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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS,

Plaintiff,

v.

STATE OF OREGON; OREGON HEALTH AUTHORITY; and DAVID BADEN, in his official capacity as Director of Oregon Health Authority,

Defendants.

Case No. 3:22-cv-01486-SI

DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Oregon Association of Hospitals and Health Systems (OAHHS) fails to establish that HB 2362 is unconstitutionally vague in every conceivable application, as required by current Ninth Circuit precedent. Even applying a lower standard, HB 2362 survives this vagueness challenge as a matter of law because OAHHS fails to account for the notice provided by Defendants State of Oregon, Oregon Health Authority, and Acting Director David Baden (collectively, "OHA") in the duly promulgating administrative regulations and the publicly available sub-regulatory guidance documents. HB 2362 is not void for vagueness, and summary judgment should be granted in OHA's favor on this claim.

The Court should decline to exercise supplemental jurisdiction over OAHHS's non-delegation doctrine claim under the Oregon Constitution. But if the Court is inclined to exercise supplemental jurisdiction, the Oregon Legislature did not violate the Oregon Constitution's non-delegation doctrine by giving OHA authority to implement HB 2362. OHA is entitled to summary judgment on this claim as well.

OAHHS cannot establish that it is entitled to summary judgment as a matter of law. In turn, for the reasons described in OHA's Motion for Summary Judgment (ECF 28) and this reply, OHA is entitled to judgment on both of OAHHS's claims. The Court should therefore grant OHA's Motion for Summary Judgment and deny OAHHS's cross-motion.

COMBINED MEMORANDUM IN OPPOSITION AND REPLY

I. OHA is entitled to judgment as a matter of law on OAHHS's vagueness claim.

A. Because OAHHS does not show that HB 2362 is vague in every conceivable application, OAHHS's vagueness claim fails.

In its moving papers, OHA asked this Court to grant summary judgment in its favor because OAHHS cannot establish that HB 2362 is unconstitutionally vague in every conceivable application. (Defs.' Mot. Summ. J. (Defs.' MSJ) at 9–12, ECF No. 28.) In response, OAHHS does not dispute that it cannot meet this high standard. Instead, OAHHS argues, incorrectly, that the standard does not apply at all. (Pl.'s Cross-Mot. Summ. J. & Opp'n to Defs.' Mot. Summ. J.

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(Pl.'s Cross-MSJ.) at 9–11, ECF No. 31.) OAHHS contends that the U.S. Supreme Court broadly invalidated the "every conceivable application" standard for most, if not all, facial vagueness challenges in *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). (Pl.'s Cross-MSJ at 9–10.) OAHHS's argument misapprehends the scope and reach of the Supreme Court's rulings in these two cases.

Johnson was a criminal case involving a federal statute that imposed heightened sentencing for a person convicted of a firearm-possession charge where they had three or more convictions for violent felonies. *Johnson*, 576 U.S. at 593. The statute defined the term "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* (citation omitted). When reviewing the statute for unconstitutional vagueness, the Court repeatedly anchored its analysis in the Constitution's prohibition of vague *criminal*, not civil, laws.[1] In that context, the Court rejected the "every conceivable application" standard, declining to find constitutional an otherwise hopelessly vague criminal statute "merely because there is some conduct that clearly falls within the provision's grasp." *See id.* at 602-03.

Dimaya involved a similarly worded clause, this time in a federal deportation statute. *Dimaya*, 138 S. Ct. at 1210. Under that statute, any alien convicted of an "aggravated felony" would be deportable, with removal from the country a "virtual certainty … no matter how long he has previously resided here." *Id.* at 1210–11. The definition of an "aggravated felony" included "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing

[1] *Johnson*, 576 U.S. at 593 ("We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague **criminal** laws.") (emphasis added); *id.* at 594 ("In [previous cases], the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague **criminal** laws.") (emphasis added); *id.* at 595 ("Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a **criminal** law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.") (emphasis added); *id.* (noting the "prohibition of vagueness in **criminal** statutes") (emphasis added);

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the offense." *Id.* at 1211 (citation omitted). The government urged the Court to apply a "less searching form of the void-for-vagueness doctrine" than that applied in *Johnson*, because the statute governing removal was a civil rather than criminal matter. *Id.* at 1212–13. The Court rejected this argument, noting long-standing precedent that "the most exacting vagueness standard should apply in removal cases," and ultimately invalidated the statute. *Id.* at 1213.

Neither *Johnson* nor *Dimaya* invalidated the "every conceivable application" standard for every context. Certainly not where, as here, the vagueness challenge is to business regulations. The Supreme Court simply declined to apply the higher standard to the circumstances presented in *Johnson* and *Dimaya*, because significant individual liberty interests were at stake. It is beyond dispute that courts approach vagueness challenges differently based on context. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests. Inc.*, 455 U.S. 489, 498 (1982) ("The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."). Here, because health care is a closely regulated industry, the *Johnson/Dimaya* standard does not apply. (*See* Pl.'s Cross-MSJ at 2, ECF 31 ("[T]he market that [HB 2362] regulates is similarly complex and highly regulated.").)

OAHHS misplaces its reliance on *Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018), to support its proposition that the "every conceivable application" standard no longer applies to any vagueness challenge after *Johnson* and *Dimaya*. Like *Dimaya*, *Guerrero* dealt with an immigration removal statute. *Id.* at 542. The court followed the standards set forth in *Johnson* and *Dimaya* and found that the challenged statute was not vague. *Id.* at 544–45. *Guerrero*, like *Johnson* and *Dimaya* before it, did not deal with business regulations such as the statute challenged here. *Guerrero* should likewise be limited to its context.

As further evidence that *Johnson*, *Dimaya*, and *Guerrero* announced no categorical rule for all vagueness cases, the Ninth Circuit in 2020 again applied the rule that "a facial vagueness challenge under the Due Process Clause of the Fourteenth Amendment can succeed only if the

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law 'is impermissibly vague in all of its applications.'" *See Monarch Content Mgmt. LLC v. Arizona Dep't of Gaming*, 971 F.3d 1021, 1030 (9th Cir. 2020) (citing *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494–95 (1982)). That case involved a vagueness challenge to an Arizona statute that regulated simulcasts of horse racing, which, as a business regulation, did not implicate the kind of significant individual liberty interests at issue in *Johnson, Dimaya*, and *Guerrero*, and was therefore subject to a less strict vagueness test. *Monarch Content Mgmt.*, 971 F.3d at 1025, 1030.

