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; STATE OF OREGON, by and through Kate Brown, its Governor, and Bev Clarno, its Secretary of State, Respondents.	SC S066939

RESPONDENTS' RESPONSE TO PETITION FOR DIRECT REVIEW

TYLER D. SMITH #075287
Tyler Smith & Associates PC
181 N. Grant St., Ste. 212
Canby, OR 97013
Telephone: (503) 266-5590
Email: tyler@ruralbusinessattorneys.com

Attorney for Petitioners

EDWARD H. TROMPKE #843653
Jordan Ramis PC
2 Centerpointe Dr., 6th Fl.
Lake Oswego, OR 97035
Telephone: (503) 598-5532
Email: ed.trompke@jordanramis.com

Attorney for Petitioner

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
PHILIP THOENNES #154355
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: philip.thoennes@doj.state.or.us

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

RESPONDENTS' RESPONSE TO PETITION FOR DIRECT REVIEW

INTRODUCTION

In 2015, the legislature referred a measure to the voters of the city of Damascus on the question whether to disincorporate their city. A majority of the voters participating in a special election in May of 2016 voted in favor of disincorporation, after which the city satisfied its debts, transferred its assets to the county, surrendered its charter, and ceased to exist. In May of 2019, the Court of Appeals concluded that the legislature had not properly exempted the special disincorporation election from statutory provisions that govern such elections and, because the special election did not comply with those requirements, the plaintiff was entitled to summary judgment in his favor.

During the 2019 legislative session, the legislature enacted Senate Bill (SB) 226 (2019) "to cure any defect in the procedures, and to ratify the results" of any disincorporation vote held on the date of a primary election before the effective date of the 2019 act, at which a majority of the voters participating voted in favor of disincorporation. Or Laws 2019, ch 545, § 4(1). The legislature also gave this court original jurisdiction to determine the validity of the substantive provisions of the law. Petitioners have asked this court to exercise its jurisdiction to make that determination.

STATEMENT OF THE CASE

This case is before the court under the legislature's provision for expedited review of a disincorporation bill enacted during the 2019 legislative session. *See* Or Laws 2019, ch 545, § 4(2).[1] In light of that judicial review provision, the state agrees with petitioners that the petition is timely and that this court has jurisdiction to decide the question presented. (*See* Pet Br 1–2).

The state also agrees that at least one petitioner has standing. In this case, petitioner De Young is an elector and taxpayer of the city of Damascus. For the reasons set forth in the petition for review, De Young is "interested in or affected or aggrieved by" Oregon Laws 2019, chapter 545, sections 1 to 3. (*See* Pet Br 13). And, because at least one petitioner has standing, this case presents a proper occasion for this court to exercise its jurisdiction to conduct the review contemplated in Oregon Laws 2019, chapter 545, section 4. *See AAA Oregon/Idaho Auto Source v. Dept. of Rev.*, 363 Or 411, 413, 423 P3d 71 (2018) (applying *MacPherson v. DAS*, 340 Or 117, 123–24, 130 P3d 308 (2006), in a direct review case and concluding that at least one petitioner was "interested in or affected or aggrieved by" the challenged legislation).

---

[1] The law, enacted as Senate Bill 226 (2019) and compiled in Oregon Laws 2019, chapter 545, is available at https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB226/Enrolled. As relevant to the procedure for expedited review, that law provides that "[o]riginal jurisdiction to determine the validity of sections 1 to 3 of this 2019 Act is conferred on the Supreme Court." Or Laws 2019, ch 545, § 4(2).

Question Presented

Are sections 1 to 3 of Oregon Laws 2019, chapter 545, valid under Oregon law, the Oregon Constitution, and the United States Constitution?

Proposed Rule of Law

Yes, sections 1 to 3 of Oregon Laws 2019, chapter 545, are valid under Oregon law, the Oregon Constitution, and the United States Constitution.

Summary of Argument

First, sections 1 to 3 of Oregon Laws 2019, chapter 545, do not violate the home rule provisions of the Oregon Constitution, because the law does not expressly or impliedly conflict with any contrary local policy choice and, even assuming that the law does conflict with the city's charter, it is a constitutional exercise of the legislature's authority to enact a general law addressed to substantive social, economic, and regulatory objectives and does not infringe on the city's home rule authority. Second, the law does not violate Article III, section 1, of the Oregon Constitution, because the legislature did not direct a particular outcome in pending litigation, but rather addressed deficiencies in previous legislation identified by the Court the Appeals. Third, the law does not violate Article IV, section 23, because it is not a "special or local law" and does not concern any of the "enumerated cases" that constitutional provision prohibits the legislature from regulating via special law. Finally, the law does not violate the Fourteenth Amendment to the United State Constitution, because

it does not affect a fundamental right, it does not deprive the plaintiffs of a constitutionally-significant interest in life, liberty, or property, and it is rationally related to the state's legitimate interest in providing a means by which the voters of a city may disincorporate.

STATEMENT OF FACTS

A. A majority of the voters of Damascus have twice voted to disincorporate their city.

The pertinent facts are procedural and undisputed. The city of Damascus was first incorporated in 2004. In 2013, the Damascus city council referred a citizen-initiated disincorporation measure to the city's voters. To pass, the measure needed to garner an absolute majority of votes in favor of disincorporation. *See* ORS 221.610 (disincorporation requires the vote of "a majority of the electors of the city."). Although a majority of those participating in the election voted in favor of disincorporation, it was not enough to meet the absolute majority threshold and the measure failed. *See De Young v. Brown*, 297 Or App 355, 357, 360, 443 P3d 642 (2019) (recounting that history).

Following that unsuccessful attempt at disincorporation, the legislature passed House Bill (HB) 3085 (2015), a referendum to the voters of the city of

Damascus on the question whether to disincorporate.[2] *De Young*, 297 Or App at 358. The Secretary of State designated the referral as Measure 93 and placed it on the ballot of all registered voters in Damascus. The vote was scheduled for a special election on May 17, 2016.

Measure 93 provided that, if a majority voted in favor of disincorporation, the city of Damascus would "surrender its charter, disincorporate and cease to exist" and the city's property rights would vest in Clackamas County. Or Laws 2015, ch 603, § 1(2)(a), (b)(B). Measure 93 further provided that

> [t]his 2015 Act shall be submitted to the people of the City of Damascus for their approval or rejection, by a majority of the voters voting on this 2015 Act, at a special election held on the same date as the next primary election.

Or Laws 2015, ch 603, § 2.

A majority of the voters participating in the May 17 election cast their vote in favor of disincorporation. Measure 93 was thus deemed to have passed according to its terms. *De Young*, 297 Or App at 358. The city proceeded to disincorporate according to the terms set out in HB 3085 and House Bill (HB)

---

[2] HB 3085 was not signed by the Governor and—as a referred measure—was not itself a "law." *See Davis v. Van Winkle*, 130 Or 304, 307, 278 P 91, *reh'g den*, 130 Or 307 (1929) (explaining that a referred measure is not a "law," "unless a majority of voters voting upon the referred bill vote in favor of the bill").

3086 (2015),[3] and, among other things, satisfied its debts, transferred its assets to Clackamas County, surrendered its municipal charter, and "cease[d] to exist." *Id.* at 357.

