IN THE COURT OF APPEALS OF THE

STATE OF OREGON

CHESTER MOONEY, SHANNAN POZZI, and KEVIN RUBIO, Petitioners, v. STATE OF OREGON, acting by and through the OREGON HEALTH AUTHORITY; KATE BROWN, in her official capacity as Governor of Oregon and as Chief Executive of the Oregon Health Authority; Respondents.	Court of Appeals No.: A174300 PETITIONERS' REPLY BRIEF

PETITIONERS' REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

This case asks this court to determine whether Oregon operates pursuant to the rule of law, or some new kind of indefinite unlimited power of the executive order. Petitioner challenged the uncontested fact that state agencies, including the Oregon Health Authority ("OHA") are not following the Oregon Administrative Procedures Act (Oregon APA or ORS Chapter 183). Respondent argues that state agencies do not have to comply with state laws when implementing directives, standards, regulations or other statements of general applicability like OHA 2288K (the "Mask Mandate") if the Governor has issued an executive order directing agencies to develop said policy. Respondent claims this new creation, called a "guidance", is not a directive, standard, regulation or other statement of general applicability. This novel approach has never been the law in Oregon and directly conflicts with state statutes, rules, and the practices of state agencies. Respondent's entire case rests on their assertion that the APA does not apply to these agencies.

Respondent erroneously argues that administrative agencies can take administrative actions[1], which clearly historically would fall within the statutory definition of a rule under ORS 183.310(9), but treat them legally as executive orders simply because they were authorized by an executive order. Respondent

[1] Petitioners call them "rules", Respondent calls them "guidances" even though guidances are undefined in Oregon law.

neglects to admit that all agency actions must be authorized by statute or an executive order, that does not make them a statute nor an executive order. The State insists that these agency actions –themselves become executive orders if the Governor authorizes the agency action in her executive order. This process of morphing an agency's actions from being a rule into being an executive order is found no-where in Oregon law and is contrary to the Oregon Constitution and state statutes. Administrative agencies do not, and cannot, issue executive orders. Therefore, these guidances are invalid when they fail to follow the Oregon APA.

Moreover, an examination of the record demonstrates the State's current argument is a fabrication that was invented after this lawsuit was filed. There was one document produced on the record for the creation of OHA 2288K, the rule itself. After this case was filed challenging OHA 2288K and pointing out the OHA's failure to follow the Oregon APA, Respondent invented a theory that any guidances[2] that are authorized pursuant to some prior executive order themselves are a part of the executive order. Petitioners ask this court to rule that "guidances" when issued by an agency are a "rule" under ORS Chapter 183.

The Governor must follow the laws applicable to executive orders and agencies must follow the laws pertaining to rules. As explained below, OHA 2288K did not follow the laws required for an executive order. Administrative

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[2] Note there is no statutory or constitutional definition as to what constitutes a guidance, demonstrating that guidances fall within the broad catchall definition of ORS 183.310(9) for a "rule".

agencies do not have authority to issue executive orders, but they do have the authority to make rules, after following the Oregon APA. OHA 2288K and the practice of establishing guidances out of compliance with the APA makes any such rules invalid. OHA 2288K is also at least partially preempted by federal law.

RIPENESS OF THIS REVIEW

Respondent admits that this case is not moot pursuant to ORS 14.175 because the policies and practices of Respondent related to issuing guidances without following the Oregon APA is ongoing. Some agency guidances have even been changed from time to time since the filing of this appeal. Therefore, if this extraordinary practice is not reviewed by this court these questions would be likely to repeat yet evade review. Likewise, the constitutional validity of the Mask Mandates previously issued pursuant to OHA 2288K or any future derivation need adjudication or else the agency or governor can change the rule each time before any Petitioner can get through the legal process.

In this case, there are two scenarios which Petitioners ask this court to review in relation to the State's original guidance practices in place before this lawsuit, and second to make a determination about the validity of guiances with the Governor's new practices.

The first scenario covers OHA 2288K and situations like OHA 2288K where guidances are issued simply because the Governor directed an agency to

regulate a topic. In the present case, Executive Order 20-27 came some 25 days before OHA 2288K, and did not state anywhere inside the body of the executive order ("EO") that guidances were actually executive orders. EO 20-27 contained no authority for OHA to mandate compliance with on face coverings, and the governor merely recommended compliance ("should" was used). In fact, even when OHA 2288K was issued on June 30th, 2020 the agency called it a rule. ER 5. OHA 2288K had one single document that constituted the entire executive and administrative record for appeal. In this first legal scenario, petitioner asks this court to determined that such guidances are rules and must follow the Oregon APA. Respondent has admitted OHA 2288K did not follow the Oregon APA, and accordingly OHA 2288K was invalid at least between June 30th and December 2, 2020 when Respondent attempted a work-around.

