IN THE CIRCUIT COURT OF THE STATE OF OREGON

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.: 15-CV-23592

INTERVENOR-DEFENDANTS' RESPONSE OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. OPPOSITION TO SUMMARY JUDGMENT MOTION

Intervenor-Defendants Siskiyou Seeds, LLC and Oregonians for Safe Farms and Families (together, "Intervenors") oppose Plaintiffs' motion for summary judgment because, pursuant to ORCP 47, genuine issues as to material facts exist pertaining to Plaintiffs' standing. Moreover, the far-reaching constitutional and public policy issues presented in this case render the matter inappropriate for summary judgment, and Plaintiffs are otherwise not entitled to judgment as a matter of law for the reasons set forth herein. This opposition is supported by the following Memorandum of Points and Authorities, the attached exhibits and the records and files of this case.

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

As a threshold matter, Intervenors contend that Plaintiffs lack standing to pursue this action and that this case should therefore be dismissed as the Court lacks jurisdiction to hear it.[3] At the least, genuine issues of material fact exist as to Plaintiffs' standing as evidenced herein. Moreover, the Seed Law is fraught with constitutional problems, both inherently and as applied to Josephine County, particularly as it creates a regulatory void--a preemption without protection--for actual local farmers.

Therefore, Intervenors respectfully submit that Plaintiffs' case should be dismissed, or at the least that this matter proceed to trial.

II. BACKGROUND

A. The Plant Ordinance was adopted to address local concerns of genetic contamination from genetically engineered plants.

As fully set forth in Don Tipping's Declaration, attached to Intervenors' Motion to Intervene in this matter, the potential for contamination from genetically engineered crops puts the future growth of Josephine and Jackson Counties' seed production at risk. *Intervenors' Mot. to Intervene,* Tipping Decl. p. 4 ¶ 16. In fact, Mr. Tipping's business, Intervenor Siskiyou Seeds, has suffered direct losses from genetic contamination. *Id.* at 5 ¶ 25.

Siskiyou Seeds was compelled to pull up organic Swiss chard and table beet crops after learning that Syngenta had planted genetically engineered sugar beets within less than 1 mile of the chard and beet crops, given the risk of contamination within the known pollination distances for sugar beets. *Id.* at 6 ¶ 28.

Josephine County has the potential to be a premier commercial seed growing region both nationally and internationally, but unregulated, open-air genetically engineered crops within known pollination distances cause known transgenic contamination, and the testing for genetic contamination

[3] A Cross-Motion for Summary Judgment accompanies this filing.

(the burden of which is on the non-genetically engineered crop farmer) can be prohibitive. *Id.* at 6-7 ¶ 31, 36.

As stated by Mr. Tipping, an acknowledged expert in the field:

> "I believe there is no biologically plausible way to keep the genetically engineered genie in the bottle. If genetically engineered crops are grown in Josephine County then they will contaminate and cause damage to traditional crops and it is only a question of how quickly this contamination will occur and how significant the damage will be."

Id. at 8 ¶ 39.

Siskiyou Seeds and other local farmers attempted to work with Syngenta to discuss these issues and the possibility of co-existence, but the representatives walked out of talks; accordingly, and without the Plant Ordinance, Siskiyou Seeds and other non-genetically engineered crop farmers are unable to grow and sell Swiss chard and beet seed, which causes a negative financial impact on Siskiyou Seeds and other Josephine County farmers. *Id.* at 8-9 ¶ 41-44.

Based on these real local farmer concerns, Intervenor Oregonians for Safe Farms and Families, ("OSFF") representing hundreds of local farmers, restaurants, health care professionals and other concerned citizens, drafted the Plant Ordinance and led the campaign for Ballot Measure 17-58. Intervenors' Mot. to Intervene*,* Middleton Decl. p 5 ¶ 22.

The Plant Ordinance aims to protect agriculture by regulating certain farming practices and plants in Josephine County that had been demonstrated to be unreasonable and detrimental to local farmers given the topography of our narrow valleys and given how co-existence between GE farmers and non-GE farmers is not feasible here: "the Rogue Valley is a narrow valley and we have strong year-round winds that drive pollen drift and the contamination risks from genetically engineered plants even further than in places that lack our winds." Tipping Decl. 8-10 ¶ 41-49.

The stated purpose of the Plant Ordinance is to protect the collective food sovereignty rights of the citizens, farmers, and gardeners in Josephine County, including to "[p]rotect the County's

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

Q Other than 2014, have you ever made a profit from farming?
A No. We have made income, but never a profit.

Ex. 4, R. White Dep., 37:13-24.

Mr. White's wife, Plaintiff Shelly White, works at the local high school in the kitchen and as a rally squad coach. (Ex. 5, S. White Dep., 6-7:20-5)

Plaintiffs were contacted by a Paulette Pyle, a lobbyist for Oregonians for Food and Shelter, sometime approximately in early 2015, after the passage of the Plant Ordinance. Ms. Pyle was actively looking for a Plaintiff to stand up to the Ordinance and connected the Whites with an attorney, John DiLorenzo.

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.

Ex. 4, R. White Dep. 11:19-13:25.

This Court denied Intervenors' motion to compel seeking further information regarding the

financial arrangement of this representation.

Although Mr. White claimed that the principal crops or farming activities were "Grain and Christmas Trees" on his Schedule F, Profit or Loss from Farming in 2009, 2011, 2012 and 2013 (Ex. 6; 2010 was not produced) he admitted in his deposition that he never farmed Christmas trees and his indication to the IRS otherwise was in error.

In fact, he began clearing all of the "Christmas" trees on his property when he purchased it in around 2004, which took until approximately 2007 and burned all of the wood right there on the property. *Id.* at 24:1-25:3. The Whites never claimed a profit from farming until 2014, when they received a check from Syngenta for $30,000, dated just seven (7) days after the vote on the Plant Ordinance.

Mr. White admitted Plaintiffs never actually farmed genetically engineered crops, but rather leased land (one acre a year for several years) for Syngenta to bring their own people in to handle all of the actual farming (trial test plot) operations, once the soil was prepared. *Id.* at 27: 14- 28:6-20.

