IN THE SUPREME COURT OF THE STATE OF OREGON

CITY OF PORTLAND, an Oregon municipal corporation,	Multnomah County Circuit Court Case No. 16CV015929
Plaintiff-Respondent,	CA A164469
and	S067940
MARK BARTLETT,	
Defendant-Appellant.	

BRIEF OF *AMICUS CURIAE* LEAGUE OF OREGON CITIES IN SUPPORT OF PETITIONER ON REVIEW

Petition for Review of the decision of the
Court of Appeals dated June 10, 2020
Opinion by Shorr, J.

Joined by Egan, Chief Judge, and Armstrong, Ortega, DeVore, Tookey, DeHoog, James, Aoyagi, Mooney, and Kamins, Judges. Powers, J., dissenting

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I. INTRODUCTION

Amicus curiae represents 241 incorporated cities. Supreme Court review is important to *amicus's* membership because the attorney-client privilege is integral to the structure and procedures of every city in Oregon. *Amicus* submits that this case requires the Court's unique authority to interpret the legislative intent underlying ORS 192.390 in light of the home rule protections within the Oregon Constitution. The outcome holds import beyond the particular facts of this case.

II. INTEREST OF *AMICUS CURIAE*

The League of Oregon Cities (LOC) is organized under ORS 190.010 as a consolidated department of Oregon's 241 incorporated cities. Founded in 1925, the LOC was formed to be, among other things, the collective voice of Oregon's cities before the state courts and an advocate for preserving local authority. Court review is important for *amicus* and all its members.

III. HISTORICAL AND PROCEDURAL FACTS

The Court of Appeals decision correctly states the historical and procedural facts in this case. ORAP 9.05(4)(a).

IV. QUESTION PRESENTED AND PROPOSED RULE OF LAW

Amicus supports petitioner's position on the questions presented. *Amicus* supports review because this question squarely presents the Supreme Court with

the opportunity to clarify whether the legislature may waive a city's attorney-client privilege.

V. REASONS TO ALLOW REVIEW

Amicus supports review of this case for two specific reasons: (1) reading ORS 192.390 to limit the attorney-client privilege violates the home rule authority of every city in Oregon; and (2) the Court of Appeals' conclusion limiting the attorney-client privilege for cities is not evidenced in the legislative history. ORAP 9.07(3); ORAP 9.07(14)(a).

A. The Case Affects the Home Rule Authority of Every City in Oregon.

Applying ORS 192.390 to privileged information contained in the public records of home rule cities violates the Oregon Constitution. To explain why, some context is required. The following argument begins with a brief history of Oregon's home rule amendments and the key case law that defines the scope of the home rule doctrine. The argument then explains what the home rule amendments mean for a city's legal identity in the context of Oregon's law on the attorney-client privilege. Finally, the argument applies the *La Grande/Astoria* framework to the attorney-client relationship between a home rule city and its legal counsel, concluding that the Oregon Constitution prohibits the legislature from forcibly waiving a city's privilege.

1. A Brief History of Home Rule in Oregon

In the first decades of the twentieth century, the principle known as "Dillon's Rule," by which cities lacked inherent authority and possessed only powers affirmatively granted by the state, began to change. A wave of Progressive Era populism brought numerous political reforms, including a push for local authority over local government and local policies. The legislature's control over local matters fostered discontent amongst voters because, "many 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 Comm. v. City of Portland*, 310 Or 152, 158, 795 P2d 541, *cert den*, 498 US 999 (1990).

In 1906, consistent with home rule reforms in other states, the voters amended Oregon's constitution to limit the power of the Legislative Assembly over local matters and empower cities with home rule authority. Specifically, the voters amended Article XI, section 2, which now provides, in relevant 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, Article XI, section 2. On the same ballot, the voters amended the initiative and referendum provision of the Oregon Constitution 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, section 1(5).

