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 **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Intervenor-Defendants' Response Opposing Plaintiffs' Motion for Summary Judgment ("Response") relies heavily on asking this Court to examine irrelevant factual assertions and to apply incorrect or non-existent legal standards. Plaintiffs have standing to challenge Josephine County Ordinance 2014-007 ("Ordinance") because they have demonstrated they will be affected by the Ordinance if it is applied. Nothing more is required. Intervenor-Defendants' attempts to challenge the validity of leases, to require the existence of contracts to grow GMOs, and to require a showing of past profit and lost future profit are all irrelevant. Under Oregon case law (which Intervenor-Defendants ignore) plaintiffs' stated intent to grow GMO crops is sufficient—although plaintiffs have shown far more here. But even if the Ordinance somehow did not affect plaintiffs sufficiently for plaintiffs to have standing, this court could still hear and decide this case because it is a public action and involves a matter of public concern. *See Couey*

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v. Atkins, 357 Or 460, 520 (2015).

On the merits, ORS 633.738 expressly and clearly preempts the Ordinance such that the Ordinance is invalid and unenforceable. No authority supports Intervenor-Defendants' argument that ORS 633.738 cannot preempt local measures without affirmatively regulating GMOs. And Intervenor-Defendants' attack on the *exemption* from ORS 633.738 is both irrelevant to the constitutionality of ORS 633.738 and substantively meritless. Intervenor-Defendants' other arguments similarly rely on misreading and misapplying Oregon law. Accordingly, the court should grant plaintiffs' motion for summary judgment and deny Intervenor-Defendants' cross-motion.[1] Further, because Intervenor-Defendants have no objectively reasonable basis for their constitutional challenge to ORS 633.738, plaintiffs are entitled under ORS 20.105(1) to recover from Intervenor-Defendants their attorney fees incurred in addressing those arguments.

II. BACKGROUND

In the "background" section in Intervenor-Defendants' Response, Intervenor-Defendants argue at the outset that "[t]he Plant Ordinance was adopted to address local concerns of genetic contamination from genetically engineered plants." Response, pp. 3-6. Intervenor-Defendants' argument regarding why the Ordinance was adopted and the "evidence" on which it relies[2] are irrelevant to the issues before the court. The issues relevant to summary judgment are (1) whether plaintiffs have standing, and (2) whether ORS 633.738 preempts the Ordinance. The background section in plaintiff's motion for summary judgment sets forth the facts relevant to

[1] During the course of the scheduling conference of January 21, 2016, counsel agreed that this reply would be filed by March 4, 2016. No mention was made by counsel for Intervenor-Defendants as to their intent to file a cross-motion for summary judgment, nor was any schedule for briefing mentioned. To the extent the court considers Intervenor-Defendants' cross-motion, this reply may also serve as a response to that motion.

[2] Intervenor-Defendants cite the Declaration of Don Tipping and the Declaration of Mary Middleton, both previously submitted in support of Intervenor-Defendants' Motion to Intervene. Although neither gives rise to genuine issues of material fact in any event, both are rife with statements that would not be admissible at trial and which the court therefore should disregard. *See* ORCP 47 D.

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those issues.

The remainder of Intervenor-Defendants' "background" section contains a mix of factual assertions, discussion of legislative history of ORS 633.738, and argument. Intervenor-Defendants' discussion of plaintiffs' other sources of income, how they came to be plaintiffs in this case, what their "principal crops" have been, what they reported on income taxes, and whether their farming activities have been "profitable" is irrelevant. Response, pp. 8-10; February 1, 2016 Letter Ruling on Intervenors' Motion to Compel. To the extent Intervenor-Defendants' factual and legal assertions warrant a response, Plaintiffs address them in the argument section below.

III. ARGUMENT

A. Intervenor-Defendants urge incorrect legal standards.

Intervenor-Defendants have filed a cross-motion for summary judgment based on the argument that plaintiffs lack standing. Intervenor-Defendants' Cross-Motion, p. 1. They suggest that the evidence nonetheless should be viewed in the light most favorable to them. Response, p. 15. On cross-motions for summary judgment, however, "[e]ach party that moves for summary judgment has the burden of demonstrating that there are no material issues of fact and that the movant is entitled to judgment as a matter of law." *Powell v. Bunn*, 185 Or App 334, 338 (2002). The court views "the record for each motion in the light most favorable to the party opposing it." *Eden Gate, Inc. v. D & L Excavating & Trucking, Inc.*, 178 Or App 610, 622 (2002). "In the case of cross-motions for summary judgment, [the court] determine[s] which party is entitled to judgment as a matter of law." *Powell*, 185 Or App at 338.

Intervenor-Defendants also incorrectly assert that "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." Response, p. 15 (citing *Or. Med. Ass'n v. Rawls*, 276 Or 1101, 1106-1110

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(1976)). *Rawls* does not support that proposition. As the Oregon Supreme Court has twice said, *Rawls* was dismissed for want of a justiciable controversy. *Couey v. Atkins*, 357 Or 460, 484 (2015) (in *Rawls*, the "trial court dismissed the action for want of a justiciable controversy, and this court affirmed"); *McIntire v. Forbes*, 322 Or 426, 434 n 5 (1996) (in *Rawls*, "the parties came to the court seeking a declaration, without a concrete controversy or palpably adverse interests. In that situation, this court concluded that the case was not justiciable."). Moreover, *Rawls* predated the Oregon Rules of Civil Procedure. ORCP 47 C requires that the "court ***shall*** grant the motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." (Emphasis added.) *Now* is the time for Intervenor-Defendants demonstrate the existence of any genuine issue of material fact. Intervenor-Defendants cannot avoid their failure to do so by creating a false "public importance" exception to summary judgment.

