No. 23-4292

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS LINTHICUM; BRIAN J. BOQUIST,

Plaintiffs-Appellants,

REJEANA JACKSON; KLAMATH COUNTY REPUBLICAN CENTRAL COMMITTEE; JOHN SWANSON; POLK COUNTY REPUBLICAN CENTRAL COMMITTEE; CEDRIC HAYDEN; JOHN LARGE; LANE COUNTY REPUBLICAN CENTRAL COMMITTEE,

Plaintiffs,

v.

ROB WAGNER, Oregon Senate President, individually and in his official capacity; LAVONNE GRIFFIN-VALADE, Oregon Secretary of State, in her official capacity,

Defendants-Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLEES' BRIEF

INTRODUCTION

In Oregon, efforts by minority-party legislators to deny quorum—often called "legislative walkouts"—are increasingly common and disruptive. Under Oregon's Constitution, neither the House nor the Senate can transact business without two-thirds of members present. Between 2019 and 2021, minority-party legislators walked out and denied quorum on five separate occasions, including a walkout that shut down the 2021 regular session after the legislature had passed only three bills. In response, voters overwhelmingly passed Measure 113 (2022), which amended Oregon's Constitution to disqualify legislators who accrue ten or more unexcused absences from their next term of office.

But the disruption continued. During the 2023 regular session, a minority of the Senate walked out and remained absent for six weeks—the longest legislative walkout in Oregon's history. Legislative business ground to a halt, once again threatening to shut down the session, with the fate of key legislation and essential budget bills in doubt. Given those consequences, the Senate President put all members on notice that he would excuse absences only in extraordinary circumstances. Despite that warning, ten senators remained absent for weeks, each accruing more than enough absences during the walkout

to disqualify them from their next term. When some of them attempted to run for reelection anyway, Oregon's Secretary of State deemed them ineligible, and rejected their candidate filings on that basis.

Two of those senators—Senators Brian Boquist and Dennis Linthicum—now ask the federal courts to intervene. They argue that they have a First Amendment right to use legislative walkouts as a means of political protest and, as a result, that the Senate cannot punish them for refusing to carry out their legislative duties. Specifically, plaintiffs contend that the Senate's decision not to excuse their absences, and the Secretary of State's reliance on that decision, amount to First Amendment retaliation. They seek an injunction that would allow them to run for reelection, for an office they are otherwise barred from holding under Oregon's Constitution.

The district court denied that relief, for good reason. Plaintiffs' claims find no support in the law or American legislative traditions. Under controlling Supreme Court precedent, legislators do not have a First Amendment right to abscond from their official duties. And legislative bodies have broad authority to regulate and discipline member conduct. Moreover, the relief plaintiffs seek—the second-guessing of a core legislative act by the federal courts—is wholly improper in our federal system and fundamentally inconsistent with separation of powers. For those reasons, this court should affirm.

STATEMENT OF JURISDICTION

Defendants agree with plaintiffs' statement of jurisdiction. (*See* App. Br. 3).

ISSUE PRESENTED FOR REVIEW

Whether the district court acted within its discretion by denying plaintiffs' motion for a preliminary injunction, based on its conclusions that legislators do not have a First Amendment right to use legislative walkouts as a means of protest, and that other factors weigh against enjoining plaintiffs' disqualification from office under Oregon's Constitution.

STATEMENT OF THE CASE

A. Statement of Facts[1]

1. In response to legislative walkouts, Oregon voters adopted Measure 113, which disqualifies legislators with ten or more unexcused absences from serving their next term of office.

The Oregon Constitution requires each chamber of the Legislative Assembly to have a quorum of two-thirds of its members to conduct business. Or. Const. art. IV, § 12. Because two-thirds of members must be present, a group of more than one-third of members can halt business through their absence. When a quorum is absent, the Oregon Constitution allows a smaller

[1] The authorities and sources cited in the following Statement of Facts were cited to the district court and were not contested by plaintiffs.

number of legislators present to "compel the attendance of absent members." *Id.*

Although efforts by a minority of legislators to deny quorum have occurred sporadically throughout Oregon's history,[2] the frequency of legislative walkouts has increased in recent years, particularly after a 2010 constitutional amendment limiting the duration of regular sessions of the Legislative Assembly. *See* Or. Const. art. IV, § 10. In May 2019, Senate minority members walked out for four days to block a school revenue bill, returning only after the Governor and legislative leaders agreed to not advance bills addressing gun safety and vaccination exemptions.[3] The next month, senators engaged in a

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[2] *See, e.g.*, Thomas C. McClintock, *Seth Lewelling, William S. U'Ren and the Birth of the Oregon Progressive Movement*, 68 Oregon Hist. Quarterly 196, 210–14 (1967) (recounting 1897 walkout by House members that blocked the reelection of an incumbent United States senator); Tracy Loew, *Oregon Legislators in the Minority have often used Walkouts as Leverage*, Statesman J. (June 20, 2019), *available at* https://tinyurl.com/4nknrd2m (summarizing Oregon legislative walkouts that occurred in 1971, 1995, 2001, 2007, and 2019).

For ease of reading, this brief uses short links when citing materials that are publicly available on the internet, all of which were last accessed on the date this brief was filed.

[3] Loew, *supra* note 2.

prolonged walkout to block climate-change legislation.[4] In February 2020, House minority members engaged in a session-ending walkout to block another climate-change bill; as a result, the legislature passed only three bills during the session.[5] In February 2021, Senate minority members walked out to object to the Governor's COVID-19 emergency response.[6] And later that year, House minority members walked out once again, delaying passage of legislative redistricting plans.[7] In each instance, the legislature could not conduct its business until the walkout ended and a quorum was present.

Following those walkouts, Oregon voters approved Measure 113 (2022) with 68 percent of the vote, including majorities in 34 of 36 counties statewide,

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[4] Julie Turkewitz, *Oregon Climate Walkout Left Republicans in Hiding, Statehouse in Disarray*, N.Y. Times (June 28, 2019), *available at* https://tinyurl.com/3syw358m.

[5] Connor Radnovich, *2020 Oregon Legislature's Final Tally: 3 Bills Passed, 255 Abandoned*, Statesman J. (Mar. 7, 2020), *available at* https://tinyurl.com/77nrycbc.

