IN THE SUPREME COURT OF THE STATE OF OREGON

MICHELLE ROSSOLO,
Plaintiff-Appellant,
Petitioner on Review,

v.

MULTNOMAH COUNTY ELECTIONS DIVISION and
TIM SCOTT, Director,
Defendants-Respondents,
Respondents on Review,

and

METRO,
Intervenor-Respondent,
Respondent on Review.

Multnomah County Circuit Court
1401-00046
Oregon Court of Appeals
A156429
Oregon Supreme Court
S063524

PETITIONER'S BRIEF ON THE MERITS ON REVIEW

Review of the Decision of the Court of Appeals on Appeal
from the Judgment of the Circuit Court for Multnomah County
The Honorable Eric J. Bloch

Opinion Filed: July 29, 2015
Before: Sercombe, P.J.; Hadlock, J.; Tookey, J.

FILED: DECEMBER 2015

James T. McDermott, OSB 933594
jmcdermott@balljanik.com
Dwain M. Clifford, OSB 025074
dclifford@balljanik.com
Ball Janik LLP
101 SW Main St., Ste. 1100
Portland, OR 97204
Tel: (503) 228-2525
Attorneys for Petitioner on Review Michelle Rossolo

Jacqueline A. Weber, OSB 824243
jacquie.a.weber@multco.us
Multnomah County Attorney's Office
501 SE Hawthorne Blvd., Ste. 500
Portland, OR 97214
Tel: (503) 988-3138
Attorney for Respondents on Review Multnomah County Elections Division and Tim Scott, Director

William F. Gary, OSB 770325
william.f.gary@harrang.com
Sharon A. Rudnick, OSB 830835
sharon.rudnick@harrang.com
Harrang Long Gary Rudnick PC
360 E. 10th Ave., Ste. 300
Eugene, OR 97401
Tel: (541) 485-0220
Attorneys for Respondent on Review Metro

Daniel W. Meek, OSB 079124
dan@meek.net
10949 SW 4th Ave.
Portland, OR 97219
Tel: (503) 293-9021
Attorney for *Amicus Curiae* Oregon Progressive Party

Greg Wasson, *amicus curiae*
petitioncpr@aol.com
PO Box 2333
Salem, OR 97308
Tel: (503) 371-6614

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

APPENDIX

1. Questions Presented and Proposed Rules of Law

Question 1: For many years, every guest of every hotel in Multnomah County has paid transient-lodging taxes to support publicly-owned facilities and to promote tourism. But in December 2013, the Multnomah County board voted to upend this existing tax structure by enacting Ordinance 1206, which exempts guests of only the planned Oregon Convention Center hotel (the "OCC hotel") from paying these taxes supporting tourism. Instead, Ordinance 1206 would require guests of only the planned OCC hotel to pay a new site-specific tax for the next 30 years to be used solely to repay $60 million for bonds issued to finance the construction of a new OCC hotel. *Is Ordinance 1206 a new "legislative" enactment subject to the referendum power of the voters of the County?*

Proposed Rule of Law: Ordinance 1206 is "legislative" in nature because it abandons the previous "legal framework" furthered by the County's transient-lodging taxes, changing both the taxpayers and the beneficiaries of these taxes. Because Ordinance 1206 is "legislative" in nature, it must be vulnerable to challenge by the referendum power held by the County's voters.

Question 2: Under Multnomah County's home-rule charter and code, all "ordinances" enacted by the County's board are subject to the referendum power of the voters of the County. *Must the County's own choice to enact Ordinance 1206 as an "ordinance" hold the*

County to its own established rules, subjecting Ordinance 1206 to the referendum power of its voters?

Proposed Rule of Law: A County's choice to pass a legislative enactment as an "ordinance" that is subject to the referendum power under the County's own rules cannot be retracted in order to thwart the voters' exercise of the referendum power.

Question 3: Article VI, § 10 of the Oregon Constitution requires that the voters of any county — like voters state-wide — must be able to refer "legislative" enactments by a county to a referendum of its voters. Multnomah County's code respects this constitutional floor, as it must, but the code also permits referral of all self-styled "ordinances" to the voters of Multnomah County, regardless of whether the Constitution would require this option. *May Multnomah County's code give County voters greater voting rights than the floor mandated by the Oregon Constitution?*

Proposed Rule of Law: The Oregon Constitution provides a floor for the referendum power of the voters regarding legislative enactments by state and County lawmakers, but Oregon's counties are free to permit voters even greater voting powers than the minimum mandated by the Constitution, including the power to refer County legislation that would otherwise be "administrative" in nature and not subject to the Constitutional floor.

2. Factual and Procedural Background

On December 19, 2013, the board of Multnomah County voted to enact Ordinance 1206, which amends portions of the County's code. App. 1-15. The next day, on December 20, 2013, petitioner on review Michelle Rossolo filed a prospective petition to refer three parts of Ordinance 1206 to the County's voters. All three of the parts challenged by Rossolo's petition relate to the board's decision to exempt guests of the planned Oregon Convention Center hotel from paying the transient-lodging tax surcharge that every other guest of every other hotel in Multnomah County must pay to promote tourism in the Portland and Multnomah County region and, instead, tax only those guests of the OCC hotel for the next 30 years for the sole purpose to repay $60 million in bonds that Metro intends to issue to finance the construction of the OCC hotel.

