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 OPENING BRIEF

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INTRODUCTION

This case involves Defendants punishing Plaintiffs for participating in a political protest by disqualifying them from the 2024 Election. While the majority party may lawfully *compel the return* of absent members to maintain a quorum, they may not constitutionally *punish* members for participating in a walkout by denying them access to the ballot in a future election.

In 2019, 2020, and 2021, Oregon lawmakers used walkouts to protest the majority party's greenhouse gas cap-and-trade plans, to kill vaccine and gun regulation bills, and to protest the Governor's Covid-19 regulations. With Democratic supermajorities in both the House and Senate, walkouts were one of the few tactics minority lawmakers had available to block the majority from passing their policy priorities. Republican, Independent, and Democratic Party caucuses have all effectively used walkouts as a political tool in Oregon because the state is one of a few in the nation that requires two-thirds of lawmakers to be present for a quorum.

In 2022, Measure 113 was conceived to sidestep Oregon's quorum requirement after polling showed voters were not receptive to the idea of

lowering the requirement to a simple majority. Public employee unions and groups that predominantly support Democratic candidates spearheaded and funded the effort to get Measure 113 on the ballot - reportedly spending $1.7 million on signature-gathering and more than $100,000 on the campaign to pass it. Measure 113 successfully amended Or. Const. art. IV, § 15 (the "Punishment and expulsion of members" section), and now provides that legislative members shall be disqualified from holding office in a future term if they receive ten or more unexcused absences. Defendant Senate President Rob Wagner solely determines if a member's absence request is excused or not. No guidelines or policies establish what constitutes an excused or unexcused absence, or what constitutes permission or excuse.

On May 3, 2023, Senator Plaintiffs in minority parties participated in a walkout to protest what they deemed unlawful and unethical behavior by the majority party. Plaintiffs' constituents re-elected them after prior walkouts, and likewise supported the 2023 walkout. At no time in the four months prior to the walkout did Defendant Senate President Wagner issue a single unexcused absence but when the walkout began, Wagner denied Plaintiffs' absence requests in retaliation

for their political protest – including retroactively denying prior-approved requests.

Plaintiffs accumulated over ten unexcused absences due to their political protest and were deemed disqualified from the 2024 Election by the Oregon the Secretary of State. Plaintiffs then filed this suit on the premise that while the majority party may lawfully *compel the return* of absent members to maintain a quorum, they may not constitutionally *punish* members for participating in a walkout by denying them access to the ballot in a future election.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiffs' federal law claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over Plaintiffs' appeal from an interlocutory order denying injunctive relief pursuant to 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED

I. Whether the lower court erred by denying Plaintiffs' Motion for Preliminary Injunction when political protests are categorically protected under the First Amendment, and both the Plaintiffs' and their constituents will be irreparably harmed if Plaintiffs are prevented from

appearing on the ballot as punishment for the exercise of their First Amendment rights.

STATEMENT OF THE CASE

A. *Statement of Facts*

In 2022, Measure 113 amended Or. Const. art. IV, § 15 ("Punishment and expulsion of members"), which now provides:

> 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.

(ER-5) (Measure 113 amendment underlined). On January 9, 2023, the Senate adopted its Rules for the 82nd Legislature Assembly, the first session to convene after the amendment to art. IV, § 15. (ECF 16, p. 11). Rule § 3.10(1) provided:

> 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."

No guidelines or policies exist to establish what constitutes an excused or unexcused absence, or what constitutes permission or excuse under art. IV, § 15. Only the Senate President makes such determinations.

Beginning on May 3, 2023, Plaintiffs participated in an organized walkout to deny the majority a quorum. (ER-7). When Plaintiffs requested to be absent to exercise their First Amendment right to protest what they deemed unlawful and unethical activity by the majority party, Wagner indicated they were unexcused. (ECF 4-1, p. 2). At no time prior to the walkout had Defendant Wagner issued an unexcused absence. *Id*. Moreover, Wagner retroactively changed excused absences to unexcused absences when Plaintiffs' walkout began. (ER-7–8).

