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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINCOLN

REX CAPRI, WAKEFIELD FARMS, LLC,)	Case No. 17CV23360
)	
Plaintiffs,)	INTERVENOR-DEFENDANT'S
)	CROSS-MOTION FOR
v.)	SUMMARY JUDGMENT
)	
DANA W. JENKINS, LINCOLN COUNTY,)	<i>Oral Argument Requested</i>
)	
Defendants,)	
)	
and)	
)	
LINCOLN COUNTY COMMUNITY RIGHTS,)	
)	
Intervenor-Defendant.)	

UTCR 5.050 INFORMATION

Pursuant to UTCR 5.050,

1. Oral argument is requested.
2. Time required for oral argument is 2 hours.
3. Telephonic communication is not requested.
4. Official court reporting services are requested for the hearing.

CROSS-MOTION

Pursuant to ORCP 47, Intervenor-Defendant Lincoln County Community Rights moves this court for an order granting summary judgment in favor of Intervenor-Defendant and against Plaintiffs in the above-entitled matter.

1 This motion is supported by the following points and authorities, and by other pleadings
2 filed herein.

3 **POINTS AND AUTHORITIES**

4 **I. Introduction**

5 The concept of popular sovereignty – the right of local community self-government –
6 was incontrovertible in the minds of early settlers and constitutional framers throughout the
7 burgeoning United States. Across the country, people’s social, political, and constitutional ideals,
8 and attendant local engagement, evidenced their consciousness of this natural right. Early
9 Oregonians, too, engaged in local lawmaking before and after the adoption of their state
10 constitution in 1857, and subsequent statehood in 1859. In 1902, the Oregon Legislature adopted
11 a constitutional amendment granting direct lawmaking authority – a foundational, if incomplete
12 power¹ – to the people through the initiative and referendum system. Subsequently, however, due
13 to decades of struggles among competing powers and interests across the country, and in Oregon
14 alike, the people’s lawmaking authority has been significantly reduced, but is no less inherent,
15 inalienable or fundamental.

16 Today, Oregonians again claim this natural right of local community self-government to
17 secure and protect the communities where they live. Accordingly, Oregon courts should affirm
18 the people’s inherent and inalienable lawmaking authority to enact rights-based protections for
19 the health, safety, and welfare of people, their communities, and nature that are greater than
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23 _____
24 ¹ The initiative and referendum powers – under Article IV, Section 1 of the Oregon Constitution – are
25 foundational because this popular authority scaffolds the procedural system through which voters in local
26 jurisdictions can write and pass their own laws that protect and secure their communities’ values. It is
incomplete because, under the current structure of law, the state government can override the people’s
self-governing authority to protect their rights, health, and safety through state preemption.

1 existing state and federal protections. By enacting the Freedom from Aerially Sprayed Pesticides
2 Ordinance, Lincoln County voters have exercised and codified their inherent and inalienable
3 right of local community self-government to protect their community from the aerial spraying of
4 pesticides. Under this lawful exercise of the people’s lawmaking power, this Ordinance is validly
5 adopted and legally enforceable under current law.
6

7 **II. Freedom from Aerially Sprayed Pesticides Ordinance of Lincoln County**

8 At the May 2017 election, Lincoln County voters lawfully enacted the Freedom from
9 Aerially Sprayed Pesticides Ordinance (hereafter, the “Ordinance”). *See* Exhibit 1. As stated in
10 the Purpose section, this Ordinance is authorized by Lincoln County residents’ right of local
11 community self-government rooted in the Declaration of Independence and the Oregon
12 Constitution. *See*, Ordinance, Section 1.
13

14 This Ordinance recognizes and secures the people’s and nature’s right to be free from
15 toxic trespass, and the people’s rights to clean air, water, and soil, and to rural preservation free
16 from aerially sprayed pesticides. *See Id.*, Sections 3(a), (b), and (c). Additionally, the Ordinance
17 recognizes and secures the people of Lincoln County’s right of local community self-
18 government, and their right to assert that self-governing right through their municipal
19 corporation for the purpose of securing Lincoln County to be free from aerially sprayed
20 pesticides. *See Id.*, Sections 3(e), (f), and (g). At the same time, the Ordinance bans corporations
21 from violating the secured rights or engaging in the aerial spraying of pesticides in Lincoln
22 County. *See Id.*, Sections 4(a) and (b).
23

24 Pursuant to the Ordinance, a resident of Lincoln County or the local government may
25 bring a legal action to enforce the rights and prohibitions of the Ordinance. *See Id.*, Section 5(b).
26 Likewise, ecosystems and natural communities may be named in legal actions brought by a

1 Lincoln County resident or local government to enforce or defend their rights. *See Id.*, Section
2 5(c). The Ordinance imposes criminal penalties against any corporation violating any provision
3 of the Ordinance (*see id.*, Section 5(a)), and provides for enforcement by direct action where the
4 county government fails to enforce or defend the law, or a court fails to uphold the law’s
5 limitations on corporate powers (*see id.*, Section 5(d)).
6

7 In actions against corporations that violate or seek to violate the Ordinance, those
8 corporations shall not be deemed to be “persons” or possess any other legal rights and privileges
9 that would interfere with the rights or prohibitions of the Ordinance. *See, Id.*, Section 6(a).
10 Additionally, corporations cannot recover “future lost profits,” which is not a property interest
11 under the Ordinance. *See, Id.*, Section 6(b).
12

13 **III. Procedural posture of case**

14 On May 16, 2017, the Lincoln County electorate voted to enact the Freedom from
15 Aerially Sprayed Pesticides Ordinance of Lincoln County. On June 5, 2017, Dana Jenkins,
16 Lincoln County Elections Officer, certified the election results and the enactment of the
17 Ordinance. On June 6, 2017, Plaintiff Rex Capri filed a complaint alleging that the Ordinance
18 was not validly adopted and is void in its entirety on statutory and constitutional grounds. On
19 June 14, 2017, Plaintiffs filed an amended complaint adding Wakefield Farms, LLC as a plaintiff
20 in the matter. On July 2, 2017, the court signed an order allowing Lincoln County Community
21 Rights to intervene as a defendant in the action.
22

23 This matter now comes to the court on the parties’ motions for summary judgment.
24 Resolution of this case by summary judgment is appropriate because there are no issues of fact in
25 dispute. The parties’ claims present pure questions of law. *See ORCP 47 A; 47 C; see also,*
26 *William C. Cornitius, Inc. v. Wheeler*, 276 Or. 747, 757, 556 P.2d 666 (1976).

1 Additionally, in the present case, this court may issue a declaratory judgment. An action
2 for declaratory relief may be heard by a court where (1) there is a justiciable controversy, and (2)
3 the court has subject-matter jurisdiction over the controversy. *See* ORS 28.010, *et. seq.*; *see also*,
4 *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982).

5 **IV. Summary of Arguments**

6 The inherent, inalienable and constitutional power of the people to self-govern in the
7 communities where they live is fundamental to the principles of free government this nation is
8 founded upon. This right of local community self-government is secured by the Declaration of
9 Independence, the United States Constitution, state constitutional bills of rights, the Oregon
10 Constitution, and now by this Ordinance too.

11 It is widely-recognized that, under the Ninth Amendment to the U.S. Constitution², states
12 have the authority to recognize and secure “unenumerated” rights, and thereby, codify greater
13 rights at the state level than the protections provided under federal law.³ Likewise, between state
14 and local levels of government, Article I, Section 33 of the Oregon Constitution⁴ – which closely
15 mirrors the Ninth Amendment – recognizes the same limitation on the state’s general powers to
16 infringe upon the “unenumerated” rights of the sovereign people. Within this body of
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22 ² Ninth Amendment of the Bill of Rights, U.S. Constitution reads: “The enumeration in the Constitution,
of certain rights, shall not be construed to deny or disparage others retained by the people.”

23 ³ *See* Schuman, David, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 279 (1992)
24 (“States remain free, in other words, to *add to* the national values given voice in the U.S. Constitution,
which constitutes a core, an irreducible minimum. An Oregonian shares fundamental constitutive values
with all Americans and also a larger set with all other Oregonians.”)

25 ⁴ Article I, Section 33 of the Oregon Constitution reads: “**Enumeration of rights not exclusive.** This
26 enumeration of rights, and privileges shall not be construed to impair or deny others retained by the
people.”

1 “unenumerated” rights, and together with Article I, Section 1 of the Oregon Constitution⁵, lies
2 the people’s natural, inherent and inalienable right of local community self-government. By
3 exercising this fundamental right, the people may recognize and secure expanded local rights and
4 prohibitions that surpass current state protections. By the same token, the State cannot pass
5 preemptive laws that encumber or prohibit the exercise of the people’s right of local community
6 self-government. Said another way, state preemptive laws – when applied to set a “ceiling,”
7 rather than a “floor,” for local rights-based lawmaking – violate a fundamental right in both the
8 U.S. and Oregon constitutions. As such, current state preemptive laws – such as those cited by
9 Plaintiffs – violate the right of local community self-government, and thus, cannot operate to
10 overturn the Ordinance at issue.
11

12 Similarly, the doctrine of corporate constitutional “rights” infringes unconstitutionally
13 upon the people’s right of local community self-government. As creatures of the State,
14 corporations are subject to the same constraints as the state legislature; *i.e.*, corporations lack the
15 authority to prevent the people from securing greater rights by exercising their right of local
16 community self-government. Therefore, Plaintiffs’ arguments asserting corporate constitutional
17 “rights” under the Oregon Constitution fail to nullify the Ordinance that was lawfully enacted
18 under the people’s self-governing power.
19

20 Additionally, Plaintiffs’ argument based on ORS 203.010 *et. seq.* fails because the scope
21 of the people’s lawmaking authority under the right of local community self-government is not
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23
24 ⁵ Article I, Section 1 of the Oregon Constitution reads: “**Natural rights inherent in people.** We
25 declare that all men, when they form a social compact are equal in right: that all power is
26 inherent in the people, and all free governments are founded on their authority, and instituted for
their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish
the government in such manner as they may think proper.”