On December 31, 2013, Tim Scott, the director of the County's elections division and a respondent on review, rejected Rossolo's petition on the grounds that, despite the County's decision to codify the enactment as an "Ordinance" under the County's code, Ordinance 1206 was really not an ordinance at all (which, under the County's code, meant "County Legislation") but was merely an "exercise of the Board of County Commissioner's Executive and Administrative powers" that "does not meet constitutional or legislative requirements" to permit the County's voters to have their say in the matter.

On January 3, 2014, Rossolo filed a complaint in Multnomah County Circuit Court under ORS 246.910(1) to appeal Scott's refusal to certify her petition for circulation to the County's voters. Metro filed a motion to intervene in the action on January 10, 2014.

The Hon. Eric J. Bloch heard oral argument on February 10 and 14, 2014 on Metro's motion to intervene and on the motion for summary judgment filed by Rossolo and the cross-motions filed by Scott, the Elections Division, and Metro (collectively, the "County").

On March 3, 2014, Judge Bloch denied Rossolo's motion for summary judgment and granted the County's motions for summary judgment, finding that refusing to certify Rossolo's referendum was proper because "Ordinance 1206 is an administrative act, not a legislative one." Order Granting and Denying Motions for Summary Judgment at 6-7. The general judgment dismissing Rossolo's claims under these orders was entered on March 13, 2014. Order and General Judgment of Dismissal.

The Oregon Court of Appeals affirmed the trial court's summary-judgment orders and judgment against Rossolo's claims in an opinion issued on July 29, 2015, holding that "the parts of Ordinance No. 1206 sought to be referred are administrative, rather than legislative, in character and, accordingly, are not subject to

the referendum process." *Rossolo v. Multnomah Cty. Elections Div.*, 272 Or App 572, 587, 357 P3d 505 (2015).

Rossolo timely filed a Petition for Review in this Court, which was allowed on November 4, 2015.

3. Summary of Argument

Ordinance 1206 is a legislative enactment by the County because it does not merely implement existing legislative policy taxing all hotel guests in the County to fund, among other things, tourism-related facilities owned and operated by the County, the City of Portland ("City"), and Metro. Rather, Ordinance 1206 abandons this previous policy by exempting guests of the planned OCC hotel for a 30-year period from paying this tax to support publicly-owned tourism facilities, Instead, Ordinance 1206 erects a new legal framework under which guests of the privately-owned and operated OCC hotel are taxed to repay bonds issued to finance the construction of the very same hotel where these guests will be staying. Because this change to the County's tax code establishes and funds an entirely new purpose that was previously unknown under County law, Ordinance 1206 is manifestly "legislative" in nature. Accordingly, Ordinance 1206 must be vulnerable to a referendum by the County's voters.

But even if Ordinance 1206 were not "legislative" in nature, the County's code still mandates that Ordinance 1206 must be subject to a voter referendum. Article VI, § 10 of the Oregon Constitution

requires that any County "legislation" must be vulnerable to a referendum by a county's voters. This constitutional floor, however, does not prohibit the County from permitting voters the right to challenge County legislation that would otherwise be merely "administrative" in nature. This enlargement is precisely what the code for Multnomah County permits, which expressly defines any "ordinance" enacted by the County as "County Legislation" subject to the referendum power of the County's voters. County Code § 5.100. Under this code provision, the County enacted Ordinance 1206 as a titular "ordinance." Accordingly, no matter the substantive nature of Ordinance 1206, the County's code specifically permits referral of Ordinance 1206, like *all* County "ordinances," to the voters.

For both of these reasons, Scott and the Elections Division erred in denying Rossolo's petition to refer Ordinance 1206 to the voters of Multnomah County.

4. The County wrongfully refused to accept Rossolo's petition for a voter referendum.

Article VI, § 10 of the Oregon Constitution provides that the "referendum powers reserved to the people by this Constitution" are also reserved to the voters in Oregon's counties relative to "legislation passed by counties" that, like Multnomah County, have adopted a charter. These "referendum powers" permit the voters to decide whether to "reject" legislation enacted by the

County's board. *See* Or Const, Art IV, § 1 (reserving and defining the "referendum powers" held by voters).

Not every legislative action, however, may be challenged by a referendum because not every legislative act is "legislation" under these constitutional provisions. The Court of Appeals well summarized Oregon law relevant to determining whether a particular action by the County's board is "legislation" that may be rejected under the "referendum power" of the County's voters or simply an "administrative" act outside of this power:

> In classifying an enacted or proposed law as legislative in character (and subject to the initiative and referendum provisions in the Oregon Constitution) and not executive, administrative, or adjudicative in nature (and outside the scope of those provisions), Oregon courts assess the law to determine if it makes policy of general applicability and is more than temporary in duration (and is thus legislative in nature), or if it applies previous policy to particular actions, or is otherwise compelled in substance or process by predicate policy (and is thus executive, administrative, or adjudicative in nature).

