

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

PENDLETON SCHOOL DISTRICT 16R,
et al.,

Plaintiffs,

v.

STATE of OREGON, et al.,

Defendants.

No. 0603-02980

**PLAINTIFFS’ ANSWERING
MEMORANDUM TO MOTION TO
DISMISS FILED BY SENATORS
COURTNEY AND BROWN**

Introduction

Senators Peter Courtney and Kate Brown (“the Legislators”) have moved, separately from the other legislator defendants, for dismissal of this action as to them. In support of their motion, they argue (1) that Oregon Constitution Article IV section 9 cloaks them with absolute immunity, and (2) that even if not immune, they are improper parties to the action because “they are personally powerless to redress the alleged injuries” (Motion to Dismiss, page 5). Neither argument is well taken. The Motion to Dismiss should be denied.

Summary of Answering Argument

Legislative immunity does not extend to these defendants in this action, for the reasons outlined in Plaintiffs’ Answering Memorandum to the dismissal motion of Senator Ferrrioli and Representatives Merkley, Minnis, and Scott (filed concurrently with this Memorandum). Neither common law legislative immunity, nor its Oregon constitutional codification in Article IV section 9, allows the Oregon Legislature to disregard a constitutional mandate without judicial scrutiny. For example, the people of Oregon have told the legislature that it must meet biennially in open session (Article I sections 10 and 14), and it does. The legislature’s refusal to do that would be a matter for the courts, and nothing

1 in Article IV section 9 would immunize the legislature from constitutional accountability.
2 Just as surely, the people have told the legislature it must appropriate in each biennium
3 enough money to ensure that specific quality goals are met (Article VIII section 8). Nothing
4 in Article IV section 9 immunizes the legislature or its members from that responsibility
5 either.

6 With regard to the Legislators’ second argument, the personal ability of the
7 Legislators to deliver the relief sought is immaterial to this proceeding, where they are
8 impleaded as officers of the Oregon Legislature in a representative capacity. Other states’
9 highest courts have accepted the propriety and effectiveness of judicial instruction to
10 legislatures through their representative officers. The Legislators’ tacitly assumed alternative
11 – impleading and serving all 90 Oregon state legislators – has been rejected as lacking in
12 common sense. The Legislators’ list of allegedly necessary “other events,” over which they
13 claim to have no control (Motion to Dismiss, page 7), is a straw man. This dispute is fully
14 justiciable, and the Legislators are proper parties to the action.

15 **1. Article IV Section 9 of the Oregon Constitution Does Not Provide the Immunity**
16 **That the Legislators Claim Here.**

17 The Legislators seem to be relying entirely on the final clause of Oregon Constitution
18 Article IV section 9, which is shown in italics below:

19 “Senators and Representatives in all cases, except for treason, felonies, or
20 breaches of the peace, shall be privileged from arrest during the session of
21 the Legislative Assembly, and in going to and returning from the same; and
22 shall not be subject to any civil process during the session of the Legislative
23 Assembly, nor during the fifteen days before the commencement thereof:
24 *Nor shall a member for words uttered in debate in either house, be
25 questioned in any other place. –*”

26 They liken it to the “Speech and Debate Clause” of the United States Constitution, in
27 Article I section 6:

28 “[Senators and Representatives] shall in all Cases, except Treason, Felony,
29 or Breach of the Peace, be privileged from Arrest during Attendance at the
30 Session of their respective Houses, and in going to and returning from the

1 same; and for any Speech or Debate in either House, they shall not be
2 questioned in any other Place.”

3 The similarity is close enough that the Legislators are not out of line to invite this Court’s
4 attention to federal case law. However, those cases provide no support for the Legislators in
5 this action. Moreover, given the populist legal history of the State of Oregon, it is unlikely
6 that the Oregon Constitution would be interpreted to afford Oregon legislators any liberally-
7 construed immunity from accountability for failure to observe a mandate placed in the
8 Oregon Constitution by the people through an initiative measure.¹ The Legislators’ citations
9 to federal cases interpreting Congressional immunities are neither on point nor otherwise
10 helpful here.

11 The Legislators’ basic premise, on which they build their entire federal case argument
12 (Motion to Dismiss, pages 3-5), is that “[a]bsolute legislative immunity attaches to all actions
13 taken ‘in the sphere of legitimate legislative activity,’ ” quoting from *Tenney v. Brandhove*,
14 341 US 367, 376, 71 S Ct 783, 95 L Ed 1019 (1951) (emphasis added). The protected
15 “legitimate activity” in *Tenney* was legislators’ questioning of a witness in a legislative
16 hearing, free from the threat of individual liability in a civil action – obviously within the
17 necessary ambit of legislative process. In contrast, this case charges the Oregon Legislature
18 (through the representative defendants, who run no individual liability risk) with failing to
19 follow explicit directions given to them in the Oregon Constitution. Flouting of the
20 constitution, under which the people have created the legislature and charged it with certain
21 specific responsibilities, is plainly not a “legitimate legislative activity.”