1 derived from state statutory law, and thus, supersedes it. The Ordinance specifically provides that
2 the people’s right of local community self-government shall not be limited in any way by the
3 people’s use of their local government to exercise the right by enacting this Ordinance. *See*
4 Ordinance, Section 3(g). Therefore, the right of local community self-government provides an
5 independent and greater lawmaking authority than that extended to the County through Oregon
6 statutes.

7
8 In sum, the people of Lincoln County possess the inherent and inalienable right of local
9 community self-government which is reserved by the Ninth Amendment, secured under Article I,
10 Sections 1 and 33 of the Oregon Constitution, and codified locally by the Freedom from Aerially
11 Sprayed Pesticides Ordinance. This lawmaking right of the people of Lincoln County is infringed
12 by the legal doctrines asserted by Plaintiffs in this action, *i.e.*, the enforcement of state
13 preemptive laws, certain corporate constitutional “rights,” and state statutes granting limited
14 county authority.⁶ Because Plaintiffs seek to enforce these doctrines in violation of the
15 constitutional right of the people of Lincoln County to local community self-government, this
16 court should dismiss Plaintiffs’ amended complaint, and grant Intervenor-Defendant the
17 declaratory and other relief that it seeks.

18
19 **V. Standard of Review**

20 Intervenor-Defendant asserts that the people of Lincoln County (and all Oregonians)
21 possess the inherent, and inalienable right of local community self-government. Through Article
22

23
24 ⁶ Lincoln County is a general law county, not a “home rule” county. Therefore, the County derives its
25 authority from ORS 203.010 *et. seq.*; *i.e.*, the County has authority over “matters of county concern.” This
26 authority is separate and distinct from the people’s law-making authority under their right of local
community self-government. The plain text of Oregon Constitution Article I, Section 1, assures that the
people's political power is inherent and inalienable. So while the state legislature may divide its power
between different jurisdictions, the legislature cannot suppress the people's self-governing authority.

1 I, Sections 1 and 33 of the Oregon Constitution, the framers of the state constitution guaranteed
2 this natural right to the people of Oregon.

3 When looking to an Oregon constitutional amendment as the source of a right, Oregon
4 courts have used a three-prong test. *Priest v. Pearce*, 314 Or. 411, 416, 840 P.2d 65 (1992)
5 (“There are three levels on which that constitutional provision must be addressed: Its specific
6 wording, the case law surrounding it, and the historical circumstances that led to its creation.”);
7 *see also*, *State v. Norris*, 188 Or. App. 318, 72 P.3d 103, 110 (2002) (applying the *Priest* test
8 where “the disputed provision is part of the original 1859 constitution.”).

9
10 Notably, Oregon courts have suggested a similar test should apply when looking to
11 Article I, Section 33 as the source of an “unenumerated” right. *See State v. Williams*, 313 Or. 19,
12 48, 828 P.2d 1006 (1982) (Justice Unis, dissenting)⁷; *see also*, *State v. Burrow*, 293 Or. 691, 713,
13 653 P.2d 226 (1982) (Linde, J., dissenting)⁸ and *State v. Jalo*. 72 Or. App. 479, 483, 696 P.2d 14
14 (1985)⁹.

17 ⁷ In *State v. Williams*, Justice Unis, in his dissenting opinion, proposed the following test to find an
18 “unenumerated” right in Article I, Section 33: “First, the right must be one that no other Oregon
19 constitutional provision affirmatively addresses. Second, the right must be shown to have been recognized
20 at least in general terms to exist at the time Oregon became a state. Third, the right must be one that the
21 people of Oregon’s founding generation would have considered of constitutional magnitude between
22 government and people, “that is to say, rights specifically against government and ‘so rooted as to be
23 fundamental.’” 313 Or. 19, 48, 828 P.2d 1006 (1982).

24 ⁸ In *State v. Burrow*, Justice Linde, in his dissenting opinion, observed: “In any event, if a procedure is ‘so
25 rooted in the traditional conscience of our people as to be ranked as fundamental,’ the people of Oregon
26 do not need the fourteenth amendment to protect it. I take article I, section 33 of the Oregon Constitution
to preserve such ‘unenumerated’ rights as were of constitutional magnitude in 1859, that is to say, rights
specifically against government and ‘so rooted as to be fundamental.’” 293 Or. 691, 713, 653 P.2d 226
(1982).

⁹ In *State v. Jalo*, the Oregon Court of Appeals reviewed, but rejected as-applied a defendant’s claim that
“the requirement of a culpable mental state for conviction of a crime was a fundamental right guaranteed
by Article I, section 33” because he failed to demonstrate that that a culpable mental state was required at
the time the Oregon Constitution was adopted in 1859. 72 Or. App. 479, 483, 696 P.2d 14 (1985).

1 Consistent with the analysis below, under the tests of both *Priest* and *Williams*, the right
2 of local community self-government is a fundamental right guaranteed by Article I, both
3 Sections 1 and 33.

4 **VI. Taken together, Article I, Sections 1 and 33 guarantee Oregonians their inherent,
5 inalienable, and fundamental right of local community self-government.**

6 An analysis of the *Priest* test, and considerations of the *Williams* test, support this court
7 finding that Article I, Sections 1 and 33 guarantee the people of Oregon the right of local
8 community self-government.

9 **A. Taken together, the wording of Articles I, Sections 1 and 33 support the
10 conclusion that the framers of the Oregon Constitution understood the right of local
11 community self-government to be fundamental, inherent, and inalienable.**

12 The first prong of the *Priest* test requires a review of the wording of the constitutional
13 provision that supports the asserted right. In *Vannatta v. Keisling*, the Oregon Supreme Court
14 stated:

15 Our precedents make it clear that, when construing provisions of our constitution,
16 we attempt *to understand the wording in the light of the way that wording would
17 have been understood and used by those who created the provision.*

18 324 Or. 514, 530-1, 931 P.2d 770 (1997) (Emphasis added.).

19 Both Article I, Sections 1 and 33 are original to the Bill of Rights in the Oregon Constitution of
20 1857, which was adopted two years prior to Oregon statehood.

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1 **1. The Bill of Rights section of the Oregon Constitution is a “manual – a**
2 **sort of textbook – of weighty matters”¹⁰ that delineated the people’s rights**
3 **under the general powers of government.**

4 Leading up to the vote on the Bill of Rights in the last months of the summer of 1857, the
5 framers of the Oregon Constitution debated the options of putting the Bill of Rights at the front
6 of the constitution, or dispersing the provisions throughout by relevant topic. Delazon Smith,
7 whose proposal to put the Bill of Rights at the beginning of the constitution ultimately prevailed,
8 made this observation about the model Indiana Constitution:

9 [The Indiana Constitution’s Bill of Rights] nobly reasserts what our fathers said
10 about the natural rights of man to the pursuit of life, liberty and happiness, but she
11 proceeds to assert the civil rights of the citizens as ascertained in those 70 years of
12 progress. Believing, as I do, that these declarations, thus solemnly made by a
13 convention and ratified by the people, will always not only command universal
14 respect, but the attention of courts, I desire that such a bill may proceed or
15 become a part of our constitution. It is a sort of manual – a sort of text book - of
16 weighty matters, placed there *multum in parvo*, and the reference of the most
17 common mind to the constitution of Indiana reaches that mind its rights under our
18 government.

19 OREGON CONSTITUTION AND PROCEEDINGS, p. 102.

20 Another framer, George Henry Williams (who later was a state senator and Oregon Supreme
21 Court Justice) instead supported dispersing the provisions of the Bill of Rights throughout the
22 Constitution. While he did not object to the substance of the Bill of Rights,¹¹ he thought the
23 placement at the front of the constitution was unnecessary in light of what he believed was
24 incontrovertible; affirming these views, he said:

25 The people of this country are sovereigns; they make the government, and this bill
26 of rights is intended to contain restrictions upon that government. Now, these

27 ¹⁰ THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE
28 CONSTITUTIONAL CONVENTION OF 1857, [hereinafter OREGON CONSTITUTION AND
29 PROCEEDINGS] (Charles Henry Carey ed., 1926), p. 102.

30 ¹¹ “There is no natural difference of opinion between the gentleman from Linn (Mr. Smith) and myself, as
31 to the substance, but it seems to be a question of form rather than anything else.” *Id.*, p. 102.

1 restrictions must be either of the legislative, the executive, or the judicial
2 department of the government.

3 *Id.*, p. 103.

4 Thus, he advocated for placing the rights within each of those departments addressed separately
5 within the constitution itself.

6 After debating both views on where to place the Bill of Rights provisions in the
7 constitution, the framers agreed to form a committee on the Bill of Rights to draft the language
8 that would appear in its entirety at the beginning of the constitution.¹² Delazon Smith
9 characterized the Bill of Rights' significance in this way:
10

11 It is manifest from reading all the various bills of rights [from other states] that
12 they were designed to have, and do have, *all the force of any other portion of the*
constitution.

13 *Id.*, p. 101. (Emphasis added.)

14 **2. Article I, Section 1 affirms the ideals of the right of local community self-**
15 **government.**

16 When the state constitution was adopted in 1857, the constitutional framers demonstrated
17 their commitment to the people's sovereign power by adopting Article I, Section 1 of the Oregon
18 Constitution.

19 Article I, Section 1 of the Oregon Constitution,¹³ was taken from the Indiana Constitution
20 of 1851, and is "similar"¹⁴ to that constitution's Bill of Rights, Article I, Section 1.¹⁵ In fact, at
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22
23 ¹² *Id.*, p. 104.

24 ¹³ *See* FN4.

25 ¹⁴ According to W.C. Palmer, Article I, Section 1 of the Oregon Constitution is "similar" to the same
26 section of the Indiana Constitution where "[t]he word similar is used to denote either a partial
resemblance or sameness in all essential parts." Palmer, W.C., *The Source of the Oregon Constitution*, 5
Or. L. Rev. 200, 201 (1925-6).