Rossolo, 272 Or App at 584. *See also Monahan v. Funk*, 137 Or 580, 585, 3 P2d 778 (1931) ("The crucial test for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence."). The Court of Appeals erred in applying this rule to the facts in this case, which show that Ordinance 1206 abandons the "predicate policy" of the County's code already in place to enact a very different tax, with a very different policy, ap-

plying to the guests of the OCC hotel (and by exclusion, the guests of every other hotel in the County) for the next 30 years.

4.1. Ordinance 1206 is "legislative" because it significantly alters the framework of the County's tax code.

For many years, the County imposed a tax of 11.5% on every "transient" (that is, hotel guest) "for the privilege of occupancy in any hotel" in Multnomah County. County Code § 11.401.[1] This "transient lodging" tax included two components as "surcharge" taxes. The first of these surcharges was a 3% tax that was "allocated to the Excise Tax Fund," which was used to pay for Metro's operation of the Oregon Convention Center, the operation of the Portland Center for the Performing Arts, and other, explicitly described purposes. *Id.* § 11.401(D); App. 6. The second surcharge was a 2.5% tax that was "allocated to" a second fund, the Visitor Facilities Trust Account ("Visitor Account"), which was used, among other described purposes, to repay several bonds that the City had issued to fund improvements to the Oregon Convention Center, the Portland Center for the Performing Arts, and Civic Stadium. *Id.* § 11.401(E); App. 7.

Additionally, the City has long imposed two surcharges payable by guests staying in hotels in the City. The revenue generated

---

[1] The current version of the County's Charter and Code may be found on the County's website at https://multco.us/county-attorney/multnomah-county-code.

from a 5% tax goes to the City's general fund, and the revenue from a 1% tax goes to Travel Portland, which is used "for the promotion of convention business and tourism." App. 18 ¶ O.

In 2013, the County decided that it would amend the relevant provisions of its tax code to get into a new line of business that the County had never before become involved with: the financing and construction of the Oregon Convention Center hotel, a privately-owned and operated hotel that was to be built across the street from the Oregon Convention Center. The County, the City, and Metro (which owns and operates the Oregon Convention Center) decided that a significant portion of the financing for the OCC hotel ($60 million) was to come from bonds that were to be sold by Metro. These bonds would, in turn, be repaid with the "site specific" taxes paid by future OCC hotel guests to the County and the City, money that used to be collected from every hotel guest in the entire County and City. These new "site specific" taxes would not be used as described above, to support publicly-owned tourist facilities and to promote tourism in the area. Instead, the new "site specific" taxes would be used for the County's new line of business — financing the construction of a new OCC hotel.

The County resolved to participate in this new taxing framework with the City and Metro in Resolution 2013-130, which was

adopted on September 19, 2013. App. 16-19.[2] In conjunction with other public and private financing for the OCC hotel, the County announced its future plans to "expand" its authority under the existing County Code in order to repay the OCC hotel bonds if Metro completed a development agreement and its anticipated bond offering for the OCC hotel. App. 17 ¶ L; App. 19 ¶ X.

These "site-specific transient lodging taxes" to be levied by the County were to be composed of revenue from OCC hotel guests generated by the County's 2.5% and 3% surcharge taxes. *Id*. at 25 (defining "Site-Specific Transient Lodging Tax Revenues"). In addition to this revenue from the County to repay the OCC hotel bonds, the City's two additional surcharge taxes of 5% and 1% were also to be diverted from their original purposes to repay the to-be-issued bonds for a new, to-be-built OCC hotel. *Id*.

Ordinance 1206, adopted by the County on December 19, 2013, enacted the legislative changes to the County's code contemplated by Resolution 2013-130. App. 1-15. The three relevant changes to the County's tax code all relate to the County's unprecedented decision to (1) exempt the future guests of the OCC hotel from paying a tax for the same purposes as other hotel guests in the County, and (2) diverting that "site specific" tax revenue from OCC ho-

---

[2] The full text of this resolution may be found on the County's website at https://multco.us/resolution-approving-amended-and-restated-2013-visitor-facilities-intergovernmental-agreement-vfiga.

tel guests from the purpose of supporting general, publicly-owned tourism facilities to paying for the construction of just one privately-owned hotel. *See* County Code § 11.401(E) (App. 7) (requiring the 2.5% surcharge tax to continue for the 30-year life of the OCC hotel bonds); County Code § 11.402(A)(2) (App. 8) (excepting "taxes collected by an Oregon Convention Center Hotel to support bond repayment" from going to the former purpose in the Excise Tax Fund for this tax); County Code § 11.402(B)(3) (App. 9) (adding new policy for spending priority, second only to the repayment of previous bonds issued by the City, "To Metro for payment of debt service on the Oregon Convention Center Hotel Project Bonds").[3]

Under Oregon law, *State ex rel. Dahlen v. Ervin*, 158 Or App 253, 974 P2d 264 (1999) establishes that these changes to the County's taxing framework are "legislative" in nature. In *Dahlen*, the proponent of an initiative had presented a petition to amend Multnomah County's charter "to establish new requirements for the siting of community corrections facilities." *Id*. at 255. But, like the County in this appeal, the County in *Dahlen* refused to accept the petition under the County's view that the proposed changes related only to "administrative" matters. *Id*. The trial court ac-

---

[3] When the County adopted Ordinance 1206, a total of approximately $133 million had been used to support tourism. App. 1.

cepted this finding, refusing to grant the writ to compel the County's Director of Elections to accept the proposed petition.

