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**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 SENATOR
FERRIOLI AND
REPRESENTATIVES MERKLEY,
MINNIS, AND SCOTT**

Introduction

The legislators represented by the Oregon Department of Justice – Senator Ted Ferrioli and Representatives Jeff Merkley, Karen Minnis, and Wayne Scott (hereinafter “the Legislators”) – take an all-or-nothing position in their Motion to Dismiss. They do not argue that they are inadequate representatives of the Oregon Legislative Assembly, nor that Plaintiffs can obtain their ends only by impleading and serving all 90 members of the legislature. Instead, the Legislators argue a single point, that under Article IV section 9 of the Oregon Constitution, they and all other members of the Oregon Legislative Assembly are absolutely and completely immune from any legal actions whatsoever against them as legislators.

The Legislators are mistaken. Legislative immunity insulates the people’s representatives from judicial interference in their discretionary policy decisions, and it relieves them of individual liability for what they do as legislators. Legislative immunity does *not* protect the legislature itself from the obligation to follow the Oregon Constitution. Just as surely as the legislature does not try to re-enact a statute the courts have declared to be

1 unconstitutional, neither can or should the legislature be immune from its obligation to
2 follow a mandate given to it by the Oregon Constitution, and recognized as such by a court.

3 **Oregon Constitution Article IV Section 9 Does Not Confer Absolute Legislative**
4 **Immunity.**

5 We begin with the text of Article IV section 9, which dates from 1857:

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

10 That provision deals with the personal privileges of individual legislators, in their
11 individual capacities, and it is not absolute even at that. A legislator is immune from civil
12 process during and immediately before a legislative session, meaning that at other times a
13 legislator *is* subject to process, in whatever capacity. Article IV section 9 does not speak to a
14 legislator’s immunity for legislative acts at all, except in one respect – to guarantee the
15 freedom of debate on the floor of either house.

16 The Legislators note that “[n]othing about [Plaintiffs’] allegations * * * has any legal
17 or logical connection to the defendant legislators’ individual policy views about any aspect of
18 state funding of K-12 public schools.” Motion to Dismiss, p. 2. Their statement proves too
19 much – the Legislators’ individual policy views are not at issue in any way, and the argument
20 highlights their mistake in invoking Article IV section 9 here. Under the Oregon
21 Constitution the circuit courts have “general jurisdiction, to be defined, limited, and regulated
22 by law in accordance with this Constitution.” Or Const Art VII (Original) sec 1. Unless the
23 Legislators can point to something in Article IV section 9 that specifically limits this court’s
24 jurisdiction over them as representatives of the legislature – something they cannot do in the
25 context of this lawsuit – their motion is lost.

26 ////

1 **Legislative Immunity Does Not Extend to Failure to Follow a Constitutional Mandate.**

2 The Legislators rely on United States Supreme Court cases, so a good starting point
3 for this investigation is *Tenney v. Brandhove*, 341 US 367, 71 S Ct 783, 95 L Ed 1019
4 (1951), cited at page 3 of the Motion to Dismiss. In *Tenney* the Supreme Court held that a
5 congressional enactment, allowing civil remedies against state actors who deprived a person
6 of constitutional rights, did not reach legislator members of a California legislative
7 committee that had investigated the plaintiff for alleged Communist activity. Citing the
8 longstanding “privilege of legislators to be free from arrest or civil process for what they do
9 or say in legislative proceedings” (341 US at 372), the Supreme Court invalidated the statute
10 as applied to the individual state legislators. The Court went on, however, to say:

11 “We have only considered the scope of the privilege as applied to the facts of
12 the present case. * * * We conclude only that here the individual [legislator]
13 defendants and the legislative committee were acting in a field where
legislators traditionally have power to act, and that the statute * * * does not
create civil liability for such conduct.”

14 341 US at 379.