The second scenario this court should review, is the newly invented position of the state, that guidances later become executive orders if the Governor states in her executive orders that all guidances issued pursuant to the executive order are themselves an executive order. Respondent makes this argument to suggest that if guidances become a part of an executive order, they no longer fall within the definition of a "rule" pursuant to ORS 183.310(9). This argument too fails under Oregon law. Petitioners ask this court to rule that agency guidances cannot become an executive orders because the Governor cannot delegate executive order authority to an agency, and also cannot exempt state agencies

from the rulemaking process.

As explained below, both sets of factual scenarios should be ruled invalid practices and violations of state law. Case law explains that this court can review more than just the "rule" at issue, including analyzing the validity of the authority allegedly supporting the agency action. "In determining the validity of the rules, [this court] may examine 'the statutory provisions authorizing' them. ORS 183.400 (3)(b). *Merrick v. Bd. of Higher Educ*., 116 Or App 258, 262, 841 P2d 646, 649 (1992). Here, the Governor's executive orders are the equivalent to the statutory authority allegedly authorizing the agency actions, so they can be reviewed. Thus, both the rules themselves and the alleged authority for the guidances can be examined by this court.

REPLY ARGUMENTS

I. REPLY TO RESPONDENT'S COMBINED ANSWER.

Petitioners' opening brief points out that the content, scope, author, and authority of agencies guidances such as OHA 2288K demonstrate that guidances fall squarely within the definition of a rule under ORS 183.310(9). Even though the Governor is the only state agent authorized to issue executive orders, and these guidances are issued by agencies, Respondent insists that OHA guidances are, or become, executive orders. OHA's own actions demonstrate that it did not classify OHA 2288K as an executive order. OHA and other agencies have specifically enacted administrative rules that acknowledge that guidances are

different than executive orders. For the reasons below Oregon law dictates that OHA 2288K was not in fact, or by law, an executive order.

1. Agency guidances are not executive orders.

Only the governor can issue executive orders. Furthermore, under Oregon law a certified copy of each executive order issued, prescribed or promulgated by the Governor must be filed in the office of the Secretary of State. ORS 183.355(5). Executive Order 20-27 was adopted June 5th, 2020 and issued by the Governor. OHA 2288K (ER1-4) was not even created until June 30, 2020, twenty-five days after EO 20-27 was already issued and published. Since the Governor did not issue OHA 2288K and OHA 2288K was not filed with the Secretary of State pursuant to ORS 183.355(5), it is not an EO. Either Respondent is in violation of ORS 183.355(5), or OHA's 2288K is simply not an executive order.

Those statutes and a few key administrative rules also demonstrates that agency action 'guidances' are not executive orders. OHA's own administrative rules do not assert that guidances are executive orders. The opposite is true. For example, a comparison of OAR 333-003-1011(1) subsection (a) compared to subsection (b) demonstrates that a guidance is not an executive order. The two are defined and categorized as different things legally. The agencies know guidances are not executive orders, for example OAR 333-003-1011(3)

specifically states that executive orders can be found at a particular website and explains that is a different website than the one published for OHA guidance. OHA even advertised its OHA 2288K as a "new statewide rule". ER 5. OHA has other published administrative rules, which state the same distinction between directives implementing executive orders and executive orders themselves. See OAR 331-020-0079(2)(b) compared to (2)(c). Likewise, many other agencies acknowledge the same distinction[3].

2. Neither the Governor nor OHA is exempt from ORS Chapter 183.

The Governor, and only the Governor, has the authority to issue an executive order, even in an emergency. The State errs to contends that ORS Chapter 401 exempts OHA and other agencies from the Oregon APA. The agencies implementing an executive order still must follow state law. ORS Chapter 401 also does not exempt OHA, nor authorize the Governor to exempt OHA, from generally applicable statutes, nor the constitution. This court has already ruled on this issue.

> [T]he Governor's emergency powers under ORS chapter 401 are not unlimited. To the contrary, they are limited both by statutes and by the state and federal constitutions.

