IN THE SUPREME COURT OF THE STATE OF OREGON

City of Damascus, James B. De Young, Jeanne Robinson, Mark Fitz, and William Wehr, Petitioners, v. State of Oregon, by and through Kate Brown, its Governor and Bev Clarno, its Secretary of State, Respondents.	SC S00669939

PETITIONERS' REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR DIRECT REVIEW

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PETITIONERS' REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR DIRECT REVIEW

Introduction

Chapter 545 Oregon Laws 2019 ("the 2019 Act" or "SB 226") directs this Court to consider first the validity of Section 1 of the 2019 Act, and then the validity of Sections 2 and 3 of the 2019 Act. (*See*, Section 4(5). This might be an interference with the courts under Article III section 1 of the Oregon Constitution (separation of powers) but petitioners will not belabor that point. In section 1 of the 2019 Act, the Legislative Assembly attempts to do directly what it later attempts to do indirectly through the Secretary of State. Here, there is little or no constitutional difference in the limitations on legislative authority whether exercised directly or indirectly. The Legislative Assembly may not retroactively change the rules applicable to elections in order to reverse the outcome, nor may it amend a city charter as to the electoral structure of the city, nor its manner of exercising its municipal authority, and it may not deny electors their rights protected under the Fourteenth Amendment to the U.S. Constitution.

This case challenges the authority of the Legislative Assembly to adopt the 2019 Act or whose application:

(1) contradicts a city charter on a matter of municipal legislation (city elections) and structure;

(2) is directed to only one city;

(3) retroactively overturns both a three-year-old election, and a court decision that determined the outcome of that election;

(4) exceeds the authority granted to the Legislative Assembly by Article XI § 2, Oregon Constitution; and

(5) violates the Fourteenth Amendment to the U.S. Constitution.

Respondents claim, incorrectly, that "petitioners do *not* argue that the legislature's act of retroactively referring a measure to the voters of the City went beyond the limits of legislative authority(.)" *Respondents' Response to Petition for Direct Review* ("*Response*"), P. 39. (Emphasis in the original.) That is, however, precisely what petitioners are asserting.

The opening Petition refers expressly to Article XI § 2, Article IV § 1, and Article I § 33 of the Oregon Constitution as textual sources of the limitations on legislative authority and as sources of inherent limitations on legislative authority. The limitations arise out of both the text and inherent or natural law, limiting authority to "'pass laws retrospective in nature and retrospective in effect.'" *Petition for Review Under Oregon Laws 2019, Chapter 545, Section* 5 ("*Petition*"), P. 17, quoting *Commentaries on State and Constitutional Law* (1848). App-9-10.

This assertion is rooted both in the Constitution as well as inherent limitations on legislative authority. Petitioners have made their arguments about limitations on legislative authority within the confines of Oregon Supreme Court precedent.

Home Rule

This case is governed by the text and case law applicable to Article VI § 1(5) Oregon Constitution (among other sections):

> The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers [the initiative and referendum or referral] shall be provided by general laws, but ***cities may provide the manner of exercising those powers [the initiative and referendum or referral] as to their municipal legislation.***

(Emphasis added.)

Under this provision, this Court must hold that even laws of general applicability may not pre-empt a city charter adopted by the voters governing the "the manner of exercising" the referendum or referral power as to municipal legislation, such as dissolution or amendment of the Charter. That is what the 2019 Act purports to do, by changing the Charter using procedures the Charter does not allow. Nothing in 2016 Measure 93, which was purportedly (and retroactively) referred by the 2019 Act, claims to amend or except that measure from the requirements of the City Charter. "It was held by the court in Acme Dairy Co. v. Astoria, 49 Or. 520, 90 Pac 153, that amending municipal charters is, 'municipal legislation' within the meaning of said provision of the Constitution, and cities have the power to provide the manner of exercising the

initiative [and referendum] power in the *amendment* of their charters." *Duncan v. Dryer*, 71 Or 548, 552 (1914). (Emphasis in the original.)

Municipal elections are part of the form of government – the city may decide on supermajority requirements and other requirements, unlike the regulatory matters that are subject to state law pre-emption. *See, e.g.*, *Springfield Utility Bd v. Emerald PUD*, 339 Or 631, 646 (2005) (territorial limits of utility provider were policy determination for state preemption).