[6] Hillary Borrud, *Oregon Senate Republicans Walk Out for 3rd Straight Year, citing Governor's COVID-19 Restrictions*, Oregonian (Feb. 25, 2021), *available at* https://tinyurl.com/567c2dap.

[7] Dirk VanderHart, *Oregon Lawmakers Pass Plans for New Political Maps, After Republicans End Boycott*, Oregon Public Broadcasting (Sept. 27, 2021), *available at* https://tinyurl.com/5af8pjrk.

in urban and rural areas alike.[8] That measure added the following underlined language to Article IV, section 15, of the Oregon Constitution:

> Section 15. Punishment and expulsion of members. Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause. Failure to attend, without permission or excuse, ten or more legislative floor sessions called to transact business during a regular or special legislative session shall be deemed disorderly behavior and shall disqualify the member from holding office as a Senator or Representative for the term following the election after the member's current term is completed.[9]

According to the Yes on Measure 113 campaign, the measure was a response to the increase in legislative walkouts in recent years, and the purpose of the measure was to impose "real consequences" when legislators "don't show up to do the job we elected them to do"[10]—a purpose that mirrored arguments in the voters' pamphlet and those reported in the media.[11] *See also State v. Sagdal*,

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[8] Oregon Secretary of State, November 8, 2022, General Election Abstract of Votes, at 29, *available at* https://tinyurl.com/42e5susw.

[9] Official Voters' Pamphlet, General Election, Nov 8, 2022, 65 (Marion County version), *available at* https://tinyurl.com/2p9ecm34.

[10] Hold Politicians Accountable (Yes on 113) website (archived July 6, 2022), *available at* https://tinyurl.com/5uawkhuy.

[11] *See, e.g.*, Official Voters' Pamphlet, *supra* note 9, at 66–67 (argument submitted by Tan Perkins, Vote Yes On 113) ("[B]y voting YES on Measure 113, we can come together to create real consequences for politicians who want special treatment when they skip work.").

343 P.3d 226, 228 (Or. 2015) (when interpreting constitutional amendments adopted by initiative, Oregon courts examine "the text, context, and legislative history of the amendment to determine the intent of the voters").

2. The Oregon Senate adopted rules governing member attendance and excused-absence requests.

In January 2023, the Senate adopted its Rules for the 82nd Legislative Assembly, the first session to convene after voters adopted Measure 113.[12] (SER-25); *see also* Or. Const. art. IV, § 11 (empowering each legislative chamber to "choose its own officers" and to "determine its own rules of proceeding"). Those rules require senators to attend all floor sessions unless an excused absence is approved by the Senate President in writing:

> A member shall attend all sessions of the Senate unless excused by the President. A request by a member to be excused from a session shall be in writing. The President shall indicate approval or disapproval of the request in writing. The Journal will record on each roll call all members "present," "excused," or "absent."

Senate Rule § 3.10(1). In other words, the Senate President—the presiding officer of the chamber who is elected by a majority of members at the beginning of the session, Senate Rule § 7.01(1)—determines in the first instance whether particular absences are excused. Senate Rule § 3.10(1). That

[12] The current version of the Senate Rules is available on the Secretary of the Senate's webpage at https://tinyurl.com/2by95v3w.

determination is then communicated to the senator. *Id.* If the senator does not attend, the Senate Journal records the senator as "excused" or "absent." *Id.* And like other "questions of order," the Senate President's decision on an excused-absence request is "subject to appeal by any two members." *See* Senate Rule § 7.10(3); Paul Mason, Mason's Legislative Manual § 221(i) (2020) (listing the "[a]ccuracy of the journal and records of the house" as a question of the privilege of the house); *id.* § 240(1) ("The proper method of taking exception to a ruling of a presiding officer is by appeal."); *see also* Senate Rule § 2.01 ("*Mason's Manual of Legislative Procedure* shall apply to cases not provided for by the Oregon Constitution, the Senate Rules, custom of the Senate or statute.").

3. Several minority-party senators engaged in a prolonged walkout during the 2023 legislative session.

Notwithstanding the passage of Measure 113, on May 3, 2023, ten minority-party senators (including Senators Boquist and Linthicum) staged another walkout.[13] That walkout was in part based on the senators' opposition to House Bill 2002 (a bill focused on reproductive health rights and gender-affirming healthcare) and House Bill 2005 (a bill focused on gun safety).

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[13] Ben Botkin and Julia Shumway, *Oregon Senate Republicans, Independent Stage Walkout as Divisive Bills Await Votes*, Oregon Capital Chronicle (May 3, 2023), *available at* https://tinyurl.com/mud65d49.

(SER-96–98, 167, 169, 171, 173, 175, 177).[14] Because two other members were excused that day, the Senate did not have the 20 lawmakers needed for a quorum. (SER-44).

Two days after the walkout began, Senate President Rob Wagner announced that requests for excused absences for May 6, 2023, onward "would be granted only in 'extraordinary circumstances.'" (SER-18). President Wagner determined that standard was necessary "because the Legislative Assembly was not able to conduct its work without a quorum." *Id.* In particular, the extraordinary-circumstances standard would ensure that the Senate had quorum to fulfill its constitutional duties, including its obligation to fund state government. *Id.* Consistent with that policy, on May 5, 2023, President Wagner revised prior approvals of member requests for absences beginning on and following May 6, 2023, which included absences for a family event, a garden show, a family member's graduation, and to care for parents. *Id.* President Wager applied that policy to majority-party and minority-party senators alike. (*See* SER-61–62 (denying two excused-absence requests from a majority-party senator)).

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[14] *See also Oregon Senate Republicans Stage Walkout*, KGW (May 3, 2023), https://tinyurl.com/49k58j5k.

The walkout left the Senate without a quorum for six weeks. Most absent senators returned on June 15, 2023, after reaching an agreement with legislative leadership.[15] But by then, ten senators had accrued ten or more unexcused absences. (SER-77).

4. Plaintiffs each accrued more than ten unexcused absences during the legislative walkout.

The two plaintiff senators who are parties to this appeal each accrued more than ten unexcused absences as a result of their walkout during the 2023 legislative session, disqualifying them from their next term of office. (SER-77); *see also* Or. Const. art. IV, § 15.

