IN THE COURT OF APPEALS OF THE
STATE OF OREGON

CITY OF CORVALLIS,
Plaintiff-Appellant,
v.
PI KAPPA PHI,
Defendant-Respondent.

Benton County Circuit Court
15CR05381; A161263

Locke A. Williams, Judge.

Argued and submitted January 9, 2017.

David E. Coulombe argued the cause for appellant. With him on the briefs was Fewel, Brewer & Coulombe.

Jessica E. May argued the cause for respondent. With her on the brief was Arnold Law.

Before DeHoog, Presiding Judge, and Hadlock, Judge, and Aoyagi, Judge.*

HADLOCK, J.

Affirmed.

Aoyagi, J., concurring.

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* Hadlock, J., *vice* Flynn, J. pro tempore; Aoyagi, J., *vice* Sercombe, S. J.

HADLOCK, J.

Plaintiff City of Corvallis appeals a trial court order affirming a municipal court order allowing defendant's demurrer and declaring plaintiff's "hosting" ordinance unconstitutional. Plaintiff assigns error to the trial court's determination that state law preempts the local ordinance. We affirm.

Because this case comes to us on a demurrer, we need not recite the facts in detail. *State v. Illig-Renn*, 341 Or 228, 230 n 2, 142 P3d 62 (2006). Plaintiff cited defendant for violating, along with another ordinance, Corvallis Municipal Code (CMC) 5.03.040.010.10(1), which provides that "[n]o person shall permit, allow or host a juvenile party at his or her place of residence or premises under the person's control while alcoholic liquor is consumed or possessed by any minor." CMC 5.03.040.010.01(3) defines "juvenile party" as "[a] social gathering attended by one or more persons under the age of twenty-one (21)." The ordinance states expressly that violation of its terms "is intended to be a strict liability crime," that "proof of a mental state" is not required, and that violation of the ordinance is a class A misdemeanor. CMC 5.03.040.010.10(3) and (4).

Defendant demurred, arguing, in part, that CMC 5.03.040.010.10 is unconstitutional because ORS 471.410(3), part of the Oregon Liquor Control Act, preempts it. That statutory provision, which we discuss in more detail later, generally prohibits a person who is present and in control of private property from knowingly allowing a minor who is not the person's own child or ward to consume alcoholic liquor on the property. The first time that a person violates ORS 471.410(3), that person has committed a Class A violation; each subsequent violation "is a specific fine violation" with a presumptive fine of $1,000. ORS 471.410(10).

The municipal court allowed defendant's demurrer and declared the ordinance invalid. Plaintiff appealed to the circuit court, arguing that the ordinance is a valid exercise of its home rule authority not preempted by state law. The trial court affirmed the municipal court's order. On appeal, plaintiff assigns error to the trial court's order. We review

the trial court's ruling for errors of law. *State v. Walsh*, 288 Or App 331, 332, 406 P3d 152 (2017).

Oregon grants municipalities home rule authority in Article XI, section 2, of the Oregon Constitution.[1] A party's argument that a city exceeded its home rule authority by enacting an ordinance can implicate two questions: first, whether the ordinance is authorized by the city's charter or a state statute and second, if so, "whether [the ordinance] contravenes state or federal law." *City of La Grande v. PERB*, 281 Or 137, 142, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173 (1978). In this case, the parties focus on the second question. Defendant contends that plaintiff's ordinance contravenes, or conflicts with, state law; plaintiff contends that it does not.

The test for whether state law conflicts with a local ordinance is "whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive." *Id.* at 148. "In the area of civil or administrative ordinances regulating local conditions, it is reasonable to assume that the legislature did not mean to displace local ordinances, unless that intention is apparent." *City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986). But Oregon courts apply a different test for ordinances that purport to create crimes. Recognizing that Article XI, section 2, subjects home rule provisions to "the Constitution and criminal laws of the State of Oregon," the *Dollarhide* court was "left *** with the inescapable conclusion that the voters who adopted Article XI, section 2[,] envisioned a stricter limitation on the lawmaking power of cities in respect of criminal laws than with regard to civil or regulatory measures" and reversed the assumption that the legislature did not intend to displace local ordinances unless the intent is apparent. *Id.* at 497, 501 ("The analysis of compatibility begins *** with the assumption that state

[1] Article XI, section 2, provides, in part:

"The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon ***."

criminal law displaces conflicting local ordinances which prohibit and punish the same conduct, absent an apparent legislative intent to the contrary." (Emphasis in original.)).

