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.	CA A156623

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

The State Board of Tax Practitioners (board) accepts petitioner's statement of the case in this rule challenge except its statement of facts which contains factual information that is not part of the record on review. Judicial review of a rule is "limited to an examination of: (a) The rule under review; (b) The statutory provisions authorizing the rule; and (c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures." ORS 183.400(3). Accordingly, this court should strike or disregard the declarations petitioner attached to its brief and not consider anything in petitioner's statement of the facts or argument that depends upon those declarations.[1] *See Merrick v. Board of Higher Education*, 103 Or App 328, 334, 797 P2d 388 (1990) (striking irrelevant affidavit in rule challenge). Because petitioner has not challenged the board's procedure for adopting its rule, which is the only issue to which facts matter, the board has not presented a separate statement of facts.

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[1] Petitioner appears to rely on the declarations primarily to establish standing to challenge the rule. However, no specific interest is required for a facial rule challenge. *See* ORS 183.400(1) ("any person" may petition the Court of Appeals to determine the validity of an agency rule); *Kellas v. Dep't of Corrections*, 341 Or 471, 477-78, 145 P3d 139 (2006) (petitioner need not establish any personal interest in the rule to establish standing).

Summary of Argument

The board licenses tax preparers and tax consultants. Such licensees may charge for preparing personal income tax returns. Petitioner challenges the validity of OAR 800-020-0015(5). That rule provides that in order for an enrolled agent who is authorized to practice before the Internal Revenue Service (IRS) to be licensed as a tax consultant in Oregon, the enrolled agent must demonstrate that he or she has 360 hours of experience. The board had authority to adopt the rule because the legislature has given it broad rulemaking authority, including with respect to licensing tax consultants. Further, the legislature has specifically given the board discretion to determine whether an applicant is fit for a tax consultant license. The board reasonably determined that an enrolled agent must demonstrate that he or she has a minimum amount of work experience to qualify for a tax consultant license.

Moreover, the rule does not conflict with ORS 673.637(2) which exempts enrolled agents from the statutory 1,100-hour work experience requirement imposed on other applicants for a tax consultant license. The rule does not impose the same 1,100-hour requirement. And it is consistent with the legislative history of the statute which demonstrates that the legislature intended the board to protect consumers in Oregon from inexperienced or unqualified tax preparers and consultants.

Further, federal law and regulation of enrolled agents does not preempt the board's rule. The most obvious reason that there is no preemption is that Congress and the IRS have expressly recognized and endorsed state regulation and licensing of tax preparers. Congress provided that "taxpayer identity information" which is generally protected from disclosure, may be provided to "any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of tax return preparers" for the purpose of "licensing, registration, or regulation of tax return preparers." 26 USC § 6103(k)(5). That statute demonstrates that Congress did not intend to occupy the field of tax preparer regulation. The IRS also acknowledged and endorsed state licensing of tax preparers in its recently adopted Annual Filing Season Program. Revenue Procedure 2014-42.[2] And contrary to petitioner's argument, preparing and filing tax returns with the IRS is not the type of "practice before the IRS" for which the IRS approves enrolled agents. Thus, there is no conflict between the board's rule and federal law.

Finally, even if there were preemption, it would only preclude applying the rule to an enrolled agent who is filing federal tax returns. Because the board's rule also applies to a tax consultant who charges for preparing an

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[2] Available at: http://www.irs.gov/pub/irs-drop/rp-14-42.pdf.

Oregon state income tax return, which would not be preempted by any federal regulation, the rule is facially valid.

ANSWER TO FIRST ASSIGNMENT OF ERROR

The Board did not exceed its authority when it adopted OAR 800-020-0015(5).

A. Preservation

This is a facial rule challenge brought under ORS 183.400. No preservation rules apply.

B. Standard of Review

The court may declare a rule invalid only if the rule violates a constitutional provision, exceeds the agency's statutory authority, or was adopted without compliance with applicable rulemaking procedures. ORS 183.400(4); S*mith v. Department of Corrections*, 219 Or App 192, 194-195, 182 P3d 250 (2008), *rev den*, 345 Or 690 (2009), *cert den*, 129 S Ct 2853 (2009).