D. The "lease" between Plaintiffs and Jack Sauer

As more fully set forth in the section on standing, below, Plaintiffs signed an undated document, alleging it is a "lease" for 100 acres of land in exchange for $10,000. Ex 7. This is the document they claim they "remain bound to pay" *Decl. Robert White supporting Pl. Mot. Summ. J.* at 2 ¶5.

Plaintiffs entered into this "lease" with Jack Sauer, whom the Plaintiffs have known as long as they could remember. They are friends with Mr. Sauer and socialize with him. Ex. 5 at 32:7-33:5. In her deposition, Mrs. White alleges to have paid some of their "lease" payments in cash, and received no receipts from him. She alleges to have paid $10,000 in cash to Mr. Sauer in December 2013, and a $10,000 check in October 2014, (Ex. 8) and as of the date of the deposition (February 2, 2016) no payment had been made for 2015. *Id.* at 38:23-41:11. However, Mrs. White testified that she believed her good longtime friend Mr. Sauer would not be upset with a delayed payment, not even if

it were 12 months late. *Id.* at 41:12-42:10; Ex. 4 at 55:1-56:4.

Although the document is not dated, Mr. White testified he believed it was executed in the Spring of 2013. R. White Dep. at 42:18-44:5. He agrees that Mr. Sauer is a good friend and reasonable to do business with. *Id.* at 51:2-51:18. He said that his remaining "bound" to the lease is dependent on the outcome of this lawsuit. *Id.* at 79:17-80:10. Mr. White said that he generally tries to lease for five-year terms, but **can back out of a lease** if the ground isn't producing what he needs:

> But generally you do a five-year because your production -- you plant something for five years; it starts depleting after five years, so four, five years. So generally you try, for myself, to lease a piece of ground, if I'm going to put it into production, that in four to five years I'd either renew my lease to go again; or the ground isn't producing what I need to, then I would back out of my lease. *Id.* at 80:21-81:5

Mr. White admitted *it is common practice to back of out of his lease* in such instances. However, he did not ask his good family friend and reasonable businessman Mr. Sauer if he could back out of the lease in this instance, even if the crop that he wanted to grow on the land was no longer legal to grow under the Plant Ordinance. *Id.* at 81:6-82:1.

Mr. White stated that it was his intention in leasing the 100 acres that he would be able to rotate GE sugar beets into that land. However, he did not have a contract with Syngenta to do so as of the time he allegedly signed the "lease." *Id.* at 48:11-50:19. Therefore, he signed the lease for 100 acres in reliance on a non-existent contract with Syngenta.

E. Contracts with Syngenta

The relevant terms of the produced contracts between Plaintiff Robert White and Syngenta, as confirmed by Plaintiff Mr. White in his deposition, are summarized below. Plaintiffs produced the following contracts with Syngenta and corresponding payments:

- Syngenta 2011 Regulated Materials Cooperator Agreement, executed by Mr. White February 4, for field trials, leasing 1 acre of land at 119 Smith Sawyer Road in Cave Junction (Plaintiffs' residence) in exchange for $900, to be paid by April 30, 2011. No proof of payment was provided. Ex. 9.

- Syngenta 2012 Materials Trial Agreement for Regulated materials ("Sample seed contains Regulated transgenic events and/or trait stacks. "Regulated" is defined as "the transgenic

events and/or trait stacks contained in the Sample Seed have not received full governmental approval (i.e. USDA, EPA or FDA) in the United States.") Executed by Mr. White on February 7, 2012, again with $900 for one acre at 119 Smith Sawyer Road in Cave Junction. Exhibit B describes the terms of the biotech field trial research program, spelling out that the field trial contains genetically engineered (transgenic) crops and the obligations of the parties. Ex. 10. There is a check stub for $900 dated March 27, 2012, corresponding to the above contract. Ex. 11.

- No 2013 contract was provided. However, a check stub for $900 dated June 11, 2013, was provided, and Plaintiff guessed that he had signed a contract for 2013. Ex. 12.

- A Syngenta contract signed January 27, 2014 was provided, this time indicating the "Sample Seed *does not* contain Regulated transgenic events and/or trait stacks." (Emphasis added.) Again, the contract provides for a $900 payment for one acre at 119 Smith Sawyer Road in Cave Junction, with payment in full due 40 days within receipt of signed contract. Ex. 13. A check stub for $900 dated March 25, 2014, was provided. Ex. 14.

- An additional check stub, for $30,000, was provided, with the invoice date of May 27, 2014 (just one week after the Plant Ordinance election) and the check date of October 7, 2014. No corresponding contract was produced to explain this uncharacteristically large payment. Ex. 15.

When asked about the $30,000 payment from Syngenta, invoiced just a week after the Plant Ordinance passed on the ballot in May 2014, without any corresponding contract, Mr. White stated that 30 acres of his land was planted with sugar beet seeds in August 2013, that would be grown to a certain stage and then uprooted and moved in around February of the following year. Ex. 4 at 46:4-48:3.

Mr. White could not explain the timing of the check, why it was invoiced (May 27, 2014) five months before it was cut, (October 7, 2014) and why the payment was made over a year after the crop was allegedly grown (beginning in August 2013). *Id*. He surmised the dates on the invoicing were wrong, but then admitted that he claimed the $30,000 as income on his 2014 tax return. *Id*. Then he guessed that in fact the alleged 30 acres of sugar beet seeds may have been planted in August 2014. Intervenors requested that Plaintiffs produce a contract or any other evidence of 30 acres of sugar beets actually being grown at 119 Smith Sawyer Road, to which no response has been provided as of the date of this filing. *Id.* at 62:17-68:10.

Moreover, Mr. White did not know whether in fact towards the end of his working relationship with Syngenta he was actually growing genetically engineered crops, given the "non-regulated" language of the 2014 contract, and he didn't know the status of Syngenta's field trials in Josephine County, and whether they in fact had ended. *Id.* at 69:8-75:18.

> 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.

Id. at 88:21-89:5.

