IN THE SUPREME COURT OF THE STATE OF OREGON

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| OOMA, INC., a foreign corporation,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>DEPARTMENT OF REVENUE, State of Oregon,<br><br>Defendant-Respondent. | Tax Court No. 5331<br><br>SC S067581 |

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# RESPONDENT'S ANSWERING BRIEF

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Appeal from the Judgment of the Oregon Tax Court
Honorable ROBERT T. MANICKE, Judge

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# RESPONDENT'S ANSWERING BRIEF

## INTRODUCTION

ORS 403.200[1] imposes a tax of 75 cents monthly on each subscriber to Voice over Internet Protocol ("VoIP") service with access to Oregon's emergency communications or "911" system. The tax is known as an "E911 tax" or "emergency communications tax." Under ORS 403.215, VoIP providers are "responsible for collecting the tax" from the subscriber and remitting it with quarterly returns filed with respondent, Department of Revenue (the "department").

From January 2013 to March 2016 (the "tax period"), appellant Ooma, Inc., provided VoIP services to Oregon subscribers for thousands of lines. Despite billing its Oregon subscribers over $2.2 million for VoIP services during the tax period, Ooma did not collect and remit the E911 tax and file quarterly returns with the department. The department issued Ooma notices of assessment, which Ooma appealed to the Magistrate Division of the Tax Court.

After the magistrate issued a decision in favor of the department, Ooma appealed to the Regular Division of the Tax Court. In the Regular Division,

[1] References to the ORS are to the 2015 edition unless otherwise noted. Amendments to the E911 tax statutes during the 2014 legislative session are not relevant to the constitutional issues on appeal. (SER-45, Order at 4 n 2; Tr 14:8-20).

Ooma and the department filed a joint stipulation of facts and filed cross-motions for summary judgment. Ooma's motion argued, in part, that the undisputed facts showed that requiring it to collect and remit the E911 tax violated the Due Process Clause and the substantial nexus test under the Commerce Clause. The department's cross-motion argued that the undisputed facts showed that Ooma's contacts with Oregon sufficed to defeat Ooma's due process and substantial nexus challenges.

The Tax Court denied Ooma's motion, granted the department's, and declared in its judgment that Ooma is liable for the E911 tax during the tax period. On appeal to this court, Ooma challenges the Tax Court's due process and substantial nexus rulings.

## STATEMENT OF THE CASE

The department provides its own questions presented and supplements Ooma's Statement of the Case by providing more complete information about the proceedings below. The department otherwise accepts Ooma's Statement of the Case.

### Questions Presented on Appeal

The federal constitution's Due Process and Commerce Clauses allow Oregon to require an out-of-state company to collect and remit E911 taxes if the company has a sufficient connection to Oregon. The questions presented are:

1. Do the undisputed facts show that Ooma had the necessary minimum connection with Oregon for purposes of the Due Process Clause?
2. Do the undisputed facts show that Ooma had a substantial nexus with Oregon for purposes of the Commerce Clause?

**Summary of Argument**

ORS 403.215 makes VoIP providers "responsible for collecting" the E911 tax from their subscribers and remitting it to the department. Ooma contends that the Due Process Clause and the Commerce Clause prohibit Oregon from requiring Ooma to collect and remit the E911 tax. But, as the Tax Court properly concluded, the undisputed facts demonstrate that Ooma's contacts with Oregon sufficed to meet each constitutional test.

The Due Process Clause requires that a person have a minimum connection with the taxing state in order to be subject to its taxing jurisdiction. A taxpayer that purposefully avails itself of the benefits of an economic market in the taxing state has a minimum connection even if not physically present in the state. Ooma purposefully availed itself of the benefits of the Oregon market. During the tax period, Ooma targeted customers nationwide, including in Oregon, and entered contracts with Oregon subscribers, providing thousands of VoIP lines in Oregon and billing subscribers monthly. Ooma's service revenues from Oregon subscribers totaled over $2.2 million during the tax period. Ooma also sold VoIP equipment to Oregon purchasers in hundreds of

transactions during the tax period, generating over $225,000 in additional revenue. Ooma's purposeful availment of the Oregon market qualifies as a minimum connection and entitled Oregon to require Ooma to collect and remit the E911 tax. Accordingly, the Tax Court properly rejected Ooma's due process argument.

The Tax Court also properly rejected Ooma's Commerce Clause argument. Under the Commerce Clause, a state may not require a business to collect and remit a state tax, such as the E911 tax, unless the tax applies to an activity with a substantial nexus with the taxing state. A taxpayer without a physical presence in the taxing state has a substantial nexus if the taxpayer avails itself of the substantial privilege of conducting business in the taxing state. Here, Ooma did that by providing VoIP service over the internet for thousands of Oregon VoIP lines, generating substantial revenue for Ooma, as well as by selling equipment to Oregon purchasers in hundreds of transactions annually. As a result, the Tax Court correctly concluded that Ooma had substantial nexus with Oregon under the Commerce Clause.

Ooma also contends that the Tax Court erred in granting summary judgment to the department either because the factual record does not establish the precise number of its Oregon customers or because, according to Ooma, the Tax Court relied on inaccurate figures regarding sales of Ooma hardware to Oregon purchasers. Yet the record entitled the Tax Court to rule as it did.

No genuine issue of material fact exists if no objectively reasonable trier of fact could return a verdict for the adverse party. Here, no objectively reasonable trier of fact could find for Ooma, viewing the stipulated record in the light most favorable to Ooma on the department's cross-motion for summary judgment.

It is immaterial that, because some customers may have had more than one VoIP line, the record does not disclose the precise number of Oregon customers. The absence of that information does not create a genuine issue of material fact when the parties' stipulation establishes that Ooma contractually provided thousands of VoIP connections to Oregon subscribers monthly, billing over $2.2 million during the tax period. The nature, extent, and volume of Ooma's VoIP services to Oregon customers are sufficient to establish that Ooma had the requisite minimum contacts with Oregon under the Due Process Clause and a substantial nexus with Oregon under the Commerce Clause.