Senator Boquist had 30 unexcused absences, all of which occurred between May 3, 2023—the first day of the walkout—and the end of the legislative session on June 25, 2023. (SER-77). For 19 unexcused absences, his sole excuse was a desire to work with constituents in his district to protest allegedly "unlawful" actions by the Senate President and the Secretary of the Senate—in particular, the Senate's consideration and enactment of bills that Senator Boquist believed were not "plainly worded." (SER-83–88, 90–92, 96–101 (written requests for May 8–11, 15–18, 24–25, 30–31, and June 1, 16, 20–

[15] Lauren Dake and Dirk VanderHart, *Oregon Lawmakers Make Deal to End Senate Walkout*, Oregon Public Broadcasting (June 15, 2023), *available at* https://tinyurl.com/ja3pkx3k.

24, 2023)). For seven unexcused absences, Senator Boquist's written requests included both protest and other reasons that conflicted with floor sessions, such as illness and medical issues, a meeting with the Governor, or mass at his church. (SER-80–82, 89, 102 (written requests for May 3–7, 22, and June 25, 2023)). Additionally, two unexcused absences were to attend a previously scheduled legislative meeting in Eastern Oregon.[16] (SER-95 (written request for June 7–8, 2023)).

Senator Linthicum had 32 unexcused absences between May 3, 2023, and the end of the session. (SER-77). For 14 of those absences, his sole excuse was "protesting" the Senate's purported failure to comply with rules and statutes, or "working with constituents" regarding allegedly "unlawful, unconstitutional actions" of the majority-party caucus. (SER-114–15, 137–48, 161–62, 166–77 (written requests for May 3, 23–25, 30–31, and June 1, 15, 20–25, 2023)). For ten unexcused absences, Senator Linthicum's written requests included a combination of protest and non-protest reasons, such as health issues relating to hypertension and diabetes, cold and flu symptoms, or obligations on his ranch. (SER-123–36, 149–60, 163–65 (written requests for May 15–18, 22, and

[16] Senator Boquist does not appear to have submitted written requests to be excused for two of his absences, on May 23 and June 15, 2023. (*See* SER-77–102).

June 5–8, 16, 2023); *see also* SER-116 (written request for May 4–22, 2023, citing health reasons)). Eight of the unexcused absences involved multiple overlapping requests based solely on ongoing health issues.[17] (SER-116–17, 119–22 (written requests for dates that include May 4–11, 2023)).

In addition to those unexcused absences, Senators Boquist and Linthicum were excused from some floor sessions. Prior to the walkout, Senator Boquist was excused for a medical procedure, and to speak to a transportation forum. (SER-78–79 (written requests for March 31 and April 27, 2023)). Senator Linthicum was excused for a medical appointment, inclement weather, "personal family obligations," and "[p]ersonal business" in his district. (SER-109–13 (written requests for January 19, February 22–23, April 13, and April 27, 2023)). And during the walkout, Senator Boquist was excused for two days when a waterline ruptured on his rural property, requiring emergency repairs. (SER-93–94 (written requests for June 5–6, 2023)).

[17] Senator Linthicum submitted an additional written request for May 7 and 14, 2023, seeking excused absences to attend "religious faith services." (SER-118). President Wagner did not take action on that request because he had already denied Senator Linthicum's excused absence request for May 7 on a separate form that cited health reasons. *Id.* The Senate did not meet on May 14, 2023.

5. The Secretary of State determined that Measure 113 bars plaintiffs from running for reelection.

Under Oregon law, the Secretary of State is the filing officer for declarations of candidacy filed by candidates for state senator. Or. Rev. Stat. §§ 249.002(10), 249.035(1). If the Secretary determines that a "candidate will not qualify in time for the office if elected, the name of the candidate may not be printed on the ballots." Or. Rev. Stat. § 254.165(1); *see also State ex rel. Kristof v. Fagan*, 504 P.3d 1163, 1172–73 (Or. 2022) (interpreting that statute as entrusting the Secretary with "the responsibility of determining, in the first instance, whether a prospective candidate is qualified to appear on the ballot"); (SER-105 (opinion of Chief Counsel, Oregon Department of Justice General Counsel Division, confirming the Secretary's authority to reject declarations of candidacy filed by legislators barred by Measure 113)).

In August 2023, the Secretary of the Senate provided the Secretary of State's Elections Division staff a memorandum documenting the "unexcused absences recorded for senators during the 2023 Regular Session." (SER-76–77). In reliance on that memorandum, the Secretary determined in September 2023 that Senators Boquist and Linthicum did not qualify for the office of state senator for the 2024 election under Article IV, section 15, of the Oregon Constitution, as amended by Measure 113, and rejected their candidacy

declarations on that basis. (SER-103, 179; *see also* SER-104, 180–86 (declining to reconsider that determination)).

B. Procedural History

In November 2023, nine plaintiffs—Senators Boquist and Linthicum, Senator Cedric Hayden (whose current term does not expire until 2027), one voter in each of their districts, and a county political party in each of their districts—filed this 42 U.S.C. § 1983 action against the Senate President and the Secretary of State.[18] (SER-195–205). The complaint asserts free speech retaliation, freedom of association, and free exercise claims under the First Amendment, and due process and equal protection claims under the Fourteenth Amendment. (SER-201–04). Plaintiffs seek declaratory and injunctive relief, and nominal damages. (SER-204–05).

On the same day that they filed their complaint, plaintiffs moved for a preliminary injunction. (SER-187–94). That motion focused on only one of the claims—the First Amendment retaliation claim—with respect to Senators

[18] Separately, five senators who accrued ten or more unexcused absences during the 2023 legislative session filed a state-court action in August 2023, challenging the Secretary of State's interpretation of Measure 113 as barring those senators from their immediate next term of office. That action—focused exclusively on state-law grounds—was argued before the Oregon Supreme Court on December 14, 2023, and remains pending at this time. *See Knopp v. Griffin-Valade*, No. S070456 (Or.).

Boquist and Linthicum, whose legislative seats are up for election in 2024. *Id.* That claim alleged that the Senate President refused to excuse the plaintiff senators' absences in retaliation against their participation in the walkout, and that the Secretary of State based her disqualification determination on that retaliatory act. (SER-201 ¶ 21). Plaintiffs requested an order requiring the Secretary of State to place Senators Boquist and Linthicum on the 2024 ballot despite their disqualification under the Oregon Constitution. (SER-188).

