IN THE SUPREME COURT OF THE STATE OF OREGON

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| ROB HANDY,<br>Plaintiff-Appellant,<br>Respondent on Review,<br><br>v.<br><br>LANE COUNTY, JAY BOZIEVICH, SID LEIKEN, and FAYE STEWART,<br>Defendants-Respondents,<br>Petitioners on Review. | Lane County Circuit Court<br>Case No. 161213685<br><br>CA A153507<br><br>SC S063725 |

# BRIEF OF *AMICI CURIAE* ASSOCIATION OF OREGON COUNTIES, LEAGUE OF OREGON CITIES, CITY OF PORTLAND, AND WASHINGTON COUNTY IN SUPPORT OF PETITIONERS LANE COUNTY, JAY BOZIEVICH, SID LEIKEN, AND FAYE STEWART

On Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Lane County,
the Honorable Richard L. Barron, Judge.

Opinion Filed: November 4, 2015
Author of Opinion: Garrett, Presiding Judge
Concurring Judge: Ortega, Judge
Concurring and Dissenting Judge: DeVore, Judge

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## I. INTEREST OF *AMICI CURIAE*

The Association of Oregon Counties ("AOC") is an intergovernmental entity formed in 1906 by Oregon's counties for the purpose of promoting and advocating the common interests of Oregon's county governments. Founded in 1925, the League of Oregon Cities ("LOC") is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the state courts. The City of Portland is Oregon's largest city and has a commission form of government, under which a Mayor and four Commissioners legislate for the City, manage its respective offices and bureaus, and rely on the advice of numerous boards and commissions, which also perform other delegated functions on behalf of the City. Washington County, Oregon's second largest county, filed its own *amicus* brief in support of the petition for review and now signs on in support of the position set forth in this brief.

*Amici* have a substantial interest in the outcome of this case because it will significantly affect how members of governing bodies interact in pursuing government decisions. Specifically, the outcome of this case will significantly affect the ability of every public official serving on a public body – with the exception of the Legislative Assembly, the appellate courts in judicial proceedings, and a few other select advisory bodies that are exempt from

Oregon's Public Meetings Laws – to efficiently and effectively make well-informed and well-reasoned decisions that are in the public interest. Moreover, this case provides an opportunity to give members of governing bodies clear guidance on how to comply with Oregon's Public Meetings Laws, which are intended to ensure transparency of decisions and accountability of the decision-makers, without compromising the free exchange of thoughts and opinions needed for an effective representative democracy.

## II. SUMMARY OF ARGUMENT

As part of a movement nationwide to daylight government operations (so called "government in the sunshine" laws), in 1973 Oregon adopted its Public Meetings Law, ORS 192.610 to 192.695, which requires governing bodies of public bodies to hold open meetings when deliberating toward or making decisions. *See* Or Laws 1973, ch 172, §§ 1-10. Along with that enactment, Oregon adopted rules requiring public records to be open to public inspection, and a year later in 1974 referred ethics rules that prohibited public officials from accepting certain gifts and participating in decisions when they had a conflict of interest. *See* Or Laws 1973, ch 794, §§ 1-35 (inspection of public records); Or Laws 1974, ch 72, §§ 1-31 (Spec Sess) (ethics rules for public officials).

Upon those three pillars rests Oregon's legacy of transparency in government, from which flows the ability of the electorate to hold elected and appointed officials accountable for their decisions. Those laws, robust in their structure, serve a vital purpose of maintaining integrity in a representative democracy and preserving public confidence in the government processes and decisions by both elected officials and appointed decision-making bodies. Those laws are not without limit, however, and this case provides this Court with an opportunity to reinforce the clear standard that the legislature intended to apply to public meetings – a standard that ensures transparency and accountability without eroding the integrity of the public decision-making process.

At issue in this case is whether every exchange or gathering among two or more members of a governing body is, or when aggregated with other exchanges and gatherings becomes, a "public meeting." The Court of Appeals answered that question in the affirmative, concluding that – despite clear text, context and legislative history to the contrary – the aggregation of separate communications between members of a governing body constitutes a public meeting once the number of persons who have had discussions on the topic is

equal to a quorum (a so called "serial meeting"[1]). As the dissent rightly concluded, and for the reasons that follow, that decision is legally in error. *See Handy v. Lane County*, 274 Or App 644, 676-93, 362 P3d 867 (2015) (DeVore, J., concurring and dissenting). If allowed to stand, the majority's decision will place public officials in a perilous situation and will deprive the public of unfettered access to their elected representatives.