Ooma also argues that the Tax Court relied on product sales revenues that were not accurate. But even assuming that the product sales figures that the Tax Court cited were not entirely accurate, the error was not material. Ooma stipulated to facts that demonstrate that Ooma directly sold equipment to Oregon purchasers in hundreds of transactions annually, generating over $225,000 in revenue. Whether Ooma's direct product sales are viewed in isolation or in combination with the evidence of Ooma's VoIP service to

Oregon subscribers, no objectively reasonable factfinder could conclude that Ooma did not purposefully avail itself of Oregon's economy under the Due Process Clause or that Ooma lacked a substantial nexus to Oregon under the Commerce Clause. Accordingly, the Tax Court's judgment should be affirmed.

**Supplementary Summary of Facts**

Ooma provides VoIP services to customers across the United States, including Oregon residents. (ER-2, Stip ¶ 7). VoIP technology enables customers to conduct voice communications over a high-speed (broadband) internet connection. (ER-2, Stip ¶ 7). Ooma also provides additional telecommunications services to Oregon residents, including voicemail, call waiting, call forwarding, and caller identification. (ER-2, Stip ¶ 8).

Ooma prepared marketing plans and employed business strategies that targeted customers nationwide, including Oregon residents. (ER-5, Stip ¶¶ 21-22). Ooma provided service to Oregon customers for thousands of VoIP lines each month—growing its number of Oregon lines from 6,633 in January 2013 to 13,467 in March 2016. (ER-6, Stip ¶ 26 *with* SER-40, Stip Ex D) (number of Oregon VoIP lines determined by dividing per-month tax paid by Ooma by 75 cents).[2] Ooma received monthly service revenue from Oregon customers that

[2] The versions of Stipulated Exhibits B and D attached to the ER are incomplete. The department has included the full version of those exhibits with the SER.

increased from $33,000 in January 2013 to approximately $100,000 in March 2016. (SER-55-56, Order at 14-15; ER-6, Stip ¶ 27).[3] Total service billings to Oregon customers for the tax period exceeded $2.2 million.

Ooma required its customers to enter a standard contract with Ooma and to purchase Ooma equipment to access its VoIP service. (ER-3-4, Stip ¶¶ 11, 15, & 18; ER-76-98, Stip Ex C). Under the contract, Ooma granted each Oregon customer, with the customer's purchase of equipment, a license to use Ooma firmware and software embedded in the equipment, and the customer agreed to use the equipment exclusively in connection with Ooma's VoIP communication service. (ER-78-79, -89, Stip Ex C at 3-4, 14). Ooma accepted payment only by credit or debit card. (ER-84, Stip Ex C at 9; ER-93, Stip Ex C at 18).

As part of its VoIP service, Ooma provided Oregon customers access to the emergency communication ("911") system in Oregon and informed customers of the requirements of, and risks that come with, accessing 911 using Ooma's VoIP service. (ER-82-83, Stip Ex C at 7-8; ER-91-92, Stip Ex C at 16-

[3] Ooma's billings to Oregon customers are shown on page 1 of Stipulated Exhibit E. (ER-101). That page includes monthly revenues during and after the tax period. The billings solely for the tax period (January 2013 to March 2016) are summarized in the fourth column of the table at SER-55-56 (Order at 14-15), along with the number of Oregon VoIP lines in the second column of the same table.

17). For purposes of 911 access, each Oregon customer is required to register with Ooma the physical location where the customer was using Ooma equipment and also to update the physical address if the customer's address changed. (ER-82, Stip Ex C at 7 (section 9(d)); ER-91, Stip Ex C at 16 (section 3(b)(iii))).

Ooma's customers could purchase Ooma equipment from third parties or from Ooma. (ER-3, Stip ¶¶ 11, 15). Ooma directly sold equipment to Oregon purchasers in dozens of monthly transactions that generated for Ooma an average of over $6,000 in additional monthly revenue. (ER-3-4, Stip ¶ 16 *with* SER-1-38, Stip Ex B (showing 2,200 equipment sales transactions over 37 months shown, averaging 60 transactions monthly); SER-39, Stip Ex B at 39 (showing $226,937 in total revenue from equipment sales over 37 months)).

Ooma did not file quarterly E911 tax returns with the department during the tax period. (ER-2, Stip ¶ 4). Upon realizing that Ooma had not filed returns, the department issued notices of assessment based on the best information then available, assessing deficiencies of tax, interest, and 100-percent failure-to-file penalties. (ER-2, Stip ¶¶ 3, 4). Before the Tax Court, the department did not dispute Ooma's assertions that Ooma had no real or tangible personal property, employees, independent sales representatives, or other agents located in Oregon during the tax period. (ER-4-5, Stip ¶ 19).

## ANSWER TO ASSIGNMENT OF ERROR

The Tax Court correctly denied Ooma's motion for summary judgment and granted the department's cross-motion for summary judgment, concluding that Ooma was liable for the E911 tax.

### A. Preservation of Error

Ooma preserved the assigned error.

### B. Standard of Review

The court reviews tax court decisions for "errors of law or lack of substantial evidence in the record." ORS 305.445 (2019). On appeal from a grant of summary judgment, "the issue presented is a question of law: whether the Tax Court erred in concluding that there was no genuine issue of material fact and that the department was entitled to judgment as a matter of law." *Habitat for Humanity of the Mid-Willamette Valley v. Dept. of Rev.*, 360 Or 257, 261, 381 P3d 809 (2016); TCR 47 C.[4]

No genuine issue of material fact exists if "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject

[4] ORS 305.425(3) (2019) provides: "All hearings and proceedings before the tax court judge shall be in accordance with the rules of practice and procedure promulgated by the court, which shall conform, as far as practical to the rules of equity practice and procedure in this state." TCR 47 is based on ORCP 47. *See Village at Main St. Phase II, LLC v. Dept. of Rev.*, 360 Or 738, 742-43, 387 P3d 374 (2016) ("Although the Oregon Rules of Civil Procedure (ORCP) do not apply to Tax Court proceedings, many of the TCRs mirror their ORCP counterparts.").

of the motion for summary judgment." TCR 47 C. With respect to the department's cross-motion, this court must view the evidence and all reasonable inferences from that evidence in the light most favorable to Ooma, the nonmoving party. *Portfolio Recovery Associates, LLC v. Sanders*, 366 Or 355, 376, 462 P3d 263 (2020).