1 the 1857 Constitutional Convention, the framers of the Oregon Constitution drew most heavily
2 from the Constitution of Indiana,¹⁶ where self-governing values were engrained at the local
3 levels of government. *See., Indiana ex rel. Holt v. Denny*, 118 Ind. 449, 457-75, 21 N.E. 274
4 (1889) (“the right of local self-government in towns and cities of this State is vested in the
5 people of the respective municipalities”).

6
7 In Oregon, this Section constitutionally anchors the people’s inherent and inalienable
8 right of local community self-government. From the beginning, the phrase – “We declare that all
9 men, *when they form a social compact* are equal in right”¹⁷ – distinctly recognizes a concept of
10 popular sovereignty.¹⁸ Likewise, the phrase – “all power is inherent in the people, and all free
11 governments are founded on their authority, and instituted for their peace, safety, and
12 happiness”¹⁹ – echoes the popular sovereignty concept of the Declaration of Independence, as
13 does the assertion that the people “have at all times a right to alter, reform, or abolish the
14

15 ¹⁵ *Constitution of the State of Indiana*, Bill of Rights, Article 1, Section 1: **Inherent rights.** WE
16 DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain
17 inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is
18 inherent in the People; and that all free governments are, and of right ought to be, founded on their
19 authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the
20 People have, at all times, an infeasible right to alter and reform their government.

21 ¹⁶ According to W. C. Palmer, “The Oregon Constitution of 1857 contains a deep strain of Indiana
22 influence. Of a total of 186 sections in the instrument, 103 may be traced directly to the Indiana
23 Constitution of 1851. The preamble and the articles on the Bill of Rights, suffrage and elections,
24 distribution of powers, executive department, administrative department, finance, miscellaneous,
25 boundaries and amendments are predominantly Hoosier.” As for the other sections, nine came from the
26 Michigan Constitution; seven from the Iowa Constitution, seven from the Wisconsin Constitution, four
from the Ohio Constitution, and two from the Illinois Constitution.” *See, supra*, Palmer, 5 Or. L. Rev. at
214-5.

27 ¹⁷ *See* FN4.

28 ¹⁸ Amar, Akhil Reed, *The Creation and Reconstruction of the Bill of Rights*, South Illinois University
29 Law Review, Vol. 16, p. 349 (“[T]hat phrase [retained by the people] could also be understood as a
30 popular sovereignty, social compact idea, not just a federalism idea.”

31 ¹⁹ *See* FN4.

1 government in such manner as they may think proper.”²⁰ In sum, the right of local community
2 self-government – rooted in the sovereignty of the people – was a well-settled and foundational
3 concept that not only existed, but was fully exercised before the time of statehood.²¹

4 Unfortunately, there was no recorded discussion or debate concerning the language of the
5 Article I, Section 1.²² Nevertheless, in light of its prominent placement, the expectation of its
6 legal force, and its apparent uncontentious adoption, Article I, Section 1 is a yet-to-be-
7 acknowledged, but foundational element of the Oregon Constitution.
8

9 Additionally, the first prong of the *Williams* test to find an “unenumerated” right under
10 Article I, Section 33, requires that the right of local community self-government is “one that no
11 other Oregon constitutional provision affirmatively addresses.” *See Williams, supra*, at 48. While
12 Article I, Section 1 embodies important historical concepts and popular values that support the
13 inherent right of local community self-government, as explained above, it does so without
14 expressly delineating the parameters of the people’s law-making authority.
15

16 Therefore, Intervenor-Defendant asserts that the recognition of the people’s fundamental
17 right of local community self-government under Article I, Sections 1 and 33 is foundational,
18 fundamental, and long overdue.

19 ///

20 ///

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22 ²⁰ *Id.*

23 ²¹ Oregon settlers created the Provisional Government through the adoption of the Organic Act of 1843,
24 the territory’s first “constitution,” subsequently, revised by the Organic Act of 1845. About the Provision
25 Government, Historian Charles H. Carey wrote: “Thus, there was created a government, republican in
substance, grounded upon the broadest principles of democracy.” *General History of Oregon: A*
Definitive Record of the Oregon Country Complete in One Volume, Binsford and Mort, p. 337.

26 ²² Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I*
(*Article I & II*), p. 489.

1 **B. Under the second prong of the *Priest* test, Oregon case law allows for an**
2 **interpretation that Article I, Sections 1 and 33 of the Oregon Constitution guarantee**
3 **Oregonians their inherent, inalienable and fundamental right of local community**
4 **self-government.**

5 Without citing to Article I, Section 1, early Oregon courts affirmed the historic and
6 political significance of the right of local community self-government. *See Schubel v. Olcott*, 60
7 Or. 503, 513 (1912) (“The principle of local self-government is regarded as fundamental in
8 American political institutions. It is not an American invention, but is traditional in England, and
9 is justly regarded as one of the most valuable safeguards against tyranny and oppression.”). In
10 *Schubel*, Judge Bean further asserts:

11 In construing a written constitution, the object is to give effect to the intent of the
12 people in adopting it. In the case of all written laws, it is the intent of the lawgiver
13 that is to be enforced. But this intent is to be found in the instrument itself. It is to
14 be presumed that language has been employed with sufficient precision to convey
15 it, and, unless examination demonstrates that the presumption does not prevail in
16 the particular case, nothing remains except to enforce it. The thing which we are
17 to seek is the thought which it expresses. To ascertain this, the first resort in all
18 cases is to the natural signification of the words employed, in the order of
19 grammatical arrangement in which the framers of the instrument have placed
20 them. If, thus regarded, the words embody a definite meaning, involving no
21 absurdity and no contradiction between different parts of the instrument, then that
22 meaning apparent on its face is the only one we are at liberty to say was intended
23 to be conveyed. In such case there is no room for construction. We have no right
24 to add to or take away from that meaning.

25 *Id.* at 511-12 (citing Endlich, Interpretation of
26 Statutes, §507 Cooley’s Constitutional Limitations
(7th Ed.) p. 89.

The *Schubel* decision validates the right of local self-government, and affirms the import of the words and intent of the constitution, and the accompanying expectation of their enforcement.

Cases citing Article I, Section 1 are few and far between. Generally, Oregon courts have not interpreted Article I, Section 1 itself to recognize any inherent rights. *Martinez v. Kulongoski*, 220 Or. App. 142, 159, 185 P.3d 498 (2008) (“Oregon case law supports the position that

1 [Article I, Section 1] does not create any individual fundamental or inalienable natural rights.”).
2 Importantly, this holding is consistent with Intervenor-Defendant’s assertion that no
3 constitutional provision “affirmatively addresses” the people’s right of local community self-
4 government, as required by the first prong of the *Williams* test for “unenumerated” rights under
5 Article I, Section 33.
6

7 However, Oregon courts have entertained the argument – while not relying on it – that
8 Article I, Section 1, together with Article I, Section 33, could guarantee a fundamental right. In
9 *Does 1,2,3,4,5,6,and 7 v. State*, the Oregon Court of Appeals considered the plaintiffs’ argument
10 that Article I, Sections 1 and 33, taken together, recognized “privacy and confidentiality rights”
11 of birth mothers. 164 Or. App. 543, 993 P.2d 822, 833 (1999), *rev. den.*, 330 Or. 138, 6 P.3d
12 1098 (2000). While the court denied that these constitutional provisions supported any general
13 right of privacy, the court did not assail the legal theory on the whole. *Id.* at 833-4.
14

15 Similarly, in *Libertarian Party of Oregon v. Roberts*, the Oregon Supreme Court
16 considered the Libertarian Party of Oregon’s argument that an Oregon law establishing minimum
17 requirements to qualify as a minor party excessively burdened their constitutional rights,
18 including among others, Article 1, Section 1. In this case, the court simply found that Article 1,
19 Section 1 did not establish a right to be listed on the ballot as a political party.
20

21 In sum, Oregon courts to date have not recognized an actionable right of local community
22 self-government, or any other right, in Article I, Section 1 standing alone. Importantly, however,
23 the question of whether Article I, Sections 1 and 33, taken together, guarantee this right is a
24 matter of first impression. Notably, an affirmative answer to that question is not inconsistent with
25 current Oregon jurisprudence.
26

1 **C. American and Oregon history clearly evidences the people’s inherent,**
2 **inalienable, and fundamental right of local community self-government.**

3 The third prong of the *Priest* test requires an examination of the historical context of the
4 constitutional provisions giving rise to a new right, as well as the history of the claimed right
5 guaranteed by those provisions. American and Oregon history alike – as detailed below – clearly
6 support the conclusion that the early settlers and constitutional framers across the nascent United
7 States of America understood and exercised their natural, inherent, and inalienable right of local
8 community self-government.

9
10 **1. Community self-government is the well-settled foundation of the**
American system of constitutional law.

11 The Supreme Court has declared that:

12 In determining which rights are fundamental, judges are not left at large to decide
13 cases in light of their personal and private notions. Rather, they must look to the
14 "traditions and [collective] conscience of our people" to determine whether a
15 principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is
16 whether a right involved "is of such a character that it cannot be denied without
violating those 'fundamental principles of liberty and justice which lie at the base
of all our civil and political institutions' . . .

17 *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (citations omitted).