B. Plaintiffs have standing.

The court should deny Intervenor-Defendants' cross-motion for summary judgment and reach the merits of the preemption question because plaintiffs plainly have standing. As stated in plaintiff's motion, a party has standing to challenge the validity or enforceability of a statute or ordinance where the party's "rights, status or other legal relations are affected by the law or enactment at issue." *League of Oregon Cities v. State of Oregon*, 334 Or 645, 658 (2002). Intervenor-Defendants offer five arguments why plaintiffs lack standing, but each fails on the undisputed facts and/or seeks to impose legal requirements for standing that do not exist.

1. Plaintiffs have more than an "abstract" interest at stake.

Intervenor-Defendants first argue that plaintiffs lack standing 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." Response, p. 17. That assertion on its face is patently wrong. Even Intervenor-Defendants do not and cannot dispute that plaintiffs farm land in Josephine County

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and have done so for years. As farmers, they obviously have a greater interest in an Ordinance that purports to regulate farming than members of the public who do not farm.

The crux of Intervenor-Defendants' argument is that being a farmer is not sufficient; instead, according to Intervenor-Defendants, plaintiffs must show that they have a "valid lease" and have incurred specific financial injury in the 2015 or 2016 farming seasons. Response, p. 17. Controlling cases that plaintiffs cited in their motion but that Intervenor-Defendants fail to address show that Intervenor-Defendants attempt to impose requirements for being affected by the enactment at issue that do not exist.

In *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 460 (2010), the plaintiff, an owner of mobile home parks, filed a declaratory judgment action against the City of Wilsonville to invalidate a city ordinance regulating the closure of mobile home parks by requiring that a park owner obtain a closure permit from the city and compensate displaced tenants. The plaintiff argued that the Oregon Residential Landlord and Tenant Act, which set forth certain requirements for mobile home park owners who wished to convert a park to a different use, preempted the city ordinance. *Id.* at 462. 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 court disagreed, noting that since the plaintiff had listed the mobile home park property for sale, the plaintiff had "found potential purchasers interested in redeveloping the park," but had "not found a potential purchaser interesting in continuing to operate it as a mobile home park." *Id.* at 466. Additionally, all of the interested purchasers would require the "plaintiff to close the park and remove the mobile homes as a condition of closing a purchase." *Id.* Thus, the court concluded that the fact that the plaintiff was unable to "sell its property to any of the potential purchasers without first closing the park," gave rise to an "inference that the ordinance ha[d] deterred the potential purchasers from buying the property as is." *Id.* at 467. Because the plaintiff's request for a declaration that the ordinance was unlawful

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would, "if granted, appear to have an immediate effect on plaintiff's legal interests," the court held that the plaintiff had standing under ORS 28.020. *Id.*

In a case that is even more closely analogous to the current controversy, the court in *Marks v. City of Roseburg*, 65 Or App 102 (1983), similarly held that plaintiffs challenging an ordinance had standing, even though the ordinance had not yet been applied to them. In *Marks*, the plaintiffs brought suit seeking a declaration the City of Roseburg's "occult arts ordinance," which prohibited the practice of fortunetelling, palmistry, astrology, phrenology, and other similar practices for hire or profit, was unconstitutional, as well as an injunction enjoining the City of Roseburg from enforcing the ordinance. *Id.* at 104. The defendant argued that because the plaintiffs were no longer residents of Roseburg, and ceased operating a palmistry business in Roseburg, "no justiciable controversy" existed. *Id.* at 105. The plaintiffs, however, presented an affidavit that they had "rented a dwelling in Roseburg intending to engage in palmistry for profit," and thereafter were informed that "there intended activity was prohibited by the ordinance at issue." *Id.* at 105-06. Additionally, the plaintiffs made clear that they "moved outside the Roseburg limits to engage in palmistry," so as not to "risk prosecution under the ordinance," but that they intended to live in Roseburg if the action was "resolved in their favor." *Id.* at 106. Based on the foregoing, the court held that it was "obvious … that the controversy [was] justiciable," and that a "judgment as to the facial validity of the ordinance [would] settle this controversy." *Id.* *Marks* and *Thunderbird Mobile Club* show that plaintiffs unquestionably satisfy the standing requirements under ORS 28.020.

a. Intervenor-Defendants' arguments regarding the "validity" of the lease are irrelevant.

Intervenor-Defendants spill considerable ink arguing that plaintiffs lack standing based on the argument that the lease under which they obtained the right to farm the subject land is not "valid," Response, pp. 18-21, but that argument is without merit. First, *Marks* shows that Intervenor-Defendants' "valid lease" argument is a red herring. In *Marks*, the Court of Appeals

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found standing "obvious" where the plaintiffs stated they had rented a dwelling and intended to engage in an activity the ordinance at issue there barred. The court did not require proof of the "validity" of the lease, that the plaintiffs were presently obligated to pay under the lease, or would be obligated to pay in the future.[3] Likewise, in *Thunderbird Mobile Club*, the plaintiff had not given notice of termination of her mobile home park and had not entered into any agreement to sell the park. This court need look no further than *Marks* and *Thunderbird Mobile Club*, which Intervenor-Defendants ignored in their Response, to conclude that plaintiffs here have standing. Indeed, plaintiffs undisputed residence in Josephine County and stated intent to grow GMO crops but for the Ordinance is just like the *Marks'* plaintiffs intent to reside in Roseburg and stated intent to engage in palmistry but for the ordinance in that case.

Second, even if plaintiffs somehow were required to show more, the "validity" of the lease is not Intervenor-Defendants' to challenge. The point relevant to the standing analysis under Intervenor-Defendants' construct is the plaintiffs indisputably have an obligation to Jack Sauer, the owner of the land, to compensate him for the use of his land, whether in the form of a "valid lease" or otherwise. The undisputed evidence shows that plaintiffs have paid tens of thousands of dollars to Mr. Sauer and remain obligated to him for the right to use the leased land.