After a hearing, the district court denied plaintiffs' motion in December 2023. (ER-3–18). Applying the factors from *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the district court first concluded that plaintiffs had established neither a likelihood of success on the merits nor serious questions going to the merits of their First Amendment retaliation claim. (ER-11–15). It noted that a legislator's refusal to attend mandatory floor sessions is not constitutionally protected activity because it is an exercise of the legislator's official power, and "'a legislator has no right to use official powers for expressive purposes.'" (ER-13–14 (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011))). The court also pointed to the long-established ability of American legislative bodies to compel the attendance of absent members, including by arrest or imprisonment, if necessary. (ER-14–15 (citing *Kilbourn v. Thompson*, 103 U.S. 168, 190

(1880))). In light of those traditions, the court reasoned that it could not see "how a lesser penalty, such as temporary disqualification, or the threat of temporary disqualification, for the same conduct would constitute a violation" of plaintiffs' free speech rights. (ER-15).

The district court concluded that the other *Winter* factors similarly weighed against a preliminary injunction. (ER-15–17). Because plaintiffs were not likely to prevail on the merits, the court reasoned that they also had failed to establish irreparable harm from the purported constitutional violation. (ER-15–16). And even if plaintiffs could establish irreparable harm, "that showing would [be] outweighed by the other *Winter* factors." (ER-16). Additionally, the court concluded that the balance of the equities and public interest factors weighed against the requested injunction. (ER-16–17). It noted that Oregon voters passed Measure 113 by "an overwhelming margin" to "curb the use of legislative walkouts," and that the interest of voters in "Measure 113 working as intended" outweighed plaintiffs' interests in circumventing the measure's disqualification. (ER-17).

For those reasons, the district court entered an order denying plaintiffs' motion for a preliminary injunction. (ER-18). Plaintiffs appealed. (ER-53–56).

SUMMARY OF ARGUMENT

The district court properly denied preliminary injunctive relief in this case. Most notably, plaintiffs are unlikely to prevail on the merits, for three reasons. First, they do not have a viable claim for First Amendment retaliation because, under controlling Supreme Court precedent, a legislator's absence from floor sessions is official conduct, not constitutionally protected speech. Second, to the extent plaintiffs' arguments on appeal implicate their ballot-access claims under the First and Fourteenth Amendments, those arguments were not preserved below, and lack merit because Measure 113 sets forth a neutral candidate disqualification. Third, legislative immunity bars plaintiffs from challenging the Senate's refusal to excuse their absences, the predicate determination underlying their claims.

The other factors also weigh against preliminary injunctive relief. As the district court concluded, even if plaintiffs could show irreparable harm, the balance of the equities and public interest factors overwhelmingly disfavor an injunction here. Oregon's voters amended the state constitution to prohibit the very conduct at issue in this case, to ensure a functioning legislative branch. Accordingly, the State would suffer irreparable injury if federal courts were to enjoin the enforcement of Measure 113, allowing plaintiffs to run for an office they are constitutionally barred from holding.

For those reasons, this court should affirm.

STANDARD OF REVIEW

This court reviews a denial of a preliminary injunction for abuse of discretion, a standard of review that is "limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam) (citation omitted). The district court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. *K. W. ex rel. D. W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015). The purpose of the inquiry is not to "determine the ultimate merits," but rather to "determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Saravia v. Sessions*, 905 F.3d 1137, 1141–42 (9th Cir. 2018) (citation and quotation marks omitted). Additionally, this court may affirm on any ground supported by the record. *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (affirming the denial of a motion for preliminary injunction on a basis not relied upon by the district court).

ARGUMENT

A preliminary injunction is an "extraordinary remedy," appropriate only "upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555

U.S. at 22. Such relief is warranted only if (1) plaintiff is "likely to succeed on the merits"; (2) plaintiff is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [plaintiff's] favor"; and (4) "an injunction is in the public interest." *Id.* at 20 (citation omitted); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (preliminary injunctive relief is also appropriate under an alternative "serious questions" test, if there are "serious questions going to the merits," the balance of hardships "tips sharply toward the plaintiff," and the other two elements of the *Winter* test are met). Preliminary injunctive relief is inappropriate unless plaintiff makes a "clear showing" that those elements are satisfied. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

The district court properly concluded that is not the case here. As explained below, plaintiffs have not satisfied the elements from the *Winter* test. Thus, the district court did not abuse its discretion by denying preliminary injunctive relief.

A. Plaintiffs are unlikely to succeed on the merits.

As an initial matter, plaintiffs are unlikely to prevail on their claims. (*See* ER-11–15 (district court opinion, concluding as much)). Plaintiffs' motion focuses solely on their First Amendment retaliation claim, and yet they cannot establish that walkouts are constitutionally protected conduct. Their arguments

regarding ballot access pertain to other claims that were not preserved below and, in any event, lack merit. And finally, legislative immunity bars plaintiffs from challenging the Senate's decision not to excuse their absences, the predicate determination underlying their claims.

1. Refusing to attend legislative floor sessions is not constitutionally protected activity for a First Amendment retaliation claim.

When seeking relief under the First Amendment, plaintiffs have the threshold burden to establish that they engaged in constitutionally protected activity. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). They cannot do so here. Legislators do not have a First Amendment right to abscond from legislative floor sessions or the performance of other official duties, regardless of their motives for doing so or the message they seek to convey.

As the Supreme Court's seminal decision in *Carrigan* makes clear, legislators have no right to use their official functions as a means of expression. 564 U.S. at 125–28. In that case, a state ethics commission investigated and censured a city councilor after he refused to abstain from voting on a matter for which he had a conflict of interest. *Id.* at 119–20. The city councilor sought review, arguing that casting votes is protected activity under the First Amendment. *See id.* at 120–21. But the Supreme Court disagreed, holding that

"a legislator has no right to use official powers for expressive purposes." *Id.* at 127. Instead, whenever a legislator performs a legislative function that is not inherently expressive and serves an "independent governmental purpose," that act is outside the scope of the First Amendment regardless of any message the official intends to convey. *Id.* In other words, a governmental act does not become expressive "simply because the governmental actor wishes it to be so." *Id.* at 128.

