IN THE SUPREME COURT
OF THE STATE OF OREGON

CITY OF PORTLAND, an Oregon municipal corporation, Plaintiff-Respondent, Petitioner on Review, v. MARK BARTLETT, Defendant-Appellant, Respondent on Review.	Multnomah County Circuit Court Case No. 16CV01529 CA No. A164469 No. S067940

REPLY BRIEF OF PETITIONER ON REVIEW CITY OF PORTLAND

On review of the decision of the Court of Appeals on an appeal from the Judgment of the Circuit Court for Multnomah County, the Honorable Eric J. Neiman, Judge.

Opinion Filed June 10, 2020
Majority opinion by Shorr. J., joined by Egan, C.J., and Armstrong, Ortega, Tookey, DeHoog, Aoyagi, Mooney, and Kamins, JJ.
Dissenting opinion by Powers, J., joined by DeVore and James, JJ.

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INTRODUCTION

Defendant's brief on the merits does not take issue with the bulk of the City's arguments in this case. Defendant does not appear to dispute that his proposed construction of ORS 192.390 would create an apparent conflict with federal law, a second-class attorney-client privilege for public bodies and public employees, and potential Equal Protection and Due Process problems. Defendant also does not appear to dispute that the attorney-client privilege is integral to the structure and procedures of the City as a home-rule government, or that his proposed construction of ORS 192.390 would amount to reading the "notwithstanding" clause of that statute out of existence.

Indeed, defendant does not engage in any genuine statutory analysis at all: he does not meaningfully analyze the text or context of the provisions he cites, and he produces no legislative history to support his conclusions. Instead, defendant offers a narrow reading of OEC 503 to conclude that applying the 25-year sunset of ORS 192.390 to information protected by the attorney-client privilege would create no textual conflict between those provisions. In particular, defendant

suggests that OEC 503 embodies a mere "evidentiary privilege" that is unaffected by compelled disclosure under the Public Records Law. But those arguments rely on fundamental misunderstandings of the attorney-client privilege and how to analyze potentially conflicting statutes, and this Court should reject them.

Contrary to what defendant asserts, the attorney-client privilege is not a mere "evidentiary matter," but a privilege against compelled disclosure in any setting. Construing ORS 192.390 to require the disclosure of privileged information over a client's objection would therefore create at least a potential conflict with OEC 503, which must be resolved through statutory interpretation. As this Court recently explained in *Mathis v. St. Helens Auto Ctr., Inc.*, 367 Or 437, 442, 478 P3d 946 (2020), the analysis centers on "the effect that the legislature intended [both potentially conflicting statutes] to have." Here, a proper application of *Mathis* leads to the conclusion that the 25-year sunset for exemptions under the Public Records Law codified at ORS 192.390 does not apply to information protected by the OEC 503 attorney-client privilege. Nothing in defendant's arguments undermines that

conclusion.

Defendant also asserts, with little explanation, that his proposed construction of ORS 192.390 would give rise to "no constitutional conflict with federal law," would "not violate 'home-rule' provisions of the Oregon Constitution," and that "ORS 192.398 would not make sense if the City were correct." But defendant does not develop those arguments, which, in any event, fail on the merits.

As explained in the City's brief on the merits and below, text, context, legislative history, and the rule that this Court should, whenever possible, construe statutes to avoid constitutional problems, all weigh in favor of the conclusion that ORS 192.390 does not trump the attorney-client privilege. Nothing in defendant's brief suggests otherwise.

ARGUMENT

I. The OEC 503 attorney-client privilege is a privilege against compelled disclosure, not a mere "evidentiary matter" of admissibility at trial.

As an initial matter, defendant argues that the attorney-client privilege codified at OEC 503 is "not the same thing" as an exemption

under the Public Records Law. (Resp BOM 4-5). While defendant's precise meaning is unclear, he asserts that a "privilege" is not an "exemption" from disclosure but merely "an evidentiary rule" for court proceedings. *Id*. at 4-5. Therefore, defendant concludes, "privilege, an evidentiary matter, is maintained even if disclosure of information that is privileged is ordered [under the Public Records Law]." *Id*. at 5. That argument is flawed, and this Court should reject it.