Plaintiff Shelly White made that clear during the course of her deposition:

> 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 An who's that made out to?

[3] In fact, it is not clear in *Marks* whether the rented dwelling was to be the location of the palmistry business. The defendant in *Marks* had argued that the plaintiffs lacked standing because they were not residents of Roseburg at all and, separately, because they did not operate a business in Roseburg. *Marks*, 65 Or App at 105. A fair reading of *Marks* is that the renting of the dwelling showed the intent to reside in Roseburg, whereas the plaintiffs' mere statements that they intended to engage in palmistry showed they would be sufficiently affected by the ordinance to have standing. *Id.* at 105-06. The Court of Appeals did not need to parse out these details because standing was, in the words of the court, "obvious." *Id.* at 106.

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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.
Q Kind of a handshake deal?
A Yes, ma'am.
Q Do you think he's fair to do business with, Mr. Sauer?
A Yes, he is.
Q Is that how you say it?
A Sauers, yes.
Q Sauers. You trust him?
A Definitely
Q And forgive me if I already asked this. You – Exhibit 5 indicates the first payment in cash that you made to Mr. Sauers.
A Yes
Q And why is it for only $6,000?
A Because the rest of the payment I had on cash already.
Q When did you pay him the rest of the $10,000?
A At the same timeframe as the 6,000.
Q So the first payment -- is it fair to say that the first payment of $10,000 under the lease that's marked as Exhibit 1, you paid December 2013?
A Yes
Q When was the next payment that you made? I'm handing you what's been marked as Exhibit 4. Can you tell me what that is?
A Copy of a canceled check.
Q And what's the date?
A October 26th, 2014.
Q And who's it made out to?
A Jack Sauers.
Q And that's for the lease?
A Yes.
Q And when was the next time that you paid him? Did you pay him for 2015 yet?
A No, I have not.
Q When do you intend to pay, if at all?
A My intentions to pay him will be when we have the availability to.
Q And is Mr. Sauer okay with that delayed payment?
A Yes.

Deposition of Shelly Ann White, ("Shelly White Dep."), 39:10-41:17, attached to

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Supplemental Declaration of John DiLorenzo, Jr. ("DiLorenzo Suppl. Decl"), Ex. 2.

Third, in addition to being irrelevant, Intervenor-Defendants' arguments that the lease is not valid are incorrect. The lease clearly identifies the property being leased and the consideration. Intervenor-Defendants argue, however, that the lease is invalid because it does not contain the "duration of the term." Response, pp. 18-19. Term is not left unaddressed; the lease says "Property shall be leased until both parties agree upon cancellation of lease." Response, Ex. 7. Intervenor-Defendants offer no authority that the parties' agreement to be bound until they mutually cancel invalidates a lease.[4] Regardless, where a lease of real property does not specify a duration and, like here, sets out an annual rent, the lease is not invalid. Rather, a year-to-year tenancy is created. ORS 91.060; *see also Falk v. Amsberry*, 279 Or 417, 419-20 (1977) (farm lease with annual rent but indefinite duration creates year-to-year tenancy that can only be terminated upon 60 days' notice). In tacit recognition that their "indefinite term" argument fails, Intervenor-Defendants attempt to characterize this term statement as an "extension provision," which they then prop up as a strawman to knock down using case law they say invalidates extension provisions that leave too much to future negotiation. Response, pp. 19-20. Even if it were an extension provision, parties may agree to extend by later mutual agreement, and if no term is later identified but the parties continue under the agreement, the relationship is terminable at will. *See, e.g., Andersen v. Waco Scaffold & Equip. Co.*, 259 Or 100, 105 (1971) (franchise agreement renewal only by mutual agreement and continued without specified term is terminable at will).

Fourth, Intervenor-Defendants argue that the "lease is no longer valid for lack of consideration" because, they argue, plaintiffs have not made required payments. Response, pp. 21-22. That argument is frivolous. Consideration relates to contract *formation*. A contract once

[4] Intervenor-Defendants also make a passing reference to the statute of frauds, Response, p. 20, but part performance, such as the evidence here shows, is a longstanding exception to the statute of frauds. *See Luckey v. Deatsman*, 217 Or 628, 633 (1959).

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supported by consideration cannot become invalid for lack of consideration. Indeed, the notion that a party can render a contract invalid (and thus relieve itself of its obligations) by not meeting its contractual obligations is absurd. Further, it is hornbook contract law that a *promise* to pay, as oppose to actual payment, can constitute consideration. If a contracting party fails to perform that promise or otherwise to provide the agreed-upon consideration, that results in breach, not invalidation of the contract.

Finally, Intervenor-Defendants argue that a genuine issue of fact exists regarding whether plaintiffs "remain[] bound" under the lease.[5] Response, p. 21. This argument appears to be based on the idea that plaintiffs and Mr. Sauer are friends and that plaintiffs might be able to be relieved of their contractual obligations. Response, p. 21.

Ms. White confirmed that plaintiffs are obligated to pay Mr. Sauers rent for 2015: "My intentions to pay him will be when we have the ability to." Shelly White Dep., 41:13-16, attached to Supplemental Declaration of John DiLorenzo, Jr. ("DiLorenzo Suppl. Decl"), Ex. 2. When Intervenor-Defendants inquired further of plaintiff Robert White on this subject, the following colloquy ensued:

> By Ms. Dolan:
> Q But you have not paid Mr. Sauer by December of 2015, correct?
> A Correct.
> Q Has Mr. Sauer asked for the money?
> A I've talked to him personally.
> Q What did you talk about?
> A I just told him that we were short on income this year; that we need to work it out; and when he was fine with that. Deposition of Robert White ("Robert White Dep.") 55:18-25; 56:1, attached to DiLorenzo Suppl. Decl, Ex. 1.