## ARGUMENT

The Tax Court correctly sustained the department's determination that Ooma was liable for failing to collect and pay the E911 tax of 75 cents monthly for each VoIP line that Ooma provided an Oregon customer. Under the Due Process Clause, Ooma had the necessary minimum connection with Oregon by purposefully availing itself of the Oregon market—providing monthly service to Oregon subscribers for thousands of VoIP lines, billing Oregon subscribers over $2.2 million during the tax period, and selling VoIP equipment to Oregon purchasers in hundreds of transactions annually. For similar reasons, Ooma substantially availed itself of the privilege of conducting business in Oregon, thereby meeting the substantial nexus test under the Commerce Clause. Given these undisputed facts, no objectively reasonable trier of fact, viewing the record in the light most favorable to Ooma, could find for Ooma based on Ooma's contention that the record does not show the exact number of Oregon subscribers or its questioning of the accuracy of Ooma's revenues from selling equipment. Accordingly, the Tax Court's judgment should be affirmed.

## A. VoIP providers are required to collect the E911 tax from their subscribers.

Oregon imposes the E911 tax—75 cents monthly—on each consumer or subscriber with access to the 911 system in Oregon, including subscribers of VoIP and other telecommunications services. *See* ORS 403.200(1), (2); (SER-45-46, Order at 4-5). ORS 403.215(1) makes VoIP providers like Ooma "responsible for collecting the tax under ORS 403.200" from their subscribers and filing quarterly returns with the department. ORS 403.215(2) requires that VoIP providers "remit the tax due to the department at the time fixed for filing the return." *See also* ORS 403.210 (requiring providers to keep records and make returns); ORS 403.225 (deeming providers to hold tax in trust for state and prescribing manner of enforcement against providers). Revenues from the E911 tax support Oregon's 911 system. *See* ORS 403.235 to 403.245.

## B. The Tax Court correctly concluded that requiring Ooma to collect the E911 tax did not violate the Due Process Clause.

The Tax Court properly determined that Ooma was required to collect and remit the E911 tax under the Due Process Clause. Ooma contends that it lacked a minimum connection with Oregon under the Due Process Clause, on the grounds that it did not purposefully target Oregon customers and that requiring it to collect and remit the E911 tax does not comport with traditional notions of fair play and substantial justice. The undisputed facts in the record show otherwise.

### 1. Ooma purposefully availed itself of Oregon's market by servicing thousands of VoIP lines and selling equipment in hundreds oftransactions.

"The Due Process Clause requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax, and that the income attributed to the State for tax purposes must be rationally related to the values connected with the taxing State." *Quill Corp. v. North Dakota*, 504 US 298, 112 S Ct 1904 (1992), *overruled on another issue by South Dakota v. Wayfair, Inc.*, __ US __, 138 S Ct 2080 (2018); *see also N. Carolina Dept. of Rev. v. The Kimberley Rice Kaestner 1992 Family Tr.*, __ US __, 139 S Ct 2213, 2220 (2019) (*Kaestner*). With respect to that two-step analysis, Ooma argues only that it did not have the requisite "minimum connection" to Oregon. But it did.

"To determine whether a State has the requisite minimum connection with the object of its tax," the court examines if "the taxed entity has certain minimum contacts with the State such that the tax does not offend traditional notions of fair play and substantial justice." *Kaestner*, 139 S Ct at 2220 (citing *International Shoe Co. v. Washington*, 326 US 310, 316, 319, 66 S Ct 154 (1945)) (internal quotations omitted). A taxpayer who "purposefully directed its activities" at the taxing state's residents and "purposefully avail[ed] itself of the benefits of an economic market in the forum State" has the requisite minimum connection under the Due Process Clause, even if the taxpayer lacks

physical presence in the state. *Quill*, 504 US at 307-308. One way to establish purposeful availment of a state's market is through a "regular flow" or "regular course of sales" to customers in the state. *Willemsen v. Invacare Corp.*, 352 Or 191, 203, 282 P3d 687 (2012), *cert den sub nom China Terminal & Elec. Corp. v. Willemsen*, 568 US 1143, 133 S Ct 984 (2013).

Ooma's activities directed at Oregon subscribers sufficiently established the requisite minimum contacts. Indeed, in *Willemsen*, this court found minimum contacts under the Due Process Clause based on a regular flow or regular course of sales in Oregon that involved far fewer contacts with Oregon than Ooma's here. There, a Taiwanese manufacturer of battery chargers indirectly sold 1,102 chargers to Oregon consumers over two years (through an Ohio company that sold the chargers with wheelchairs). This court concluded that the Taiwanese manufacturer had minimum contacts with Oregon based on a regular flow or regular course of sales in Oregon. *Id.* at 207.

Ooma's contacts based on a regular course of sales of goods and services in Oregon far exceeded the contacts in *Willemsen* in quality and quantity. Ooma targeted its strategies and marketed to customers throughout the nation, including Oregon. (ER-5, Stip ¶¶ 21-22). Pursuant to contracts with Oregon subscribers, Ooma provided those subscribers with VoIP services—from 6,633 to 13,467 lines *monthly*. (ER-4 & 6, Stip ¶¶ 18 & 26 *with* SER-40, Stip Ex D). Ooma's Oregon customers paid Ooma over $2.2 million for its VoIP services

over the 13 calendar quarters at issue. (ER-6, Stip ¶ 27; ER-101, Stip Ex E). Ooma also sold VoIP equipment directly to Oregon customers in hundreds of sales transactions each year, generating substantial additional revenue. (ER-3-4, Stip ¶ 16 *with* SER-1-39, Stip Ex B). Ooma had a regular course or regular flow of sales in Oregon.

Ooma's purposeful availment of the economic market in Oregon—through its regular sales of services and equipment to Oregon customers—shows it had the requisite minimum contacts with Oregon under the Due Process Clause. The Tax Court correctly concluded that Oregon's imposition of the E911 tax comports with due process.