18 The local right of community self-governance is deeply rooted in our nation’s history and
19 tradition. Communities within the early American colonies were founded on the people’s
20 authority to govern themselves. From the Mayflower Compact to the conflagration of the
21 American Revolutionary War and the ratification of the United States Constitution, no principle
22 has been more seminal than that of the people’s sovereignty, and no right more fundamental than
23 the right of local community self-government. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 721
24 (1997) (declaring that “[o]ur Nation’s history, legal traditions, and practices thus provide the
25
26

1 **2. Community self-government was the foundation of the early American**
2 **colonies.**

3 The concept of community self-government in America²³ dates back to the Mayflower
4 Compact, adopted in 1620, over a hundred and fifty years before Thomas Jefferson articulated
5 the principles of community self-government in the national Declaration of Independence. The
6 Mayflower Compact was the first constitution of its kind to be written by the American colonists,
7 and it set the stage for an understanding of government that represented a dramatic departure
8 from European rule. In one paragraph, the colonists dismantled the old system of government –
9 based on royal authority – and forged a new one based purely on the political sovereignty of the
10 people themselves. They declared:
11

12 We . . . covenant and combine ourselves together into a civil Body Politick, for
13 our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And
14 by Virtue hereof to enact, constitute, and frame, such just and equal Laws,
15 Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be
16 thought most meet and convenient for the general good of the Colony²⁴

17 Far from being unusual, such early American concepts of community self-government
18 were the norm: the people possessed the innate authority to create, control, and change their own
19 governing systems locally. COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A
20

21 _____
22 ²³ This motion traces the Anglo-American history (not the indigenous political history) of this deeply-
23 rooted right, as that is the political history of the American legal structure. The term, “the people,”
24 embodies the inclusive and broad ideal used today, not the narrower application from the past where “the
25 people” was effectively synonymous with the One Percent. *See, e.g.*, Terry Bouton, TAMING
26 DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE
AMERICAN REVOLUTION 4 (2007)
(citations omitted) (“To see the Revolution as a democratic victory for the people, one has to cut most of
the people out of the story.”).

²⁴ THE MAYFLOWER COMPACT, in Kermit L. Hall et al., AMERICAN LEGAL HISTORY: CASES
AND MATERIALS 14 (3rd ed. 2005).

1 DOCUMENTARY HISTORY 3 (Lutz ed., 1998). When the people of various towns and colonies
2 joined together in confederations, they retained “exclusive jurisdiction and government within
3 their limits,” thereby securing their authority to self-govern locally.²⁵

4 Judge Eugene McQuillin, author of the seminal treatise on the law of municipal
5 corporations, explained that those communities constituted “miniature commonwealths [with]
6 the solid foundation of that well-compacted structure of self-government.” McQuillin, A
7 TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS, Vol. 1, at 144 (1911). “In this
8 country from the beginning, political power has been exercised by citizens of the various local
9 communities as local communities, and this constitutes the most important feature in our system
10 of government.” *Id.* at 152. Thus, the early American colonies were replete with constitutions,
11 compacts, and agreements reflecting that emergent self-organizing American form of
12 government, one in which the people of those communities possessed the unabridged right to
13 create, control, and change their systems of governance. *Id.* at 384-85. (“[T]he people of the
14 various organized communities exercise their rights of local self-government under the
15 protection of these fundamental principles which were accepted, without doubt or question . . .”)

16
17
18 **3. Community self-government is the foundation of legitimate government**
19 **in American constitutional law.**

20 While Great Britain tolerated the colonists' self-rule in the interests of efficiency, it
21 believed that final authority over governing matters lay with the British king and parliament.
22 Clashes between these two theories of government – of the right of the American people to
23 create, manage, and alter their systems of government as they saw fit; and the “right” of the
24 British government to manage the colonies – were commonplace in the period leading up to the
25

26 ²⁵ See, e.g., THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW
ENGLAND (May 19, 1643), available at avalon.law.yale.edu/17th_century/art1613.asp.

1 American Revolution. Miller, ORIGINS OF THE AMERICAN REVOLUTION 38 (1962). Such
2 clashes led to the development of the doctrine of community self-government as constitutional
3 law, and, inevitably, to revolutionary conflict.

4 In 1760, colonial lawyer James Otis, Jr. first used the right of community self-
5 government as a constitutional doctrine when he represented colonial merchants in a direct
6 challenge to Great Britain’s authority to adopt “writs of assistance.” *Id.* at 46. The writs allowed
7 British authorities to enter any colonist’s residence without advance notice or probable cause.
8 Otis argued that the writs were invalid because they had been adopted only by the British
9 parliament, and not by the people of the colonies. Otis’ thesis – that the people themselves were
10 the only rightful lawmaking authority – was the first articulation of community self-government
11 as a legal and constitutional doctrine in the colonial context. Beach, SAMUEL ADAMS: THE
12 FATEFUL YEARS 1764-1776, at 55 (1965). The right of community self-government (including
13 the right to alter any system of governance that undermines that right) formed the heart of the
14 patriots’ struggle. *See* THE FOUNDERS’ CONSTITUTION, Vol. 1, Ch. 13, Doc. 4 (Kurland &
15 Lerner eds., 1987).

18 **4. Denial of the right of community self-government was the cause of the**
19 **American Revolution.**

20 The British Parliament’s denial of local community self-government was the cause of the
21 American Revolution. In Boston, which would become the epicenter of the American
22 Revolution, a concerted movement—to replace British rule with a system of governance
23 premised on community self-government—began in 1764. That year, the British parliament
24 passed the Currency Acts to remove colonial legislative control over issuing currency. In
25
26

1 response, the people of the Town of Boston, through their Town Meeting²⁶, voted to establish the
2 first, temporary Committee of Correspondence. The Committee was tasked with informing the
3 public about the Currency Acts, along with building public support for repeal. Maier, FROM
4 RESISTANCE TO REVOLUTION 216 (1972). Other towns formed similar committees. See Miller,
5 ORIGINS OF THE AMERICAN REVOLUTION 124-26 (1962).

6
7 “Stamp Act Riots” against British authority ensued. In 1765, the Stamp Act Congress
8 issued a “Declaration of Rights and Grievances,” which focused on the Currency and Stamp
9 Acts’ violation of the colonial right of local self-government. The Stamp Act Congress argued
10 that the Currency Act’s removal of monetary policy from the colonists, and the Stamp Act’s
11 removal of tax policy, violated the people’s right of local self-government. See JOURNAL OF THE
12 FIRST CONGRESS OF THE AMERICAN COLONIES 29-31 (1845).

13
14 The British Parliament retaliated by adopting the “American Colonies Act,” which
15 rejected the colonists’ authority to self-govern locally. It proclaimed that Parliament “had hath,
16 and of right ought to have, full power and authority to make laws and statutes of sufficient force
17 and validity to bind the colonies and people of America . . . in all cases whatsoever.” Maier,
18 FROM RESISTANCE TO REVOLUTION 145 (1972). In response, the colonists attacked the Act
19 as “inconsistent with the natural, constitutional and charter rights and privileges of the
20 inhabitants of this colony.” Marc Kruman, BETWEEN AUTHORITY AND LIBERTY: STATE
21 CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 12 (1997).

22
23
24
25 ²⁶ The Boston Town Meeting was a regular event to which all of the people of Boston were invited to
26 discuss, and vote upon, issues important to Bostonians. The Town Meeting form of government, unique
to New England, continues today. All New England Towns hold an annual Town Meeting (and special
Town Meetings in between) to vote on resolutions and laws proposed by residents.

1 Over the next decade, Parliament continued to assert taxation authority over the colonists,
2 and the American people continued to assert their right of community self-governance. People in
3 hundreds of towns and villages formed committees to coordinate responses to Parliamentary
4 actions. *Id.*

5 In May 1773, Parliament adopted the Tea Act, allowing the East India Company to sell,
6 for the first time, surplus tea directly to people in the colonies. Purchase of the English tea, and
7 the payment of parliamentary taxes along with it, was viewed as an effort to weaken colonial
8 opposition to parliamentary taxation, and thus to weaken colonial claims to the right of local self-
9 government. Maier, FROM RESISTANCE TO REVOLUTION 275-78 (1972). But the colonists
10 rebelled, resulting in the Boston Tea Party, as well as similar Tea Parties hosted by the people of
11 other towns and villages.
12

13 To punish the colonists for their opposition to the Tea Act, Parliament adopted a series of
14 laws known as the “Intolerable Acts” or “Coercive Acts.” These sought to nullify completely
15 certain types of colonial self-government.²⁷
16

17 In 1774, in response to growing unrest, Parliament enacted the Massachusetts
18 Government Act, designed to displace the various legislative mechanisms of local self-
19 government by expanding the royal governor's powers. British officials believed that their
20 inability to control the people of Massachusetts was directly attributable to the highly
21 independent nature of its local governments and the operation of the Town Meeting at the
22

23 ²⁷The Acts included the Quebec Act (stripping the people of Quebec of most governing authority, it was
24 seen as a parliamentary model for future treatment of the colonists); the Administration of Justice Act
25 (requiring trials of certain British officers to occur in British courts, removing the jurisdiction of colonial
26 courts over them); the Massachusetts Government Act (banning Town Meetings without the consent of
the royal Governor, and canceling part of the Colony’s original Charter by eliminating the authority of the
colonial assembly to elect the Executive Council); and the Quartering Act (requiring the colonies to
provide housing for British soldiers over the refusal of the assemblies of several states to do so).