Because Oregon's Public Meetings Law is statutory, this case requires the Court to apply its familiar methodology to determine whether the aggregation of separate communications between members of a governing body becomes a public meeting. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (explaining that statutory interpretation begins with examination of text and context, then legislative history, and then, if ambiguity remains, maxims of construction). As explained more fully below, the text, context, and legislative history demonstrate that Oregon's Public Meetings Law is designed to regulate meetings of a quorum of a governing body when it convenes for the

[1] Because a "serial meeting" is not a meeting (which as this brief describes is the contemporaneous convening of a quorum of a governing body), this brief uses the phrase "serial communications" from this point forward. The phrase "serial communications" describes a series of communications among members of a governing body that is less than a quorum, where the number of members having discussed the topic eventually is equal to the number required to constitute a quorum (although a quorum of members never gathered at the same time to discuss the topic).

purpose of deliberating or making a decision. Nothing in that law regulates communications among less than a quorum. As a result, communications like those that took place in this case are not prohibited by law. That result effectuates the legislature's dual intent both to ensure transparency and to allow for efficient and effective communications among public officials, staff, and constituents outside of public meetings.

Additionally, because Oregon's Public Meetings Law imposes a mandate on home rule entities, and mandates are a form of preemption, this Court should apply its well settled home rule principles and require the scope of the legislature's intent to be clear. Specifically, because Oregon's Public Meetings Law does not unambiguously apply to "serial communications," this Court should hold that such communications are not subject to that law. Even if such communications are subject to the law, this Court should limit its holding to only those communications that involve "deciding on or deliberating toward a decision on any matter," in accordance with the plain text of the statute. ORS 192.630(2). To hold otherwise would work a grave injustice to the public process because it will chill communications between and the public's access to members of governing bodies – a result that the legislature was careful to avoid when crafting Oregon's Public Meetings Law.

For those reasons, this Court should reverse the Court of Appeals and hold that only contemporaneous gatherings among a quorum of a governing body with the purpose of deliberating toward or making a decision are public meetings that are subject to Oregon's Public Meetings Law.

## III. ARGUMENT

In 1973 when Oregon first enacted its Public Meetings Law, private meetings were a frequent occurrence. *See, e.g.*, Testimony, Joint Special Committee on Professional Responsibility, SB 15, Feb 26, 1973, App B (statement of Dolores Hurtado and Blanche Schroeder, Co-Chairmen of Oregon Common Cause PAC) (explaining that "[e]xecutive sessions, pre-meeting meetings, coffee-break sessions tend to break down public access to the decision-making process"); Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 5, 1973, Tape 2, Side 1 (statement of Miles Green, Oregonian reporter) (discussing closed pre-meetings of State Highway Commission). In response to those private meetings, the legislature enacted Oregon's Public Meetings Law to allow for "an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made." ORS 192.620.

To accomplish that goal, the legislature had to determine how to implement the radical shift of opening up the meetings of governing bodies,

while maintaining the ability of those bodies to effectively operate. As a first step, the legislature had to determine what conduct it would regulate, *i.e.*, what would qualify as a "meeting." Defining that term was no easy task. Indeed, defining that term had plagued public meeting legislation in other states, and as a result, many other states had chosen not to define the term "meeting" at all. *See* Testimony, Joint Special Committee on Professional Responsibility, SB 15, Mar 5, 1973, App D (statement of Dolores Hurtado, Co-Chairman of Oregon Common Cause PAC) (explaining that the most consistent cause of litigation involving public meetings laws was the lack of definition of the term "public meeting").

However, the Oregon Legislature took a different approach. To provide governing bodies with certainty, the legislature opted to define the term "meeting" in a thoughtful and comprehensive manner so as to clearly identify what behavior would be subject to the law. As a result of its deliberations, the legislature drew a bright line rule that the requirements of Oregon's Public Meetings Law only would apply to a contemporaneous gathering of a quorum of the governing body where those members were deliberating toward or making a decision.

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### A. The text and context of ORS 192.630 regulates "meetings," *i.e.*, contemporaneous gatherings of a quorum of a governing body to deliberate or make a decision, and does not regulate "serial communications."

The text and context of ORS 192.630 demonstrate that the legislature's focus was on regulating contemporaneous gatherings of a quorum of a governing body convened to deliberate or make a decision. Oregon law provides, "[a]ll *meetings* of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690." ORS 192.630(1) (emphasis added). Conversely, except as otherwise provided in the law, a "quorum of a governing body may not *meet* in private for the purpose of deciding on or deliberating toward a decision on any matter." ORS 192.630(2) (emphasis added). Oregon's substantive provisions provide both a mandate and a prohibition focused on the gathering at one time of a sufficient number of members of a governing body as to constitute a quorum. In both the mandate in ORS 192.630(1) and the prohibition in ORS 192.630(2), the *only* conduct regulated by the legislature was "meeting."