Importantly, in *Oregon Manufacturers & Commerce v. Oregon Occupational Safety & Health Division*, No. 1:22-cv-00875-CL, 2022 WL 17820312, at *8 (D. Or. Dec. 20, 2022), this Court recently rejected the precise arguments OAHHS makes here. In that case, this Court considered a vagueness challenge to administrative rules adopted to protect Oregon workers from exposure to excessive temperatures and hazardous levels of wildfire smoke while at work. *Id.* at *1. Like OAHHS, the plaintiffs argued that *Johnson*, *Dimaya*, and *Guerrero* establish that the vague-in-all circumstances standard no longer applies, even for cases involving business regulations. In rejecting the argument, this Court found that *Johnson* "very clearly applied to criminal law circumstances," and that the removal statutes in *Dimaya* and *Guerrero* were "at least quasi-criminal in nature" with deportation "'a particularly severe penalty.'" *Id.* at *9. After finding that the challenged rules implicated economic and business conduct, which is not constitutionally protected, the Court concluded that the plaintiffs had not and could not establish that the rules were vague in all circumstances. *Id.* at *10.

The other cases cited by OAHHS do not compel a different conclusion. In *Helicopters for Agriculture v. County of Napa*, 384 F. Supp. 3d 1035, 1039–40 (N.D. Cal. 2019), the Northern District of California interpreted *Guerrero* as "lower[ing] the burden for parties, like plaintiffs, that bring facial void for vagueness challenges as the government cannot defeat challenges by simply offering a single example where a law could be clearly applied." In addition to having no precedential value, that short opinion did not address or even contemplate the arguments raised

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here. Similarly, the Northern District of California in *Williams v. Alameda County*, No. 3:22-cv-01274-LB, 2022 WL 17169833, at *6 (N.D. Cal. Nov. 22, 2022), cited *Guerrero* as recognizing an exception to the "no set of circumstances" standard in facial vagueness challenges, with no analysis at all.

In sum, the law in this circuit still requires OAHHS to prove that HB 2362 is unconstitutionally vague in every conceivable application. OAHHS makes no effort to do so. Thus, OHA is entitled to summary judgment on OAHHS's void-for-vagueness due-process claim.

B. HB 2362 is not unconstitutionally vague, because health care is closely regulated and OHA has adopted rules and guidance that clarify the statute's scope.

Even if this Court declines to apply the "every conceivable application" standard, OAHHS has not established that HB 2362 is unconstitutionally vague. A statute can be impermissibly vague either because it fails to provide fair notice, where persons of ordinary intelligence have a reasonable opportunity to understand what conduct it prohibits; or it authorizes and encourages arbitrary and discriminatory enforcement. *Hill v. Colorado,* 530 U.S. 703, 732 (2000). The plaintiff "must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all…. Such a provision simply has *no* core." *Vill. of Hoffman,* 455 U.S. at 495 n.7 (cleaned up) (emphasis in original).

The Court must also consider whether the statute "applies to a select group of persons having specialized knowledge." *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 571 (9th Cir. 2018) (cleaned up). That is the case here because, as OAHHS acknowledges, health care is a complex and highly regulated field. (Pl.'s Cross-MSJ at 2, ECF 31.)

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1. The definition of "health care entity" is not unconstitutionally vague.

OAHHS's challenges to the definition of "health care entity," including the definition of "hospital system" do not pass muster. OAHHS claims that HB 2362 is unconstitutionally vague because the definition of "health care entity" is purportedly inadequate for certain businesses to know whether the statute applies to them. (Pl.'s Cross-MSJ at 13–18.) Or. Rev. Stat. § 415.500 (4)(a) provides the definition for "health care entity" by listing types of entities that are included and those that are excluded. (See Appendix A.) OAHHS challenges the statute's use of a list rather than the provision of a specific definition, but it offers no authority for the premise that a list is constitutionally inadequate. In fact, a list is sufficient to give the required notice. *See Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 972 (9th Cir. 2003).

OAHHS also contends that the definition for one item on the list of included entities—"hospital system"—is unconstitutionally vague because the terms "hospital" and "system" have "no specialized meaning when combined." (Pl.'s Cross-MSJ at 4.) OAHHS incorrectly asserts that "hospital system" "does not appear anywhere else in the statute or administrative rules, other than in the agency's own created definition." (*Id.* at 14.) In fact, OHA defined "hospital system" in Oregon Administrative Rule 409-070-0005(19).[2] OAHHS does not challenge the rule defining "hospital system," suggesting instead that by permitting OHA to define the term by rule, the statute is void for vagueness.

In disregarding OHA's rules and guidance documents and asking the Court to do the same, OAHHS errs. The rules and guidance documents are integral to this Court's analysis: "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Vill. of Hoffman Estates*, 455 U.S. at 494 n.5 (upholding a challenged ordinance by reviewing the city's guidelines,

[2] "Hospital system" is defined as "(a) A parent corporation of one of more hospitals and any entity affiliated with the parent through ownership, governance, control, or membership; or (b) A hospital and any entity affiliated with the hospital through ownership, governance, control, or membership. Or. Admin. R. 409-070-0005(19). The distinction between "administrative rules" and "the agency's own created definition" is not clear.

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created to help businesses determine whether the law applied to them) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)); *Cal. Pac. Bank*, 885 F.3d at 571 ("[A]n agency-issued instruction manual, even if lacking the force of law itself, can clarify what conduct is expected of a person subject to a particular regulation and thus mitigate against vagueness.") And the Supreme Court has emphasized that federal courts owe "deference to the executive … officials who are charged with implementing [the challenged law]." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008) (rejecting a facial vagueness challenge to a state's primary system for selecting candidates for general elections). In Oregon, OHA has "broad authority to promulgate rules necessary to administer the statutes that it is charged with administering." *Adamson v. Or. Health Auth.*, 289 Or. App. 501, 505 (2017); *see also* Or. Rev. Stat. § 413.042. Here, the rules provide a definition for "hospital system," which OAHHS does not challenge. That is the end of the inquiry.

OAHHS further challenges the residual clause in the statute's definition of "health care entity," again ignoring the administrative rules that address this very issue. (Pl.'s Cross-MSJ at 14.) Oregon Administrative Rule 409-070-0005(16)(g) restates the residual clause to include as a "health care entity": "Any other person or business entity that is a parent organization of, has control over, is controlled by, or is under common control with, an entity that has as a primary function the provision of health care items or services." The administrative rules provide further definitions, as set forth in Appendix A. Again, OAHHS's void-for-vagueness claim does not challenge the rules themselves, where some of OAHHS's concerns are addressed.

OAHHS also fails to acknowledge the publicly available sub-regulatory guidance documents. As discussed in the moving papers, OHA maintains a website providing numerous such documents that include detailed information on the program's parameters and procedures. OHA, Health Care Market Oversight Rules and Guidance, https://www.oregon.gov/oha/HPA/HP/Pages/HCMO-Rules.aspx (last visited Aug. 18, 2023). One such document, titled "Entities Subject to Review," describes "the types of entities that may be subject to review when

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materiality and transaction criteria are met" under the statutes and rules, and also provides a chart with helpful examples. *See* https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Entities-Subject-to-Review.pdf (last visited August 16, 2023). The statute, the rules, and the sub-regulatory guidance documents provide sufficient notice of which entities fall within the law.