In reaching that conclusion, the Supreme Court reasoned from the nature of official conduct and long-standing traditions. *Id.* at 122–28. The court emphasized that, unlike private citizens exercising personal rights, legislators perform official functions on behalf of those they represent—*i.e.*, "as trustee for [their] constituents, not as a prerogative of personal power." *Id.* at 125–26. As a result, when the "expressive value" of a legislator's action is "not created by the conduct itself but by the speech that accompanies it," regulation of the underlying conduct does not implicate the First Amendment. *Id.* at 127. Additionally, the court noted that a "universal and long-established tradition" of regulating certain conduct "creates a strong presumption" that such regulation is constitutional. *Id.* at 122. In *Carrigan*, the existence of recusal and conflict-of-interest rules for government officials—from the founding era to the present—

suggested that First Amendment protections do not extend to a legislator's act of voting. *Id.* at 122–25.

The same is true here. Like casting a vote, showing up to a mandatory floor session is a quintessentially legislative function, and not inherently expressive. (*See* ER-13–14 (district court's opinion, concluding as much)). Attendance during floor sessions serves an important, "independent governmental purpose" to the functioning of the legislative branch—without quorum, the legislature cannot transact business and legislators are incapable of exercising their powers and duties on behalf of constituents. *See Carrigan*, 564 U.S. at 127; Or. Const. art. IV, § 12 ("Two thirds of each house shall constitute a quorum to do business[.]"). In that sense, a legislator's decision to attend or not attend floor sessions can have a profound legal effect on the legislative process itself. And because any "expressive value" associated with a legislator's presence or absence from the floor is "not created by the conduct itself but by the speech that accompanies it," a legislative body does not implicate First Amendment concerns when it regulates or compels member attendance, or when it punishes members who are absent from legislative business. *See Carrigan*, 564 U.S. at 127. This case is a straightforward application of *Carrigan*.

Indeed, as the district court recognized, "long-established tradition" clearly indicates that legislators do not have a right to refuse to attend floor sessions and can be punished for doing so, regardless of the message they intend to convey. (ER-14–15 (quoting *Carrigan*, 564 U.S. at 122)). Since the dawn of the Republic, the federal Constitution and most state constitutions have authorized legislative bodies to compel the attendance of absent members—by force or imprisonment, if necessary. *See, e.g.*, U.S. Const. art. I, § 5, cl. 1; Or. Const. art. IV, § 12; *Kilbourn*, 103 U.S. at 190 (penalty for compelling the attendance of absent members of Congress "may be imprisonment"); *Schultz v. Sundberg*, 759 F.2d 714, 716–17 (9th Cir. 1985) (Alaska Senate President's authority to compel the attendance of absent legislators included an ability to direct sergeant-at-arms to use "show of force"); *In re Abbott*, 628 S.W.3d 288, 292–93, 296–97 (Tex. 2021) ("physical restraint of absent members" permitted by Texas Constitution and not barred by federal Constitution). The district court correctly rejected plaintiffs' novel suggestion that they enjoy a First Amendment right to use their legislative offices to prevent the legislature from functioning, when such conduct has been punishable by force and imprisonment for hundreds of years.

Plaintiffs' arguments to the contrary are without merit. First, they attempt to distinguish *Carrigan*, arguing that its rule applies "narrowly" to

instances in which legislators are "considering and voting upon bills." (App. Br. 14–16). But *Carrigan* says no such thing. Instead, that case broadly applies whenever legislators use "official powers for expressive purposes" or employ "governmental mechanics to convey a message." 564 U.S. at 127; *accord Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 680 (9th Cir. 2014), *on reh'g en banc*, 782 F.3d 520 (9th Cir. 2015) ("*Carrigan* establishes that the *legal authority attaching to a legislative office* is not an aspect of the freedom of speech protected by the First Amendment." (Emphasis added.)). The Oregon Constitution provides legislators with the ability to deny quorum and gives the legislature the power to enforce attendance to secure quorum. Or. Const. art. IV, § 12; *see also In re Abbott*, 628 S.W.3d at 292 (noting that similar provision in Texas Constitution "enables 'quorum-breaking' by a minority faction of the legislature" and "likewise authorizes 'quorum-forcing' by the remaining members"). Those powers are not "attenuated from lawmaking," as plaintiffs suggest. (App. Br. 16). Rather, quorum is an essential predicate for lawmaking and denying a quorum has the direct legal effect of leaving Oregon's statutes unamended—the same legal effect as a floor vote that rejects a bill. As a result, efforts to deny and secure quorum are both official acts that are part of the legislative process.

Second, plaintiffs argue that legislators are entitled to the same First Amendment protections as citizens and that walkouts should be protected as protests. (App. Br. 16–17). But neither assertion comports with *Carrigan*. Unlike citizens, legislators are *not* entitled to First Amendment protection when they use official functions to convey a message. *Carrigan*, 564 U.S. at 125–28. And a legislator's motives for doing so are irrelevant. *See id.* at 127 ("[T]he fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech."). Moreover, the cases plaintiffs rely on are inapposite. (*See* App. Br. 16–17). *Bond v. Floyd* involved a legislature's refusal to seat a member-elect based on his prior statements as a citizen; it did not suggest that the First Amendment applies to official acts by legislators. 385 U.S. 116, 118–23, 136–37 (1966). *Boquist v. Courtney* involved floor and media statements by a legislator and did not analyze whether the act of denying quorum is constitutionally protected speech. 32 F.4th 764, 772, 781 (9th Cir. 2022).

Thus, plaintiffs do not have a viable claim. And for good reason: Legislators should not be able to invoke the First Amendment to shut down the legislative process—regardless of whether they are Democratic representatives

in Texas walking out over voting legislation,[19] Republican senators in Oregon walking out to block a reproductive health bill,[20] or a senator in Nebraska's nonpartisan legislature protesting a bill banning gender-affirming care.[21] In all of those circumstances, the Constitution does not give minority-party legislators a First Amendment right to subvert the legislative process and the will of the majority, with the aid of federal courts.

The district court did not abuse its discretion when it concluded that plaintiffs' conduct is not protected by the First Amendment, and that they are unlikely to prevail on their retaliation claim.