ARGUMENT

A. Background

For context, the board provides a brief background on the pertinent statutes and the rule at issue. Oregon law requires that a person be licensed as either a tax consultant or tax preparer if the person charges a fee to assist another person in preparing personal income tax returns. ORS 673.615. Both

licenses require that the licensee meet certain minimum qualifications and pass a specific examination. ORS 673.625(1)-(3). Tax consultants must also have at least 1,100 hours of experience preparing taxes. ORS 673.625(3)(a). In addition to providing direct tax preparations services, a tax consultant may supervise an income tax preparer. ORS 673.615(2). An income tax preparer must work under the supervision of a tax consultant, an attorney, or a certified public accountant. ORS 673.615(2).

Attorneys and certified public accountants are exempt from the licensing requirements. ORS 673.610. When the legislature first created the board in 1973, it also exempted enrolled agents from the board's licensing requirements. ORS 673.610(6) (1973). An enrolled agent is a person authorized to practice before the IRS based on passing a written examination or by virtue of past employment in specific IRS positions. 31 CFR § 10.4(a) and (d).

In 1977, the legislature eliminated the licensing exemption for enrolled agents. Or Laws 1977, ch 100, § 1. The legislature required that an enrolled agent be licensed in order to act as a tax consultant in Oregon. ORS 673.637(2) (1977). However, the legislature also exempted enrolled agents from some of the licensing requirements including passing an examination and having at least two "tax seasons" experience as a tax preparer. Or Law 1977, ch 100, § 3; ORS 673.625(3)(a) (1977). In 1983, the legislature again changed the law, this

time to require that an enrolled agent pass a state examination to obtain a tax consultant license. Or Laws 1983, ch 110, § 5.

In 2013, the board adopted, by rule, a work experience requirement for enrolled agents. The rule provides:

> An Enrolled Agent applicant who is enrolled to practice before the Internal Revenue Service, holding a valid treasury card, shall submit verification by the applicant's employer or employers, on forms prescribed and furnished by the Board, that the applicant has completed a minimum of 360 hours work experience during at least two (2) of the last five (5) years.

OAR 800-020-0015(5). Petitioner challenges the rule.

Petitioner asserts in its first assignment of error that the board lacked authority to adopt a rule imposing an additional licensing requirement on enrolled agents. Petitioner asserts in its second assignment of error that federal law preempts the board's rule. As explained below, the rule is valid.

B. The board had authority to adopt a rule requiring that an enrolled agent meet minimum work experience standards to be a licensed tax consultant.

In determining whether an agency exceeded its authority in adopting a rule, this court considers whether the agency had rulemaking authority and whether the substance of the rule conflicts with relevant legal standards. *Parenthood Assn. v. Dep't of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984). Here, the board met both requirements.

1. The rule falls within the board's rulemaking authority.

The board had authority to adopt a rule requiring that enrolled agents have 360 hours of work experience to be a licensed tax consultant. The legislature gave the board broad power to regulate tax preparers and consultants, including the power to adopt licensing requirements. In particular, the legislature gave the board the powers granted by ORS 673.605 to ORS 673.740, which include licensing and disciplinary powers, and the power to adopt rules "necessary to carry out the provisions of ORS 673.605 to 673.740." ORS 673.730.[3]

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[3] ORS 673.730 provides in pertinent part:

> The State Board of Tax Practitioners shall have the following powers, in addition to the powers otherwise granted by ORS 673.605 to 673.740, and shall have all powers necessary or proper to carry the granted powers into effect:
>
> (1) To determine qualifications of applicants for licensing as a tax consultant or a tax preparer in this state; to cause examinations to be prepared, conducted and graded; and to issue licenses to qualified applicants upon their compliance with ORS 673.605 to 673.740 and the rules of the board.
>
> (2)(a) To restore the license of any tax consultant or preparer whose license has been suspended or revoked.
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> * * * * *
>
> (3) To investigate alleged violations of ORS 673.605 to 673.740, or any rule or order adopted thereunder. * * *

Footnote continued...

