No. 23-4292

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Dennis Linthicum, et al.
Plaintiff-Appellant,

v.

Rob Wagner, et al.
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Hon. Ann L. Aiken
Case No. 6:23-cv-01624-AA

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF OREGON

IN SUPPORT OF DEFENDANTS-APPELLEES' POSITION FOR AFFIRMANCE OF THE DISTRICT COURT'S ORDER DENYING A PRELIMINARY INJUNCTION

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I. Statement of Interest of *Amici Curiae*.

The American Civil Liberties Union of Oregon is a statewide non-profit and non-partisan organization with over 28,000 members and supporters. The ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians. The ACLU of Oregon advocates for these rights to be realized in the Oregon legislature, in state and federal courts, and through public education that emphasizes the important role these rights have in ensuring our democracy is fair and just for all.

II. Rule 29(a)(4)(E) Statement

Counsel for the ACLU of Oregon authored this brief in its entirety and no party's counsel contributed to it. No party or party's counsel contributed money to fund preparing or submitting the brief. No other person contributed money to fund preparing or submitting the brief.

III. Conferral Certification

Pursuant to Ninth Circuit Rule 29-3, the ACLU of Oregon endeavored to obtain the consent of all parties to the filing of this brief. Defendants-Appellees consented. Plaintiffs-Appellants took no position on the ACLU of Oregon's amicus participation and consented to the filing of this amicus brief without a motion pursuant to Fed. R. App. P. 29-2(a).

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IV. Introduction.

The ACLU of Oregon is the state's most prominent, longstanding, and effective advocate for the freedom of expression. But, though sometimes described as "America's first freedom," free speech is not America's only constitutional principle. Even the most ardent speech advocate acknowledges: not every claim of right under the First Amendment has merit, particularly when used to undercut other constitutional rights and values that protect our fragile democracy. This case is an example.

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In 2020, Oregon voters exercised their rights to speech, petition, and civic participation when they conceived of and sponsored an initiative petition, gathered signatures, qualified for the ballot, and voted into law Measure 113—now part of the Oregon Constitution, in Article IV, Section 15. Measure 113 passed overwhelmingly: 68 percent of voters approved it; it passed in all but two counties; and it passed in every State Senate district.[1]

Voters understood the Measure's purpose: to ensure that their elected representatives showed up to work to perform their democratic lawmaking function. The ballot measure was a response to the increasingly used tactic of

[1] "How Did Oregon Counties Vote on Measure 113, The Anti-Walkout Law?," https://www.kgw.com/video/news/local/the-story/how-did-oregon-counties-vote-on-measure-113-the-anti-walkout-law/283-c3f11bff-28c7-41b4-985f-ddf1f9e97f3c (visited Dec. 2, 2023).

legislators refusing to attend legislative floor sessions in order to deprive the legislature of a quorum. This tactic, which legislators of both parties have deployed in the past, has ground legislative business to a halt and has disrupted the legislature's constitutionally mandated functions: convening in annual sessions, *see* Or. Const. Art. IV, § 10, raising revenue, *see* Or. Const. Art. IV, §§ 18, 25(2), appropriating monies to operate state government and for education, *see* Or. Const. Art. IX, § 4, Art. VIII, § 8, considering and voting on policy reforms, *see* Or. Const. Art. IV, §§ 1(1), 17, and even voting to adjourn, *see* Or. Const. Art. IV, § 11. Oregon voters disapproved of these obstructions of the legislature's core public functions and deemed more than ten unexcused absences to be "disorderly behavior" subject to the sanction of disqualification.

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Unhappy with the public's policy choice, plaintiff-legislators now claim that depriving the legislature of a quorum is their constitutional right so long as they have some expressive motive and, thus, that implementation of the voter-adopted state constitutional policy constitutes unlawful retaliation.[2] But freedom of expression does not offer such a trump card here. If plaintiff-legislators wish to express disagreement, the Oregon Constitution provides a mechanism to do so:

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[2] Amicus ACLU of Oregon limits its discussion to plaintiff-legislators' claims of retaliation relating to their unexcused absences. Because each plaintiff-legislator far exceeded the 10-absence threshold triggering disqualification, amicus will not discuss other, specific absences for which they claim to have individual excuses.