Taken together, Article XI, section 2, and Article IV, section 1(5), guarantee to the voters of each municipality the right to draft, amend, and vote on municipal charters and ordinances and insulate those powers from state interference. Of course, the passage of the home rule amendments did not end the debate over the scope of local government authority vis-à-vis state authority. On the contrary, the passage of Article XI, section 2, and Article IV, section 1(5), catalyzed a century-long process of interpreting, refining, reconsidering, and applying those amendments. The case law arising out of that process has not always been clear, consistent, or concise. *See Mid-County*, 310 Or at 159-61 (demonstrating the extent of inconsistencies by examining major home rule case law); DILLER, PAUL A., THE PARTLY FULFILLED PROMISE OF HOME RULE IN OREGON, 87 Or L Rev 939, 956-70 (2008) (criticizing inconsistent interpretations of the home rule amendments and opinions that read those amendments narrower than originally intended). At times, for example, the courts took the view that local charters were not subject to any statewide civil laws. *See Branch v. Albee*, 71 Or 188, 142 P 598 (1914). At other times, the courts stated that local charters were subject to general civil laws, but not special civil laws. *See Rose v. Port of Portland*, 82 Or 541, 162

P 498 (1917). Still later, the courts balanced statewide and local interests to determine whether a generally applicable civil law could constitutionally override a local charter. *See State ex rel. Heinig v. City of Milwaukie*, 231 Or 473, 373 P2d 680 (1962).

The tangled two-steps-back-one-step-forward line of home rule cases culminated in the seminal home rule decision of the modern era: *La Grande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *adh'd to on recons*, 284 Or 173, 586 P2d 765 (1978). In *La Grande*, Justice Linde rejected *Heinig's* balancing test and declared that, although Article XI, section 2 protects the "structure and procedures" of local government from state interference, the amendment does not shield local policy preferences from state preemption. Specifically, the *La Grande* court crafted a two-part test to determine where local authority ends and state authority begins:

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

Id. at 156 (footnote omitted).

La Grande draws a distinction between the structure and procedures of local government, on the one hand, and social, economic, and regulatory objectives (*i.e.*, policy preferences), on the other. The former is protected from most state interference, while the latter is subject to legislative preemption—*if* such is clearly intended. In the years since *La Grande*, home rule disputes have almost exclusively involved the question of whether a state law preempts local policy choice. Those local policies, in turn, take the form of local criminal laws or substantive civil laws. No case since *La Grande* has squarely confronted the question of what constitutes the "structure and procedures" of local government or determined when a state law impermissibly intrudes into that arena. As the following sections explain, the adoption of a home rule charter severs the legal tie between a city and the state, creating a structurally independent legal entity with its own executive, legislative, and judicial authority. The relationship between a city—as a home rule entity—and its legal counsel represents a distinct attorney-client relationship to which the state is not a party. Further, under *La Grande*, the relationship between a home rule city and its legal counsel is fundamental to the "structure and procedures" of that distinct legal entity and is thus shielded from state interference by Article XI, section 2.

2. Home Rule Cities Are Separate Political Entities From the State and the State May Not Waive Their Attorney-Client Privilege.

All of Oregon's incorporated cities operate under home rule charters. Although the precise language varies, those charters broadly confer on each city all powers permissible under state and federal law and vest all government powers not reserved to constituents in the city council and identified Council appointees. By adopting a home rule charter, a city becomes an independent government entity formed directly by its citizens, rather than a mere "convenient agenc[y]" of the state. *Hunter v. City of Pittsburgh*, 207 US 161, 178, 28 S Ct 40, 52 L Ed 151 (1907). A home rule charter does not give a city carte blanche lawmaking authority, but, rather, frees a city to make its own decisions about its structure and procedures of government and craft its own local policy preferences. The attorney-client privilege is a critical component of a home rule city's authority to make independent decisions about the form and structures of its own government.

Under Oregon Rule of Professional Conduct (RPC) 1.6(a) and ORS 40.225(2) (which codified existing common law), only a client may waive the attorney-client privilege. A local governmental entity is the client, not the state, and acts through its duly authorized officials. RPC 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); ORS 40.225(1)(a) (defining "client" to include public

corporations); ORS 40.225(1)(d)(A) (a representative of a client includes the officers of the client). Home rule cities vest government authority in their city councils. Thus, under Oregon's rules of evidence, only the city council, or a public official properly designated by the city council, can waive the attorney-client privilege held by a home rule city.