22 In violating a constitutional mandate, a legislative body cannot by definition be
23 performing a “legitimate legislative activity,” and no immunity can attach. That difference

24 ¹ Article VIII section 8, which orders the Legislative Assembly to “appropriate in
25 each biennium a sum of money sufficient to ensure that the state’s system of public education
26 meets quality goals established by law,” was added to the constitution by initiative petition in
2000, when the voters adopted Ballot Measure 1 by a margin of 66 to 34 percent. The
measure won easily in every county of the state.

1 from the Legislators’ federal case citations – here we have a constitutional direction to a
2 legislative body, disobeyed by that body – removes the relevance from every one those
3 federal cases. In each of the Legislators’ cited cases of legislative immunity, the body was
4 involved in a legitimate legislative activity. *See Bogan v. Scott-Harris*, 523 US 44, 118 S Ct
5 966, 140 L Ed 2d 79 (1998) (civil rights action against city council for legislative elimination
6 of city department); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 US
7 391, 405, 99 S Ct 1171, 59 L Ed 2d 401 (1979) (damage claim against planning agency
8 members who adopted regional land use plan); *Supreme Court of Virginia v. Consumers*
9 *Union of the United States, Inc.*, 446 US 719, 100 S Ct 1967, 64 L Ed 2d 641 (1980)
10 (adoption by state supreme court, in legislative capacity, of attorney code of ethics); *Scott v.*
11 *Taylor*, 405 F3d 1251 (11th Cir 2005) (civil rights action challenging legislative revision of
12 county commission election zones); *Larsen v. State of Pennsylvania*, 152 F3d 240 (3d Cir
13 1998) (civil rights action challenging legislative impeachment proceedings).

14 The same is true of each of the Legislators’ citations to other states’ cases. *See*
15 *Kniskern v. Amstutz*, 760 NE2d 876 (Ohio App 2001) (challenge to legislature’s enactment of
16 tort reform legislation); *Stranière v. Silver*, 218 AD2d 80 (NY App 1996) (challenge to
17 legislators’ failure to report bill out of committee). The one Oregon case dealing with
18 legislative immunity does not offer any helpful information for this case.²

19 Analytically, this case is more akin to *United States v. Brewster*, 408 US 501, 92 S Ct
20 2531, 33 L Ed 2d 507 (1972), where immunity was denied to a legislator charged with

21 ² In *Coalition for Equitable School Funding, Inc. v. State*, 311 Or 300, 811 P2d 116
22 (1991), the supreme court briefs reveal that neither party mentioned Article IV section 9 in
23 more than a passing context. The circuit court had dismissed individual legislators as parties,
24 but the Oregon Supreme Court expressly declined to reach the question. 311 Or at 305 fn 6.
25 In briefing, the plaintiffs had pointed to cases where suits against legislators in their
26 representative capacity had been upheld by two states’ highest courts: *Seattle School District*
No. 1 v. State, 90 Wn 476, 585 P2d 71 (1978); and *Rose v. Council for Better Education,*
Inc., 790 SW2d 186 (Ky 1989). The State had not responded to those case citations. If the
Oregon Supreme Court had needed to reach the issue, it seems likely the court would have
kept the legislative officers in the case.

1 accepting money unlawfully. The legislator claimed that because the alleged bribe was
2 received in connection with his legislative role, he enjoyed immunity from suit. The
3 Supreme Court ruled the legislator’s unlawful act, if proven, would not be part of his
4 legitimate legislative duties, and it denied immunity. 408 US at 526. The claim against the
5 Oregon Legislature in this case does not involve any such moral turpitude, but the principle is
6 the same. Violation of the law, whether constitutional or statutory, is no part of a
7 legislature’s duty, and legislative immunity does not apply. For purposes of this Motion to
8 Dismiss, the allegations of the Amended Complaint have to be accepted as true – the
9 legislature has violated the Oregon Constitution. In that circumstance, legislative immunity
10 is not available to the Legislators.

11 Plaintiffs can readily agree that legislative immunity will apply when the legislature
12 has been ordered by the Court to comply with Article VIII sections 8 and 3 of the
13 constitution. The means that the legislature chooses then to meet its funding obligation for
14 the state’s public schools, so long as it complies with the constitutional requirements, will be
15 immune from judicial interference. That is plainly not the present case, however. When the
16 legislature violates the constitution, it is not immune.