The legislature defined a "meeting," in part, as "the *convening* of a governing body of a public body for which a *quorum* is required in order to make a decision or to deliberate toward a decision on any matter." ORS 192.610(5) (emphasis added); *see State v. Couch*, 341 Or 610, 617, 147 P3d

322 (2006) (explaining that court must begin with statutory definitions for defined terms). Although the legislature defined the term "meeting," it did not define some of the critical terms used in that definition, which this Court should look to the dictionary to define.[2] *Couch*, 341 Or at 618 (turning to dictionary to define terms used in a statutory definition).

To "convene" a body of persons means "to meet in formal session" or "to cause (persons) to assemble in a group or body: call or gather together." *Webster's Third New Int'l Dictionary* 497 (unabridged ed 2002). A "quorum" is "the number of the members of an organized body of persons (as a legislature, court, or board of directors) that when duly *assembled* is legally competent to transact business in the absence of the other members" or "a usu. specified number of members (as an absolute majority) in the absence of which an organized body cannot act legally." *Id.* at 1868 (emphasis added).

The legislature's use of the terms "convene" and "quorum" within the definition of "meeting" demonstrates an express intent to treat the contemporaneous gathering of a quorum of a governing body as a formal meeting that was subject to the public meetings law. Specifically, by defining a

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[2] In fact, the legislative history shows that the legislature consulted a dictionary to better understand some of the terms used in the "meeting" definition. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Rep Robert Ingalls) (consulting dictionary on meaning of the term "convene").

meeting as occurring only when a "quorum" is required, the legislature expressly indicated its intent to regulate only those gatherings at which a decision could be reached because the body was "legally competent to transact business." Taken together, the legislature's definition of the term "meeting" demonstrates that it intended the law to apply to the convening of a quorum, *viz*., a contemporaneous gathering of a sufficient number of members of a governing body where business could be transacted, rather than to informal discussions among less than a quorum where no final decision could be reached.

The Court of Appeals majority reached a different conclusion by reasoning that the legislature must have intended to regulate conduct in addition to formal "meetings" because the legislature used the term "meet" in ORS 192.630(2). The court felt compelled to reach that conclusion to avoid construing the prohibition on private meetings in ORS 192.630(2) as being redundant of the mandate for open meetings in ORS 192.630(1).[3] *Handy*, 274

[3] The Court of Appeals majority also suggested that "meet" in ORS 192.630(2) could not have the same meaning as "meeting" because if that were the case "there would have been no need for subsection (2) to include the qualifying phrase 'decide or deliberate toward a decision,' because that phrase is already encompassed within the statutory definition of 'meeting.'" *Handy*, 274 Or App at 658. There is a similar redundancy in ORS 192.630(1), however. That provision states that all meetings of "the governing body *of a public body*" shall be open to the public. The reference to a governing body "of a public body" is redundant because the definition of governing body is, in part, "members of any

Or App at 658. And from their conclusion that ORS 192.630(1) and ORS 192.630(2) must mean different things, the majority gave an interpretation to ORS 192.630(2) that further allowed the court to reach the conclusion that Oregon's Public Meetings Law prohibits non-contemporaneous communications among the members of a governing body if, when aggregated, those communications involve the same number of members that would constitute the number needed to establish a quorum of the public body.

There are several flaws in the Court of Appeals' reasoning. First, there are other places in Oregon's Public Meetings Law where it is apparent that the legislature intended that the term "meet" have the exact same meaning as the defined term "meeting." *See State v. Cloutier*, 351 Or 68, 99, 261 P3d 1234 (2011) ("Although, in the abstract, there is nothing that precludes the legislature from defining the same terms to mean different things in the same or related statutes, in the absence of evidence to the contrary, we ordinarily assume that the legislature uses terms in related statutes consistently."); *State v. Keeney*, 323 Or 309, 316, 918 P2d 419 (1996) (concluding that statute using the terms "untruthfulness" and "inaccuracy" must intend for those terms to have different

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public body." ORS 192.610(3). The majority's interpretation ignores that the legislature built some redundancy into the statute without intending to apply definitions other than those provided by statute. The history shows that the legislature believed that some redundancy was necessary because of the significant shift in public policy and the need to provide public officials clear direction on what was expected of them.

meanings). If "meet" and "meeting" do not apply to the same conduct, under the Court of Appeals' reasoning, a governing body would not be engaged in discrimination when it holds a "meeting" in a place inaccessible to a person with disabilities, because that discrimination occurs only when a governing body "meet[s]" in an inaccessible place. *See* ORS 192.630(5)(a) ("It is discrimination on the basis of disability for a governing body to *meet* in a place inaccessible to a person with disabilities * * *." (Emphasis added.)). That interpretation would render the protection in ORS 192.630(5)(a) virtually meaningless. As that example demonstrates, the legislature used the terms "meeting" and "meet" interchangeably, understanding that one word is a form of the other.