3. The Attorney-Client Privilege is Essential to the Structure and Procedures of Home Rule Cities.

Under *La Grande*, Article XI, section 2 of the Oregon Constitution shields the "structure and procedures" of home rule governments from legislative interference. *Amicus* disagrees with the Court of Appeals' analysis of the text in ORS 192.390. That Court "readily conclude[d] that ORS 192.390 is not directed at the structures and procedures of local government, but is a general law addressed primarily to social objectives." *City of Portland v. Bartlett*, 304 Or App 580, 595, ___ P.3d ___ (2020). Not only is there no support for that conclusion in the text of ORS 192.390, but only a city may waive its attorney-client privilege- the state may not do so. As detailed in the following sections, the ability of a home rule city to enjoy the protections of the attorney-client privilege codified in ORS 40.225 is critical to the structure and procedures of city government.

Privilege is essential to the attorney-client relationship. Indeed, the United States Supreme Court recognized the critical need for the privilege in *Upjohn Co. v. United States*:

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. * * * Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."
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> 449 US 383, 389, 101 S Ct 677, 66 L Ed 2d 584 (1981) (citation omitted).

The Oregon Supreme Court has made similar observations. *See State v. Jancsek*, 302 Or 270, 274, 730 P2d 14 (1986) (citing Laird C. Kirkpatrick, Oregon Evidence 146 (1982)).

In 1981, the Legislative Assembly enacted the Oregon Evidence Code (OEC).[1] Or Laws 1981, ch 892, § 32. The OEC formally codified the common law evidentiary rule protecting confidential communications between an attorney and a client. *See*, OEC 503. The Oregon Supreme Court recently noted that the 1981 codification of the privilege was intended to extend and clarify the scope of the privilege. *See Longo v. Premo*, 355 Or 525, 534, 326 P3d 1152 (2014) (observing that the OEC extended the privilege "to areas in which the law is silent

[1] The Oregon Legislature enacted ORS 192.390 in 1979, two years before the OEC. *See* Or Laws 1979, ch 301, § 2.

or unclear"). However, the common law privilege exists even without its codified form.

OEC 503 contains the exclusive list of exceptions to the privilege. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 501, 326 P3d 1181 (2014) (concluding that "OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege."). Notably, there is no temporal limitation on the privilege within the exemptions codified in ORS 40.255(3). The privilege even survives the death of the client. *See Swidler & Berlin v. United States*, 524 US 399, 404, 118 S. Ct. 2081, 2085 (1998).

Oregon courts have long confirmed that the privilege extends to confidential communications between a government entity—as the client—and its attorneys. *See State ex rel. OHSU v. Haas*, 325 Or 492, 500, 942 P2d 261 (1997) (public corporation); *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404, 243 P3d 102 (2010), *rev den*, 350 Or 230, 253 P3d 1079 (2011) (port district); *Klamath County School Dist. v. Teamey*, 207 Or App 250, 261-62, 140 P3d 1152, *rev den*, 342 Or 46, 148 P3d 915 (2006) (school district).[2]

[2] It does not appear that any previous Oregon appellate case has addressed the privilege in the context of a home rule city and its attorneys. Federal courts have recognized that cities and their attorneys enjoy the privilege under federal law, see *Mendoza v. Gates*, 19 F App'x 514, 519-20 (9th Cir 2001) (unpublished opinion) (Los Angeles police officer could assert the attorney-client privilege on behalf of city) and *Weaving v. City of Hillsboro*, 2011 WL 1938128, 2-3 (D Or 2011) (recognizing privilege between city and its attorneys), as have other states,

As the Second Circuit observed, the traditional rationale for recognizing the privilege applies with "special force in the government context." *In re Grand Jury Investigation*, 399 F3d 527, 534 (2d Cir 2005). Municipal corporations routinely perform functions that entail more legal risk than is typical in the private sector, and government employees are expected to understand, uphold, and execute the law in a variety of contexts. For example, municipal police departments investigate crime and enforce criminal laws, while city governments set policies on officer training and criminal investigation. *See Monell v. Dep't of Social Serv. of City of New York*, 436 US 658, 98 S Ct 2018, 56 L Ed 2d 611 (1978) (holding that municipalities are "persons" for purposes of 42 U.S.C. § 1983 and thus may be liable for compensatory damages under that law). Cities also make land use decisions that may result in regulatory takings under the Fifth Amendment or Article I, section 18, of the Oregon Constitution. *See Penn Cent. Transp. Co. v. City of New York*, 438 US 104, 98 S Ct 2646, 57 L Ed 2d 631 (1978) (setting out factors for determining when local regulations constitute takings under the Fifth Amendment); *Fifth Ave. Corp. v. Washington County*, 282 Or 591, 611-14, 581 P2d 50 (1978) (explaining regulatory takings test under Article I, section 18).