B. The trial court rejected a challenge to the 2016 disincorporation election but the Court of Appeals reversed.

Following the special election, plaintiff De Young sought a declaration that the purported disincorporation was without legal effect because Measure 93 violated the city's charter, the Oregon Constitution, and various Oregon laws that govern the procedures for a municipal disincorporation. The trial court granted summary judgment to the defendants and declared the results of the special election valid. *De Young*, 297 Or App at 357.

The plaintiff appealed, again arguing that Measure 93 violated the Oregon Constitution, the city charter, and ORS chapter 221. *Id.* at 358. Addressing only the statutory argument, the Court of Appeals framed the issue on appeal as "whether the special election was required to comply with ORS 221.610[4] and ORS 221.621,[5] and, if so, whether it did comply with

---

[3] HB 3086 was enacted into law as Oregon Laws 2015, chapter 637 and, unlike HB 3085, was signed by the Governor. Section 1 of that law set forth detailed procedures that the city was required to follow in the process of disincorporation and became effective no earlier than the ratification of HB 3085 by the voters. *See* Or Laws 2015, ch 637, § 2.

[4] ORS 221.610 provides, in part:

Footnote continued…

those statutes." *Id.* at 364. The plaintiff argued that, although HB 3085 purported to expressly exempt the voters of Damascus from the requirements of ORS chapter 221 in the process of voting on the question whether to disincorporate, the voters could not have exempted themselves from those statutory provisions in an election that remained subject to those provisions until *after* the passage of Measure 93. *Id.* at 365. The state did not dispute that the special election did not comply with ORS chapter 221, but argued that (1) those statutes govern one path to disincorporation—citizen-initiated disincorporation petitions—whereas Measure 93 was referred by the legislature and thus was not subject to ORS chapter 221, and (2) in any event, the

---

(…continued)

> Any city not liable for any debt or other obligation, may surrender its charter, disincorporate and cease to exist if a majority of the electors of the city authorize the surrender and disincorporation as provided in ORS 221.621 and 221.650.

[5] ORS 221.621 provides, in part:

> (1) This section establishes the procedure for determining whether a city shall disincorporate. The question shall be decided by election. The governing body of the city shall call an election when a petition is filed as provided in this section.
>
> * * * * *
>
> (4) The question of disincorporation shall be submitted to the electors of the city at an election held on the first Tuesday after the first Monday in November in any year, but shall not be submitted more than once in two consecutive calendar years.

legislature effectively exempted the special election from the requirements of ORS chapter 221 by contemplating an election in accordance with the terms set forth in HB 3085, "[n]otwithstanding ORS 221.610 and 221.621." *Id.* at 365–66 (citing Or Laws 2015, ch 603, § 1(1)).

The Court of Appeals rejected both of the state's arguments. As to the second argument, the court explained that, even assuming that the legislature could create a "different path" to disincorporation through the legislative referral process, "the legislature did not create that alternative through [Measure 93] itself." *Id.* at 369. The court observed that

> [t]he only provision, legislative or otherwise, for a special election at which a simple majority would prevail is that found in the substantive text of HB 3085, text that defendants acknowledge cannot have been given effect until *after* the election it purported to authorize.

Id. at 369 (emphasis in original). Thus, the court concluded, "even assuming that the legislature could have authorized a different procedure in the course of ordering a referendum on HB 3085, it does not appear to have done so here." *Id.* at 369–70. And, because the special election failed to comply with ORS chapter 221, the trial court erred in awarding summary judgment to the state. *Id.* at 370–71. The state did not petition for review of that decision.

C. Following the Court of Appeals decision, the legislature enacted Senate Bill 226.

As noted above, the legislature enacted SB 226 during the 2019 legislative session. The legislature intended SB 226

> to cure any defect in the procedures, and to ratify the results, of any vote on the question of the disincorporation of a city in which the disincorporation was approved by a majority of the voters of the city voting on the question at an election held on the date of a primary election held throughout the state before the effective date of this 2019 Act.

Or Laws 2019, ch 545, § 4(1).[6] To address the deficiencies with Measure 93 identified by the Court of Appeals, the legislature enacted three substantive provisions, in addition to the judicial review provision.

1. Substantive Provisions

First, the legislature created an alternative to the process for disincorporation set out in ORS chapter 221. Specifically, the legislature provided that, "[n]otwithstanding ORS 221.610, 221.621 and 221.650, a city shall be deemed to be disincorporated and shall cease to exist * * * upon a determination by the Secretary of State" that:

> (a) An election was held in the city on or after January 1, 2016, and before July 1, 2016, which included the question of whether to disincorporate the city;
>
> (b) A majority of voters voting on the question in the election voted in favor of disincorporation;
>
> (c) Following the election, the city charter was surrendered to the county in which the city is situated; and

[6] The Governor signed SB 226 on July 15, 2019, and the law became effective on that date. *See* Or Laws 2019, ch 545, § 5 (declaring emergency).

> (d) The Department of Revenue approved a boundary change map or maps under ORS 308.225 that eliminated the city boundaries.

Or Laws 2019, ch 545, § 1(1)(a)–(d). Those factual determinations are listed in the conjunctive—that is, the Secretary of State must determine that each circumstance exists before a city is deemed disincorporated under the method set out in Section 1. If the Secretary of State determines that each circumstance exists with regards to a given city, that city is disincorporated on "the date on which the city charter was surrendered to the county." Or Laws 2019, ch 545, § 1(2).

Second, the legislature provided that it could refer to the people of a city the question whether to disincorporate that city. The legislature declared that it could (1) refer a measure to the voters of a city on the question whether to disincorporate, (2) the election on that measure would be held on the date of the next statewide primary election occurring after the referral, and (3) the measure would pass if a majority of those participating in the election voted in favor of disincorporation.[7]

---

[7] Specifically, that provision provides:

> Section 2. (1) Notwithstanding ORS 221.610, 221.621 and 221.650:
>
> (a) The Legislative Assembly may refer an Act to the people of a city on the question of whether to disincorporate the city.

Footnote continued…

Third, the legislature made Oregon Laws 2019, chapter 545, section 2 retroactive: "Section 2 of this 2019 Act applies to Acts enacted or referred, and elections held, before the effective date of this 2019 Act." Or Laws 2019, ch 545, § 3. Section 3 therefore authorizes the referral of a measure that conforms

---

(…continued)

> (b) If the Legislative Assembly refers an Act under this section:
>
> (A) The election on the measure shall be held on the date of the next primary election held throughout this state that occurs after the enactment of the referred Act; and
>
> (B) The measure shall be approved if a majority of the voters voting on the question in the election votes in favor of disincorporation.
>
> (c) An Act referred by the Legislative Assembly under this section may include any other provision applicable to the disincorporation of a city that does not absolve the city from satisfying outstanding debts or other obligations.
>
> (2) Any other departure or deviation from the election procedures provided under ORS 221.610, 221.621 or 221.650, or from any other law whatsoever, appearing in an Act referred by the Legislative Assembly described in subsection (1) of this section, and any conflict between the election procedures or any other law whatsoever and the referred Act, shall be resolved in favor of the referred Act so that the consequent election shall be considered valid and without defect.
>
> (3) Notwithstanding any other provision of law, any Act enacted by the Legislative Assembly that requires action as a consequence of the approval of a measure referred as described in subsection (1) of this section becomes operative on the date on which the voters of the city approve the measure."

