Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 23, 2021

Representative Cedric Hayden
900 Court Street NE H383
Salem OR 97301

Re: Senate Joint Resolution 12

Dear Representative Hayden:

You asked the following questions regarding the implications of voter approval of Senate Joint Resolution 12:

1. What legal responsibility would the Legislative Assembly have to implement further health care policy?

2. Would the state be subject to a private cause of action if it fails to satisfactorily implement the fundamental right to access health care?

3. What is the maximum potential liability the state could face if it fails to satisfactorily implement the fundamental right to access health care?

4. If the state is successfully sued for failing to meet its "obligation" under this measure, can the state, through statutory changes, meet its obligation by assigning responsibilities of its duty or the budgetary cost of the duty in the following manner:

    a. Require county governments to establish and maintain healthcare delivery systems so that county residents can have access to cost-effective, clinically appropriate and affordable health care? This could include things like establishing free clinics, providing home-based care to residents, and distributing routine drugs like insulin or vaccines at no cost to the patient/county resident.

    b. Require county governments to establish and maintain healthcare delivery systems (like aforementioned examples) without any new state funding for counties to deliver those services? The county could be determined to have to provide those new services to effect access to cost-effective, clinically appropriate and affordable healthcare via passage of new state statute but with no new funding provided by the state (unfunded mandate).

    c. Require the same provisions of (a) and (b) at the city level?

    d. In order to ensure access to cost-effective, clinically appropriate and affordable healthcare, direct (as an example) school and education services districts to implement lower student to nurse staffing ratios, build out new school-based health facilities, or

require districts to allow non-school medical personal access to district buildings to deliver healthcare services to students and staff?

e. Direct schools and education service districts to do the examples aforementioned, with no new funding provided by the state (unfunded mandate)?

f. Require private employers to buy and maintain health insurance for every employee, regardless of the level of employment/number of hours that employee has through that employer?

(i) Could they be required to buy coverage through private insurance?

(ii) Could they be required to buy coverage through a state-sponsored plan (similar to the state-sponsored retirement plans passed a few years back that are managed for employers with no retirement programs)?

(iii) Could they be fined by the state for failure to provide such coverage?

(iv) Could they be required to cover in part or all the cost of insurance for independent contractors?

g. Require, for the consideration of being eligible for licensure in Oregon, that a medical professional who seeks licensure must be required as part of that license, to do some number of hours of charity/free care, without compensation, in order to maintain that license (which also addresses the state's obligation to ensure "access"?

h. Require, as part of any kind of determination of certificate of need for equipment or facilities by the Oregon Health Authority, that the facility or equipment have some percentage of use to be given at a reduced or free rate as part of the determination of the need in the community in which the facility or equipment is to be housed/used? (NOTE: There is some legislative corollary here in what this body has done with Inclusionary Zoning—whereby, to be eligible to build new housing, a percentage of that has to be set aside for affordable housing at a cost to the builder with no government funds to cover any losses that the builder incurred by not being able to sell property at a higher, market-rate price point).

i. Create a penalty on taxpayers (similar to the ACA penalty) for failure to have insurance coverage, if the purpose of that fine was to cover things like Medicaid and free clinics?

j. Determine drug/pharmaceutical pricing at the state level? Are there any interstate commerce clause issues here in setting drug pricing levels?

5. Currently, there is no constitutionally specific directive to "fund" public schools, or other essential services, that are not constitutionally designated like (for example) Lottery obligations or Highway Trust obligations. Could this newly included, and somewhat vague language trigger unforeseen consequences like:

a. A situation where healthcare funding as an "obligation of the state described in subsection (1)" is now the measuring stick for all other General Fund spending?

b. A situation where if we spend more on healthcare that we do public schools, and a perceived lack of "balance" in funding between healthcare and public schools opens the state for new litigation (currently, the healthcare spending in Oregon is significantly higher than education or any other funding line item, so it could be argued that we'd be immediately out of balance once this passes)?

c. A situation where "other essential public services" being undefined in this proposed constitutional amendment, triggers litigation to have current or future uses of legislative funds be defined as "essential" so that they may be considered in balance testing for future public funding?

6. Is there any case law in Oregon that would define or shape how funding between a constitutional "obligation" like healthcare would be balanced against non-constitutionally mandated budgetary needs of public education and other current/future General Fund spending for undefined "essential" public services?

7. Would a court test for balance be measured in dollars, lives served (i.e., number of students, number of insured, number of veterans, number of prisoners, or any other constituency group seeking funds, measured by number of lives in that constituency grouping), geographic need, other metrics? Any court holding on balance testing for public funding expenditures would be helpful to understand.

8. By inserting language that the state's obligation to serve its people with health care must be balanced against public school funding, does this inadvertently create a constitutional right of funding for public education? Similarly, if it does, would it create a constitutional right of funding for "essential public services" if a court or statute determines that a general fund or other funded agency, budget, or service is "essential"?

