

1 GARRETT, J., dissenting.

2 ORS 91.225 prohibits cities and counties from enacting any ordinance that  
3 "controls the rent." From the statutory text, legislative history, and surrounding context,  
4 it is clear that the legislature's concern was that local governments, faced with rising rents  
5 due to inadequate housing supply, would try to address that problem -- and thereby  
6 exacerbate it -- by interfering with the setting of fair market rates for rent.

7 The City of Portland, having declared a "Housing State of Emergency,"  
8 enacted Ordinance 188219 ("ordinance"), which provides that, if a landlord raises the rent  
9 by 10 percent or more in a 12-month period and the tenant subsequently gives notice of  
10 an intent to terminate the lease, then the landlord must make a cash payment to the tenant  
11 in an amount ranging from \$2,900 to \$4,500, depending on the size of the unit. Portland  
12 City Code 30.01.085 (2017), *amended by* Ordinances 188519, 188558, 188628 (2017),  
13 188849 (2018), 189421, 189726 (2019). Although the ordinance does not create "rent  
14 control" in the typical form, it nevertheless imposes an adverse financial consequence on  
15 a landlord for no reason other than its decision to raise the rent. Because I believe that  
16 effort to restrain rent falls within the scope of what the legislature prohibited in ORS  
17 91.225, I respectfully dissent.

18 I begin with the relevant text of ORS 91.225:

19 "(1) The Legislative Assembly finds that there is a social and  
20 economic need to insure an adequate supply of affordable housing for  
21 Oregonians. The Legislative Assembly also finds that the imposition of  
22 general restrictions on housing rents will disrupt an orderly housing market,  
23 increase deferred maintenance of existing housing stock, lead to  
24 abandonment of existing rental units and create a property tax shift from  
25 rental-owned to owner-occupied housing. Therefore, the Legislative

1 Assembly declares that the imposition of rent control on housing in the  
2 State of Oregon is a matter of statewide concern.

3 "(2) Except as provided in subsections (3) to (5) of this section, a  
4 city or county shall not enact any ordinance or resolution which controls the  
5 rent that may be charged for the rental of any dwelling unit."

6 The question is what is meant by the phrase "controls the rent" in subsection (2). I agree  
7 with the majority's textual analysis of that phrase: ORS 91.225 preempts "local laws that  
8 'regulate' or 'exercise *restraining* or *directing* influence over' the rent that landlords may  
9 charge." \_\_ Or at \_\_ (slip op at 9:19-20).

10 I also agree with the majority that that definition is not enough to resolve  
11 this case. One could interpret "regulate" and "exercise restraining or directing influence  
12 over" narrowly to mean that the only type of prohibited ordinance is one that directly  
13 prescribes the amount of rent that may be charged. Alternatively, one could understand  
14 those terms more broadly to encompass ordinances that have any restraining, limiting, or  
15 directing influence on rent. I agree with the majority that the most expansive  
16 understanding of those terms is not what the legislature had in mind. \_\_ Or at \_\_ (slip op  
17 at 10:12-13). The word "control" connotes purposive action; thus, the statute is naturally  
18 read to prohibit local measures that are *aimed* at restraining, limiting, or directing rent  
19 (and are calculated to have that effect<sup>1</sup>), and not to prohibit all local measures that could

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<sup>1</sup> The majority misinterprets what I mean by saying that "control" connotes purposive action. \_\_ Or at \_\_ n 5 (slip op at 10 n 5). I do not contend that ORS 91.225 preempts any ordinance that might have been enacted for the subjective purpose of trying to control rent, regardless of what the ordinance actually does. To be preempted, an ordinance must satisfy two conditions: It must be directly targeted at restraining the amount of rent that a landlord charges, *and* it must be calculated to have that effect. To put it differently, another case might present the question whether a city that deliberately

1 have an effect, however indirect, on landlords' costs or on the rental market generally.

2           That understanding follows from the legislative history, which reflects a  
3 concern that local governments, faced with a problem of high rents, would be tempted to  
4 simply restrain them instead of taking longer-term actions geared toward increasing the  
5 supply of affordable housing. The legislative record is replete with testimony to the  
6 effect that the promised benefits of suppressing rent below fair market levels are, at best,  
7 transient and that "rent control, in the long run, makes affordable housing less available  
8 for lower-income renters." Testimony, House Committee on Judiciary, HB 2505, Apr 16,  
9 1985, Ex E (testimony of Debbie Wood, State Housing Council). That is because actions  
10 taken by government to keep rent below fair market rates reduce the "incentive for  
11 developers to develop and maintain rental units." *Id.* As the potential profitability of  
12 housing development is artificially suppressed, investors will opt out and spend their  
13 money where it is not so suppressed, compounding the very problem of short supply that  
14 led to rising rents in the first place. As another witness put it,

15           "[a]lthough the imposition of rent controls has in most cases been in  
16 response to a 'housing shortage' and the subsequent spiral of rising rents,  
17 the experience of cities in which rent control has existed for a period of  
18 time strongly supports the conclusion that rent control not only does not  
19 alleviate the problem, it actually leads to greater pressures on the rental  
20 housing market and has a severe economic impact in the communities in  
21 which it is imposed."