Second, even if that the legislative definition of "meeting" did not apply to the term "meet" used in ORS 192.630(2), the plain meaning of "meet" is remarkably similar to the statutory definition of "meeting" and contemplates a contemporaneous gathering: "to hold a session: convene for worship, business, or other purpose: ASSEMBLE, CONGREGATE <the city council will ~ soon to deal with the issue>." *Webster's* at 1404. That definition reinforces the legislature's intent to regulate a contemporaneous gathering (a convening) of a quorum to deliberate or make a decision. *See Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or 551, 565-66, 871 P2d 106 (1994) (examining

definition of "administer" to determine the ordinary meaning of "administration"); *Labor Ready Northwest v. BOLI*, 188 Or App 346, 359, 71 P3d 559 (2003) (examining root word "intent" in defining statutory use of the word "intentionally"). Despite that definition, the majority's analysis departed from the text, drawing on the legislative policy statement to overcome the plain meaning of the statute. *Handy*, 274 Or App at 661 (concluding that case law interpreting statutory text and legislative history do not directly address the issue in this case and instead relying on legislative policy statement to guide interpretation). That was in error. *See Burke v. DLCD*, 352 Or 428, 441, 290 P3d 790 (2012) ("[A] statement of legislative findings, without more, is a slim reed on which to rest an argument that the operative provisions of a statute should be taken to mean something other than what they appear to suggest.").

Finally, as explained below, the Court of Appeals' conclusion is not supported by the legislative history. That legislative history demonstrates that ORS 192.630(1) and ORS 192.630(2) are not redundant but instead were aimed at ensuring that the rampant past practice of making decisions in private, whether formally or informally, clearly was prohibited. Specifically, the legislature added the prohibition in ORS 192.630(2) to avoid a strict reading by the courts that the law and its requirements would only attach to the formal convening of a quorum.

**B. The legislative history demonstrates that the legislature considered and decided not to prohibit "serial communications."**

Although today public meetings are a normal part of how governing bodies function, the legislative history of Oregon's Public Meetings Law paints a very different picture of how governing bodies transacted business in 1973. At the time, it was common for governing bodies to meet in private both before and after any public deliberations or decisions to talk about public business. *See, e.g.*, Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 5, 1973, Tape 2, Side 1 (statement of Harold Reaume, Woodburn City Councilor) (describing pre-meetings where arguments would take place before every public meeting). Given that status quo, the discussions among legislators about the appropriate scope of the public meetings legislation illustrate the controversy and concern over opening up all meetings to the public.

Much of the committee discussions about the Public Meetings Law focused on what types of gatherings would rise to the level of a meeting subject to the law. The committee had to engage that issue because Oregon based its Public Meetings Law, in part, on California's Brown Act, which did not include a definition of the term "meeting." Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Feb 26, 1973, Tape 2, Side 1 (statement of Sen Fred Heard). In particular, two key elements of the definition of

"meeting" occupied much of the discussion – the legislature focused on the use of the word "convene" and the use of the word "quorum" because the legislators understood that those terms would establish the parameters of what conduct among members of a governing body would be subject to the Public Meetings Law requirements.

Although most legislators favored those parameters, Senator Carson expressed concern that the words "convene" and "quorum" would create "loopholes" in the law that would allow decisions to be made in private. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Sen Wallace Carson). In particular, he was concerned that the word "convene" would be interpreted to reach only formal gatherings of a governing body, thereby allowing decisions to be made in more informal settings. *Id.* ("Convening a meeting is different than two people sitting down talking."). When Senator Carson suggested removing the word "convene" to ensure that the law also would reach informal gatherings of a quorum, he met resistance by his fellow committee members. *Id.*

Concerned that a court might interpret the word "convene" to mean only a formally noticed public meeting, Senator Carson turned to a bill introduced by the Attorney General that simply prohibited meeting in private. *Id.* In response, the Chair of the committee wondered whether the committee would

prefer to use the Attorney General's wording, which later became ORS 192.630(2), to avoid addressing Senator Carson's concern over the definition of the term "meeting." Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Rep Robert Ingalls) ("So, I guess the question before us is could the phrasing in the original AG's bill be substituted here rather than the one we are wrestling with."). As Senator Carson pointed out, however, using the Attorney General's wording would not alleviate the need to define the term "meeting." Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Sen Wallace Carson). Consequently, Senator Carson suggested both.

