IN THE COURT OF APPEALS OF THE

STATE OF OREGON

OREGON SOCIETY OF ENROLLED AGENTS, Petitioner, v. **STATE OF OREGON, acting By and Through the STATE BOARD OF TAX PRACTITIONERS**, Respondent.	Appellate Court No. A156623

PETITIONER'S REPLY BRIEF

Tyler Smith OSB No. 075287
Tyler Smith & Associates, P.C.
Attorney for Respondent
181 N Grant St. STE 212
Canby, OR 97013
(503)266-5590
Tyler@ruralbusinessattorneys.com
Of Attorneys for Petitioner

Ellen F. Rosenblum OSB No. 753239
Attorney General
Anna M. Joyce OSB No. 013112
Solicitor General
Jona J. Maukonen OSB No. 043540
Assistant Attorney General
Department of Justice
1162 Court Street NE
Portland, OR 97301-4096
(503)378-4402
Attorneys for Respondent

October 2014

INDEX

INDEX OF AUTHORITIES

RULES CITED

SUMMARY OF THE ARGUMENT

The text and legislative history of ORS 673.637(2) show that the board's 360 hour rule substantially changed the law without statutory authority to do so and is therefore invalid. Further, *Loving* is inapplicable to this case because it narrowly applies to tax preparers, not enrolled agents. The 360 hour rule directly conflicts with federal regulation of enrolled agents, and it is therefore invalid.

FIRST REPLY ARGUMENT

1. The Board of Tax Practitioners did not have the authority to adopt the 360 hour rule.

Respondent argues incorrectly that "shall" as used in ORS 673.637(2) is not mandatory because the legislature also requires an enrolled agent to pay a licensing fee and complete 30 hours of continuing education for license renewal. Resp. Br. 15-16. Respondent neglects to point out that both of those requirements are included in the requirements under ORS 673.637(2) which, if met, require that "the board shall license [an enrolled agent] as a tax consultant." ORS 673.637(2). The legislature put the licensing fee and continuing education requirements on an enrolled agent by statute; therefore, they cannot logically be examples of exceptions to the "shall" requirement.

Respondent also argues incorrectly that the board has broad power to adopt licensing requirements because the legislature granted the board the power to adopt rules "necessary to carry out the provisions of ORS 673.605 to 673.740." Resp. Br. 7. Respondent's arguments must fail here because the legislature's

intent to narrowly regulate enrolled agents is clear from the text and the legislative history of the statute. It is well established that the board does not have the authority to change or substantially add to the law. *Univ. of Or. Coop. Store v. State, Dep't of Revenue*, 273 Or 539, 550 (1975). Here, the legislature clearly exempted enrolled agents from a work experience requirement and stated exactly what an enrolled agent had to do to become an Oregon licensed tax consultant. The board acted outside of its delegated authority and substantially changed the law by adding another substantive requirement.

a. <u>Both the statutory context and the legislative history show that "shall" as used in ORS 673.637(2) is imperative</u>.

i. The context of ORS 673.637(2) shows that the legislature specifically intended to exempt enrolled agents from any work experience requirement and thus intended "shall" to be imperative.

Respondent relies on *Pendleton Sch. Dist. 16R v. State*, 345 Or 596 (2009), for its argument that "shall is not always mandatory." At issue in that case was a Constitutional provision stating that "The Legislative Assembly shall appropriate in each biennium a sum of money…and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency…." *Id.* The Court of Appeals held that "shall," in that context, was intended to mean "may" and that the legislature could either appropriate the amount or publish a report explaining why it had not. The Supreme Court rejected this decision while acknowledging that the text of the provision seemed

to be contradictory. The Supreme Court held that while the meaning of "shall" may vary by its context, the use here was not "permissive" and the legislature was using "shall" "as a directive or command that states a requirement." *Id*. at 607. The Court held that although the provision did contemplate a situation in which the legislature would not comply with the funding requirement, the word "shall" made the funding requirement mandatory nonetheless. Further, in cases where "shall" is construed as permissive or directive, Oregon courts have found that the statute was not "the essence of the thing to be done" but rather was "given with a view merely to the proper, orderly, and prompt conduct of the business." *Childs v. Marion Cnty.*, 163 Or 411, 414-415 (1940). Conversely, "[t]he courts are…reluctant to contravene or construe away terms of a statute which in themselves are mandatory, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction." *Stanley v. Mueller*, 211 Or 198, 208 (1957).