Or Laws 2019, ch 545, § 2.

to the requirements established in Section 2, even where the referral occurred prior to the effective date of SB 226.

2. Judicial Review

The legislature also conferred jurisdiction on this court to determine the validity of the foregoing provisions. *See* Or Laws 2019, ch 545, § 4(2). The legislature specified that the scope of this court's review is limited to "[t]he question of whether sections 1 to 3 of this 2019 Act are valid under the laws of this state and the United States and Oregon Constitutions" and the "[l]egislative history and any supporting documents related to" that question. Or Laws 2019, ch 545, § 4(4)(a)(A)-(B). Further, the legislature directed this court to "[f]irst * * * determine whether section 1 of this 2019 Act is valid." Or Laws 2019, ch 545, § 4(5)(a)(A). "Second, only if the court determines that section 1 of this 2019 Act is invalid * * *, the court shall determine whether sections 2 and 3 of this 2019 Act are valid." Or Laws 2019, ch 545, § 4(5)(b)(A). Stated another way, if this court determines that Section 1 is valid, this court should not then consider the validity of Sections 2 and 3, and the Secretary of State must make the determinations described in Section 1, which has the effect of validating any disincorporation that meets the factual prerequisites.

ARGUMENT

Because this court may need to address the validity of Sections 2 and 3 (if it first determines that Section 1 is invalid), the state will respond to

petitioners' arguments by addressing the validity of each substantive provision collectively. As explained below, petitioners fail to identify any constitutional provision—state or federal—that limits the legislature's ability to establish an alternative process for disincorporation by referring the issue to the voters, even where that process is different from the disincorporation procedures provided for in a city's charter.

A. SB 226 does not violate the home rule provisions of the Oregon Constitution.

Petitioners first argue that SB 226 violates the limits on legislative authority set out in the home rule provisions of the Oregon Constitution—Article XI, section 2, and Article IV, section 1(5)—and, by extension, the Damascus charter. (Pet Br 18–28). Petitioners are wrong. SB 226 does not violate the city's home rule authority, for two reasons. First, SB 226 does not preempt or conflict with any provision in the city's charter and therefore does not implicate the city's home rule authority at all. Second, even if the law is arguably inconsistent with the city's charter, the home rule provisions do not prevent the legislature from enacting a general law that establishes an alternative method for disincorporation. In the interest of correctly situating petitioners' home rule argument, the state begins with a brief summary of Oregon's home rule doctrine and the case law interpreting the home rule

amendments. The state then explains why SB 226 does not transgress those provisions.

1. Home rule in Oregon

Under federal constitutional law, municipal corporations are "convenient agencies" of their respective states. *Hunter v. City of Pittsburgh*, 207 US 161, 178, 28 S Ct 40, 52 L Ed 151 (1907). The states, therefore, enjoy every prerogative to add, alter, or withdraw municipal boundaries, merge municipalities, or abolish municipalities altogether, "unrestrained by any provision of the Constitution of the United States." *Id.* at 179. Because cities owe their existence to state law, they lack any inherent authority and possess only those powers affirmatively granted by the state. *See* 1 Dillon, *The Law of Municipal Corporations* § 9(b), at 93 (2d ed 1873) (arguing that cities lack inherent lawmaking power and derive all authority from their respective states). The "Dillon's Rule" theory of the city-state relationship dominated legal scholarship and jurisprudence in the nineteenth and early twentieth centuries, both nationally and in Oregon. *See City of Corvallis v. Carlile*, 10 Or 139, 141 (1882) (endorsing Dillon's view of city-state relations). Indeed, prior to 1906, Oregon's legislature possessed all power over local policy and had the exclusive authority to adopt and amend city charters, to establish and alter municipal boundaries, and to grant and remove legislative authority from

municipal corporations.[8] As originally enacted, Article XI, section 2, of the Oregon Constitution provided:

> Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights.

Or Const, Art XI, § 2 (1857).

But the legislature's absolute control over local charters and local policy preferences was not terribly popular. As this court later summarized the sentiment at the time, the legislature's control over local matters fostered discontent because "[m]any people perceived the legislature and those who could influence it as politically self-interested rascals and not as statesmen truly concerned with the needs of the people of Oregon." *Mid-County Future Alternatives v. City of Portland*, 310 Or 152, 158, 795 P2d 541, *cert den*, 498 US 999 (1990).

Thus, the Dillon's Rule model of the city-state relationship gave way to a model in which cities possessed greater control over their political form and the ability to enact their own policies. To achieve that goal, many states, including Oregon, adopted state constitutional provisions that granted a certain level of

---

[8] *See* John P. Ronchetto & Wayne Woodmansee, *Home Rule in Oregon*, 18 Or L Rev 216, 216 (1938-1939) (describing legislature's use of special legislation to incorporate municipalities and amend municipal charters).

autonomy to their municipal corporations. *See* Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 Or L Rev 909, 918–27 (1997) (surveying home rule reforms in Oregon and in other states).

a. The home rule amendments granted cities the right to adopt and amend their municipal charters.

In 1906, Oregon voters were presented with two "home rule" amendments to the state's constitution. The *Morning Oregonian*, editorializing in favor of the amendments, stated that the goal was "to take from the Legislature power to enact city charters, and place that power in the hands of the people of the territory to be affected." *Home Rule for Cities*, Morning Oregonian at 6 (May 28, 1906). The paper went on to explain that the amendments would

> ha[ve] the double object of relieving the Legislature of a vast amount of work that it should not be called upon to perform, and of placing in the hands of the people themselves the power to determine the fundamental law of their city government.
>
> * * *
>
> The people of a city would have the power to say upon what terms franchises shall be granted, and what shall be the general policy of the city regarding the many important questions that arise in every municipality.

Id.

The voters ratified both of the "home rule" amendments.[9] Specifically, the voters amended Article XI, section 2, which now provides, in part:

> The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon[.]

Or Const, Art XI, § 2. The voters also amended the initiative and referendum provision to reserve those powers "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." Or Const, Art IV, § 1(5).

Taken together, Article XI, section 2, and Article IV, section 1(5) guarantee to each locality the right to draft, amend, and vote on municipal charters and ordinances, but they do not define the precise nature of the city-state relationship, which led to much disagreement about the intent of the framers who drafted the amendments, the understanding of the voters who ratified them, and the proper application of the provisions to questions of state and local authority.[10]

---

[9] *See Initiative, Referendum, and Recall: 1902-2018*, 2019-2020 Oregon Blue Book (2019), *available at* https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf.

[10] The courts have consistently considered Article XI, section 2, and Article IV, section 1(5), in tandem when faced with a challenge based on a city's home rule authority. *See Burton v. Gibbons*, 148 Or 370, 374, 36 P2d

Footnote continued…

b. In *La Grande/Astoria*, this court established a test for assessing the boundary between state and local authority.