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[3] Other administrative rules recognize guidances are not executive orders. See OAR: 333-003-1021; 333-003-3010; 333-003-3020; 333-003-3030; 333-003-3040; 811-035-0015; 833-110-0041; 848-045-0030; 851-001-0150; 855-007-0086; 858-020-0115.

Elkhorn Baptist Church v. Brown, 366 Or 506, 525, 466 P3d 30, 43 (2020). In *Elkhorn* the court went on to say, "although the state's police powers include the power to impose reasonable public safety regulations, courts may intervene if the regulations exceed constitutional limits. Id. at 526. The court specifically concluded,

> "Thus, when the Governor declares a state of emergency pursuant to ORS 401.165, the Governor has express authority to take the actions specified in ORS 401.165 to 401.236, subject to statutory and constitutional limits."

Id. at 526.

ORS Chapter 183 is one statutory limit on what agencies can do, and how they implement their administrative authority. Art. I, section 22 of the Oregon Constitution dictates, "The operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly." Thus, ORS Chapter 183 cannot be waived because such unwritten waiver would operate as an invalid suspension of those laws. See *Macpherson v. Dep't of Admin. Servs*., 340 Or 117, 132 (2006).

The State errs to argue that because the Governor has broad powers under Chapter 401, that somehow administrative agencies are not required to follow Oregon laws such as ORS Chapter 183. That kind of approach is directly prohibited by Art. 1, Section 22 of the Oregon Constitution, which the Governor cannot ignore even in an emergency. Both sides agree that executive orders and rules are both "public health laws", but that does not transform an agency action which would ordinarily qualify as a rule, into an executive order just because it

was authorized by an executive order.

Analysis of other statutes demonstrates that agencies are not exempt from ORS Chapter 183 in an emergency. As noted in ORS 431A.015(4) ordinarily OHA and all other agencies must follow the Oregon APA rulemaking process. ORS 433.441 does not change that in an emergency. Nowhere in ORS 433.441 does it say that the agencies are exempt from ORS Chapter 183, in fact the legislature must have understood and intended ORS Chapter 183 to apply in emergencies, because there is one, narrow exception for temporary rules to subsection (6)(a) of ORS 183.335. Logically, if there is one small exception during an emergency, that means the rest of Chapter 183 must apply to agencies like OHA in the emergency. Likewise, ORS 401.192 expressly states that certain emergency powers therein are granted to the Governor, but those emergency statutes do not grant any powers to any agencies. The state's interpretation of ORS Chapter 183 is wrong.

3. Executive Order authority cannot be delegated to an agency.

The Oregon Constitution grants executive powers exclusively to the chief executive, legislative powers to the legislature and the people, and administrative powers to the administrative. It is a violation of separation of powers when whether one department has performed functions that the constitution commits

to another department. *Rooney v. Kulongoski*, 322 Or 15, 31, 902 P2d 1143 (1995).

Administrative agencies are not given the authority to make executive orders, or else they would be in violation of Or Const. Art. III, section 1 by making law. The State's theory fails. When the legislature directs an agency to make regulations, the regulations do not become legislation, they remain a rule. Likewise, agency regulations, even when called guidances fall within the definition of a rule. The State's argument that guidances are a portion of an executive orders is just a pre-text and a recent invention. A guidance may be connected to an executive order, but the agencies' portion is still a rule. The Oregon Supreme court long ago explained, "[t]he power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated; that is to say, confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted by Congress; and it cannot be extended to amending or adding to the requirements of the statute itself." *Winslow v. Fleischner*, 112 Or 23, 30, 228 P 101, 103 (1924). The same principle applies here, an agency can't add to an executive order, nor create part of an executive order after the executive order was already issued.

Article 5, section 1, Or. Const. declares: "The chief executive power of the state shall be vested in a governor." *Biggs v. McBride*, 17 Or 640, 649, 21 P 878, 881 (1889). Under the Oregon Constitution, only the Governor is entitled to make

executive orders so that power cannot be delegated to an agency to make a rule and call it an executive order. Furthermore, this court's jurisprudence on delegation also explains that executive powers cannot be delegated to a completely unbridled and unconstrained administrative agency in general. In *State v. Self*, 75 Or App 230, 236-37 (1985), the test for unlawful delegation was laid out as:

> "The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of factfinding power is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application." (emphasis mine).

The same test applis here, where the EO included certain words when it was issued, is fixed when the EO "leaves the legislative halls", and that is the complete executive order. A guidance issued later, with different content, is neither part of the EO nor an executive order itself because that would be an illegal delegation.