Respondent argues that because the legislature requires a fee for licensure in a separate statute, the use of the word "shall" in ORS 673.637(2) must be permissive. Respondent is wrong. As the Supreme Court demonstrated in *Pendleton*, even a seemingly contradictory term will not invalidate the mandatory use of the word "shall" when the legislature's intent is clear. For the reasons set forth in Petitioners' Opening Brief, the context of ORS 673.637(2) proves that the legislature intended that enrolled agents be licensed as tax consultants if they

are enrolled to practice before the IRS and if they pass an examination and comply with the requirements of ORS 673.605 through 673.740. The licensing fee and continuing education requirement are subparts of ORS 673.605 through 673.740. The fact that another statute requires a licensure fee does not negate the mandatory nature of the word "shall" because ORS 673.637(2) itself requires that the board shall license enrolled agents "as provided in ORS 673.605 to 673.740…." who pass the examination. Nowhere else in ORS 673.605 to 673.740 does the legislature require work experience for enrolled agents. In fact, as explained in detail in Petitioner's Opening Brief, the statute *specifically exempts* enrolled agents from such a requirement and even uses the word "may" with respect to other types of applicants for a tax consultant or tax preparer license showing its careful choosing of the word "shall" in ORS 673.637(2) instead of "may" or another permissive word. *See* 673.637(1).

Furthermore, unlike the statute in *Childs* which was not "the essence of the thing to be done" and was merely procedural, ORS 673.637(2) is a substantive law setting forth requirements for licensure which were created by the legislature specifically for enrolled agents as distinct from any other applicant. This statute is "the essence of the thing to be done." As was the Court in *Stanley v. Mueller*, this Court should be careful not to construe a mandatory word as permissive where the statute does not clearly signify that construction. The text here in no way signifies a permissive construction. It does just the opposite by requiring

the board to license enrolled agents who meet the requirements listed in ORS 673.637(2). The board's 360 hour rule creates an additional requirement contrary to the directive of the legislature and thus is invalid.

ii. Legislative history shows that the legislature specifically intended to exempt enrolled agents from any work experience requirements and thus intended "shall" to be imperative.

Where legislative intent is unclear from the text of a statute, the Court should consider the legislative history to interpret the statute's meaning. *State v. Gaines*, 346 Or 160 (2009). Although the text is clear here, the legislative history also supports invalidating the board's 360 hour rule. As Respondent has pointed out, the legislature has indeed given lengthy consideration to crafting ORS 673.605 to 673.740 to "protect the public from inexperienced or ill-prepared tax preparers." Resp. Br. 10. Respondent explained that due to the board's expression of concern that it had no control over "the degree of expertise of enrolled agents," and so the "Legislature imposed an examination requirement on enrolled agents." *Id.* Respondent argues that this change "demonstrates that the legislature is concerned about protecting Oregon taxpayers from inexperienced tax preparers." However, as concerned as the legislature may have been about protecting taxpayers from inexperienced tax preparers it *specifically exempted* enrolled agents from a work experience requirement and, although it has enacted other requirements applicable to enrolled agents, it has never reinstated the work experience requirement. In fact, in 2011, the legislature

increased the work experience requirement for other applicants for licensure as a tax consultant from 780 hours to 1,100 hours, but the legislature did not impose *any such requirement* on enrolled agents. *See* House Bill (HB) 2066 (2011). Respondent is correct that the legislature was concerned with protecting taxpayers from inexperienced tax preparers, and in response to that concern, the legislature has enacted laws to effect its goals. However, none of those laws include a work experience requirement for enrolled agents. Legislative commentary about tax preparers is distinguished from that of an enrolled agent. (*See e.g.* ORS 673.605 (definitions of tax preparer and tax consultant) and ORS 673.637(2) (distinction of tax consultant who is an enrolled agent)). If anything, the legislative history shows the legislature decided *not* to enact a work experience requirement for enrolled agents only after careful consideration. The legislature intended to limit the licensure requirements for enrolled agents to those listed in ORS 673.637(2), and the board does not have the authority to do override the legislature.

b. <u>ORS 673.605 to 673.740 does not give the board the authority to substantially change the law</u>.

Where an administrative agency is given the power to adopt regulations which are necessary and proper to carry out the provisions of the enabling statute, that rule-making power is broad. *Joint Council of Teamsters No. 37 Int'l Bhd. of Teamsters, etc. v. Or. Liquor Control Comm'n*, 46 Or App 135, 139 (1980). Nevertheless, this broad rule-making power is necessarily constrained by the

statute itself. *Id.* "The Supreme Court…[has] consistently held that an administrative agency may not, by its rules, amend, alter, enlarge, or limit the terms of a legislative enactment. *Id.* "The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare." *Univ. of Or. Coop. Store*, 273 Or at 550. "The [agency] cannot rewrite the law, it can only fill in the interstices in the legislation to aid in the accomplishment of the statute's purpose." *Id.* at 551.

> The tendency of administrators to expand the scope of their operations is perhaps as natural as nature's well-known abhorrence to a vacuum. But no matter how highly motivated it may be, the tendency to make law without a clear direction to do so must be curbed by the overriding constitutional requirement that substantial changes in the law be made solely by the Legislative Assembly or by the people.