OAHHS does not argue that its own members cannot determine whether they are considered "health care entities" under the statute. Instead, OAHHS proffers hypothetical business entities and questions whether each would fit within the definition of a health care entity. (Pl.'s Cross-MSJ 14.) But "speculation about possible vagueness in hypothetical situations not before [the court] will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1048 (9th Cir. 2005) (quoting *Hill v. Colorado*, 530 U.S. 703, 733, (2000)); *see also United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) ("Unless First Amendment freedoms are implicated, a vagueness challenge may not rest on arguments that the law is vague in its hypothetical applications, but must show that the law is vague as applied to the facts of the case at hand."). Additionally, as discussed in the OHA's moving papers, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Vill. of Hoffman*, 455 U.S. at 495.

Finally, the residual clause in the definition of "health care entity," as part of a statutory scheme regulating business activity, is nothing like the residual clause in *Johnson*, which could subject an individual to life in prison. OAHHS's comparison of the two is inapposite.

The statute's definition of "health care entity" is not unconstitutionally vague.

2. The definition of "material change transaction" is not unconstitutionally vague.

OAHHS's main challenge to the statute's definition of "material change transaction" is that the statute authorizes OHA to promulgate rules on certain provisions, which OAHHS characterizes as giving OHA "complete and standardless discretion…, which leaves both parties and OHA adrift with no legislative guidance at all." (Pl.'s Cross-MSJ 16.) But a careful review

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of the statute, the administrative rules, and the sub-regulatory guidance documents—which OAHHS again ignores—demonstrate that this characterization is entirely incorrect. (*See* Defs.' MSJ at 3; Appendix B.) The statute is mostly complete, with OHA providing minor supplementation through administrative rules. A ten-page guidance document, titled "Defining Essential Services & Significant Reduction," provides additional information, including descriptions and explanations of key definitions, flowcharts, tables, and examples. *See* https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Essential-Services-and-Significant-Reduction-Guidance-FINAL.pdf (last accessed August 16, 2023). The statute itself, OHA's implementing rules and guidance documents, and OHA's availability for informal consultation on the program provide ample notice to any business unsure of whether the statute applies and what the statute requires.

OAHHS also argues that the statute gives OHA a "blank check … to impose penalties on parties to a transaction well after the transaction has closed based on its assessment of what the parties could have anticipated occurring post-closing." (Pl.'s Cross-MSJ at 17.) Not so. Oregon Administrative Rule 409-070-0080(1) provides:

> Following approval of a material change transaction, the Authority may verify compliance with any conditions that the Authority included in its approval of the transaction and issue such additional orders, following notice and opportunity for hearing, as may be necessary to enforce compliance with the terms and conditions of the approval of the transaction; provided however, that the Authority may not impose new conditions that are unrelated to, or not reasonably required to enforce compliance with, those conditions, if any, that were included in the Authority's approval of the transaction. Such verification of compliance shall occur, at minimum, at the intervals required by ORS 415.501(19).

Further, HB 2362 provides for a maximum penalty of $10,000 for each offense, with "individual health professional[s]" subject to a maximum penalty of $1,000 for each offense. Or. Rev. Stat. § 415.900(1). Imposition of penalties are further subject to hearing, if requested, at which an entity or individual can argue that they lacked fair notice that their conduct would

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constitute a violation. *Id.* § (2); *see* Or. Rev. Stat. §§ 183.745(3)–(5) (providing for administrative hearings and judicial review).

This argument is belied by the statute and the rules.

3. The criteria for OHA's preliminary and comprehensive reviews are not unconstitutionally vague.

OAHHS also challenges the statutory review criteria as insufficiently objective and defined, encouraging arbitrary enforcement. (*Id.* at 18-19.) These arguments are without merit, suffering from the same flaw as the previous arguments: they fail to account for the administrative rules and the sub-regulatory guidance documents. A sub-regulatory guidance document entitled, "Criteria for Comprehensive Review of Material Change Transactions," details the criteria OHA will use to determine whether a transaction warrants comprehensive review.

Attempting to discount the relevance of the administrative rules and sub-regulatory guidance documents, OAHHS asserts that "[d]ue process requires, first and foremost, an ascertainable *legislative* standard," citing *Grayned*, 408 U.S. at 108. (Pl.'s Cross-MSJ at 20 (emphasis in original).) On that premise, OAHHS contends that "OHA's interpretations cannot fix the fundamental statutory vagueness problem." (*Id.*) But neither *Grayned* nor the cited law review article, nor the cited 1921 Supreme Court case support that proposition. Instead, as discussed above, it is well settled that "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." 455 U.S. at 494 n.5 (citing *Grayned*, 408 U.S. at 110); *see also Vill. of Hoffman*, 455 U.S. at 503 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope."); *Cal. Pac. Bank*, 885 F.3d at 571 ("Further, exactness can be achieved not just on the face of the statute, but also through limiting constructions given to the statute by the … enforcement agency.") (quotation marks omitted).

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OAHHS then turns to the rules and sub-regulatory guidance documents, first arguing that the breadth of the administrative rules in defining "services that are essential to achieve health equity"—"which includes a vast swath of health-care related services"—itself demonstrates "the complete absence of statutory guidance." (Pl.'s Cross-MSJ at 21.) But, as the Ninth Circuit recently held, "breadth is not the same thing as vagueness." *Pac. Choice Seafood Co. v. Ross*, 976 F.3d 932, 945 (9th Cir. 2020). And in the federal context, the Supreme Court has noted, "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quotation marks omitted).

Finally, OAHHS complains that the detailed criteria and examples provided in OHA's sub-regulatory guidance documents "reveals the absurdity of arbitrary standards." (Pl.'s Cross-MSJ at 22.) More specifically, OAHHS dismisses the eight criteria OHA developed, noting "There is no indication of where or how OHA came up with those criteria, but it considers them regardless."[3] (*Id.*) OAHHS then criticizes a specific metric OHA uses to determine whether a substantial reduction in essential services has occurred, asking, among other things, "Is 5 miles meaningful enough to be 'significant'?" (*Id.* at 23.) OAHHS further notes, "The sheer volume and complexity of the subregulatory guidance reveals the work that the agency performed to do

[3] OAHHS refers to a document titled, "Defining Essential Services & Significant Reduction." *Available at* https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Essential-Services-and-Significant-Reduction-Guidance-FINAL.pdf. The document itself explains that "OHA sought input from a Technical Advisory Group (TAG) to develop a rubric that health care entities can use to determine if a proposed relevant transaction is subject to review." *Id.* at 1. The advisory group circulated the draft document on January 12, 2022, and held a meeting on January 14 to explain the document and provide an opportunity for questions and input. *See* OHA, Health Care Market Oversight Rules and Guidance, https://www.oregon.gov/oha/HPA/HP/Pages/HCMO-Rules.aspx (last visited Aug. 17, 2023) (scroll down to section titled "Technical Advisory Group Meetings"); OHA, Health Care Market Oversight (HCMO) Program at 4–5 (Jan. 14, 2022), *available at* https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/TAG-1_Health-Care-Market-Oversight_HCMO_Program.pdf. OAHHS participated in the advisory group's development of the final document. *See* Letter from OAHHS to OHA and Health Policy & Analytics Div. directors (Jan. 21, 2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OAHHS-2362-TAG-Response-1-1.21.2022-v.F.pdf (providing written comments to advisory group meeting).