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applying state law. *See Paxton v. City of Dallas*, 509 SW3d 247 (Texas 2017); *State v. Today's Bookstore, Inc.*, 86 Ohio App 3d 810, 621 NE2d 1283 (1993). In any event, municipal corporations fall squarely within the meaning of "client" under OEC 503(1)(a), and further have constitutional home rule protection, which arguably support a greater right to the privilege.

Cities must provide due process protections when disciplining or terminating certain employees. *See Cleveland Bd. of Education v. Loudermill*, 470 US 532, 105 S Ct 1487, 84 L Ed 2d 494 (1985) (public employees with constitutionally-protected interest in employment must receive notice and the opportunity for a hearing before termination); *Tupper v. Fairview Hosp. & Training Center, Mental Health Div.*, 276 Or 657, 556 P2d 1340 (1976) (explaining procedural minimums to terminate public employee with constitutionally-significant property interest in employment). Finally, cities and other government entities regularly make decisions that potentially impact protected speech. *See Reed v. Town of Gilbert*, 576 US 155, 135 S Ct 2218, 192 L Ed 2d 236 (2015) (striking down local sign ordinance as an unconstitutional content-based restriction on protected speech); *Karuk Tribe of California v. TriMet*, 241 Or App 537, 251 P3d 773 (2011), *aff'd*, 355 Or 329, 323 P3d 947 (2014) (striking down transit district policy, under Article I, section 8, of the Oregon Constitution, that classified speech on the basis of content).

The cases above all demonstrate the importance of the attorney-client privilege to the structure and procedures of home rule cities. In addition to the cases above, a number of other practical considerations evidence that a 25-year limit on the attorney-client privilege intrudes into the structure and procedures of home rule cities. Twenty-five years is shorter than many political and legal

careers. As noted by Petitioner, that period is shorter than some ongoing litigation. (Petition for Review, at 9-10). In addition, 25 years is also far shorter than countless franchises, government contracts and leases. Waiver of the attorney-client privilege after 25 years would critically alter home rule cities' procedures and practices with regard to nearly every aspects of local governance, as listed above.

The upshot is that cities routinely perform actions that carry significant levels of legal risk—risk which can continue for multiples of 25 years. Acting through their representatives, cities must rely on the advice of legal counsel to ensure compliance with the law, minimize risk, and protect the rights and interests of citizens. The Oregon Supreme Court recently made a similar observation about the state and its employees:

> "The state acts through its employees, and many of the functions that the state undertakes on behalf of its citizens entail risks of liability that few private entities would choose to bear—guarding prisoners, policing the streets, and intervening in families to protect children from abuse, to name only a few."

Horton v. OHSU, 359 Or 168, 222, 376 P3d 998 (2016). To effectively and equitably carry out the public's business, cities must have unrestricted access to privileged communications with legal counsel. Limiting the privilege to 25 years would put public entities at an unfair disadvantage in both criminal prosecutions and civil litigation when asserting their rights, defending themselves, and avoiding

costly litigation. *MUELLER, CHRISTOPHER B. & LAIRD C KIRKPATRICK, EVIDENCE*, pp. 348-349 and 396-397 (2d ed. 1999). Without the privilege, governments could be deterred from seeking legal assistance or fully and candidly disclosing facts bearing upon the case. *Id.* at 348. Consequently, attorneys would be deprived of the factual information necessary to provide effective legal representation. *Id.* A 25-year limit on attorney-client privilege would significantly alter home rule cities' risk assessment and litigation procedures.

As the foregoing argument demonstrates, a home rule city must be able to utilize the privilege to candidly and honestly communicate with legal counsel on sensitive issues, without fear that those communications will lose their privileged status. Because that ability is of vital importance to the structure and procedures of government, *amicus* respectfully asks this Court to hold that Article XI, section 2, of the Oregon Constitution protects the privilege from state interference of the kind embodied by ORS 192.390.