F. Failure to Mitigate

Although the Plant Ordinance wasn't enforceable until after the 12-month phase out period ending September 4, 2015, Plaintiffs did not seek to grow GE crops or continue any relationship with Syngenta after 2014.

In fact, as of the Spring of 2014, despite having 60-70 acres of available leased land to grow whatever they wanted, and another 16 months in which to legally grow GE plants, Plaintiffs failed to pursue this option.

> Q (BY MS. DOLAN) 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.

Ex. 5 at 62:5-63:25.

Moreover, when they received a written offer from local farmer Jonathan Spero (Ex. 16) to provide them with organic sugar beet seed, Plaintiffs ignored it. Mr. White testified he "never even looked at it." Ex. 4. at 84:10. Mrs. White said she "felt a little iffy" about it and did not follow up with Mr. Spero with her alleged questions about the offer. Ex. 5 at 50:17-52:16. Both parties admitted they had heard the market for GE sugar was declining due to consumer demand, including that Hershey Chocolate had recently made the switch to non-GMO sugar. Ex. 4 at 84:1-6; Ex. 5 at 49:4-15.

III. ARGUMENT

A. Standard of review for summary judgment

Pursuant to ORCP 47, summary judgment may only be successful if no genuine issue of material fact exists to be resolved at trial. No genuine issue of material fact exists "if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively

reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." ORCP 47 C.

A material fact under this standard is "one that, under applicable law, might affect the outcome of the case." *Zygar v. Johnson*, 169 Or App 638, 646, 10 P3d 326 (2000).

Summary judgment may not be granted even if *undisputed* facts give rise to inferences susceptible to more than one reasonable conclusion. *Val Osdol v. Knappton Corp.*, 91 Or App 499, 502, 755 P2d 744 (1988), *Weiner Inv. Co. v. Weiner*, 105 Or App 339, 343, 804 P2d 1211 (1991).

The inquiry for this court is twofold, and always viewing the evidence in a light most favorable to the party opposing a motion for summary judgment: "whether a genuine issue of material fact exists, and, if not, whether the moving party [is] entitled to judgment as a matter of law." *Metropolitan Prop. & Cas. v. Harper*, 168 Or App 358, 363, 7 P 3d 541 (2000).

Moreover, Oregon courts may defer judgment until after trial if the decision is likely to have far-reaching import or to involve difficult constitutional or other legal questions, or if the record on summary judgment, even when demonstrating the absence of factual issues, is likely to be less than comprehensive on broad policy questions. *Or. Med. Ass'n v. Rawls*, 276 Or 1101, 1106-1110, 557 P2d 664 (1976).

In the present case, genuine issues of material fact exist to defeat Plaintiffs' allegation of standing, and Intervenors have filed a Cross-Motion for Summary Judgment accompanying this opposition, asserting in the alternative that there are no material facts in dispute to defeat Plaintiffs' standing. The facts in dispute in this matter are outcome-determinative, because if Plaintiffs lack standing, this court lacks jurisdiction to hear this matter as there is no justiciable controversy.

Moreover, given the complex constitutional and far-reaching public policy issues at play in the present case, including that efforts are currently underway to overturn the Seed Law at issue in this case, and the implications to local farmers' livelihoods, Intervenors respectfully submit that summary

judgment is an inappropriate vehicle to attempt to overturn the will of the majority of Josephine County voters who voted in favor of the Plant Ordinance.

B. Because Plaintiffs have not shown an injury to a legally recognized interest that will be cured by the court's ruling, they do not have standing under the Uniform Declaratory Judgments Act or to seek injunctive relief

1. Legal Standard.

"Standing" is a term of art that establishes when a party "possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties." *Kellas v. Dep't of Corr*., 341 Or 471, 476-77, 145 P3d 139 (2006). "To maintain a declaratory judgment action, a plaintiff must establish at the outset that he or she satisfies the statutory requirements for standing to bring the action. *Morgan v. Sisters School District # 6*, 353 Or. 189, 195, 301 P.3d 419 (2013)." *Couey v. Atkins*, 357 Or. 460, 469, 355 P.3d 866 (2015).

"In the context of a declaratory judgment action, a justiciable controversy requires 'a dispute based on present facts,' not facts that may or may not happen in the future." (internal citations omitted) *Id*. at 470. [A] justiciable controversy is, by very definition, one that is not hypothetical. If a case is nonjusticiable, there is no subject matter jurisdiction and the court may not hear it. *Beck v. City of Portland*, 202 Or App 360, 367-68, 122 P3d 131 (2005).

Here, Plaintiff seeks relief under the Uniform Declaratory Judgments Act, ORS 28.020. The Uniform Declaratory Judgments Act (hereinafter, "DJA") provides the following,

> 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.

Under the DJA, a plaintiff "must establish that its 'rights, status, or other legal relations' are 'affected by'" the ordinance being challenged. *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or 189, 194,

301 P3d 419 (2013). The court set out three "related but separate" elements that a plaintiff must satisfy to show that its legal interests are "affected by" an ordinance. *Id*. at 195.

First, the plaintiff must show "some injury or other impact upon a legally recognized interest" that goes "beyond an abstract interest in the correct application or the validity of a law." *Id*. (quoting *League of Oregon Cities*, 334 Or at 658). Second, any such "impact on a legally recognized interest" of plaintiff's "must be real or probable, not hypothetical or speculative." *Id*. Third, "the court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate." *Morgan*, 353 Or at 197 (citing *Kellas*, 341 Or at 484-85). The legal standard is similar when seeking injunctive relief.

2. Plaintiffs are not "affected by" the GE plant ordinance, because they have no actual property interest or real financial injury

a. Plaintiffs' interest in the GE plant ordinance is abstract, because there is no injury or other impact upon a legally recognized interest

Plaintiffs do not have standing under the DJA because they have no more interest than any other member of the public at large in declaring that the plant ordinance is invalid and unenforceable. . Plaintiffs do not have a valid lease and have not paid rent for the 2015 or 2016 farming season in which they allege to have incurred financial injury. Therefore, whether or not the Plant Ordinance is invalid and unenforceable has no specialized effect on Plaintiffs, and the complaint should be dismissed for lack of subject matter jurisdiction.