Specifically, to address his concern that the word "convene" might be interpreted to cover only formal gatherings, the committee added the wording from the Attorney General's bill, (which would become ORS 192.630(2)) to make it abundantly clear that the law prohibited informal gatherings of a quorum, like the ones that had been so common prior to adoption of the law. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Sen Jack D. Ripper) (explaining that private meeting prohibition in ORS 192.630(2) would "make it perfectly clear" that informal gatherings of a quorum would be subject to the law); *id.*

(statements of Rep Robert Ingalls) (explaining that the law "needed a clear prohibition").

In addition to addressing whether the law would cover both formal and informal gatherings, legislators had to determine whether the law would reach communications among members of a governing body when no quorum was gathered together, *i.e.*, whether the law would prohibit private, "serial communications" among less than a quorum. The issue was squarely presented to the Committee in testimony from the advocacy group, Common Cause. An attorney for the group offered a hypothetical of an eight-member city council, where groups of two members each held four separate meetings to discuss public business. The attorney suggested that the law should prohibit "pairing up in pairs, if done intentionally." Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Feb 26, 1973, Tape 2, Side 1 (statement of Charles Habernigg). Common Cause offered an example of that type of prohibition, noting that San Francisco had required "all committee meetings of boards and commissions, regardless of the number of members in attendance, be open to the public," a necessary extension of California's Brown Act which applied only to a quorum. Testimony, Joint Special Committee on Professional Responsibility, SB 15, Mar 5, 1973, App D (statement of Dolores Hurtado, Co-Chairman of Common Cause). In other words, the legislature was aware of the

possibility of "serial communications" about public business involving groups constituting less than a quorum. Moreover, the legislature was aware of one jurisdiction that had prohibited those types of gatherings, providing a model for Oregon to adopt, if the legislature wanted to address those types of communications.

Senator Carson shared an additional concern that a "quorum" was not a sufficient limiting principle. He was concerned that if the bill applied only to gatherings of a quorum, decisions could be made in private because a governing body could define a quorum as more than a simple majority needed to make a decision. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Sen Wallace Carson). Specifically, Senator Carson provided an example of a 10 member governing body that defines a quorum as nine, but requires only a simple majority of six members to make a decision. Senator Carson explained that under those circumstances, six members could meet in private and reach a decision without violating the Public Meetings Law. [4]

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[4] Along those same lines, the history indicates that Senator Carson attempted to expressly prohibit one type of serial communication among a quorum when he inserted a provision into the bill that provided, "No meeting of a governing body of a public body shall be held through the use of electronic communications *or the mail*." *See* Minutes, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, 11 (emphasis added). However, the reference to mail later was removed, which is consistent with the

Taken together, the legislature was presented with the possibility that members of a governing body might communicate in private about public business in groups that did not constitute a quorum, and even reach a decision outside the public eye. Nonetheless, the legislature did not restrict interactions among less than a quorum of members, even with the knowledge that one member of the governing body could have one-on-one discussions with a number of other members sufficient enough to create a quorum. Instead, the committee retained the quorum limitation in both the definition of "meeting" and, more importantly, in the private meeting prohibition in ORS 192.630(2). *See* ORS 192.630(2) ("A *quorum* of a governing body may not meet in private * * *." (Emphasis added.)). In other words, the legislature knowingly accepted that communications among less than a quorum could occur in private under the wording of the law – even if those communications, in the aggregate, involved a majority needed to make a decision. Indeed, in response to Senator Carson's hypothetical, one member of the committee said "[that is] not an end run, it's a lawful action within the act." Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of

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legislature's decision not to regulate "serial communications" among members unless they were contemporaneously gathered in a number sufficient to constitute a quorum. *See* Minutes, Joint Special Committee on Professional Responsibility, SB 15, Mar 26, 1973, 11 (replacing prior section on electronic communications without reference to mail).

unidentified committee member). Another member noted that Senator Carson's hypothetical was an "extreme example" and if a body would define a quorum to be more than that number needed to make a decision, then the committee could revisit that issue in a future legislative session.[5] *Id.*

In sum, the legislature's discussions demonstrate that, although there was some disagreement, Oregon's Public Meetings Law applies to only contemporaneous gatherings of a quorum of a governing body. There is no indication, in either the text, context, or legislative history, that the legislature intended to prohibit "serial communications" among less than a quorum.