As the City explained in its brief on the merits, the attorney-client privilege is a privilege against compelled disclosure, not just evidentiary use at trial. (*See* Pet BOM 23, 34-39); OEC 503(2) (stating that a client "has a privilege to refuse to disclose and to prevent any other person from disclosing" privileged communications). That rule reflects the commonsense notion that the attorney-client privilege would be meaningless if it were a mere rule of admissibility, with confidential communications between lawyer and client otherwise freely discoverable. Furthermore, the privilege can be asserted "at all stages of all actions, suits, and proceedings." OEC 101(3). As a plain textual matter, this includes public-records proceedings. Defendant does not

show or argue otherwise.

II. The legislative purpose underlying ORS 192.390 conflicts with that underlying OEC 503, and the more particular provision should therefore control.

Defendant also makes a related argument that "[t]here is no conflict between OEC 503 and ORS 192.390" even if the latter statute is construed to trump the former. (Resp BOM 6-7). Specifically, defendant contends that, "even [if] the 25 year sunset in ORS 192.390 [were] applied to attorney-client information" and disclosure compelled, the client would still retain a residual "evidentiary privilege" under OEC 503. *Id*. at 5, 6-7. This, defendant argues, means that "the provisions work together and are not in conflict." *Id*. at 6. Like defendant's previous argument, that argument is based on a misunderstanding of the attorney-client privilege codified in OEC 503, combined with a misunderstanding of what constitutes a potential conflict under Oregon law.

As the City explained in its brief on the merits, the general 25-year sunset for public records codified at ORS 192.390 conflicts, at least potentially, with the attorney-client privilege codified at OEC 503. (*See*

Pet BOM 49-55). Quite simply, it is impossible to give "full effect" to the OEC 503 attorney-client privilege if ORS 192.390 functionally extinguishes it after 25 years. *See Powers v. Quigley*, 345 Or 432, 198 P3d 919 (2008) (holding that, if a general statute prevents this Court from giving "full effect" to a specific statute, ORS 174.020(2) requires that the latter control over the former). That potential conflict can be avoided only by holding that the 25-year general sunset codified at ORS 192.390 does not trump a client's assertion of the attorney-client privilege under OEC 503. (*See* Pet BOM 54) (making that argument).

This Court recently analyzed how "two potentially conflicting provisions" should be construed in light of "the legislature's longstanding requirement[s] for construing statutes" codified in ORS 174.010 and 174.020(2). *Mathis*, 367 Or at 439. That analysis is directly applicable here.

1. Under Mathis*, this Court reviews potentially conflicting statutes to determine whether it can give full effect to the legislative intent underlying each statute.*

This Court held in *Mathis* that statutes conflict when the operation of one statute prevents giving full effect to the other, even if

the plain text of the statutes does not facially conflict. In that case, "a statute, ORS 652.200(2), * * * provide[d] that an employee who succeeds in an action to recover unpaid wages is entitled to 'a reasonable sum for attorney fees' in addition to the other sums awarded in the judgment." 367 Or at 439. At the same time, "a rule of civil procedure, ORCP 54 E(3), * * * provides that a plaintiff who rejects an offer of judgment and ultimately fails to recover more than the offer 'shall not recover * * * attorney fees incurred after the date of the offer.'" *Id.* The trial court and Court of Appeals both concluded that, because the plaintiff had rejected an offer of judgment but ultimately did not recover more than the offer, ORCP 54 E(3) limited his recovery of attorney fees under ORS 652.200(2) to fees incurred before the date of the offer. *Id.* at 440. The plaintiff petitioned for review, and this Court reversed.