The *Dahlen* court reversed the County's erroneous attempt to protect the County's siting decisions from the voters' powers to decide. The *Dahlen* opinion begins with a summary of this Court's holdings under *Monahan v. Funk* and *Long v. City of Portland* in distinguishing "administrative" matters from "legislative" ones:

> It has long been Oregon law that a local initiative may deal only with legislative decisions — laws of general applicability and permanent nature — not with administrative decisions, which involve the details of implementing established policy.

Id. *See also Monahan*, 137 Or at 584-85 (holding that "administrative" acts "are those which are necessary to be done to carry out legislative policies and purposes already declared" and that the "crucial test for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence"); *Long v. City of Portland*, 53 Or 92, 100-01, 98 P 1111 (1909) (holding that the referendum power can be used to challenge "legislation" enacted by the City of Portland, which means "rules of civil conduct prescribed by the lawmaking power and of general application" rather than "a transient, sudden order to and concerning a particular person").

Under this rule, the County lost its bid to prevent the voter initiative from proceeding. The *Dahlen* court held that the proposed

initiative was "legislative" because it "does not attempt to change a specific siting decision of the county but, rather, to change the framework within which the county makes siting decisions." *Dahlen*, at 257. The same analysis should apply to hold that Ordinance 1206 is "legislative" and, consequently, subject to voters' referendum powers. Before 2013, the County's "transient lodging" code provisions had erected a framework requiring all County hotel guests to pay into two funds, which, in turn, could be spent only for the specific, described purposes in the code. But the new framework enacted by Ordinance 1206 effects major changes to the code: (1) the source of tax revenue has been split between guests of the OCC hotel and every other County hotel guest; and (2) a brand-new category of where that money can be spent has been created and, under the County's "pledge" of "site specific taxes," mandated to go to repayment of the OCC hotel bonds.

In other words, Rossolo's petition, like the petition in *Dahlen*, does not challenge a "specific siting decision" made by the County in furtherance of an existing framework. For example, if the County had decided to spend taxes collected from OCC hotel guests for some new program promoting "cultural tourism," that "specific decision" would have fallen outside of the referendum powers of the County's voters because it would have been permitted under the County's existing framework for spending transient-lodging taxes. County Code § 11.401(D)(2)(c). But nothing in the

pre-2013 framework in the County's tax code (before the enactment of Ordinance 1206, that is) would have permitted the County to spend even a single dollar of "transient-lodging" taxes to build a private hotel — or for any other purpose than those specifically described and enumerated in the code. It took a change to the County's legislation to enable this spending decision, and this change to the basic framework of allowable expenditures makes Ordinance 1206 a "legislative" enactment under *Dahlen*, *Monahan*, and *Long*.

4.2. Acts that are merely "administrative," unlike Ordinance 1206, simply follow well-established, existing policy.

Oregon cases finding that enactments are "administrative" in nature demonstrate why Ordinance 1206 does not belong in this category. For example, in *Foster v. Clark*, 309 Or 464, 466, 790 P2d 1 (1990), a group of Portland residents had proposed a ballot measure that, if passed, would have "renamed" a street in Portland from "Martin Luther King, Jr. Boulevard" to "Union Avenue." Two other residents, however, challenged this ballot measure by seeking a declaratory judgment that renaming a street was merely "administrative" in nature and, accordingly, not permitted by the proposed ballot measure. *Id.*

In answering this question against the proponents of the ballot measure, this Court held that "whether a particular municipal activity is 'administrative' or is 'legislation' often depends not on the

nature of the action but the nature of the legal framework in which the action occurs." *Id.* at 474. For the question regarding the naming of city streets in Portland, there already existed a "legal framework" for the city council to make these decisions. *Id.* at 467 (describing two previous changes to the City's code "to prescribe a policy and a procedure for renaming streets").

Because this "administrative framework" was already in place for renaming streets, this Court held that the initiative proposing the same action was merely "administrative" and, consequently, could not be decided by Portland's voters. *Id.* at 473 (holding that Portland's existing code "represents a completed legislative plan, requiring no further legislative contribution. Acts of renaming streets under the policies embodied in the plan thereafter become administrative acts, not legislation.").