### C. When preempting home rule entities, the legislature must unambiguously express the scope of that preemption, and the prohibition in ORS 192.630(2) does not unambiguously apply to "serial communications."

As set out in the Oregon Constitution, cities and counties in Oregon enjoy home rule authority. *See* Or Const, Art XI, § 2 (granting home rule authority to cities); Or Const, Art IV, § 1(5) (reserving initiative and referendum powers to municipalities); Or Const, Art VI, § 10 (granting home rule authority to counties); *cf. Allison v. Washington County*, 24 Or App 571, 581, 548 P2d 188 (1976) (explaining that counties that derive their authority from statute have the same authority as constitutional home rule counties). The

[5] *Amici* are not aware of any local government governing body that has defined a quorum to be greater than a majority of members of that body.

purpose of those provisions was to "allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature." *Gunderson, LLC v. City of Portland*, 352 Or 648, 659, 290 P3d 803 (2012) (internal quotations omitted).

Consequently, this Court has held that a home rule entity may enact substantive civil legislation unless clearly preempted by the legislature, but that given the authority afforded to home rule cities and counties by the Oregon Constitution (and, by extension, to all counties through ORS 203.035), the legislature's intent to preempt must be clear. *Id*. at 660; *see also Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450-51, 353 P3d 581 (2015) (explaining that to preempt a local government's constitutional home rule authority, the legislature must unambiguously express its intent to do so). Whether ORS 192.630 is preemptive is not at issue here. By its application, ORS 192.630 is preemptive.[6] Rather, the issue is the scope of that preemption.

Because the effect of a preemption is to encroach upon a home rule entity's law making authority, this Court's inquiry into the scope of a

[6] ORS 192.630 takes the form of a mandate and forecloses local choice on whether the public will be allowed to attend a meeting of a quorum of the governing body. *See LaGrande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *aff'd on reh'g* 284 Or 173, 586 P2d 765 (1978) (providing that state law that required local governments to enroll employees into state public retirement system was preemptive because it foreclosed local choice).

preemption should be governed by the same principles as the inquiry into whether a preemption exists. *See, e.g.*, *Rogue Valley Sewer Services*, 357 Or at 454 (explaining that it is a "high bar to overcome" to show preemptive intent). Specifically, this Court should limit the reach of any preemption to only those circumstances clearly addressed by the state legislation.

As illustrated above, Oregon's Public Meetings Law does not unambiguously reach "serial communications." Rather, what is clear is that the legislature intended the law to apply only to contemporaneous gatherings of a quorum. Such a holding preserves home rule authority where the legislature has not clearly preempted it, thereby respecting the authority of local government governing bodies and the voters of each community to self determine whether to go beyond the reach of state law and prohibit "serial communications."

### D. To the extent that "serial communications" are subject to Oregon's Public Meetings Law, the law does not regulate or restrict communications for the purpose of gathering information.

If this Court stretches the text, context, and legislative history and construes Oregon's Public Meetings Law to reach "serial communications," then this Court should acknowledge and retain the distinction drawn by the legislature between information gathering and deliberating toward or making a

decision. The legislature made clear that information gathering is not subject to the open meeting requirements of ORS 192.630(1).

Textually, the legislature expressly regulated only those gatherings where deliberations or decisions occur. The term "meetings" includes only those gatherings where a quorum is required "to make a decision or to deliberate toward a decision." ORS 192.610(5). Similarly, the prohibition on private meetings in ORS 192.630(2) applies only to those gatherings "for the purpose of deciding on or deliberating toward a decision." Although the legislature recognized the distinction between gathering information and deliberating, it chose to regulate only deliberating or making a decision. *See* ORS 192.620 (providing that the public should be aware of "the deliberations and decisions of governing bodies and *the information upon which such decisions were made*" (emphasis added)). The public has the right to know the information upon which a decision was made, but does not have a right to be present at gatherings that are solely for the purpose of gathering information.

In addition, by using the term "deliberate," the legislature demonstrated its intent to regulate only those formal discussions that occurred in preparation for a decision. Earlier drafts of the bill used the word "consider," rather than "deliberate." Minutes, Joint Special Committee on Professional Responsibility, SB 15, Mar 5, 1973, App A (earlier draft of bill defining "meeting" as "the joint

convening of a governing body for the purpose of making a decision or *considering* any matter before a governing body" (emphasis added)). "Consider" means "to reflect on: think about with a degree of care or caution." *Webster's* at 483; *see also id.* ("CONSIDER often indicates little more than *think* about. It may occasionally suggest somewhat more conscious direction of thought, somewhat greater depth of scope, and somewhat greater purposefulness."). In contrast, "deliberate" carries a greater formality to the discussion: "to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion." *Id.* at 596. The legislature's substitution of the word "deliberate" for "consider" demonstrates that the legislature wanted to shield certain, less formal communications from the public meetings requirements. Those communications would include information gathering that is not part of the "formal discussion" preceding the final decision.