In support of their claim for standing, Plaintiffs allege that they "have been unable to use the rented farmlands for their intended purpose and have incurred financial injury as a result" (*Pl. Mot. Summ. J*. at 7:5-7) and there is "a real injury to plaintiffs' property due to Josephine County's enactment of the Ordinance." *Id*. at 7:17-18.

In addition, the Plaintiffs rely on the Declaration of Robert White as evidence to establish

standing. Relevant portions include the following:

> Over the last five years my wife and I have devoted our farm in large part to growing genetically engineered crops, including genetically engineered sugar beets for seed and stecklings.[9]

Pl. Mot. Summ. J. Decl. Robert White at p. 1 ¶*3*.

> In 2013, it appeared to my wife and I that crop rotation required us to access more land to continue growing sugar beets. At that time, we rented 100 acres of land near our farm so that we could continue growing sugar beets. The terms of the rental agreement were to pay $10,000 per year and to maintain equipment used by us and to supply our own fertilizer and rotation crops. We paid $10,000.00 at the time of entering into the agreement, and have paid $10,000.00 per year since that time.

Id. at 2 ¶4.

> At the time we entered into the agreement, we intended to grow genetically engineered sugar beets for seed and stecklings. After renting the land, however, the Ordinance was adopted. Particularly in light of the County's threatened enforcement of the Ordinance we have been unable to plant and grow genetically engineered sugar beets as we intended and as was the purpose for renting the land. Despite this, we remain bound to pay the agreed-upon rent for the leased property.

Id. at 2 ¶5.

> Further, because, under the ordinance, we cannot grow genetically engineered sugar bests as we intended, we have devoted the rented land to crops that are less profitable than genetically engineered sugarbeets. Specifically, we have grown hay. Based upon our history farming genetically engineered sugar beets for seed and our understanding of the market for such seed, we believe we can gross only around $20,000 for hay but would have likely grossed $36,000 for GE sugar beets during 2015-16.

Id.

b. Plaintiffs have presented no concrete evidence that they have a valid lease.

There are "three elements essential for any lease, i. e., the description of the property, the duration of the term, and the rental consideration." (internal citations omitted). *Bennett v. Pratt*, 228 Or. 474, 477, 365 P.2d 622, 624 (1961). A defect that is "patent upon the face of the instrument, and cannot be removed by the application of extrinsic evidence without adding to or varying the writing,

[9] Plaintiffs did not in fact devote their farm "in large part" to growing genetically engineered crops. They leased out one acre (of their 58.3 acre farm) per year for approximately four years, with only ¼ acre actually planted and farmed (by Syngenta, not Plaintiffs) per year. Ex. 4 at 27: 14- 28:6-20; 44:16-46:3.

which, of course, is not permissible. *Holcomb v. Mooney*, 13 Or. 503, 11 Pac. 274." *Bingham v. Honeyman*, 32 Or. 129, 133, 51 P. 735, 736 (1898).

In *Bevan*, Oregon's Supreme Court applied the general rule set forth in Keating that "[a] covenant to renew, upon such terms as may be agreed upon, is void for uncertainty. *Keating v. Michael*, 154 Ark. 267, 242 S.W. 563, 564 (1922)." (internal citations omitted). *See*, *Bevan v. Templeman*, 145 Or. 279, 288-289, 26 P.2d 775 (1933).

In *Bevan*, the parties entered into a contract that contained a "promise on the part of [a party] to enter into a lease mutually satisfactory, based on the earning capacity of the hotel." The court discussed the indefinite nature of the agreement that left matters "to be determined later." *Id*. at 288. The court found the agreement to be void, because "[i]t amounts to no more than the lessor saying that at the present time, he would consider the lessee a satisfactory tenant provided they could agree on terms. No new lease had been entered into." *Id*. Similarly, in *Slayter,* Oregon's Supreme Court discussed the requirements for an option for an extension of a lease. *Slayter v. Pasley*, 199 Or. 616, 264 P.2d 444 (1953). The court stated,

> The majority rule, in essence, is that a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement, it is not enforceable. 32 Am.Jur. 806, 810, Landlord and Tenant, §§ 958, 965; 51 C.J.S., Landlord and Tenant, § 56(b), page 596; 3 Thompson, Real Property, perm. ed., 360, § 1263.

Id. at 620. Twenty years later, in *Karamanos*, Oregon's Supreme Court applied the *Slayter* holding to a provision for an extension of the lease and held that the same majority rule applies to a lease extension. *Karamanos v. Hamm*, 267 Or. 1, 5, 513 P.2d 761 (1973). The Court held that, "[l]acking such definiteness of time and rent there is no contract to extend or renew, and the agreement is void for inactivity. The exact terms may be left for future arbitration provided the method is fixed but if there is no such certain method the agreement is void for

uncertainty." (internal citations omitted). *Id* at 1.

In *Karamanos*, the extension terms of the lease provided for the description of the property, and the duration of the term, however, left the rental consideration as negotiable. The court held, "since the essential element of monthly rental is lacking in the consent to the assignment and there is no method providing for fixing the amount of rental, the agreement to extend the lease is fatally defective and unenforceable." *Id*. at 6.

In the present case, Plaintiffs have presented no credible or concrete evidence that they have a valid lease. First, the agreement is not dated and contains no provisions that set forth the duration of the lease. Ex. 7. Therefore, the agreement is void for uncertainty, violates the statute of frauds and is invalid.

Second, the agreement contains an extension provision that states that the "[p]roperty shall be leased until both parties agree upon cancellation of lease." *Id.* The agreement's extension to "lease until both parties agree upon cancellation" is left to terms that the parties may never agree upon. The agreement's extension is silent as to the term of duration. While the extension terms of the agreement provided for the description of the property, and the rental consideration, the duration of the term is unknown. The agreement's lack of a duration term is patent on its face, and not the type curable by parol evidence. Therefore, the agreement's extension is also void for uncertainty, and invalid.