We begin our analysis by considering which of the *Dollarhide* tests—the civil/regulatory or the criminal—applies in this context. Plaintiff argues that the civil/regulatory analysis applies, as ORS 471.410(3) is not a criminal law, both because it falls outside of the criminal code and because the Liquor Control Act's primary purpose is regulatory. Defendant counters that ORS 471.410(3) creates a crime, as evidenced by the criminal nature of subsections (1) and (2) of the same statute,[2] the fact that the state is a party, and that ORS 131.005(6) includes violations in its definition of "criminal action."

The parties' arguments, focused as they are on the statutory provision, overlook part of the analysis. To determine whether the regulatory or the criminal analysis applies, we must consider both the nature of the statutory provision and the nature of the ordinance that the statute arguably preempts. After all, if the voters intended to strictly limit the ability of municipalities to adopt criminal ordinances even in contexts in which the state legislature also believed that criminalizing certain types of conduct was appropriate, the voters must also have intended to strictly limit municipalities' authority to criminalize behavior that the state legislature has specifically decided *not* to criminalize. That is, a criminal municipal ordinance can conflict with "the criminal laws of the State of Oregon" for purposes of Article XI, section 2, if it criminalizes behavior that the legislature has chosen should not be subject to criminal sanction, whether that legislative choice is itself reflected in a criminal statute or in a different statutory provision. *Cf. City of Portland v. Jackson*, 316 Or 143, 149, 850 P2d 1093 (1993) ("When a local criminal ordinance prohibits conduct,

[2] ORS 471.410(1) states that a person "may not sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated." Violation is a Class A misdemeanor. ORS 471.410(5). Subsection (2) of the statute similarly prohibits people from providing alcohol to minors unless, under certain circumstances, the alcohol is provided by the minor's parent or guardian. Violation of that provision is a misdemeanor under some circumstances and a violation under others. ORS 471.410(5), (6).

unless the legislature has permitted that same conduct, either expressly or under circumstances in which the legislative intent to permit that conduct is otherwise apparent, the ordinance is not in conflict with state criminal law ***."); *State v. Tyler*, 168 Or App 600, 604, 7 P3d 624 (2000) ("the test for whether a state law preempts a local civil or criminal ordinance is whether the local rule is incompatible with the legislative policy"; "because of the constitutional provision the assumption is that the legislature *did* intend to displace a criminal ordinance" (emphasis in original)).[3] Accordingly, we look to both the city ordinance and the state statute to determine which of the *Dollarhide* tests to apply.

Although ORS 471.410(3) defines a noncriminal violation, it is part of a statute that creates misdemeanor crimes. ORS 471.410(1), (2). Thus, although subsection (3) itself does not create a crime, it is part of a statute that reflects the legislature's intention to criminalize certain conduct and to not criminalize other conduct. Moreover, plaintiff's ordinance expressly provides that a violation of its terms constitutes a Class A misdemeanor, with each conviction carrying a mandatory sentence that, upon a third conviction, includes imprisonment.[4] CMC 5.03.040.010.10(4). Consequently, we apply the criminal law analysis. *Cf. Dollarhide*, 300 Or at 503 ("As long as a city ordinance employs civil or administrative procedures and sanctions lacking punitive significance, *** the validity of the ordinance must meet only the [civil regulatory test] rather than the more stringent constraints

[3] Here, the legislature has chosen to criminalize certain conduct involving the provision of alcohol to minors, ORS 417.410(2), (5), and has chosen not to criminalize the related conduct described in subsection (3) of the same statute. Discerning legislative intent may be more challenging "when there is *no* state criminal law on the subject"; in that circumstance, "[t]he assumption *** that the legislature intended to displace conflicting local criminal ordinances *** does not apply" and a court "would have to ascertain whether the legislature, by repealing a statute or decriminalizing certain conduct, intended also to preclude local prohibition and [criminal] punishment of that conduct." *Dollarhide*, 300 Or at 502 n 9 (emphasis added).

[4] Plaintiff argues that the ordinance is a civil regulation, in part because CMC 5.03.010.080 permits a private person to commence an infraction or misdemeanor charge. The CMC does authorize citizen complaints, which may also be used to commence and serve as the basis for nonfelony criminal actions and commence felony criminal actions under ORS 131.005(3) and (4). That a private individual's complaint triggers the prosecution does not, however, change the nature of the proceeding from criminal to civil.

of the phrase in Article XI, section 2, that expresses the dominance of state criminal laws over the creation and punishment of local criminal offenses.").