The legislative history further illuminates the distinction between information gathering and deliberating or deciding. For example, one of the members of the committee working on the bill referenced the fine line between talking and deliberating. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 26, 1973, Tape 4, Side 1 (statement of Sen Edward Fadeley); s*ee also* Tape Recording, Joint Special Committee on

Professional Responsibility, SB 15, Feb 26, 1973, Tape 2, Side 1 (statement of Sen Edward Fadeley) (discussing the fine line between a meeting and a discussion).

Another member of the committee suggested that a quorum could gather to "consider" any matter, as long as it did not deliberate toward a decision or make a decision. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 26, 1973, Tape 4, Side 1 (statement of Rep George Cole). As an example, Representative Paulus had explained that she thought that two members of a three member governing body should be able to go out and inspect roads together without triggering the public meetings provisions. Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 19, 1973, Tape 3, Side 2 (statement of Rep Norma Paulus). When the committee replaced the term "consider" with the term "deliberate," Representative Paulus indicated that her concern had been addressed, meaning the committee understood that that type of activity would not constitute "deliberations." Tape Recording, Joint Special Committee on Professional Responsibility, SB 15, Mar 26, 1973, Tape 4, Side 1 (statement of Rep Norma Paulus).

In other words, the legislature recognized that information gathering, such as inspecting roads, is an important part of the public process, distinct

from deliberating toward or making a decision, and therefore should not be subject to open meeting requirements. Should this Court conclude that "serial communications" are subject to Oregon's Public Meetings Law, it should retain the textual distinction between "meetings" subject to the law and information gathering that falls outside the restrictions of the law.

### E. Extension of Oregon's Public Meetings Law to "serial communications" will impair the public decision-making process, a consequence the legislature was aware of and careful to avoid.

This Court should not let policy concerns regarding "serial communications" being potential "end runs" or "abuses" of Oregon's Public Meeting's Law, drive the interpretation of those laws, as the Court of Appeals majority did. *See Handy*, 274 Or App at 661-62 (relying on legislative policy statement after failing to find clear guidance in text or legislative history); *Burke*, 352 Or at 441 (cautioning against relying on legislative findings to overcome the plain text of the operative provisions of a statute). The 1973 legislature recognized that the wording of the statute would not prohibit "serial communications" and if such communications became a problem, the legislature understood it would be its responsibility (not the courts') to address it. And indeed, there is good reason why the legislature did not go so far as to prohibit "serial communications" in the 1973 legislation, or any subsequent amendment to that statute: If "serial communications" can constitute a public

meeting, elected officials who want to comply with the law, and may even think they are doing so, may unwittingly and inadvertently engage in a "meeting."

By way of example, assume Councilor A discusses a pending issue with Councilor B. If "serial communications" constitute a meeting, then when Councilor B shares that discussion with Councilor C (assuming a five-member council with a quorum requirement of three) a meeting has occurred. And that "meeting" can occur without the knowledge, direction, or consent of Councilor A, as was the case here. Moreover, Councilor A bears personal liability for that improper meeting, despite having no intent or control over that "meeting" occurring. *See* ORS 244.350(2)(a) (providing for penalty of up to $1,000 for violations of the executive session rules because a meeting in private that should have been open is an unlawful executive session).

That scenario becomes even more problematic if, as the Court of Appeals held, an intermediary (such as staff or a constituent holding a series of meetings with individual members of the governing body) can link those "serial communications" to create a "quorum" to which the Public Meetings Law will attach. *See Handy*, 274 Or App at 667 (concluding that a violation of the Public Meetings Law could have occurred even if the "serial communications" occurred through an intermediary). Under the Court of Appeals' construction of the statute, members of a city council cannot meet individually with the

city's budget officer to get briefed on matters relating to the budget process, even in situations in which there is no pending budget matter upon which to deliberate or to decide.

Worse, that construction of the statute will chill communications between elected officials and their constituents. It is typical for citizens to approach their elected officials individually to express concerns or to promote ideas. Under the Court of Appeals' interpretation of the statute, such individual conversations between elected officials and their constituents ultimately could create a "public meeting." To avoid the creation of an after-the-fact public meeting, members of governing bodies will stop meeting with constituents, staff, and each other (particularly given the potential personal liability).