In addition, even if parol evidence applied, the Plaintiff testified that there was no agreement as to the duration of the lease, or even when it was signed. Ex. 4 at 79:17-81:5; Ex. 5 at 28:3-31:22

Third, even if the lease was valid, the Plaintiffs have not paid the $10,000 in consideration for the agreement for the past two years, 2015 or 2016 so no consideration has been tendered. Ex. 4 at 55:18-20. The Plaintiffs testified they paid for two prior years, 2013 and 2014 but made their last

payment on October 26, 2014; (Ex. 5 at 38:23-41:11; Ex. 4 at 55:1-17; Ex. 8) therefore the lease is no longer valid for lack of consideration.

According to Plaintiffs, Mr. Sauer, from whom Plaintiffs "leased" the subject land was a long-standing friend of Plaintiffs, was fair to conduct business with, and could not imagine he would be upset by their late payments. *Id.* at 32:7-33:5, 41:12-42:10 However, even though the purpose of the lease was purportedly thwarted by enactment of the Ordinance, Plaintiffs did not seek to be relieved from the lease, even though that was common practice among farmers in the area, including Plaintiff. Ex. 4 at 79:17-82:1. Therefore, genuine issues of material fact exist whether or not Plaintiffs in fact "remained bound" to the indefinite document for an indefinite term, notwithstanding their characterization to the contrary.

In sum, the document is not a valid lease because the duration of the term is uncertain, and for lack of consideration. Therefore, because Plaintiffs have not paid — and are not bound to pay —rent for the rented farmlands, they have suffered no financial injury related to future rent payments.

c. Plaintiffs have provided no concrete evidence that their "lease" was for the cultivation of GE sugar beets and stecklings

Plaintiffs' complaint and declaration suggest that the plaintiffs entered into the agreement for 100 acres with intent to grow GE crops, specifically GE sugar beets and stecklings. However, Plaintiffs have provided no concrete evidence that they rented to farmlands to grow GE sugar beets. In fact, Plaintiffs' testimony states that at no time did they grow GE sugar beets or stecklings, or any other GE crop on the rented farmlands (S. White Dep. at 62:5-63:25; R. White Dep. at 56:5-57:3), nor did they have a contract with Syngenta to grow GE sugar beets or stecklings on the rented farmlands. R. White Dep. at 49:5-50:19.

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

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.

sugar. R. White dep. at 84:1-6, S. White dep. at 49:4-15.

c. Plaintiffs never had a contract with Syngenta to grow GE crops on rented farmlands

During the three years prior to the passage of the ban, the Plaintiffs never had any contracts with Syngenta related to the rented farmlands. Ex. 4 at 49:5-50:19. The Plaintiffs had several one-year contracts with Syngenta[11], on their residential farmlands one-acre site for $900.00 to conduct sugar beet field trials. Ex. 9-10;13. The one-acre site was fixed, and provided the appropriate rotation, because Syngenta would rotate the site ¼ acre every year. Ex. 4 at 27: 14- 28:6-20; 44:16-46:3. Two of the contracts with Syngenta were for "regulated transgenic events and/or trait stacks." Ex. 9-10. However, the most recent contract did not contain "regulated transgenic events and/or trait stacks." Ex. 13.

It is very likely that even prior to the voter approval of the Plant Ordinance, and its subsequent enactment that Syngenta was growing non-GE sugar beets and stecklings on the Plaintiffs residential farmlands. Ex. 13;17. Plaintiff testified that he did not know whether or not the 30 acres he alleged to have planted were GE crops. (Ex. 4 at 69:8-75:18; 88:21-24.)

Plaintiffs allege that in the spring prior to the Ordinance's voter passage, the Plaintiffs had a discussion with Syngenta to contract for 30 acres of GE sugar beets and stecklings. However, the Plaintiffs claim that Syngenta did not go forward with a contract, because of the ban it was against Syngenta's "code of ethics." *Id*. at 16:9-21:10.

Plaintiffs testified at deposition that Syngenta relocated to Coos Bay, Oregon and that it was too far to contract with the Plaintiffs. *Id*. There is no evidence to suggest that Syngenta moved their operations because of the passage of the ordinance. Given the nature of field trial operations, it is just

[11] 2011, 2012, 2013 and 2014

as likely that the field trial that the Plaintiffs were participating in was over.[12] Furthermore, they never had a contract with Syngenta for more than one-acre so it is very unlikely that but for the enactment of the ordinance Syngenta would have contracted with the Plaintiffs. Plaintiffs reliance on "contingent or hypothetical events" is insufficient to confer standing. *Morgan v. Sisters School Dist. No. 6*, 353 Or 189, 195, 301 P3d 419 (2013)

Whether a contract or writing is unambiguous is a matter of law for the court. *Oregon School Employees Ass'n. v. Rainier School Dist. No. 13*, 311 Or 188, 194 (1991). In determining whether an ambiguity exists, a court may consider extrinsic evidence of the circumstances under which an agreement was made, but only if "there is language in the agreement that is susceptible to being construed to carry out that intent." *Morton v. Assocs., LLC v. McCain Foods USA, Inc*., 226 Or App 532, 539 (2009) (quoting *Criterion Interests v. Deschutes Club*, 136 Or App 239, 242 (1995).

If the language is ambiguous, then what the parties intended presents a question of fact that generally cannot be resolved on summary judgment. *Biomass One, L.P. v. S-P Constr.*, 120 Or App 194, 200 (1993).

Therefore, because the contracts at issue are ambiguous as to whether or not Plaintiffs were even growing GE crops for Syngenta given their last contract was for "non-regulated" materials, when the prior contracts were for "regulated" transgenic (GE) materials, genuine issues of material fact exist whether or not Plaintiffs were even growing GE sugar beets in 2014. Viewing the evidence in a light most favorable to Intervenors, summary judgment is improper in this instance.