An ordinance that criminalizes conduct conflicts with a state statute if it "either prohibits conduct that the statute permits[] or permits conduct that the statute prohibits." *State v. Krueger*, 208 Or App 166, 169, 144 P3d 1007 (2006). Defendant contends that the ordinance prohibits conduct that ORS 471.410 permits. To determine whether that is so, we examine both the ordinance and the statute with which it is claimed to conflict. *Jackson*, 316 Or at 151. Next, "we determine what conduct the ordinance prohibits." *Id.* Finally, we determine whether the statute permits that conduct. *Id.* A statute permits conduct if the legislature (1) expressly precludes local legislation on a subject ("occupies the field"), (2) expressly permits specified conduct, or (3) "otherwise manifest[s] its intent to permit specified *conduct*." *Id.* at 147-48 (emphasis in original). If the statute permits conduct that the ordinance prohibits, the laws conflict and the statute displaces the ordinance. *Id.* at 151.

We begin by examining the ordinance and the statute. Defendant was charged with hosting a party for minors in violation of CMC 5.03.040.010.10(1), which, as set out above, provides that "[n]o person shall permit, allow or host a juvenile party at his or her place of residence or premises under the person's control while alcoholic liquor is consumed or possessed by any minor." CMC 5.03.040.010.01(3) defines "juvenile party" as "[a] social gathering attended by one or more persons under the age of twenty-one (21)." CMC 5.03.040.010.10(2) provides an affirmative defense in the event that "the alcoholic liquor is provided by the minor's parent or guardian ***." The ordinance does not include any mental state requirement; rather, it expressly creates a "strict liability" crime. CMC 5.03.040.010.10(3). Thus, the ordinance prohibits a person from permitting, allowing, or hosting a social gathering attended by one or more persons under 21 years of age at the person's "place of residence or premises under the person's control while alcoholic liquor is consumed or possessed by any minor," regardless of whether the person does so knowingly or with any other culpable

mental state, unless the alcohol is provided by the minor's parent or guardian.

As noted, defendant argues that the ordinance conflicts with ORS 471.410(3) of Oregon's Liquor Control Act. ORS 471.410(3) provides:

> "(a) A person who exercises control over private real property may not knowingly allow any other person under the age of 21 years who is not a child or minor ward of the person to consume alcoholic liquor on the property, or allow any other person under the age of 21 years who is not a child or minor ward of the person to remain on the property if the person under the age of 21 years consumes alcoholic liquor on the property.
>
> "(b) This subsection:
>
> "(A) Applies only to a person who is present and in control of the location at the time the consumption occurs;
>
> "(B) Does not apply to the owner of rental property, or the agent of an owner of rental property, unless the consumption occurs in the individual unit in which the owner or agent resides; and
>
> "(C) Does not apply to a person who exercises control over a private residence if the liquor consumed by the person under the age of 21 years is supplied only by an accompanying parent or guardian."

If the statute permits conduct that the ordinance prohibits in any of the three ways *Jackson* identified, then the statute displaces the ordinance. We first consider whether the Liquor Control Act occupies the field of liquor control, precluding local legislation on that topic. *Jackson*, 316 Or at 147. It does not. As we have previously explained, because the Liquor Control Act's preemption statute, ORS 471.045, "provides only that inconsistent local ordinances are preempted by the Liquor Control Act, it is clear that the legislature did not intend to retain exclusive regulatory power in the field of liquor control." *City of Portland v. Sunseri*, 66 Or App 261, 265, 673 P2d 1369 (1983). Further, "ORS 167.840(3) specifically recognizes the power of cities to enact ordinances in this area that are not inconsistent with state law." *Id.*

Second, we consider whether the statute *expressly* permits conduct that the ordinance prohibits. *Jackson*, 316 Or at 148. It does not. ORS 471.410(3), like many statutes, is written primarily in terms of prohibited conduct, and while ORS 471.410(4) expressly permits providing sacramental wine "provided as part of a religious rite or service," CMC 5.03.040.010.03(3) includes an analogous exception to the conduct that the ordinance criminalizes.

Third, we consider whether the legislature has otherwise manifested its intention to permit specific conduct that the ordinance criminalizes. *Jackson*, 316 Or at 148. To answer that question, we look to both "the phrasing of the statute" and "the enactment history of the state law." *State v. Robison*, 202 Or App 237, 241, 120 P3d 1285 (2005).

In arguing that ORS 471.410(3) does not preempt its "hosting" ordinance, plaintiff contends that the legislature did not intend the statute to regulate the same "juvenile party" conduct that plaintiff's ordinance addresses; rather, plaintiff suggests that the two laws address different subjects entirely. To assess that argument, we start by considering the phrasing of ORS 471.410(3). As always when determining the meaning of a statutory provision, we consider subsection (3) in its context—here, the entirety of the statute.