2. Plaintiffs' ballot-access arguments were not before the district court and also lack merit.

Plaintiffs also contend that a legislative body cannot punish members for engaging in a walkout by denying them access to the ballot. (App. Br. 17–21). They appear to be arguing that the enforcement of Measure 113 interferes with

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[19] *See* Elizabeth Findell, *Texas Democrats Stage Walkout to Kill Voting Bill*, Wall Street J. (July 12, 2021), *available at* https://tinyurl.com/y5frhjrp.

[20] Mike Baker, *In a Year of Capitol Feuds, Oregon Has a Political Breakdown*, N.Y. Times (June 4, 2023), *available at* https://tinyurl.com/bdfa6dhn.

[21] Ernesto Longoño, *Nebraska's Fight over Transgender Care Turns Personal and Snarls Lawmaking*, N.Y. Times (Mar. 30, 2023), *available at* https://tinyurl.com/yvnj3tz9.

their ability to run for office and the ability of voters to choose their preferred candidates. *See id.* As explained below, those claims lack merit. As a procedural matter, however, the claims are not preserved for appellate review. Plaintiffs' preliminary injunction motion only raised their First Amendment retaliation claim, and the district court's opinion focused exclusively on that claim. (*See* SER-187–94 (plaintiffs' motion); *see also* ER-19–42 (hearing transcript); ER-3–18 (district court opinion); SER-201 (plaintiffs' first claim for relief, alleging First Amendment retaliation)). By contrast, plaintiffs' ballot-access theory goes to their First Amendment freedom of association and Fourteenth Amendment equal protection claims, which they pled in their complaint but did not raise in their motion. (*See* SER-201–04 (plaintiffs' second and fifth claims for relief)). As a result, plaintiffs did not preserve those claims for purposes of this appeal. *See CDK Global LLC v. Brnovich*, 16 F.4th 1266, 1275 (9th Cir. 2021).

Regardless, the claims lack merit. This court applies the *Anderson-Burdick* test to determine the constitutionality of restrictions on eligibility for public office. *Bates v. Jones*, 131 F.3d 843, 846–47 (9th Cir. 1997) (en banc); *see also Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Under that test, the court weighs

> the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the

> plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Bates, 131 F.3d at 846 (citation and quotation marks omitted). Strict scrutiny applies only if the restriction "severely burdens the plaintiffs' rights." *Id.* (citing *Burdick*, 504 U.S. at 434). But if the law instead "imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (citation and quotation marks omitted); *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) (candidates do not have a fundamental right to run for office).

Applying that standard here, the State's interest in requiring legislators to attend mandatory floor sessions far outweighs the modest burden placed on legislators to remain eligible for reelection. Disqualification for unexcused absences is no more burdensome than other neutral eligibility requirements and restrictions on state officeholders—such as term limits, age restrictions, and residency requirements—which "the State certainly has the right to impose." *Bates*, 131 F.3d at 847 (rejecting First and Fourteenth Amendments challenge to lifetime term limits). To remain eligible for reelection, a legislator can still be absent without excuse nine or fewer times each session. As long as they are present, they may protest the legislature's actions however they please,

including by speaking on the floor or entering their protest in the Senate Journal. *See* Or. Const. art. IV, § 26 ("Any member of either house, shall have the right to protest, and have his protest, with his reasons for dissent, entered on the journal."). And unlike lifetime term limits, which *Bates* upheld, Measure 113's disqualification expires after a single term.

On the other hand, as previously explained, the State has a profound interest in ensuring that legislators attend floor sessions. Without a quorum, the legislature cannot function. *See Keefe v. Roberts*, 355 A.2d 824, 827 (N.H. 1976) ("The right of a legislative body to have the attendance of all its members and to enforce such attendance, if necessary, is one of its most undoubted and important functions."); Mason's Legislative Manual § 190(4) ("The absence of the power of a house of a state legislature to compel the attendance of all members at all times would destroy its ability to function as a legislative body."); 1 Joseph Story, Commentaries on the Constitution § 836 (5th ed. 1891) (noting that the compulsion of absent members ensures that "the interests of the nation and the d[i]spatch of business are not subject to the caprice or perversity or negligence of the minority"). For those reasons, were these issues before the court, Measure 113's restrictions would easily survive scrutiny under the First and Fourteenth Amendments.

3. In any event, legislative immunity bars plaintiffs from challenging the Senate's decision not to excuse their absences.

Lastly, the Senate's decision not to excuse plaintiffs' absences is an act protected by absolute legislative immunity from civil suit. Although the district court did not reach that issue, the parties briefed it below. (SER 192 (plaintiffs' motion); SER-64–69 (defendants' response); SER-4–5 (plaintiffs' reply)). This court may affirm on that alternative basis. *See Big Country Foods*, 868 F.2d at 1088.

State legislators are entitled to absolute common-law immunity from civil suits arising from their legislative acts—a privilege that parallels the immunity afforded members of Congress by the Speech and Debate Clause. *Tenney v. Brandhove*, 341 U.S. 367, 372–76 (1951). Legislative immunity extends to actions within the "sphere of legitimate legislative activity"—*i.e.*, any action that is "integral" to legislators' "deliberative and communicative processes," including any conduct and voting by legislators with respect to proposed legislation or "other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 624–25 (1972).

As the Supreme Court's seminal decision in *Tenney* makes clear, absolute immunity attaches to state legislative proceedings, even when legislators allegedly have political or vindictive motives, and even when those

proceedings allegedly violate an individual's constitutional rights. In that case, a non-legislator brought federal civil rights claims against members of a state legislative committee, alleging that those legislators violated his First Amendment free speech rights when they investigated his conduct and required him to testify a day after he urged legislators to cut the committee's funding. 341 U.S. at 369–71. Despite those allegations, the court held that defendants were entitled to immunity because committee investigations fell within "the sphere of legitimate legislative activity." *Id.* at 376–78. It stressed that legislative immunity is absolute: it protects legislators from suit even when they allegedly violate constitutional rights or act on political or "vindictive motives." *Id.* at 371, 377–78. "Courts are not the place for such controversies," unless it is "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.* at 378.