17 **2. Justiciability of this Action, With The Legislators as Representatives of the**
18 **Oregon Legislature, Is Not in Doubt.**

19 **A. As Responsible Representatives of the Oregon Legislative Assembly,**
20 **Senators Courtney and Brown Are Proper Parties.**

21 The Legislators’ second argument is that as individuals they would be powerless to
22 respond to a declaratory judgment. They argue that they themselves could not enact the
23 legislation called for by the Oregon Constitution, even if they wanted to. Their argument
24 boils down to a simple proposition – Plaintiffs will have to sue and serve all 90 members of
25 the legislature if they want relief. *See* Motion to Dismiss, page 7 fn 4: “Courtney and Brown
26 have no ability to control the votes of the other 88 elected members of the Legislature
regardless of whether they are sued ‘on behalf of’ those members or not.”

1 Plaintiffs have impleaded the principal officers of the Oregon Legislature, instead of
2 every member of the body, because this is not a circus. This issue was raised in *Rose v.*
3 *Council for Better Education, Inc.*, 790 SW2d 186 (Ky 1989), where the central question was
4 similar to the question in this case: “[W]hether the Kentucky General Assembly has
5 complied with its constitutional mandate to ‘provide an efficient system of common schools
6 throughout the state.’ ” 790 SW2d at 189. The plaintiff sued individual legislative leaders,
7 as representatives of the assembly. The named defendants claimed, as the Legislators do
8 here, that the complaint did not state a claim against them, because they could not themselves
9 enact any legislation. The Kentucky Supreme Court acknowledged that irrelevant fact but
10 stated that the legislators were well able to defend the constitutionality of legislative actions
11 [or in the present case inactions], and that it was “only common sense and practical” to hold
12 that service on responsible legislative officers, rather than on every member, was sufficient to
13 acquire jurisdiction over the legislative assembly. 790 SW2d at 205.

14 In reaching its conclusion, the Kentucky Supreme Court in *Rose* pointed to another
15 case closer to home for this action, *Seattle School District No. 1 v. State*, 90 Wn2d 476, 585
16 P2d 71 (1978), in which the house speaker and senate president were named as defendants in
17 an action for declaratory judgment. As here, the claim there was that the Washington
18 Legislature had failed to obey a constitutional mandate to make ample provision for
19 education of the state’s children. The Washington Supreme Court modified but affirmed
20 judgment against the legislative officers, as representatives of the legislature. The question
21 of justiciability did not arise in the *Seattle School District* case, evidently because the
22 legislative officers recognized that they were the proper parties to defend the action on behalf
23 of the Washington Legislature. That closely similar case from our closest sister state should
24 provide guidance to this Court on the justiciability of the claims against the Legislators in
25 this action.

26

1 As already noted, analogies to the United States Constitution’s Speech and Debate
2 Clause are probably not very helpful, but Plaintiffs will offer one here. In dictum, the United
3 States Supreme Court has suggested that the immunity of the Speech and Debate Clause may
4 not apply at all where the challenged action or inaction is solely that of members of Congress
5 (no congressional agents involved), and no other remedy is available. *See Powell v.*
6 *McCormack*, 395 US 486, 506 fn 26, 89 S Ct 1944, 23 L Ed 2d 491 (1969).

7 As part of their argument, the Legislators allude to a “series of other events,” which
8 they say they cannot compel, that would supposedly be required as part of the relief Plaintiffs
9 seek. Motion to Dismiss, page 7. In fact, their list is a series of straw men:

10 (1) Convening the Legislature in emergency session. Plaintiffs make no such
11 claim for relief. It may be that this Court would order that as part of its final
12 judgment, but Plaintiffs have not called for it. With the Oregon Legislature
13 present in this action through its representative officers, the judgment will run
14 to the whole body, so the Court could properly order the legislature to call
15 itself into special session. *See, e.g., Rose v. Council for Better Education*, 790
16 SW2d at 205; *Seattle School District v. State*, 90 Wn2d at 486.

17 (2) Passing a new K-12 appropriation bill. The Legislators are making a
18 bootstrap argument. The Oregon Legislature is before the Court here, through
19 its representative officers. If their Motion to Dismiss is denied, the way will
20 be clear for the Court to enter a judgment calling upon the legislature as a
21 body to appropriate funds in accordance with Article VIII section 8 of the
22 Oregon Constitution.