The first three subsections of ORS 471.410 prohibit three types of conduct. Subsection (1) prohibits selling, giving, or otherwise making available any alcoholic liquor to a visibly intoxicated person. Using similar terminology, subsection (2) prohibits making alcohol available to a person under 21 years old, unless the person providing the alcohol is the minor's parent or guardian and the activity takes place in certain specified circumstances. Subsection (3)—the provision at issue here—prohibits a person "who exercises control over private real property" from knowingly allowing a person under the age of 21 to consume alcohol on the property (unless the minor is the child or ward of the person who controls the property). Thus, ORS 471.410(2) and (3) have different objectives. Subsection (2) is concerned with *giving* alcohol to minors, while subsection (3) is aimed at preventing people who own or otherwise control real property

from knowingly allowing juveniles to drink alcohol *at that location—e.g.*, the location of a party.

Legislative history confirms that ORS 471.410(3) was meant to target the locations at which juveniles might consume alcohol. Representative Ken Strobeck sponsored the 1995 house bill that added subsection (3) to the statute. House Bill (HB) 2582 (1995). At the first committee hearing on the bill, Strobeck explained that the bill was designed as a means to hold people "in control of the premises" accountable for parties involving underage drinking—specifically those parties thrown by teenagers when their parents are away. Tape Recording, House General Government and Regulatory Reform, Regulatory Reform Subcommittee, HB 2582, Apr 3, 1995, Tape 23, Side A (statement of Rep Ken Strobeck). In other words, the statute was enacted to regulate juvenile parties. Representative Strobeck explained to various legislative committees (the House General Government and Regulatory Reform, Regulatory Reform Subcommittee, the House General Government and Regulatory Reform Committee, and the Senate Business and Consumer Affairs Committee) that the bill arose from conversations with Beaverton police about their effective use of a local ordinance to combat risks associated with teen drinking. *Id.*; Tape Recording, House General Government and Regulatory Reform, Full Committee, HB 2582, Apr 19, 1995, Tape 99, Side B (statement of Rep Ken Strobeck); Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 103, Side A (statement of Rep Ken Strobeck). A Beaverton police officer explained that it was important to create a statewide law to avoid pushing parties out of town and into areas that had no similar prohibition, which would create a higher risk of fatal accidents. Tape Recording, House General Government and Regulatory Reform, Regulatory Reform Subcommittee, HB 2582, Apr 3, 1995, Tape 23, Side A (statement of Officer Dennis Marley). Given that legislative history, Plaintiff's contention that the statute does not address juvenile parties at all lacks merit.

We turn to considering, more broadly, whether the legislature has manifested an intention to permit conduct that the ordinance criminalizes. "In theory, what the

legislature 'permits' can range from express permissive terms to total inattention and indifference to a subject." *City of Portland v. Lodi*, 308 Or 468, 474, 782 P2d 415 (1989). "The search is not for particular words but for a political decision, for what the state's lawmakers either did or considered and chose not to do." *Id*. Thus, although we cannot simply assume that, by its silence, the legislature meant to permit all conduct that it did not expressly prohibit, *Jackson*, 316 Or at 149, we must determine what the legislature *did* intend. That is, we must determine whether the legislature's decision not to prohibit particular conduct reflects something more like a conscious decision to allow that conduct (even if the legislature did not consider it desirable) or, rather, little more than the legislature's indifference to the subject.

Here, the legislature was not indifferent to the issue of whether a culpable mental state should be required, but consciously decided to require a knowing mental state. Again, the ordinance, by its terms, creates a strict liability crime when a person allows a "juvenile party" on his or her property, while ORS 471.410(3) prohibits allowing juveniles to consume alcohol on private property only when the person who controls the property *knowingly* allows that to happen. The legislature's choice to prohibit the conduct only when the person controlling the property acts knowingly "yields an inference that the legislature intended to permit [that] conduct *** if the person engaging in it does so without the requisite intent." *Robison*, 202 Or App at 242 (considering difference between statute criminalizing disorderly conduct, which includes a specified mental state, with city ordinance that created a strict liability offense for the same kind of behavior).