This holding should apply, by way of a useful foil to Ordinance 1206, to reject the County's argument that Ordinance 1206 is merely "administrative." Before Ordinance 1206, the County's "legal framework" for the transient-lodging tax mandated that no specific "site" for any particular hotel would be singled out, and that all revenues from the transient-lodging tax had several shared purposes. All of these shared purposes for deploying transient-lodging tax revenues were explicitly spelled out in, and limited by, the County's code. Accordingly, this "legal framework" left no room for what the County would eventually propose in Ordi-

nance 1206: carving out "site-specific" tax revenue from the OCC hotel guests and then spending that revenue for a purpose that was entirely new to the code. The scheme for the County to participate in funding the OCC hotel, in other words, necessarily required exactly the kind of "further legislative contribution" that was unnecessary in *Foster*. *See* App. 1 ¶ 5 (reciting that "Amendments to Multnomah County Code, Chapter 11, are necessary to fully implement" the County's participation in the OCC hotel funding plan under Resolution 2013-130).

Foster stands for the controlling proposition that once a legal framework exists that governs some issue, the execution of an action *within that framework* is "administrative" only. But the converse is also true: if there is no existing legal framework under which a legislative act may be taken, then any action outside of that framework, which requires some "further legislative contribution," will be deemed "legislative" in nature and vulnerable to the voter referendum power.

Similarly, the existing legal framework in *Lane Transit Dist. v. Lane Cty*., 327 Or 161, 957 P2d 1217 (1998) precluded an initiative addressed to matters already governed by that framework. In *Lane Transit*, an initiative was proposed with the purpose to regulate and "to severely limit benefits" paid to the general manager of the Lane Transit District. *Id*. at 165. This Court held that the proposed initiative was "administrative" (and, accordingly, could

not be included in the ballot) because existing statutes already gave Lane Transit District a full complement of powers for all employees, including the general manager, to appoint, to remove, and to "fix their compensation" and other benefits: "The proposed initiative measure purports to set the salary and benefits for the general manager of [Lane Transit District]. That is an administrative task under the existing legal framework we have set out above." *Id.* at 169.

This Court's holding in *Lane Transit*, like its holding in *Foster*, should lead this Court to similarly reject the County's arguments in this appeal. Very unlike the situation in *Lane Transit*, there are no statutes, charter provisions, code provisions, or any other legal authority permitting the County to direct any revenue from the County's transient-lodging taxes to repaying the OCC hotel bonds. Before Ordinance 1206 was enacted, the existing "legal framework" controlling transient-lodging taxes specified the *only* permissible purposes for the County to spend this revenue, including repayment of the City's bonds issued to subsidize improvements to its tourism-related facilities, and programs "for the purposes of promoting regional tourism." App. 16 ¶ a. But there was simply no "legal framework" before the enactment of Ordinance 1206 allowing the County to divert any transient-lodging tax revenue to the OCC hotel.

This change in Ordinance 1206 *changes* the legal framework of these taxes; it does not simply follow from what the existing framework already allows, as did the control of "benefits" to the general manager in *Lane Transit*. *Cf. Dahlen*, 158 Or App at 255 (describing "administrative" actions as those that "involve the details of implementing established policy"); *Monahan*, 137 Or at 584 (holding that "administrative" acts are "those which are necessary to be done to carry out legislative policies and purposes already declared"). Accordingly, this Court should hold that Ordinance 1206 effects a "legislative" change to the County's code and that the County must, therefore, accept Rossolo's proposed referendum and then count and verify the over 20,000 signatures gathered in support of it.

The cases cited by the Court of Appeals as examples of actions that are "not referable" follows this pattern of proposed legislative actions that are *already permitted* under the existing legal framework. *Rossolo*, 272 Or App at 585. *See, e.g., Yamhill Cty. v. Dauenhauer*, 261 Or 154, 155, 492 P2d 766 (1972) (holding that a proposed initiative forbidding building a bridge was improper in light of a previous measure already passed by the voters to issue bonds for the construction of that bridge); *Whitbeck v. Funk*, 140 Or 70, 75, 12 P2d 1019 (1932) (holding that an ordinance was not subject to a referendum because the ordinance was "merely carrying out a business transaction designating real property for use as a public

market" and the selection of this property had already been authorized by the city's code and a previous ordinance providing the financing for the same "business transaction" at issue). By contrast, Ordinance 1206 proposes legislative action that is manifestly not permitted by the County's existing "legal framework" for spending transient-lodging tax revenue. Accordingly, these cases do not support the County's position in this appeal.

Facially and substantively, Ordinance 1206 does not merely "implement" or "execute" legislation already enacted by the County, which would be an administrative act under that legislation. *Cf. Dahlen*, 158 Or App at 255 (describing "administrative" actions as those that "involve the details of implementing established policy"); *Monahan*, 137 Or at 584 (holding that "administrative" acts are "those which are necessary to be done to carry out legislative policies and purposes already declared"). Rather, Ordinance 1206 changes existing legislation by deleting some parts of the County's tax code and adding entirely new parts, writing new code provisions into law that alter the existing taxing framework to allow the County to spend new tax revenue for a purpose never before contemplated by its code.