We will address each question in turn below.

Senate Joint Resolution 12 provides:

> PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section 47 to be added to and made a part of Article I, such section to read:
>
> SECTION 47. (1) It is the obligation of the state to ensure that every resident of Oregon has access to cost-effective, clinically appropriate and affordable health care as a fundamental right.
>
> (2) The obligation of the state described in subsection (1) of this section must be balanced against the public interest in funding public schools and other essential public services, and any remedy arising from an action brought against the state to enforce the provisions of this section may not interfere with the balance described in this subsection.
>
> PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout this state.

Interpreting a constitutional provision adopted by the people after referral by the Legislative Assembly requires using the method laid out by the Oregon Supreme Court:

> We focus first on the text and context of a constitutional amendment for an obvious reason: "The best evidence of the voters' intent is the text and context of the provision itself[.]" . . . Context for a referred constitutional amendment includes the historical context against which the text was enacted—including preexisting constitutional provisions, case law, and statutory framework . . . . However, "caution must be used before ending the analysis at the first level, *viz.*, without considering the history of the constitutional provision at issue."[1] The history of a referred constitutional provision includes "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure," such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials . . . . Although legislative history can be helpful, we are cautious in relying on statements of advocates, such as those found in the voters' pamphlet, because of the partisan character of such material.[2]

In its 2001 decision in *Shilo Inn Portland/205 v. Multnomah County*, the Oregon Supreme Court held that the legislative history of a joint resolution is not relevant to an interpretation of the constitutional amendment that was referred to the people by the resolution.[3] In 2015, in *State v. Lane*,[4] the court backed away from its *Shilo Inn* rule:

> *Shilo Inn* adopted an artificially blinkered view of the process by which measures are adopted. Voters do not approve a referred measure in a vacuum. As required by Article XVII of the state constitution, amendments such as Article I, section 44(1)(b), are drafted by the legislature, acting in its capacity as the collective representative of the people. Those proposed amendments are then subject to the hearings and deliberations that are part of that process and, if approved by the legislature, referred by the Secretary of State to the voters. That legislative deliberation is a part of the constitutionally mandated adoption process. It is conducted in public, and its records are available to the public. Although the measure that the legislature refers becomes effective only if ultimately approved by the voters, the voters have the opportunity to give their approval only after the legislature drafts a measure and, after deliberation, deems it worthy of submission to them. Under the circumstances, the legislature's deliberations seem no less worthy of consideration than the deliberations of a

[1] *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 57, 11 P.3d 228 (2000); *see State v. Algeo*, 354 Or. 236, 246, 311 P.3d 865 (2013) ("We focus first on the text and context . . . but also may consider the measure's history, should it appear useful to our analysis.").
[2] *State v. Sagdal*, 356 Or. 639, 642-643 (2015) (citations omitted).
[3] *Shilo Inn Portland/205 v. Multnomah County*, 333 Or. 101, 129-130 (2001), *modified on recons. on other grounds*, 334 Or. 11 (2002).
[4] *S*357 Or. 619 (2015).

> legislative committee in referring a bill to the floor of the House or the Senate. Certainly, they are at least as germane to the intended meaning of a measure as a newspaper editorial that we have no way of knowing anyone actually read.[5]

The court then cautioned: "That does not necessarily mean that such legislative history will have significant weight. As always, the weight that the courts will accord a particular bit of enactment history will depend on the circumstances—including the clarity with which the legislature's or the people's intentions have been expressed in the text of an enactment and the nature of the history itself."[6]

With respect to SJR 12, we have no evidence yet of voter intent because the measure has not been placed on the ballot. The only evidence of legislative intent so far is the Senate's consideration of the measure on March 18. In the floor debate, the carrier of the bill, Senator Steiner Hayward, stated in her closing remarks, first by reading from former Representative Greenlick's floor speech on a nearly identical House Joint Resolution 100 (2008 special session), "[v]oter approval of the measure that follows from . . . SJR 12 does not put a right to health care above any other constitutional right—it simply gives that right constitutional standing. It does not produce any specific or immediate changes in the way health care is delivered to, or financed for, those of us who are currently happy with our health care arrangements."[7]

Senator Steiner Hayward went on to state:

> It will require substantial action on the part of this legislature, in consultation with a wide range of experts, to determine the best way to fulfill the requirements put forward in this constitutional amendment. Those legislative actions will then be evaluated as part of the process for their costs and how they will be paid for and they will require a vote of this body before anything specific is determined.
>
> So to be crystal clear about legislative intent, because if, in fact, someone decides to take this to court, I want to be clear, as the chief sponsor, about legislative intent, this does not create a specific definition of the kinds of health care except to say that it is . . . cost-effective, clinically appropriate and affordable.[8]

This opinion will rely on the text and context of the resolution, as well as the legislative intent expressed by Senator Steiner Hayward, in evaluating how a court might interpret SJR 12.