The legislative history is again helpful in assessing the significance of that difference between the statute and the ordinance. As introduced, the bill that added subsection (3) to ORS 471.410 prohibited people who control real property from (a) allowing underage drinking on the property and (b) allowing a person under age 21 to remain on the property if the person controlling the property "knows or should know that the person under the age of 21 years will consume alcoholic liquor on the property." HB 2582 (1995), introduced. Subsequent legislative discussion resulted in

three significant amendments. First, the word "knowingly" was added, so that the statute applies only to people who "knowingly allow" underage drinking on their property. HB 2582 (1995), house amendments (Apr 25, 1995); ORS 471.410(3). Second, a provision was added clarifying that the subsection's prohibitions apply "only to a person who is present and in control of the location at the time the consumption occurs." HB 2582 (1995), senate amendments to A-Engrossed (May 25, 1995); ORS 471.410(3). Third, the legislature deleted the provision that would have held a property owner responsible for underage drinking on the property if the owner *should have known* that would happen. Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 103, Side A (statement of Sen Joan Dukes); Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 106, Side A; HB 2582 (1995), senate amendments to A-Engrossed (May 25, 1995).

Plaintiff asserts that the statutory mental state requirements were added to protect owners of large tracts of private property in the event that those properties were used without their knowledge as the locations for juvenile parties—a concern different from plaintiff's goal of prohibiting juvenile parties within city limits. True, specific statements in the legislative record reflect that protecting owners of large, rural properties from criminal liability was one aim of the pertinent amendments. Tape Recording, House General Government and Regulatory Reform, Full Committee, HB 2582, Apr 19, 1995, Tape 99, Side B (statement of Rep Ken Strobeck). However, a broader consideration of the legislative history reveals that the mental-state requirements were not added *solely* to protect owners of large tracts of private property, but were intended to more generally clarify that the statute targets people who *facilitate* events at which minors consume alcohol. *Id.*; Tape Recording, House General Government and Regulatory Reform, Regulatory Reform Subcommittee, HB 2582, Apr 3, 1995, Tape 23, Side A (statement of Rep Ken Strobeck); Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 103, Side A (statement of Rep Ken Strobeck).

For example, Representative Strobeck emphasized the legislation's focused target in countering opposition to the bill. A representative of a rental property owners trade association expressed concern that the legislation would make landlords liable for "that which is being done on the property." Tape Recording, House General Government and Regulatory Reform, Regulatory Reform Subcommittee, HB 2582, Apr 3, 1995, Tape 23, Side A (statement of Emily Cedarleaf); *see* Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 103, Side A (statement of Emily Cedarleaf). Representative Strobeck explained that he did not mean the statute to apply to commercial property owners who were "not aware" of "something []going on behind a building." Tape Recording, House General Government and Regulatory Reform, Regulatory Reform Subcommittee, HB 2582, Apr 3, 1995, Tape 23, Side A (statement of Rep Ken Strobeck). He specifically pointed to the word "knowingly" as indicating that "we are not expecting someone to know what is happening on every inch of their property even if they are not aware of somebody being there." *Id.* And he confirmed to the House sub and full committees as well as a Senate committee that addressed the legislation that the bill's target was the person who "opens the door," rather than an absent property owner. *Id.*; *see also* Tape Recording, House General Government and Regulatory Reform, Full Committee, HB 2582, Apr 19, 1995, Tape 99, Side B (similar statement of Rep Ken Strobeck); Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 103, Side A (similar statement of Rep Ken Strobeck). Finally, as noted, the legislature removed a proposed provision that would have held property owners responsible for underage alcohol consumption that they "should have known" of. Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 103, Side A (statement of Sen Joan Dukes); Tape Recording, Senate Business and Consumer Affairs Committee, HB 2582, May 16, 1995, Tape 106, Side A (statement of Sen Joan Dukes).

Considered as a whole, that history persuades us that the legislature deliberately chose to include a culpable

mental state to define which property owners (or controllers) should be held responsible when minors consume alcohol at parties on their property and which should not. Under the statute, people who control property commit a violation when juveniles consume alcohol on the property only when *they*—the property controllers—knowingly allow that consumption. That is, the statute punishes people who engage in the culpable behavior of knowingly permitting their property to be used for an improper purpose. In stark contrast, the city ordinance creates a strict-liability crime, punishing property owners (in some instances by mandatory imprisonment) for conduct committed by *other* people on their property—conduct of which the property owners may not even be aware. Given the legislature's deliberate choice not to punish property owners (or controllers) in those circumstances, which may involve no culpability on the part of the property owner whatsoever, we conclude that the ordinance conflicts with the state criminal laws and is, therefore, preempted. *See Robison*, 202 Or App at 244 (holding that state criminal law preempted a local ordinance when the ordinance created a strict liability offense for conduct the legislature had chosen to criminalize only when the defendant acted with a culpable mental state). The trial court did not err when it affirmed the municipal court's order allowing defendant's demurrer and declaring the ordinance unconstitutional.