**2. Ooma's reliance on *Nicastro*'s plurality opinion is meritless.**

Ooma, citing the plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 US 873, 131 S Ct 2780 (2011), contends that Ooma's activity was insufficient for purposes of due process because it was not "specifically directed at Oregon." (Op Br 28). In particular, Ooma argues that it "did not tailor" its business and marketing plans to Oregon residents—on the grounds that it used a "national" business and advertising strategy. (Op Br 28). For two reasons, this court should reject Ooma's contention.

First, and as discussed further below, the plurality's opinion is not controlling. Second, even if that opinion controlled, it did not require the sort of "specific targeting" that Ooma contends is missing here: Ooma

unequivocally directed its activities at Oregon when it entered contracts with Oregon subscribers to provide VoIP service for thousands of lines in Oregon and billed those subscribers over $2.2 million during the tax period, as well as by directly selling Ooma devices to Oregon customers in dozens of transactions monthly. That conduct qualifies as purposefully "targeting" the Oregon market, even if Ooma simultaneously directed materially the same strategies and efforts to customers in other states.

**a. Justice Kennedy's plurality opinion is not controlling.**

As this court has observed, *Nicastro* "did not produce a majority opinion for the Court." *Willemsen*, 352 Or at 199. In a plurality opinion, Justice Kennedy reasoned that purposeful availment must be determined by examining whether a person "has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign." *Nicastro*, 564 US at 884. Justice Kennedy determined that a British manufacturer had not directed its activities toward the forum state when it sold machines to an unrelated distributor in another state, who in turn sold one of those machines to a purchaser in New Jersey. Notably, the record in *Nicastro* contained no other evidence that the manufacturer directed its activities to New Jersey. *Id.* at 878, 886.

But it was Justice Breyer's concurring opinion, not Justice Kennedy's opinion, that reflects *Nicastro*'s holding. Justice Breyer, joined by Justice

Alito, declined to follow the plurality opinion's reasoning, holding more narrowly that the Court's existing precedents were adequate to decide the case in favor of the defendant. *Nicastro*, 564 US at 887-90. Relying on the Court's existing precedents, Justice Breyer looked for evidence of either (1) "a regular flow or regular course of sales" in the state or (2) in the *absence* of that evidence, "evidence of 'something more,' such as special state-related design, advertising, advice, [or] marketing." *Willemsen*, 352 Or at 201 (quoting Justice Breyer, 564 US at 889; internal quotations omitted). Since nothing in the record supported finding that the defendant had either a regular flow or regular course of sales in the forum state or evidence of "something more," Justice Breyer held that the British manufacturer lacked minimum contacts with the forum state.

In *Willemsen*, this court observed that Justice Breyer's concurring opinion in *Nicastro*, being narrower than the plurality's, is the "holding" that "controls." 352 Or at 201; *see Marks v. United States*, 430 US 188, 193, 97 S Ct 990 (1977) (when "no single rationale explaining the result enjoys the assent of five Justices, the holding * * * may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds"). Thus, it is Justice Breyer's opinion that controls, not the plurality's. And Justice Breyer's opinion in *Nicastro* demonstrates that Ooma's contacts with Oregon satisfy the "minimum connection" test for due process. That

opinion reflects that a "regular flow or regular course of sales" in a state satisfies the due process test. As recounted already, the undisputed facts—which show that Ooma provided thousands of VoIP lines to Oregon subscribers, realizing $2.2 million therefrom, as well as that Ooma sold hundreds of devices to Oregon purchasers—confirm that Ooma maintained a regular flow or regular course of sales in Oregon.

**b. Even under Justice Kennedy's plurality opinion, Ooma directed its activities toward customers in Oregon so as to purposefully avail itself of the economic market in Oregon.**

Even if Justice Kennedy's plurality opinion were controlling, that would not change the result here. Ooma misconstrues what the plurality meant in *Nicastro* when the plurality stated that due process principles require evidence that a taxpayer "directed" its activities at a particular forum. Ooma argues that, under "the 'specific targeting' model outlined by Justice Kennedy," Ooma did not target Oregon. (Op Br 28). That is—notwithstanding that Ooma stipulated that its "marketing plans" and "business strategies" "targeted customers nationwide, including Oregon residents"—Ooma maintains that there is no "specific targeting" of Oregon because those "national" business and advertising plans to solicit and sell to customers throughout the United States mean that Ooma "did not tailor its business plans, advertising, or online presence to focus its solicitation efforts on Oregon residents." (Op Br 28 *with*

ER-5, Stip ¶¶ 21-22). Nothing in the plurality opinion supports Ooma's argument.

Despite Ooma's use of quotation marks around "specific targeting," Justice Kennedy's plurality opinion nowhere uses that phrase. Nor does anything in the plurality opinion indicate that purposeful availment requires that business and marketing strategies be uniquely tailored to a given state's customers. The plurality agreed that "a defendant may in an appropriate case be subject to jurisdiction without entering the forum—*itself an unexceptional proposition*—as where manufacturers or distributors *seek to serve a given State's market*. * * * [T]he defendant must *purposefully avail itself of the privilege of conducting activities* within the forum State, thus invoking the benefits and protections of its laws." *Nicastro*, 564 US at 882 (internal quotations, brackets, and citations omitted; emphasis added). The plurality would have put a new gloss on purposeful availment, requiring "a forum-by-forum, or sovereign-by-sovereign, analysis." *Id.* at 884. It noted, "The question is whether a defendant has followed a course of conduct directed at the society or economy *existing within the jurisdiction of a given sovereign*, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." *Id.* at 884 (emphasis added).