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the legislature's job." (*Id.*) OAHHS accordingly acknowledges the very details that defeat its vagueness claim.

The void-for-vagueness doctrine does not require that a statute be self-contained. Because OAHHS's arguments flow from the incorrect premise that it does, this Court should deny its motion for summary judgment and grant summary judgment in favor of OHA.

II. Because OHA is entitled to judgment on the federal claims, comity weighs heavily against a federal court invalidating a state statute under the State's constitution.

A district court's exercise of discretion in these circumstances "is informed by whether declining jurisdiction comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." *O'Connor v. Nevada*, 27 F.3d 357, 363 (9th Cir. 1994) (brackets, ellipsis, and quotation marks omitted). OAHHS's arguments in favor of retaining jurisdiction are either legally incorrect or merely recite the ordinary results of any district court's decision declining jurisdiction. In light of the comity interests implicated by OAHHS's facial challenge to a state statute based on the state constitution, this Court should decline supplemental jurisdiction after granting summary judgment in favor of OHA on the federal claim.

A. The State of Oregon does not apply the federal nondelegation doctrine.

One of the reasons OAHHS puts forth for retaining jurisdiction is its view that its unlawful-delegation claim under the Oregon Constitution "mirrors its federal counterparts." (Pl.'s Cross-MSJ at 34, ECF 31.) That argument fails for two reasons.

First, even if OAHHS were correct about the doctrinal standards, retaining supplemental jurisdiction would not serve the interests of economy, convenience, fairness, or comity on that basis. OAHHS's other claim is *not a federal nondelegation claim*. Thus, retaining supplemental jurisdiction would still require this Court to apply an analysis distinct from the due-process vagueness challenge. The economy and convenience served by having those distinct analyses

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performed in one action is inherent in any case involving supplemental jurisdiction and therefore cannot weigh in favor of retaining jurisdiction.

Second, OAHHS is wrong about the standards. Oregon appellate courts have repeatedly held that interpretation of state constitutional provisions is independent of the federal constitution, even when the provisions are similar. *See, e.g.*, *State v. Barnthouse*, 271 Or. App. 312, 323 n.1 (2015) ("It is this court's duty to interpret the protections afforded Oregonians by our state constitution independently from the federal constitution." (Quotation marks and brackets omitted.")); *State v. McCarthy*, 369 Or. 129, 153 (2021) (accord); *State v. Caraher*, 293 Or. 741, 756 (1982) (accord). In the instances in which Oregon appellate courts have cited to federal case law, they have done so because those state courts have, in their judgment, found them persuasive. *State v. Kennedy*, 295 Or. 260, 267 (1983). To the extent that Oregon courts might find the federal doctrine persuasive, that is a question that should be left to Oregon courts.

Further, OAHHS incorrectly describes the Oregon Supreme Court's decision in *General Electric Co. v. Wahle*, 207 Or. 302 (1956), as "relying on federal caselaw." (Pl.'s Cross-MSJ at 35, ECF 31.) Instead, the court in that case looked to its prior caselaw, as well as cases from other state courts of last resort that involved "the question of due process and an unlawful delegation of legislative power under their own state constitutions." *Gen. Elec. Co.*, 207 Or. at 329–31. In any event, *General Electric Co.* is no longer good law. *See Corvallis Lodge No. 1411 v. Or. Liquor Contr. Comm'n*, 67 Or. App. 15, 19–20 (1984) (rejecting petitioners' reliance on *General Electric Co.*, because "the emphasis of the prohibited delegation doctrine has shifted").

B. There is no "fairness" basis for retaining jurisdiction.

OAHHS asserts that "fairness . . . supports retaining OAHHS's state-law claim," but does not articulate any specific prejudice. (Pl.'s Cross-MSJ at 34–35, ECF 31.) Nor could OAHHS argue, given the brief procedural history, that it has exerted significant resources in this litigation. *See Shah v. Aerotek, Inc.*, No. 3:21-cv-422-SI, 2022 WL 951776 at *4 (D. Or. Mar. 30, 2022) (holding that "judicial economy and fairness weigh in favor of declining to exercise

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supplemental jurisdiction" because "neither party has exerted significant resources in federal court"). OAHHS's fairness argument is without merit. *See Gibson v. Cmty. Dev. Partners*, No. 3:22-cv-454-SI, 2022 WL 10481324 at *9 (D. Or. Oct. 18, 2022) ("[D]elay does not necessarily implicate fairness.").

C. Absent a viable federal claim, application of the state's constitutional nondelegation doctrine should be heard in state court.

Beyond a sentence asserting that "[e]conomy, convenience, fairness, and comity support retaining OAHHS's state-law claim" (Pl.'s Cross-MSJ at 34, ECF 31), OAHHS makes no response to OHA's argument that "the comity factor tips heavily *against* exercising jurisdiction." (Defs.' MSJ at 13, ECF 28.) That is likely because this is a quintessential case of comity weighing in favor of declining jurisdiction.

As OHA has explained, "the second claim asks this Court to invalidate a duly enacted state law on state-constitutional grounds." (*Id.*) That requires not only that this Court construe HB 2362, but that it also navigate state caselaw on Oregon's unlawful-delegation doctrine within the context of state administrative law. That is "the very sort of 'novel' issue that usually will justify declining jurisdiction over the claim." *O'Connor*, 27 F.3d at 363; *see id.* (affirming district court's decision to decline supplemental jurisdiction over "difficult question of Nevada constitutional law").

The interest in comity thus outweighs the remaining factors, judicial economy and convenience. To be sure, it would be more convenient for OAHHS to obtain adjudication of the state-constitution claims in its chosen forum. And it is also true that some efforts—here, pleading and dispositive motions—will need to be duplicated if OAHHS were to refile in state court. But that kind of convenience and economy applies in almost every case involving supplemental jurisdiction. That cannot outweigh the comity interests at play when a federal court considers whether to facially invalidate an entire state statute based on state constitutional law.

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In sum, because OHA is entitled to judgment on the federal claim, declining supplemental jurisdiction most sensibly accommodates the values of economy, convenience, fairness, and comity, and this Court should therefore dismiss OAHHS's state-law claim.