In reaching that conclusion, the Supreme Court reasoned from separation of powers and federalism principles. The court emphasized that legislative immunity has its "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," when Parliament asserted its sovereignty and independence from the crown. *Id.* at 372. Later, at the founding of the American Republic, protection of legislative acts from intrusion by the executive and judicial branches "was deemed so essential for representatives of

the people" that common-law legislative immunity was imported "as a matter of course" by those who framed state and federal constitutions. *Id.* at 372–73; *see also United States v. Johnson*, 383 U.S. 169, 179 (1966) (legislative privilege protects legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary"). Additionally, preventing *federal* courts from interfering with *state* legislative functions was particularly important to the framers, as such intrusion would be an affront to core federalism values. *See Tenney*, 341 U.S. at 376 (expressing skepticism that Congress could constitutionally subject state legislators to civil liability in federal court "for acts done within the sphere of legislative activity").

Notably, the "taproots" of legislative immunity extend to the actions at issue in this case: legislative acts that regulate or discipline member conduct. As Parliament began asserting its independence from the crown, it implemented several measures for internal member discipline, including censure, imprisonment, expulsion, and also punishments of "a more modified character," such as member suspensions. *See* Thomas Erskine May, A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament 43, 49 (London, Charles Knight & Co. Ludgate-Street 1844). American governments imported that understanding of the privilege, affording immunity to legislative disciplinary matters. *See, e.g.*, Mary Patterson Clarke, Parliamentary Privilege in the

American Colonies 184 (1943) (noting that, during colonial times, "[t]he power to discipline [legislators] was more or less assumed as a part of [legislative] privilege"). As a result, the federal Constitution explicitly recognizes the authority of the House and Senate to "punish [their] Members for disorderly Behavior," and the legislatures of forty-six states (including Oregon) have similar powers. *E.g.*, U.S. Const. art. I, § 5, cl. 2; Or. Const. art. IV, § 15; 6 Nat'l Conf. of State Legislatures, Inside the Legislative Process 4–5 (1996).

Accordingly, other circuits have unanimously held that legislators are entitled to absolute immunity when they regulate and discipline member conduct, even when those acts allegedly retaliate against speech.[22] The Fourth

[22] *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 361, 365–67 (6th Cir. 2022) (state legislators entitled to absolute immunity from First Amendment retaliation claim after voting to remove member from party's caucus); *Gamrat v. McBroom*, 822 F. App'x 331, 334 (6th Cir. 2020) (expulsion of a member is legislative activity for which the legislature has exclusive jurisdiction; legislative defendants are entitled to absolute immunity); *McCann v. Brady*, 909 F.3d 193, 194–95, 197–98 (7th Cir. 2018) (state senate minority leader entitled to absolute immunity from First and Fourteenth Amendment claims after expelling legislator from party's caucus); *Rangel v. Boehner*, 785 F.3d 19, 23–24 (D.C. Cir. 2015) (ethics committee members entitled to absolute immunity for disciplinary proceedings that resulted in a member's censure); *Youngblood v. DeWeese*, 352 F.3d 836, 837–38, 840–42 (3d Cir. 2003) (legislative leaders entitled to absolute immunity for claim that they unfairly allocated legislative funds "in retaliation for [a member's] dissent against the party leadership"); *Whitener v. McWatters*, 112 F.3d 740, 741, 745 (4th Cir. 1997) (county board members entitled to absolute immunity from First Amendment retaliation claim after voting to censure member and strip him of his committee assignments).

Circuit's decision in *Whitener v. McWatters* is particularly instructive. *See* 112 F.3d at 743–45. In that case, a member of a county board of supervisors sued for First Amendment retaliation after the board censured him for using abusive language and stripped him of his committee assignments. *Id.* at 741–42. The Fourth Circuit affirmed the dismissal of plaintiff's complaint and held that "a legislative body's discipline of one of its members is a core legislative act" entitled to absolute immunity, even when it implicates speech. *Id.* at 741, 744. The court reasoned that just as legislative speech and voting are protected by absolute immunity, "the exercise of self-disciplinary power is likewise protected." *Id.* at 744. "Absent truly exceptional circumstances, it would be strange to hold that such self-policing is itself actionable in court." *Id.*

That is the case here, too. The Senate President's approval or disapproval of absence requests is a mandatory act essential to the regulation and discipline of member conduct—a core legislative function. The Senate Rules require the Senate President to make that determination, for purposes of carrying out obligations entrusted to the Senate by the Oregon Constitution. *See* Or. Const. art. IV, § 15 (Senate "may punish its members for disorderly behavior" and failure to attend ten or more floor sessions "without permission or excuse" shall "be deemed disorderly behavior" and disqualifies the member from their next term of office); Senate Rule § 3.10(1) ("A request by a member

to be excused from a session shall be in writing. The President shall indicate approval or disapproval of the request in writing."); *see also* Or. Const. art. IV, § 11 (Senate shall "determine its own rules of proceeding"). And those functions, in turn, are essential to ensuring that the Senate has quorum to transact business. Or. Const. art. IV, § 12 (quorum requirement).

Because the Senate President's actions in this case are core legislative acts taken pursuant to powers textually committed to the legislature, he is entitled to immunity *per se* under Supreme Court and Ninth Circuit precedent. *See Gravel*, 408 U.S. at 625 (immunity extends not only to action on proposed legislation, but also to acts "with respect to other matters which the Constitution places within the jurisdiction of either House"); *Schultz*, 759 F.2d at 717 (Alaska Senate President entitled to immunity when compelling attendance of absent members because such act is an "integral legislative function" and was "clearly legislative in nature"). For that reason, the balancing test this court uses in more difficult cases is either inapplicable or adds no value to the analysis.[23] *See Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir.

[23] To date, this court has used *Kaahumanu*'s balancing test to discern the nature of acts performed by officials with both quasi-administrative and quasi-legislative duties. *See Jones v. Allison*, 9 F.4th 1136, 1139–42 (9th Cir. 2021) (parole eligibility regulations adopted by state corrections agency); *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1135–38 (9th Cir. 2012) (qualifications policy for commissioners adopted by court executive

Footnote continued…

2003) (analyzing the nature of an act undertaken by officials with both legislative and non-legislative functions by considering "(1) whether the act involves ad hoc decision making, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation" (citation and quotation marks omitted)).