22 Testimony, House Committee on Judiciary, HB 2505, Apr 30, 1985, Ex K (testimony of

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tried to control fair market rents through a completely ineffectual means (such as the imposition of a one-dollar fine on landlords) could be saved from preemption by its own ineptitude. This is not that case.

1 James Irvine, Oregon State Home Builders Association and The Multifamily Housing  
2 Council of Oregon).

3 In response to those concerns, the legislature prohibited cities and counties  
4 from enacting "any ordinance or resolution which controls the rent that may be charged  
5 for the rental of any dwelling unit." ORS 91.225(2). As noted above, I agree with the  
6 majority that "controls," in this context, encompasses ordinances that regulate or exercise  
7 restraining or directing influence over the amount of rent that a landlord may permissibly  
8 charge. The crucial question, however, remains whether ORS 91.225 prohibits *only* the  
9 direct prescription of rent, or whether city ordinances may violate the statute through less  
10 direct means.

11 The majority opinion is elusive on that point. On the one hand, it seems to  
12 conclude from the text, context, and legislative history that preemption applies only to  
13 ordinances that "prescribe certain rent amounts or prohibit increases." \_\_ Or at \_\_ (slip  
14 op at 20:21-22). On the other hand, the majority proceeds to consider whether a city  
15 could violate ORS 91.225 through an ordinance that "effectively" does the same thing --  
16 and it seems to answer that question "maybe, but not in this case." \_\_ Or at \_\_ - \_\_ (slip  
17 op at 24:13-25:8).

18 There should be no doubt that a city can violate ORS 91.225 through means  
19 other than "prescrib[ing] certain rent amounts or prohibit[ing] increases." \_\_ Or at \_\_  
20 (slip op at 20:21-22). Those types of prescriptions and prohibitions are commonly known  
21 as "rent control." If the legislature had prohibited "rent control," perhaps it would be  
22 reasonable to infer that the legislature was concerned only with what most people think of

1 when they hear that phrase, *i.e.*, the model exemplified in New York and San Francisco,  
2 where rents are set by city regulators. But the legislature did not do that; it prohibited  
3 ordinances that "control[ ] the rent." ORS 91.225(2). That choice of language is  
4 significant because the phrase "rent control" appears in the previous subsection of the  
5 statute, where the legislature stated its prefatory findings. ORS 91.225(1). Having  
6 specifically called out the concern about "rent control" in subsection (1), the legislature  
7 could easily have repeated that phrase in subsection (2), the operative provision of the  
8 statute, which states what cities and counties are prohibited from doing. That is, if the  
9 legislature had been content to prohibit cities and counties from setting up rent-regulation  
10 boards, it could have done that. But legislators, being students of human nature, knew  
11 that prohibiting a single means to an undesired end can be a roadmap for evasion.  
12 Instead, they chose to prohibit any ordinance that "controls the rent." ORS 91.225(2).  
13 That choice alone signals that the legislature did not want the preemption inquiry to turn  
14 on whether cities had chosen a specific *mechanism*. That signal is amplified by the  
15 warning in subsection (1) about "the imposition of general restrictions on housing rents."  
16 ORS 91.225(1).

17           However, *even if* the phrase "controls the rent" should be understood to  
18 mean exactly the same thing as "rent control," that still does not mean that the only way  
19 that a city can violate the statute is by fixing rents at certain levels. Given its stated  
20 purpose, the prohibition should be understood to cover local ordinances that "regulate" or  
21 "exercise restraining or directing influence over" the amount of rent -- either by direct  
22 prescription or prohibition, or through less direct measures that are nonetheless calculated

1 to "regulate" or "exercise restraining or directing influence over" the rent by directly  
2 attaching adverse consequences to the setting of rents at levels that the city does not  
3 favor. Consider two hypothetical ordinances:

4 (1) "No landlord shall raise rent by more than 10 percent in a 12-  
5 month period."

6 (2) "Landlords may set rents at whatever levels they choose, but  
7 those who raise rent by more than 10 percent in a 12-month period shall  
8 pay a fee to the city in the amount of \$25,000 per affected unit."

9 The difference between those two ordinances is no difference at all when it  
10 comes to real-world consequences. The legislature cannot have intended to treat them  
11 differently. The majority somehow resists that conclusion; it only begrudgingly  
12 considers the possibility that ORS 91.225 preempts ordinances that "effectively" control  
13 the rent even without a direct prescription or prohibition. \_\_ Or at \_\_ (slip op at 24:15-  
14 21). Then, "assuming without deciding" that the answer is yes, the majority goes on to  
15 conclude that Portland's ordinance does not do so, essentially because the financial  
16 consequences that the city has chosen to impose are not sufficiently harsh to deter  
17 landlords from setting rents at their desired levels. \_\_ Or at \_\_ - \_\_ (slip op at 24:21-  
18 25:1). The majority is incorrect.