Affirmed.

AOYAGI, J., concurring.

The majority holds that the City of Corvallis's teenage-party ordinance is preempted by state law because the legislature made a "deliberate choice" to include a mental-state requirement in the statute. *City of Corvallis v. Pi Kappa Phi*, 293 Or App 319, ___, ___ P3d ___ (2018). In my view, in both this case and others, we are applying too low a bar for implicit preemption under *City of Portland v. Jackson*, 316 Or 143, 850 P2d 1093 (1993). At the same time, I am compelled to agree with the majority's conclusion that, under our existing case law, the ordinance is unconstitutional. Accordingly, I concur, but I write separately in the hopes of spurring further discussion of the difficult issues inherent in implicit preemption.

As discussed in the majority opinion, the "essential test" for preemption of local ordinances by state law is "whether the local rule is incompatible with the [state] legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive." *City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986) (internal quotation marks omitted). With respect to criminal laws, there is an assumption that state criminal law "displaces *conflicting* local ordinances which prohibit and punish the same conduct, absent an apparent legislative intent to the contrary." *Id*. (emphasis added). Historically, the classic conflict scenario is a local ordinance that allows conduct prohibited by state law. *Jackson*, 316 Or at 146. However, it is also the case that, "if a statute *permits* conduct that an ordinance *prohibits*, the two laws are in conflict." *Id*. at 147 (emphasis in original).

Jackson recognizes that that begs a question: "How does one determine whether a state law *permits* that which an ordinance prohibits?" 316 Or at 146 (emphasis in original). Because criminal statutes are normally written in terms of prohibited conduct, not permitted conduct, interpreting Oregon's criminal statutes to "permit" all conduct not expressly prohibited "would swallow Article XI, section 2, for it would bar all local governments from legislation in the area of criminal law unless the local legislation was identical to its state counterpart." *Id*. at 147.

Jackson identifies three ways that a state law may "permit" conduct and thereby conflict with a local ordinance prohibiting it. *First*, the legislature may expressly "occupy an entire field of legislation on a subject." *Id*. An example of preempting the field is a statute that expressly "prohibits local governments from creating offenses that involve public intoxication, public drinking, and drunk and disorderly conduct." *Id*. *Second*, the legislature may "expressly permit specified conduct," such as a statute that prohibits prosecution of persons with a concealed handgun permit from possessing a firearm in a public building. *Id*. at 148. *Third*, the legislature may "otherwise manifest its intent to permit specified conduct." *Id*. An example of this enigmatic catchall, which I will refer to as "implicit preemption," is the concealed weapon statute at issue in *City of Portland v. Lodi*,

308 Or 468, 782 P2d 415 (1989). *See Jackson*, 316 Or at 148. The legislative history of that statute showed that "a decision had been made to permit the concealed carrying of any knife not a switchblade, dirk, or dagger," which led the court to conclude that a city ordinance prohibiting the carrying of any pocketknife with a blade longer than a certain length was preempted by state law. *Id.* at 148.

In articulating the three ways that the legislature may "permit" conduct, the *Jackson* court emphasized that, if "the statute and its legislative history are silent or unclear as to whether a decision to 'permit' conduct has been made," the court should not assume that the legislature intended to "permit" it. *Id.* at 148-49. The court expressly disavowed any such interpretation of *Dollarhide*, and it reiterated the importance of municipalities' rights to pass laws that regulate conduct within their jurisdictions. *Id.* "We cannot simply 'assume' that, by its silence, the legislature intended to permit conduct made punishable under an ordinance. The state constitutional rights granted to the citizens of a municipality are not so easily discarded." *Id.* "When a local criminal ordinance prohibits conduct, unless the legislature has permitted that same conduct, either *expressly* or under circumstances in which the legislative intent to permit that conduct is *otherwise apparent*, the ordinance is not in conflict with state criminal law and is valid under Article XI, section 2, of the Oregon Constitution." *Id.* (emphasis added).