III. If this Court reaches the novel question raised by OAHHS under Oregon's unlawful-delegation doctrine, it should grant summary judgment for OHA.

HB 2362 more than meets the constitutional minimums required by Oregon's unlawful delegation doctrine. OAHHS has abandoned its argument that the Oregon Constitution requires objective standards, and it now argues instead that HB 2362 unlawfully delegates authority because it lacks a "full expression of legislative policy." (Pl.'s Cross-Mot. at 24–29, ECF 31.) OAHHS also argues that HB 2362 lacks adequate safeguards. But, under a proper construction of HB 2362 and application of Oregon's caselaw, the statute exceeds those requirements. This Court should accordingly grant summary judgment to OHA.

A. The federal cases OAHHS cites are inapposite.

As explained in Part II.A above, Oregon courts do not look to federal caselaw when deciding whether a state statute unlawfully delegates authority under the Oregon Constitution. OAHHS's citations to numerous federal cases is thus without merit. (*E.g.*, Pl.'s Cross-MSJ at 25, 28–29.) OAHHS does not cite any modern state-court decision on Oregon's unlawful-delegation doctrine that looks to federal caselaw, and OHA is not aware of any.

OAHHS's attempt to insert federal doctrine into Oregon's constitution underscores the comity concerns here. Absent a valid federal claim that justifies the exercise of supplemental jurisdiction, this Court should leave the interpretation and application of Oregon's constitution to Oregon's courts. If this Court nevertheless retains jurisdiction, it should disregard OAHHS's federal citations for the unlawful-delegation claim.

B. HB 2362 contains a "full expression of legislative policy."

OAHHS argues for the first time in its cross-motion and response that HB 2362 lacks a "full expression of legislative policy," as that standard is stated in *City of Damascus v. Brown*, 266 Or. App. 416 (2014). In its First Amended Complaint, OAHHS alleged that HB 2362

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violated Oregon's unlawful-delegation doctrine, because it lacked "clear and objective standards for identifying and reviewing transactions." (FAC ¶¶ 30, 79–80, 84, ECF 14.) As OHA noted in its Motion, the Oregon Constitution does not require that the legislature include "a statement of standards circumscribing [the] exercise" of delegated authority. *MacPherson v. Dep't of Admin. Servs.*, 340 Or. 117, 135 (2006); (*see* Defs.' MSJ at 14, ECF 28 (so stating)). OAHHS's change of tack implicitly concedes that its "clear and objective standards" count is without merit.[4]

That change of tack fares no better. The "full expression" standard requires only that the Oregon legislature fully express a *general* policy that identifies "central consideration[s]" for a state agency's exercise of authority. *State v. Reasoner*, 313 Or. App. 139, 148 (2021). At bottom, OAHHS's argument is that the Oregon legislature needed to expressly include statutory standards that circumscribe OHA's various regulatory duties under HB 2362. But that is not the law. *See Reasoner*, 313 Or. App at 148 (rejecting unlawful delegation argument that statute did "not expressly set out standards to guide" the exercise of delegated authority). This Court should reject OAHHS's argument.

1. The Oregon Constitution requires only an expression of *general* policy.

Review of modern Oregon decisions on unlawful delegation demonstrates that the "full expression" standard is not demanding.

First, the statute in *City of Damascus* is an example of when a statute lacks an expression of legislative policy. In that case, the petitioners had challenged House Bill 4029, which delegated to private landowners the legislative authority to change a city's boundary. *City of Damascus*, 266 Or. App. at 450. In construing HB 4029, the court noted that delineation of city boundaries is a legislative function. And although the statute specified which landowners were eligible and prescribed the procedure for changing the city's boundary, it did not state any policy purpose for delegating that legislative function to the landowners, nor did it provide any criteria

[4] The First Amended Complaint references the "full expression" standard in passing in paragraphs 79–80. (ECF 14.)

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for the landowners to consider when deciding whether to change city boundaries. *Id.* at 448; *see id.* at 427 n.2 (quoting entire legislative act). The statute essentially enabled each eligible landowner to make unconstrained legislative decisions. *Id.* at 450 n.9. The court held that the delegation was therefore unlawful. *See id.* at 449–50 ("It is the nature of the ultimate decision at issue here—changing a city's boundary—that distinguishes HB 4029 from other laws and that results in an impermissible delegation of legislative authority . . . .").

Second, *Reasoner* demonstrates that a statute need not contain *any* standards, so long as a general legislative policy is discernable after proper construction of the statute. In that case, a defendant had challenged Oregon Revised Statute § 419C.370, which delegated to the county juvenile courts the authority to waive "all cases involving violation of a law or ordinance relating to the use or operation of a motor vehicle to criminal or municipal court."[5] *Reasoner*, 313 Or. App. at 141 (cleaned up). After looking to legislative history, the court construed the legislative policy underlying Oregon Revised Statute § 419C.370 as "mak[ing] clear that the administrative capacity of a county's juvenile court to handle motor vehicle code violations without being 'swamped with routine traffic cases' is a central consideration in deciding whether to retain or waive all violations related to motor vehicles." *Reasoner*, 313 Or. App. at 148. That general legislative policy was sufficient to make the delegation permissible. *See id.* ("In our view, ORS 419C.370, properly interpreted, provides the substantive guidance that defendant contends is lacking.").

Third, as discussed in *Megdal v. Or. State Bd. of Dental Examiners*, 288 Or. 293 (1980), Oregon's unlawful-delegation doctrine dovetails with its administrative law. "Often very broad terms . . . are employed in laws that assign an agency responsibility for managing a program or pursuing a policy whose goals the law indicates only in the most general sense." *Id.* at 297. "[T]he constitutional issue in such broad delegations of authority is only whether it remains

[5] Oregon's juvenile courts generally have exclusive jurisdiction over criminal charges involving individuals under 18 years of age. Or. Rev. Stat. § 419C.005(1).

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possible for the agency and for reviewing courts to determine when subsequent agency rules or actions have honored and when they have departed from the general policy indicated by the politically accountable lawmaker." *Id.* The court further noted that "broad delegation of policymaking [is] least vulnerable" when the delegee is a public body with "political accountability for lawmaking as well as administration." *Id.* n.3 (quotation marks omitted).

Megdal cites *Warren v. Marion County et al.*, 222 Or. 307 (1960), which is still good law. *Megdal*, 288 Or. at 297 n.3. In *Warren*, the court explained that the legislature can express legislative policy in "abstractions," such as "'public convenience, interest or necessity' or 'unjust or unreasonable,' or 'for the public health, safety, and morals' and similar phrases." *Warren*, 222 Or. at 314.[6]

Today, Oregon courts refer to those general statements of legislative policy as "delegative terms." *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 228 (1980). Delegative terms are "delegated to the [administrative] agency the authority and responsibility to complete the legislation by rule." *Id.* at 230. Other examples of delegative terms include "'good cause,' 'fair,' 'unfair,' 'unreasonable,' [and] 'public convenience and necessity.'" *Blue Iguana, Inc. v. Or. Liquor Contr. Comm'n*, 258 Or. App. 535, 542 (2013) (quotation marks and ellipsis omitted).