Finally, Plaintiffs have not presented any evidence of a financial harm. Plaintiffs' tax returns indicate they received $37,000.00 on October 7, 2014 with an invoice date of May 27, 2014 – seven days after the voters approved the Plant Ordinance. Plaintiffs testified that the $37,000.00 payment from Syngenta was for a 30-acre field leased to Syngenta for sugar beet stecklings planted in 2013 -

[12] Information Systems for Biotechnology data indicate the trials ended in 2013. Ex. 17.

one-year prior to the invoice date and 1.5 years before the payment was received. However, Plaintiff has provided no evidence of a contract with Syngenta for a 30-acre plot. Ex. 15; R. White Dep. at 88:21-89:5.

Moreover, assuming that the 2014 contract was for non-GE crops, it was *for the exact same contract price ($900 for one acre) as previous contracts for GE crops*. Therefore, because the contract price is identical between GE and non-GE crops, Plaintiffs are hard pressed to argue that the Plant Ordinance's ban on GE crops has any nexus whatsoever on their alleged financial injury.

d. Plaintiffs failed to mitigate financial loss

The Plaintiffs received an offer to grow organic sugar beets for seed, for which there is an increased demand given the market for GE sugar beets is declining. Because Plaintiffs did not even consider pursuing growing these seeds to mitigate their losses, again, their claim of financial injury is disingenuous.

e. Plaintiffs fail to evince a concrete interest in the outcome of the case.

Neither the allegations in the complaint nor the attached declaration of Mr. White demonstrates how the Plant Ordinance affects Plaintiffs. As to the third element, the plaintiffs have no injury, so there is no injury to redress.

In sum, the Plaintiffs' stated intended purpose to use rented farmlands for sugar beets is purely hypothetical and speculative because they did not incur any financial harm related to lease payments, very likely made more money from hay than GE crops at the rented farmlands, never had a contract with Syngenta for the three years preceding the ordinance's enactment, and failed to remediate their loss by planting a higher value organic beet crop.

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

1. The Seed law creates a regulatory void, affording only preemption and thus no protection for Josephine County farmers

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" (*Mot. for Sum. J.,* p. 2:21-23). 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 outright 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 areno such meaningful statewide statewide efforts whatsoever to regulate genetically engineered plants.

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

It appears that this may be a case of first impression as Oregon courts have not yet squarely addressed a challenge to statewide preemption legislation that fails to be accompanied by a corresponding regulatory scheme.

2. A recent Ohio case is persuasive on state preemption statutes lacking a regulatory scheme

However, a recent Ohio case is persuasive and nearly precisely on point on this issue. 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 went on to trumpet how 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 strikingly similar. Akin to Ohio's law that was struck down as unconstitutionally impermissible, Oregon's Seed Law was drafted by special interests, (who are still pursuing this matter into this Court) stuffed into and made part of other unrelated budget legislation, not properly vetted, and completely lacking in a statewide regulatory scheme, creating a void that leaves local interests unprotected. Accordingly,

Intervenors suggest that this court be guided by the Cleveland decision and similarly rule the Seed Law as unconstitutional.

D. The Seed Law is an impermissible preemption of Josephine County's home rule authority.

1. Seed Law Background:

SB 683, legacy bill SB 633, and LC-5 hereinafter referred to as the "Seed Law", specifically "[r]elating to preemption of the local regulation of agriculture; and declaring an emergency" was enacted during the special session. Section 1 incorporates two sections of the Act, sections 2 and 3, into ORS 633.511 to 633.750, ORS Chapter 633 "Grades, Standards and Labels for Feeds, Soil Enhancers and Seeds." Section 2 of the Act, pulls in two definitions: "Nursery stock" as defined in ORS 571.005; and "Local government" as defined in ORS 174.116. Section 4 contains an exemption for local measures that meet specific criteria. Section 5 sets forth the declaration of emergency.

2. Legal standard for state preemption of local laws

Oregon law presumes the legislature did not intend to displace local ordinances, unless that intention is apparent. *See*, e.g., *State ex rel Haley v. City of Troutdale*, 281 Or 203, 211, 576 P2d 1238 (1978) (finding no manifest legislative intent to exclude local provisions that supplemented the state building code).

> A local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and the state law deal with different aspects of the same subject. Rather, we generally assume that the legislature did not mean to displace local regulation of a local condition unless its intent to do so is apparent.

Thunderbird Mobile Club v. City of Wilsonville, 234 Or App 457, 474, 228 P3d 650, rev den, 348 Or 524 (2010) (quotations and citations omitted). An argument of field preemption does not change the legal standard a court should apply to determine if a state law preempts a local ordinance.

"Under *LaGrande /Astoria* * * * the occupation of a field of

> regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city. Instead, a local law is preempted only to the extent that it 'cannot operate concurrently' with state law, i.e., the operation of local law makes it impossible to comply with a state statute."

Id. Even though a state statute contains an express preemption clause, a local rule will survive *LaGrande/Astoria* scrutiny if it does not unambiguously conflict with the area governed by the statute. "A state statute will displace the local rule where the text, context, and legislative history of the statute 'unambiguously expresses an intention to preclude local governments from regulating' in the same area as that governed by the statute." *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or. 437, 450-451, 353 P.3d 581 (2015) (internal citations omitted).

The burden of proof is on the party challenging the home rule authority. "A party that challenges a home-rule city's authority as preempted by state law is required to show that the legislature "unambiguously" expressed its intent—a high bar to overcome." *Id*. at 454.

Standard statutory interpretation methodology determines the conflict. *Id* at 451. The standard of review for statutory interpretation of ordinances and initiatives is the same as a statute. "The meaning of a county's ordinance, like the meaning of a statute, presents a question of law for the court." *Friends of Yamhill County Inc. v. Bd. of Commissioners of Yamhill County*, 351 Or. 219, 250, 264 P.3d 1265 (2011) (internal citations omitted).

Oregon's seminal case on statutory interpretation establishes a 3-step sequential framework to discern legislative intent. *Portland General Elec. Co. v. Bureau of Labor and Indus*., 859 P.2d 1143, 1145, 317 Or. 606 (1993).

> In step (1) the court "examines both the text and context of the statute," and only if intent of legislature is still unclear, the court proceeds to step (2) "which is to consider legislative history," then if the legislative intent remains unclear, the court proceeds to step (3) where "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.