Regardless, even if immunity turned here on the factors mentioned in *Kaahumanu*, the Senate President's actions satisfy that test, too. In particular, the third and fourth factors—whether the actions are "formally legislative in character" and "bear[] all the hallmarks of traditional legislation," *id.*—are easily met and dispositive, given the weight of the authorities, historical

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(…continued)
committee); *Norse v. City of Santa Cruz*, 629 F.3d 966, 976–77 (9th Cir. 2010) (removal of attendee from city council meetings); *Community House, Inc. v. City of Boise*, 623 F.3d 945, 959–64 (9th Cir. 2010) (mayor and city council's promotion and approval of a lease and sale of a shelter facility); *Gerow v. Washington*, 383 F. App'x 677, 678 (9th Cir. 2010) (rules adopted by state commission); *Grunert v. Campbell*, 248 F. App'x 775, 776–77 (9th Cir. 2007) (program adopted by state board); *Kaahumanu*, 315 F.3d at 1220–24 (county council's denial of conditional use permit). Similarly, prior to setting forth the four-pronged test in *Kaahumanu*, this court relied on a few of its factors to distinguish between legislators' lawmaking and administrative roles. *See Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220–21 (9th Cir. 1996) (legislative caucus not immune for employment actions); *Chappell v. Robbins*, 73 F.3d 918, 920–21 (9th Cir. 1996) (legislator entitled to immunity for sponsoring legislation).

context, and institutional prerogatives discussed above. Additionally, the first two factors weigh in favor of immunity as well. The purpose and effect of the absence request denials in this case were not limited to "a few individuals," and casting them as "ad hoc decision making" ignores the context in which they occurred. *See* 315 F.3d at 1220. Within that context, the Senate President's actions implicated the *legislature's* prerogatives and interests, its ability to perform its lawmaking functions and, consequently, the interests of "the public at large." *See id.*; (SER-18 (Senate President explained that he would deny absence requests absent "extraordinary circumstances" to ensure the Senate had quorum to fulfill its constitutional duties, including its obligation to fund state government)). And even if that were not the case, the third and fourth factors predominate here, given the institutional interests at play. *See Norse*, 629 F.3d at 977 (finding no need to analyze all of the *Kaahumanu* factors when some factors "clearly point" to the nature of the act).

That must be so, as applying *Kaahumanu*'s factors mechanically in a way that denies immunity for core legislative acts would risk eviscerating the privilege in circumstances in which it obviously applies. For example, mechanical application of those factors may well lead to a different result in a case with facts identical to *Tenney*, which afforded immunity to committee investigative acts targeted at a single individual. *See* 341 U.S. at 370–71.

Additionally, other core acts that are constitutionally committed to the legislative branch—such as a committee vote on a nominee subject to Senate confirmation, or even a vote by a House committee on articles of impeachment—appear more akin to "ad hoc decisionmaking" than the "formulation of policy," and do not strictly resemble "the hallmarks of traditional legislation." *See Kaahumanu*, 315 F.3d at 1220. And yet, no one would suggest that federal courts can police those core legislative decisions, and no one would suggest that legislators should be subject to suit when taking such actions.

Moreover, plaintiffs cannot circumvent legislative immunity by naming the Secretary of State as a defendant, as their complaint alleges no facts indicating that the Secretary engaged in any retaliatory acts. (*See* SER-195–205). Instead, the only action attributed to the Secretary was her determination that plaintiffs were not qualified to run for reelection, based on information transmitted to her by the Senate. (SER-200–01 ¶¶ 18, 21; *see also* SER-76–77, 103, 179). Because there are no allegations in the complaint suggesting that the qualification determination was a retaliatory act in response to the allegedly protected conduct, plaintiffs have failed to state a claim for relief against the Secretary. *See Boquist*, 32 F.4th at 777 (to state a claim for First Amendment retaliation, plaintiff must plead facts showing that "the protected conduct played

a part, substantial or otherwise, in the defendant's wrongdoing" (citation and quotation marks omitted)).

Thus, the doctrine of legislative immunity provides additional support for the district court's determination that plaintiffs are unlikely to prevail on their First Amendment claims. For that reason, too, this court should affirm the denial of a preliminary injunction in this case.

B. The other factors do not weigh in favor of a preliminary injunction.

After concluding that plaintiffs were unlikely to prevail on the merits, the district court applied the other *Winter* factors, and held that those factors did not weigh in plaintiffs' favor. (ER-15–17). It did not abuse its discretion by doing so.

As the district court concluded, even if plaintiffs could show irreparable harm, "that showing would [be] outweighed by the other *Winter* factors." (ER-16). In addition to *Winter*'s first factor (discussed above), its third and fourth factors—which examine the balance of the equities and the public interest—weigh against an injunction here. *See Winter*, 555 U.S. at 20, 24–26; *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (last two factors merge when the government is a party). Although this court has "consistently recognized the significant public interest in upholding First Amendment principles," plaintiffs cannot show that those principles are actually at play in

this case, which involves official acts by legislators. (*See* ER-17 (district court's opinion, quoting *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014))). And as the district court also noted, the State's interests predominate, given that Oregonians have a profound interest in having a functional legislature and overwhelmingly passed Measure 113 to prevent the very conduct at issue here. (ER-17); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (holding that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined").

For those reasons, the other *Winter* factors weigh against plaintiffs' request for a preliminary injunction. The district court did not abuse its discretion when it concluded as much, and this court should affirm on that basis as well.

CONCLUSION

This court should affirm the district court's order denying a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellees' Brief is proportionately spaced, has a typeface of 14 points or more and contains 8,954 words.

DATED: January 23, 2024

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS LINTHICUM; BRIAN J. BOQUIST, Plaintiffs-Appellants, REJEANA JACKSON; KLAMATH COUNTY REPUBLICAN CENTRAL COMMITTEE; JOHN SWANSON; POLK COUNTY REPUBLICAN CENTRAL COMMITTEE; CEDRIC HAYDEN; JOHN LARGE; LANE COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiffs, v. ROB WAGNER, Oregon Senate President, individually and in his official capacity; LAVONNE GRIFFIN-VALADE, Oregon Secretary of State, in her official capacity, Defendants-Appellees.	U.S.C.A. No. 23-4292 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellees, notifies this court of a related case pending in this court: *Boquist v. Courtney*, No. 23-35535 (9th Cir.). That appeal raises an issue closely related to one of the issues in this case: whether legislators are entitled to absolute legislative immunity when they take actions that regulate or discipline member conduct.

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2024, I directed the Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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