Within those statutory powers, the legislature provided the board with discretion in licensing. The legislature gave the board the power to license an applicant who "demonstrates *to the satisfaction of the board* fitness for a license." ORS 673.640(1) (emphasis added). Along with that discretion, the legislature acknowledged that the board would adopt licensing rules by providing that the board will "determine qualifications of applicants for licensing as a tax consultant or a tax preparer" and create licensing examinations. ORS 673.730(1). Moreover, the legislature directed the board to "issue licenses to qualified applicants upon their compliance with ORS 673.605 to ORS 673.740 *and the rules of the board*." ORS 673.730(1) (emphasis added). By providing the board general rulemaking authority, giving the board discretion to determine licensee "fitness," and directing the board to issue

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(...continued)

> (4) To enforce the provisions of ORS 673.605 to 673.740 and to exercise general supervision over tax consultant and tax preparer practice.
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> * * * * *
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> (7) To formulate a code of professional conduct for tax consultants and tax preparers.
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> * * * * *
>
> (10) To adopt rules pursuant to ORS chapter 183 necessary to carry out the provisions of ORS 673.605 to 673.740.

licenses to individuals who comply with the applicable "rules of the board," the legislature authorized the board to adopt licensing rules.

Petitioner argues that the legislature authorized the board only to determine *whether* an applicant for a tax consultant met the statutory qualifications for licensure and not to impose any requirements beyond those in the statutes. (Pet Br 8-9). However, that ignores the last portion of ORS 673.730(1), which expressly recognizes that an applicant for a tax consultant license must comply with the "rules of the board." That reference to board rules demonstrates—particularly in light of the board's discretion to determine "fitness" for a license—that the legislature understood the board could adopt, by rule, additional requirements for a tax consultant license.

Petitioner also argues that nothing in ORS 673.637(2) suggests that the legislature intended that the board adopt work experience requirement for enrolled agents. (Pet Br 8-9). That statute exempts enrolled agents from certain licensing requirements and requires that enrolled agents pass an examination. ORS 673.637(2).[4] While the statute does not contain an express reference to a 360-hour work experience requirement for enrolled agents, the board nonetheless has authority to impose such a requirement if it deems it necessary to determine the fitness of an enrolled agent to be a licensed tax consultant. In

[4] The board quotes ORS 673.637(2) and discusses it at length in the next section of its brief.

particular, as described below, such a requirement is consistent with the board's consumer protection charge from the legislature.

The legislative history of the board's statutes demonstrates that the legislature intended that the board operate to protect the public from inexperienced or ill-prepared tax preparers. The legislature initially created the board and gave it licensing authority in response to concerns about tax-preparation fraud and incompetence. Or Laws 1973, ch 387; Testimony, Oregon House Revenue Committee, HB 2271, Feb 23, 1973, Ex A (statement of L.J. Scheer, Association of Tax Consultants). The aim was to improve performance standards and education of tax preparers and ensure that they kept up with tax law changes. Testimony, Oregon House Revenue Committee, HB 2271, Feb 23, 1973, Ex A.

Although the legislature initially exempted enrolled agents from the licensing requirements for tax consultants, it removed that exemption in 1977. Or Laws 1977, ch 100, § 1. The legislature removed the licensing exemption because it created problematic loopholes. Testimony, House Committee on Business & Consumer Affairs, HB 2086, Jan 26, 1977, Ex E (statement of Bill Bogen, Association of Tax Consultants), Ex O (Memo from Elinor Blundell, State Board of Tax Service Examiners). Specifically, a tax consultant who had his or her license revoked by the board could pass the federal enrolled agent examination and then continue to work in the state as a tax consultant. Minutes,

House Committee on Business & Consumer Affairs, HB 2086, Jan 26, 1977 (statement of Laurence Scheer, State Board of Tax Service Examiners). Similarly, a licensed tax consultant could avoid licensing requirements such as the continuing education by also becoming an enrolled agent. Testimony, House Committee on Business and Commerce, HB 2086, Jan 1, 1977, Ex O.

At that time, the board also expressed concern that it had no control over the "degree of expertise" of enrolled agents. *Id.* Six years later, the legislature imposed an examination requirement on enrolled agents. Or Laws 1983, ch 110, § 5. The legislature was again concerned with consumer protection. *See* Minutes, Senate Committee on Business & Consumer Affairs, HB 2093, May 2, 1983, (Statement of Mr. Grandstad, Legislative Research) (purpose of regulating tax preparers and consultants is consumer protection). In particular, the change was driven by concern that some enrolled agents were not sufficiently knowledgeable about Oregon tax regulation and policy. Minutes, Senate Committee on Business & Consumer Affairs, HB 2093, May 2, 1983 (statement of Ivan Hoyer, Board of Tax Service Examiners); HB 2093 Staff Measure Summary.