The specific ordinance at issue in *Jackson* made it "unlawful for any person to expose his or her genitalia while in a public place or place visible from a public place, if the public place is open or available to persons of the opposite sex." *Id.* at 152. A citizen challenged the ordinance as preempted by a state statute that made it a crime for a person to publicly expose one's genitals "with the intent of arousing the sexual desire of the person or another person." *Id.* The question before the court, therefore, was whether the statute reflected a legislative decision to "permit" the conduct that the ordinance proscribed, *i.e.*, "non-sexually motivated" public exposure of genitalia. *Id.* After examining the legislative history, the court concluded that the evidence of legislative intent was not strong enough to declare the ordinance unconstitutional. *Id.* at 154. An older statute had

"[a]rguably" prohibited both sexually and non-sexually motivated public exposure of genitalia. *Id*. at 152. That statute was repealed and replaced with the statute that prohibited only sexually motivated exposure. *Id*. at 153. Although the repeal of the earlier statute could "be evidence of a political decision to permit conduct that was previously forbidden," the court concluded that it was not, because the official commentary to the replacement statute did not indicate an affirmative intent to *permit* that conduct, even though it did expressly acknowledge that it would not violate the statute. *Id*. The commentary was "insufficient to demonstrate a legislative political decision to permit non-sexually motivated public nudity." *Id*. The court also declined to consider a comment on a "tentative draft" of the statute, regarding accidental or negligent exposure not violating it. *Id.* at 153-54. Ultimately, the court upheld the ordinance, explaining, "In the absence of stronger evidence of legislative intent, we are unconvinced that the legislature intended to permit the conduct prohibited in the city ordinance." *Id*.

Jackson implicitly recognizes that not all legislative history is created equal. That point is made even more directly in *Lodi*:

> "In theory, what the legislature 'permits' can range from express permissive terms to total inattention and indifference to a subject. The search is not for particular words but for a *political decision*, for what the state's lawmakers either did or considered and chose not to do. The search for a negative decision, in the context of preemption, can involve variations ranging from *mere inaction on a bill or other proposal*, which hardly represents a collective judgment, to *rejection of a proposal by vote after debate (perhaps even after passage by one house)*, which may be a collective decision although it also falls short of affirmative lawmaking."

Lodi, 308 Or at 474 (emphasis added; footnote omitted).

Lodi foresees an important and challenging question that is inherent in the idea of implicit preemption and that remains unclear 25 years after *Jackson*: When does something that "falls short of affirmative lawmaking" nonetheless establish a "collective decision" of the legislature to "permit" particular conduct? We know that "silence" is

not enough. *Jackson*, 316 Or at 149. We also know that the legislative intent is supposed to be clear, not "unclear," and *Jackson* demonstrated that principle by rejecting a preemption challenge in the "absence of stronger evidence of legislative intent." *Id.* at 149, 154. But what is enough? How much and what kind of "evidence" is necessary to establish that the legislature made a *collective political decision* about something, even if that decision is not reflected in affirmative lawmaking?

Part of the difficulty in answering that question lies in our historical ambivalence towards legislative history. To explain, a short detour into the land of statutory construction is necessary. In the past, for purposes of statutory construction, legislative history could be considered only if a statute was ambiguous on its face. *State v. Gaines*, 346 Or 160, 164, 206 P3d 1042 (2009). That changed in 2001, with the statutory amendment discussed in *Gaines*, and we may now consider legislative history at the first level of statutory construction. *Id.* at 171-72. Even under the newer methodology, however, we are not required to seek out legislative history beyond that provided by the parties. *Id.* at 166; ORS 174.020(3). Moreover, we have broad discretion in deciding how much weight to give to whatever legislative history we do consider. *See* ORS 174.020(3). "A court need only consider legislative history 'for what it's worth'—and what it is worth is for the court to determine." *Gaines*, 346 Or at 171.

For purposes of statutory construction, the *Gaines* court expressly repudiated the notion that legislative history should be given the same weight as text. It recognized that "[t]he formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law." *Id.* "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Id.* (internal quotation marks omitted). As explained in an 1868 treatise quoted by the *Gaines* court,

> "[N]ot only is it important that the will of the law-makers be expressed, but it is also essential that it be express

> in *due form of law*; since nothing is law simply and solely because the legislators will that it shall be, unless they have expressed their determination to that effect, *in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential*."

Gaines, 346 Or at 171 (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 130 (1868)) (emphasis added).

In other words, the legislature typically must take formal *action* before we will give the force of law to its intentions. Due to the critical distinction between formal legislative action and, frankly, everything else, "text and context remain primary" in statutory construction "and must be given primary weight in the analysis," whereas legislative history receives only "whatever weight [the court] deems appropriate." *Id.* at 166, 171.