1. What legal responsibility would the Legislative Assembly have to implement further health care policy?

The text of SJR 12 in proposed section 47 (1) does two things. First, it expressly creates an affirmative state obligation to ensure that each resident of Oregon has access to cost-effective,

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[5] *Id*. at 634 (citations omitted).
[6] *Id.*
[7] Senate floor session beginning at 1:03, March 18, 2021, https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2021031137 (visited April 15, 2021).
[8] *Id*.

clinically appropriate and affordable health care. Second, it also recognizes in each resident of Oregon a fundamental right to access cost-effective, clinically appropriate and affordable health care. In short, a state obligation and corresponding individual right are created under section 47 (1). On its face, the text of SJR 12 does not require the state to implement any further policies if current state policies satisfactorily ensure access to cost-effective, clinically appropriate and affordable health care for every resident of Oregon. However, if current policies do not satisfy the state's obligation, the state—presumably the Legislative Assembly and the executive branch—would be required to take steps to fulfill the right of each resident of Oregon to access health care.

Although section 47 (1) creates a state obligation to ensure access to health care, section 47 (2) requires the state to balance that obligation against the public interest in funding public education and other essential public services.

Article IV, section 1 (1), of the Oregon Constitution, provides:

> The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.

The legislative power includes the power to enact laws. The Oregon Supreme Court has held that:

> There is always a presumption in favor of the constitutionality of a legislative enactment. Until the contrary is shown beyond a reasonable doubt, it is the duty of the courts to assume that the challenged statute is valid.
>
> It is also a canon of statutory construction that if a legislative enactment can be given any reasonable construction consistent with its validity, such interpretation should be adopted.
>
> Our constitution, like all other state constitutions, is not to be regarded as a grant of power, but rather a limitation upon the powers of the legislature. The people in adopting it, committed to the legislature the whole law making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule and a prohibition to exercise a particular power is an exception. It is, therefore, competent for the legislature to enact any law not forbidden by the constitution or delegated to the federal government or prohibited by the Constitution of the United States. (Citations omitted.) [9]

If, as Senator Steiner Hayward predicted if the resolution were approved by the voters, the Legislative Assembly took substantial action, in consultation with a wide range of experts, to determine the best way to fulfil the obligation and then voted to approve the action, we believe a court is likely to give the Legislative Assembly substantial deference in how the Legislative

[9] *Wright v. Blue Mountain Hospital District*, 214 Or. 141, 144-145 (1958).

Assembly chooses to meet its obligation, especially given the balancing language of section 47 (2).

2. Would the state be subject to a private cause of action if it fails to satisfactorily implement the fundamental right to access health care?

If SJR 12 is adopted by the voters, the state could be subject to a lawsuit if it fails to satisfactorily implement each resident of Oregon's fundamental right to access cost-effective, clinically appropriate and affordable health care. As discussed above in question 1, the text of SJR 12 establishes a state obligation and a corresponding individual right. Further, section 47 (2) expressly mentions "any remedy arising from an action brought against the state to enforce the provisions of this section" and Senator Steiner Hayward acknowledged that an action could be brought against the state. We believe a court would likely conclude that subsections (1) and (2) of section 47 read together, along with the legislative history, create a private right that could be enforced in court and that the adoption of SJR 12 by the people constitutes a waiver of sovereign immunity.[10]

3. What is the maximum potential liability the state could face if it fails to satisfactorily implement the fundamental right to access health care?

We cannot meaningfully answer this question. We can, however, provide the following observation: Where an individual is successful in bringing a private cause of action against the state for failing to ensure access to health care, the remedy a court awards the individual—whether monetary damages, injunctive relief or otherwise—cannot interfere with the state's balance under section 47 (2). It is impossible to predict where a court will place the precise threshold between a remedy that does interfere with the state's chosen balance and a remedy that does not interfere with the state's chosen balance.

4. If the state is successfully sued for failing to meet its "obligation" under this measure, can the state, through statutory changes, meet its obligation by assigning responsibilities of its duty or the budgetary cost of the duty in the following manner . . . ?

It is impossible to predict at this point whether a court would find that the state is failing to meet its obligation to ensure access to cost-effective, clinically appropriate and affordable health care and whether any of the laws that you suggest would be sufficient to address that failure. Therefore, we will focus this opinion on whether there are constitutional provisions that might limit the power of the Legislative Assembly to enact such laws.

a. Require county governments to establish and maintain healthcare delivery systems so that county residents can have access to cost-effective, clinically appropriate and affordable health care? This could include things like establishing free clinics, providing home-based care to residents, and distributing routine drugs like insulin or vaccines at no cost to the patient/county resident.