The history demonstrates that the legislature is concerned about protecting Oregon taxpayers from inexperienced tax preparers. Accordingly, although the legislature did not expressly adopt a work experience requirement for enrolled agents, it recognized the importance of ensuring such individuals

are qualified. It authorized the board to impose requirements to ensure the fitness of all tax consultants, including those who are also enrolled agents, and the rule fits within that directive.

Petitioner also argues that the board may only adopt "necessary" rules and that the work experience rule for enrolled agents is not "necessary" because it did not exist for the prior 36 years. (Pet Br 9-10). As previously discussed, the legislature authorized the board to determine what is necessary to ensure the fitness of its licensees. *See* ORS 673.640(1) ("fitness" for a license must be demonstrated to the "satisfaction of the board"). Imposing a work experience requirement ensures that enrolled agents who prepare taxes and supervise tax preparers have the relevant background to do so. The board concluding that work experience is necessary to protect Oregon taxpayers is within the range of the board's discretion. *See United Telephone Employees PAC v. Secretary of State*, 138 Or App 135, 139, 906 P2d 306 (1995) (a rule is valid if it is within the range of discretion allowed by the general policies declared in the statute). The board had authority to adopt a rule consistent with the legislative policy underlying the statutes, which is precisely what it did.

2. The rule does not conflict with ORS 673.637(2).

Petitioner also asserts that the board lacked authority to adopt a 360-hour experience requirement for enrolled agents to be licensed tax consultants

because it conflicts with ORS 673.637(2). (Pet Br 10-14). That statute provides:

> (2) Notwithstanding ORS 673.625 (1) and (3), but as otherwise provided in ORS 673.605 to 673.740, the board shall license as a tax consultant any person who is, on the date of the application for a tax consultant's license, enrolled to practice before the Internal Revenue Service pursuant to 31 C.F.R. part 10 if the person has passed to the satisfaction of the board an examination covering Oregon personal income tax law, theory and practice, the provisions of ORS 673.605 to 673.740 and the code of professional conduct prescribed by the board.

The requirements from which the legislature exempted enrolled agents include minimum age, minimum education, and 1,100 hours of tax preparation experience. ORS 673.625(1) and (3).[5] The board's rule requiring that enrolled

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[5] ORS 673.625(1) and (3) provide:

> (1) Every applicant for a license as a tax consultant and every applicant for licensing as a tax preparer must:
>
> (a) Be 18 years of age or older;
>
> (b) Possess a high school diploma or have passed an equivalency examination;
>
> (c) Present evidence satisfactory to the State Board of Tax Practitioners that the applicant has successfully completed at least 80 hours in basic personal income tax law, theory and practice at a school training session or educational institution approved by the board; and
>
> (d) Possess a preparer tax identification number issued by the Internal Revenue Service.
>
> * * * * *

Footnote continued...

agents have 360 hours of work experience is different from the statutory 1,100-hour work experience requirement from which the legislature exempted enrolled agents. The board's much lower, albeit still significant, work experience requirement does not conflict directly with the statute.

(...continued)

(3) In addition to the requirements of subsection (1) of this section, every applicant for licensing as a tax consultant must:

(a) Present evidence satisfactory to the board of active employment, as described in ORS 673.615 (2), as a tax preparer or employment in this or another state in a capacity that is, in the judgment of the board equivalent to that of a tax preparer or tax consultant, for not less than a cumulative total of 1,100 hours during at least two of the last five years. The hoard shall consider certification by a tax consultant or person described in ORS 673.610 (2) or (4) that the applicant was employed as a tax preparer under supervision for the period indicated in the certificate to be satisfactory evidence of the applicant's employment as a tax preparer for the period indicated. If an applicant has worked less than a cumulative total of 1,100 hours in at least two of the last five years, the hoard may consider the number of hours employed, the number of years employed, the number of tax returns prepared and whether the work involved contributed directly to the professional competence of the individual in determining if a tax preparer or tax consultant has met the work experience requirement.

