IN THE SUPREME COURT OF THE STATE OF OREGON

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

CORRECTED BRIEF OF *AMICI CURIAE* ASSOCIATION OF OREGON COUNTIES AND LEAGUE OF OREGON CITIES IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Lane County, 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.

AOC and LOC, on behalf of their member entities, 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, and a few other select advisory bodies – 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. HISTORICAL AND PROCEDURAL FACTS

The Court of Appeals decision correctly states the facts in this case.

III. QUESTION PRESENTED AND PROPOSED RULE OF LAW

In addition to the questions presented by Petitioners on Review, AOC and LOC offer the following question presented and proposed rule of law:

Question Presented:

Does ORS 192.630(2) preempt local governments from engaging in serial, *i.e.* non-contemporaneous, communications among a quorum of a governing body, and if so, can staff intermediaries create a quorum by sharing information with individuals or groups of less than a quorum of the governing body?

Proposed Rule of Law:

No. The text, context, and legislative history of ORS 192.630(2) demonstrate that the legislature intended the prohibition on private meetings to apply only to contemporaneous gatherings of a quorum of a governing body for the purpose of deciding on or deliberating toward a decision.

To the extent that there is more than one possible interpretation of ORS 192.630(2), the narrower interpretation controls because the statute is a mandate

that limits the authority of constitutional home rule entities. To preempt a local government's constitutional home rule authority, the legislature must unambiguously express its intent to do so. Mandates – which are a form of preemption – on home rule authorities therefore should be construed narrowly. As a result, the narrower interpretation – that Oregon's Public Meetings Law applies only to contemporaneous gatherings of a quorum – should control in this case.

IV. REASONS TO ALLOW REVIEW

This Court should allow review of Petitioners' case because it presents a significant issue of first impression that will impact the authority and ability of nearly every public official serving on a governing body of a public body in the state of Oregon to make reasoned, well-informed decisions.

Nearly every public official of a governing body of a public body in Oregon, including every county and city governing body, is subject to Oregon's Public Meetings Law, ORS 192.610 – 192.710. Oregon's Public Meetings Law places a mandate on home rule entities, and the city and county officials that govern them, to conduct business in a particular manner.[1] Specifically, under

[1] Cities and counties in Oregon derive their authority from the "home rule" provisions of the Oregon Constitution. *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,

that law, "[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). In addition, "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 except as otherwise provided by ORS 192.610 to 192.690." ORS 192.630(2). Those core tenants of Oregon's Public Meetings Law, which are at issue in this case, govern the way in which decisions are made at the local level every day. ORAP 9.07(2) (whether the issue arises often).

This case presents two significant questions regarding what constitutes a public meeting. Specifically, does Oregon's Public Meetings Law recognize serial meetings and, if so, can intermediaries create a quorum that triggers the provisions of the law. ORAP 9.07(1)(b), (d) (whether case presents a significant issue of law, including interpretation of a statute and legality of an important governmental action). The answer to those questions will affect how

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581, 548 P2d 188 (1976) (explaining that counties that derive their authority from statute have the same authority as constitutional home rule counties). The 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). To that end, cities and counties have authority to regulate unless state law unambiguously expresses an intent to preempt that local authority. *See Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450-51, 353 P3d 581 (2015).

most governing bodies in the state operate. As the Court of Appeals noted, those are issues of first impression. *See Handy v. Lane County*, 274 Or App 644, 656, __ P3d __ (2015) (noting no appellate court had addressed whether ORS 192.630(2) applies to serial discussions); ORAP 9.07(5) (whether the issue is one of first impression).

The way in which those questions are answered will have important implications for both the method by which the Oregon courts interpret statutes, and in particular the method by which the Oregon courts interpret statutes that contain a mandate on home rule entities. As described more fully below, the manner in which the Court of Appeals decided those issues creates an unworkable test that is without limits and is not rooted in the text, context or legislative history of the statute. The Court of Appeals' rationale goes against well-established precedent regarding the methods by which the Oregon courts interpret statutes, and allows an intrusion into city and county home rule authority that is not expressly or clearly provided for by statute. *See* ORAP 9.07(14)(a) (whether the Court of Appeals decision appears to be wrong and the error results in a distortion or misapplication of a legal principle). For those reasons, as further explained below, this case warrants review by this Court.

Before fully exploring why this Court should accept review, AOC and LOC begin with a brief description of the Court of Appeals' holding and

reasoning. In interpreting ORS 192.630(2), the Court of Appeals concluded that the prohibition on private meetings "contemplates something more than just a contemporaneous gathering of a quorum." *Handy*, 274 Or App at 664. The court went on to adopt a "purpose" test for determining when a governing body meeting in private violates Oregon's Public Meetings Law. According to the Court of Appeals, "A series of discussions may rise to the level of prohibited 'deliberation' or 'decision'; the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purpose for which they discuss it – not the time, place, or manner of their communications." *Id.* at 664-65. The court held that private, serial communications among a quorum violate the law when they are "conducted for the 'purpose' of deliberation or decision." *Id.* at 666. In other words, the Court of Appeals concluded that Oregon's Public Meetings Law prohibits private serial meetings, including serial meetings where the only aggregation of a quorum is through the communications of an intermediary. *Id.* at 664-65.