On May 5th, Wagner announced that absence requests would only be granted in "extraordinary circumstances." (ECF 16, p. 12). He "believed the lack of a quorum substantially threatened the Legislative Assembly's ability to do its critical duty of funding state government, and concluded the extraordinary-circumstances standard was justified to ensure that the Senate and the Legislative Assembly could fulfill their constitutional roles." (Order 5) (citation and internal quotation marks

removed). Despite these concerns, the Senate took no action to compel the return of absent members under Or. Const., art. IV, § 12 (Oregon's "compulsion of attendance" provision allows less than a quorum to compel the return of absent members to reinstate a quorum.).[1] Instead, Wagner used Or. Const. art. IV, § 15 to "punish" Plaintiffs for walking out. Wagner's punishment did nothing to reinstate a quorum. The quorum was reinstated after negotiations between caucus leadership, and the session ended as scheduled in June. (ECF 16, p. 13).

In Oregon, the Secretary of State determines whether a candidate qualifies for the ballot. (ECF 16, p. 18) (citing ORS 254.165(1). Accordingly, the Secretary of the *Senate* submitted a record of Plaintiffs' unexcused absences from the 2023 session to Defendant Secretary of State Griffin-Valade. (ECF 4-1). September 14, 2023, marked the first day of the 2024 election season in Oregon. Senator Plaintiffs Linthicum and Boquist both submitted candidacy forms and paid fees to appear on

[1] "**Section 12. Quorum; failure to effect organization.** Two thirds of each house shall constitute a quorum to do business, but a smaller number may meet; adjourn from day to day, and compel the attendance of absent members. A quorum being in attendance, if either house fail to effect an organization within the first five days thereafter, the members of the house so failing shall be entitled to no compensation from the end of the said five days until an organization shall have been effected."

the 2024 ballot. (ECF 3-2; 4-3) Defendant Griffin-Valade determined these senators were disqualified from the 2024 ballot based on the "unexcused" absences levied against them by Defendant Wagner. *Id.* Both Senators submitted requests for reconsideration, explaining that Wagner unconstitutionally issued unexcused absences for their protest activities, but Defendant Griffin-Valade was unpersuaded and affirmed their disqualifications. (ECF 4-4). Plaintiffs' Complaint followed. (ECF 1).[2]

B. *Procedural History at District Court*

On November 6, 2023, Plaintiffs filed a Motion for Preliminary Injunction, asking the district court to enjoin Defendant Oregon Secretary of State Griffin-Valade from disqualifying Senators Linthicum and Boquist from the 2024 Election. (ECF 2). The court denied Plaintiffs' motion on December 13, 2023, and this interlocutory appeal followed.

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[2] "Plaintiffs bring claims for violation of their civil rights pursuant to 42 U.S.C. § 1983 alleging (1) First Amendment retaliation; (2) violation of Plaintiffs' First Amendment right to freedom of association; (3) violation of Plaintiffs' First Amendment right to free exercise of their religion; (4) violation of Plaintiffs' Fourteenth Amendment due process rights; and (5) violation of Plaintiffs' Fourteenth Amendment equal protection rights. The present motion is, however, limited to the claim for First Amendment retaliation as to the Senator Plaintiffs." (ER-11).

(ER-18). Plaintiffs' Motion to Expedite the Briefing Schedule was granted on December 29, 2023. (Dkt 007.1).

SUMMARY OF ARGUMENT

I. Political walkouts are a constitutionally protected activity under the First Amendment.

Despite a long history of political walkouts, there is no case law suggesting this conduct is an exercise of legislative power. The lower court erroneously relied on *Nev. Comm'n on Ethics v. Carrigan* to support this premise. 564 U.S. 117 (2011). Legislative power, however, only includes actions with "the purpose and effect of altering the legal rights, duties and relations of persons…." *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983) (lawmaking authority).

Moreover, political protests have always rested on the highest rung of the hierarchy of First Amendment values and there is no justification for denying this shield to an elected official. *Bond v. Floyd* established that legislators do not forfeit their constitutional right to speak out on public issues. 385 U.S. 116, 136 (1966). And, critically, the State may not apply stricter First Amendment standards to its legislators than to private citizens. *Id. at* 116. Accordingly, Plaintiffs have the same

personal right to participate in organized political protests as private citizens, and their conduct is entitled to First Amendment protection.