B. The Legislature Did Not Intend to Waive the Attorney-Client Privilege for Home Rule Cities.

1. The Text of ORS 192.390 Does Not Evidence Intent to Waive the Attorney-Client Privilege of Home Rule Cities.

The attorney-client privilege is one of the most fundamental privileges in American law, yet the Court of Appeals held the legislature intended to waive that right for public bodies without any discussion of waiver in the legislative history.

The attorney-client privilege is certainly more than a "local policy" and therefore cannot be supplanted by the more generalized ORS 192.390.

Even if the Court agrees with the Court of Appeals' conclusion that ORS 192.390 addresses social objectives, not the structure and procedures of local government, a general law addressed primarily to substantive social objectives cannot prevail over contrary local policies without a clear intent to do so. *La Grande*, at 156. Such an intent is completely lacking here.

Determining the legislature's intent requires an analysis of the text of the statutes in context, informed by any legislative history this court deems appropriate. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (setting out methodology). *Amicus* agrees with Petitioner that the text and context of ORS 192.390 and ORS 192.502, as informed by the legislative histories of those statutes, demonstrate that the legislature did not intend to attempt to waive the attorney-client privilege held by home rule cities. So as not to be duplicative, *Amicus* does not reiterate the Petitioner's arguments on that point, other than to note the judicial preference for resolving subconstitutional issues before constitutional ones, *Crocker and Crocker*, 332 Or 42, 46, 22 P3d 759 (2001) (stating that the "court ordinarily will not decide constitutional questions when an adequate subconstitutional basis for decision exists"), and for interpreting statutes in a way that avoids constitutional problems, *Salem College & Academy, Inc. v.*

Employment Division, 298 Or 471, 481, 695 P2d 25 (1985) (describing the avoidance doctrine).

Further, *if* the legislature intended to narrow the scope of the attorney-client privilege as to governments, it knows how to do this. ORS 192.355(9)(b) specifically addresses the attorney-client privilege in the context of public records and clearly exempts confidential, as opposed to factual, information from disclosure. *See* ORS 192.355(9)(b)(A)-(E) (citing to the attorney-client privilege extended under ORS 40.225). In contrast, ORS 192.390 is far less explicit than ORS 192.355(9)(b) on its face and its legislative history lacks any mention of attempting to alter or waive the attorney-client privilege.

ORS chapter 40 provides further support for the argument that the legislature did not intend to waive the attorney-client privilege in the context of home rule cities. The legislature specifically states in ORS 40.295:

> "Unless expressly repealed by Section 98, Chapter 892, Or Laws 1981, all existing privileges either created under the constitution or statutes of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law."

This text shows that changes to or limitations on the attorney-client privilege must be far clearer than ORS 192.390 and its underlying legislative history. Therefore, even if ORS 192.390 addresses social objectives, the legislature did not

clearly intend to abrogate the attorney-client privilege with the adoption of ORS 192.390.

C. This Case Meets the Court's Criteria for Review.

Amicus agrees with Petitioner that this case meets many of the essential criteria for granting review. In summary, the case involves: a matter of first impression, ORAP 9.07(5); interpretation of the Oregon Constitution, ORAP 9.07(1)(a); an issue impacting many entities and the general public, ORAP 9.07(3); preserved legal issues that are well briefed, ORAP 9.07(7), ORAP 9.07(15); a published Court of Appeals opinion, ORAP 9.07(11); and a ruling that establishes a legal principle that cannot be corrected by other branches of government, ORAP 9.07(14). Failing to accept review would do a disservice to every city in Oregon and the people they serve.

VI. CONCLUSION

For the foregoing reasons, *Amicus Curiae* asks this Court to grant the Petition for Review and, on the merits respectfully asks this Court to hold that the

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Oregon legislature did not forcibly waive a city's attorney-client privilege through adoption of ORS 192.390, and further could not under the Oregon Constitution.

Respectfully submitted this 25th day of August, 2020.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05

I certify that this brief complies with the word count limitation in ORAP 9.05 and the word count of this brief is 4,037 words.

I certify that the size of type of this brief is not smaller than 14 point for both the text of the brief and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed **BRIEF OF AMICUS CURIAE LEAGUE OF OREGON CITIES IN SUPPORT OF PETITIONER ON REVIEW'S PETITION FOR REVIEW** with the Oregon State Court Administrator, Appellate Records Section, by using the appellate Electronic Filling System on August 25, 2020.

I further certify that I served a true copy upon all participants in the case as follows:

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