Justice Kennedy did not require a state to prove that a company uniquely targeted that state. The plurality did not suggest that if a company engages in

an undifferentiated, nationwide marketing strategy targeting all states, resulting in successfully contracting with and providing services over the internet to thousands of customers in each of 50 states, the company's lack of physical presence in some (perhaps 49) of those states would deprive those states of jurisdiction. Rather than announcing a unique-targeting rule, the plurality stated that a "defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle." *Id.* at 885. The plurality made clear, though, that it was "an unexceptional proposition" that a defendant could "be subject to jurisdiction without entering the forum" if it "seeks to serve" that state's market. *Id.* at 882. Thus, if a company—as in this case—seeks to serve (and does serve) a state's market without physically entering the forum, it directs its activities at the state within the meaning of the plurality opinion.

In *Nicastro* itself, purposeful availment of the New Jersey market was lacking, due to circumstances that are easily distinguished from the circumstances in this case. As previously noted, the company at issue in *Nicastro*, a British manufacturer, sold its machines through an unrelated distributor in the United States, who in turn sold one (or possibly four) machines to customers in New Jersey over a 15-year period. *See Nicastro*, 564 US at 878 (noting one, and possibly four, sales); *Willemsen*, 352 Or at 203 n 11

(noting underlying record showed a 15-year sales period). The British manufacturer had no other contacts with New Jersey. There was no evidence of a broad strategy that resulted in regular monthly sales to thousands of customers in the state, or evidence that the defendant otherwise sought to serve New Jersey's market. As a result, the plurality concluded that the British manufacturer had not purposefully availed itself of the New Jersey market and that it lacked minimum contacts with New Jersey sufficient to be subject to suit in that state. *Nicastro*, 564 US at 886.

In contrast to the facts in *Nicastro*, the record here shows that Ooma sought to serve—and served—Oregon's market under the plurality's opinion. The same facts that show that Ooma maintained a regular course of sales in Oregon, and thereby satisfied the standard under Justice Breyer's controlling opinion, also show that Ooma purposefully directed its activities at Oregon's market in a manner that satisfied the plurality opinion's standard in *Nicastro*.

**3. Ooma's other arguments are without merit.**

Ooma suggests three other reasons that it cannot be found liable for the E911 tax under the Due Process Clause. First, it maintains that it could not have purposefully availed itself of the Oregon marketplace because its sales volumes are less than those mentioned in *Asahi Metal Industry Co. v. Superior Court*, 480 US 102, 107 S Ct 1026 (1987). Second, it suggests, it is improper to find it purposefully availed itself of the Oregon marketplace because federal

law required Ooma to provide 911 access with its VoIP service. Finally, Ooma argues that requiring it to collect and remit the E911 tax contravenes "traditional notions of fair play and substantial justice." None of these arguments assists Ooma.

**a. Ooma's reliance on sales volumes in *Asahi* is mistaken.**

Suggesting its volume of sales of services and products to Oregon subscribers falls below that sufficient for minimum contacts, Ooma contends that its number of lines in Oregon monthly "falls substantially short of the 20,000 to 100,000 sales of tire valves by the manufacturer in *Asahi*." (Op Br 30). Ooma's reference to sales volumes in *Asahi* is misleading for reasons explained in *Willemsen*.

First, "the [*Asahi*] decision does not identify the annual sales figures in California (or the United States) of [another foreign company's tire] tubes containing Asahi's valve assemblies." *Willemsen*, 352 Or at 206. Accordingly, Ooma is wrong in reading *Asahi* to mean that the defendant there "sold between 20,000 and 100,000 tire valve stems per year through stores in California." (Op Br 26 n 12; *see also* Op Br 30).

Second, *Asahi*'s "holding is limited to" the conclusion that hauling a Japanese seller of tire valve assemblies to a company in Taiwan into a California court contravened traditional notions of fair play and substantial justice regardless of whether the company had minimum contacts with

California. *Willemsen*, 352 Or at 206. Nothing in *Asahi* either establishes or holds that there is a sales-volume floor below which a seller would lack of minimum contacts.

**b. Complying with federal laws does not show that Ooma failed to purposefully avail itself of the Oregon marketplace.**

Ooma also suggests that it "can hardly be said to have met the requirement of 'purposeful availment' under the Due Process Clause where the impetus for its obligation to collect, remit, and report E911 Taxes comes from a mandate of federal law." (Op Br 22 n 7). Ooma conflates its voluntary decision to regularly sell VoIP services to Oregon subscribers—and thereby purposefully avail itself of the Oregon market—with its obligations under federal law if it chose to sell those services. Federal law requires VoIP providers to provide 911 access. *See* 47 CFR § 9.5 (VoIP providers required to provide 911 access); *Nuvio Corp. v. FCC*, 473 F3d 302, 303 (DC Cir 2006) (noting "tragedies" that prompted 2005 FCC order that required VoIP providers to ensure subscribers had access to local 911 systems). But federal law does not require Ooma to provide VoIP services to Oregon subscribers. Once Ooma chose to regularly provide VoIP services and sell VoIP equipment to Oregon subscribers, Ooma purposefully availed itself of the Oregon market. Its compliance with federal law by ensuring that its customers had 911 access was merely a necessary outgrowth of its decision to serve the Oregon market.

### c. Ooma's contacts with Oregon satisfy "traditional notions of fair play and substantial justice."

Ooma also complains that subjecting it to liability for the E911 tax violates "traditional notions of fair play and substantial justice" under the Due Process Clause. (Op Br 32-33.) Ooma errs again.

"[T]here is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result." *South Dakota v. Wayfair*, __ US __, 138 S Ct 2080, 2096 (2018). In that respect, this case is similar to *Quill*. In *Quill*, 504 US at 308, the Court held that, under the Due Process Clause, out-of-state mail-order sellers who regularly sold goods to North Dakota customers could be required to collect state use tax. Just as in *Quill*, Ooma here "purposefully directed its activities at [the taxing state's] residents" and "the magnitude of those contacts is more than sufficient for due process purposes." *Quill*, 504 US at 308.[5] Ooma successfully took advantage of Oregon's market for VoIP services, deriving substantial revenues over the

[5] The department has not found a United States Supreme Court or Oregon case invalidating a state tax based on "traditional notions" *despite* the existence of purposeful availment, and Ooma cites none. Indeed, having determined that the taxpayers purposefully directed their activities at the taxing state in *Quill*, *Quill* did not find it necessary to evaluate "traditional notions of fair play and substantial justice" or indicate how they apply in state tax cases. *See* 504 US at 308.

tax period from providing thousands of Oregon VoIP lines, as well as by selling Ooma equipment to Oregon customers.