1 community level. The Act required that each “agenda item at every town meeting in
2 Massachusetts . . . be submitted in writing to the governor and meet with his approval No
3 meeting could be called without the prior consent of the governor.” Ray Raphael, THE FIRST
4 AMERICAN REVOLUTION: BEFORE LEXINGTON AND CONCORD 50 (2002). As Lord North
5 explained to Parliament, the purpose of the Act was “to take the executive power from the hands
6 of the democratic part of government.” Christie & Labaree, EMPIRE OR INDEPENDENCE, 1760-
7 1776, at 188 (1976). The royal governor eventually used the Act to dissolve the Massachusetts
8 Assembly completely.
9

10 The people of Massachusetts rebelled against this threat to their right of local self-
11 government by closing down the British judicial system, so that it could not be used to enforce
12 the Act. People in the Towns of Worcester, Springfield, Southampton, Salem, Marblehead,
13 Taunton, and Stoughton not only forcibly closed the courts, but forced hundreds of British
14 officials to resign their positions. Without the courts, the people of those Towns drew up their
15 own plans for keeping order, while urging the people of their own Town Meetings to “pay no
16 regard to the late act of parliament, respecting the calling of town meetings, but, to proceed in
17 their usual manner.” Raphael, THE FIRST AMERICAN REVOLUTION BEFORE LEXINGTON AND
18 CONCORD 107 (2011).
19

20 **5. Community self-government is the foundation of the Declaration of** 21 **Independence.**

22 Beginning in 1773, in response to those royal assertions of power and nullification of
23 community self-governance, the people of ninety towns, villages, and counties across the thirteen
24 British colonies began to issue their own local declarations of independence. Declaring that only
25 their own homegrown, democratically-elected governments could “constitutionally make any
26

1 laws or regulations,” those communities proclaimed their own independence from British rule
2 years before Congress issued a national Declaration of Independence. Maier, AMERICAN
3 SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 48-49 (1997). The Charlotte
4 Town Resolves, for example, declared in May 1775, over a year before the national declaration,
5 that “all laws derived from the authority of the King or Parliament are annulled and vacated.”²⁸
6

7 It was amidst the issuance of these local declarations that the colonists formed the First
8 Continental Congress, which met in September of 1774, with representatives attending from
9 twelve of the thirteen colonies. During that Congress, the delegates declared: “[a]ssemblies have
10 been frequently dissolved, contrary to the rights of the people ... [and] that the inhabitants of the
11 English Colonies in North America, by the immutable laws of nature ... are entitled to life,
12 liberty, and property, and they have never ceded to any sovereign power whatever a right to
13 dispose of either without their consent.” This articulation of the right of community self-
14 government continued to lay the foundation for the final break between the American colonies
15 and Great Britain.
16

17 In May 1776 – before the issuance of the national Declaration of Independence - the
18 Second Continental Congress adopted a resolution that power be transferred from governments
19 resting on the Crown’s sovereignty to those based upon popular authority and self-government.
20 The preamble demanded “that the exercise of every kind of authority under the. . . Crown should
21 be totally suppressed.” JOURNALS OF THE CONTINENTAL CONGRESS, 4:342, 357-58. Several
22 months later, the people of Virginia adopted the first “Declaration of Rights,” which set forth the
23 constitutional doctrine of local self-government:
24

25
26 ²⁸ THE MECKLENBURGH RESOLUTIONS (May 20, 1775), *available at*
avalon.law.yale.edu/18th_century/nc06.asp.

1 Section 2. That all power is vested in, and consequently derived from, the people;
2 that magistrates are their trustees and servants and at all times amenable to them.

3 Section 3. That government is, or ought to be, instituted for the common benefit,
4 protection, and security of the people, nation, or *community*; of all the various
5 modes and forms of government, that is best which is capable of producing the
6 greatest degree of happiness and safety and is most effectually secured against the
7 danger of maladministration. And that, when any government shall be found
8 inadequate or contrary to these purposes, a majority of the *community* has an
9 indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in
10 such manner as shall be judged most conducive to the public weal.²⁹

11 This fundamental principle of local self-government was recognized and reasserted by
12 Congress in June 1776, when it issued the national Declaration of Independence. The
13 Declaration codified the principles of local self-government that had been forged by the
14 American colonists starting in the 1600s onward. Drawing on the declarations of towns, villages,
15 colonies, compacts, early constitutions, and the writings of James Otis and others, the
16 Declaration reaffirmed four major principles of law:

- 17 • First, certain rights – those of life, liberty, safety, and the pursuit of happiness – are
18 natural rights, held by virtue of being human³⁰;
- 19 • Second, the people create governments to secure those natural rights³¹;
- 20 • Third, each government owes its existence to, and derives its power exclusively from, the
21 community that creates it³²; and
- 22 • Fourth, when government becomes destructive of the people's natural rights, the people
23 have a right (and duty) to alter or abolish that government and establish new forms.³³

24 ²⁹ *Id.* at Virginia Declaration of Rights (http://avalon.law.yale.edu/18th_century/virginia.asp)
25 (accessed November 10, 2014) (emphasis added).

26 ³⁰ THE DECLARATION OF INDEPENDENCE ¶ 2 (“That all men [*sic*] . . . are endowed by their
27 Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”).

³¹ *Id.* (“that, to secure these rights, governments are instituted among men [*sic*]”).

³² *Id.* (“deriving their just powers from the consent of the governed”).

1 The Declaration of Independence has been congressionally recognized as an organic, enforceable
2 law of the United States, and is part of the United States Code. *See* 1 U.S.C. at i-iii. In the words
3 of historian Joshua Miller, the great principles “evoked in the Declaration are autonomy of
4 collectivities, natural rights, and the legitimacy of revolution.” *See* Miller, THE RISE AND FALL OF
5 DEMOCRACY IN EARLY AMERICA, 1630-1789 70 (1991).

6
7 **6. The U.S. Constitution guarantees the right of local community self-
government.**

8 The U.S. Constitution also secures the right of local community self-government in a
9 number of places. The Preamble says:

10
11 We the People of the United States, in Order to form a more perfect Union, establish
12 Justice, insure domestic Tranquility, provide for the common defence, promote the
13 general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do
ordain and establish this Constitution for the United States of America.

14 U.S. CONST. at Preamble.

15 Three of the four principles of self-government from the Declaration appear here, though
16 more loosely. The words “justice, tranquility, defence, welfare, and blessings of liberty” express
17 the Declaration’s principle that people have certain natural rights by virtue of being human. The
18 words “in Order to” and “do ordain and establish” express the Declaration’s principle that people
19 form governments to secure their civil and political rights. The words “We the People of the
20 United States” express the Declaration’s principle that governmental authority stems from the
21 people of the community exercising the powers of government, and is to be exercised for their
22

23
24
25 ³³ *Id.* (“whenever any form of government becomes destructive of these ends, it is the right of the people
26 to alter or to abolish it, and to institute new government, laying its foundation on such principles, and
organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness .
. . it is their right, it is their duty, to throw off such government”).

1 benefit only. Only the Declaration’s fourth fundamental principle, on the people’s authority to
2 alter or abolish governments, fails to find literal expression in the Preamble.³⁴

3 The framers debated whether more explicitly to insert all four principles of the
4 Declaration of Independence directly into the United States Constitution's preamble, or whether
5 the people's right of self-government was so fundamental that it need not be expressly stated in
6 the text of the Constitution itself. Advocating for express inclusion, James Madison argued: “[i]f
7 it be a truth, and so self-evident that it cannot be denied—if it be recognized, as is the fact in
8 many of the State Constitutions. . . this solemn truth should be inserted in the Constitution.”³⁵

10 The House rejected the addition, significantly because it deemed the language already
11 incorporated in the Constitution's preamble. Roger Sherman explained that since:

12 this right is indefeasible, and the people have recognized it in practice, the truth is
13 better asserted than it can be by any words whatever. The words “We the people,”
14 in the original Constitution, are as copious and expressive as possible; any
15 addition will only drag out the sentence without illuminating it. . .

17 ³⁴ As one writer said, “The people, who are sovereigns of the state, possess a power to alter when and in
18 what way they please. To say [otherwise] ... is to make the thing created, greater than the power that
19 created it.” Fed. Gazette, 18 Mar. 1789 (reprinted in Matthew J. Herrington, *Popular Sovereignty in
Pennsylvania 1776–1791*, 67 TEMP. L. REV. 575 (1994)).

20 ³⁵ Madison proposed amending the Constitution’s preamble to include the following language:

21 “That all power is originally vested in, and consequently derived from the people.

22 That government is instituted, and ought to be exercised for the benefit of the people,
23 which consists in the enjoyment of life and liberty, with the right of acquiring and using
property, and generally of pursuing and obtaining happiness and safety.

24 That the people have an indubitable, unalienable, and indefeasible right to reform or
25 change their government, whenever it be found adverse or inadequate to the purposes of
its institution.”

26 U.S. House of Representatives, June 8, 1789

(http://teachingamericanhistory.org/bor/madison_17890608/) (accessed November 8, 2014).

1 U.S. House of Representatives, August 14, 1789.³⁶

2 Fourteen years later, the U.S. Supreme Court, in *Marbury v. Madison*, 5 U.S. 137 (1803),
3 validated Sherman's reasoning. Interpreting the Constitution's preamble as recognizing the
4 people's inherent and fundamental right of self-government, the Court concluded:

5 [t]hat the people have an original right to establish, for their future government,
6 such principles as, in their own opinion, shall most conduce to their own
7 happiness, is the basis on which the whole American fabric has been erected.

8 *Marbury*, 5 U.S. (1 Cranch) at 176.³⁷

9 The right of local community self-government, as a fundamental right, is also protected by the
10 Ninth Amendment of the Bill of Rights. That Amendment says “the enumeration in the
11 Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by
12 the people.” As the concurrence in *Griswold* explained: “The language and history of the Ninth
13 Amendment reveal that the Framers of the Constitution believed that there are additional
14 fundamental rights, protected from governmental infringement, [in addition to] those
15 fundamental rights specifically mentioned in the first eight constitutional amendments.” 381 U.S.
16 at 488.

17
18 Historical evidence uncovered in the last twenty-five years reinforces that the public
19 intent of this amendment was to elevate the natural rights of people – rights that pre-existed the
20 Constitution – to the same status, whether or not the rights were explicitly enumerated in the
21

22 ³⁶ Available at www.teachingamericanhistory.org/bor/select-committee-report/ (accessed November 8,
23 2014).

24 ³⁷ Speaking at the Pennsylvania convention that ratified the federal Constitution, James Wilson said: “His
25 [Mr. Findley’s] position is, that the supreme power resides in the States, as governments; and mine is, that
26 it resides in the people, as the fountain of government; that the people have not—that the people mean
not—and that the people ought not, to part with it to any government whatsoever. They can delegate it in
such proportions, to such bodies, on such terms, and under such limitations, as they think proper.” James
Wilson, Pennsylvania Ratifying Convention, 4 Dec. 1787 (reprinted in Philip B. Kurland, THE
FOUNDERS’ CONSTITUTION VOLUME ONE at 62).

1 Bill of Rights. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L.
2 REV. 1, 28-29 (2006). These pre-existing natural rights include individual rights as well as
3 collective rights. *Id.* at 20-21, 46.