19 In the majority's hypothetical example, if the market would support an  
20 increase of 10 percent in the rent for a studio apartment, a landlord who raises the rent by  
21 exactly 10 percent for one year, and then increases that rent 9.9 percent the following  
22 year, would recoup the \$2,900 "relocation assistance" payment and earn an additional  
23 \$1,533 over those two years. From that, the majority infers that the \$2,900 payment is

1 not enough to interfere with the setting of market rent. The flaw in the majority's  
2 reasoning is that no rational landlord would do what the majority proposes. Instead of  
3 raising the rent 10 percent in the first year, the landlord would raise the rent by 9.9  
4 percent in both years, earning nearly the same amount of increased rental revenue and  
5 avoiding the \$2,900 "relocation assistance" payment altogether. The difference between  
6 9.9 percent and 10 percent may seem trivial, but economically it will make sense for  
7 many landlords to raise rent no more than 9.9 percent even where the market would  
8 support increases of 11 percent, 12 percent, or more. Moreover, because of the  
9 compounding effect, the difference between annual increases of 9.9 and, say, 12 percent  
10 will lead to highly disparate results over time. The majority dismisses all of this as  
11 simply "altering a landlord's calculus regarding how much it will increase the rent," but  
12 that is the entire point. \_\_\_ Or at \_\_\_ (slip op at 26:1-2). A landlord that must alter its rent-  
13 raising calculus solely to avoid a city-imposed financial penalty<sup>2</sup> has had its freedom to  
14 set rents "restrained" just as if the city had enacted an outright prohibition.

15           The majority's argument also fails to take the city at its word. The city  
16 made no bones about its intent to discourage landlords from raising rents in amounts  
17 higher than what the city considered acceptable. At the February 2, 2017, Portland City  
18 Council meeting discussing the ordinance, Commissioner Eudaly, the lead sponsor,

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<sup>2</sup> The majority makes much of the difference between a "penalty," as plaintiffs call it, and a "relocation assistance payment," as the city calls it. \_\_\_ Or at \_\_\_ - \_\_\_ (slip op at 22:1-23:1). The terminology is irrelevant, as is the use to which the money is put. What matters is the indisputable fact that the city has imposed a *cost* on landlords that is tied directly to their decision to raise rent and thus restrains their freedom to do so.

1 framed it as a deterrent when she said, "there's an easy way to avoid relocation  
2 assistance. Do not no-cause evict your tenants and don't raise their rent 10 percent or  
3 more per year." Audio Recording, Portland City Council, Ordinance 188219, Feb 2,  
4 2017, Part 21 of 27, at 11:40 (comments of Commissioner Chloe Eudaly),  
5 <https://www.portlandoregon.gov/auditor/article/622981> (accessed Oct 29, 2021). The  
6 deterrent purpose and effect of the ordinance was further confirmed when, three years  
7 later, the city's mayor described the relocation assistance program as "one tool we have to  
8 keep rent levels stable." Audio Recording, Portland City Council, Ordinance 190122,  
9 Sept 16, 2020, Part 1 of 3, at 2:43:13 (comments of Mayor Ted Wheeler supporting an  
10 amendment to lower the 10 percent threshold for relocation assistance payments during  
11 the COVID-19 public emergency),  
12 <https://www.portlandoregon.gov/auditor/article/751848> (accessed Oct 29, 2021). Even  
13 putting those comments aside, the purpose of discouraging rent increases is amply  
14 demonstrated by the fact that, if the city had been concerned solely with providing  
15 assistance to displaced renters, other means were available. The city could have required  
16 payments to all renters who terminate their leases without regard to the amount of any  
17 rent increase, or whether it had been increased at all. Or the city could have imposed a  
18 surcharge on all leases to fund an assistance program for displaced renters. Instead, the  
19 city required the "relocation assistance" payment only from landlords who raised the rent  
20 more than a threshold amount. This court should assume the city knew what it was  
21 doing, and I see no reason for this court to question the city's economic assumptions  
22 about what would work. Certainly, there is nothing in the record that gives this court a

1 basis for confidently stating that the penalties the city chose to impose are too modest to  
2 make a difference.

3           In my view, the text of the ordinance and the circumstances surrounding its  
4 adoption permit only one conclusion: The city, as a means of "stabilizing" rising rents,  
5 intended to deter landlords from setting rents at fair market levels and selected a coercive  
6 tool to accomplish that objective. That is what the 1985 legislature feared cities would  
7 do. The ordinance is a measure that "controls the rent" and is preempted by ORS  
8 91.225(2). Because the majority concludes otherwise, I respectfully dissent.