Consequently, this Court should (1) hold that the County and the Court of Appeals erred in concluding that Ordinance 1206 was merely "administrative" in nature and immune from the voters' referendum power, and (2) reverse and remand with instructions

to order the County to accept Rossolo's petition for referendum and to count and verify the more than 20,000 signatures that Rossolo has proffered to the County in support of that referendum.

4.3. The County's charter and code expressly allow referral of every "ordinance" to voters, no matter its nature.

As a "home rule" county, Multnomah County has broad authority to conduct all business related to "matters of county concern," limited only by the federal and Oregon Constitutions and by acts of the State Legislature:

> Multnomah County became a "home rule" county in 1966. Pursuant to the Oregon Constitution, art VI, § 10, the county adopted a charter which granted it authority over "matters of county concern," "to the fullest extent allowed by the Constitution and laws of the United States and the State of Oregon, as fully as though each particular power conveyed in that general authority were specifically listed ***."

Multnomah Kennel Club v. Dept. of Rev., 9 Or Tax 183, 185 (1982) *aff'd*, 295 Or 279, 666 P2d 1,327 (1983); ORS 203.035 (1) (except for ordinances related to elective county officers, providing that "the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state"); ORS 203.035 (2) (providing powers to home-rule counties, and stating, "The power granted by this section is in addition to other grants of power to counties, shall not be construed to limit or qualify any such grant and shall be liber-

ally construed, to the end that counties have all powers over matters of county concern that it is possible for them to have under the Constitutions and laws of the United States and of this state."); County Charter § 2.10 (granting the County all powers "over matters of county concern to the fullest extent granted or allowed by the constitutions and laws of the United States and the State of Oregon").

Of these matters of "county concern," the County has chosen to permit its voters to exercise the referendum power over all "ordinances" adopted by the County, without regard to whether any such "ordinance" reflects a "legislative" or an "administrative" act by the County. Under County Charter § 5.10, "All legislative action by the county shall be by ordinance." And every County ordinance, except for one designated as an "emergency" ordinance taking effect immediately, becomes effective 30 days after the chair of the County's board signs it, unless "It is referred to the voters of the county, in which event it shall take effect only upon receiving their approval." *Id.* § 5.50. There is nothing in state law, in Oregon's Constitution, or in the federal Constitution that prohibits the County's explicit grant of authority to refer every "ordinance" adopted by the County.

The County's code provisions governing referendums carry the County's grant of broad referendum powers into effect. Under

County Code § 5.100, "County Legislation" means every "ordinance" enacted by the County with only three exceptions:

> *COUNTY LEGISLATION*. Any ordinance that has been or lawfully may be enacted by the county, and any proposed amendment, revision or repeal of the Charter. It does not include any property tax or bond measure or any emergency ordinance.

County Code § 5.100.[4] Following this definition, the County's code defines "Measure" to include County Legislation that has been proposed for "referral through the initiative or referendum procedures prescribed by this subchapter." *Id.* Under this section, every "ordinance" is subject to referral to the voters under the procedure mandated by the County. *See id.* § 5.101(A)(3) (providing the procedures for referring County Legislation to the voters, including that the proposed petition must state "the text of the county legislation proposed for referral, and where applicable, the title, ordinance number or code section numbers of the county legislation proposed for referral").

Ordinance 1206 is "County Legislation" subject to referral under County Code § 5.100 because it is plainly entitled an "ordinance" and it is not a property tax, a bond measure, or an "emer-

---

[4] Quite tellingly, this code provision was amended by the County on March 19, 2015, apparently in direct response to the issues raised by Rossolo's referendum petition. County Ordinance 1215; App. 20-21. The provisions of the code quoted here are from the County's code as it existed before the recent amendments. The relevant amendments are discussed below.

gency" ordinance. The County does not dispute this. Nor does the County dispute that Rossolo complied with the procedures for presenting a proposed petition. Accordingly, under the County's charter and code provisions, the County should have accepted Rossolo's proposed referendum petition, which indisputably seeks to refer "County Legislation" because Ordinance 1206 is, by the County's own choice, an "ordinance" of the County. Therefore, Ordinance 1206 is "County Legislation" subject to the voters' referendum powers.

Rather, the County has defended its refusal to certify Rossolo's petition by ignoring the plain language of its own rules and, instead, relying on a distinction that those rules simply fail to make: distinguishing referable ordinances from non-referable ordinances according to whether the ordinance constitutes a "legislative" or an "administrative" act under the cases discussed above. But because the County's Code, as it was written at the time of Rossolo's petition, excluded *only* property taxes, bond measures, and emergency ordinances from referable ordinances passed by the County, this Court should not read the County's Code as if this fourth exclusion were any part of County law. That is, at the time.