This Court noted that, at first blush, there was no "clear inconsistency between ORCP 54 E(3) and ORS 652.200(2)." *Mathis*, 367 Or at 450. As a purely textual matter, it is possible both to be entitled to an attorney-fee award under ORS 652.200(2) and to have that award capped by ORCP 54 E(3). Furthermore, "[t]o the extent that ORCP 54

E(3) encourages employers to reasonably estimate an offer to pay wage claims prior to trial, the result seemingly complements the prompt payment of wages that ORS 652.200(2) is intended to accomplish." *Id.* This Court explained, however, that the provisions were at least "potentially conflicting," warranting a deeper analysis into that "close" question. *Id.* at 439, 444.

As this Court explained, "the legislature has supplied general statutory construction guidance" for such cases: "ORS 174.010 directs that, 'where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all,'" and "ORS 174.020(2) directs that, '[w]hen a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular.'" *Mathis*, 367 Or at 441. Applying those rules necessarily means that this Court "must decide the effect that the legislature intended [both potentially conflicting statutes] to have." *Id.* at 442.

Turning to the statutes at issue in *Mathis*, this Court determined

from text, context, and legislative history that the legislature's intent in enacting ORS 652.200(2) was to encourage "the prompt payment of wages" and "deter employers from taking action that would discourage employees from pursuing the full amount of their wages that are due." *Id.* at 444-47, 450. By contrast, the intent behind ORCP 54 E(3) was to "shift the balance toward settlement by increasing the financial risk attendant to choosing to pursue a claim" by "penalizing a plaintiff who fails to accept what, in retrospect, is seen to have been a reasonable offer." *Id.* at 449-50 (quoting *Carlson v. Blumenstein*, 293 Or 494, 503-04, 651 P2d 710 (1982)). Thus, while there was no "clear inconsistency between ORCP 54 E(3) and ORS 652.200(2)" as a purely textual matter, this Court concluded that the separate "intent underlying" each provision "cannot both be given effect[.]" *Id.* at 450, 454.

This Court therefore turned to ORS 174.020(2), which provides that, "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." *Mathis*, 367 Or at 454. This Court noted that ORCP 54 E(3) was the more-

general statute, since it "applies to all civil proceedings." *Id*. at 454-55. By contrast, neither party disputed that ORS 652.200(2), which applies specifically to wage claims, "is more particular" and therefore "is paramount" under ORS 174.020(2). *Id*. This Court accordingly concluded that the general, fee-limiting provisions of ORCP 54 E(3) did not trump the particular provisions of ORS 652.200(2). *Id*.

This Court's analysis in *Mathis* is directly apposite here. As explained below, the legislative intent underlying OEC 503 and that underlying ORS 192.390 cannot both be given full effect in this case. Under ORS 174.020(2), the general statute must therefore yield to the particular one, OEC 503. Defendant cannot show otherwise.

2. For information protected by the attorney-client privilege, OEC 503 controls over ORS 192.390 because it expresses the more particular intent.

As this Court has explained, OEC 503 "was adopted to further codify the common-law lawyer-client privilege as it had existed in Oregon and to extend coverage to 'areas in which current law is silent or unclear.'" *Longo v. Premo*, 355 Or 525, 534, 326 P3d 1152 (2014) (quoting OEC 503 Commentary (1981)). The exceptions codified in OEC

503 were also "intended [by the legislature] as a complete enumeration of the exceptions to the attorney-client privilege." *Crimson Trace Corp. v. Davis Wright Tremaine, LLP*, 355 Or 476, 501, 326 P3d 1181 (2014). The privilege applies regardless of whether the client is "a person, public officer, corporation, association or other organization or entity, either public or private[.]" OEC 503(1)(a). The OEC 503 privilege is not time-limited, and the client has the authority "to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client[.]" OEC 503(2).