Id. at 1146. "[W]e look to the text of the statutes in context, along with any legislative history that is useful to our analysis. *Rogue Valley Sewer Services,* 357 Or. at 191, 353 P.3d 581. The text of the statute carries the most weight, and if the text is "truly capable of only one meaning, no weight can be given to legislative history that suggests-or even confirms-that legislators intended something different." *State v. Gaines*, 346 Or. 160, 173, 206 P.3d 1042 (2009).

3. Application of statutory interpretation of the Seed Law

a. The Legislature expressly preempted seeds not genetically modified organisms or plants or farming practices

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 products of those seeds. However, there is a dispute as to the extent of the intended preemptive effect of the Seed Bill on local governments. Specifically, in this matter the dispute is whether or not the Seed Bill preempts a local governments regulation of genetically engineered organisms and plants.

b. The Seed Law text applies to seeds not plants or farming practices

Step 1 examines the text and context of the statute. "The text is the principal evidence of the legislature's intention. 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). Common principles for interpreting text include, "the statutory enjoinder 'not to insert what has been omitted, or omit what has been inserted.' ORS 174.010. Others are found in case law, including for example, the rule that words of common usage should typically be given their plain, natural, and ordinary meaning." *See*, *Portland General Elec. Co*., 859 P.2d at 1146.

Statutory analysis begins with the definition when the legislature expressly defines terms used within the statutes; however, where a statute fails to provide a definition the following principles

apply. "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).

Giving effect to the statute as a whole, chapter 633 Grades, Standards and Labels for Feeds, Soil Enhancers and Seeds, the Seed Bill is incorporated into a comprehensive regulation of commercial activities and industries associated with feeds, soil enhancers and seeds. Because the legislature failed to include a definition of "product of seed," we must look to see if the legislature included a definition of "product of seed" in other parts of the statute.

While there is no definition for "products of seed," nor does the statute include a general definition section, the statute does include a definition of product under the section titled "Fertilizers And Other Soil Enhancing Products." Under § 633.311(25) "product" means, "a readily distinguishable, individually labeled substance."

Therefore, if we apply the definition "products of seed" as set forth under the section on "fertilizer", it means seeds that are a readily distinguishable, individually labeled substance. For example, under this definition "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). And in fact the American Legislative Exchange Counsel (ALEC) developed seed preemption bills to prevent other states from following suit.[13]

Alternate definitions of products, include "something produced; especially: commodity" and "something that is made or grown to be sold or used." *See*, Webster's dictionary at http://www.merriam-webster.com/dictionary/product.

However, given the express language of "products of seeds" and its context of being in a chapter related to grades, standards and labels for feeds, soil enhancers and seeds it is unlikely for a court to extend the meaning of "product of seed" to include plant, pollen, farming practices or organisms because if they meant to preempt regulation of plants, pollen, farming practices or organism they would have said so expressly.[14]

While the title of the law is "[r]elating to preemption of the local regulation of agriculture" the bill is not added to state agriculture laws, but rather incorporated under the general laws related to seeds. Because the Seed Law includes more than agriculture seeds, and includes nursery seeds, flower seed, and vegetable seed it's likely that the court would rely on the maxim of avoidance of absurd results and find that the bill is more accurately depicted as relating to preemption of the local regulation of seeds and seed products.

c. The Seed Law text lacks a comprehensive state-wide scheme

In addition, as noted in the discussion of the *Cleveland* case *supra*, what is strikingly absent from the text of this legislation is comprehensive state-wide scheme that actually regulates agriculture, seeds and seed products, or genetically engineered organisms and plants. The stated purpose of the

[13] Oregon's Seed Bill is an ALEC model preemption bill, available at https://www.alec.org/model-policy/pre-emption-local-agriculture-laws-act/

[14] In fact Center for Sustainability Law prepared a memorandum of law that was part of the legislative record for SB 633 (the legacy bill) that argued the bill covered plants. However, legislators ultimately rejected this position. Testimony available at http://oregon.granicus.com/MediaPlayer.php?clip_id=991

legislation is "reserving exclusive regulatory power over agricultural seed, flower seed, nursery seed or vegetable seed and their products" in order to protect, preserve, and promote agricultural seed, flower seed, nursery seed or vegetable seed industries. The stated harm to be avoided is the economic harm of patchwork regulations on the industry.

As expressed in section 2(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." There is no stated purpose of the state's goal of uniformity, as typically expressed in state wide comprehensive legislation of pesticide and firearm legislation, but rather a limited purpose that seed industries in the state "will be adversely affected if those industries are subject to a patchwork of local regulations."

d. The Legislative history is ambiguous

The legislative history reveals that the legislature did not intend to enact a broad preemption statute on all agriculture, but rather a limited prohibition against a local governments enactment or enforcement of laws and measures to inhibit or prevent the production or use of types of seeds and their products in order to ensure seed industries were not subject to a patchwork of regulations.

Applying the above statutory canons, it is clear from the text, context and legislative history that were a city ordinance to require that owners of homes keep their vegetation below a certain height, we would not conclude that the cities have regulated seeds or the products of seeds. Similarly, the fact that the GE plant ordinance regulates genetically modified organisms and related farming practices; we would not conclude that the county has regulated seeds or the products of seeds. The plant ordinance contains no restrictions whatsoever on the seed industry, seeds, or seed products. Furthermore, the plant ordinance does not inhibit or prevent production or use of seeds or products of seeds.

E. *LaGrande* should not apply in the instant case

Josephine County is a chartered home rule county under Article VI, section 10 of Oregon's constitution. Cities derive their home rule authority from Article XI, section 2, and 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.[15] To date, nine counties, including Josphine County, have home rule charters.[16] Oregon's remaining twenty-seven counties derive their home rule authority by statute. ORS 203.035. Oregon courts do not distinguish 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*, has 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 Grande/Astoria*.[17] *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).

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

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

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

LaGrande was decided on a bare majority, and the legal landscape has changed enough since that time for it to be weak precedent in the present case, particularly as that case is most often applied to cases involving cities, not counties. Intervenors suggest that Justice Togue's dissent, 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).