Article IV, Section 26 grants all members "the right to protest"—that is, the right to express disagreement in the legislative body—"and have [one's] protest, with [one's] reasons for dissent, entered on the journal." Of course, legislators can also vote "no" on any legislation. But because their office belongs not to them personally, but to the public, it is not theirs to use for personal prerogatives; they must discharge their public function by attending mandatory legislative floor sessions. If they do not, they are subject to constitutionally prescribed consequences for behavior "deemed disorderly" by the state Constitution.

Refusal to attend mandatory floor sessions is not an individual's exercise of free speech. Rather, it wields a public office—that is, an office held in trust for the public—to prevent the public from engaging in the constitutionally prescribed legislative process. It frustrates the very republican form of government that the U.S. Constitution guarantees. *See* U.S. Const. Art. IV, § 4. Because plaintiff-legislators have no constitutional right to misuse their public office in this way, the ACLU of Oregon respectfully asks the Court to affirm the district court's denial of their motion for preliminary injunction.

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V. Argument.

DEPRIVING THE LEGISLATURE OF A QUORUM IS NOT "PROTECTED ACTIVITY" AND, THUS, PLAINTIFF LEGISLATORS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiff-legislators' core contention is that Senate President Wagner unlawfully retaliated against them by not excusing absences for the six-week period they refused to attend mandatory floor sessions. Because their absences should have been excused, the argument goes, they are not disqualified from office under Article IV, Section 15 of the Oregon Constitution. But to establish retaliation, plaintiff-legislators must show that their own conduct—refusing to attend mandatory floor sessions—is constitutionally protected. It is not.

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The predicate to retaliation is protected activity. "To establish a First Amendment retaliation claim in the [free] speech context, a plaintiff must show that … he was engaged in a constitutionally protected activity[.]" *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 770 (9th Cir. 2006). Plaintiff-legislators' retaliation claim never gets going because refusing to attend mandatory legislative floor sessions is not constitutionally protected.[3]

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[3] Amicus acknowledges that, in other contexts, so-called "walkouts" (that is, protesting by walking out of a venue) can amount to expressive conduct. *See, e.g.*, *Corales v. Bennett*, 567 F.3d 554, 565 (2009) (describing student absences from class in order to attend a protest "arguably expressive conduct"). The Court should not conflate plaintiff-legislators' conduct with that of, say, a student walkout,

Performing the functions of a legislator's office is not a personal prerogative; it is a public trust. The U.S. Supreme Court said so in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011): "The legislative power thus committed [to a legislator] is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 126. "'[T]he procedures for voting in legislative assemblies ... pertain to legislators not as individuals but as political representatives executing the legislative process.'" *Id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 469–470 (1939) (opinion of Frankfurter, J.)). Simply put: "a legislator has no right to use official powers for expressive purposes." *Id.* at 127.

In *Carrigan*, the Supreme Court held that a legislator's vote is not an exercise of individual speech because it is an official, not a personal, act. There, the Court upheld Nevada's government ethics law that requires legislators to recuse from voting on matters where they might reasonably be said to have a conflict of interest. In an opinion by Justice Scalia, the Court rejected the argument made by the court below, and by Justice Alito in a partial concurrence, that a legislator's vote is constitutionally protected speech, because, it said: "[t]his Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Id.* at 127.