With that in mind, let us return to the law of preemption. There is inherent tension between our approach to legislative history when construing statutes and our approach to legislative history when analyzing preemption. In construing a criminal statute for purposes of convicting, fining, and jailing citizens, we are not required to search for any legislative history that the parties do not provide, we have broad discretion to disregard legislative history if we do not consider it useful, and we treat the words of the statute as far more compelling evidence of legislative intent than anything in the legislative history. In the preemption arena, however, we are *required* to pore over the legislative history and, at least in some circumstances, give it the same weight as affirmative lawmaking. And we are doing so for *constitutional* purposes.

This leads me to make two observations. First, we need better guidance from the Supreme Court as to the third means of establishing preemption under *Jackson*. Without it, there is too much risk of inconsistent decisions. Indeed, the "evidence" of legislative intent in *Lodi*, 308 Or at 474-75—the introduction of a bill with broad language about prohibited weapons, a house subcommittee's implicit decision not to outlaw the carrying of knives other than three

types, and the subsequent enactment of the amended bill—is not obviously that much "stronger" than the evidence that the court deemed "unpersuasive" in *Jackson*. The cases from our own court since *Jackson* also, in my view, do little to clarify the standard for implicit preemption and set a fairly low bar—lower than *Jackson* may have intended.

Second, we should be very cautious about finding collective "legislative intent" in legislative history. By definition, any analysis of implicit preemption involves a situation in which the legislature has not expressly occupied the field or expressly permitted the conduct at issue. As such, *Jackson* necessarily recognizes the possibility of establishing legislative intent by legislative history alone, and we are bound by *Jackson*. At the same time, we should not forget the cautions in *Jackson*, *Lodi*, and *Gaines* about different types of legislative history. We must ask ourselves whether a given piece of legislative history evidences the intent of *the legislature*, or whether it evidences only the intent of an individual legislator, the members of a particular committee or subcommittee, or perhaps even one legislative chamber.

We may also need to grapple with whether the *reason* that the legislature decides not to prohibit something is relevant. For example, if someone introduces legislation to regulate a broad class of weapons, and the legislature later decides to regulate a narrower class of weapons, does it matter why? Does it matter whether it was in response to citizen complaints about wanting to carry certain weapons, versus in response to a budget analysis of the cost to enforce a broader law? There are many reasons that the legislature may consider prohibiting, but then ultimately decide not to prohibit, particular conduct that do not necessarily reflect a collective decision that the conduct is desirable and affirmatively should be allowed to occur. Sometimes it is just not worth the effort and cost of regulating. Moreover, individual legislators may have different reasons to support the bill that is actually up for vote, regardless of what the bill does *not* cover. The reason for a legislative decision not to prohibit certain conduct is yet another potential piece of the analysis.

As for the case before us today, the majority concludes that the legislature made a "deliberate choice" to require a knowing mental state under ORS 471.410(3). 293 Or App at ___. I cannot disagree with that conclusion. The original bill contained a "should have known" provision that would have applied to property owners who recklessly or negligently allowed minors to consume alcohol on their property. A legislative subcommittee decided that a "knowing" *mens rea* requirement was preferable, however, and the legislature ultimately enacted a statute with a "knowing" requirement. It appears that decision was made at least in part to avoid a political fight with property owners. Nonetheless, it was a "deliberate choice."

A "deliberate choice" by the legislature not to include certain conduct in a criminal statute, for any reason, appears to be all that we require under our current case law. In both *City of Eugene v. Kruk*, 128 Or App 415, 419-21, 875 P2d 1190 (1994), and *State v. Robison*, 202 Or App 237, 243-44, 120 P3d 1285 (2005), we struck down an ordinance as preempted by state law where there was legislative history indicating an affirmative decision in at least one chamber not to regulate passive conduct or impose strict liability because doing so could potentially infringe on citizens' First Amendment rights. In both of those cases, evidence of the legislature's "deliberate choice" to criminalize a more limited category of conduct was deemed enough, regardless of the reason for that choice.

Jackson suggests a higher standard. In my view, preemption should be limited to circumstances where there is clear evidence that the legislature made a *collective* decision that conduct should be affirmatively *allowed* in the State of Oregon. A choice not to prohibit certain conduct for political, budgetary, or like reasons should not be treated as preventing local governments from prohibiting that conduct in their own jurisdictions, nor should the views of only a subset of legislators lead us to declare a local ordinance unconstitutional. Here, the legislative history of ORS 471.410(3) does not persuade me that the legislature made a collective political decision that the citizens of our state should be allowed to recklessly, negligently, and unintentionally allow

teenagers to hold drinking parties on their property without any risk of criminal consequences. That said, under our existing case law, I concur.