Oregon Newspaper Publishers Ass'n v. Peterson, 244 Or 116, 123-24 (1966) (Citing Or Const, Art IV § 1.).

In *Univ. of Or. Coop. Store*, the Oregon Department of Revenue adopted a regulation defining a corporation "organized exclusively for educational purposes" as one which offered "a regular course of instruction in an institution established for that purpose." The Court held that such a definition was "an attempt to drastically limit the scope of the exemption 'for educational purposes'" provided by Oregon law. Although the Department of Revenue had the authority "to make regulations as necessary to enforce income tax laws," such a regulation was an act tantamount to rewriting the law and it did "much more than add meaning to the bare bones of the statute." *Univ. of Or. Coop. Store,* 273 Or at

551. The Court concluded that the agency exceeded its authority in adopting the rule.

In *Council of Teamsters*, the Oregon Liquor Control Commission was also given authority to adopt regulations "necessary or proper to enable it to carry out fully and effectively all the purposes of [the Act]." *Council of Teamsters*, 46 Or App at 138. In that case, the legislature required that beverages be "pasteurized" without defining that term. The agency adopted a definition of "pasteurize" which conflicted with its universally recognized definition. The Court of Appeals held that by adopting a definition broader than that the legislature intended, the agency exceeded its authority. The Court stated that "regulations may only be adopted to carry out provisions of the act, not to change them." *Id.* at 139. The Court also quoted the Oregon Supreme Court and stated that the agency "may write rules and enforce them but may not 'undertake anything contrary to the statute itself.'" *Id.*

Here, Respondent argues that because the enabling statute grants the board the power to adopt rules "necessary to carry out the provisions of ORS 673.605 to 673.740," the legislature gave the board the authority to create a new regulation which requires enrolled agents to have and provide proof of 360 hours of work experience. Respondent also claims that ORS 673.640(1) (giving the board power to license applicants who demonstrate "to the satisfaction of the board, fitness for a license") and 673.730(1) (giving the board the power to "determine

qualifications of applicants for licensing as a tax consultant or tax preparer" and "to issue licenses to qualified applicants upon their compliance with [the enabling statute] and the rules of the board.") provide the board with such broad rule-making power sufficient to authorize the board to add to the qualifications the legislature has expressly stated for enrolled agents. While the legislature has given the board broad power to carry out the statute, the board "may not, by its rules, amend, alter, enlarge, or limit the terms of a legislative enactment." *Univ. of Or. Coop. Store*, 273 Or at 550. Although the board may "write rules and enforce them…[it] may not undertake anything contrary to the statute itself." *Council of Teamsters*, 46 Or App at 139. As explained both in Petitioner's Opening Brief and above, the 360 hour rule substantially changes the law as the legislature enacted it. The history of the statute shows clearly that the legislature specifically exempted enrolled agents from a work experience requirement. The legislature even addressed its concerns about taxpayer protection by amending the current law to increase the work experience requirement for other applicants; however, it left ORS 673.637(2) unchanged leaving enrolled agents free from any work experience requirement at all. *See* HB 2066 (2011). The board's 360 rule "does much more than add meaning to the bare bones of the statute." *Univ. of Or. Coop. Store*, 273 Or at 551. The rule does what the legislature did not do by adding different requirements to the terms the legislature set forth for licensing enrolled agents.

Respondent's argument must also fail because, under Respondent's theory, there could be no limit to the agency's power and discretion to license enrolled agents. Respondent argues that the board has broad authority to adopt any additional qualifications for licensure as a tax consultant even if those additional rules exceed what the legislature mandated. Under Respondent's argument, the board could adopt a work experience requirement far greater than 360 hours and the board could adopt other licensing requirements which substantially change those set by the legislature simply because they were given some licensing power. The board's authority under Respondent's proposed holding is wildly overbroad and treads into lawmaking constitutionally reserved to the legislature. The board acted outside of its authority, and the 360 rule is therefore invalid.

SECOND REPLY ARGUMENT

1. The 360 hour rule is preempted by federal law.

As an initial matter, Respondent argues that "the board's rule has no impact on an enrolled agent's practice before the IRS" and "the board's rule – unlike the federal regulation – is not directed at 'practice before the IRS.'" Resp. Br. 22-23. Petitioner accepts Respondent's concession that enrolled agents may represent clients before the IRS in the state of Oregon without being licensed as a tax consultant. However, this court should go further and hold that federal law preempts the board's 360 hour rule entirely.

