No. 23-4292

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS LINTHICUM, BRIAN J. BOQUIST,

Plaintiffs-Appellants,

v.

OREGON STATE SENATE PRESIDENT ROB WAGNER, OREGON SECRETARY OF STATE LAVONNE GRIFFIN-VALADE,

Defendants-Appellees,

Appeal from the United States District Court
for the District of Oregon, Eugene (Hon. Ann Aiken)
Dist. Ct. No. 6:23-cv-01624-AA

PLAINTIFFS-APPELLANTS REPLY BRIEF

Elizabeth A. Jones, OSB #201184
Capitol Legal Services
901 Capitol St. NE
Salem, OR 97301
Telephone: (503) 480-7250
beth@capitol.legal

Vance D. Day, OSB #912487
Law Offices of Vance D. Day
PO Box 220
Powell Butte, OR 97753
Telephone: (503) 409-5562
vance.day@teamvanceday.org

Attorneys for Plaintiffs-Appellants

January 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

Constitutional Provisions

REPLY

INTRODUCTION

An elected official bringing a First Amendment retaliation claim has the initial burden of pleading and proving:

> (1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action."

Blair v. Bethel Sch. Dist., 608 F.3d 540, 542–43 (9th Cir. 2010). There is no dispute that being disqualified from re-election is an adverse action that would chill a person of ordinary firmness from continuing to engage in an activity. Neither is there any dispute that Defendants denied Plaintiffs access to the ballot solely for their conduct. The question is whether Plaintiffs engaged in a constitutionally protected activity by participating in an organized political protest – walking out to deny the majority a quorum.

Minority lawmakers have a long history of denying a quorum by walking out in protest. (Ans Br 33) [1] (Defendants concede "[t]he Oregon Constitution provides legislators with the ability to deny quorum…"). Further, lawmakers have a right to compel the return of absent members. *Id*. (The Oregon Constitution "gives the legislature the power … to secure quorum."). But the majority's right to compel the

[1] Page numbers refer to the number appended to Appellees' Brief by ECF.

return of absent members does not negate lawmakers' First Amendment right to participate in a walkout. Nor does the majority's right under Or. Const. Art. IV, § 12 to "compel the return" of absent members allow Defendants to "punish" absent members under Art. IV, § 15 for denying a quorum by denying them access to the ballot in a future election.

Of course, the First Amendment right to protest is subject to restrictions. When lawmakers exercise their right to deny a quorum, they are subject to a critical constitutional restriction – they may be compelled to return at any time. That didn't happen here. The Senate took no action to end the 2023 walkout by compelling the return of absent members. Instead, Defendants punished Plaintiffs by disqualifying them from a future election – an action not reasonably related to their interest in maintaining a quorum in 2023.

I. Denying a quorum is expressive conduct, not part of the legislative process.

Defendants argue that walking out to deny a quorum has no expressive value because it is part of the legislative process. (Ans Br 29-33). Their line of reasoning is as follows: "legislators have no right to use their official functions as a means of expression"; official functions encompass all legislative acts; denying a quorum is a legislative act; therefore, denying a quorum has no expressive value. *Id*.

Defendants' reasoning is flawed because denying a quorum is not a legislative act – it prevents legislative acts. In Defendants' words, "…[l]egislative business

ground[s] to a halt…" during a walkout. (Ans Br 1). Denying a quorum cannot be part of the legislative process when there is no legislative process when a quorum is denied.

II. The First Amendment protects lawmakers engaged in legislative acts.

Even if denying a quorum was a legislative act, the First Amendment shields lawmakers from punishment for exercising their First Amendment rights while performing legislative acts. In *Boquist v. Courtney*, the Ninth Circuit found Senator Boquist adequately alleged a First Amendment retaliation claim against Senate President Courtney for, in relevant part, a statement Boquist made on the Senate floor.[2]

> Boquist spoke on the floor of the Senate to oppose that legislation. During his speech, Boquist said to Courtney: "I understand the threats from members of the majority that you want to arrest me, you want to put me in jail with the state police, and all that sort of stuff.... Mr. President, and if you send the state police to get me, Hell's coming to visit you personally." After Courtney reminded Boquist of "decorum," Boquist stated "I apologize. To you personally."

Boquist v. Courtney, 32 F.4th 764, 772 (9th Cir. 2022). Speaking on the Senate floor to oppose legislation is clearly a legislative act. *United States v. Brewster*, 408 U.S. 501, 512 (1972) ("A legislative act has consistently been defined as an act generally

[2] Defendants took action against Boquist for two statements in that case, "one on the floor of the senate, and the other to a reporter in the state capitol building." 32 F.4th 764, 771. The Court did not differentiate between the two statements or their locations in its legal analysis.

done in Congress in relation to the business before it."). Despite Boquist's statements being made while engaging in a legislative act, he was allowed to proceed on his First Amendment claim. 32 F.4th 764, 771 (9th Cir. 2022) ("Boquist adequately alleged that he engaged in constitutionally protected speech and was subject to a retaliatory adverse action on account of that speech.").