The County's own recent actions vividly demonstrate why Rossolo's arguments should prevail. On March 19, 2015, the County amended its code, moving the definition of "County Legislation" from County Code § 5.100 to a new section and, critically for the

purposes of this appeal, adding the underlined language, which would have permitted the County to review Rossolo's petition in December 2013 for its substantive effect:

> COUNTY LEGISLATION. Any ordinance that has been or lawfully may be enacted by the county, and any proposed amendment, revision or repeal of the Charter. It does not include any property tax or bond measure ~~or~~, any emergency ordinance~~.~~ or any part of an ordinance that deals with purely administrative matters.

County Ordinance 1215; *Compare* App. 20 (new version) *with* App. 21 (old version).[5] If this additional language had been part of the County's Code when Rossolo presented her referendum petition to the County in December 2013, then — and only then — would the County have had grounds to assert that the alleged "administrative" nature of Ordinance 1206 makes any difference.

But this is precisely Rossolo's point: this exception to referable ordinances did not exist in the County's Code in December 2013. Accordingly, this Court should refuse to insert language into County Code § 5.100 that simply was not present at the time. *See* ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted[.]"); *City of Salem v. Lawrow*, 233 Or App 32, 39-40, 225 P3d 51 (2009) (interpreting city ordinance and recognizing "a sharp

---

[5] The full text of Ordinance 1215 may be found on the County's website at https://multco.us/node/23849.

distinction between judicial interpretation, which is permissible, and redrafting, which is not," and refusing any invitation to read an ordinance by "adding a completely new word, phrase, or concept" that the original text did not include). Under the operative language of the County's Code in December 2013, the only time that matters for this appeal, the County's attempt to disenfranchise the voters should fail.

4.4. Multnomah County may expand, but not contract, the voter referendum power.

Under *Allison v. Washington Cty.*, 24 Or App 571, 581, 548 P2d 188 (1976), "Home rule counties derive their legislative power from Art. VI, § 10 of the Oregon Constitution and from their individual charters." As to the Constitutional powers, "Art. VI, § 10 grants home rule counties authority 'over matters of county concern.'" *Id.* This grant specifically includes the power of the county charter to "prescribe the organization of the county government." Or Const, Art VI, § 10. There is no limit in the Constitution as to how a county may "prescribe the organization" of its own governments, and Multnomah County's charter contains no such limitation either. *See* County Charter § 2.10 (granting the County all powers "to the fullest extent granted or allowed by the constitutions and laws of the United States and the State of Oregon"). Accordingly, home-rule counties like Multnomah County are legally

permitted to allow their voters whatever say in legislative acts that the counties deem appropriate.

Relevant to this appeal, nothing in the Oregon Constitution or the County's charter forbids the County from permitting the County's citizens the power to vote on all of the County's legislative actions, regardless of whether those actions would be considered "legislative" or "administrative" in nature. For example, Section 40 of the Lake Oswego Municipal Code forbids the City from building any "major road" or even a "major road expansion" in the city limits as long as 25 of its voters refuse to waive the right to require the city to hold an election regarding any such project. App. 23. By its own choice, then, Lake Oswego has chosen to give its voters the power to approve or reject, in a referendum election, even those legislative acts that would almost certainly be considered "administrative" acts under the laws of any other city, county, or legislative body. *See, e.g., Foster*, 309 Or at 466 (holding that an initiative proposing to rename one of Portland main streets was "administrative" in nature). Nothing in Oregon law prohibits this generosity to voters, a point that the County does not dispute and, in fact, admits in its briefing submitted to the Court of Appeals. *See* County's Ans. Br. at 31 (admitting that a home-rule county, like Multnomah County, has the power to "allow its voters to vote on administrative matters").

Article IV, § 1 of the Oregon Constitution reserves to the state's voters the "referendum power," which provides the authority for Oregon's voters "to approve or reject at an election any Act" of the legislature. And under Article VI, § 10, the "referendum powers reserved to the people by this Constitution" are also reserved to the voters in Oregon's counties relative to "legislation passed by counties" that, like Multnomah County, have adopted a charter. These provisions provide a constitutional floor that guarantees that Multnomah County's voters cannot be deprived of their "referendum power" regarding "legislative" acts by any provision in the County's charter, its code, or any other act. *See Long*, 53 Or at 96 (holding that the "right of the referendum" in the Constitution is reserved to the voters "regardless of any provisions of the city charter. It is superior to the charter.").

But nothing in the Oregon Constitution or any other source of law governing the authority of Multnomah County forbids the County from permitting its voters *greater* opportunities to challenge County legislation than those "reserved" and inviolable under the Constitution.[6] Under state law, if a referendum is proposed to reject some "Act" of the State Legislature, the question whether the Act is "legislative" or "administrative" is always rele-

[6] Because the Court of Appeals held that the County did not intend to make "administrative" acts subject to the referendum power of the voters, the Court of Appeals did not reach this issue. *Rossolo*, 272 Or App at 582.

vant because Oregon's state laws (unlike County Code § 5.100) do not provide any method by which the state's voters may challenge an Act by the State Legislative Assembly that may be said to be merely "administrative" in nature. The State Legislature has decided that its "administrative" acts are to remain forever beyond challenge by the voters.