As noted by the dissent, the Court of Appeals opinion creates an unworkable standard that places unsuspecting public officials in a precarious situation. *Id.* at 690-92 (Devore, J., concurring and dissenting). Moreover, as noted by the dissent, the majority reached that result with little textual or historical support, and it instead rested its analysis on the policy statement of

the legislature. *See id.* at 689 (noting that the majority is "based on something other than text and context, legislative history, [and] Oregon precedent"); *see also id.* at 661-62 (majority noting that case law and legislative history do not directly address the question in the case and relying instead on the legislature's "declaration of the objective" of the law). That approach was an error, warranting review by this Court.

To avoid judicial overreaching in interpreting statutes, this Court has been clear that legislative policy statements cannot overcome the plain text of the operative provisions of the statute. *See Burke v. DLCD*, 352 Or 428, 441-42, 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"). Given the constitutional grant of home rule authority to local voters, that rule is particularly important when the statutory provisions impose a mandate or limit the authority of a home rule entity. *See Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 453-55, 353 P3d 581 (2015) (explaining that court will not imply broad preemption of local government authority based on express authorization of certain regulations). This Court has been consistent in limiting the legislature's intrusion into constitutional home rule authority to only those instances where the legislature has clearly and

unambiguously expressed its preemptive intent. *See Gunderson, LLC*, 352 Or at 659-62. Consequently, to give weight to legislative policy statements over the text, context, and legislative history of a mandate on home rule entities, as the Court of Appeals did, goes against both this Court's rules for statutory construction and expands Oregon's jurisprudence in the area of home rule contrary to this Court's precedents.

The majority raises legitimate policy concerns regarding serial meetings. However those concerns can first be addressed at the local level through the adoption of ordinances that further regulate public meetings, or by the legislature further defining the scope of the public meetings law to include serial meetings. In short, the Court of Appeals decision erred in recognizing a preemptive mandate on serial meetings where the legislature failed to unambiguously express one.

This Court's precedent holds that when the legislature imposes a mandate, which is a form of preemption, it must do so unambiguously. This case raises the question of how this Court will interpret a preemptive mandate. Stated differently, this Court has required the legislature to be unambiguous in expressing *whether* it intends to impose a mandate; this case requires this Court to address whether the legislature must be similarly unambiguous in the *scope* of the mandate. Because a mandate limits the authority of constitutional home

rule entities, and because the legislature must be unambiguous in its intent to impose a mandate, it follows that a preemptive mandate must be narrowly construed. To the extent that there is an ambiguity in the scope of the mandate, the narrower – that is, less preemptive – interpretation must control. *See Rogue Valley Sewer Services*, 357 Or at 454 ("A party that challenges a home-rule city's authority as preempted by state law is required to show that the legislature 'unambiguously' expressed its intent—a high bar to overcome."). In other words, when the extent of the mandate is ambiguous, the courts must adopt the narrowest interpretation, and allow local governments to rely on their home rule authority to address issues not squarely covered by the preemption.

Here, to the extent that the Court of Appeals determined that it was unclear whether Oregon's Public Meetings Law applies to serial meetings, it should have adopted the narrower interpretation advocated by the dissent and concluded that local governments may exercise their home rule authority to determine how to address serial meetings. Where it is unclear if the mandate reaches particular conduct, it is up to the voters of each jurisdiction to determine how to best effectuate the objective of transparency described by the legislature. For example, the City of Corvallis posts the emails of its Mayor and City Councilors directly to its website. Other jurisdictions take a more conservative approach. To the extent that it is unclear whether Oregon Public

Meetings Law applies to serial meetings, and a narrower interpretation is supported by the text, context, and legislative history, there is no mandate on local governments to treat those communications as public meetings. Rather, it should be a local choice.

In sum, rather than recognizing the limits of the statute, the Court of Appeals adopted an incorrect interpretation that ignores well-settled methods of statutory construction as well as constitutional home rule principles. ORAP 9.07(14)(a) (whether the Court of Appeals decision appears to be wrong and the error results in a distortion or misapplication of a legal principle). The holding of the Court of Appeals is also problematic because it is vague and unworkable. As a result, local governing bodies across the state, as well as the constituents they serve, will be impacted by this decision. ORAP 9.07(3) (whether many people are affected by the decision in this case).

Moreover, those officials who want to comply with the law will not be able to do so under the Court of Appeals decision because intermediaries can create a quorum without the knowledge or direction of a public official. That affects the operation and structure of every local government, where elected officials, who typically are unpaid volunteers, rely heavily on staff. If a staff member has individual discussions with each member of the governing body, even if those members of the governing body are not aware of the other

discussions that are taking place, the court's decision could be interpreted to find a public meetings law violation. The court's decision leaves public officials unable to control when a meeting occurs, unless those officials stop interacting with their colleagues and staff outside public meetings. Even acknowledging the legislature's purpose of advancing transparency, it stretches reason to think that the legislature intended to eliminate all communication outside public meetings.

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V. CONCLUSION

This case will impact the way in which decisions are made by nearly every governing body of a public body in the state – including every city and county governing body – which will, in turn, directly affect the constituents that those bodies serve. For that reason, and the reasons described above, AOC and LOC request that this Court allow review of Petitioners' case.

Respectfully submitted this 23rd day of December, 2015.

By: *s/ Katherine Thomas*

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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 9.05(3)(a) and (2) the word count of this brief (as described in ORAP 9.05(3)(a)) is 2,516 words.

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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 December 23, 2015, I electronically filed the foregoing **Corrected Brief of *Amici Curiae* Association of Oregon Counties and League of Oregon Cities in Support of Petitioners' Petition for Review** 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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