Moreover, as the Tax Court noted, Ooma "had 'fair warning' that Oregon's E911 Tax would apply." SER-54 (Opinion at 13 n 19); *see Quill*, 504 US at 308, 312. Ooma advised its customers in its service contracts that E911 taxes might apply. (SER-54; ER-84, Stip Ex C at 9; ER-93, Stip Ex C at 18). Ooma knew, or reasonably should have known, in advance of providing VoIP service to each Oregon subscriber, that it was required to collect tax of 75 cents per month.

Ooma does not argue otherwise, but instead contends that the Tax Court's focus on "recurring" billings and "ongoing" relationships with Oregon customers makes it difficult for a company to determine when it has crossed the "minimum contacts" threshold—that "there must have been a time that it would have been unconstitutional under the Due Process Clause to assert taxing jurisdiction over Ooma." (Op Br 32). But this case does not involve an isolated sale over an extended period. Ooma provided thousands of VoIP lines in Oregon each month, generating more than $2,200,000 in service revenue over the tax period. The court has no need to determine the constitutional floor when Ooma's availment of the Oregon marketplace already had gone through the roof.

#### 4. Conclusion

The Tax Court rightly concluded that, under the Due Process Clause, Ooma exceeded the minimum contacts necessary for Oregon to require Ooma to collect and remit 75 cents for each VoIP line Ooma provided Oregon customers. Requiring Ooma to collect and pay the E911 tax to support Oregon's 911 system is fair and substantially just. Ooma's argument to the contrary is meritless.

### C. The Tax Court correctly concluded that Ooma has a substantial nexus with Oregon under the Commerce Clause.

The Tax Court properly determined that Ooma has a substantial nexus with Oregon under the Commerce Clause. Ooma availed itself of the substantial privilege of carrying on business in Oregon when it provided VoIP services to Oregon subscribers for thousands of lines each month, billed those subscribers over $2.2 million for those services during the tax period, and sold equipment to Oregon purchasers in hundreds of transactions annually. Notwithstanding Ooma's contentions to the contrary, its contacts with Oregon met the standard in *South Dakota v. Wayfair*, __ US __, 138 S Ct 2080 (2018).

#### 1. Ooma availed itself of the substantial privilege of carrying on business in Oregon.

Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) authorizes Congress to "regulate Commerce * * * among the several States." When Congress has not expressly regulated commerce, a

state tax will not contravene the Commerce Clause if the tax "is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 279, 97 S Ct 1076 (1977). Here, Ooma's only argument is that it lacked a "substantial nexus" with Oregon and that the state thus could not constitutionally require it to collect and remit the E911 tax from Oregon subscribers. The Tax Court correctly concluded otherwise.

For the purposes of requiring a seller of goods to collect state sales-and-use taxes, a substantial nexus exists if the seller "avails itself of the substantial privilege of carrying on business" in the taxing jurisdiction. *Wayfair*, 138 S Ct at 2099 (internal quotations and citation omitted). A seller may have a substantial nexus even if it lacks a physical presence in the state. *See* 138 S Ct at 2099.

In *Wayfair*, state law required sellers of goods or services to collect state sales-and-use tax if they met either a revenue threshold—more than $100,000—or a transactional threshold—200 or more sales transactions—annually. *See id.* *Wayfair* upheld each of South Dakota's alternative statutory thresholds as *sufficient* indicators of substantial nexus. The Court noted that, in order to meet either statutory threshold imposed by South Dakota, the seller would

necessarily have availed itself of the substantial privilege of doing business in that state:

> The [South Dakota law] applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.

*Id.* at 2099.

Here, the undisputed facts show that Ooma had the requisite substantial nexus with Oregon. Ooma's VoIP service revenues from Oregon customers each calendar *quarter* exceeded the $100,000 *annual* threshold in South Dakota's law. Moreover, Ooma provided VoIP services for *thousands* of Oregon lines monthly—well above the alternative 200-annual-transaction threshold for sales of goods or services that the Court upheld in *Wayfair*. Ooma's sales of goods and services to Oregon customers exceeded both of the alternative statutory thresholds for substantial nexus upheld in *Wayfair*, showing that Ooma availed itself of the substantial privilege of carrying on business in Oregon. Thus, whether because Ooma's revenues exceeded those found to be sufficient in *Wayfair*, or because Ooma provided thousands of VoIP lines and sold hundreds of VoIP devices to Oregon subscribers, the Tax Court correctly concluded that Oregon's tax satisfied the substantial nexus test.

**2. The Tax Court correctly applied *Wayfair*.**

Ooma protests that the Tax Court declined to examine "the extent, if any, of Ooma's virtual presence," alleging that, under *Wayfair*, a substantial nexus for an out-of-state seller requires both "economic" and "virtual" presence. (Op Br 39). This is wrong, for two reasons. First, Ooma misreads the test in *Wayfair*. Second, the record easily establishes Ooma's extensive "virtual" contacts with Oregon.

First, under *Wayfair*, a substantial nexus exists if the taxpayer availed itself of the substantial privilege of conducting business in the taxing state. *Wayfair* did not hold that a taxpayer can avail itself of the substantial privilege of conducting business in the state only if it met both levels of economic *and* virtual contacts described in South Dakota's law. Rather, the "quantity of business" reflected in the South Dakota law's *alternative* thresholds—more than $100,000 of sales *or* at least 200 transactions annually—"could not have occurred unless the seller availed itself of the substantial privilege of carrying on business" in the state. *Wayfair*, 138 S Ct at 2099.

Accordingly, when *Wayfair* noted that the large internet retailers' nexus with the state was "clearly sufficient" "based on both the economic and virtual contacts" the retailers had with the state, it was merely referring to two types of contacts that supported finding that the retailers met *either one* of the South Dakota law's alternative thresholds. Meeting either the economic threshold

("economic contacts") or the transactional threshold (online, or "virtual," contacts) was sufficient to demonstrate that the retailers met the constitutional standard—that they availed themselves of the substantial privilege of carrying on business in the state. The Court did not impose a conjunctive test in place of South Dakota's disjunctive one.