Citing federal case law, OAHHS attempts to insert a scope-based analysis into the "full expression" standard. (Pl.'s Cross-MSJ at 28–29, ECF 31.) The federal analysis, however, does not apply in Oregon. *See Barnthouse*, 271 Or. App. at 324 (holding that Oregon Constitution is interpreted independently of U.S. Constitution). To the extent that the scope of a delegation is relevant, that is an issue for the "adequate safeguards" analysis. *See Meyer v. Lord*, 37 Or. App.

[6] *Warren* is also relied on in *City of Damascus*, 266 Or. App. at 441, *Reasoner*, 313 Or. App. at 147, and *MacPherson*, 340 Or. at 135–46.

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59, 65 (1978) (explaining that test is whether "the practical necessities . . . requiring the delegation of discretion outweigh the danger of discriminate . . . action" and that "the existence of Safeguards for those whose interests may be affected is determinative").

2. HB 2362 contains a full expression of legislative policy.

OAHHS challenges two aspects of HB 2362. First, OAHHS challenges OHA's rulemaking authority for preliminary-review criteria. (Pl.'s Cross-MSJ at 27, ECF 31.) Second, OAHHS challenges OHA's rulemaking authority for comprehensive-review criteria. (*Id.* at 28.) Both challenges turn on OHA's rulemaking authority under Oregon Revised Statute § 415.501(9). But HB 2362 contains a full expression of legislative policy for that authority, and both challenges therefore fail.

Specifically, Oregon Revised Statute § 415.501(9) refers to "criteria adopted by [OHA] under subsection (2)." (*See* OHA Mot. at 22, ECF 28 (so explaining).) Subsection (2), in turn, provides for OHA's authority to adopt criteria by rule "[i]n accordance with subsection (1) of [§ 415.501]." And in subsection (1), the legislature fully expressed its policy: "The purpose of this section is to promote the public interest and to advance the goals set forth in ORS 414.018 and the goals of the Oregon Integrated and Coordinated Health Care Delivery System described in ORS 414.570." Under binding precedent, that is enough. *See Warren*, 222 Or. at 314 (holding that legislative policy can be expressed in "abstractions," such as "'public convenience, interest or necessity' or 'unjust or unreasonable,' or 'for the public health, safety, and morals' and similar phrases"); *Blue Iguana*, 258 Or. App. at 542 (providing "'good cause,' 'fair,' [and] 'unfair,'" as other examples of delegative terms (quotation marks and ellipses omitted)).

Despite OHA walking through that analysis in its Motion (ECF 28), OAHHS's cross-motion response ends its analysis at subsection (2), without acknowledging the legislative policy expressed in subsection (1). That is not a reasonable way to construe the statute. *See City of Damascus*, 266 Or. App. at 444 (explaining that delegation analysis turns on the proper

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construction of the challenged statute). OAHHS's incomplete analysis demonstrates that its argument is without merit.

3. OAHHS does not argue that HB 2362's definitions lack a full expression of legislative policy.

OAHHS's new full-expression argument does not include a challenge to any of HB 2362's definitions. (*See* Pl.'s Cross-MSJ at 26–29 (discussing only criteria for preliminary and comprehensive review).) OAHHS has accordingly waived any argument on those points. *See Saban S. v. Kijakazi*, No. 3:20-cv-1549-SI, 2022 WL 843339 at *7 (D. Or. Mar. 22, 2022) (holding that failure to make argument constituted waiver). Even if OAHHS had included those arguments, they would fail.

As explained in OHA's Motion, OAHHS's complaint appeared to challenge three definitions under Oregon's unlawful-delegation doctrine, namely "health care entity," covered "transactions," and "essential services." (*See* OHA Mot. at 18–21, ECF 28.) Like the criteria for preliminary and comprehensive review, however, binding precedent requires the conclusion that HB 2362 contains full expressions of legislative policy.

First, HB 2362 provides a comprehensive definition for "health care entity," including by defining what does *not* come within that definition. Or. Rev. Stat. § 415.500(4); (*see also* Appendix A). OAHHS's complaint focused on the definition's use of the terms "primary function," "healthcare items or services," and "closely related to" in subparagraph (4)(a)(F), which defines "health care entity" as including:

> Any other entity that has as a primary function the provision of health care items or services or that is a parent organization of, or is an entity closely related to, an entity that has as a primary function the provision of health care items or services.

(FAC ¶ 33, ECF 14.) Although that definition does give OHA some discretion in determining what constitutes a "health care entity," it is a far more precise expression of legislative policy than the constitutionally adequate examples in *Warren* and *Blue Iguana* (for example, "for the public convenience").

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Second and similarly, the definition for "transaction" exceeds the full-expression requirement. As to that definition, OAHHS's complaint focused on the terms "corporate affiliation" and "eliminate or significantly reduce," as used in Oregon Revised Statute § 415.500(10), which defines the term "transaction" as used in HB 2362. (FAC ¶ 34, ECF 14.) The complaint also takes issue with the part of the definition relating to the creation of new entities. (*Id.*) Viewed in their full context, those parts of the definition are also far more precise than the examples in *Warren* and *Blue Iguana*:

> "Transaction" means:
>
> . . . . .
>
> (c) New contracts, new clinical affiliations and new contracting affiliations that will eliminate or significantly reduce, as defined by the authority by rule, essential services;
>
> . . . . .
>
> (e) Transactions to form a new partnership, joint venture, accountable care organization, [etc.], as prescribed by the authority by rule.

Or. Rev. Stat. §§ 415.500(10)(c)–(e).

Lastly, OAHHS's complaint challenges the definition for the term "essential services," Or. Rev. Stat. § 415.500(2), which is part of the definition for "transaction." (FAC ¶ 34, ECF 14.) In particular, OAHHS's complaint took issue with the terms "essential" and "health equity" as those terms are used in the definition (FAC ¶ 48–49, ECF 14.), which provides that essential services include "[s]ervices that are essential to achieve health equity." But those terms are quintessential delegative terms under Oregon administrative law, much like "public . . . necessity," "public health . . . and morals," and "fair." *See Warren*, 222 Or. at 314 (discussed above); *Blue Iguana*, 258 Or. App. at 542 (same). And even if any question remained, a look at context and legislative history demonstrates that the guiding legislative policy is preventing merger-and-acquisition activity that negatively affects vulnerable populations' and rural communities' access to care. *See Reasoner*, 313 Or. App. at 148 (looking to legislative history to

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construe legislative policy); *e.g.*, Or. Rev. Stat. § 415.501(9)(a)(A)(ii) (providing that OHA consider whether transaction would increase access in underserved areas); Staff Measure Summary, HB 2362 B, 2021 Reg. Sess. (Or. 2021)[7] (noting "access," "affordability, and price of health care as among issues discussed); Staff Measure Summary, HB 2362 A, 2021 Reg. Sess. (Or. 2021)[8] (noting "[a]ccess to care among vulnerable populations . . . and rural hospitals and clinics" as among issues discussed); Floor letter submitted by Senator Deb Patterson, HB 2362, June 25, 2021[9] ("Vote Yes" publication noting that "experts predict[] a post-pandemic tidal wave of healthcare consolidation").[10]

Notably, OAHHS understands the general policy of "health equity" enough to allege that it "supports health equity." (FAC ¶ 50, ECF 14.) In any event, because OAHHS has waived its argument on whether those definitions pass muster under Oregon's unlawful-delegation doctrine, this Court should not reach those questions.