The case law arising out of the home rule provisions has not always been clear, consistent, or concise. *See Mid-County*, 310 Or at 158–61 (examining major home rule case law); *see also* Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or L Rev 939, 956–70 (2008) (critiquing contradictory interpretations of the home rule amendments). In the initial decades after their enactment, this court vacillated between an absolutist interpretation of Article XI, section 2 (where local charters were not subject to *any* state civil laws)[11] and a functional interpretation (where general state laws would preempt contrary local policy choices).[12] *See Burton v. Gibbons*, 148 Or

---

(…continued)
786 (1934) (so noting); *Acme Dairy Co. v. Astoria*, 49 Or 520, 525, 90 P 153 (1907) (same).

[11] In that line of cases, this court took the view that the language of limitation in Article XI, section 2, should be read literally—that is, that the power to enact and amend municipal charters was *only* "subject to the Constitution and criminal laws of the State of Oregon" and not to any statewide civil law. *See Branch v. Albee*, 71 Or 188, 195–96, 142 P 598 (1914) (holding that local charters are not subject to any statewide civil laws); *Kalich v. Knapp*, 73 Or 558, 598, 142 P 594 (1914), *overruled by Winters v. Bisaillon*, 152 Or 578, 54 P2d 1169 (1936) (holding that a statewide law regulating traffic speed was unconstitutional insofar as it conflicted with Portland's charter).

[12] In that line of cases, this court took the view that local charters were subservient to general statewide civil laws, even when such laws had the effect of altering or amending a city's charter. *See Straw v. Harris*, 54 Or 424, 435, 103 P 777 (1909) (explaining that a state law may not directly amend a

Footnote continued…

370, 374, 36 P2d 786 (1934) (describing "two lines of decisions entirely inconsistent with each other").

Later, in *State ex rel. Heinig v. City of Milwaukie*, 231 Or 473, 373 P2d 680 (1962), this court held that the proper inquiry for determining whether a state law violates a city's home rule authority included not simply the question whether the law was generally applicable to all municipalities, but also whether the law was primarily aimed at advancing a statewide concern. Specifically, this court held that

> the legislative assembly does not have the authority to enact a law relating to city government even though it is of general applicability to all cities in the state unless the subject matter of the enactment is of general concern to the state as a whole, that is to say that it is a matter of more than local concern to each of the municipalities purported to be regulated by the enactment.

Id. at 479.

(…continued)
local charter, but may indirectly amend local charters "to the extent that they may be in conflict or inconsistent with the general object and purpose" of the statewide law); *Rose v. Port of Portland*, 82 Or 541, 162 P 498 (1917) (examining the amendments and declaring that the legislature "cannot *create* any corporation by a special law; * * * cannot enact a special measure which enacts, amends, or repeals a specified city or town charter[; but] can enact a general law affecting the charters or acts of incorporation of all cities or towns, or municipalities or districts." (Emphasis in original)). That functional view prevailed, for a time. In *Burton*, this court explained that, following *Rose*, "it is now settled that, within the limits prescribed by the other provisions of the state Constitution and of the Federal Constitution, the power of the Legislature to enact a general law applicable alike to all cities is paramount and supreme over any conflicting charter provision or ordinance of any municipality, city, or town." 148 Or at 379.

Then, in *La Grande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *adh'd to on recons*, 284 Or 173 (1978), this court rejected *Heinig*'s balancing of state and local interests in favor of a more straightforward test.[13] At issue in *La Grande/Astoria* was a state law requiring cities to bring all police officers and firefighters into PERS or to provide them with equivalent or better retirement benefits. *Id.* at 139. The cities argued that, under *Heinig*, providing retirement benefits to city employees was a matter of local concern and, thus, the legislature was prohibited from interfering with their respective charter provisions regarding such benefits, even by enacting a general law of statewide applicability. This court disagreed. After examining the genesis and evolution of the home rule amendments, this court explained that the home rule provisions were designed to protect the *structure* of local government, not the policy preferences of local government. Specifically, this court crafted a two-part test to determine where local authority ended and state authority began:

> 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

---

[13] The court's rejection of *Heinig*'s balancing test fit within a larger pattern of decisions that moved away from balancing legal interests and towards a more categorical approach to constitutional interpretation. *See* Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 Alb L Rev 2027, 2040–47 (2013) (identifying that trend).

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

Id. at 156 (footnote omitted). Thus, *La Grande/Astoria* draws a distinction between the "structure and procedures" of a local government, on the one hand, and social, economic, and regulatory objectives (*i.e.*, substantive policy preferences), on the other. The former is protected from state interference except when the state has an overriding concern, and the latter can be preempted by state law except when doing so interferes with local freedom to choose political form.

Because those formulations reflect two sides of a single rule, Oregon courts have, in the years since *La Grande/Astoria*, resolved home rule disputes by first asking whether the challenged state law is intended to displace contrary local policies or conflicts with a local policy choice. If not, there is no interference with a city's home rule authority. But if the law is intended to displace local policies or conflicts with local policies, the next question is whether the challenged law is addressed to the "structure and procedures" of

local government or is addressed to "substantive social, economic, or other regulatory objectives of the state[.]"

Put differently, since *La Grande/Astoria*, Oregon's home rule cases have exclusively turned on the question whether a state law preempts a local policy choice. Those local policies, in turn, take the form of local criminal or civil laws.[14] State law can preempt local civil law expressly or impliedly. A state law expressly preempts local civil law when "the text, context, and legislative history of the statute 'unambiguously expresses an intention to preclude local governments from regulating' in the same area as that governed by the statute." *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450–51, 353 P3d 581 (2015) (quoting *Gunderson, LLC v. City of Portland*, 352 Or 648, 663, 290 P3d 803 (2012)) (emphasis deleted). State law impliedly preempts local civil law when the two are in conflict, meaning that compliance with both state and local law is "'impossible.'" *Id.* at 455 (quoting *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524 (2010)).

---

[14] The courts presume that state criminal law preempts local criminal law. *See City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986) (explaining presumption); *see also State v. Uroza-Zuniga*, 364 Or 682, 687, 439 P3d 973 (2019) (explaining that presumption applies in situations where state criminal law preempts local criminal law by implication).

Thus, in light of the test set out in *La Grande/Astoria*, petitioners' home rule argument reduces to a two-part inquiry: (1) Does SB 226 preempt—either expressly or impliedly—any provision in the Damascus city charter; and (2) if so, does SB 226 concern substantive social and economic concerns, or is it addressed to structure and procedures reserved to local control under Article XI, section 2, and Article IV, section 1(5)? Since *La Grande/Astoria*, this court has never held that a state law that preempts a local policy choice is an unconstitutional infringement on the "structure and procedures" of local government, and this case presents no reason to depart from that trend. As explained further below, SB 226 is a general law that creates a new mechanism for the voters of a city to choose to disincorporate and does not preempt any provision of the Damascus city charter. Rather, the charter expressly provides that city elections must conform to state law and compliance with both is not impossible. Finally, even assuming that SB 226 preempts the city's charter, the law is not addressed to the structure and procedures of local government, but rather to substantive social, economic, and regulatory objectives of the state.

2. SB 226 is a general law that creates an alternative path to disincorporation and, to the extent that it impliedly preempts the city's charter, it does not intrude into the city's home rule authority.