OHA 2288K actually conflicted with EO 20-27, which did not mandate compliance with any guidance on face coverings. Petitioners' Opening Brief p.36. The text of OHA 2288K was not contained in EO 20-27, and did not even exist when EO 20-27 was issued on June 5, 2020. Accordingly, OHA cannot issue a guidance 25 days after an executive order is issued and validly contend that both are the same executive order. Oregon law, logic, and the timeline proves

that OHA 2288K was not part of Executive Order 20-27.

4. Conclusion that agency guidances are not executive orders.

OHA 2288K was not issued as an executive order. Agency's cannot issue executive orders. An agency action does not become an executive order simply because it is authorized by an executive order. Even if the Governor could delegate executive order power to an agency, the agency would still need to follow the Oregon APA because neither the agency nor the governor could exempt the agency from other generally applicable laws like the Oregon APA, Article 1, Section 22, or Article III, Section 1 of the Oregon Constitution.

ORS 401.192 does not give the Governor a blank check to ignore or violate all state statutes or constitutional provisions. Likewise, ORS 401.165 to 401.236 do not give the governor the power to suspend laws like ORS Chapter 183, nor delegate such authority. ORS 401.168(2) literally limits the governor's suspension power to mere agency rules and orders. ORS Chapter 401 allows the governor to make rules but does not authorize her to ignore otherwise generally applicable statutes, nor exempt an agency from state law.

Because OHA 2288K was issued by OHA, after EO 20-27 was published it is not factually, nor legally, an executive order, and is therefore a rule. All other subsequent agency guidances that also did not follow the Oregon APA are accordingly invalid.

II. OHA 2288K is partially preempted by the ADA.

OHA 2288K is partially preempted and cannot prohibit places of public accommodation from making reasonable accommodations for customers, which may on a case-by-case basis require allowing a customer inside the place of public accommodation without a face covering. The 9th Circuit has "recognized that the question of what constitutes a reasonable accommodation under the ADA 'requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodation'". *Kulin v. Deschutes Cty*., 872 F Supp 2d 1093, 1100 (9th Cir. May, 31 2012). Respondent fails to even defend against Petitioners' preemption claim. The sign portion of OHA 2288K, mandates denial of entry, no matter what accommodation is actually reasonable. For person like Petitioners, the State's outright ban on entry to a place of public accommodation as one potential reasonable accommodation conflicts with the ADA and is therefore preempted.

III. The compelled disclosure required by OHA 2288K is prohibited by the First Amendment and would compel violations of HIPPA.

The State cannot compel public disclosure of the medical nature of why a reason a person needs an accommodation because that would both constitute compelled speech and violate HIPPA.

Protections against compelled speech extend far beyond just not being compelled to disclose your personal medical history, the constitution prohibits compelled displays on license plates or compelled participation in the Pledge of Allegiance. Certainly, being compelled to make oral statements about your own medical history is, or should be, at least as strongly protected as a license plate. This court should clarify that OHA 2288k cannot and does not compel a detailed disclosure of the reason for the requested medical exemption to the Mask Mandate. A person should be allowed to request an accommodation and follow the ADA, without disclosing anything extra.

Respondent brief does not even defend its infringements on free speech, nor its interference with federal laws. 42 USC §1320d, and 45 CFR § 164.502, prohibit 'covered entities' and a great many types of businesses from the use or disclosure of a wide swath of "individually identifiable health information" to anyone but statutorily authorized recipients. See 45 CFR § 164.502. Individuals should not be compelled to disclose the medical nature of why they need an accommodation.

IV. Conclusion

This Court should declare the OHA 2288K invalid for failure to comply with ORS Chapter 183. OHA 2288K and any future derivation should be required to follow the federal ADA and allow reasonable accommodations on a case-by-case basis without having to disclose protected medical information.

DATED this 8th day of March 2021.

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CERTIFICATE OF COMPLIANCE
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii) the word count of this brief (as described in ORAP 5.05(1)(b)) is 3,291 words.

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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 this 8th day of March, 2021.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 8th day of March 2021, I caused a true copy of the PETITIONERS' REPLY BRIEF to be filed with the Appellate Court Administrator by electronic filing.

I further certify that on the 8th day of March, 2021, I caused a true copy of the PETITIONERS' REPLY BRIEF to be served on the following parties at the addresses set forth below:

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