4 The right to local self-government is a right retained by all people and can be
5 exercised in whatever political direction the people please. What we have
6 forgotten, what we have lost, is that the right to local self-government is more
7 than an idea. It is a right enshrined in the Constitution itself.

8 Kurt Lash, *THE LOST HISTORY OF THE NINTH AMENDMENT* 360 (2009).

9 **7. Community self-government is the foundation for state constitutions.**

10 The Constitutions adopted by the people of the colonies – transforming the colonies from
11 chartered corporations into sovereign states – reaffirmed and codified the four principles of
12 community self-government in the Declaration as the basis for those state governments.³⁸ For
13 instance, in Pennsylvania’s Declaration of Rights, incorporated into the Pennsylvania
14 Constitution of 1776, the people declared:

15 That all men are born equally free, and independent; and have certain, natural,
16 inherent, and inalienable rights; amongst which are; the enjoying and defending of
17 life and liberty; acquiring, possessing, and protecting property; and pursuing and
18 obtaining happiness and safety.

19 That all power being originally inherent in, and consequently derived from, the
20 people; therefore all officers of government, whether legislative, or executive, are
21 their trustees, and servants, and at all times accountable to them.

21 ³⁸ The people of two states, New York and Connecticut, adopted the text of the Declaration directly into
22 their state constitutions; the people of eight states adopted a Declaration of Rights that restated the four
23 principles of the Declaration; and the people of four states, New Jersey, Georgia, South Carolina, and
24 New Hampshire, included the principles of the Declaration in the text of the preamble to their state
25 constitutions. *See* CONSTITUTION OF NEW YORK (April 20, 1777); CONSTITUTION OF NEW
26 JERSEY (July 2, 1776); CONSTITUTION OF GEORGIA (Feb. 5, 1777); CONSTITUTION OF SOUTH
CAROLINA (March 26, 1776); CONSTITUTION OF NEW HAMPSHIRE (Jan. 5, 1776);
CONSTITUTION OF DELAWARE (Sept. 21, 1776); CONSTITUTION OF MARYLAND (Nov. 11,
1776); CONSTITUTION OF NORTH CAROLINA (Dec. 18, 1776); CONSTITUTION OF
PENNSYLVANIA (Sept. 28, 1776); CONSTITUTION OF VIRGINIA (June 29, 1776);
CONSTITUTION OF VERMONT (July 8, 1777), *available at*
avalon.law.yale.edu/subject_menus/18th.asp.

1 That government is, or ought to be, instituted for the common benefit, protection
2 and security of the people, nation, or *community*; and not for the particular
3 emolument or advantage of any single man, family, or set of men, who are a part
4 only of that community; And that the *community* hath an indubitable, unalienable
and infeasible right to reform, alter, or abolish government in such manner as
shall be by that *community* judged most conducive to the public weal.³⁹

5 In addition to being expressly secured by state constitutions, the right of community self-
6 government was embodied in the process by which the people of each state drafted and adopted
7 their constitutions. All but one of the thirteen original colonies entrusted the responsibility of
8 drafting new constitutions to the people themselves through constitutional conventions, rather
9 than through permanent state legislatures. *See* Marc Kruman, BETWEEN AUTHORITY AND
10 LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 157-58 (1997).

11
12 In Oregon, the democratic spirit of self-determination also gripped Oregonians as it had
13 in the first colonies. Historian Charles H. Carey described the pre-government meetings in this
14 way:

15 It is peculiarly true of this first public assemblage of the Oregon colonies that the
16 citizens were strongly inclined to self assertion and to join freely in debate upon
17 every public issue. The spirit which led to the town meeting of New England, had
descended upon them.”

18 Carey, *General History of Oregon: A Definitive Record of the Oregon*
19 *Country Complete in One Volume* (Binsford and Mort, 1971), p. 335.

20 ///

21 ///

23 ³⁹ *See* The Avalon Project at Yale Law School, Constitution of Pennsylvania at ¶¶ 2-5
24 (September 28, 1776) (http://avalon.law.yale.edu/18th_century/pa08.asp) (accessed
25 November 9, 2014) (emphasis added); Gormley, THE PENNSYLVANIA CONSTITUTION at
26 43–44 (the Pennsylvania Constitution “explicitly incorporated the Declaration of Rights
into the Constitution with the mandate that it ‘ought never to be violated on any pretence
whatever.’”).

1 **8. The right of local community self-government is guaranteed by the**
2 **Oregon Constitution.**

3 From the early settlers to the framers of the Oregon Constitution and first Oregonians, the
4 people of Oregon exercised their inherent and inalienable right of local community self-
5 government.

6 The first settlers of the western territories were “chiefly former servants of the fur trading
7 companies,” who lived in the absence of any organized government.⁴⁰ However, with more
8 people migrating from the east, including New England religious leaders and missionaries, the
9 spirit of and a yearning for a civil society grew. As James Rood Robertson explained:

10
11 In any analysis of the influences affecting the course of civil government in
12 Oregon a prominent place should be given to that slow yet powerful westward
13 movement of population. It consisted of a people aggressive and assertive of their
14 own desires, patriotic, and upright in the main, with a consciousness of their own
15 wants and their ability to get them, and possessing but little knowledge of, or
16 reverence for, the intricacies of international usage, or the restrictions of a
17 conservative legislative body. *Being a part of the people, they were the sovereign
18 power, and if they determined upon having the west, it must finally be had.*

16 Robertson, James Rood, *The Genesis of Political Authority and of a*
17 *Commonwealth Government in Oregon*, The Quarterly of the Oregon
18 Historical Society, Vol. 1, No. 1 (Mar., 1900), p. 8. (Emphasis added.)

18 In this vein, the first formal meetings occurred in February and March of 1843 where participants
19 established the Provisional Government.⁴¹ In May, June and July of 1843, subsequent meetings
20 at Champog produced the Organic Law of 1843, the Oregon territory’s first “constitution.” On
21 July 26, 1845, the legislative committee met again to address new issues and to consider whether
22 to convene a constitutional convention. Following a vote of the people, the Organic Act of 1845
23

24
25 _____
26 ⁴⁰ *Id.*, p. 282.

⁴¹ Carey, Charles H., *General History of Oregon: A Definitive Record of the Oregon Country Complete in One Volume*, Binsford and Mort, p. 337.

1 was adopted while a proposed convention was rejected.⁴² Thereafter, it took more than a decade
2 for the people of the territory to agree to a constitutional convention. Having become accustomed
3 to managing their local affairs and fearful of control by governmental forces from afar, the
4 people resisted losing their local authority.⁴³ Only after three separate votes did the people agree
5 to a constitutional convention, which ultimately convened for four weeks in Salem in the
6 summer of 1857.⁴⁴ At the convention, the constitutional framers relied heavily on earlier state
7 constitutions thereby further embedding the established concepts of the popular sovereignty,
8 hallmarked by the adoption of the Bill of Rights as Article I (that included both Sections 1 and
9 33) of the new constitution.
10

11 Notably, the second prong of the *Williams* test requires that “the right must be shown to
12 have been recognized at least in general terms to exist at the time Oregon became a state.”
13 *Williams, supra.*, at 48. As explained above, early Oregonians were fully engaged with their right
14 of local community self-government and cognizant of the value of their popular sovereignty. In
15 sum, the right of local community self-government clearly fits the profile of a deeply-rooted and
16 fundamental right guaranteed by Article I, Section 33 of the Oregon Constitution.
17

18 Additionally, the third prong of the *Williams* test requires that “the right must be one that
19 the people of Oregon's founding generation would have considered of constitutional magnitude
20 between government and people,” and furthermore, a right “specifically against government and
21 so rooted as to be fundamental.” *Id.* at 48 (citing *State v. Burrow*, 293 Or. 691, 713, 653 P.2d
22 226 (1982)). As the history of Oregon (detailed in Section VI above) demonstrates, the right of
23

24
25 ⁴² *Id.*, p. 346.

26 ⁴³ Robertson, p. 53.

⁴⁴ *Id.*, p.55.

1 local community self-government is of the fundamental quality envisioned by the Oregon courts.
2 Further, this right is clearly one that empowers the people to stand “against government” for the
3 protection of their community values. *See, Williams* at 48. From the days of the Boston Tea
4 Party forward, history has borne this out. Still today, the persistent dismantling of the people’s
5 inherent self-governing authority by the legislature and the courts – through legal doctrines like
6 “ceiling” preemption and corporate constitutional “rights”⁴⁵ – best demonstrates how the right
7 of local community self-government stands in opposition to state power.⁴⁶

9 **D. As an “unenumerated” right under Article I, Section 33 of the Oregon**
10 **Constitution, the right of local community self-government authorizes the people to**
11 **exercise this right free from state interference.**

12 Similar to the Ninth Amendment’s function to reserve “unenumerated” right to the states
13 free from federal overreach, so, too, Article I, Section 33 – a so-called “Baby Ninth” – retains
14 unenumerated, individual rights to the people.⁴⁷ This conclusion is consistent with the available
15 transcripts and journals of state constitutional conventions.⁴⁸

17 ⁴⁵ As used herein, the phrase “corporate ‘rights’” includes both corporate “personhood” rights (those core
18 constitutional rights belonging to natural persons, which have been conferred on the corporate form), and
19 those conferred by the Commerce and Contracts Clauses of the United States Constitution on the
20 corporate form. The phrase “ceiling preemption” refers to the practice of state government and the federal
21 government of establishing a ceiling of regulations that prevent municipal communities from adopting
22 more protective standards.

23 ⁴⁶ Not coincidentally, these are the legal doctrines asserted by Plaintiffs in this case to insulate their
24 harmful corporate activities in Lincoln County from the local law passed by the people of the county to
25 protect their health, safety, and welfare under their right of local community self-government. To be true
26 to the fundamental and constitutional ideals of this state and country, these manufactured legal concepts
must yield to the people’s inherent and inalienable right of local community self-government. This
framework, while at times at odds with current case law that has assumed (without question) total state
preemption, is consistent with the limited Oregon jurisprudence concerning Article I, Sections 1 and 33.