[10] *Macpherson v. Department of Administrative Services*, 340 Or. 117, 137-138 (2006) (explaining that the Legislative Assembly or the people—"Oregon's legislative bodies"—may waive sovereign immunity). Put differently, we believe the state would not be able to rely upon the doctrine of sovereign immunity to stop lawsuits against it for failure to ensure every resident of Oregon has access to health care as a fundamental right.

The Legislative Assembly would not be prohibited by the Oregon Constitution from enacting legislation to require county governments to establish and maintain health care delivery systems so that county residents can have access to cost-effective, clinically appropriate and affordable health care. This could include things like establishing free clinics, providing home-based care to residents and distributing routine drugs like insulin or vaccines at no cost to the county resident. However, if the legislation resulted in increased costs that meet the thresholds of Article XI, section 15, of the Oregon Constitution, a county could not be forced to comply with the legislation unless the Legislative Assembly also provided funding to the county or unless the bill passed with a three-fifths majority vote.

Article XI, section 15, of the Oregon Constitution, provides:

> (1) Except as provided in subsection (7) of this section, when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.
>
> (2) As used in this section:
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> (a) "Enterprise activity" means a program under which a local government sells products or services in competition with a nongovernment entity.
>
> (b) "Local government" means a city, county, municipal corporation or municipal utility operated by a board or commission.
>
> (c) "Program" means a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally.
>
> (d) "Usual and reasonable costs" means those costs incurred by the affected local governments for a specific program using generally accepted methods of service delivery and administrative practice.
>
> (3) A local government is not required to comply with any state law or administrative rule or order enacted or adopted after January 1, 1997, that requires the expenditure of money by the local government for a new program or increased level of service for an existing program until the state appropriates and allocates to the local government reimbursement for any costs incurred to carry out the law, rule or order and unless the Legislative Assembly provides, by appropriation, reimbursement in each succeeding year for such costs. However, a local government may refuse to comply with a state law or administrative rule or order under this subsection only if the amount appropriated and allocated to the local government by the Legislative Assembly for a program in a fiscal year:
>
> (a) Is less than 95 percent of the usual and reasonable costs incurred by the local government in conducting the program at the same level of service in the preceding fiscal year; or
>
> (b) Requires the local government to spend for the program, in addition to the amount appropriated and allocated by the

> Legislative Assembly, an amount that exceeds one-hundredth of one percent of the annual budget adopted by the governing body of the local government for that fiscal year.
>
> . . .
>
> (7) This section shall not apply to:
>
> (a) Any law that is approved by three-fifths of the membership of each house of the Legislative Assembly.
>
> . . .
>
> (11) In lieu of appropriating and allocating funds under this section, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by a local government to recover the actual cost of the program.

In *Linn County v. Brown*,[11] the Oregon Supreme Court was asked to decide whether legislation increasing the state minimum wage was a "program" within the meaning of Article XI, section 15, of the Oregon Constitution. To do so, the court examined the legislative history and voter intent behind Ballot Measure 30 (1996), that became Article XI, section 15. The court held that the minimum wage was not a "program" and thus the Legislative Assembly was not required to provide funding. The court's reasoning for concluding that the minimum wage was not a program is helpful here. In particular, the court cited materials in the voters' pamphlet in support of the ballot measure stating "under existing law, the state could 'compel a local government to provide . . . health and other services *to the public*,' but did not have to provide any money 'to pay the cost of those services.'"[12] The court concluded that such services were the types of programs envisioned by the voters in passing Measure 30.

Therefore, while the Legislative Assembly could enact requirements for counties to provide the services you mention, if the legislation requires the county to spend for the program, in addition to 95 percent of the costs of implementation as appropriated and allocated by the Legislative Assembly, an amount that exceeds one-hundredth of one percent of the annual budget adopted by the governing body of the local government for that fiscal year, then Article XI, section 15, would excuse the county from complying, unless the legislation was enacted by a three-fifths majority of each chamber.

Another issue to be considered is whether a county could resist complying with the legislation based on the county's charter. There exist two types of counties in Oregon—counties that have adopted charters pursuant to Article VI, section 10, of the Oregon Constitution, and counties that have not adopted charters. Counties that have not adopted charters are fully subject to existing and potential future Oregon law provisions. However, for counties that have adopted charters, the home rule provisions of Article VI, section 10, of the Oregon Constitution, include the power to exercise "authority over matters of county concern." Matters regarding the organizational structure of chartered county government are therefore not subject to modification by the state. However, laws enacted by a chartered county regarding substantive policies that affect county operations are subject to preemption by state law.[13]

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[11] 366 Or. 334 (2020).
[12] *Id.* at 350.
[13] *See, e.g.*, *Buchanan v. Wood*, 79 Or. App. 722, 720 P.2d 1285 (1986) (statute establishing state control over district court operations and funding preempted county ordinance regulating office of district court clerk); *see also 1000 Friends of Oregon v. Washington County*, 80 Or. App. 34, 720 P.2d 1316 (1986) (statute requiring that county comprehensive plan approval be by governing body preempted county ordinance allowing plan approval by planning commission).