II. Disqualifying Plaintiffs from a future election does not further the State's interest in maintaining a quorum.

The lower court concluded that the State's interest in maintaining a quorum is legitimately furthered by disqualifying Plaintiffs from future elections. Indeed, expressive conduct may be "regulated if … the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." But here, the Senate took no action to further their interest in maintaining a quorum. They did not compel the return of absent members despite having the authority to do so under Or. Const. art. IV, § 12. Instead, Defendants chose to prospectively punish Plaintiffs for denying a quorum in a prior legislative session. Or. Const. art. IV, § 15 has never been used to punish a legislator after the session ended. The lower court found that denying Plaintiffs access to the ballot involves a "neutral candidacy qualification" and is a valid form of punishment under Or. Const. art. IV, **§ 12**. But Defendants used Or. Const. art. IV, § 15 – not § 12 – to punish absent members. Defendants' conduct did nothing to further their stated interest.

III. Plaintiffs and their constituents are inflicted with irreparable harm.

Not only do Plaintiffs have a right to participate in organized political protests but Defendants punished them for their expressive conduct without furthering their stated interest in maintaining a quorum. Plaintiffs' political opponents are now months ahead of them in campaigning and fundraising. Every day that passes without the ability to campaign for office in 2024 harms Plaintiffs and those who wish to re-elect them. Plaintiffs' constituents are irreparably harmed by not being allowed to choose and support candidates who further their interests. Moreover, irreparable harm occurs every time the government violates its citizens' constitutional rights, particularly by refusing them access to the democratic process.

IV. The balance of hardships and public interest weigh in Plaintiffs' favor.

The lower court held that "the balance of the equities and the public interest weigh against the requested injunction" primarily because an injunction would "negate a lawfully enacted measure [now Or. Const., art. IV, § 15]." This reasoning is flawed for multiple reasons. First, enjoining Defendants from applying Or. Const. art. IV, § 15 against

Plaintiffs for participating in a constitutionally protected activity does not negate the amendment in any regard. Nowhere does art. IV, § 15 suggest that participating in a political walkout is disorderly conduct, subject to punishment. Second, fundamental rights may not be submitted to a vote. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Third, systematically removing a particular class of unpopular candidates from the ballot is never in the public interest. The public interest is best served by allowing voters to choose their representatives. "The exclusion of candidates [] burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983). For those reasons, the balance of hardships and public interest weigh in favor of Plaintiffs.

STANDARD OF REVIEW

This court reviews the district court's denial of a motion for a preliminary injunction to "determine whether the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *See Desert Citizens Against Pollution*

v. Bisson, 231 F.3d 1172, 1176 (9th Cir. 2000). Such a denial "is based on an erroneous legal standard if it (a) did not employ the appropriate legal standard governing the decision to issue a preliminary injunction or (b) misapprehended the law with respect to the underlying issues in the litigation." *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 924 (9th Cir. 2003) (citation omitted). "The district court's interpretation of the underlying legal principles is subject to de novo review." *Id.*

ARGUMENT

The lower court misapprehended the law with respect to the underlying issues in this case and there does not appear to be any disputes of fact. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). And to prevail on a First Amendment retaliation claim, an elected official has the 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." *Boquist v. Courtney*, 32 F.4th 764, 775 (9th Cir. 2022). The parties dispute the law regarding the first element of the First Amendment claim.

I. Political walkouts are a constitutionally protected activity under the First Amendment.

The lower court erred by holding "legislative walkouts [are] not constitutionally protected activity for purposes of the Free Speech Clause of the First Amendment and so, on this record, Plaintiffs have not established either a likelihood of success on the merits or serious questions going to the merits of their claim for First Amendment retaliation." (ER-15). The court reasoned that being present or absent is akin to a legislative vote "in that they are an exercise of the power of the legislator's office," but cited no authority for this erroneous assertion. (Er-13) (Plaintiffs never argued that being "present or absent" are constitutionally protected activities, rather, they argued that participating in organized political walkouts is protected conduct).

A. Unlike voting, participating in a walkout is not an exercise of legislature power.

The court relied heavily on *Nev. Comm'n on Ethics v. Carrigan* to support its premise that walking out to deny the majority a quorum is an exercise of legislative power. 564 U.S. 117 (2011). In *Carrigan*, an elected local official was censured for failing to abstain from voting on a project in which he had a conflict of interest. *Id*. Plaintiff challenged the governing provision in the Nevada Ethics in Government Law as overbroad under the First Amendment. *Id*. The Supreme Court held the law does not violate the First Amendment for two reasons. First, the act of voting "is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id* at 125 ("the legislator casts his vote as trustee for his constituents, not as a prerogative of personal power.") (Citation and quotation marks removed). Second, "the act of voting [by a legislator] symbolizes nothing" and therefore is not an "act of communication" to which the First Amendment applies. *Id* at 126-127.