(b) Pass to the satisfaction of the board an examination that is constructed in a manner that in the judgment of the board measures the applicant's knowledge of Oregon and federal personal income tax law, theory and practice. The examination for a tax consultant's license must be of a more exacting nature and require higher standards of knowledge of personal income tax law, theory and practice than the examination for a tax preparer's license.

Petitioner also argues that the board could not adopt *any* work experience requirement for enrolled agents. Petitioner asserts that because the legislature used "shall" in ORS 673.637(2), the two requirements in the statute—being enrolled with the IRS and passing a state examination—are the only requirements that may be imposed on an enrolled agent. (Pet Br 11-13). However, "shall" is not always mandatory. *See Pendleton School Dist. 16R v. State*, 345 Or 596, 607, 200 P3d 133 (2009) (recognizing that "'shall' may carry a number of meanings depending on its context").

Here, context demonstrates that the legislature did not intend to *require* the board to license an enrolled agent whenever the enrolled agent met just those two requirements. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (statutory text is construed in context). Despite using the phrase "shall license" in ORS 673.637(2), the legislature itself imposed additional licensing requirements on enrolled agents, beyond the two listed in that section. First, an applicant for a tax consultant license must pay a license fee. *See* ORS 673.637(4) ("Any person desiring to be licensed under this section shall make written application to the board and shall pay to the board at the time required by the board the examination and license fees provided by rule of the board"); ORS 673.685(1)(b) (board "shall adopt by rule fees for," among other things, "[i]ssuance or renewal of a tax consultant's license"). Second, *any* applicant for renewal of a tax consultant license must demonstrate that the

applicant completed at least 30 hours of continuing education. ORS 673.655(1) ("upon annual renewal of a tax preparer's or tax consultant's license, each person licensed * * * shall submit evidence" of "at least 30 hours of instruction or seminar in subjects related to income tax preparation since the preceding license renewal date" and if evidence of such continued education is not provided then "the board shall not renew the applicant's active license").

The additional requirements of a licensing fee and 30 hours of continuing education are not mentioned in ORS 673.637(2), but nonetheless apply to enrolled agents. Those additional requirements demonstrate that despite using the word "shall," the legislature did not intend for the two requirements listed in ORS 673.637(2) to he the *only* requirements imposed on an enrolled agent seeking a Oregon tax consultant license. Because ORS 673.637(2), in context, does not require that the board confer a tax consultant license on any enrolled agent who meets the two requirements in the statute, OAR 800-020-0015(5) does not conflict with the statute.

3. A legislative committee declining to pass a 360-hour experience requirement for enrolled agents to be licensed tax consultants does not render the rule invalid.

Petitioner describes how the 2013 House Committee on Business and Lahor considered, but did not pass, a statutory amendment that would have required enrolled agents to have 360 hours of work experience to obtain a tax

consultant license. (Pet Br 14-15). Petitioner fails to explain why the committee's inaction renders the board's rule invalid. It does not.

Rather, "the defeat of an amendment, even one concerning only one substantive aspect of a bill, is of dubious value in determining legislative intent." *Springfield Ed. Ass'n v. Springfield Sch. Dist.*, 24 Or App 751, 758, 547 P2d 647 (1976), *modified*, 25 Or App 407 (1976); *see also Berry v. Banner*, 245 Or 307, 421 P2d 996 (1966) ("The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. Legislative inaction is a weak reed upon which to lean in determining legislative intent.").

Relying on that principle, this court has rejected an argument similar to the one petitioner makes here. In *Oregon State Employees Ass'n v. Workers' Compensation Dep't*, 51 Or App 55, 624 P2d 1078 (1981), the petitioner challenged the validity of rules adopted by the Worker's Compensation Department. Petitioner argued that the department's rules, which provided schedules of disabilities, were invalid because the legislature had considered and rejected legislation that would have required the use of "charts, graphs, statistical tables and other analysis devises" to create uniform schedules for disabilities. *Id.* at 58-59. This court rejected the petitioner's argument. *Id.* at 59. The court explained that legislation "may be defeated for many reasons" and that the legislature's failure to pass legislation that mandated use of

disability schedules did not demonstrate that it disagreed with that approach. *Id.*

Similarly, here the House Committee on Business and Labor declining to pass a 360-hour work experience requirement for enrolled agents does not indicate that the legislature disagrees with that requirement. As discussed above, the legislature gave the board sufficient discretion and authority to impose such a requirement to demonstrate fitness to be a tax consultant.