Finally, when asked whether Mr. Sauer would forgive the White's lease obligation for 2015 Mr. White responded as follows:

> By Mr. DiLorenzo:

[5] If this were true, and if there were issues of fact that had to be resolved by the court, this argument would require denial of Intervenor-Defendant's cross-motion.

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A Okay. Do you remember the series of questions that Miss Dolan asked you about Mr. Sauer and whether he would be inclined to let you out of your lease?
A Yes
Q You don't know for a fact whether Mr. Sauer would let you out of the lease, do you?
A No, I don't.

Robert White Dep. 87:9-16, attached to DiLorenzo Suppl. Decl, Ex. 1.

Of course, the idea that plaintiffs might have to seek relief to avoid their contractual obligations because they cannot use the leased land for the intended purpose shows that plaintiffs are directly affected by the Ordinance and have standing. Whether plaintiffs could get out of the obligations is irrelevant; the obligation alone is more than sufficient to show standing.

b. Plaintiffs do not need a current contract to grow GMO crops to have standing.

Intervenor-Defendants' arguments regarding contracts with Syngenta once again are irrelevant. It is sufficient for standing purposes that plaintiffs intend to grow GMO crops, as they have stated under oath. They do not need to show that their lease was for that purpose or that they have or have had a contract with Syngenta to grow GMO crops—conduct that the Ordinance makes unlawful. Response, pp. 21-22; 23-25. As noted above, in *Marks*, standing was "obvious" where the plaintiffs stated they intended to engage in palmistry for profit, without requiring a showing of existing (or even past) contracts or customers. 65 Or App at 106-06. In *Thunderbird Mobile Club*, the plaintiff had standing to challenge an ordinance regulating conversion of mobile home parks to other uses even though the plaintiff had not sought to close her park or entered into a contract to sell the park, because the "mere enactment of the ordinance has affected plaintiff's legal interests." 234 Or App at 468. Such is the case here—the mere fact of the enactment of the Ordinance prohibiting GMO crops affects the legal rights of plaintiffs, who undisputedly have farmed and continue to farm land in Josephine County and who have the stated intent to grow GMO crops. Nothing in Oregon law requires plaintiffs to have a current

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contract to engage in conduct the Ordinance proscribes for their legal rights to be affected in a way sufficient to have standing. It is, however, undisputed that plaintiffs have had actual and substantial dealings with Syngenta (a company specializing in, among other things, GMO sugar beet seed crops).

The evidence is clear that Syngenta paid the Whites approximately $37,600 in 2014 for growing GMO sugar beets.

> By Ms. Dolan:
>
> Q Okay. I want to jump back to the profit you alleged in 2014 from Syngenta. Where did that come from? How much?
> A The profit from Syngenta, how much Syngenta paid us?
> Q Yeah, in 2014.
> A If I recall correctly, it was about 37,600 and something.
> Q And what was that from?
> A Them growing genetically modified sugar beets.
> Q For 30 acres?
> A Yes, ma'am.

Robert White Dep. 54:25-55:12, attached to DiLorenzo Suppl. Decl, Ex. 1.

Robert White further testified that he intended to use the leased land for GMO sugar beets.

> By Ms. Dolan:
>
> Q Did you have a contract with Syngenta when you signed that lease?
> A No.
> Q So your intentions in leasing the hundred acres was what, exactly?
> A To use that hundred acres to rotate GMO sugar beets into.

Robert White Dep. 50:17-23, attached to DiLorenzo Suppl. Decl, Ex. 1.

He further made clear that he could not obtain a contract from Syngenta to grow GMO sugar beets for 2015 due to the existence of the County Ordinance.

> By Ms. Dolan:
>
> 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?

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> 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. Robert White Dep. 57:25; 74:1-13, attached to DiLorenzo Suppl. Decl, Ex. 1.

This shows that plaintiffs' stated intent to grow GMO crops, itself sufficient to establish standing, is backed an actual history of doing so, even if Intervenor-Defendants do not find the degree to which plaintiffs have been involved with GMO crops to be satisfying. It also shows the likelihood that plaintiff would have continued to devote their land and leased land to GMO crop production but for the Ordinance.

c. Standing does not require a showing of financial injury.

Intervenor-Defendants' argument that plaintiffs must show financial loss once again seeks to impose a standard that does not exist. Response, pp. 22-25. Standing to bring a declaratory judgment action requires, at most, showing that plaintiffs' rights, status or legal relations are "affected" by the Ordinance. *See League of Oregon Cities*, 334 Or at 658. As argued in plaintiffs' motion, plaintiffs have a legally protected right to possession, use and enjoyment of their property. *Nearing v. Weaver*, 295 Or 702, 707 (1983). They could grow GMO crops on the leased (or other) land, but for the Ordinance. They do not need to show that they would make a profit growing GMO crops or that growing GMO crops would be the most profitable use of the land (or, for the reasons described above, that they have ever grown GMO crops).[6] The court cannot properly impose a "financial injury" requirement on plaintiffs.

[6] Intervenor-Defendants go far afield with their purported analysis of the "ambiguity" of plaintiffs' contracts with Syngenta. Response, pp. 23-25. For the reasons described above, the court does not need to construe those contracts to assess whether plaintiffs have standing. Accordingly, plaintiffs note their disagreement with Intervenor-Defendants' arguments but do not otherwise expend their or the court's resources by engaging the argument further.

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d. Intervenor-Defendants' argument regarding failure to mitigate lacks any objectively reasonable basis.