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because a student does not wield a public office. In any event, even students can be disciplined for unexcused absences. *Id.*

If a legislator's vote is not protected speech, the requirement that a legislator show up to vote likewise does not implicate the First Amendment. That is why the U.S. Constitution and the constitutions of 41 states mandate attendance of legislators and allow enforcement of this mandate with compulsion. *E.g.*, U.S. Const. Art. I, § 5 ("Each House … may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide."). As the Supreme Court further explained in *Carrigan*: "[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional[.]" 564 U.S. at 122. It is indeed a near-"universal and long-established tradition" that attendance of legislators at mandatory legislative sessions may be compelled, even, if necessary, by force or imprisonment. *See Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880) ("the penalty which each House is authorized to inflict in order to compel attendance of absent members may be imprisonment."); *Schultz v. Sundberg*, 759 F.2d 714, 716-17 (9th Cir. 1985) (recognizing that the president of the Alaska Senate "had the authority to compel the attendance of absent legislators at the joint session" with force). If that is so, compelling attendance with the sanction of disqualification—a lesser burden on legislators' liberty than force or imprisonment—necessarily must also be constitutionally permissible.

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That is not to say that legislators can never engage in constitutionally protected speech. Of course they can. This Court recently held in *Boquist v. Courtney*, 32 F.4th 764 (9th Cir. 2022), that a legislator's statements—including statements to a reporter—despite being "vituperative, abusive, and inexact," fit "easily within the wide latitude given to elected officials 'to express their views'" and were therefore constitutionally protected, at least as alleged in the complaint in that case. *Id.* at 780-81. But this case is not about statements, and certainly not statements made to a reporter; it is about using a function of the legislator's office to deprive a legislative chamber of a quorum in order to halt legislative business.

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Plaintiff-legislators distinguish *Carrigan* by arguing that its rationale extends no further than legislators' votes. But that is neither what *Carrigan* says nor how lower courts have described its holding. *Carrigan* broadly disclaims uses of "official powers for expressive purposes" and "governmental mechanics to convey a message." 564 U.S. at 127.[4] That is why one Ninth Circuit opinion describes its holding thus: "*Carrigan* establishes that the legal authority attaching to a legislative office is not an aspect of the freedom of speech protected by the

[4] *Carrigan* also speaks not just of voting itself but of "[*t*]***he procedures for voting*** in legislative assemblies" as "pertain[ing] to legislators not as individuals but as political representatives executing the legislative process." 564 U.S. at 126 (citation omitted) (emphasis added). Mandatory attendance to establish a quorum is one such "procedure[] for voting."

First Amendment." *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). Clearly, *Carrigan* is about more than just the legislative act of voting.

It also makes no sense to distinguish voting from showing up to vote or refusing to vote. *Carrigan* holds that the legislative power belongs to the people, not to the legislator. 564 U.S. at 126-27. Voting, on the one hand, and establishing a quorum by being present, on the other, are both ways that an individual legislator contributes to the exercise of a chamber's legislative power. *See* Or. Const. Art. IV, § 12. When a legislator either attends a legislative session to establish a quorum and vote or stays home to deprive the chamber of a quorum so that others cannot vote, the legislator's act is a use of their public office. As such, a legislator has no greater personal stake in the act of showing up than the act of voting. To be sure, both acts may evoke a legislator's strong personal feelings and opinions; but, like voting, that does not make it the legislator's personal prerogative. *See Carrigan*, 564 U.S. 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.").

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Plaintiffs confuse the point by arguing that "legislative power" involves only actions "with 'the purpose and effect of altering the legal rights, duties and relations of persons[.]'" (Opening Brief at 15 (quoting *INS. v. Chadha*, 462 U.S.

919, 952 (1983)).) But that cannot be right because no single legislator can act to alter anyone's legal rights. Rather, legislative *bodies* alter legal rights when they pass legislation that is signed into law. But individual legislators use their offices in a variety of ways—including, for example, by voting "no" on legislation—that do not alter legal rights.[5] These actions (voting "no," proposing legislation, blocking legislation with "holds" or other legislative mechanics, engaging in oversight and investigations, and so on) are no less "use[s of] official powers," *Carrigan*, 564 U.S. at 127, because they do not alter legal rights. Establishing a quorum by being present, or absenting oneself to deprive a quorum, are likewise uses of the legislator's office.