The intent underlying OEC 503 is the "promot[ion of] broader public interests in the observance of law and administration of justice." *State ex rel. OHSU v. Haas*, 325 Or 492, 500, 942 P2d 261 (1997) (quoting *Upjohn Co. v. United States*, 449 US 383, 389 (1981)). The privilege encourages "the full disclosure of information by clients," in recognition that "[l]awyers can act effectively only when fully advised of the facts by the parties whom they represent[.]" *State v. Jancsek*, 302 Or 270, 274, 730 P2d 14 (1986). For that reason, the OEC 503 privilege

can be waived only by a lawyer's client, and by no other. OEC 503(2), (3). Furthermore, as noted previously, the OEC 503 privilege is a privilege against *disclosure*, OEC 503(2), not mere evidentiary use at trial.

By contrast, the legislative intent underlying the Public Records Law is "access to public records." *Oregonian Pub. Co. v. Portland Sch. Dist. No. 1J*, 329 Or 393, 398, 987 P2d 480 (1999). To that effect, in 1979 the legislature adopted ORS 192.390 to ensure that exemptions from disclosure under the Public Records Law would sunset after 25 years. (*See* Pet BOM 30-34). That sunset provision makes no explicit reference to OEC 503, and it applies regardless of any person's privacy interest in the contents of any particular record.

As with the two statutes at issue in *Mathis*, the legislative intent underlying ORS 192.390 therefore "conflicts with the legislative intent underlying" OEC 503. *Mathis*, 367 Or at 454. One statute promotes "the observance of law and administration of justice" by promising confidentiality and giving clients the power "to refuse to disclose and to prevent any other person from disclosing" privileged communications.

Haas, 325 Or at 500; OEC 503. The other promotes "access to public records" by making such records public after 25 years regardless of any person's privacy interest in the contents of any record. *Oregonian Pub. Co.*, 329 Or at 398; ORS 192.390.

Furthermore, contrary to what defendant argues and the majority below accepted, those conflicting legislative intents cannot be reconciled by reference to ORS 192.355(9)(a)(b) and OEC 503(7). (*See* resp BOM 5); *City of Portland v. Bartlett*, 304 Or App 580, 590, 468 P3d 980, *rev allowed,* 304 Or 290 (2020). As explained in the City's brief on the merits, those particular provisions were adopted at the same time, in 2007, to provide for the disclosure of factual information compiled by a public body as part of an internal investigation when the holder of the OEC 503 privilege has publicly characterized or partially disclosed that factual information. (*See* Pet BOM 50-55). The legislature adopted ORS 192.355(9)(a)(b) and OEC 503(7) to provide that such factual information—which the Court of Appeals had held was privileged—could be disclosed under the Public Records Law without waiving the OEC 503 privilege as to related, undisclosed information. *Id.*; *see Frease*

v. Glazer, 330 Or 364, 371, 4 P3d 56, 60 (2000) (noting that, ordinarily, "a client waives the attorney-client privilege by voluntarily disclosing or consenting to the disclosure of any significant part of [a] matter or communication.")

ORS 192.355(9)(a)(b) and OEC 503(7) therefore do not reconcile the conflicting purposes underlying ORS 192.390 and OEC 503.[1] Even if ORS 192.390 and OEC 503 did not evidence "a clear inconsistency" as a purely textual matter, the fact remains that "the legislative intent underlying" ORS 192.390 "conflicts with the legislative intent underlying" OEC 503. *Mathis*, 367 Or at 450, 454. As the City explained in its brief on the merits—and as this Court held in *Mathis*—that conflict is resolved by ORS 174.020(2): "When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." (Pet BOM 42-43).

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[1] Furthermore, ORS 192.355(9)(a)(b) and OEC 503(7) were adopted in 2007 and cannot inform what the legislature intended in 1979 when it adopted ORS 192.390 or in 1981 when it codified the attorney-client privilege.