Failure to mitigate is a concept that applies where a party has suffered and attempts to recover damages. *See, e.g.*, Oregon Uniform Civil Jury Instructions (2005 rev. with 2006-2015 supps.), No. 73.01 ("A person who suffered damage has a duty to exercise reasonable care to avoid increasing that damage."). Plaintiffs do not seek damages or any other form of financial relief (other than fees and costs) in this case. Intervenor-Defendants' argument (and pleaded affirmative defense) that plaintiffs have failed to mitigate damages therefore lacks any objectively reasonable basis as applied to the issues in this case. Response, p. 25.

In sum, Intervenor-Defendants attempt to impose requirements for standing that are far in excess of anything Oregon's appellate courts have ever required. Their notions that plaintiffs must show the existence of a "valid" lease, current contracts to grow GMO crops, or concrete financial injury go far beyond the minimal requirement that plaintiffs show they are "affected" by the Ordinance, a fact as to which there can be no genuine issue on this record.

2. Plaintiffs have standing under *Couey v. Atkins* because this case is a public action or matter of public interest.

Even if the court somehow were to conclude that plaintiffs lack standing notwithstanding *Marks*, *Thunderbird Mobile Club*, and the other authority discussed above, this court still has the judicial power to hear and decide this case. In *Couey v. Atkins*, the Oregon Supreme Court conducted a comprehensive review of Oregon's law of justiciability and concluded "there is no basis for concluding that the court lacks judicial power to hear public actions or cases that involve matters of public interest that might otherwise have been considered nonjusticiable under prior case law." 357 Or at 520. "Public action" and actions "involving issues of 'public interest' … include those challenging the lawfulness of an action, policy, or practice of a public body[.]" *Id.* at 522. Challenging the validity of the Ordinance plainly falls within the category of public actions or actions involving issues of public interest. Under *Couey*, this court has the power to decide the issues presented even if it were to find plaintiffs lack standing under the traditional

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analysis.[7] This is because plaintiffs are also seeking injunctive relief which does not require the same showing as that required by ORS 28.010 *et seq.*

C. Intervenor-Defendants' constitutional challenge fails.

1. The Legislative Assembly's ability to enact a preemptive statute does not depend on affirmatively imposing a regulatory scheme.

Intervenor-Defendants fail to support their assertion that ORS 633.738 is "unconstitutionally vague" with a single citation to any Oregon authority. Response, pp. 26-27. And for good reason—no such authority exists. Intervenor-Defendants contend that ORS 633.738 somehow is unconstitutional because it "creates a novel vacuum," but no Oregon authority imposes Intervenor-Defendants' requirement that the Legislative Assembly set forth affirmative rules when it preempts local legislation to avoid patchwork regulation. Response, p. 26. For that reason, Intervenor-Defendants' arguments regarding the Oregon Department of Agriculture's present authority are irrelevant. Response, pp. 26-27. Regardless of the ODA's present authority, the Legislative Assembly could grant the ODA the supposedly missing authority or otherwise put in place a statewide regulatory scheme. It is not obligated to do so in order to preempt local legislation in the meantime.

To the contrary, as one example, state law preempts local rent control measures by local government, and the absence of statewide rent control is irrelevant to the preemptive effect. *See* ORS 91.225 (declaring that "the imposition of rent control on housing in the State of Oregon is a matter of statewide concern" and that "a city or county shall not enact any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit").

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[7] The court's discussion in *Couey* focused on the mootness aspect of justiciability in light of the procedural posture of that case, but made clear that the holding applies equally to standing. 357 Or at 521 ("It suffices at this juncture to make the point that, even though such justiciability doctrines as mootness *and standing* are not implicit in Article VII (Amended), section 1—at least not in public action cases or those involving matters of public importance—there remain other limitations on the 'judicial power' that may be exercised under the state constitution." (emphasis added)).

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Likewise, ORS 837.385 preempts local regulation of "the ownership or operation of unmanned aircraft systems" (drones) without enacting or authorizing an accompanying regulatory scheme. And ORS 467.136 preempts local regulation of shooting ranges, also without accompanying affirmative regulation. These examples make clear that the Legislative Assembly will often preempt local government from legislating in an area even if the Legislative Assembly has no present intention of implementing an affirmative statewide policy. In other words, the Legislative Assembly's determination that the interests of Oregon's citizens are best served by disallowing a different legislative policy in each of Oregon's 36 counties is itself a permissible statewide policy. Or the Legislative Assembly may ultimately want a single, affirmative, statewide policy, and wants to avoid 36 different county policies while the Legislative Assembly devises that policy. Or, the Legislative Assembly might prefer no regulation at all, deferring to free market forces. Intervenor-Defendants do not point to any Oregon law to the contrary.

2. The *City of Cleveland* case is inapposite.

Intervenor-Defendants' description of *City of Cleveland v. State of Ohio*, 989 NE2d 1072 (2013), as "nearly precisely on point on this issue" is off base. Response, p. 27. The Ohio court in *Cleveland* applied an analytical scheme under Ohio law that differs markedly from the Oregon analysis. Under Ohio law, the court applies a three-step home rule test for evaluating conflicts with Ohio's home rule amendment. *Cleveland*, 989 NE2d at 1079. "A state statute takes precedence over a local ordinance when (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *Id.* (quotation omitted). In *Cleveland*, only the "general law" (a term of art under Ohio law) prong was at issue. *Id.* Under Ohio law, whether a statute is a general law for purposes of home-rule analysis is itself subject to a four-prong test. *Id.* at 1080. To be a general law, the statute must:

> (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) *set forth police, sanitary, or similar*

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> *regulations*, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations, and (4) *prescribe a rule of conduct upon citizens generally*.