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Plaintiff-legislators also say that the method Oregon now uses to compel attendance—i.e., disqualification from holding office in a future term—is unlike the types of physical compulsion sanctioned by the U.S. Supreme Court in *Kilbourn*, 103 U.S. at 190, and this Court in *Schultz*, 759 F.2d at 716-17, because disqualification exacts a penalty after-the-fact. But this argument misses the point.

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[5] Indeed, at issue in *Carrigan* was a determination by the Nevada Commission on Ethics to censure a city councilor for voting, rather than abstaining, on a matter for which he had a conflict of interest. *Carrigan* does not say whether the councilor voted "yes" or "no" on the matter, as any vote was impermissible where recusal is required. Of course, voting "no," putting a "hold" on legislation, and depriving a chamber of a quorum all have the same practical effect: potentially stopping the passage of legislation. But none of these acts alter anyone's legal rights.

Using the levers of one's public office to obstruct legislative business is not protected speech—*that* is why legislative bodies are free to compel members' attendance. It does not matter the method used to compel attendance—whether only prospective (i.e., arrest) or both prospective and retrospective (i.e., threating and imposing a consequence)—because the burdened activity is not constitutionally protected in the first place.

And even if it were, plaintiff-legislators offer no coherent rationale to explain why a maximally burdensome prior restraint (i.e., arrest) would be constitutionally permissible, but a threat of consequences (i.e., disqualification) would not. Indeed, under traditional free speech principles, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). But plaintiff-legislators propose the inverse, arguing that the threat and imposition of punishment somehow violates their free speech in a way that arrest and imprisonment would not.[6] Their position is without authority and contrary to fundamental free speech principles.

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[6] Plaintiff-legislators' position seems to be: *you can compel our attendance **but only if you can catch us***. They apparently demand that legislative bodies expend scarce law enforcement resources to search the state to find absent legislators, and then to use law enforcement personnel to engage in physical confrontations with legislators, in order to find, arrest, deliver, and hold absent legislators.

Simply put: legislators have no personal constitutional right to deploy their office to deprive a legislative chamber of a quorum. Because refusing to attend legislative floor sessions is not a protected activity, Senate President Wagner's decision not to excuse absences cannot be retaliation. Accordingly, plaintiff-legislators are unlikely to succeed on the merits and, for that reason, the district court correctly denied their motion for preliminary injunction.

VI. Conclusion.

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There is a cruel irony in plaintiff-legislators' litigation position. Before this Court, they purport to be champions of civil rights—claiming the mantle of free speech and even religious free exercise. But, in the 2023 legislative session, plaintiff-legislators deprived the legislature of a quorum for six weeks in order to halt ***expansions*** of civil rights—the civil rights of women and of LGBTQ+ people, among others. Perhaps only plaintiff-legislators' own rights matter to them.

Of course, plaintiff-legislators' claims of right under the First Amendment would fail regardless of the reasons they refused to attend mandatory legislative floor sessions. For, their offices belong not to them personally, but to the public, and they had no personal right to use their offices to deprive the legislature of a quorum.

Indeed, the rights truly at stake in this case are not legislators'; they are the public's rights to adopt a policy by initiative petition that compels legislators'

attendance by disqualifying them from office when their absences are unexcused. Oregon voters exercised these rights—of speech, petition, and civic participation—when they conceived of and sponsored an initiative petition, gathered signatures, qualified for the ballot, and voted into law Measure 113—now part of the Oregon Constitution, in Article IV, Section 15. For six weeks last year, Oregonians trying to engage in representative democracy by urging action on legislation were stymied by plaintiff-legislators' withholding of a quorum. Plaintiff-legislators' hollow assertions of free speech and retaliation are mere pretexts to undermine these actual rights.

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Amicus curiae the ACLU of Oregon respectfully urges the Court to affirm the district court's denial of plaintiff-legislators' motion for preliminary injunction.

DATED: January 25, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,899 words excluding the parts of the motion exempted under Rule 32(f).

This motion complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this motion has been prepared in proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing document on January 25, 2024, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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