For substantive policy matters, the applicable analysis is established in *La Grande/Astoria v. Public Employees Retirement Board*.[14] Under *La Grande/Astoria*, "the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive."[15] If the local rule is held to be incompatible with the legislative policy, the following test applies:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.[16]

In *La Grande/Astoria,* the court considered whether state laws requiring cities to bring police officers and firemen into the public employees retirement system unless the city provided equal or better retirement benefits and to pay premiums on life insurance policies purchased by the state were valid. The cities argued that the laws "invaded a domain reserved to local discretion by the Oregon Constitution."[17] The court upheld the laws finding that the laws addressed primarily a "substantive social, economic, or other regulatory objectives of the state" because they addressed a "social concern with the living standards of [police and firemen], not with local governments as such."[18]

We believe a court would likely conclude that the legislation you described would be a general law "addressed primarily to the substantive social, economic or other regulatory objectives of the state" and would thus prevail over a county's resistance to comply with it under Article VI, section 10, of the Oregon Constitution.

b. Require county governments to establish and maintain healthcare delivery systems (like aforementioned examples) without any new state funding for counties to deliver those services? The county could be determined to have to provide those new services to effect access to cost-effective, clinically appropriate and affordable healthcare via passage of new state statute but with no new funding provided by the state (unfunded mandate).

Please see the answer above.

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[14] 281 Or. 137, 576 P.2d 1204, *on reh'g*, 284 Or. 173, 586 P.2d 765 (1978).
[15] *Id*. at 148.
[16] *Id.* at 156.
[17] *Id.* at 139.
[18] *Id.* at 156.

c. Require the same provisions of (a) and (b) at the city level?

The answer would be the same as above if applied to cities.

d. In order to ensure access to cost-effective, clinically appropriate and affordable healthcare, direct (as an example) school and education services districts to implement lower student to nurse staffing ratios, build out new school-based health facilities, or require districts to allow non-school medical personal access to district buildings to deliver healthcare services to students and staff?

Assuming the funding requirements of Article XI, section 15, of the Oregon Constitution, were met, the Legislative Assembly could require districts to implement lower student to nurse staffing ratios and build new school-based facilities or allow nonschool medical personnel access to district buildings to deliver health care services to students and staff.

Article XI, section 15, applies to "programs" created by the Legislative Assembly or a state agency "aimed at accomplishing a major service or function for which the municipality is responsible[,]" and "municipality" likely includes school districts and education service districts.[19] Therefore, if the cost to a district was more than one-hundredth of one percent of the annual operating budget adopted by the district, over and above a legislative appropriation that covered 95 percent of the costs, the district would not have to comply.

e. Direct schools and education service districts to do the examples aforementioned, with no new funding provided by the state (unfunded mandate)?

Please see the previous answer.

f. Require private employers to buy and maintain health insurance for every employee, regardless of the level of employment/number of hours that employee has through that employer?

(i) Could they be required to buy coverage through private insurance?

"Federal preemption" is a shorthand phrase for a legal concept founded on the Supremacy Clause of the United States Constitution, which reads, in part, "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[20] The Supremacy Clause allows a federal law to nullify contravening state laws.

The federal Employee Retirement Income Security Act of 1974 (ERISA) explicitly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[21]

An "employee welfare benefit plan" includes "any plan, fund, or program which . . . is . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for it participants or their beneficiaries,

[19] See *Linn County v. Brown*, 297 Or. App. 330, 343 (2019), *quoting* ORS 294.311 and relying on the definition of "municipal corporation" in ORS 294.311.
[20] Article VI, clause 2, United States Constitution.
[21] 29 U.S.C. 1144(a).

through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits . . . ."[22]

The United States Supreme Court's:

> [C]ase law to date has described two categories of state laws that ERISA pre-empts. First, ERISA pre-empts a state law if it has a "reference to" ERISA plans. To be more precise, "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . ., that 'reference' will result in pre-emption." Second, ERISA pre-empts a state law that has an impermissible "connection with" ERISA plans, meaning a state law that "governs . . . a central matter of plan administration" or "interferes with nationally uniform plan administration." A state law also might have an impermissible connection with ERISA plans if "acute, albeit indirect, economic effects" of the state law "force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." When considered together, these formulations ensure that ERISA's express pre-emption clause receives the broad scope Congress intended while avoiding the clause's susceptibility to limitless application. (Citations omitted.)[23]

The Ninth Circuit Court of Appeals has employed a "relationship test" in determining whether a state law is preempted due to its "connection with" an ERISA plan. A state law is preempted when it "bears on an ERISA-regulated relationship, *e.g.*, the relationship between the plan and plan member, between plan and employer, between employer and employee."[24]

At issue in *Standard Oil Co. v. Agsalud*,[25] was the Hawaii Prepaid Health Care Act which required employers to provide their employees with a comprehensive prepaid health care plan. The plaintiff, an employer that offered a self-insured plan that did not comply in all respects with the requirements of the Hawaii Prepaid Health Care Act, challenged the law after the state attempted to enforce it against the plaintiff. The Ninth Circuit Court of Appeals held that the law was preempted by ERISA. However, Congress later amended ERISA to create an exception for the Hawaii law.