Id. (emphasis added) (quotation omitted). Ohio law thus *requires* that a statute affirmatively establish regulations and "go beyond merely limiting municipal authority…." *Id.* at 1082-83. The Ohio statute at issue did not do so, and for that reason, failed under established Ohio law. *Id.*

Oregon law imposes no such requirement for the legislature to exercise its preemption powers. The seminal Oregon case addressing conflicts between state and local laws is *City of La Grande v. Public Employees Retirement Bd.*, 281 Or 137 (1978). Under *La Grande*, when assessing conflicts between local and state laws (outside the context of laws prescribing the modes of local government), "the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive." *Id.* at 148. The test is *incompatibility*, not affirmative regulation, and expressly accounts for the situation in this case, where "the legislature meant its law to be exclusive." Under the *Oregon* rule, "when a local enactment is found incompatible with a state law in an area of substantive policy, the state law will displace the local rule." *Id.* at 149. *La Grande* further states that

> a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it 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. at 156. Again, the test is whether the state law is *addressed* to substantive *objectives* of the state. Unlike Ohio law, which expressly requires affirmative regulation in order to supplant local law, Oregon law expressly does *not* require such regulation. *La Grande* controls and shows that ORS 633.738 is constitutional and preempts the Ordinance. The *Cleveland* case has no bearing on the analysis.[8]

[8] Intervenor-Defendants also disparage SB 863 and attempt to liken it to the Ohio enactment,

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D. ORS 633.738 preempts the Ordinance.

1. *La Grande* governs the analysis.

As set forth above, *La Grande* governs the determination of whether a state statute preempts local regulation. Intervenor-Defendants urge this court to ignore *La Grande* as the controlling precedent here based on their arguments that it was decided on a "bare majority" and the "legal landscape has changed" such that it is now "weak precedent." Response, p. 36. Of course, only the Oregon Supreme Court can overrule its decision. *Couey*, 357 Or at 485 ("This court, after all, is the body with the ultimate responsibility for construing our constitution, and, if we err, no other reviewing body can remedy that error." (quotation omitted)).[9] This court is bound by *La Grande*.

Under *La Grande*, state law preempts local legislation if "the legislature meant its law to be exclusive" and the state law does not impinge on local government's "freedom to choose its own political form." 281 Or at 148, 156. There can be no question that the Legislative Assembly meant its law to be exclusive—it says a "local government may not enact or enforce a local law or measure" of the type described. ORS 633.738(2). Intervenor-Defendants therefore concede, as they must, that the Legislative Assembly "expressly intended state reservation of regulatory powers…." Response, p. 31. As Intervenor-Defendants themselves further concede, *La Grande* applies to counties as well as cities. Response, p. 35 (citing cases). Because the intent to displace local regulation is apparent, Intervenor-Defendants' attempt to supplant *La Grande* with *State ex rel Haley v. City of Troutdale*, 281 Or 203 (1978), must fail.[10]

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which was a provision "tucked away" in a larger, unrelated bill. Response, p. 28. Intervenor-Defendants conflate the structure of legislation with general politics. SB 863 was a stand-alone bill. As a political compromise, the governor agreed to sign SB 863 if the other components of the Grand Bargain were also enacted by the Legislative Assembly. That is routine politics, not structural "logrolling."

[9] And, moreover, Intervenor-Defendants do not identify any ground sufficient to suggest *La Grande* reflects an "'error' sufficient to warrant reconsideration[.]" *Couey*, 357 Or at 485.

[10] In *Haley*, the court addressed ORS 456.775(1), which at the time said: "The state building

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2. The Ordinance falls within the category of local regulation ORS 633.738 preempts.

As noted, Intervenor-Defendants concede that ORS 633.738 preempts local regulation. Response, p. 31. They argue, however, that ORS 633.738 preempts only "seeds not plants or farming practices." Response, p. 31. Intervenor-Defendants' argument strains credulity and should be rejected.

There is no objectively reasonable basis to argue that a statute that expressly refers to growing, harvesting and planting seeds or products of seeds is limited to seeds and product packaging. ORS 633.738 is titled "*Production and use of seeds*; restrictions on local government laws or measures." (Emphasis added.) It preempts local laws relating, among other things, to "the production or use" of seeds or "products" of seeds, including "growing, harvesting, …[or] planting" seeds or products of seeds. ORS 633.738(2). This court must construe ORS 633.738 to give meaning all of its terms and to avoid an absurd result. *Parks v. Bd. of Cty. Comm'rs of Tillamook Cty.*, 11 Or App 177, 200 (1972) ("Statutes are construed to give meaning and effect to all of the terms used therein."); *Schutz v. La Costita III, Inc.*, 256 Or App 573, 583 (2013) (recognizing "precept that [the court] should avoid interpreting a statute so as to produce an absurd result). One cannot grow, harvest or plant "individually labeled package[s] of seeds." Response, p. 32. Yet that is the absurd construction Intervenor-Defendants urge. Intervenor-Defendants' arguments are without merit.

The definition of "product" in ORS 633.311(27) to which Intervenor-Defendants cite[11] as

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code shall be applicable and uniform throughout this state and in all municipalities therein, and no municipality shall enact or enforce any ordinance, rule or regulation in conflict therewith." *Haley*, 281 Or at 210. Because ORS 456.775(1) on its face did not preempt all local regulation—only local regulation "in conflict" with the state building code—the court analyzed the state building code and the local ordinance at issue to determine whether they conflicted. The court concluded that the state building code set forth only minimum requirements, and thus local regulation imposing greater requirements did not conflict. *Haley*, 281 Or at 211. Here, *Haley* is inapposite because the Legislative Assembly expressed its clear intent to preempt *all* local regulation. *See* ORS 633.738(2).

[11] Intervenor-Defendants erroneously cite subsection 25. Response, p. 32.