C. Petitioner's request for attorney fees is premature.

Petitioner asks this court to award it costs and attorney fees under ORS 183.497(1)(a) and (b). Petitioner's request for attorney fees is premature. To begin with, petitioner can only request attorney fees if this court finds in its favor. For all the reasons explained above, the board's rule is valid and so petitioner is not entitled to attorney fees. Moreover, the correct procedure for requesting attorney fees is by filing a petition with the court *after* its decision. *See* ORAP 13.10(2) ("A petition for attorney fees shall be served and filed within 21 days after the date of decision."). The board does not respond further to petitioner's request at this time, but reserves the right to do so should the court invalidate the board's rule.

ANSWER TO SECOND ASSIGNMENT OF ERROR

Federal law does not preempt OAR 800-020-0015(5).

A. Preservation

Preservation does not apply in a facial rule challenge.

B. Standard of Review

The standard of review is the same as under the first assignment of error.

ARGUMENT

Federal law does not preempt the board's rule imposing a work experience requirement on enrolled agents seeking an Oregon tax consultant license. The Supreme Court has explained that the states are independent sovereigns in the federal system and preemption will not easily be found. *Medtronic, Inc. v. Lohr*, 518 US 470, 485, 116 S Ct 2240, 135 L Ed 2d 700 (1996). "In all preemption cases, and particularly in those in which Congress has legislated * * * in a field which the states have traditionally occupied [the court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotation omitted). Consequently, there is a presumption against preemption. *New York v. Federal Energy Regulatory Comm'n*, 535 US 1, 17, 122 S Ct 1012, 152 L Ed 2d 47 (2002).

With that presumption in mind, a federal law may preempt state law in only three ways: (1) express preemption, where Congress expressly defines the extent to which a federal statute preempts state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the

federal law to occupy exclusively; or (3) conflict preemption, where it is impossible to comply with hoth state and federal requirements, or where state law impedes the objectives of the federal law. *English v. General Elec. Co.*, 496 US 72, 78-80, 110 S Ct 2270, 110 L Ed 2d 65 (1990). The court's ultimate task is to determine whether "state regulation is consistent with the structure and purpose" of the federal law. *Gade v. National Solid Waste Management Ass'n*, 505 US 88, 98, 112 S Ct 2374, 120 L Ed 2d 73 (1992). Here there is no preemption.

A. There is no express or implied preemption.

Neither express nor field preemption invalidate the hoard's rule hecause Congress has explicitly recognized that states may impose licensing requirements on tax preparers. Specifically, 26 USC § 6103(k)(5), provides, in relevant part:

> Taxpayer identity information with respect to any tax return preparer, and information as to whether or not any penalty has been assessed against such tax return preparer * * *, may be furnished to *any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of tax return preparers*. * * * Information may be furnished and used under this paragraph only *for purposes of the licensing, registration, or regulation of tax return preparers*.

(Emphasis added). Through the emphasized text, Congress explicitly acknowledged, and even endorsed, the existence of state agencies charged by state law with licensing or otherwise regulating income tax preparers. The

statute expressly allows the federal government to disclose taxpayer identity information with respect to any income tax preparer, and information about whether any penalty has been assessed against such income tax preparer, to any such state regulatory agency.

The congressional history shows that Congress meant exactly what the law says on its face:

> Another section of the Act provides in relation to this provision that States or local governing bodies charged with the administration of any tax in their jurisdiction may obtain the social security account number or employer identification number assigned to any taxpayer upon application to the Secretary for use in fulfilling their tax administration responsibilities. This disclosure provision permits the IRS to give to *State or local governing bodies charged with licensing, registering or regulating income tax preparers* information contained on the annual information reports submitted to the [IRS] which identifies tax preparers or which indicates any penalties which have been assessed.