Here, there is no dispute that OEC 503 is the more particular provision in the context of compelled disclosure of attorney-client privileged information: it expressly regulates assertions of the attorney-client privilege and provides "a complete enumeration of the exceptions" thereto. *Crimson Trace Corp.,* 355 Or at 501. By contrast, ORS 192.390 is the more general provision: it applies generally to public records, without any reference to OEC 503 or to any other privilege. Therefore, under ORS 174.020(2), the attorney-client privilege codified in OEC 503 "is paramount" to ORS 192.390.[2] Defendant cannot show otherwise.

III. Defendant's reference to ORS 192.398 does not affect the statutory analysis in this case.

Defendant also argues that "ORS 192.398 would not make sense if the City were correct." (Resp BOM 7-8). But defendant does not meaningfully develop that argument, which would, in any case, fail on the merits. This Court should therefore reject it.

Defendant first states that, if the legislature had wanted "more

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[2] Furthermore, a "statute enacted later in time * * * impliedly amend[s]" an earlier, inconsistent one. *State v. Langdon*, 330 Or 72, 84, 999 P2d 1127 (2000). Here, in addition to being the more particular statute, OEC 503 was adopted several years after ORS 192.390.

clarity" on the issue presented by this case, it "should have included another subsection" to ORS 192.398 stating that the 25-year sunset codified in ORS 192.390 does not apply to privileged material. (Resp BOM 7). Defendant may well be correct that "more clarity" would have been welcome, but that ambiguity does not demonstrate that the legislature therefore intended ORS 192.390 to apply to privileged material. In *Mathis*, the legislature similarly could have provided "more clarity" by including a provision in ORCP 54 E(3) stating that it did not trump the right to recover attorney fees codified at ORS 652.200(2). That the legislature might have been clearer, however, did not relieve this Court of its duty to interpret the statutes before it in *Mathis*, nor does it here.

Next, defendant contends that the legislative history provided by the City, which shows that ORS 192.390 was adopted mainly to ease longitudinal and genealogical research "makes no sense" because "ORS 192.398 [includes] exceptions for matters clearly unrelated" to that purpose. (Resp BOM 7). But defendant does not point to any contrary legislative history—indeed, his brief does not cite or discuss any

legislative history whatsoever. Defendant also does not explain why the exceptions codified in ORS 192.398 would "make no sense" if the legislative history the City provided is correct, and this Court should decline to consider his undeveloped argument. *See State v Thompson*, 328 Or 248, 254 n 3, 971 P2d 879 (1999) (declining to address argument absent "thorough and focused" analysis).

Finally, defendant asserts that ORS 192.398 would also "make no sense" if the City is correct, because ORS 192.398 would allegedly then be unnecessary. (Resp BOM 7-8). Again, however, defendant does not develop that argument, and it is unclear why he believes ORS 192.398 would be rendered superfluous by the City's proposed construction of ORS 192.390.

ORS 192.398 simply provides that four categories of "public records are exempt from disclosure" under the Public Records Law—"[r]ecords less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual," "[r]ecords less than 75 years old which were sealed in compliance with statute or by court order," "[r]ecords of a person who is

or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government," and "[s]tudent records required by state or federal law to be exempt from disclosure." Such records are expressly exempted from the application of ORS 192.390. *See* ORS 192.390 (providing that, "except as otherwise provided in ORS 192.398, public records that are more than 25 years old shall be available for inspection.") Because ORS 192.390 sunsets the exemptions from disclosure codified in the Public Records Law (of which ORS 192.398 is a part), a cross-reference to ORS 192.398 was needed if the legislature wished to preserve those particular exemptions. This remains true regardless of the application of ORS 192.390 to material protected by the attorney-client privilege. Defendant's argument that the City's construction of ORS 192.390 would render ORS 192.398 superfluous is therefore incorrect.

In sum, ORS 192.398 has no bearing on the question before this Court—namely, whether the 25-year sunset of ORS 192.390 applies to material protected by the attorney-client privilege. Defendant does not show otherwise, and this Court should reject his undeveloped

arguments to the contrary.