Petitioners argue that SB 226 is unconstitutional because it contravenes the disincorporation process set out in the Damascus charter. (Pet Br 18–28).

But, to the contrary, SB 226 does not conflict with the city charter. It is a general law that creates a new path to disincorporation apart from the one set out in ORS chapter 221. And, even assuming that the law impliedly preempts a portion of the city's charter, it does not intrude on the city's home rule authority.

a. SB 226 does not preempt or conflict with any provision of the Damascus charter.

To address petitioners' preemption argument, this court must first determine "whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive." *La Grande/Astoria,* 281 Or at 148. In making that determination, this court assumes that "the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent." *Id.* at 148–49 (footnote omitted). A state law will expressly preempt "the local rule where the text, context, and legislative history of the statute '*unambiguously* expresses an intention to preclude local governments from regulating' in the same area as that governed by the statute." *Rogue Valley*, 357 Or at 450–51 (quoting *Gunderson*, 352 Or at 663) (emphasis in *Rogue Valley*); *see also State ex rel. Haley v. City of Troutdale*, 281 Or 203, 211, 576 P2d 1238 (1978) (because any legislative intent to preempt local ordinances establishing building codes more

stringent than the state "minimum" was "not unambiguously expressed[,] local requirements compatible with compliance with the state's standards are not preempted"). A state law will impliedly preempt a local law where the two "conflict," meaning that compliance with both is "impossible." *Thunderbird Mobile Club*, 234 Or App at 474.

The first step, therefore, in answering the preemption question in this case is accurately determining what constitutes the "local rule" that SB 226 purportedly preempts. That is, what provisions of the Damascus charter, if any, govern disincorporation elections? The next step is asking whether the legislature, in enacting SB 226, "unambiguously" expressed an intention to displace those charter provisions or, in the alternative, whether SB 226 conflicts with the charter such that compliance with both is impossible. Only if this court determines that SB 226 preempts the city's charter—either expressly or impliedly—should this court turn to the question whether SB 226 intrudes on the city's home rule authority.

The city of Damascus, like all other cities in Oregon, operates under a "home rule" charter. To that end, the charter provides that

> [t]he city shall have all powers that the constitution, statutes and common law of the United States and Oregon expressly or impliedly grant or allow the city, as though this charter specifically enumerated each of those powers.

Damascus Charter, § 4. Regarding elections, the charter provides that "[c]ity elections must conform to state law except as this charter or ordinances provide otherwise." *Id.*, § 27. Finally, the charter declares that

> [t]he Oregon Constitution reserves initiative and referendum powers as to all municipal legislation to city voters. * * * Any change to the general laws of the State of Oregon regarding the processes for the use of the initiative, referendum and recall by city voters shall not be valid, unless such change has been proposed by the initiative petition and approved by a majority of the voters in a general election.

Id., § 6(a). Nothing in the charter specifically addresses disincorporation elections—as distinct from other elections on initiatives or referenda—or otherwise governs the use of the initiative and referendum powers by the city's voters.

i. SB 226 does not expressly preempt any provision of the Damascus charter.

Only when the legislature "unambiguously" expresses its intention to displace contrary charter provisions has this court held that a state law preempts a contrary local rule. *See Gunderson*, 352 Or at 663. Here, SB 226 does not expressly preempt any of the foregoing charter provisions. Indeed, SB 226 contains none of the language of preemption that the legislature typically uses when it intends to expressly preempt contrary local charters and ordinances. *See, e.g.*, ORS 471.045 ("The Liquor Control Act * * * shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it."); ORS 653.017 ("[T]he

State of Oregon preempts all charter and statutory authority of local governments to set any minimum wage requirements."). That leaves the question whether SB 226 impliedly preempts any provision of the Damascus charter because the two cannot operate "concurrently." *La Grande/Astoria*, 281 Or at 148.

ii. SB 226 does not impliedly preempt any provision of the Damascus charter.

In determining whether a state law impliedly preempts a local rule, this court asks whether compliance with both is "'impossible.'" *Rogue Valley*, 357 Or at 455 (quoting *Thunderbird Mobile Club*, 234 Or App at 474). The question in this case, therefore, is whether compliance with both SB 226 and the Damascus charter is impossible. It is not. As noted, the charter provides that city elections "must conform to state law[.]" Damascus Charter, § 27. Put another way, the city charter expressly provides that its local elections will be governed by state law.

This court faced similar charter provisions in *Mid-County*, 310 Or at 163–64. In that case, the state legislature passed a law enacting municipal boundary changes that were previously ordered under a statutory procedure that had since been held invalid. *Id.* at 156–57 (discussing Or Laws 1987, ch 818, § 3). After recognizing the state legislature's authority to legislate on the subject

of municipal annexation, the court suggested that such authority *might*, hypothetically, be limited by Article XI, § 2:

> Of course, a determination that annexation is within the state's legislative purview does not resolve this case. Even though a city must follow a legislatively-approved procedure to annex territory, it does not follow that the legislature can decree any annexation for any reason. There still is room to argue, as petitioners do, that the borders of a municipal corporation are an integral part of the corporate charter which cannot be altered by the legislature. *See* Or Const, Art XI, § 2.

Mid-County, 310 Or at 163 (footnote omitted). But this court ultimately avoided the question whether Article XI, § 2, created any such constraints, concluding that any possible constitutional limitation would not preclude the challenged annexations because the cities had enacted charters "permitting legislative alteration of their borders."[15] *Id.* The same principle is true here. The Damascus charter expressly provides that local elections "must conform to state law except as this charter or ordinances provide otherwise." Petitioners point to no other city charter provision or ordinance that would otherwise

---

[15] The relevant portion of the Portland charter provided that "'[t]he City of Portland may annex additional territory and other cities or areas may be consolidated or merged with the City *in any manner permitted by statute*.'" *Mid-County*, 310 Or at 164 (quoting The Charter of the City of Portland, ch I, Art 2, § 1-202) (emphasis in *Mid-County*). Similarly, the Gresham charter provided that "'[t]he city shall include all territory encompassed by its boundaries as they now exist or hereafter are modified by voters, by the council, *or by any other agency with legal power to modify them* * * * .'" *Id.* (quoting The Charter of the City of Gresham, ch I, § 3) (emphasis in *Mid-County*; other emphases deleted).

govern a disincorporation election and do not dispute that SB 226 constitutes a "state law" that expressly provides for a process by which the voters can elect to disincorporate a city. SB 226 does not, therefore, impliedly preempt the city's charter.