A more suitable analysis for the present case lies in that from *Haley*, *supra*, 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 Genetically Engineered 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 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 the Rogue Valley (in both Jackson and Josephine Counties) have voted to have stricter local 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.

F. The Legislature has a valid purpose allowing local governments that have already proposed measures to continue with them; however, because there was no rational basis for the date, it should be stricken.

The Seed Law passed on Oct 2, 2013. Section 4 of the Seed Law contains an exemption clause, which states,

> 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.

1. Legal Standard

Unlike its Federal counterpart, Oregon's equal protection clause, article I, section 20 prohibits the granting of privileges and immunities to citizens or classes of citizens that are not available to other citizens or classes of citizens on equal terms. Article I, section 20 of the Oregon Constitution currently provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."[18]

"The original target of this constitutional prohibition was the abuse of governmental authority to provide special privileges or immunities for favored individuals or classes, not discrimination against disfavored ones." *In re Marriage of Crocker*, 332 Or. 42, 54, 22 P.3d 759, 765 (2001) (internal citations omitted). Rational basis review is applied when the distinctions are personal and not

[18] Intervenors contend "citizens" should be extended to non-natural persons in this instance.

immutable characteristics. "When distinctions are based on personal characteristics that are not immutable, this court reviews the classification for whether the legislature had a rational basis for making the distinction. *Id*. at 55.

Most of the Oregon cases focusing on the Article I, section 20, prohibition on unequal treatment of individuals have arisen in the criminal context. However, in *Richardson v. Driver & Motor Vehicle Services Div.* (DMV), 213 Or App 18, 29–31, 159 P3d 1227 (2007), the court of appeals analyzed whether an administrative licensing scheme was unconstitutionally vague under Article I, section 20, using the same mode of analysis employed in criminal cases. That analysis suggests that a governmental exercise of discretion to confer a benefit or burden in the civil context may also violate Article I, section 20.

In the present case, Intervenors contend that the Seed Law is unconstitutionally vague and confers an impermissible benefit on the class of GE producers and large chemical corporations who backed in, at the expense/burden of local farmers. Moreover, there is no rational basis for the geographical classification at issue.

A law will survive rational scrutiny where there is a rational basis for treating the class in the way that it is treated under the statute. *Id*. To put it another way, one must look to the class or classification and how the class or classification is treated under the statute, and see if there indeed is any rational basis for that distinction.

In addition, geographical classifications will be upheld were the legislature had a rational basis for the distinction. "This court has repeatedly upheld rational geographical classifications in state legislation in the face of state constitutional equal privileges or immunities challenges and federal equal protection challenges. *See State v. Clark, supra,* 291 Or. at 241, 630 P.2d 810." *Seto v. Tri-Cty. Metro. Transp. Dist. of Oregon*, 311 Or. 456, 467, 814 P.2d 1060, 1066 (1991).

2. The exemption should apply to the greater Rouge River Valley geographic region

Here, the legislative history of the Seed Law shows that the Legislature intended to exempt a region of Oregon based on their geographic classification— specifically Jackson County. Ex. 18. However, instead of exempting Jackson county by name, the legislature created an exemption that set forth arbitrary dates that only applied to a recently qualified ballot measure in Jackson County. The legislative history demonstrates that the legislature was aware of the importance and significance of carving out both of the Rogue River basin counties in Oregon that could experience harm from GMO contamination.

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.[19]

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.[20]

While geographic classification usually survives rational scrutiny, here instead of making a geographic classification, the Legislature chose an arbitrary date. Unlike a geographic distinction, there is no rational basis for the arbitrary date selected. By selecting the arbitrary date, the Legislature overly interfered and specifically singled out one local measure in the same geographic region, with

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[19] 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.

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

the exact same climate, growing conditions, topography and farmer concerns with no rational basis for that distinction.

The legislative history supports a rational basis for the geographic classification. Both ballot measures were similarly situated parties proposed by initiative petition prior to the Seed Law's passage in the same watershed and pollenshed. The only difference is that the Jackson County ballot initiative was qualified on January 9, 2013 and Josephine county qualified on February 18, 2014 (with the Ballot Title actually approved by the County before the Seed Law was passed.) Therefore, the exemption should be applied to the geographic classification of the Rogue Valley, which includes both Jackson and Josephine counties, and the arbitrary date should be removed.

Jackson and Josephine Counties are inextricably linked in the Rogue Valley, with both counties requiring protections together, particularly given "the Rogue Valley is a narrow valley and we have strong year-round winds that drive pollen drift and the contamination risks from genetically engineered plants even further than in places that lack our winds." Tipping Decl. 8-10 ¶ 41-49.

The two counties work in tandem to create a GMO-free refugia for open pollinated, non-GMO crops to proliferate and strengthen the region's position as a world-class source for non-GMO seeds that would not require costly tests to determine their purity. The Rogue Valley is literally bisected by the county line between Josephine and Jackson Counties. If the Josephine County Plant Ordinance is nullified, the exemption for Jackson County could still put the farmers in that county at risk for transgenic contamination.

In sum, because the Legislature has a valid purpose allowing local governments in the same geographic region that have already proposed measures to continue with them, the exemption should apply to the region as a whole and arbitrary and capricious date should be stricken.

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CONCLUSION

For the reasons set forth herein, Intervenors submit that Plaintiffs' complaint be dismissed for lack of standing, or at the least, that the matter proceed to trial as genuine issues of material fact exist in this case, along with far-reaching public policy and constitutional issues for which summary judgment is not appropriate.

Dated: February 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed served the foregoing Response Opposing Plaintiffs' Motion for Summary Judgment by depositing a true, full and exact copy with the Clerk of Court using the OJD eFiling system, which will automatically deliver a notification of such filing to the following:

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And also by (co-counsel Stephanie Dolan) emailing on this date a copy of the above-listed pleading to Ms. Stineman at renee.stineman@doj.state.or.us and other counsel of record.

Dated this 19th Day of February, 2016

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