

1
2 IN THE CIRCUIT COURT OF THE STATE OF OREGON
3 FOR THE COUNTY OF MULTNOMAH
4

Case No. 0603-02980

DEFENDANT LEGISLATORS'
MOTION TO DISMISS¹

(ORAL ARGUMENT REQUESTED)

5 PENDLETON SCHOOL DISTRICT 16R; EUGENE
6 SCHOOL DISTRICT 4J; CROW-APPLEGATE-
7 LORANE SCHOOL DISTRICT 66; COOS BAY
8 SCHOOL DISTRICT 9; CORVALLIS SCHOOL
9 DISTRICT 509J; JOSEPHINE COUNTY
10 UNIT/THREE RIVERS SCHOOL DISTRICT;
11 ASTORIA SCHOOL DISTRICT 1C; CRESWELL
12 SCHOOL DISTRICT; LINCOLN COUNTY SCHOOL
13 DISTRICT; SIUSLAW SCHOOL DISTRICT 97J;
14 CENTENNIAL SCHOOL DISTRICT; AMITY
15 SCHOOL DISTRICT 4J; REYNOLDS SCHOOL
16 DISTRICT #7; COQUILLE SCHOOL DISTRICT #8;
17 PARKROSE SCHOOL DISTRICT #3; PINE EAGLE
18 SCHOOL DISTRICT #61; JEFFERSON SCHOOL
19 DISTRICT; MCKENZIE SCHOOL DISTRICT;
20 ALEXANDRA KIESLING and TIMOTHY KIESLING,
21 minors, by Amy Cuddy, their guardian ad litem;
22 GRACE PEYERWOLD, a minor, by David and Maria
23 Peyerwold, her guardians ad litem; MARSHALL
24 TAUNTON and HARRISON TAUNTON, minors, by
25 Tim and Wendy Taunton, their guardians ad litem; and
26 BENJAMIN SHERMAN and CLAIRE SHERMAN,
minors, by Larry Sherman and Diane Nichol, their
guardian ad litem,

Plaintiffs,

v.

19 STATE OF OREGON; PETER COURTNEY, in his
20 capacity as Senate President of the Legislative Assembly
21 of Oregon; KATE BROWN, in her capacity as Senate
22 Majority Leader; TED FERRIOLI, in his capacity as
23 Republican Leader of the Senate; KAREN MINNIS, in
24 her capacity as Speaker of the House of Representatives;
25 WAYNE SCOTT, in his capacity as Majority Lead of
26 the House of Representatives; JEFF MERKLEY, in his
capacity as Democratic Leader of the House of
Representatives,

Defendants.

¹ The Defendant Legislators joining in this motion are: Senator Ted Ferrioli, Representative Jeff Merkley, Representative Karen Minnis, and Representative Wayne Scott.

1 Pursuant to ORCP 21, defendants Senator Ted Ferrioli, Representative Jeff Merkley,
2 Representative Karen Minnis, and Representative Wayne Scott (“defendant legislators”) move to
3 dismiss the complaint against them on the grounds that this action is barred by legislative
4 immunity. Oral Argument is requested and is expected to require 60 minutes; official court
5 reporting services are requested. This motion is based on the records and file herein and the
6 following Points and Authorities.

7 **POINTS AND AUTHORITIES**

8 The defendant legislators did not initiate nor intervene in this lawsuit. They are
9 involuntary parties to this case. No claim by the plaintiffs against the defendant legislators
10 depends in any way on whether defendant legislators cast their votes for or against any bill
11 appropriating funds. Nothing about the allegations, the State of Oregon’s defense against those
12 allegations, or the fact that plaintiffs brought defendant legislators into this lawsuit has any legal
13 or logical connection to the defendant legislators’ individual policy views about any aspect of
14 state funding of K-12 public schools.

15 Plaintiffs sue each defendant legislator in his or her “official capacity” as legislators. As
16 explained below, the defendant legislators are immune from this suit under Article IV, section 9,
17 of the Oregon Constitution. Therefore, the complaint should be dismissed as to them.

18 Article IV, section 9, of the Oregon Constitution provides that members of the
19 Legislative Assembly shall not be sued “for words uttered in debate in either house.” This
20 provision is similar to the “Speech and Debate Clause” found in the United States Constitution,
21 which provides that “for any Speech and Debate in either House, they shall not be questioned in
22 any other Place.” U.S. Const. Art. I, section 6.