In urging a different result, petitioners add an interpretive gloss to the plain language contained in Section 27. Petitioners contend that Section 27 applies narrowly, in that the city council has since adopted a resolution that interpreted that provision "to mean that the Charter incorporated then-existing provisions of Oregon election law into the Charter [(*i.e.*, ORS chapter 221)], and that later amendments must be specifically adopted by the City, which has not occurred [(*i.e.*, SB 226)]." The trouble with that argument is twofold. First, petitioners point to no source of law that provides support for the proposition that a city council, by adopting a resolution, can effectively amend the city charter by purporting to narrow the scope of a charter provision.[16] Second,

---

[16] In support of their charter-interpretation argument, petitioners cite two land use cases that considered the level of deference that LUBA was required to grant a local governing body's interpretation of its land use code. *See Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (holding that LUBA is required to affirm a local government's plausible interpretation of its land use regulations, per ORS 197.829(1)(a)); *Clark v. Jackson County*, 313 Or 508, 518, 836 P2d 710 (1992) (concluding that LUBA exceeded its statutory scope of review in rejecting county's plausible interpretation of its land development ordinance). Those cases stand for the proposition that, in reviewing a local government's land use decision, LUBA is required to defer to a governing body's plausible interpretation of *its own* legislative enactment.

Footnote continued…

even assuming that the city council had the authority to effectively amend the scope of the charter via resolution, the council adopted the resolution that purports to "interpret" Section 27 at a city council meeting held on July 25, 2019.[17] The Governor signed SB 226 on July 15, 2019, and the law became effective on that date. Thus, at the time that the alternative disincorporation procedure in SB 226 became effective, the Damascus charter unambiguously provided that any local election must conform to state law. This court should therefore conclude that Section 27 means what it says—that local elections must conform to state law. If that is true, then it is not impossible that the 2016 disincorporation election could comply with both SB 226—a determination left to the Secretary of State—and the city's charter.

Finally, petitioners point to Section 6(a) of the city's charter as support for the proposition that the legislature cannot refer a disincorporation measure to the city's voters without local approval of such a referral through a local initiative. Again, that section provides:

(…continued)
The cases simply do not stand for the proposition that petitioners assert—that a city council is entitled to deference when it purports to narrow the scope of a city charter provision—the city's organic law approved by the voters—through the adoption of a resolution. And, again, petitioners point to no source of law that supports such a rule.

[17] *See* Minutes for Damascus City Council Meeting, July 25, 2019, *available at* https://damascusoregon.city/council-meeting-minutes/.

> Any change to the general laws of the State of Oregon regarding the processes for the use of the initiative, referendum and recall *by city voters* shall not be valid, unless such change has been proposed by the initiative petition and approved by a majority of the voters in a general election.

Damascus Charter, § 6(a) (emphasis added). The state does not dispute that the voters of a city have the authority to decide how they will exercise the right of initiative and referendum as to their *municipal* legislation. Indeed, Article IV, section 1(5), expressly provides that

> The initiative and referendum powers reserved to the people * * * 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 shall be provided by general laws, but cities may provide the manner of exercising those powers *as to their municipal legislation*.

Or Const, Art IV, § 1(5) (emphases added). Oregon law echoes that division of authority. *See* ORS 250.255 ("ORS 250.265 to 250.346 apply to the exercise of initiative or referendum powers regarding a city measure under section 1, Article IV, Oregon Constitution, unless the city charter or ordinance provides otherwise.").

Here, the question is not whether the legislature enacted a general law affecting "the use of" the initiative or referendum power "by city voters." Damascus Charter, § 6(a). Rather, the legislature exercised its own authority to order a referendum directly to the voters of the city on the question whether to disincorporate. *See* Or Const, Art IV, § 3(c) ("A referendum on an Act may be

ordered by the Legislative Assembly by law."); *Reilley v. Paulus*, 288 Or 573, 607 P2d 162 (1980) (legislative referral to voters of Multnomah, Washington, and Clackamas Counties regarding organization of metropolitan service district did not violate home rule amendments). Article IV, section 1(5) expressly provides that the manner of exercising the initiative and referendum power "*shall* be provided by general laws," but a city "*may* provide the manner of exercising those powers as to their municipal legislation." (Emphases added). Here, the legislature did not enact a general law that purports to govern the use of the initiative and referendum powers by city voters as to their municipal legislation. Rather, the legislature exercised its own authority to order a referendum, and Article IV, section 1(5) expressly gives the legislature authority to determine the manner in which its referendum will be decided. The state is aware of no authority—and petitioners cite none—that supports the proposition that the voters of a city have the power to approve or reject the *legislature's* exercise of its own referendum power, apart from the act of voting on the referred measure itself.

In sum, because SB 226 neither expressly nor impliedly preempts or otherwise conflicts with any provision in the city's charter, this court need not reach the question whether SB 226 improperly intrudes into the city's home rule authority under Article XI, section 2, and Article IV, section 1(5).

b. SB 226 is a general law addressed to a statewide regulatory objective and prevails over any contrary local policy choice.

Assuming that SB 226 expressly or impliedly preempts local law, the question becomes whether the law intrudes into the city's home rule authority, as interpreted by this court in *La Grande/Astoria*. If SB 226 constitutes "a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state[,]" it "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." *La Grande/Astoria*, 281 Or at 156. Only if the law is "addressed to a concern of the state with the structure and procedures of local" government and is not "justified by a need to safeguard the interests of persons or entities affected by the procedures of local government" is the law unconstitutional under Article XI, section 2. *Id.* SB 226 is a general law that is addressed to substantive social, economic, and regulatory objectives of the state.

First, SB 226 is a general law, not a special law. In *Allen v. Hirsch*, 8 Or 412 (1880), this court explained that the term "special," as used in Article IV, section 23, of the Oregon Constitution, has "a well known common-law meaning. When applied to statutes, the word special is a technical word, and is synonymous with 'private,' which was formerly the more frequent term." *Id.* at

415. The *Allen* court went on to explain that a "special" or "private" law, as opposed to a "general" law, "is a statute which affects only certain specified individuals or private concerns. It is the opposite of a public or general law, which applies to all persons who may happen to be so situated as to fall within the general purview of operation." *Id.* Having established the difference between a "special" and "general" law, the court held that three legislative acts that created a commission to survey and construct a public road from the Sandy River to The Dalles were general laws. The court explained that none of the acts "confers any rights or privileges upon particular individuals[,]" but rather "[t]hey are acts for a public purpose, namely, the making of certain public internal improvements." *Id.* at 416. The fact that the acts only affected a limited geographic area was immaterial, because the statutes conferred certain powers on the state agent responsible for the project, and "his relations to the public are to be determined is always the same." *Id.*; *see also Maxwell v. Tillamook County*, 20 Or 495, 502, 26 P 803 (1891) (holding that an act *specifically* appropriating $10,000 to Tillamook County for the construction of a wagon road was an unconstitutional special law, because the act conferred a special benefit on a single, identified county).

Later, in *Farrell v. Port of Columbia*, 50 Or 169, 91 P 546 (1907), this court reiterated that a "general" law is one that "operates equally and uniformly upon all persons, places or things brought within the relation and circumstances

for which it provided." *Id.* at 173. If, however, a law "is applicable only to a particular branch or designated portion of such persons, places or things, or is limited in the object to which it applies, it is special." *Id.*

Even legislation that indisputably affects only one city can be a general law. *In re Application of Boalt*, 123 Or 1, 17, 260 P 1004 (1927) (holding that "[i]t was competent for the Legislature of 1925 to enact a general law authorizing cities of over 200,000 population to elect or appoint an additional judge of their municipal court[,]" even where Portland was the only such city); *see also Ladd v. Holmes*, 40 Or 167, 175–78, 66 P 714 (1901) (upholding a state law providing a method of holding primary elections in cities having a population of 10,000 or more, because the law operated equally on all members of the designated class); *Southern Pacific Co. v. Consolidated Freightways, Inc.*, 203 Or 657, 664, 281 P2d 693 (1955) ("An act of the legislature which is a general law applicable to all municipalities of the same class, in this instance to all with 'less than 100,000 population,' repeals by implication all charters and ordinances in conflict therewith.").