IV. Defendant's remaining arguments are undeveloped and lack merit.

Defendant's remaining arguments are similarly undeveloped and fail on the merits. This Court should therefore reject them.

First, defendant argues that construing the 25-year sunset of ORS 192.390 to extend to the state- and federal-law catchalls of ORS 192.355 would not create a "conflict with federal law" because the "Supremacy Clause of the Constitution" would prohibit applying the 25-year sunset to the federal-law catchall anyway. (Resp BOM 6). That argument misses the point.

As the City explained in its brief on the merits—and as defendant impliedly concedes—construing the 25-year sunset of ORS 192.390 to extend to the state- and federal-law catchalls of ORS 192.355 would mean that, *as a textual matter*, a custodian of records would then be commanded to ignore contrary federal laws. (*See* Pet BOM 47-48). The City agrees with defendant that the Supremacy Clause would prohibit this. *See id*. But defendant does not explain why this Court nevertheless should construe ORS 192.390 in a way that would result in that

nonsensical reading. The legislature was no doubt aware of the Supremacy Clause when it adopted ORS 192.390, and there is no reason to believe that it intended to create a textual conflict with federal law. Quite the contrary: the insertion of the federal-law catchall in ORS 192.355 shows that that the legislature *was anxious to dispel any impression* that the Public Records Law might ever conflict with federal law. As a matter of statutory interpretation, therefore, this Court should not construe ORS 192.390 to conflict with federal confidentiality laws—especially when a plausible reading of the statute would avoid that nonsensical and facially unconstitutional result.

Finally, defendant argues that compelling a home-rule city, its officers, or its employees to disclose information protected by the attorney-client privilege would not interfere with "the structures and procedures of local government" because the client would not "waive any privilege" through a compelled disclosure. (Resp BOM 8). Again, that argument relies on a misunderstanding of the attorney-client privilege, to say nothing of home rule.

As explained previously, the attorney-client privilege is a privilege

against compelled disclosure, not a mere rule of admissibility at trial. Even if a client compelled to disclose privileged information were to retain a vestigial, theoretical right to object to that information being used as evidence at some later court proceeding, the harm has already been done. The whole point of the privilege is to "encourage full and frank communication between attorneys and their clients" by guaranteeing that information shared with a "lawyer in confidence cannot, over [the client's] objection, be extorted from" the lawyer or anyone else at some later date. *Haas*, 325 Or at 500 (citation omitted); *Jancsek*, 302 Or at 274 (citation omitted). Defendant's reading of ORS 192.390 all but eliminates that guarantee, and repeatedly referring to the attorney-client privilege a mere "evidentiary rule" cannot change that reality.

More significantly, as explained in the City's brief on the merits, the attorney-client privilege is integral to the City's structures and procedures. (*See* Pet BOM 62-72). Indeed, defendant does not appear to dispute that fact. (*See* Resp BOM 8). The legislature therefore lacks authority under the Home Rule amendments of the Oregon

Constitution—Article IV, section 1(5), and Article XI, section 2—to waive, limit, or abrogate the City's attorney-client privilege. (*See* Pet BOM 62-72). Defendant does not show otherwise, and this Court should reject his undeveloped argument to the contrary.

CONCLUSION

For the foregoing reasons and as explained in the City's brief on the merits, this Court should hold that the 25-year sunset of ORS 192.290 does not trump the attorney-client privilege.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05 and ORAP 9.05(3), I certify that the word count of the present brief on the merits is 3,999 words and the size of the type is not smaller than 14 point for both the text of the brief and the footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing REPLY BRIEF OF PETITIONER ON REVIEW CITY OF PORTLAND with the State Court Administrator, Appellate Court Records Section, 1163 State Street, Salem OR 97301, by electronic filing on March 11, 2021.

I further certify that the foregoing REPLY BRIEF OF PETITIONER ON REVIEW CITY OF PORTLAND will be served electronically and/or by First Class Mail on March 11, 2021, on the following individuals:

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