15 A motion to dismiss takes all of a plaintiff’s well pleaded facts as true.
16 *Lourim v. Swensen*, 328 Or 380, 387, 977 P2d 1157 (1999). The Amended
17 Complaint in this action alleges that the Oregon Legislature has failed to observe the
18 requirements imposed upon it by Oregon Constitution Article VIII sections 8 and 3
19 (See Amended Complaint ¶¶ 59, 60).¹ In a legal system where judicial review has
20 been established since at least 1803 and *Marbury v. Madison*, the Legislators here
21 would be hard pressed to declare that disregard of express constitutional mandates is

22 ¹ Art VIII sec 8: “The Legislative Assembly shall appropriate in each biennium a
23 sum of money sufficient to ensure that the state’s system of public education meets quality
goals established by law * * *.”

24 Art VIII sec 3: “The Legislative Assembly shall provide by law for the establishment
25 of a uniform, and general system of Common schools.”

26

1 “a field where legislators traditionally have power to act,” or that legislators as a
2 body or even individually have the discretion to disregard the organic law under
3 which they are constituted.

4 It bears repeating that the Legislators are not being sued here in their
5 individual capacities, they are not subject to personal liability for anything, they
6 have not been served during a legislative session, and they are not being questioned
7 with regard to anything they have said or might say in legislative debate. Their sole
8 authority for dismissal, Article IV section 9 of the Oregon Constitution (*supra*
9 page 2), offers them none of the absolute protection they claim here.

10 One of the only two Oregon cases relied on by the Legislators, *Adamson v.*
11 *Bonesteele*, 295 Or 815, 818, 671 P2d 693 (1983), holds that notwithstanding the
12 common law privilege of legislators, a city councilman may be sued for defamatory
13 comments made outside of the council assembly. The holding lends weight to the
14 textually clear conclusion that Article IV section 9, like the common law privilege,
15 is not absolute and would not protect a legislator in a similar circumstance.

16 The Legislators point to one other Oregon case, *Coalition for Equitable*
17 *School Funding, Inc. v. State*, 311 Or 300, 811 P2d 116 (1991), noting that the
18 circuit court there had dismissed individual legislators as parties but also that the
19 Supreme Court expressly declined to rule on the question. 311 Or at 305 fn 6. The
20 briefs in the *Coalition for Equitable School Funding* case reveal that the parties did
21 not meaningfully discuss Oregon Constitution Article IV section 9, which is the
22 Legislators’ only ground for dismissal here. Moreover, the plaintiffs in that case
23 pointed to cases where suits against legislators in their representative capacities had
24 been upheld by state supreme courts.² The State did not respond to the citations. If

25 ² *Seattle School District No. 1 v. State*, 90 Wn2d 476, 585 P2d 71 (1978); *Rose v.*
26 *Council for Better Education, Inc.*, 790 SW2d 186 (Ky 1989).

1 the supreme court had reached the question in that case, it is quite clear that it would
2 have ruled the legislators, as representatives of the Oregon Legislative Assembly,
3 were proper parties to the action.

4 **Conclusion**

5 We return to the only argument the Legislators are making to support
6 dismissal, that because of Oregon Constitution Article IV section 9, *no* legislator
7 may be brought before a court, in any capacity, for any act or failure to act by the
8 legislature, including failure to follow a constitutional mandate. Textually and
9 legally, the argument has no foundation. A legislature acts only through its
10 members, and the Legislators do not claim that as its elected leaders they are
11 improper representatives of the legislature. Moreover, legislators have been
12 impleaded in other states in just this context.³ The sole point the Legislators make
13 here, however – that Article IV section 9 gives them absolute immunity from suit –
14 is plainly mistaken. Their Motion to Dismiss should be denied.

15

16 DATED: June 20, 2006.

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³ See *Seattle School District No. 1* and *Rose* (*supra* page 4, fn 2).

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing PLAINTIFFS' ANSWERING
3 MEMORANDUM TO MOTION TO DISMISS FILED BY SENATOR FERRIOLI AND
4 REPRESENTATIVES MERKLEY, MINIIS, AND SCOTT on the following named
5 persons on the date indicated below, by:

6 [] mailing with postage prepaid

7 [] hand delivery

8 [] facsimile transmission

9 [x] overnight delivery

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

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