C. HB 2362 provides adequate safeguards, including by incorporating the procedures of the Oregon Administrative Procedures Act.

OAHHS's challenge to HB 2362's delegation also fails because there are adequate safeguards to guard against arbitrary decision-making. First, OAHHS's concerns about community review boards' role in comprehensive review is misplaced. Those review boards do not find facts, and, in any event, board members are subject to direct-conflicts provisions in HB 2362, to OHA's rules, and to Oregon governmental ethics laws. Second and similarly, OAHHS's arguments about the Oregon Health Policy Board are without merit. The Health Policy Board only sets general policy, and its members are subject to governor appointment, senate confirmation, and government ethics laws. Lastly, in addition to its own safeguards, HB 2362

[7] https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/63277

[8] https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/59974

[9] https://olis.oregonlegislature.gov/liz/2021R1/Downloads/FloorLetter/3305

[10] Other legislative testimony available at https://olis.oregonlegislature.gov/liz/2021R1/Measures/Testimony/HB2362. See also meeting materials presented in public hearing for HB 2362, on February 9, 2021, available at https://olis.oregonlegislature.gov/liz/2021R1/Committees/HHC/2021-02-09-15-15/MeetingMaterials.

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incorporates the procedures in the Oregon Administrative Procedures Act, Or. Rev. Stat. §§ 183.310–.750, which is on its own an adequate safeguard under Oregon's unlawful-delegation doctrine. OAHHS's arguments to the contrary are without merit, and OHA is therefore entitled to judgment on the claim.

1. OAHHS misconstrues HB 2362 as giving community review boards factfinding authority.

OAHHS's cross-motion and response maintains the mistaken notion that HB 2362 delegates factfinding authority to community review boards. (Pl.'s Cross-MSJ at 30–31, ECF 31.) As explained in OHA's Motion (pp. 24–25, ECF 28), HB 2362 gives OHA discretion to appoint a community review board to assist with comprehensive reviews. Or. Rev. Stat. § 415.501(7)(a). Directly conflicted individuals, namely those "employed by an entity that is a party to the transaction that is under review or is employed by a competitor that is of a similar size," are expressly disqualified from appointment. *Id.* § (11)(a). Other conflicts require public notice and are subject to any additional applicable rules adopted by OHA. *Id.* §§ (11)(b), (24).

It is telling that OAHHS does not grapple with OHA's citation to the direct-conflicts provision in § 415.501(11) and to OHA's authority to include further conflicts provisions under subsection (24). (*See* Defs.' MSJ at 24, ECF 28 (citing subsection (11) and administrative rules).) Further, those conflicts provisions do not exist in a vacuum. In their role as review board members, those individuals are public officials subject to Oregon's ethics laws. Or. Rev. Stat. § 244.020 (defining "public official," for purposes of ethics laws, as "any person who . . . is serving . . . any of [the State's] political subdivisions"); Or. Admin. R. 199-008-0005(7) (clarifying that "public official" includes "any individual performing governmental functions"); Or. Admin R. § 409-070-0062(5) (providing for compensation for board members' "official duties"). Those laws independently impose requirements to avoid conflicts in governmental processes. *See* Or. Rev. Stat. § 244.020(1) (defining "actual conflict of interest"); *id.* § (13) (defining "potential conflict of interest"); *id.* § 244.120 (1)(c) (requiring that, after notification, "the appointing authority shall designate within a reasonable time an alternate . . . , or shall direct

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the official to dispose of the matter in a manner specified"). Thus, assuming conflicts provisions are required for review board members, adequate safeguards exist.

The Oregon Constitution, however, does not require conflicts provisions, because HB 2362 does not give any factfinding authority to the review board. Although HB 2362 authorizes the board to conduct part of the comprehensive review, the board is ultimately only authorized to issue recommendations. Or. Rev. Stat. § 415.501(18). Nothing in the statute gives the board any factfinding authority. *Compare City of Damascus*, 266 Or. App. at 447 ("[T]he initial *decision* . . . , including whether the facts exist to meet the withdrawal qualifications, is solely within the province of the private landowner . . . ." (Emphasis added.)), *with* Or. Rev. Stat. § 415.501(18) (providing that review board "shall make recommendations" and that it is OHA that makes findings in its order). At most, the statute authorizes the board to build the initial record on which its recommendation is based. *See* Or. Rev. Stat. § 415.501(15) (providing that board may hold public hearings).

OAHHS argues otherwise, asserting that an "analytical leap" is required to construe OHA's authority to "adopt" or "modify" the board's recommendation as also authorizing OHA to reject the recommendation. (Pl.'s Cross-MSJ at 31 n.4, ECF 31.) Not so. The word "recommendation" would be a poor choice of words if the legislature intended it to be binding on OHA. *See* Recommendation, *Meriam-Webster's Unabridged Dictionary*, https://unabridged-merriam-webster-com.soll.idm.oclc.org/unabridged/recommendation (accessed Aug. 15 2023) (defining "recommendation" as "a statement . . . giving advice or counsel"). Properly construed, all that HB 2362 requires is that OHA provide its reasons if it disagrees with aspects of the recommendation.[11]

[11] OAHHS also asserts that it is the "review board (not OHA)" that must "find and provide the public" with the information specified in § 415.501(15)(a) through (c). (Pl.'s Cross-MSJ at 31, ECF 31.) That is wrong. *See* Or. Rev. Stat. § 415.501(15) (providing that "*the authority* shall post" that information (emphasis added)); *id.* § (12) (providing that "[*t*]*he authority* may request additional information from" transaction participants (emphasis added)).

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In sum, OAHHS's arguments as to the review board's role in comprehensive reviews rely on false premises. Not only do several layers of conflicts provisions apply, but the board lacks any factfinding authority that would make those provisions a *constitutional* requirement. OAHHS's argument regarding the review board thus lacks merit, and this Court should reject it.

2. Members of the Oregon Health Policy Board are governor-appointed, senate-confirmed, and subject to statutory conflicts provisions.