Both federal and state constitutions vest legislative power in the legislating body as a whole – not in individual members. *See* U.S. Const. art. I, § 1; Or. Const. art. IV, § 1 ("The legislative power of the state, …, is vested in a Legislative Assembly, consisting of a Senate and a House

of Representatives"). "Legislative power" includes actions with "the purpose and effect of altering the legal rights, duties and relations of persons…." *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983) (lawmaking authority).

Cases discussing legislative power tend to involve principles of non-delegation and separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928) (So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the legislative power] is directed to conform, such legislative action is not a forbidden delegation of legislative power."); *Field v. Clark,* 143 U.S. 649, 692 (1892) (Congress generally may not delegate its legislative power to another Branch). None of these cases remotely suggest that being present or absent, or denying a quorum, involves legislative power.

The "legislative power" contemplated in *Carrigan* relates specifically and narrowly to "procedures for voting in legislative assemblies" – an exercise of lawmaking authority. 564 U.S. at 126.

Unlike considering and voting upon bills, walking out to deny the majority a quorum is not an exercise of lawmaking authority. In fact, no bills may be presented to the legislature for debate or vote when no quorum exists.

Even if Plaintiffs' conduct is characterized as simply being present or absent, such conduct is too attenuated from lawmaking to be considered legislative power. Plaintiffs cannot locate any precedent suggesting that political walkouts – or being absent from a legislative session for any reason – involves the exercise of legislative power. The lower court erred by stretching to find this conclusion within *Carrigan* to support its legal conclusions.

B. The State may not apply stricter First Amendment standards to legislators than to citizens.

Political protest "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). In *Boquist v. Courtney*, this Court described a similar legislative walkout in 2019 as "a protest" – "a purely political controversy that has occurred many times in the past." 32 F.4th 764, 772, 781 (9th Cir. 2022). It has long been established that an organized political protest is a form of "classically political speech." *Boos v. Barry*, 485 U.S. 312, 318 (1988).

"Activities such as demonstrations, protest marches, and picketing are clearly protected by the First Amendment." *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).

Bond v. Floyd clearly established that legislators do not forfeit their constitutional right to speak out on public issues. 385 U.S. 116, 136 (1966). And critically, the State may not apply stricter First Amendment standards to its legislators than to private citizens. *Id. at* 116.

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times v. Sullivan*, 376 U.S. 254, 270 [] (1964), is that "debate on public issues should be uninhibited, robust, and wide-open."

Id. at 135–36. Accordingly, Plaintiffs have the same personal right to participate in organized political protests as private citizens, and this expressive conduct is entitled to First Amendment protection. Unlike the legislative vote contemplated in *Carrigan*, Plaintiffs' conduct in walking out is expressive for purposes of the First Amendment.

II. Disqualifying Plaintiffs from a future election does not further the State's interest in reinstating a quorum.

Plaintiffs recognize that when they engage in expressive conduct, it may be "regulated if … the regulation is narrowly drawn to further a

substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 294 (1984) (emphasis added).

> [A governmental interest] must be achieved by a means that does not unfairly or unnecessarily burden [] a minority party's [] interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad Interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

Lubin v. Panish, 415 U.S. 709, 716 (1974). "[B]are [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973).

Defendants assert to have an "interest in ensuring legislators' attendance, and thus maintaining a legislative quorum." (ECF 16, p. 22). President Wagner expressed "the lack of a quorum substantially threatened the Legislative Assembly's ability to do its critical duty of funding state government, and concluded the extraordinary-circumstances standard was justified to ensure that the Senate and the Legislative Assembly could fulfill their constitutional roles." (ER-7)

(citation and internal quotation marks removed). Despite these expressed concerns, the Senate took no action to compel the return of absent members to *maintain* or *reinstate* a quorum. Instead, Wagner acted under Or. Const. art. IV, § 15 to "punish" Plaintiffs for walking out by precluding them from a *future* ballot – conduct that did not further the State's asserted interest in maintaining a quorum.