An enactment that has an impermissible connection with an ERISA plan would be preempted. Therefore, if the enactment you describe would interfere with an employer's ability to establish or maintain its own health insurance for employees, it would be preempted by ERISA. However, if the law contained an exemption for employers that provided health insurance to employees and the law did not specify the benefits that must be provided, it would likely survive an ERISA challenge. Therefore, the answer to your question is not yes or no, but would depend on the provisions of the law.

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[22] 29 U.S.C. 1002.
[23] *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016).
[24] *Paulsen v. CNF Inc.,* 559 F.3d 1061, 1082 (9th Cir. 2009) (*citing Providence Health Plan v. McDowell*, 385 F.3d 1168, 1172 (9th Cir. 2004)).
[25] 633 F.2d 760 (9th Cir.1980).

(ii) Could they be required to buy coverage through a state-sponsored plan (similar to the state-sponsored retirement plans passed a few years back that are managed for employers with no retirement programs)?

The Oregon Retirement Savings Plan[26] exempts employers from offering the plan if an "employer offers a qualified retirement plan, including but not limited to a plan qualified under section 401(a), section 401(k), section 408(p) or section 457(b) of the Internal Revenue Code."[27]

If the law contained an exemption for ERISA plans, it would likely survive a challenge under ERISA.

(iii) Could they be fined by the state for failure to provide such coverage?

If the law exempted employers that chose to provide their own health insurance coverage for employees and did not dictate the benefits that must be provided, the law would likely survive a challenge based on ERISA.

(iv) Could they be required to cover in part or all the cost of insurance for independent contractors?

If the requirement applied prospectively, we could find no constitutional impediment to such a requirement. If it applied to existing contracts, there could be a legal challenge based on Article I, section 21, of the Oregon Constitution, which states, "[n]o . . . law impairing the obligation of contracts shall ever be passed. . . ." The United States Constitution contains a similar provision in Article I, section 10.

The impairment of contract clause restricts the power of the state to modify the obligations of parties to a private contract. It does not, however, restrict the power of the state to dictate the obligations of future contracts. If legislation affects a contract but does not act retroactively to affect contracts in existence at the time the legislation is enacted, there is no significant contract clause question.[28] If a contract is executed after a law is passed, the law becomes part of the contract.[29] Laws that are part of a contract do not impair the obligation of the contract within the meaning of Oregon's contract clause or the Contract Clause contained in the United States Constitution.[30]

g. Require, for the consideration of being eligible for licensure in Oregon, that a medical professional who seeks licensure must be required as part of that license, to do some number of hours of charity/free care, without compensation, in order to maintain that license (which also addresses the state's obligation to ensure "access"?

If the Legislative Assembly enacted a law requiring a medical professional to provide free care as a condition of licensing, the law might be challenged on the basis of Article I, section 18,

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[26] ORS 178.200 to 178.260.
[27] ORS 178.210 (1)(b).
[28] *See* Rotunda and Nowak, *Treatise on Constitutional Law, Substance and Procedure*, p. 452 (1992); *State v. Thompson*, 47 Or. 492 (1906); *Ogden v. Saunders*, 25 U.S. 213 (1827).
[29] *See Ocean A. & G. Corp., Ltd. v. Albina M.I. Works*, 122 Or. 615, 617, 260 P. 229 (1927); Attorney General Opinion Request OP-6096 (1987).
[30] Attorney General Opinion Request OP-6096, *supra note 27*; *Levy Leasing Co. v. Siegel*, 42 S. Ct. 289 (1922); *Thompson*, 47 Or. 492.

of the Oregon Constitution, which provides that "[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation[.]"

There is very little case law interpreting the "particular services" clause of Article I, section 18. Indeed, when faced with takings claims involving the taking of property, Oregon courts have generally decided takings cases "under the expressly stated assumption that federal and state constitutional takings clauses have identical meaning and effect," despite the absence of a particular services provision in the Takings Clause of the Fifth Amendment to the United States Constitution and other slight discrepancies between the state and federal clauses.[31]

However, the Oregon Supreme Court has at least minimally interpreted the particular services clause of Article I, section 18. In *Daly v. Multnomah County*, decided in 1886, the court considered whether the particular services clause required that the plaintiff be compensated for his travel and service as a witness during criminal proceedings.[32] The court ruled against the plaintiff, distinguishing between "particular services" and "general services." The particular services clause, the court concluded, does not apply to "the class of general services which every man is bound to render for his own and the general good," such as serving as a general witness in a criminal proceeding.[33]