⁴⁷ Sanders, Anthony B., *Baby Ninth Amendments and Unenumerated Individual Rights in State*
Constitutions Before the Civil War, Abstract, Institute of Justice, p. 8. (“I conclude that due to their
presence in state, as opposed to the United States, constitutions, what was said in state constitutional
conventions and in jurisprudence, and their close relationship with Baby Tenths, the only Ninth

1 **VII. Lincoln County voters possess the fundamental and constitutional right of local**
2 **community self-government, and the legal doctrines of state “ceiling” preemption and**
3 **corporate “rights” asserted by Plaintiffs in this action unconstitutionally violate that right.**

4 Under their fundamental and constitutional right of local community self-government
5 guaranteed by Article I, Sections 1 and 33 of the Oregon Constitution, Lincoln County voters
6 have enacted the Freedom from Aerially Sprayed Pesticides Ordinance. This Ordinance lawfully
7 recognizes the rights of people, their communities, and nature to be free from aerially sprayed
8 pesticides, and bans the corresponding corporate activity – the aerial spraying of pesticides – that
9 violates these expanded rights. *See* Ordinance, Sections 3 and 4. Oregon state statutes and non-
10 fundamental constitutional rights of corporate “persons” cannot operate to nullify the expanded
11 rights secured by the Ordinance’s Bill of Rights or the prohibitions enacted to protect those
12 rights.

13 Because the manufactured doctrines of “ceiling” preemption and corporate constitutional
14 “rights” violate the right of local community self-government, the Ordinance lawfully nullifies
15 their use to overturn this law.

16
17 **A. Under the right of local community self-government, Lincoln County voters**
18 **have the authority to enact and enforce the Ordinance at issue with immunity from**
19 **state preemptive statutes.**

20 In their amended complaint, Plaintiffs assert that the Freedom from Aerially Sprayed
21 Pesticides Ordinance of Lincoln County is preempted by an assortment of state statutes. *See*
22 *Amended Complaint*, ¶¶ 14(a – d). In making these claims, Plaintiffs rely on the legal doctrine of
23 preemption, which says that, as creatures of the state, local governments are prohibited from
24 enacting ordinances or regulations addressing specific issues deemed to be matters of statewide
25 concern. However, the doctrine of “ceiling” preemption – the practice of state governments
26 effectively establishing an upper limit on legal protections by preventing municipal communities

1 from adopting more protective local standards – violates the people of Lincoln County’s right of
2 local community self-government.

3 In Oregon, agribusiness corporations, timber corporations, development corporations, the
4 gun lobby, and other anti-labor interests have used the state legislature to preempt community
5 control over a variety of industry-related issues. All of these preemptive laws share one
6 commonality – they are advanced by large economic actors using state law to exempt themselves
7 from local, democratic control.⁵¹ However, even if corporate interests were not involved, the
8 doctrine of preemption wrongfully empowers state governments to set both “floor” and “ceiling”
9 limitations on the people’s authority to protect the health, safety, and welfare of people, their
10 community, and nature. Importantly, “ceiling” preemption is not the natural, unavoidable
11 consequence of the state’s creation of municipal corporations. Rather, it is a manufactured legal
12 doctrine – advanced by corporate interests – to override the will of the people, who may pass
13 local protective laws that are not favored by businesses.
14
15

16 Preemptive state and federal laws that establish a “floor,” or a minimum level, of
17 statutory protections for local jurisdictions do not violate the right of local community self-
18 government because those protections are enacted by the citizens of the state or nation as a whole
19 as minimum measures for that protection.⁵² While “floor” preemption enables communities to
20 legislate more protective standards at the local level, “ceiling” preemption divests people of the
21

22 ⁵¹ Currently, Oregon statutes preempt local jurisdictions from enacting laws to address issues concerning
23 GMO seeds and seed products, the minimum wage, sick leave, state building codes, tobacco control,
24 guns, and shooting ranges in addition to pesticides.

25 ⁵² That is, the right of local community self-government would allow municipal communities to exceed
26 minimum state and federal standards through local lawmaking, but would not allow municipal
communities to lower those minimum state standards. Analogous standards currently exist between the
state and federal government to determine the preemptive effect of federal law. *See, e.g., Florida Lime
and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (finding preemption only where
compliance with state agricultural regulations would preclude compliance with federal regulations).

1 authority to do so, thus depriving them of the authority to exercise their right of self-governance
2 to protect the community from harm.

3 Under their fundamental and constitutional right of local community self-government
4 guaranteed by Article I, Sections 1 and 33 of the Oregon Constitution, the people of Lincoln
5 County are authorized to expand local rights-based protections above those provided by state and
6 federal laws.⁵³ To secure these newly-codified rights, therefore, the Ordinance prohibits
7 corporations that violate or seek to violate the law from wielding state “ceiling” preemption laws
8 to overturn this more protective, rights-based law.⁵⁴ Thus, the Ordinance is immune from
9 “ceiling” preemption because this law is enacted under the people’s fundamental and
10 constitutional self-governing right that does not abide legislative overreach by the State.
11

12 Therefore, Plaintiffs’ claims that the Ordinance is unlawfully enacted under Oregon
13 preemption statutes violate the Lincoln County voters’ right of local community self-
14 government, and therefore, fail.
15

16 ///

17 ///

18 ///

19 _____
20 ⁵³ The people of Lincoln County seek to expand their civil, political, and environmental rights at the
21 municipal level in much the same way that States have expanded certain rights beyond those explicitly
22 guaranteed by the federal bill of rights. *See* William J. Brennan, Jr., *State Constitutions and the Protection*
23 *of Individual Rights*, 90 HARV. L.REV. 489 (1977).

24 ⁵⁴Notably, the Ordinance specifically establishes that “the people of Lincoln County possess the right to
25 use their local government to enact this Ordinance that secures Lincoln County to be free of aeri-ally
26 sprayed pesticides, and the making and enforcement of this Ordinance by the people through a municipal
corporation or any other institution shall not eliminate, limit, or reduce their sovereign right of local
community self-government as stated in subsection 3(f).” *See* Ordinance, Section 3(g). While that
provision carves out an exception to the application of preemption principles for this Ordinance, the
doctrine of “ceiling” preemption cannot, in the end, co-exist with the right of the people to local
community self-government when the relevant state law seeks to establish a ceiling, rather than a floor,
for local rights-based lawmaking.

1 **B. The enforcement of corporate constitutional “rights” infringe on the right of**
2 **local community self-government.**

3 Like “ceiling” preemption, the doctrine of corporate constitutional “rights” infringes
4 upon the right of local community self-government when that doctrine is applied to overturn a
5 local law enacted under the people’s inherent and inalienable self-governing authority.

6 American history – both before and after the American Revolutionary War – affirms that
7 colonists were intolerant of corporate power when used to subordinate the people.⁵⁵ While the
8 doctrine of corporate constitutional “rights” has subsequently developed to give the
9 constitutional rights of people to corporations, a species of property, it is nevertheless well-
10 settled law that corporations are creations of the state.^{56, 57} As such, corporations are chartered by
11

12
13 ⁵⁵ The cause of the American Revolutionary War was the systemic usurpation of the rights of colonists by
14 the British King and Parliament. *See, e.g.*, the American Declaration of Independence, ¶1 *et seq.* (U.S.
15 1776) (listing the grievances of the colonists). Often cited as the final spark of the War, the Boston Tea
16 Party resulted from the preferential governmental treatment of corporations over people enabling the East
17 India Company to monopolize the tea market in the colonies while actively violating the people’s right to
18 representation and local self-government. After the Revolution – and in recognition of their experiences
19 with those British corporations – the colonists placed corporations under strict control. Early legislatures
20 granted charters one at a time, for a limited number of years, held business owners liable for harms and
21 injuries, revoked corporate charters when necessary, forbade banking corporations from engaging in
22 trade, prohibited corporations from owning each other, and established that corporations could only be
23 chartered for “public purposes.”

24 ⁵⁶ *See St. Louis, I.M. & S Ry. Co. v. Paul*, 173 U.S. 404 (1899) (declaring that corporations are “creations
25 of state”); *Bank of Augusta v. Earle*, 38 U.S. 519, 520 (1839) (stating that “corporations are municipal
26 creations of states”); *United States v. Morton Salt Co.*, 338 U.S. 632, 650 (1950) (explaining that
27 corporations “are endowed with public attributes. They have a collective impact upon society, from which
28 they derive the privilege as artificial entities”); *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (declaring that “the
29 corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. . . . Its
30 rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation”);
31 *Chincleclamouche Lumber & Broom Co. v. Commonwealth*, 100 Pa. 438, 444 (Pa. 1881) (stating that “the
32 objects for which a corporation is created are universally such as the government wishes to promote. They
33 are deemed beneficial to the country”); *See also, People v. North River Sugar Refining Company*, 24 N.E.
34 834, 835 (NY 1890) (declaring that “[t]he life of a corporation is, indeed, less than that of the humblest
35 citizen.”); *F.E. Nugent Funeral Home v. Beamish*, 173 A. 177, 179 (Pa. 1934) (declaring that
36 “[c]orporations organized under a state’s laws. . . depend on it alone for power and authority”); *People v.*
37 *Curtice*, 117 P. 357, 360 (Colo. 1911) (declaring that “[i]t is in no sense a sovereign corporation, because
38 it rests on the will of the people of the entire state and continues only so long as the people of the entire
39 state desire it to continue”).

1 the state in the name of the people. It also is well-settled law that the Constitution not only
2 protects people against the “State itself,” but also against “all of its creatures.” *See West Virginia*
3 *State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). Therefore, as with the State,
4 state-chartered corporations lack the legal authority to elevate their rights above the people’s
5 legislative powers to recognize expanded local rights for the protection of the health, safety, and
6 welfare of themselves, their community, or nature.