OAHHS incorrectly describes the Oregon Health Policy Board as a "private board." (Pl.'s Cross-MSJ at 30, ECF 31.) The Health Policy Board "consist[s] of nine members appointed by the Governor," "subject to confirmation by the Senate." Or. Rev. Stat. §§ 413.006(1), (3). Among the board's duties is to "[b]e the policy-making and oversight body for the Oregon Health Authority . . . and all of the authority's departmental divisions." *Id.* § 413.011(1)(a).

In addition to the inherent safeguard of the appointment and confirmation processes, Oregon law provides that a majority of Board members must *not* have household incomes that derive from health care or a health care related field. *Id.* §§ 413.007(2)(a), (3). Oregon ethics laws further provide that "public official[s] serving on a board . . . shall" announce potential conflicts "prior to taking any action" in their capacity as a board member and, "[w]hen met with an actual conflict," announce the conflict publicly and "refrain from participating as a public official in any discussion or debate on the issue." Or. Rev. Stat. § 244.120 (2); *see Gallant v. Bd. of Med. Examiners*, 159 Or. App. 175, 187 (1999) (holding that conflicted medical board member would have been prohibited from participating in deliberations).

OAHHS's argument that the policy decisions of the Health Policy Board lack adequate safeguards is without merit.

3. Oregon's Administrative Procedures Act, on its own, provides adequate safeguards for the authority delegated to OHA.

The key safeguard in HB 2362 are the procedures imposed by the Oregon APA. HB 2362, of course, itself provides additional safeguards. For example, its definitions for "health care entity" and "transactions," and its provisions governing preliminary and comprehensive

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review contain numerous express criteria that must be applied and considered. *See Medford Firefighters Ass'n v. City of Medford*, 40 Or. App. 519, 526 (1979) (approving delegation in part because arbitrator's decision had to be based on "factors set out by the legislature"); (Defs.' MSJ at 18–20, 22–25, ECF 28 (so arguing)). And for comprehensive review involving a review board, HB 2362 provides for written exceptions to OHA's proposed orders, after which OHA must "issue a final order setting forth [OHA's] findings and rationale for adopting or modifying" the board's recommendations. Or. Rev. Stat. § 415.501(18); (*see* Defs.' MSJ at 24–25, ECF 28 (discussing those procedures)). *In addition* to those safeguards, HB 2362 incorporates procedures of the APA that Oregon Courts have held to be sufficient for delegation under Oregon's Constitution. *See State v. Heuker*, 83 Or. App. 180, 183–84 (1986) (holding that APA provided adequate safeguards for delegation).

The dispositive question is whether there are adequate safeguards to protect against arbitrary decision-making. *MacPherson*, 340 Or. at 135–36. Administrative contested-case proceedings in accordance with the APA are one such safeguard. *See* Or. Rev. Stat. § 183.417 (providing contested-case procedures); *id.* § 183.425(1) (providing for testimony and discovery); *id.* § 183.450 (providing procedure for entering evidence into contested-case record). Rulemaking proceedings under the APA are another. *Heuker*, 83 Or. App. at 183–84. And, for both circumstances, the APA provides for judicial review, which "is among the safeguards which serve to legitimatize broad legislative delegations of power to administrative agencies." *Sun Ray Drive-in Dairy, Inc. v. Or. Liquor Contr. Comm'n*, 16 Or. App. 63, 73 (1973).

HB 2362 incorporates all of those safeguards of the APA. That is, Oregon Revised Statute § 413.042 requires OHA rulemaking to be "[i]n accordance with applicable provisions of ORS chapter 183." And when OHA issues an order following preliminary or comprehensive review, that order may be contested in an APA contested-case proceeding. *See* Or. Rev. Stat. § 415.501(18) (providing that transaction party "may contest the final order as provided in ORS chapter 183"); Or. Admin. R. 409-070-0075 (providing that OHA "shall hold a contested case

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hearing upon a written request" by a "person aggrieved by any act, threatened act or failure of the Authority to Act under ORS 415.501"). Finally, OHA's final order after contested-case proceedings is subject to judicial review. *See* Or. Rev. Stat. § 183.482 (providing procedure and scope of review for contested-case orders).[12]

OAHHS makes three arguments to the contrary, all of which are without merit.

First, OAHHS cites *Corvallis Lodge*, arguing that the ability to seek judicial review of rules is insufficient. (Pl.'s Cross-MSJ at 33, ECF 31.) But in *Corvallis Lodge*, the petitioners argued that it was the Oregon Liquor Control Commission's *rule* that violated the unlawful delegation doctrine, *not* the underlying statute. *Corvallis Lodge*, 67 Or. App. at 19. Indeed, that case is an example of how the APA *is* an adequate safeguard, because it allows regulated entities to seek judicial review of agency rules they believe are unlawful. *See* Or. Rev. Stat. § 183.400 (providing for judicial review of agency rules).

Second, OAHHS describes OHA's argument as seeking to "allow[] APA review to replace more robust legislative safeguards." (Pl.'s Cross-MSJ at 33–34, ECF 31.) But the APA *is* an adequate legislative safeguard when, as with HB 2362, the regulatory scheme specifically incorporates the APA's statutory provisions. *See* Or. Rev. Stat. §§ 183.310–.750 (Administrative Procedures Act).

Lastly, OAHHS argues that APA review would not provide a safeguard for conflicted members of the Health Policy Board or the community review board. (Pl.'s Cross-MSJ at 34, ECF 31.) That is wrong. *See Knutson Towboat Co. v. Or. Bd. of Maritime Pilots*, 131 Or. App. 364, 366, 373 (1994) (reviewing, in procedure under Or. Rev. Stat. § 183.482, "whether the Board's decision is defective because of Board members' conflicts of interest" under government

[12] OAHHS might argue that § 415.501(6) does not expressly provide for contested-case proceedings of an OHA order approving a transaction with conditions. That argument would not be well-taken. Even if the order was not subject to contested-case proceedings, it would be subject to judicial review under Oregon Revised Statute § 183.484, under which a petitioner may make a record at a trial-level state court, with that court making findings based on the submitted evidence. *Norden v. State*, 329 Or. 641, 647 (2000).

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ethics laws). And, crucially, neither the Health Policy Board nor the community review board participate in the ultimate factfinding or decision-making processes provided in HB 2362.

Tellingly, OAHHS makes no meaningful response to OHA's argument about the adequacy of the actual APA procedures incorporated by HB 2362. (*See* Defs.' MSJ at 18–19, 21–25, ECF 28 (discussing APA procedures and arguing adequacy).) The APA, in conjunction with the other safeguards included in HB 2362, are adequate for delegation, and OAHHS cannot show otherwise.

CONCLUSION

For the reasons discussed above, the Court should grant summary judgment in Defendants' favor on both of OAHHS's claims and should deny OAHHS's cross-motion.

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Respectfully submitted,

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