23 (3) Obtaining the signature of the Governor. The Governor is not a party to
24 this action because Oregon Constitution Article VIII sections 8 and 3 do not
25 require the Governor to do anything. *See* section 8: “The Legislative
26 Assembly shall appropriate * * *;” and section 3: “The Legislative Assembly

1 shall provide by law * * *.” The Governor would veto an appropriation under
2 those sections at his or her peril, but the constitutional provisions here at issue
3 do not mandate a gubernatorial signature, and Plaintiffs are not asking for one.

4 **B. Public School Finance is a Justiciable Legal Issue.**

5 The Legislators do not argue that the subject matter of this action is nonjusticiable,
6 only that Plaintiffs’ claims are nonjusticiable as to them individually. However, to the extent
7 that the Legislators might assert that Plaintiffs could not proceed even if all 90 members of
8 the legislature were served, the argument would go nowhere. Courts in several other states
9 have directly addressed the justiciability of constitutional school funding claims, and they
10 have ruled that the courts must hear them.

11 The Idaho Supreme Court, for example, has held that a constitutional claim based on
12 inadequacy of school funding presents a justiciable issue. *Idaho Schools For Equal*
13 *Educational Opportunity v. Evans*, 123 Idaho 573, 583, 850 P2d 724 (1975). The Montana
14 Supreme Court recognizes that the judiciary is “the final guardian and protector of the
15 [constitutional] right to education.” *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 326
16 Mont 304, 310, 109 P3d 257, 260 (2005). The Texas Supreme Court has held that
17 “separation of powers does not preclude the judiciary from determining whether the
18 Legislature has met its constitutional obligation to the people to provide for public
19 education.” *Neely v. West Orange-Cove Consolidated Indep. Sch. Dist.*, 176 SW3d 746,
20 780-781 (Tex 2005). The Arkansas Supreme Court has reached the same conclusion,
21 “refus[ing] to close [its] eyes or turn a deaf ear to claims of a dereliction of [legislative] duty
22 in the field of education.” *Lake View Sch. Dist. No. 25 v. Hucakbee*, 351 Ark 31, 54, 91
23 SW3d 472, 483 (2002).

24 Of special relevance here are the words of the Wyoming Supreme Court in *Campbell*
25 *County Sch. Dist. v. State*, 907 P2d 1238, 1264 (Wyo 1995):

26

1 “Although this court has said the judiciary will not encroach into the
2 legislative field of policy making, as the final authority on constitutional
3 questions the judiciary has the constitutional duty to declare unconstitutional
4 that which transgresses the state constitution. When the legislature’s
transgression is a failure to act, our duty to protect individual [educational]
rights includes compelling legislative action required by the constitution.”
(citation omitted).

5 **Conclusion**

6 The doctrine of legislative immunity, either at common law or as embodied in the
7 Oregon Constitution, protects legislative bodies and their members in the performance of
8 legitimate legislative functions, but not in the dereliction of their constitutional obligations.
9 The Legislators, and the Oregon Legislature they represent here, are not immune from the
10 claims in this action.

11 Also, as representatives of the Oregon Legislature, the Legislators are properly before
12 this Court. Good sense and precedents from similar actions elsewhere compel the conclusion
13 not only that the claims are justiciable on their merits, but also that the Legislators are the
14 proper parties to defend those claims.

15 The Motion to Dismiss should be denied.

16 DATED: June 20, 2006.

STOEL RIVES LLP

17
18
19 _____
David H. Angeli, OSB No. 02024
dhangeli@stoel.com
Robert D. Van Brocklin, OSB No. 87130
rdvanbrocklin@stoel.com
James N. Westwood, OSB No. 74339
jnwestwood@stoel.com
Robin B. Skarstad, OSB No. 04471
rbskarstad@stoel.com

20
21
22
23
24 Trial Attorney: David H. Angeli
Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing PLAINTIFFS' ANSWERING
3 MEMORANDUM TO MOTION TO DISMISS FILED BY SENATORS COURTNEY
4 AND BROWN on the following named persons on the date indicated below, by:

5 [] mailing with postage prepaid

6 [] hand delivery

7 [] facsimile transmission

8 [x] overnight delivery

9 to said persons a true copy thereof, contained in sealed envelopes, addressed to said persons
10 at their last-known addresses.

11 Katherine G. Georges
12 Oregon Department of Justice
13 Trial Division
14 Special Litigation Unit
15 1162 Court Street NE
16 Salem, OR 97301

17 Michael H. Simon
18 Christopher L. Garrett
19 Perkins Coie LLP
20 1120 NW Couch, 10th Floor
21 Portland, OR 97209

22 DATED: June 20, 2006.

23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

James N. Westwood, OSB No. 74339

Of Attorneys for Plaintiffs

STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600, Portland, OR 97204
Main (503) 224-3380 Fax (503) 220-2480