Under Defendants' reasoning in the present case, Boquist's statements on the Senate floor would not have First Amendment protection because speaking on the floor is a legislative act. This cannot be a proper legal interpretation. When *Carrigan* states that lawmakers have "no right to use official powers for expressive purposes," surely the Court did not intend to preclude lawmakers from First Amendment protection for exercising their First Amendment rights at all times in every part of the legislative process. *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011).

III. Responding to absence requests is not a legislative act subject to immunity.

During oral arguments, the lower court found "that the legislative Senate President has legislative immunity…," but decided not to address this issue in its Order. (*compare* ER-28–29, hearing transcript, *with* ER-3–18, Order). The court reasoned as follows that immunity applies in this case:

/ / /

/ / /

/ / /

> If you want to go on to the immunity issue, which you touched on, the Senate President would delegate that authority.[3] The Senate President would evaluate each request for an excused absence. He has granted them; he has denied them. He exercised his discretion, and he has done that with the delegation of that power.

(ER-28–29, beginning at line 21). But these actions do not remotely resemble legislative acts.

The line of cases Defendants rely upon in their answering brief to support their immunity argument involve legislative bodies removing, expelling, censuring, and otherwise punishing members through the legislative process. (ER-30–35). Here, no such process ensued. The Senate did not vote to "discipline member conduct." (Ans Br 41). The Senate did not punish Plaintiffs for disorderly behavior. *Id*. at 42. *The Senate did not even compel the return of absent members during their protest*. If Wagner engaged in any of those acts he may be entitled to immunity, but he did not. *See Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003).

The entirety of President Wagner's conduct was to respond to absence requests, as tasked to him in the Senate Rules. Plaintiffs are aware of no precedent suggesting that performing administrative tasks becomes a legislative act if assigned

[3] Plaintiffs presume the court meant to say the Senate, not the Senate President, delegated its authority by tasking the Senate President to reply to absence requests in the Senate Rules.

to a legislator via chamber rule. Accordingly, Wagner is not entitled to immunity for his performance of an administrative task.[4]

IV. Plaintiffs' ballot-access arguments were preserved.

Defendants retaliated against and punished Plaintiffs for engaging in a political protest and *the punishment* infringed on Voter and Party Plaintiffs' freedom of association. (ECF 1, 7-8). Defendants incorrectly allege Plaintiffs failed to preserve their argument that disqualifying Plaintiffs from the ballot infringes on the rights of voters to associate for the advancement of common political beliefs and goals. (Ans Br 44-45). To the contrary, Plaintiffs incorporated the issue as raised in their Complaint into their Motion for Preliminary Injunction *and* independently raised the issue in their Motion. (SER-188) ("This Motion is supported by Plaintiffs' Complaint").

First, Plaintiffs' Complaint alleges,

> Disqualifying minority party members for denying the majority party a quorum unfairly excludes a certain class of candidates from the electoral process – a class of candidates willing to exercise their constitutional right to deny the majority a quorum. Disqualification from the ballot severely burdens Voter Plaintiffs' First Amendment right to vote and Party Plaintiffs' right of association and right to elect like-minded candidates.

---

[4] Reasonably, Defendants do not argue Defendant Secretary of State is entitled to legislative immunity for disqualifying Plaintiffs from the ballot. As alleged in Plaintiffs' Complaint, she knowingly disqualified Plaintiffs from the ballot for engaging in a political protest. (SER-201–202, ¶¶ 18-19).

(SER-202, ¶ 23). Next, in their Motion, Plaintiffs argued that "[d]isqualifying Senator Plaintiffs from the ballot … prevents Voter Plaintiffs and Party Plaintiffs from supporting a class of candidates who denied the majority a quorum." (SER-193). Further, "Voter Plaintiffs and Party Plaintiffs are prevented from voting [for] the incumbents they support." (SER-194). Plaintiffs' First Amendment retaliation claim cannot be separated from the consequences of their punishment under the claim – infringement on the rights of Voter and Party Plaintiffs "to associate for the advancement of common political beliefs and goals." (SER-201, ¶ 22).

CONCLUSION

Plaintiffs respectfully request this Court to enjoin Defendant Griffin-Valade from disqualifying them from the 2024 Election before the March 12, 2024 deadline – either while this appeal is pending, under its Fed. R. Civ. P. 62(g)(1) authority, or under its authority to reverse and remand the lower court's Order on Plaintiffs' Motion for Preliminary Injunction.

DATED this 30th day of January, 2024.

Respectfully submitted,

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Of Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 9th Cir. R. 32-1, the attached Reply Brief of Plaintiffs-Appellants Dennis Linthicum and Brian J. Boquist complies with the type-volume limitations because it is:

Proportionately spaced, has a typeface of 14 points or more and contains 1,456 words.

DATED this 30th day of January, 2024.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Of Attorneys for Plaintiffs-Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 30, 2024 I electronically filed the foregoing Reply Brief of Plaintiffs-Appellants 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 further certify that all participants in this case are registered CM/ECF users.

DATED this 30th day of January, 2024.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Of Attorneys for Plaintiffs-Appellants