The Senate could have compelled the return of absent members to the 82nd Legislative Assembly under Or. Const. art. IV, § 12 (Oregon's "compulsion of attendance" provision), but chose not to. The district court erred by reasoning that because the legislature *could have compelled* protesting members to return, disqualifying them from a future election is permissible punishment for denying a quorum.[3] (ER-14). Unlike compelling absent members to return, there is no long-established tradition of punishing legislators for denying a quorum by disqualifying them from a future election. To Plaintiffs' knowledge, after much research, Oregon is the first state in the history of our nation to use

[3] Nowhere does Or. Const. art. IV, § 15 require or even suggest that minority members may be punished for exercising their right to deny the majority a quorum. Reasonably, many minority voters naively voted "yes" on Measure 113, assuming legislators would be excused for absences related to denying a quorum.

"candidate qualification requirements" as punishment against minority legislators for denying a quorum. "[James] Madison and [Alexander] Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views." *Bond*, 385 U.S. at 137, n.13. "At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general." *Id.* He recognized that if the legislature could impose qualifications, "it can by degrees subvert the Constitution." *Id.* Indeed, [q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of a weaker faction." *Id.* The abuse that the British Parliament made of regulating candidate qualifications "was a lesson worthy of our attention." *Id.*

The lower court also found that disqualifying Plaintiffs from the ballot for denying the majority a quorum is akin to setting term limits because both involve "neutral candidacy qualifications." (Order 13, n.6). But the court fails to recognize that the punishment in this case has a disparate impact on minority legislators *and* voters *and* is being carried out as unconstitutional punishment for First Amendment activity. Only

minority members were disqualified from candidacy in 2024, and voters in minority parties are prevented from electing representatives willing to deny a quorum when necessary to further their political views. (ECF 4-1; 5; 6) (Plaintiffs' constituents re-elected Plaintiffs after prior walkouts, and "would happily re-elect [them] in 2024."). Accordingly, this case does not involve a "neutral" candidate qualification as the court asserts.

III. Plaintiffs and their constituents are inflicted with irreparable harm.

The lower court found that Plaintiffs will not suffer irreparable harm by being disqualified from the 2024 ballot. (ER-15–17) ("even if the Court were to accept that the Senator Plaintiffs will suffer an irreparable harm in the absence of an injunction, that showing would be outweighed by the other *Winter* factors."). Plaintiffs disagree. As examined above, Plaintiffs have a right to participate in organized political protests and Defendants punished them for this expressive conduct without furthering their stated interest. Moreover, Plaintiffs' political opponents are now months ahead of them in campaigning and fundraising. Every day that passes without the ability to campaign for office in 2024 harms Plaintiffs.

Plaintiffs' constituents are also irreparably harmed by not being allowed to choose their candidates. In fact, both Plaintiffs were reelected to the present term *after* participating in prior political walkouts. Voters would again happily re-elect their incumbents who participated in the 2023 walkout. (ECF 5; 6) (Plaintiffs represent their "unpopular" political views).

IV. The balance of hardships and public interest weigh in Plaintiffs' favor.

When the government is a party, the balance of hardships and public interest factors of the preliminary injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation marks omitted). Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted).

The lower court held that Plaintiffs have no First Amendment right to political protest in these circumstances and "the balance of the equities

and the public interest weigh against the requested injunction" primarily because an injunction would "negate a lawfully enacted measure [now Or. Const., art. IV, § 15]." (ER-17). But these conclusions are not factually or legally sound. As examined above, Plaintiffs do have a First Amendment right to protest by walking out. Next, enjoining Defendants from applying Or. Const. art. IV, § 15 against Plaintiffs for participating in a constitutionally protected activity does not negate the amendment in any regard.

> …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.

Or. Const. art. IV, § 15 (emphasis added). Nowhere does this amendment suggest that participating in a political walkout constitutes an unexcused absence. In fact, only Defendant Wagner determined which absences were excused or unexcused, without any parameters, so how could excusing political protests negate art. IV, § 15?

Moreover, fundamental rights may not be submitted to a vote. Many voters reasonably assumed that participating in a constitutionally

protected activity is a valid "excuse" under Measure 113, since constitutional rights "may not be submitted to vote." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). It is clearly established that punishing elected officials for exercising their First Amendment rights is unconstitutional – no matter how the package is delivered.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. Systematically removing a particular class of unpopular candidates from the ballot is not in the public interest. The public interest is best served by allowing voters to choose their representatives – even minority voters. "The exclusion of candidates [] burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983). For those reasons, the balance of hardships and public interest weigh in favor of Plaintiffs.

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 9th 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 Opening 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 4,683 words.

DATED this 9th 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 9, 2024 I electronically filed the foregoing Opening 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 9th day of January, 2024.

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