8 Consistent with Article I, Sections 1 and 33’s affirmation of the people’s inherent and
9 inalienable right of local community self-government, a corporation’s “rights” as a creature of
10 the state must yield to the people’s constitutional lawmaking authority.⁵⁸ Therefore, when a local
11 government enacts a law that a corporation dislikes, corporations commonly assert its
12 constitutionally-derived “rights” to challenge and defeat the law. Used in this manner to defeat a
13 local rights-based laws enacted under the right of local community self-government, legal claims
14

15 ⁵⁷ The United States Supreme Court has repeatedly reaffirmed that business corporations are “creatures”
16 of the state *See, e.g., Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1093 (1991); *Kamen v. Kember*
17 *Fin. Servs.*, 500 U.S. 90, 99 (1991); *Braswell v. United States*, 487 U.S. 99, 105 (1988); *Burks v. Lasker*,
18 441 U.S. 471, 478 (1979) (declaring that “corporations are creatures of state law [] and it is state law
19 which is the font of corporate directors’ powers”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765
20 (1978); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975);
21 *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147 (1965); *Shapiro v. United*
22 *States*, 335 U.S. 1, 66 (1948); *Ferry v. Ramsey*, 277 U.S. 88, 96-97 (1928); *Essgee Co. of China v. United*
23 *States*, 262 U.S. 151, 155 (1923); *Yazoo & M.V.R.Co. v. Clarksdale*, 257 U.S. 10, 26 (1921); *United*
24 *States v. American Tobacco Co.*, 221 U.S. 106, 142-143 (1911); *Wilson v. United States*, 221 U.S. 361,
383 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906); *Terre Haute & I.R.Co. v. Indiana*, 194 U.S. 579, 584
(1904); *Fidelity Mut. Life Asso. v. Mettler*, 185 U.S. 308 327 (1902); *Hancock Mut. Life Ins. Co. v.*
Warren, 181 U.S. 73, 76 (1901); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 11-13 (1900);
Woodruff v. Mississippi, 162 U.S. 291, 299, 309 (1896); *Philadelphia & Southern Mail S.S. Co. v.*
Pennsylvania, 122 U.S. 326 (1887); *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878); *Railroad Co. v.*
Maryland, 88 U.S. 456, 469, 471 (1874); *Dodge v. Woolsey*, 59 U.S. 331 (1855); *Bank of Augusta v.*
Earle, 38 U.S. 519, 520 (1839); *Briscoe v. President & Directors of Bank of Kentucky*, 36 U.S. 257, 328
(1837).

25 ⁵⁸ Importantly, the right of local community self-government does not authorize lawmaking that would
26 restrict fundamental rights or weaken existing protections for natural persons, their communities, or
nature. This flows logically from the principle that floor preemption does not violate the right of local
self-government. Only “ceiling” preemption does.

1 to enforce of corporate “rights” violate the people’s constitutionally-derived lawmaking
2 authority, and must therefore fail.

3 Likewise, in the present case, Plaintiffs’ claims under Article I, Sections 10⁵⁹, 18⁶⁰, and
4 20⁶¹ of the Oregon Constitution violate the right of local community self-government. Therefore,
5 Plaintiffs’ claims – asserted to elevate corporate “rights” above those exercised and secured by
6 the people of Lincoln County under their constitutional authority of the right of local community
7 self-government – must be dismissed.
8

9 Importantly, under Section 6, the Ordinance only curtails corporate “rights” and
10 *privileges for the purpose of this Ordinance’s enforcement* where a corporation seeks to assert
11 their “rights” and privileges to overturn the new law. This provision only affects corporations
12 that violate or seek to violate the Ordinance, and only to the extent necessary to enable
13 enforcement of the underlying rights. The provision does not broadly redefine the nature of
14 corporations as “persons” within the Lincoln County.⁶² Instead, the Ordinance establishes that
15
16

17 ⁵⁹ Article I, Section 10 of the Oregon Constitution reads: “**Administration of justice.** No court shall be
18 secret, but justice shall be administered, openly and without purchase, completely and without delay, and
19 every man shall have remedy by due course of law for injury done him in his person, property, or
20 reputation.”

21 ⁶⁰ Article I, Section 18 reads: “**Private property or services taken for public use.** Private property shall
22 not be taken for public use, nor the particular services of any man be demanded, without just
23 compensation; nor except in the case of the state, without such compensation first assessed and tendered;
24 provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw
25 products of mine or farm or forest or water for beneficial use or drainage is necessary to the development
26 and welfare of the state and is declared a public use.”

27 ⁶¹ Article I, Section 20 reads: “**Equality of privileges and immunities of citizens.** No law shall be passed
28 granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not
29 equally belong to all citizens.”

30 ⁶² A finding that the right of local community self-government must be elevated above the constitutional
31 “rights” of corporations does not require a repudiation of the United States Supreme Court’s recognition
32 of corporate “personhood.” It merely requires a finding that there are instances – such as in this case –
33 where corporate “rights” may conflict with exercise and enforcement of the right of local community self-

1 corporate “persons” violating, or seeking to violate, the Ordinance’s stated rights and attendant
2 prohibitions shall not have the authority to evade enforcement by asserting competing corporate
3 “rights” and privileges.

4 Furthermore, since the Ordinance is not subject to statutory preemption, as argued above,
5 the Ordinance is lawfully enacted and enforceable in its entirety. As such, the enforcement
6 provisions of the Ordinance, specifically Section 6(a)⁶³ and 6(b),⁶⁴ immunize the Ordinance
7 itself from the legal doctrines of corporate “rights” and privileges when a corporation – that
8 violates or seeks to violate the Ordinance – attempts to use those doctrines to overturn the
9 Ordinance, as Plaintiffs do here.

10
11 Therefore, for the reasons stated above, Plaintiffs’ constitutional claims must fail.

12 **VIII. Conclusion**

13 Article I, Sections 1 and 33 of the Oregon Constitution guarantee to the people of Oregon
14 the natural, inherent, and inalienable right of local community self-government. Consistent with
15 the standards of constitutional interpretation, articulated by the *Priest* and *Williams* decisions, the
16 existence of this fundamental right is evidenced by the wording of these constitutional sections,
17 applicable case law, and pertinent history.

18
19
20 government. And further that, when that conflict occurs, the people’s right of local community self-
government must prevail.

21 ⁶³ Section 6(a) of the Ordinance reads: “Corporations that violate this Ordinance, or seek to violate this
22 Ordinance, shall not be deemed to be “persons” to the extent that such treatment would interfere with the
23 rights or prohibitions enumerated by this Ordinance, nor shall corporations possess any other legal rights,
privileges, powers, or protections that would interfere with the rights or prohibitions enumerated by this
24 Ordinance. ‘Rights, privileges, powers, or protections’ shall include the power to assert state or federal
preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this
municipality lack the authority to adopt this Ordinance.”

25 ⁶⁴ Section 6(b) of the Ordinance reads: “Corporate claims to “future lost profits” shall not be considered
26 property interests under this Ordinance, and thus, shall not be recoverable by corporations seeking those
damages.”

1 The people of Lincoln County’s constitutional right of local community self-government
2 guarantees to them the authority to:

- 3 • enact expanded local protections above those secured at the state and federal
4 levels;
- 5 • prohibit corporate activities that would violate the Ordinance’s bill of rights;
- 6 • secure the Ordinance from competing legal doctrines that would otherwise allow
7 both private corporations and the state government to nullify the Ordinance’s
8 lawfully-enacted rights and prohibitions; and
- 9 • adopt the Freedom from Aerially Sprayed Pesticides Ordinance in its entirety.
10

11 Plaintiffs claim that the Ordinance is invalid and unenforceable under state preemptive
12 statutes that prevent the people from passing local laws addressing pesticides, that the Ordinance
13 violates certain constitutional provisions under the Oregon Constitution, and that the Ordinance
14 exceeds County legislative authority. As explained above, however, the constitutional right of
15 the people of Lincoln County to govern themselves – which operates independently from the
16 County’s statutory authority, and not under it – is infringed by the legal doctrines asserted by
17 Plaintiffs in this action. As enacted under the people’s right of local community self-government,
18 the Ordinance is specifically immunized from the doctrine of state “ceiling” preemption and the
19 enforcement of corporate constitutional “rights.”
20

21
22 Because Plaintiffs seek to enforce these doctrines in violation of the constitutional right
23 of the people of Lincoln County to local community self-government, this court should:

- 24 • declare that the right of local community self-government is fundamental,
25 inherent, inalienable, and constitutional;
26

- 1 • declare that the right of local community self-government lawfully authorizes the
2 voters of Lincoln County to enact and enforce the Freedom from Aerially Sprayed
3 Pesticides Ordinance;
- 4 • declare that Plaintiffs’ assertions of preemptive Oregon laws, and other state
5 statutes and constitutional provisions – to support claims that the Ordinance is
6 unlawfully-enacted and void – violate the Lincoln County voters’ right of local
7 community self-government, and;
- 8 • dismiss Plaintiffs’ claims with prejudice.

9
10 DATED this 11th day of August, 2017.

11
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1 **CERTIFICATE OF SERVICE**

2 I certify that on August 11, 2017, I served the foregoing INTERVENOR-
3 DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT upon:

4 Gregory A. Chaimov
5 Davis Wright Tremaine LLP
6 1300 S. W. Fifth Avenue, Suite 2400
7 Portland, Oregon 97201-5610,

8 and

9 Wayne Belmont
10 Lincoln County Counsel
11 110 Lincoln County Courthouse
12 225 W Olive St
13 Newport, OR 97365

14 by E-serve.

15 DATED this 11th day of August, 2017.

16 s/ Ann B. Kneeland
17 Ann B. Kneeland, OSB #992977
18 Community Environmental Legal Defense Fund
19 P.O. Box 10294
20 Eugene, OR 97440
21 Tel: (541) 514-9720
22 Email: ann@kneelandlaw.net

23 Attorney for Intervenor-Defendants
24 Lincoln County Community Rights
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