Here, Ooma exceeded each of the alternative statutory thresholds that the *Wayfair* Court found sufficient for substantial nexus: Ooma sold VoIP service over the internet for thousands of Oregon VoIP lines monthly, and it received well in excess of $100,000 annually. No further inquiry by the Tax Court was required.

Second, and alternatively, any failure to examine Ooma's virtual contacts would be harmless. Ooma's virtual contacts with Oregon—as the undisputed portions of the record reflect—were pervasive during the tax period. Ooma's Oregon customers contracted to use Ooma's VoIP service to make and receive voice calls. Each time a VoIP user made or answered a call using Ooma's VoIP service over the internet (and each time Ooma billed an Oregon subscriber for providing that service or sold equipment directly to an Oregon purchaser over the internet), Ooma had a "virtual" contact with Oregon. Given the number of VoIP lines that Ooma provided and maintained for Oregon subscribers each month and Ooma's monthly billings, Ooma had substantial virtual contacts with

Oregon. And those virtual contacts show that Ooma availed itself of the substantial privilege of carrying on business in Oregon.

**3. Ooma's "unique" targeting argument is unavailing.**

Attempting to contrast the large online retailers in *Wayfair* to its VoIP business, Ooma contends that it lacked a substantial nexus because it employed a "national advertising campaign that was indiscriminate in soliciting sales through its online presence" and because it did not use "direct mail or cookie-driven pop-up advertisements." (Op Br 40). Ooma's contentions are meritless. Ooma stipulated that it targeted customers nationwide, including in Oregon. And it also stipulated to facts that establish that it provided and billed Oregon customers for thousands of VoIP lines monthly. Those facts demonstrate that Ooma had a substantial nexus with Oregon.[6]

*Wayfair* is not to the contrary. The spare factual record in *Wayfair* does not suggest that the taxpayers used strategies uniquely designed for the taxing state's customers. Nor does anything in the Court's Commerce Clause jurisprudence suggest that an online business must have "an advertising

[6] Even if unique targeting were required, nothing in the stipulated facts supports Ooma's affirmative assertion that it "did not use direct mail or cookie-driven pop-up advertisements," nor did Ooma introduce any facts by affidavit or declaration in support of those assertions. (Op Br 40).

campaign unique to" a state to have substantial nexus, or that it must "use direct mail or cookie-driven pop-up advertisements."[7] (Op Br 40).

Ultimately, whatever strategies Ooma used to find Oregon customers, they worked. Ooma's large and growing number of Oregon VoIP connections and revenues from Oregon customers over the tax period demonstrate that Ooma availed itself of the substantial privilege of carrying on business in Oregon.

Ooma had a substantial nexus with Oregon under the Commerce Clause. Ooma was constitutionally required to collect the E911 tax from Oregon VoIP subscribers and to remit the tax to the department to help fund Oregon's 911 system.

## D. The Tax Court correctly concluded that no genuine issue of material fact existed.

In granting summary judgment in favor of the department, the Tax Court concluded that there was no genuine issue of material fact "given the extent of

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[7] For example, there are no findings in *Wayfair* about the extent to which the taxpayers targeted customers in the state by placing "cookies" on consumers' computers. The discussion of "cookies" in *Wayfair* occurs in the Court's *critique* of the "physical presence" test in *Quill.* "Cookies" are mentioned in *Wayfair* as part of the "'physical' aspects of pervasive modern technology," aspects that suggested that *Quill*'s physical-presence test was "proving unworkable." *Wayfair*, 138 S Ct at 2095, 2097-98 (noting one state regulation defining physical presence to include placing cookies on residents' web browsers and that such efforts "are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence").

[Ooma's] overall connection to Oregon during the periods at issue." (SER-52, Order at 11 n 13). In so concluding, the Tax Court relied on the number and growth in VoIP lines to Oregon subscribers and in Ooma's service revenues during the tax period. (SER-54-56, Order at 13-15; SER-60, Order at 19).[8] Viewing the record in the light most favorable to Ooma, the Tax Court correctly concluded as a matter of law that Ooma could not prevail on its constitutional arguments.

Ooma nevertheless contends that the Tax Court erred in granting summary judgment to the department because Ooma raised questions below regarding "the quantification of its customer base in Oregon and the number of hardware units actually sold by Ooma to Oregon customers." (Op Br 41).[9] On that basis, Ooma contends, "there remain genuine issues of material fact regarding Ooma's economic returns from Oregon and its activities directed toward" Oregon. (Op Br 43); (*see also* SER-52, Order at 11 n 13; Tr 68-73).

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[8] The department emphasized the same facts at oral argument. (*See* Tr at 54-55 (department's reliance on four undisputed facts: nationwide targeting that included Oregon; monthly service billings to Oregon customers growing from $600,000 in 2013 to over $1,000,000 in 2015; thousands of Oregon VoIP lines monthly; and contractual relationships with Oregon customers)).

[9] Ooma also incorrectly states that "[t]he Stipulation of Facts in this case was entered into prior to the holding in *Wayfair*." (Op Br 43). *Wayfair* was decided in June 2018. *See* 138 S Ct 2080. The parties' stipulation in the Regular Division was filed in August 2018. (ER-1; SER-74; SER-78).

Contrary to Ooma's argument, the Tax Court was not foreclosed from granting summary judgment because of uncertainty about the exact number of customers or a dispute about the exact amount of Ooma's revenues from sales of equipment to Oregon purchasers. No genuine issue of material fact exists if "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." TCR 47 C. Here, the stipulated record demonstrates that Ooma purposefully availed itself of the Oregon market and had a substantial nexus with Oregon even when one "view[s] the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to" Ooma as "the nonmoving party." *Portfolio Recovery*, 366 Or at 376.

**1. The precise number of Oregon customers is not material given the number of Oregon VoIP lines.**

First, Ooma argues that the record does not make clear whether each VoIP line represented a unique customer—suggesting, for example, that a business customer could have multiple lines. (Op Br 38). The contention is immaterial.