Those principles establish that SB 226 constitutes a general law. Nowhere in the act did the legislature limit its applicability to "certain specified individuals or private concerns." *Allen*, 8 Or at 415. Put another way, the legislature did not specify a particular city or election that would come within the scope of the law. Rather, SB 226 "operates equally and uniformly upon all

person, places, or things brought within the relation and circumstances for which it provided." *Farrell*, 50 Or at 173. Indeed, the legislature expressly provided that the substantive provisions of SB 226 would apply to "*any* vote on the question of the disincorporation of a city" that fell within the factual prerequisites set out in Section 1. Or Laws 2019, ch 545, § 4(1) (emphasis added). Further, the fact that SB 226 may apply to only one city, because that is the only city that held a disincorporation election during the relevant time period, is immaterial. SB 226 applies equally to "all municipalities of the same class"—that is, the procedure for disincorporation applies equally to any municipal corporation in the state. *Southern Pacific Co.*, 203 Or at 664. That the city of Damascus may be the only such city does not transform SB 226 into a "special" law.

Second, SB 226 is addressed to a "substantive social, economic, or other regulatory objective[s] of the state[.]" *La Grande/Astoria*, 281 Or at 156. The Oregon Constitution requires the legislature to enact laws regulating elections. Or Const, Art II, § 8.[18] In enacting SB 226, the legislature chose to create an additional method by which the voters of a municipal corporation could

---

[18] Article II, section 8, of the Oregon Constitution provides: "The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct."

disincorporate, apart from the procedure already established in ORS chapter 221. The legislature has a legitimate regulatory interest in establishing and governing the processes by which the voters can disincorporate their city, as evidenced by the procedures outlined in ORS chapter 221 itself.[19] Petitioners do not contend that the legislature lacks authority to amend, expand, or abolish those procedures, or that the legislature that enacted the disincorporation procedures in ORS chapter 221 meant to bind future legislative bodies by limiting the creation of any other method of disincorporation. *See Moro v. State of Oregon*, 357 Or 167, 195, 351 P3d 1 (2015) ("When the legislature pursues a particular policy by passing legislation, it does not usually intend to prevent future legislatures from changing course.").

Further, this is not a case in which the legislature has attempted to alter a municipality's boundaries, preempt a charter provision, or otherwise abrogate a substantive policy decision against the will of the city's voters. In *Mid-County*, the people of Portland and Gresham chose to permit the legislature to legislatively alter the cities' borders, as evidenced by the language that the people enacted into their respective charters. *Mid-County*, 310 Or at 163

---

[19] Indeed, the very reason the state regulates those processes is to "safeguard the interests of persons or entities affected by the procedures of local government," which is a sufficient basis to allow statewide legislation regarding "the structure and procedures of local agencies." *See La Grande*, 281 Or 137. That is, SB 226 is permissible even when analyzed more explicitly in terms of the first of *La Grande/Astoria*'s two mirror-image formulations.

("Even if we assume that a city's borders are inherently a part of the corporate charter which cannot be altered by the legislature against the municipality's will, we read the charters of both the City of Portland and the City of Gresham as permitting legislative alteration of their borders."). The same is true here. As noted above, the people of Damascus chose to make their local elections subject to state law. Indeed, it bears emphasis that the people of Damascus chose to disincorporate their city under the terms of Measure 93. The legislature, in enacting SB 226, is merely giving legal effect to the choice that the voters have already made, not overriding the voters' policy decision in a way that is shielded from interference under the home rule amendments. *Accord Schmidt et al v. City of Cornelius*, 211 Or 505, 529–30, 316 P2d 511 (1957) (striking down, in a pre-*La Grande/Astoria* case, the legislature's attempt to withdraw territory from a home rule city *without* the consent of the city).

In urging a different result, petitioners argue that SB 226 is a special law that is primarily "procedural" in nature. (Pet Br 27). They note that the act was meant "to cure any defect in the procedures" of a prior disincorporation vote, and reason that the act therefore must concern the "structure and procedures" of local government in violation of the city's home rule authority. But, as explained above, SB 226 is addressed to substantive regulatory objectives of the state, and the fact that the law may be "procedural" in nature, in that it concerns

the legislature's use of its authority to set the terms of its own referendum, does not mean that the law is "addressed to a concern of the state with the structure and procedures *of local agencies*." *La Grande*, 281 Or at 156 (emphasis added). Further, it bears noting 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 established by Article IV of the Oregon Constitution.[20]

---

[20] Such an argument cannot be raised for the first time on reply. And, in any event, such an argument would fail. Other courts have concluded that the legislature can validate previously held, defective elections. *See, e.g.*, *Swartz v. Borough of Carlisle*, 85 A 847 (Pa 1912) (Pennsylvania Supreme Court upholding state legislature's act that retroactively validated special election results in favor of a municipal bond, which had originally been invalid because of procedural errors in election); *Springfield Safe-Deposit & Trust Co. v. Attica*, 85 F 387, 390 (8th Cir 1898) (recognizing the power of the Kansas legislature to pass a curative statute after municipal voters voted in favor of a bond, but vote was possibly defective because of a procedural error); *Witter v. Board of Sup'rs of Polk Co.*, 83 NW 1041, 1045 (Iowa 1900) (holding valid a curative act by Iowa legislature to validate county vote authorizing issuance of bonds and construction of new court house and endorsing rule that "in regard to curative statutes" "if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless, is something which the legislature might have dispensed with by previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by a prior law, it may do so by a subsequent one." (internal citation omitted)).

While this court has not addressed curative legislation regarding an election, it has upheld retroactive laws in the civil context so long as the law does not impair contractual or vested rights. *See, e.g.*, *Carey v. Lincoln Loan Co.*, 342 Or 530, 540–41, 157 P3d 775 (2007) ("Oregon courts long have held that defects in laws can be cured by subsequent legislative action, as long as the subsequent action does not impair vested rights or the obligation of contract.");

Footnote continued…

In sum, SB 226 is a general law that neither expressly nor impliedly conflicts with any city charter provision. Even assuming that the law preempts or conflicts with the city's charter, however, the law is addressed to social, economic, or other regulatory concerns and therefore does not intrude into an area of local authority shielded from legislative interference under Article XI, section 2, and Article IV, section 1(5).

B. SB 226 does not violate Article III, section 1.

Second, petitioners argue that SB 226 violates Article III, section 1, of the Oregon Constitution, because the purpose of the law was to "reverse th[e] judicial decision" in *De Young*. (Pet Br 29). But the legislature did not purport to "reverse" or "overturn" any judicial decision. SB 226 merely accomplishes what the Court of Appeals said that the legislature did not accomplish with Measure 93—that is, it establishes a method for disincorporation apart from the one set out in ORS chapter 221. SB 226 in no way disturbs the legal analysis in that case or directs the court to reach a contrary result.