Respondent incorrectly argues that *Loving v. IRS*, 742 F3d 1013 (D.C. Cir

2014) is controlling in this case. In *Loving*, the D.C. Circuit Court held that a tax preparer filing tax returns with the IRS is not "practicing before the IRS" and therefore the IRS's statutory authority to regulate taxpayer "representatives" does not allow the IRS to regulate tax preparers *Id.* *Loving* is inapplicable here because its holding applies narrowly to tax preparers, not enrolled agents. The *Loving* court explicitly stated that "tax preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf." *Id.* Enrolled agents, by contrast, are specifically licensed to act on the taxpayer's behalf. Respondent wrongly equates a tax preparer with an enrolled agent and misapplies the holding in *Loving*.

Under Oregon law, a tax preparer is "any person who is licensed under ORS 673.605 to 673.740 as a tax preparer." ORS 673.605(8). A "tax consultant" is "a person who is licensed under ORS 673.605 to 673.740 to prepare or advise or assist in the preparation of personal income tax returns for another and for valuable consideration." ORS 673.605(6). An enrolled agent is an individual licensed to practice before the IRS. 31 CFR § 10.3(1)(c). In his practice before the IRS, an enrolled agent will necessarily prepare, advise, or assist in preparing personal income taxes.[1] Therefore, an enrolled agent's use of his federal license

[1] Federal law expressly allows enrolled agents to represent a taxpayer from the very first step of filing income tax returns. 26 CFR 1.6012-1(a)(5) (Income tax returns may be made by an agent for certain reasons). Further, as part of the presentation of a case before the IRS and the negotiation of a settlement, an enrolled agent must file any missed income tax returns on behalf of his or her

to practice before the IRS will fall within Oregon's definition of tax consulting thus subjecting an enrolled agent to a penalty under ORS 673.615. Respondent asserts that "filing a tax return does not involve "presenting a case" to the IRS. Respondent fails to understand, however, that while simply filing a tax return may not involve "presenting a case" to the IRS, presenting a case to the IRS almost always involves filing tax returns and always involves advising.

Continuing the faulty application of *Loving*, Respondent argues that the IRS, through the AFSP, has expressly acknowledged and endorsed state licensing of tax preparers. Resp. Br. 26. However, Respondent even acknowledges that the AFSP only applies to tax preparers and does not apply to enrolled agents. Resp. Br. 25. Through the AFSP, the IRS may have endorsed state licensing of tax preparers because *Loving* held that such regulation was not within the statutory authority of the IRS. However, state regulation of enrolled agents is an entirely different animal. Although a state may regulate tax preparers without butting up against federal law, a state may not prohibit an enrolled agent from filing tax returns as part of his practice before the IRS without running afoul of federal law. Enrolled agents do fall within Oregon's definition of a tax preparer and a tax consultant in their ordinary practice as enrolled agents. The board's rule makes it illegal for an enrolled agent to use his or her federally issued license without providing proof of 360 hours of work experience. This is an "additional

---

clients. 26 CFR 301.6159-1(c)(1)(iii)(B)(1).

condition not contemplated by Congress" and it is invalid. *Sperry v. Fla*, 373 US 379, 384 (1963).

Respondent argues finally that the 360 hour rule is capable of being applied constitutionally and is therefore valid even if it is preempted by federal law. Respondent rests this argument on the idea that the rule also applies to tax consultants who prepare and file Oregon tax returns which are not regulated by federal law. However, the 360 hour rule applies exclusively to enrolled agents. Under the board's rule, an enrolled agent will not be licensed as a tax consultant for any purpose without first complying with the 360 hour rule. Enrolled agents, by definition are those federally licensed to practice before the IRS. Neither Oregon law nor the rule at issue provides for an enrolled agent to be licensed as a tax consultant who *only* advises, prepares taxes, and represents clients regarding federal matters. On its face, it applies to all enrolled agents in Oregon. The 360 hour rule is not capable of being applied constitutionally; therefore, it is invalid.

Conclusion

For the reasons stated above and the reasons in Petitioner's Opening Brief, this Court should declare the 360 rule invalid.

Dated: October 30, 2014

Tyler Smith & Associates, P.C.

/s/ Tyler Smith
Tyler Smith (OSB# 075287)
Of Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,295 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated: October 30, 2014

Tyler Smith & Associates, P.C.

/s/ Tyler Smith

Tyler Smith (OSB# 075287)
Attorney for Petitioner
181 N Grant St STE 212
Canby, OR 97013
(503)266-5590

PROOF OF SERVICE

Certificate of Filing

I certify that on October 30, 2014, I directed the original of Petitioner's Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

Certificate of Service

I certify that on October 30, 2014, I served the Petitioner's Reply Brief upon Respondent, by mailing two copies, with postage prepaid, in an envelope addressed to:

Jona J. Maukonen
Department of Justice
1162 Court Street NE
Portland, OR 97301-4096
Jona.j.maukonen@doj.state.or.us

Tyler Smith & Associates, P.C.

By: /s/ Tyler Smith
Tyler Smith (OSB# 075287)
Attorney for Petitioner
181 N Grant St STE 212
Canby, OR 97013
(503)266-5590