In *Emery v. State*, the Oregon Supreme Court further characterized "general services" as those obligations that are "public duties."[34] Determining that there was "no logical reason to make a distinction in the consideration of the taking of property and the demanding of services under our state constitution," the court applied the analysis of *Daly* to deny the plaintiffs an award of compensation for their pickup truck.[35] Plaintiffs argued that the truck had been taken when the state seized the truck as evidence in a murder trial and then returned the truck in a dismantled state. The court disagreed. The furnishing of physical evidence in a criminal trial, the court reasoned, was a public duty equivalent to the furnishing of oral testimony, and therefore not compensable under Oregon's takings clause.[36] Explanation of the "public duties" doctrine in *Emery* marks the extent to which Oregon courts have interpreted the "particular services" clause.

h. Require, as part of any kind of determination of certificate of need for equipment or facilities by the Oregon Health Authority, that the facility or equipment have some percentage of use to be given at a reduced or free rate as part of the determination of the need in the community in which the facility or equipment is to be housed/used? (NOTE: There is some legislative corollary here in what this body has done with Inclusionary Zoning—whereby, to be eligible to build new housing, a percentage of that has to be set aside for affordable housing at a cost to the builder with no government funds to cover any losses that the builder incurred by not being able to sell property at a higher, market-rate price point).

The policy underlying Oregon's certificate of need process already requires consideration of the need for affordable health care in a community. ORS 442.310 provides:

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[31] Jack Landau, "Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation," 79 Or. L. Rev. 793, 889 (2000). The Takings Clause of the Fifth Amendment to the United States Constitution provides, in full: "nor shall private property be taken for public use, without just compensation."
[32] *Daly v. Multnomah County*., 14 Or. 20, 20-22 (1886).
[33] *Id.*
[34] *Emery v. State*, 297 Or. 755, 763-767 (1984).
[35] *Id.* at 765-767.
[36] *Id.*

> (1) The Legislative Assembly finds that the achievement of reasonable access to quality health care at a reasonable cost is a priority of the State of Oregon.
>
> (2) Problems preventing the priority in subsection (1) of this section from being attained include:
>
> (a) The inability of many citizens to pay for necessary health care, being covered neither by private insurance nor by publicly funded programs such as Medicare and Medicaid;
>
> . . .
>
> (5) It is the purpose of this chapter to establish area-wide and state planning for health services, staff and facilities in light of the findings of subsection (1) of this section and in furtherance of health planning policies of this state.

In addition, nonprofit health facilities have an obligation to provide some level of community benefits as a condition of being exempt from income and property taxes.[37] The Internal Revenue Service also requires a hospital that is tax exempt to have a written financial assistance policy and limits what a hospital may charge uninsured patients.[38] ORS 442.614 requires all hospitals and their affiliated clinics[39] to provide 100 percent financial assistance to an uninsured patient whose household income is at or below 200 percent of the federal poverty guidelines. In addition, ORS 442.624 requires the Oregon Health Authority, every two years, to establish a community benefit spending floor for hospitals and the hospitals' affiliated clinics.

i. Create a penalty on taxpayers (similar to the ACA penalty) for failure to have insurance coverage, if the purpose of that fine was to cover things like Medicaid and free clinics?

We are not aware of any legal impediment to doing so. Massachusetts imposes a "medical assistance contribution" on all employers and the moneys are paid into the Commonwealth Care Trust Fund and the Catastrophic Illness in Children Relief Fund to support the provision of subsidized health care services.[40] There are no reported cases challenging the law.

j. Determine drug/pharmaceutical pricing at the state level? Are there any interstate commerce clause issues here in setting drug pricing levels?

The answer depends on how the law imposes the pricing restrictions. In *Pharmaceutical Research and Manufacturers of America v. Walsh,*[41] the United States Supreme Court upheld a Maine program that imposed prior authorization for coverage of drugs dispensed in the Medicaid program if the manufacturer of the drug refused to negotiate a discounted price for residents in the state. The Court held that the law did not violate the Commerce Clause because the law did not regulate the price of any out-of-state transaction and all manufacturers were subject to the requirements regardless of whether the production facilities were in Maine or elsewhere.[42]

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[37] ORS 307.130; 26 U.S.C. 501(r)(3).
[38] 26 U.S.C. 501(r)(4) and (5).
[39] Except the Oregon State Hospital or a hospital operated by the United States Department of Veterans Affairs Veterans Health Administration or any other hospital operated by the federal government.
[40] Mass. Gen. Laws ch. 149, §189.
[41] 538 U.S. 644 (2003).
[42] *Id.* at 669-670.