If public officials were relegated to limiting communications to only noticed public meetings, the government decision-making process would grind to a halt. Most local governments in Oregon operate with unpaid, part-time elected officials who take on administrative responsibilities and have lean staff support. In several parts of the state, city councils or county commissions meet only once a month. If the only communication a member of a city council or county commission may have with constituents, staff, or other elected officials will be at a public meeting, they will either have to meet much more frequently (which will undoubtedly affect a volunteer's willingness to serve) or it may take

several months before a decision can actually be reached on a matter.[7] Put differently, effective and efficient local government requires that elected officials be able to communicate with constituents, staff, and each other (assuming a quorum is not present) without fear that such communications will inadvertently create a meeting.

The conclusion by the Court of Appeals that "meeting" in ORS 192.630(1) and "meet" in ORS 192.630(2) have different statutory meanings has already changed the outcome of one case. *See TriMet v. Amalgamated Transit Union Local 757*, 276 Or App 513, __ P3d __ (2016). In *TriMet*, the Court of Appeals concluded that bargaining sessions between the union and TriMet's negotiating team are not "meetings" under ORS 192.630(1) because the TriMet team did not have a quorum requirement. However, because of the distinction the Court of Appeals drew between ORS 192.630(1) and ORS

[7] Another unanticipated consequence of the majority's holding is that governing bodies might delegate more decisions to staff, who are not elected or directly appointed by the governing body, who are not accountable to the public in the same way, and whose deliberations and decisions can occur outside the public eye. *See* Little Hoover Commission, *Conversations for Workable Government*, Report #227, i (June 2015), *available at* http://www.lhc.ca.gov/studies/227/Report227.pdf (explaining that reforms to eliminate serial communications under California's open meetings law – on which the majority relied to reach its holding – have resulted in "less government transparency" because new constraints "have driven more decision-making downward to the staff level and out of sight of the public"). As a result, rather than ensuring transparency, as the Court of Appeals majority purported to do, the rule announced in *Handy* will result in less access to decision-makers and the decision-making process.

192.630(2) in *Handy*, the court concluded that the negotiating team, if it was a "governing body," could be subject to the public meetings requirements under ORS 192.630(2) when fifty percent of the staff serving on that team (an amount constituting a "quorum" under the default quorum provisions of ORS 174.030) "meet" to participate in a bargaining session. *See* ORS 192.610(3) ("'Governing body' means the members of any public body which consists of two or more members, with the authority to make decisions for or *recommendations to a public body* on policy or administration." (Emphasis added.)). Although the Court of Appeals remanded the case back to the trial court to determine whether a staff team constitutes a "governing body," the *TriMet* decision could extend the prohibition on private meetings to staff meetings or "serial communications" among staff, making it nearly impossible to operate local government efficiently or effectively.

To be sure, the policy concerns voiced by the Court of Appeals majority – namely public officials using "serial communications" to skirt the public meeting requirements – could arise in some jurisdictions where bad actors seek to avoid the requirements of the law. However, in those jurisdictions where state law falls short of achieving the desired level of openness, local residents can take steps to increase transparency by seeking additional open meetings legislation at the local level. For example, in Corvallis, concerns about a lack

of access to electronic "serial communications" between councilors are addressed by posting all emails directly to the city's website. If residents in other jurisdictions want a similar solution, they can seek it. Moreover, other public institutions, including the state legislature, allow for public involvement and public process without being subject to Oregon Public Meetings Law. The law need not reach "serial communications" to ensure transparency. Finally, if today's Legislative Assembly believes differently, it can amend the law to subject "serial communications" to its requirements.

/ / /

## IV. CONCLUSION

This case will impact the way in which decisions are made by nearly every governing body of every public body in the state – including every city and county governing body – which will, in turn, directly affect the constituents that those bodies serve. The Court of Appeals adopted an interpretation that is contrary to the text, context and legislative history of the statute, and this Court should reverse.

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

Brief Length

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 7,192 words.

Type Size

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)(f).

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## CERTIFICATE OF FILING AND SERVICE

I certify that on March 31, 2016, I directed to be electronically filed the foregoing **Brief of *Amici Curiae* Association of Oregon Counties, League of Oregon Cities, City of Portland, and Washington County in Support of Petitioners Lane County, Jay Bozievich, Sid Leiken, and Faye Stewart** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System, and I served the following parties by using the electronic service function of the eFiling system:

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