break. I don't necessarily want to confer with him.
I want to take a break. I just wanted to know if he had answered your question because I didn't want to do that in the middle of an answer.
MS. DOLAN: We can get back.
MR. DiLORENZO: Okay.
THE VIDEOGRAPHER: Okay. This is the end of Tape 1. The time is 5:09.
(Recess taken.)
THE VIDEOGRAPHER: Okay, this is the beginning of Tape 3, Disk 2. The time is 5:19. You

A Yes.
Q And your answer was --
A No.
Q And when were those payments due by?
A December.
Q Okay, and when did you sign your declaration?
A Well, before December. I should look at the date.
Q Will it refresh your recollection if I show you a copy of your declaration, the last page?
A October 2015.
Q Okay. So as of October 2015, or as of October 2015 your statement in this declaration was true, was it not?
A Correct.
MR. DiLORENZO: Okay. That's all I have.
Any follow-up?

FURTHER EXAMINATION

BY MS. DOLAN:
Q You don't know for a fact that the 30 acres you are alleging to have planted were GMO, do you?
A I don't know. I'm not -- I don't have the plants in front of me or anything, so...
Q You don't have a contract?

A I don't have a contract.

Q The only 2014 contract you have is for nonregulated seed, correct?

A Yeah, they wouldn't have paid me 37,000 for an acre of seeds, either.

Q Right.

MS. DOLAN: That's all I have.

MR. DiLORENZO: Mr. Hicks, do you have any follow-up?

MR. HICKS: No.

MR. DiLORENZO: Okay, thank you very much.

I do have a couple, I have something I need to get into the record before we go off the record.

We are on, right?

THE VIDEOGRAPHER: Okay.

MR. DiLORENZO: We are designating Exhibits 1, 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 as confidential under the terms of the protective order.

In addition, we will be designating portions of the deposition that reference those exhibits as confidential under the terms of the protective order.

In addition, there was a significant period of time during the deposition in which Syngenta

A Uh-huh.

Q The Sawyer Smith Road and the Sauer -- it's a tongue-twister.

And have you, since the summer of 2013, worked that land?

A Yes.

Q And, again, just to be clear, the entire area that you marked on Exhibit 3 you have worked and personally irrigated, yes?

A Yes.

Q And no land across the highway?

A No.

Q And what do you grow on that area that you worked shown on Exhibit 3? What kind of crops?

A At the moment, just hay.

Q What kind of hay?

A Grass hay.

Q What kind of grass?

A Variety, fescue, orchard, timothy, smidge of alfalfa in there.

Q Any GE alfalfa?

A No.

Q So the lease says that there was to be payment of $10,000 per year. How many years did you pay?

A Since 2013.

MS. DOLAN: Have these marked please.

(Exhibits 4 and 5 were marked.)

(Off-the-record discussion.)

MR. DiLORENZO: There you go.

THE VIDEOGRAPHER: Counselor, you have nine minutes left. Do you want to stop now and switch tapes or...

MS. DOLAN: Let's just finish up this line.

BY MS. DOLAN:

Q I'm going to hand you what's been marked as Exhibit 5.

Can you tell me what that is, please?

A Copy of a canceled check.

Q And who's that made out to?

A To cash.

Q And what does the memo say?

A Lease payment on Jack's.

Q You paid him cash?

A Yes, ma'am.

Q On 12/2/13. Was that the first payment that you made?

A Yes.

Q Did you get a receipt from him?

A No, I did not.

leased were previously GE sugar beets?

A About 30 acres of it, 40 acres of it.

Q Okay, so there was 60 acres or so left?

A Yes.

Q 60 to 70 acres remaining that could be planted?

A Yes.

Q Okay. Why didn't you plant them?

A Sugar beets are generally planted in the fall and harvested in the spring.

Q Uh-huh.

A And at the time, the effect of a possible ban coming up with a timeframe of having to harvest them by a certain time, to my knowledge, wouldn't of allowed them to mature enough to be harvested.

Q You understand that the ban allowed for a 12-month phaseout, correct?

A No. At that moment I didn't, but...

Q At what point did you learn that the, if ever until now, that the ban allowed for any GE crops to be phased out over 12 months from enactment?

A Then that would be based on me misreading and misunderstanding that small portion of the ban.

Q Okay. So when you entered into the lease and thereafter, you didn't know you had a couple

years that you could have grown GE sugar beets?

A No. I was under the assumption that it would be happening fairly quickly.

Q Okay. Did you read the ordinance?

A For the most part, yes; but not all of it, no.

Q So is it fair to summarize your testimony in this regard as in the spring of 2013 you leased a hundred acres; is that correct?

A Yes.

Q From Jack Sauer.

MR. DiLORENZO: It's okay.

THE WITNESS: Yes.

BY MS. DOLAN:

Q And it was your intention at that time to grow GE sugar beets, correct?

A Yes.

Q And there were 60 to 70 acres that were available, meaning didn't need crop rotation, to grow GE sugar beets; correct?

A Yes.

Q But you did not move forward to pursue growing GE sugar beets because of your understanding of the ban, correct?

A Yes.

EXCERPT OF RECORD

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH

AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,348.

Type Size

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 by ORAP 5.05(4)(f).

DATED this 24th day of October 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 24th day of October 2016, I filed the DEFENDANTS-APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD with the State Appellate Court Administrator by Electronic Filing.

I further certify that on the same date, I caused the foregoing to be served upon the following counsel of record by electronic filing/service, and by mail to the State Attorney General:

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