(…continued)
Smith v. Cameron, 123 Or 501, 507, 262 P 946 (1928) ("A Legislature may pass a retroactive law which could validate any act which it could in the first instance have authorized, subject to the restriction that it could not impair the obligation of a contract or a vested right.").

Nothing in Article III, section 1, of the Oregon Constitution prohibits the legislature from enacting legislation that has the effect of nullifying a judicial decision by amending, eliminating, or otherwise altering the statute on which the decision was based. That constitutional provision, establishing the separation of powers between the branches of government, provides:

> The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Or Const, Art III, § 1. This court has developed two principle inquiries when faced with a separation-of-powers challenge to the exercise of government authority. First, one branch of government may not unduly burden another branch of government in an area of responsibility committed to the latter. *See State ex rel. Emerald PUD v. Joseph*, 292 Or 357, 361–62, 640 P2d 1011 (1982) (holding that the legislature's requirement that courts hear and decide cases within 90 days of taking the case did not unduly burden the judiciary). Second, one branch of government may not exercise a function reserved to another branch of government. *See Circuit Court v. AFSCME*, 295 Or 542, 547, 669 P2d 314 (1983) (so stating).

Here, petitioners contend that the legislature intruded into the functions reserved to the judiciary by enacting a law meant to correct the problems

identified by the Court of Appeals in *De Young*. But the legislature routinely responds to court decisions that interpret existing legislation by amending that legislation or enacting new legislation to address the deficiencies or ambiguities identified by the court. *Compare Johnson v. Gibson*, 358 Or 624, 638, 369 P3d 1151 (2016) (holding that the term "owner," as defined by *former* ORS 105.672(4) (2007), did not include individual employees of a public entity), *with* Or Laws 2017, ch 449, § 1 (amending the definition of "owner" in ORS 105.672 to expressly include "[a]n officer, employee, volunteer or agent" of a public entity). Only when the legislature directs the courts to reach a particular outcome in a specific case does the legislature depart from its role as a lawmaking body and impermissibly intrude on the courts' authority to adjudicate disputes. *See United States v. Klein*, 80 US (13 Wall) 128, 20 L Ed 519 (1871) (holding that Congress may not pass a law that prescribes a rule of decision in a particular case).

Here, the legislature did not direct the Court of Appeals to reach a particular outcome, nor has the legislature directed *this* court to reach a particular outcome. At most, the legislature responded to the Court of Appeals decision by enacting legislation—an action well within the legislature's authority—to address the deficiencies that the court identified. Nothing about that conduct violates Article III, section 1, of the Oregon Constitution.

C. SB 226 does not violate Article IV, section 23.

Third, petitioners argue that SB 226 violates Article IV, section 23, of the Oregon Constitution. (Pet Br 31–32). That provision provides, in part:

> The Legislative Assembly, shall not pass special or local laws, in any of the following enumerated cases, that is to say: —
>
> Regulating the jurisdiction, and duties of justices of the peace, and of constables;
>
> For the punishment of Crimes, and Misdemeanors;
>
> Regulating the practice in Courts of Justice;
>
> Providing for changing venue in civil, and Criminal cases[.]

Or Const, Art IV, § 23. For the same reasons stated above, SB 226 is not a "special or local law," because it is not "a statute which affects only certain specified individuals or private concerns." *Allen*, 8 Or at 415 (interpreting the phrase "special or local laws" in Article IV, section 23). Rather, SB 226 "applies to all persons who may happen to be so situated as to fall within the general purview of operation." *Id.* Further, even assuming that SB 226 constituted a "special" or "local" law, it does not apply to any of the "enumerated cases" that the legislature is prohibited from regulating via special law. SB 226 is addressed to elections and the process by which a city may disincorporate, a subject nowhere mentioned in the enumerated classes of legislative action governed by Article IV, section 23. SB 226, therefore, does not violate that constitutional provision.

D. SB 226 does not violate the Fourteenth Amendment.

Finally, petitioners argue that SB 226 violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. They contend, without elaboration, that the "legislative re-determination of the election's outcome and changing election standards violates the equal protection and due process requirements of the constitution of the United States." (Pet Br 33). Not so. To the extent that petitioners argue that the city itself enjoys any federal constitutional protections against state interference—whether grounded in due process or equal protection—the Supreme Court of the United States has long since rejected the argument that municipalities enjoy any federal constitutional rights vis-à-vis the states. *See Hunter v. City of Pittsburgh*, 207 US 161, 178–79, 28 S Ct 40, 52 L Ed 151 (1907).

As to the other petitioners, they fail to identify any fundamental right that the legislature has allegedly infringed. *See, e.g.*, *Washington v. Glucksberg*, 521 US 702, 720–21, 117 S Ct 2258, 138 L Ed 2d 772 (1997) (explaining that substantive due process "protects only those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" (quotation marks omitted)). Nor do petitioners identify any deprivation of a life, liberty, or property interest that implicates the procedural aspects of the

right to due process.[21] *See, e.g.*, *Mathews v. Eldridge*, 424 US 319, 332, 96 S Ct 893, 47 L Ed 2d 18 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

Finally, as to equal protection, petitioners do not articulate what class the legislature allegedly burdened through the enactment of SB 226. In the absence of any contention that SB 226 should be subjected to strict or heightened scrutiny, and assuming that SB 226 actually distinguishes between one class versus another—which the state does not concede—this court must apply rational basis review, under which petitioners bear the burden of showing that the law is not rationally related to a legitimate state interest. *See New Orleans v. Dukes*, 427 US 297, 303, 96 S Ct 2513, 49 L Ed 2d 511 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume

---

[21] The closest thing to a protected property interest that the state can identify is De Young's position as the elected mayor of the city. That is, De Young could argue (although he does not) that he was deprived of due process when the legislature ratified a vote that disincorporated the city of which he was the mayor. The Supreme Court of the United States, however, in *Taylor v. Beckham*, 178 US 548, 577, 20 S Ct 890, 44 L Ed 1187 (1900), held that elective office is a "mere agenc[y] or trust, and not property as such[,]" and does therefore does not constitute a property interest protected by the Fourteenth Amendment.

the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."). As previously described, SB 226 is rationally related to the state's legitimate interest in providing for a means by which the voters of a municipality may disincorporate. Petitioners do not contend otherwise.

In sum, petitioners fail to establish that the legislature violated any right to equal protection or due process protected by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Sections 1 to 3 of Oregon Laws 2019, chapter 545, are valid under the laws of this state, the Oregon Constitution, and the United States Constitution. This court should declare that the law is constitutional.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Philip Thoennes
PHILIP THOENNES #154355
Assistant Attorney General
philip.thoennes@doj.state.or.us

Attorneys for Respondents
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 14, 2019, I directed the original Respondents' Response to Petition for Direct Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and to be served upon Tyler D. Smith and Edward H. Trompke, attorneys for petitioners, by using the electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 11,625 words. I further 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(2)(b).

/s/ Philip Thoennes

PHILIP THOENNES #154355
Assistant Attorney General
philip.thoennes@doj.state.or.us

Attorney for Respondents

PT4:bmg/9780076