Thus, the Legislative Assembly has no authority under Section 6(a) of the Charter to refer a matter to the voters of the City of Damascus modifying the previously adopted Section 27 of the Charter, that incorporated the statutory "majority of all electors," the November election date, and the requirement that only City Council could call such an election, when the Charter provisions were adopted. The City Council's interpretation to that effect must be given deference. *Gage v. City of Portland*, 319 Or 308, 315 (1994), *citing Fifth Avenue Corp. v. Washington County*, 282 Or 591, 599-600 (1978). Measure 93 was not adopted validly under the Charter, it is void, and the 2019 Act cannot revive or ratify it. Section 6(a) of the Charter does not allow the state to refer an amendment of "processes for use of the * * * referendum" (which includes

referral of measures).[1]

This Court should declare sections 1 to 3 of the 2019 Act, SB 226, unconstitutional, void, and therefore, invalid (as described in the 2019 Act).

Respondents refer this court to the first decision in *City of La Grande v. PERB*, 281 Or 137 (1978) ("*La Grand I*"), which was modified by the second decision, *City of La Grande v. PERB*, 284 Or 173 (1978) ("*La Grand II*"). In the end, there are two tests to determine whether a state statute violates the home rule authority granted to the voters of cities.

The Court clarified the first test (quoted by Respondents, and below) by holding, "(a) city's choice of its frame of government in its charter, and even beyond the charter as such, is not subject to general or statewide laws, except for procedural protections" [to individuals]. *La Grand II*, 284 Or at 182. The manner or method a city uses to hold municipal elections on referred and initiated measures is a matter of the City's frame of government, and is not subject to conflicting state law of general application, *Duncan v. Dryer, supra;* Article XI § 2 Oregon Constitution.

Respondents' argument attempts to modify this rule arising from the text of the Constitution by allowing state law to pre-empt the Charter provisions

[1] The word "referendum" is the noun form of the verb "refer." *See, e.g*. ORS 250.265 governing city measures, using 'refer' in sub-section (1) and 'referendum' in sub-section (2)).

concerning what law applies to the initiative and referral, and the frame of government that are found in Sections 6 and 27 of the Charter. ORS 221.621 is incorporated into the charter, and the Charter does not delegate to the legislative assembly any authority to modify the Charter. *See, Brinkley v. Motor Vehicles Division*, 47 Or App 25, 27 (1980) (city ordinance did not automatically adopt a change in state law). ORS 221.621 defines who can call such an election (the City Council), the date of election (the November general election), and the type of majority it takes to pass (majority of all electors). These constitute the "manner of exercising" the initiative and referendum powers of the city, and are expressly reserved to the city by incorporation into the Charter. Article XI § 2, Oregon Constitution. It is municipal legislation, and require deference by the state. *Id*. By purporting to change these terms, the 2019 Act conflicts with the Charter, and it is invalid.

The first *La Grande* test applies to the frame of government. Nothing is more critical to the frame of government than the choice whether to have a frame of government or not. An election to disincorporate, as provided in the 2019 Act, is invalid whether it is general, special, or local under the first *La Grande* test.

The second *La Grande* test applies to social and regulatory actions, such as rate-setting. *NW Nat. Gas Co. v. City of Gresham*, 359 Or 309, 335 (2016).

But the 2019 Act is not a general law pursuant to the second *La Grand* test, because its purportedly general provisions allow referral of a dissolution to another city only if there is separate, subsequent legislative action to have any effect other than on Damascus, placing such a referral election on the same grounds as if the 2019 Act did not exist. By granting itself authority to act in the future, the Legislative Assembly does nothing. The 2019 Act has no general application, applying only to the City of Damascus, and only to the May 2016 primary election regarding Measure 93.[2]

Respondents have set out the *La Grande* test as follows, and Petitioners have no issue with this quoted text, except that it fails to incorporate the clarification of the second *La Grande* decision, *supra* at P. 5:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state

[2] A review of the text of SB 226 demonstrates that the legislation can only apply to Damascus because Section 1 can only apply to one six month window of past actions, of which only Damascus could ever fit into the criteria. Section 4 makes obvious the intent to apply this legislation exclusively to Damascus.

> law must yield in those particulars necessary to preserve that freedom of local organization.

La Grande I, 281 Or 137 at 156. (The clarification simply states that matters of the frame of government may not be preempted, even by laws of general applicability.)