There was no need for the department or the Tax Court to determine the exact number of Oregon customers because the number of Oregon VoIP lines is dispositive without such details. The number of those lines, by themselves, demonstrate that Ooma purposefully availed itself of Oregon's market and had

a substantial nexus with the state. It is undisputed that Ooma provided thousands of VoIP lines in Oregon each month and that Ooma billed over $2.2 million in service revenues[10] over the tax period—contacts with Oregon that suffice to demonstrate purposeful availment of the Oregon market under the Due Process Clause and a substantial nexus with Oregon under the Commerce Clause.

As a result, uncertainty about the precise number of unique Oregon customers does not create a genuine issue of material fact. Whether Ooma provided 10,000 VoIP lines to 10,000 unique Oregon customers monthly, 10,000 VoIP lines to a single Oregon business customer (e.g., one business with 10,000 employees), or somewhere in between, the result is the same: No objectively reasonable trier of fact, viewing the factual record in the light most favorable to Ooma, would conclude that Ooma did not have a regular course of sales or services in Oregon under the Due Process Clause or that Ooma did not avail itself of the substantial privilege of carrying on business sufficient to establish substantial nexus under the Commerce Clause.

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[10] Ooma also suggests that, in determining that Ooma had substantial nexus, the Tax Court erred by declining to evaluate the extent of Ooma's "virtual contacts" or "virtual presence" in Oregon. *Wayfair*, 138 S Ct at 2099. For the reasons set out in Section C, the Tax Court did not need to evaluate Ooma's virtual contacts given Ooma's economic contacts, and in any event Ooma's "virtual contacts" with Oregon were pervasive and extensive.

Additionally, there is no dispute that Ooma had numerous customers at different locations in Oregon.[11] Stipulated Exhibit B shows the location of Oregon customers who purchased equipment directly from Ooma in dozens of transactions monthly. (SER-1-38, Stip Ex B). Though the customers' identities were scrambled to protect their privacy, the frequency of Ooma's direct sales to Oregon purchasers and the variety of customer locations do not support Ooma's assertion that it had only a small number of customers in Oregon.

**2. Any error in revenues from product sales is immaterial.**

Ooma also argues that another material fact was in dispute. Ooma asserts that it "questioned * * * the number of hardware units actually sold by Ooma to Oregon customers." (Op Br 41; *see also* Op Br 38). Ooma's point appears to be that revenues from product sales to Oregon customers shown in the third column of the chart on pages 14 and 15 of the Tax Court's Order could be incorrect because those figures might include equipment sales by third parties to Oregon customers. (*Cf.* SER-55-56, Order at 14-15, *with* ER-101-102, Stip Ex E at 2-3). Ooma's contention is immaterial for two reasons.

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[11] Elsewhere, Ooma criticizes the Tax Court's inference from the record that there were "ongoing" relationships between Ooma and its customers. (Op Br 30-31). Yet Ooma would purposefully avail itself of the Oregon market, and have a substantial nexus with Oregon, whether it served a stable but growing customer base or whether it contracted with and provided services to a constantly changing set of customers monthly.

First, there is no dispute that Ooma's revenues from providing VoIP *services* during the tax period totaled over $2.2 million or that Ooma provided between 6,633 and 13,467 VoIP lines to Oregon customers monthly pursuant to contracts—facts that suffice to establish purposeful availment under the Due Process Clause and a substantial nexus under the Commerce Clause. Ooma stipulated that "Exhibit E * * * shows OOMA's recurring billings to Oregon customers during the [Tax] Period." (ER-6, Stip ¶ 27). Ooma further stipulated that, using Exhibit D, "[t]he court can derive the number of telephone lines for which OOMA provided VoIP services to customers in Oregon by dividing the 'per month tax we would have paid' by $0.75." (ER-6, Stip ¶ 26 *with* SER-40, Stip Ex D). Even ignoring Ooma's product sales, then, Ooma billed over $2.2 million for providing VoIP services over the tax period, growing its number of Oregon VoIP lines from 6,633 in January 2013 to 13,467 in March 2016.

Second, viewed in the light most favorable to Ooma, the record shows that Ooma sold equipment directly to Oregon purchasers in over 2,200 transactions over the period shown,[12] resulting in an annual average of at least $73,601 from Ooma's direct equipment sales to Oregon purchasers. (*See* ER-3-

[12] The first 38 pages of Stipulated Exhibit B show that Ooma directly sold over 2,200 products to Oregon customers for the period shown—approximately 700 product sales annually. (SER-1-38). The last page of the same exhibit shows the gross amount of revenues from those sales for the period shown. (SER-39).

4 ("Stipulated Exhibit B * * * shows the revenues from OOMA's sales of equipment to Oregon customers and retailers during the [Tax] Period."); SER-39 (summarizing $226,937.20 in hardware sales over 37-month period shown in Stipulated Exhibit B)). The frequency and regularity of Ooma's own equipment sales annually and the number of equipment sales transactions shown in Stipulated Exhibit B easily meet both the purposeful availment and substantial nexus tests.

In any event, given the undisputed evidence of Ooma's service revenues and VoIP line growth, no objectively reasonable finder of fact could find in Ooma's favor on the department's cross-motion. The Tax Court correctly determined that there were no material facts in dispute.

## CONCLUSION

The Tax Court properly concluded that, based on the record, Ooma purposefully availed itself of the Oregon market under the Due Process Clause and had a substantial nexus with Oregon under the Commerce Clause. Thus, the Tax Court correctly denied Ooma's motion for summary judgment and

correctly granted the department's cross-motion for summary judgment. The court should affirm the Tax Court's judgment.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 2, 2021, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Casey M. Nokes, attorney for appellant, by using the court's electronic filing system.

I further certify that on March 2, 2021, I directed the Respondent's Answering Brief to be served upon Michael J. Bowen (*pro hac vice)*, by mailing two copies, with postage prepaid, in an envelope addressed to:

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*Continued…*

## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,697 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(3)(b).

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