

May 30, 2023

VIA US MAIL AND EMAIL oregon.sos@sos.oregon.gov

Hon. Cheryl Myers
Acting Secretary of State
900 Court Street NE
Capitol Room 136
Salem OR 97301

Re: Petition for Declaratory Ruling

Dear Acting Secretary Myers,

I represent State Senator Tim Knopp, State Senator Brian Boquist and the Oregon's 13 Constitutional Defense Fund, a Political Committee ("the Committee"). On May 18, Senate President Rob Wagner proclaimed on the Senate floor "[a]s of today, ten senators have accrued ten unexcused absences and have therefore disqualified themselves from running for reelection." Since that time, more of Senator Knopp's colleagues have had "unexcused" absences recorded.

The Senate President was, no doubt, referencing his view of the impact of Ballot Measure 113, adopted by the voters in 2022, which purports to penalize members who cause the absence of a quorum in either Chamber. Senators Knopp and Boquist and their colleagues have taken steps to cause the absence of a quorum as a parliamentary strategy to prevent the passage of certain legislative proposals and for reasons they consider existential. This parliamentary strategy has been employed many times in the past by members of both parties and in numerous states. For instance, in June 2001, 25 Democratic members of the Oregon House of Representatives absented themselves from a scheduled legislative session in order to prevent Republicans from passing their redistricting plan as a resolution, rather than a bill. A resolution, unlike a bill, would not have been subject to a veto by Democratic Gov. John Kitzhaber. Republicans held 32 seats, eight short of the 40 members needed for quorum. Democrats ignored summonses to return to the capitol, staying away for five days. By the time they returned, it was too late for Republicans to pass the resolution due to the redistricting deadline of June 30. Because the deadline was not met, the task fell to Democratic Secretary of State Bill Bradbury. Senate Democratic Leader Kate Brown called these actions "very appropriate under the circumstances" and added "[u]nder certain circumstances, its fair to say we would use all tools available to us, and stage a similar boycott." See <https://www.koin.com/news/politics/oregon-gop-calls-out-brown-for-support-of-2001-walkout/>

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In fact, depriving the legislature of a quorum was even a tool effectively used in 1898, when progressive legislators refused to provide the legislature a quorum unless the legislative leadership agreed to refer a constitutional amendment to the voters which created our treasured right of popular initiative and referendum.

Depriving a chamber of a quorum to effect a political result has not been confined to Oregon. On May 30, 2021, all 67 members of the Democratic caucus in the Texas State Senate left the chamber during consideration of Senate Bill 7, a package of voting-related legislation. Legislators left the chamber without a quorum ahead of a midnight deadline for passing legislation for the session. The walkout came following a meeting between the Democratic caucus and the Texas House Speaker. "We weren't getting satisfactory answers about why the bill had gotten so much worse. Most of us walked away from that meeting understanding that this was our only option," state Rep. Gina Hinojosa (D) said.

Last year, the 9th Circuit Court of Appeals made clear that “[t]he minority party senators’ efforts to deprive the majority of the quorum needed to proceed with senate business, and the majority party senators’ efforts to compel the minority senators to appear, was a purely political controversy that has occurred many times in the past.” *Boquist v. Courtney*, 32 F.4th 764, 780 (9th Cir. 2022).

We believe that these political controversies involve expressive acts which are protected political speech and intend to assert those claims in the appropriate forum.

However, before we undertake that exercise, it is important to know exactly what it is that Measure 113 purports to do. The Measure required the following text to be added to Art. IV, Sec. 15 of the Oregon Constitution by Ballot Measure 113 in 2022:

“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.**” [emphasis added]

Senators Knopp and Boquist were re-elected to the Senate in the 2020 general election. They assumed their current terms on January 14, 2021. Article IV, section 4 is clear that a Senator’s “term” is not completed until 4 years from the second Monday in January following the election. This definition of “term” is also tied to the prior election, making it even more clear that the term cannot be completed until after the next election. So, their current terms will not expire until January 14, 2025. The “election after the member’s current term is completed” will not be held until November of 2028. So, it appears from the unambiguous text, that if they are to be disqualified from holding the office of Senator, it would be for the term that begins in January of 2029. This means that, contrary to Senate President Wagner’s declaration, they would be qualified for another term commencing in January of 2025 until January of

2029. A similar analysis also applies to their colleagues who have also been exercising their rights to political speech by depriving the Senate of a quorum in the midst of this “purely political controversy.”

We acknowledge that the voters pamphlet material relating to Measure 113 suggests the result that the Senate President has announced. But, that material was misleading and portions were outright incorrect. The ballot title was never subject to a Supreme Court challenge. To reach the result described in the voters pamphlet, a court would need to either ignore the words in the actual text of M113 or interpret them in a way that is totally inconsistent with the “context” of other constitutional provisions. We believe that unless a court were inclined to engage in logical gymnastics, it would not be able to reconcile President Wagner’s interpretation with the actual text which now appears in Art. IV, Sec. 15 of the Constitution.

As the state’s chief election official, you are required by ORS 245.165 to withhold a candidate’s name from the ballot if it appears the candidate is not qualified. Senators Knopp and Boquist intend to appear on the May 2024 Primary and November 2024 General election ballots. You must therefore determine whether they will be disqualified from serving by virtue of his having accumulated 10 or more unexcused absences as a result of Measure 113.

ORS 183.410 provides:

“[o]n petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. However, the agency may, where the ruling is adverse to the petitioner, review the ruling and alter it if requested by the petitioner. Binding rulings provided by this section are subject to review in the Court of Appeals in the manner provided in ORS 183.480 for the review of orders in contested cases. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. The petitioner shall have the right to submit briefs and present oral argument at any declaratory ruling proceeding held pursuant to this section.”

Per the command of the statute, the Attorney General has promulgated administrative rules for this purpose that are applicable to your agency. See OAR 137-002-0010 et seq.

We therefore request that you issue a declaratory ruling to the effect that Senators Knopp and Boquist are not barred from seeking re-election to their positions at the Primary and General elections to be held in 2024 nor are they disqualified from serving as State Senators for the term commencing in January of 2025 by virtue of Art. IV, Section 15 of the Constitution.

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For the purpose of complying with OAR 137-002-0010(6) we supply the following address for Senators Knopp and Boquist and the Committee:

Oregon's 13 Constitutional Defense Fund PAC
354 NE Greenwood Suite 109
Bend, OR 97701

Senator Tim Knopp
900 Court St. NE, S-323
Salem, Oregon 97301

Senator Brian Boquist
900 Court St. NE, S-311
Salem, Oregon 97301


The rule also requires us to notify you of any other person known to us to be interested in the requested declaratory ruling. We submit that every member of the legislature, the press and the public at large would constitute that group.

Thank you for your consideration of our request. Although the provision of a declaratory ruling is discretionary on the part of the Secretary of State, we submit that issuing such a ruling will be in the public interest and will help us first resolve the meaning of the amendment prior to engaging in a debate as to its constitutionality.

Feel free to contact me if you have any questions or should you wish me to supply more information.

Sincerely,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, appearing to read "John DiLorenzo, Jr.", written in a cursive style.

John DiLorenzo, Jr.