However, only the second kind of statute, one addressed primarily to substantive social, economic, or other regulatory objectives preempts "contrary policies [of] * * * local governments." (More on this is addressed below.) Respondents argue that this text (balancing state and local policies) also applies to legislation addressing the "structure and procedures" of local governments, which it does not. The Legislature simply may not intrude into municipal structures and procedures.

This Court must give deference to the interpretation of local governments of their codes and charters. *Gage, supra*. ["(D)eference is due a local governing body's interpretation of its own ordinance(.)"]; *see also DeFazio v. Washington Public Power Supply System, et al*., 296 Or 550, 580-81 (1984) [Linde, J., wrote "Again, charter authority 'is not a matter of common law, to be determined by consulting case law or encyclopedic summaries of caselaw. Adoption of a charter is a political act * * * A city can write or amend its charter or ordinance to define for itself what functions and services it wants its agencies to perform * * * To repeat, under home rule these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines."]

The 2019 Act conflicts with the City Charter, the manner of exercising municipal referrals, and municipal legislation addressing the structure and procedures of a local government. It is not a valid exercise of the state legislative power.

Separation of Powers

This is an unusual case – the Legislative Assembly purports to overturn the decision of the Court of Appeals by retroactively changing the rules applicable to the decision. The decision was not appealed, and awaits only a determination as to attorney fees to be final. Such interference with the courts is unprecedented, and unconstitutional.

Federal Equal Protection and Due Process

In *Bush v. Gore*, 531 US 98 (2000), the US Supreme Court held that once a state has granted electors an equal vote, the state may not, by later arbitrary treatment, change the value of any elector's vote, rendering it greater than the value of any other vote. *Id.* at 104-05. That is what the state attempts with the 2019 Act, by increasing the value of the votes of those who favored dissolution in 2016 over those who either voted "no," or did not vote, some of whom would have known from the results of the 2013 dissolution election that not voting is a "no" vote, when a majority of all electors is required for adoption.

Respondents assert that voting is not a fundamental right. *Response*, P. 44.[3] However, voting is a fundamental right, once granted by the state, as discussed in the *Petition* and in *Bush v. Gore*, *supra*, at 104 ("When the legislature vests the right to vote * * * in its people, the right to vote … is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.")

Here, the Oregon Legislature vested the right to vote in all the electors, and required a majority of all of them to dissolve a city. When the Legislative Assembly did not like the result in the 2016 election, however, it retroactively changed the value of the votes of these disapproving the measure, diminishing their value and increasing the value of those voting in favor. This violates the individual petitioners' fundamental right to vote. And individuals who are eligible to vote (and in this case who actually voted) are the protected class.

Fundamental rights are subject to "more exacting judicial scrutiny" than other rights. *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938). In this case, that more exacting scrutiny extends to preventing the legislative branch from changing the outcome of an election by changing the rules, after the fact of the vote, and after litigation over the results of the vote.

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[3] Such an assertion coming from the Oregon Department of Justice is both curious and concerning.

Just as silence is protected as free speech, *West Virginia State Board of Education v. Barnette, et. al.*, 319 US 624 (1943), so should this Court protect the right of those who declined to vote on Measure 93, especially where a "supermajority" – a majority of all electors – is required to pass a measure such as Measure 93. That supermajority requirement had already been a known fact and adjudicated as it related to Damascus, so local voters intimately knew that rule. *See*, Clackamas County Case CV13120336 and 13-12-0305 (companion cases), so holding.

Here, the retroactive change from a "majority of all electors" to a "majority of those voting" is an arbitrary change in the value of each vote, and a diminution of each voter's right, prohibited by the Fourteenth Amendment to the U.S. Constitution.

Conclusion

The 2019 Act is an impermissible and unconstitutional abuse of legislative authority. The voters of the City of Damascus have in place (and continue to have in place) a Charter which expressly and unambiguously identifies and controls the manner in which the City may be dissolved. The

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Oregon Legislature may not interfere with that process, but that this exactly what the 2019 Act does. For the foregoing reasons, and as set forth in the underlying *Petition*, petitioners respectfully request that this Court declare the 2019 Act unconstitutional and void as a matter of law.

DATED this 4th day of November, 2019.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE REQUIREMENTS, AND CERTIFICATE OF FILING AND SERVICE

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