On the other hand, in *Biotechnology Industry Organization v. District of Columbia*,[43] the pharmaceutical company successfully challenged a District of Columbia ordinance that prohibited the sale of patented prescription drugs for an "excessive price" within the district. The circuit court held that the ordinance was preempted by federal patent law for which the objective is to encourage innovation by allowing inventors "to foreclose competitors from making, using, and selling the invention [to] allow them an opportunity to obtain above-market profits during the patent's term."[44]

Therefore, a law establishing pricing would not likely prevail if challenged in court, but a law could be constructed to affect drug pricing at the state level similar to the approach in *Walsh*.

5. Currently, there is no constitutionally specific directive to "fund" public schools, or other essential services, that are not constitutionally designated like (for example) Lottery obligations or Highway Trust obligations. Could this newly included, and somewhat vague language trigger unforeseen consequences like:

a. A situation where healthcare funding as an "obligation of the state described in subsection (1)" is now the measuring stick for all other General Fund spending?

Senate Joint Resolution 12 does not mandate any level of General Fund spending.

b. A situation where if we spend more on healthcare that we do public schools, and a perceived lack of "balance" in funding between healthcare and public schools opens the state for new litigation (currently, the healthcare spending in Oregon is significantly higher than education or any other funding line item, so it could be argued that we'd be immediately out of balance once this passes)?

As we said above, there "is always a presumption in favor of the constitutionality of a legislative enactment. Until the contrary is shown beyond a reasonable doubt, it is the duty of the courts to assume that the challenged statute is valid."[45] Moreover, although section 47 (1) creates a state obligation to ensure access to health care, section 47 (2) requires the state to balance that obligation against the public interest in funding public education and other essential public services.

This is similar, in some respects, to Article VIII, section 8, of the Oregon Constitution, which provides:

> (1) The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals.

Like SJR 12, it establishes a mandate on the Legislative Assembly but also provides a back door by allowing the Legislative Assembly to publish a report explaining any insufficiency.

[43] 496 F.3d 1362 (Fed. Cir. 2007).
[44] *Id*. at 1372.
[45] *Wright*, 214 Or. at 144.

Article VIII, section 3, of the Oregon Constitution, also provides that the "Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools."

In *Pendleton School District v. State of Oregon,*[46] the Oregon Supreme Court held that Article VIII, section 3, of the Oregon Constitution, "requires the legislature to establish free public schools that will provide a basic education"[47] and that Article VIII, section 8, of the Oregon Constitution, "by its terms, directs the legislature to provide funding sufficient tor the public schools to meet quality goals established by law."[48] However, the court also concluded that "the legislature's failure to fund the public schools sufficient to meet the quality goals established by law does not demonstrate that the legislature has *ipso facto* failed to provide a minimum of educational opportunities" and denied injunctive relief.[49]

We believe the balancing language of section 47 (2) and the substantial deference given to legislative enactments by courts as illustrated by *Pendleton* would likely afford the Legislative Assembly significant discretion to choose how to appropriate funds for essential public services such as health care, public education and law enforcement. Therefore, we believe it is unlikely that a court would second guess the Legislative Assembly's balance of funding between health care and public schools.

c. A situation where "other essential public services" being undefined in this proposed constitutional amendment, triggers litigation to have current or future uses of legislative funds be defined as "essential" so that they may be considered in balance testing for future public funding?

As explained above, if the resolution is referred to the voters, a court interpreting the phrase "essential public services" would look to voter intent as evidenced by statements in the voters' pamphlet and other sources. Therefore, it is premature to speculate as to how a court might interpret the phrase. Assuming that a court determines that the voters intended some other unspecified service to be "essential," it simply leads us back to whether a court would second guess the Legislative Assembly's balancing of the essential services and we believe the answer is likely no.

6. Is there any case law in Oregon that would define or shape how funding between a constitutional "obligation" like healthcare would be balanced against non-constitutionally mandated budgetary needs of public education and other current/future General Fund spending for undefined "essential" public services?

We were unable to find any cases that define or shape how funding between a constitutional obligation like health care would be balanced against other budget needs.

7. Would a court test for balance be measured in dollars, lives served (i.e., number of students, number of insured, number of veterans, number of prisoners, or any other constituency group seeking funds, measured by number of lives in that constituency

[46] 345 Or. 596 (2009).
[47] *Id.* at 616.
[48] *Id*. at 616-617.
[49] *Id*. at 616-617.

grouping), geographic need, other metrics? Any court holding on balance testing for public funding expenditures would be helpful to understand.

We found no case precedent on this issue.

8. **By inserting language that the state's obligation to serve its people with health care must be balanced against public school funding, does this inadvertently create a constitutional right of funding for public education? Similarly, if it does, would it create a constitutional right of funding for "essential public services" if a court or statute determines that a general fund or other funded agency, budget, or service is "essential"?**

Senate Joint Resolution 12 does not obligate any level of funding so it would not obligate any level of funding for public education or other essential public services.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
Lorey H. Freeman
Chief Deputy Legislative Counsel