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meaning "a readily distinguishable, individually labeled substance" expressly applies only "[a]s used in ORS 633.311 to 633.479" and therefore has no applicability to ORS 633.738. Moreover, the Legislative Assembly directed that ORS 633.733 and ORS 633.738 become part of ORS Chapter 633 *without amending ORS 633.311 to apply to the new provisions*. *See* 2013 Oregon Laws 1st Sp. Sess. Ch. 4, § 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"). Intervenor-Defendants cannot override the express limitation in ORS 633.311 to apply to ORS 633.738, when the Legislative Assembly chose not to do so, particularly given that an absurd interpretation results. Instead, the court must give "product" and "production," words of common usage, their "plain, natural, and ordinary meaning." *See Wal-Mart Stores, Inc. v. City of Cent. Point*, 341 Or 393, 397 (2006). "Product" means "something produced by physical labor or intellectual effort" or "something produced naturally or as the result of a natural process (as by generation or growth)." *Webster's Third New Int'l Dictionary* 1810 (unabridged ed 2002). "Production" means "something that is produced naturally or as the result of labor and effort." *Id.* By their plain meaning, "product" and "production" of seeds mean plants.

The context further shows that "product of seeds" means plants not packaging. The words surrounding the use of "products" refer to growing, harvesting and planting, things one cannot do with packaging. Moreover, Intervenor-Defendants' ignore the leading use of the term "production," which further shows that ORS 633.738 is concerned with growing plants. Indeed, it is beyond question that ORS 633.738 governs "production or use" of seeds. The primary manner of producing seeds, of course, is to grow a plant to generate them, and the primary use of seeds is to plant them. For that reason, the statute refers to growing, harvesting and planting, as well as referring *separately* to labeling, marketing, and processing seeds and products of seeds. The court must give meaning to all of those terms.

3. The legislative history of ORS 633.738 is not ambiguous.

Intervenor-Defendants proclaim that the "Legislative history" is ambiguous but do not in

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that section cite to any legislative history at all. Response, p. 34. Plaintiffs discussed the legislative history in its opening memorandum, Pl. Motion, pp. 12-16, and do not repeat it here. As set forth therein, that legislative history shows the clear intent of the Legislative Assembly to preempt local regulation like the Ordinance.

4. The case law supports that ORS 633.738 preempts the Ordinance.

The only case to address the preemptive effect of ORS 633.738 supports that the statute preempts the Ordinance here. In *Schultz Family Farms LLC v. Jackson County*, 2015 WL 3448069, No. 1:14-cv-01975 (D Or May 29, 2015), the plaintiffs challenged Jackson County's ordinance to ban the growing of GMOs in Jackson County. *Id.* at *1. The Jackson County Ordinance says: "It is a county violation for any person or entity to propagate, cultivate, raise, or grow genetically engineered plants within Jackson County." Jackson County Ordinance 635.04.[12] Federal Magistrate Judge Clarke held, without qualification:

> It is clear from the text and context of [ORS 633.738] that the Oregon legislature meant to preempt counties and other local governments from enacting laws banning the use of GE seeds so that the GMO issue could be addressed on a state-wide, uniform basis. In other words, [ORS 633.738] *preempts laws precisely like the Ordinance*.

Schultz Family Farms, 2015 WL 3448069 at *6 (emphasis added). The only reason ORS 633.738 does not preempt the Jackson County Ordinance was because an uncodified provision of the enactment exempted the Jackson County Ordinance. 2013 Oregon Laws 1st Sp. Sess. Ch. 4, § 4; *Schultz Family Farms*, 2015 WL 3448069 at *6 ("However, it is equally clear that the legislature meant to carve out a specific exemption authorizing Jackson County Ordinance 635.").

The Ordinance here contains language virtually identical to the Jackson County Ordinance. *See, e.g.*, Ordinance Section 5(A) ("It shall be unlawful for any person, corporation

[12] Relevant portions of the Jackson County Ordinance are referenced in Judge Clarke's opinion, a copy of which is attached to plaintiff's Motion for Summary Judgment as Appendix 4.

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or other entity to: (A) Propagate, cultivate, raise, or grow genetically modified organisms in Josephine County[.]"). It is undisputed that the exemption that applied to the Jackson County Ordinance does not apply here. Under *Schultz Family Farms* and for the reasons set forth therein and above, ORS 633.738 preempts the Ordinance.

E. Intervenor-Defendants' challenge to ORS 633.738 based on a claim that the "exemption clause" in ORS 633.738 is unconstitutional fails.

Intervenor-Defendants argue at some length that the "exemption clause" violates Article I, section 20 of the Oregon Constitution. Response, pp. 37-40. Article I, section 20 prohibits laws "granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." According to Intervenor-Defendants, the "privilege" or "immunity" at issue here is the "exemption clause," which provides:

> [ORS 633.738] 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 Oregon Laws 1st Sp. Sess. Ch. 4, § 4, now codified at ORS 633.741. Intervenor-Defendants' arguments regarding the constitutionality of the "exemption clause" fail for several reasons.

1. Even if the "exemption clause" were unconstitutional, the remedy is eliminating the exemption, not striking down the general law.

For the reasons set forth below, the "exemption clause" does not violate Article I, section 20 of the Oregon Constitution. But even if the "exemption clause" were somehow unconstitutional, the court should eliminate the *exemption*, not strike down portions of the enactment that are *not* unconstitutional. In other words, if Intervenor-Defendants were correct, the result would be that the *Jackson County Ordinance* is preempted, not that the statute is rewritten to grant Josephine County additional rights. For this reason, Intervenor-Defendants'

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arguments regarding Article I, section 20 and the "exemption clause" are irrelevant to this court's determination of the preemptive effect of ORS 633.738 on the Ordinance and the court need not decide the constitutionality of the exemption.