Staff of Joint Committee on Taxation, 94th Congress, General Explanation of the Tax Reform Act of 1976, 350-51 (Comm Print 1976). Thus, Congress has acknowledged and approved the existence of state licensing and regulation of income tax preparers. Accordingly, there is neither express preemption nor field preemption.

B. There is no conflict preemption.

Petitioner appears to primarily argue that there is conflict preemption. Again, conflict preemption exists where "compliance with both federal and

state regulations is a physical impossibility * * * or where state law stands as an obstacle to the accomplishment and execution" of the objective of the federal law. *Gade*, 505 US at 98 (internal quotation and citation omitted). Conflict preemption is a "high threshold." *Id.* at 110.

Here, the board's requirement that an enrolled agent have 360 hours of experience to obtain a tax consultant license does not conflict with any federal regulation. Petitioner relies on the federal regulation providing that: "Any individual enrolled as an agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service." 31 CFR § 10.3(1)(c). It is entirely possible to comply with that regulation and with the board's rule.

And the rule does not frustrate the purpose of that regulation. Congress providing in 26 USC § 6103(k)(5) for IRS cooperation with state tax preparer licensing agencies shows that Congress itself saw no conflict between the purpose of the IRS regulations and state licensing laws. Petitioner argues that the rule is an obstacle because filing tax returns falls within "practice before the IRS" and the rule impermissibly imposes an additional requirement on an enrolled agent to "practice before the IRS." (Pet Br 19-20). However, the board's rule—unlike the federal regulation—is not directed at "practice before the IRS." "Practice before the IRS" includes:

> [A]ll matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

31 CFR § 10.2(4). The board's rule has no impact on an enrolled agent's practice before the IRS.

Contrary to petitioner's argument, filing tax returns does not constitute "practice before the IRS." *See Loving v. Internal Revenue Service*, 742 F3d 1013 (D.C. Cir 2014) (so holding). In 2011, the IRS adopted regulations permitting it to designate "registered tax preparers," and providing that such "registered tax preparers" may practice before the IRS by, among other things, "preparing and signing tax returns and claims for refund," but that a registered tax preparer must first pass an exam and pay certain fees. 31 CFR §§ 10.3(f)(2), 10.4(c), and 10.5(b). In *Loving*, the D.C. Circuit Court invalidated the regulations and enjoined the IRS from enforcing them. 742 F3d at 1014. The court explaining that the IRS has no authority to regulate tax preparers because preparing and filing of tax returns does not constitute "the practice of representatives of persons before the [IRS]." *Id.* (quoting 31 USC § 330(a)(1),

the statute providing the IRS with authority to regulate individuals practitioners).

Loving precludes the IRS from enforcing its regulation of tax preparers and provides a well-reasoned explanation for why providing assistance with and filing tax returns is not "practice before the IRS." The D.C. Circuit Court explained that a tax preparer does not "practice" before the IRS because the preparer does not act as the taxpayer's "representative" or agent and has no authority to act on the taxpayer's behalf. *Id.* at 1016-17 (a tax-return preparer "certainly *assists* the taxpayer, but the tax-return preparer does not *represent* the taxpayer." *Id.* at 1017 (emphasis in original)).

The court also explained that context demonstrates that "practice" before the IRS refers to *post*-tax return filing matters. A taxpayer only designates a representative to act on the taxpayer's behalf before the IRS when a return is selected for an audit or the taxpayer appeals the IRS's proposed liability adjustment. *Id.* Congress's intent that "practice" before the IRS involves post-tax return filing matters is further demonstrated by 31 USC § 330(a)(2), which provides that the IRS may admit someone to "practice" before it if, among other things, the person demonstrates "competency to advise and assist persons *in presenting their cases*." *Id.* (quoting statute and emphasis in original). Filing a tax return does not involve "presenting a case" to the IRS. *Id.*

The IRS itself has acknowledged that filing tax returns is not "practice" before the IRS. *Id.* For example, in 2009, the IRS issued a guidance document that emphasized, "[j]ust preparing a tax return [or] furnishing information at the request of the IRS * * * is not practice before the IRS." *Id.* (quoting from Practice Before the IRS and Power of Attorney, IRS Publication 947, at 2 (April 2009)). Because preparing and filing tax returns is not "practice before the IRS" petitioner's preemption argument fails.