23 There is no case law in Oregon interpreting Article IV, section 9. *See Adamson v.*
24 *Bonesteel*, 295 Or. 815, 671 P.2d 693 (1983) (discussing common law immunity of city counsel
25 member from liability for defamation). However, the principle that legislators are absolutely
26 immune from liability for their legislative activities has long been recognized in Anglo-American

1 law. This privilege “has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth
2 Centuries” and was “taken as a matter of course by those who severed the Colonies from the
3 Crown and founded our Nation.” *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S.Ct. 783, 95
4 L.Ed. 1019 (1951). The United States Constitution, the constitutions of many of the states,
5 including Oregon, and the common law thus protected legislators from liability for their
6 legislative activities. *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 118 S.Ct. 966, 140 L.Ed.2d 79
7 (1998), *citing* U.S. Const., Art. I, section 6; *Tenney*, 341 U.S. at 372-75.²

8 Absolute immunity attaches to all actions taken “in the sphere of legitimate legislative
9 activity.” *Tenney*, 341 U.S. at 376. Such immunity privileges the legislative actions of both
10 members of Congress and state and local legislators. *See id.* at 377 (state legislators); *Lake*
11 *Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405, 99 S.Ct. 1171, 59
12 L.Ed.2d 401 (1978) (regional legislators); *Bogan*, 523 U.S. at 49 (local legislators); *Kilbourn v.*
13 *Thompson*, 103 U.S. [13 Otto]168, 202-04, 26 L.Ed. 377 (1881) (interpreting the federal Speech
14 and Debate Clause, U.S. Const., Art. I, section 6, to provide similar immunity to members of
15 Congress).

16 The rationales for according absolute immunity to federal, state, regional and local
17 legislators are the same. Regardless of the level of government, the exercise of legislative
18 discretion should not be inhibited by judicial interference or distorted by the fear of personal
19 liability. *Bogan*, 523 U.S. at 52; *see also Kilbourn*, 103 U.S. at 201-204 (federal legislators);
20 *Tenney*, 341 U.S. at 377 (state legislators); *Lake Country Estates*, 440 U.S. at 405 (regional
21 legislators). Furthermore, the time and energy required to defend against a lawsuit are of
22 particular concern. *See Tenney*, 341 U.S. at 377 (citing “the cost and inconvenience and
23 distractions of a trial” for state legislators). And the threat of liability may significantly deter
24 service in government, where prestige and pecuniary rewards may pale in comparison to the

25 ² Oregon is one of forty-eight States that have a specific constitutional provision to preserve the
26 principle that the legislature must be free to speak and act without fear of criminal or civil
liability. *See Tenney*, 341 U.S. at 375, n. 5 (citing each state’s constitutional provision for
legislative immunity, including Article IV, section 9, of the Oregon Constitution).

1 threat of civil liability. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 73 L.Ed.2d
2 396 (1982).

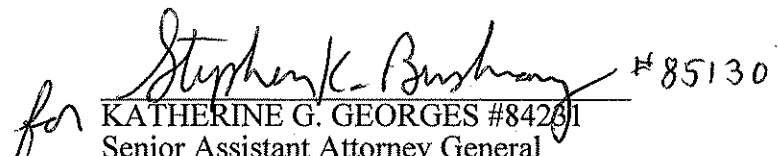
3 Whether an act is legislative turns on the nature of the act, rather than the motive or intent
4 of the official performing it. Specifically, the courts look to whether the particular activity at
5 issue is “an integral part of the [legislature’s] deliberative and communicative process...”
6 Budgetary decisions are legislative activities – “at the heart of the legislative process” – requiring
7 discretionary policymaking based on budgetary priorities. *Bogan*, 523 U.S. at 55.

8 Under the allegations of the First Amended Complaint, the challenged act of the
9 defendant legislators was voting on an appropriation bill for the K-12 public school budget for
10 the 2005-07 biennium. The act of voting on a bill in the Legislative Assembly is formally
11 legislative in character, and it bears all the hallmarks of traditional legislation. Accordingly, the
12 defendant legislators are immune from suit for that act under Article IV, section 9, of the Oregon
13 Constitution.³

14 DATED this 1st day of June, 2006.

15 Respectfully submitted,

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25 ³ Cf. *Coalition for Equitable School Funding, Inc. v. State*, 311 Or. 300, 305 n. 6, 811 P.2d 116
26 (1991) (circuit court dismissed school funding challenge against defendants Governor John
Kitzhaber and Speaker of the House Vera Katz on the basis of legislative immunity; Supreme
Court affirmed judgment in favor of the State on the merits and did not need to reach immunity
issue).

1 **CERTIFICATE OF SERVICE**

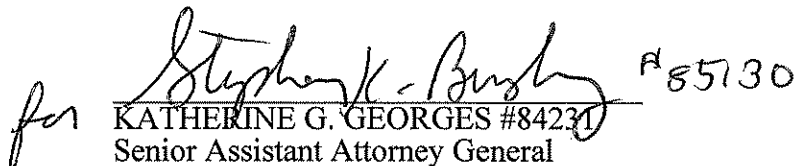
2 I certify that on June 1, 2006, I served the foregoing DEFENDANT LEGISLATORS'
3 MOTION TO DISMISS upon the parties hereto by the method indicated below, and addressed to
4 the following:

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