2. Article I, section 20 of the Oregon Constitution is not implicated.

The court need not reach the merits of Intervenor-Defendants' arguments regarding the "exemption clause" for the additional reason that Article I, section 20 is not implicated at all. First, Article I, section 20 does not apply to Josephine County. The "exemption clause" applies a *temporal* exemption to *local county measures*. Accordingly, to the extent the "exemption clause" creates a "class," it is a "class" of "local measures" or arguably of counties whose local measures fit the criteria identified. But it is well-established that cities and instrumentalities of the state are not 'citizens' for the purposes of Oregon Constitution, Article I, section 20." *Hale v. Port of Portland*, 308 Or 508, 524 (1989), *abrogated on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001); *see also Young v. State*, 346 Or 507, 513 (2009) (noting that counties are "state instrumentalities"). Article I, section 20 has no application here, and certainly not one that Intervenor-Defendants have any standing to raise.[13]

3. Intervenor-Defendants' reference to ORS 633.738 being "unconstitutionally vague" under Article I, section 20 is without merit.

Even if Article I, section 20 had relevance here, Intervenor-Defendants' allusion to ORS 633.738 as being "unconstitutionally vague" is without basis. Response, pp. 37-38. To be "unconstitutionally vague" so as to violate Article I, section 20, a statute must have standards that are so vague as to give "'unbridled discretion' to decide what is and is not prohibited, resulting in unequal application of the laws in violation of Article I, section 20." *Richardson v.*

[13] Intervenor-Defendants argue ORS 633.738 "confers an impermissible benefit on the class of GE producers and large chemical corporations who backed in, at the expense/burden of local farmers." Response, p. 38. But Intervenor-Defendants do not explain how the statute or the "exemption clause" creates any such class, because neither does so. In addition, Intervenor-Defendants have no standing to seek relief in this regard as neither of them are "citizens."

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Driver and Motor Vehicle Services Div. (DMV), 213 Or App 18, 30, 159 P3d 1227 (2007) (quoting *State v. Graves*, 299 Or 189, 195, 700 P2d 244 (1985)). Intervenors-Defendants do not even attempt to explain how ORS 633.738 or the "exemption clause" meets this test. Indeed, both are clear on their face.

4. Intervenor-Defendants' arguments regarding "geographic classifications" are without merit.

Intervenor-Defendants confusingly argue both that the "exemption clause" contains a geographic classification and that it does not. Response, p. 39. Ultimately, neither argument affects the outcome. Intervenor-Defendants first argue that the "exemption clause" constitutes "geographic classification—specifically Jackson County." Response, p. 39. As discussed above, the "exemption clause" does not contain any limitation based on geography except insofar as it is focused on *county* measures on the ballot in a certain time period. But even considering the "exemption clause" as a geographic classification of Jackson County, Intervenor-Defendants do not provide any authority to suggest that the practice of "grandfathering" certain existing or pending laws with an otherwise forward-looking application of a law is unconstitutional. In any event, Jackson County constitutes a *political* classification for purposes of the "exemption clause." That is, the "exemption clause" exempts local measures that qualified for placement on the ballot in a *county* by January 31, 2013 and approved by electors of the *county* in the May 20, 2014 election. The ability to hold an election is a political not geographic function, and Article I, section 20 has no application to the state's political subdivisions. *Hale*, 308 Or at 524.

Immediately after arguing that the Legislative Assembly *intended* a geographic classification, Intervenor-Defendants argue that "instead of making a geographic classification, the Legislature chose an arbitrary date" as to which there is no rational basis. Response, p. 39. Intervenor-Defendants' argument in this regard consists of the *non sequitur* that geographical classifications usually survive rational scrutiny, the Legislative Assembly did not make a geographical classification, and therefore there is no rational basis for the resulting law.

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Response, p. 39. Putting a different subject into the structure of Intervenor-Defendants' argument demonstrates the illogic: Dogs are usually brown; the animal is not a dog, so the animal is not brown. Of course, there is no basis in this example to conclude the animal is not brown, just as there is no basis here to conclude that, if the "exemption clause" is not a geographic classification, it must lack a rational basis. Intervenor-Defendants offer no other argument on this point.

Instead, Intervenor-Defendants argue that exempting the "Rogue Valley" would be rational. Response, p. 40. There is a rational basis for selecting a county as a classification. The "Rogue Valley" cannot enact legislation or hold elections. Jackson County, by contrast, is well-defined geographically and is a political unit which had already qualified a local measure that attempted to regulate in the area ORS 633.738 covers.[14] The Legislative Assembly had a rational basis for the "exemption clause" and Article I, section 20 does not provide any basis for avoiding the expressly stated preemptive effect of ORS 633.738.

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[14] On September 26, 2013, Governor Kitzhaber testified that the legislation "would preempt counties from adopting their own ban on genetically engineered products, with the exception of the election in Jackson County *that is already on the ballot*." Mot. for Summary Judgment, p. 14 (emphasis added). The Josephine County Ordinance at issue did not qualify for the ballot until February 19, 2014, long after the conclusion of the 2013 Special Legislative Session.

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IV. CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' Motion for Summary Judgment, plaintiffs' should be granted and Intervenor-Defendants' cross-motion should be denied. Because Intervenor-Defendants have no objectively reasonable basis for their constitutional challenge to ORS 633.738, plaintiffs are entitled under ORS 20.105(1) to recover from Intervenor-Defendants attorney fees incurred in addressing those arguments.

DATED this 4th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **COMBINED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO INTERVENOR-DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** on:

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☐ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland,

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☐ by emailing a copy thereof to said attorney at his/her last-known email address as set forth above.

Dated this 4th day of March, 2016.

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