Multnomah County, by contrast, has been more generous to its voters. As described above, the County's charter and code provisions permit the County's voters to challenge any "ordinance" passed by the County, without regard to the "legal framework" of the County's existing laws that might make the ordinance merely "administrative" in nature. The Oregon Constitution "reserves" and, therefore, protects the referendum power from being abrogated by any County that might jealously shield its own power from the voters. But nothing in the Oregon Constitution forbids a County to be more generous with the referendum power than this Constitutional floor — just as Lake Oswego has explicitly done for "administrative" decisions to build a road, and as the County has explicitly done for legislative actions that the County itself enacts as an "ordinance."[7]

---

[7] Should the County have chosen not to enact the substantive changes in Ordinance 1206 as an "ordinance," the County could have enacted these changes as a "resolution." *See* County Code § 1.002 ("RESOLUTION. A Board exercise of administrative authority granted by the Charter and state law, or authorized by ordinance."). In that case, the enactment would not have been auto-

4.5. This Court should favor voter expression, not voter suppression, especially in light of the County's role in drafting its code.

In situations where the choice between permitting and denying the right to vote presents a close call, this Court has announced a preference favoring the voters:

> Election laws should be liberally construed to the end that the people may have the opportunity of expressing opinion concerning matters of vital interest to their welfare. Expression, not suppression, tends towards good government. The great constitutional privilege of a citizen to exercise his sovereign right to vote should not be taken away by narrow or technical construction. If the statute is of doubtful construction, we think the doubt should be resolved in favor of free expression of opinion.

State ex rel. Bylander v. Hoss, 143 Or 383, 388, 22 P2d 883 (1933).

Moreover, this preference to resolve questions in favor of greater voting rights should apply with even greater force in this case because the County is a home-rule county that relies on a supposed ambiguity in its own Code to argue that Ordinance 1206 should be treated more like an administrative resolution than the "ordinance" that the County actually called it before Rossolo lodged her referendum. *Cf. St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 324 Or 184, 215, 923 P2d 1 (1996) (construing insurance policy language against the drafter of

---

matically subject to the referendum power under the County's own code, but the question would then have been live as to whether the Constitutional floor was triggered because of the manifestly "legislative" nature of those changes.

the policy, the insurer, especially in light of previous court decisions that had already interpreted ambiguous language inconsistently with the insurer's proposed interpretation). Like insurance companies that draft their own insurance policies, the County drafted its own Code.

Under both of these interpretational doctrines, this Court should hold that Rossolo's attempt to give the voters a say on Ordinance 1206 should be favored over the County's arguments to disenfranchise its own voters, especially in light of the County's code providing this right.

5. Conclusion

Ordinance 1206 proposes to permit the County to spend "transient lodging" taxes imposed on future guests of the OCC hotel for a purpose never before contemplated or allowed under the County's laws. Accordingly, Ordinance 1206 seeks to enact a new "legal framework" for the collection and spending of this tax, a change to County law that makes Ordinance 1206 "legislative" in nature and, therefore, subject to the voters' referendum power. This Court should reverse and remand with instructions to the trial court to order the County to accept Rossolo's referendum petition and to count and verify the over 20,000 signatures gathered in support of that petition.

Alternately, this Court should reverse and remand with the same instructions for a different reason: the "administrative" or

"legislative" nature of Ordinance 1206 is trumped the County's home-rule charter and code, which permit the referendum power over all titular "ordinances," regardless of whether they merely follow from an existing legal framework or, like Ordinance 1206, seek to erect a new framework for a purpose new to County law.

Dated: December 23, 2015

/s/ James T. McDermott
James T. McDermott, OSB 933594
Dwain M. Clifford, OSB 025074
Attorneys for Petitioner on Review
Michelle Rossolo

CERTIFICATE OF COMPLIANCE WITH BRIEF-LENGTH AND TYPE-SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,088 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(g).

Dated: December 23, 2015

/s/ James T. McDermott
James T. McDermott, OSB 933594
Dwain M. Clifford, OSB 025074
Attorneys for Petitioner on Review
Michelle Rossolo

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed the foregoing Petitioner's Brief on the Merits on Review on December 23, 2015 using the Oregon Judicial Department's eFiling system, which will send notification to the following parties:

Jacqueline A. Weber, OSB 824243
Multnomah County Attorney's Office
Attorney for Respondents on Review Multnomah County Elections Division and Tim Scott, Director

William F. Gary, OSB 770325
Sharon A. Rudnick, OSB 830835
Harrang Long Gary Rudnick PC
Attorneys for Respondent on Review Metro

Daniel W. Meek, OSB 079124
Attorney for Amicus Curiae Oregon Progressive Party

I certify that I served the foregoing paper on December 23, 2015 by United States Postal Service, regular first-class mail, on the following parties:

Greg Wasson, *amicus curiae*
PO Box 2333
Salem, OR 97308

Dated: December 23, 2015

/s/ James T. McDermott
James T. McDermott, OSB 933594
Dwain M. Clifford, OSB 025074
Attorneys for Petitioner on Review
Michelle Rossolo