Moreover, in response to *Loving* invalidating the IRS tax preparer regulations, the IRS enacted a new program for tax preparers, the Annual Filing Season Program (AFSP), that has three important components for purposes of this preemption analysis. *See* Revenue Procedure Guidance 2014-42 at 1-2.[6] First, it recognizes that the 2011 IRS regulations *requiring* that paid tax preparers become registered with the IRS are invalid. *Id.* at 1-2.

Second, the AFSP distinguishes preparing and filing tax returns from "practice before the IRS." *Id.* at 3 (AFSP does not apply to professionals, like attorneys and enrolled agents, who "represent" taxpayers before the IRS). As explained above, that distinction demonstrates that there is no conflict between the board's rule, which is directed at enrolled agents who prepare tax returns, and federal regulations governing "practice before the IRS."

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[6] As previously noted, the revenue procedure is available at: http://www.irs.gov/pub/irs-drop/rp-14-42.pdf.

Third, in the AFSP, the IRS expressly acknowledges and endorses state licensing of tax preparers and, in particular, Oregon's licensing program. The IRS program provides that a tax preparer may obtain an AFSP "Record of Completion" by meeting certain requirements including taking an approved course and passing an examination. *Id.* at 3-5. However, the IRS expressly exempted from those education and testing requirements tax preparers licensed by Oregon or California. *Id.* at 5-6 (exempting tax preparers with licenses from state's identified by the IRS); FS-2014-8 (Jun 2014) (tax preparers licensed by Oregon and California exempt from education and testing requirement).[7] So like Congress, the IRS has recognized state licensing—and specifically Oregon licensing—of tax preparers.

Petitioner argues that *Sperry v. Florida*, 373 US 379, 83 S Ct 1322, 10 L Ed 2d 428 (1963), controls and compels this court to conclude that the board's rule is preempted. (Pet Br 18-22). *Sperry* does not compel that conclusion. In that case, the U.S. Supreme Court held that federal patent statutes and regulations preempted Florida from enjoining a non-lawyer registered to practice before the Unites States Patent Office from preparing and prosecuting patent applications in Florida. The Court examined the long history

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[7] Available at: http://www.irs.gov/uac/Newsroom/IRS-Unveils-Filing-Season-Program-for-Tax-Return-Preparers,-Answers-Frequently-Asked-Questions.

of practice by nonlawyer agents before the Patent Office and noted the extended congressional debate over the matter. *Id.* at 388-403. Because the legislative history demonstrated that Congress clearly intended that nonlawyers be ahle to practice before the Patent Office, the Court held that Florida treating practice before the Patent Office by a nonlawyer as the unlicensed practice of law conflicted with the federal statutory framework. *Id.* at 388.

Here, unlike in *Sperry*, there is no clear Congressional intent to preclude state licensing agencies from imposing additional requirements on enrolled agents who want to prepare tax returns or supervise tax preparers. Rather, Congress and the IRS have expressly acknowledged and approved the existence of state regulation of tax preparers. Accordingly, there is no preemption.[8]

C. In any event, the rule is facially valid because it is capable of constitutional application.

Any claim that a rule is invalid under ORS 183.400 hecause it is unconstitutional, is limited to a facial constitutional challenge. *Halladay v. Board of Parole & Post-Prison Supervision*, 229 Or App 45, 47-48, 209 P3d 854 (2009). As explained above, the hoard's administrative rule is not preempted by federal regulation. However, if there were any preemption, it would be limited to the application of the rule to the preparation and filing of

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[8] Petitioner again asks for an award of costs and attorney fees. (Pet Br 22). As explained previously, that request is premature.

federal tax returns. But the rule also applies to tax consultants who prepare and file *Oregon* tax returns. The IRS does not regulate state tax returns. Thus the rule is valid because it is capable of being constitutionally applied. *See State v. Christian*, 354 Or 22, 40, 307 P3d 429 (2013) (a "facial challenge is limited to whether the ordinance is capable of constitutional application in any circumstance").

CONCLUSION

This court should conclude that OAR 800-020-0015(5) is valid.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 25, 2014, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on September 25, 2014 I directed the Respondent's Answering Brief to be served upon Tyler D. Smith, attorney for petitioner, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 6,327 words. I further 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(2)(b).

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