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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

LARRY GEORGE, individually and in his)
capacity as Oregon State Senator and a)
member of the 74th Legislative Assembly,)
and TED ABRAM, individually,)

Case No. 07C23988

Plaintiffs,)

v.)

OPINION AND ORDER

PETER COURTNEY, in his capacity as)
President, Oregon State Senate, JEFF)
MERKLEY, in his capacity as Speaker,)
Oregon House of Representatives,)
THEODORE KULONGOSKI, in his)
capacity as Governor of State of Oregon,)
and BILL BRADBURY, in his capacity as)
Oregon Secretary of State,)

Defendants.)

This case arises out of the Legislative Assembly’s call for a special session of the legislature in February 2008. Plaintiffs have filed a Complaint asking this court to issue a Declaratory Judgment and a Preliminary Injunction. The Plaintiffs contend that Defendants are attempting to circumvent Article IV, section 10, of the Oregon Constitution, which provides for a single session of the legislature each biennium, by convening a “Supplemental Session” pursuant to Senate Concurrent Resolution 1 which was adopted during the regular biennial session last January. Plaintiffs have requested this court to issue a preliminary injunction to restrain the President of the Senate and the Speaker of the House of Representatives from convening the special session and to prohibit the Governor and the Secretary of State from signing into law

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3 legislation resulting from the special session and receiving and recording any such enactments. ¹
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5 In response, Defendants have filed a Motion to Dismiss Plaintiffs' Complaint for lack of
6 jurisdiction, for failure to state a claim, and for failure to timely commence their action.
7 Defendants argue that Article IV, section 10 of the Oregon Constitution vests with the
8 Legislative Assembly the sole and unreviewable discretion to determine whether a special
9 session is warranted pursuant to its emergency powers. Defendants maintain that the internal
10 legislative lawmaking process is not subject to judicial oversight. For these reasons, Defendants
11 urge this court to deny Plaintiffs' Motion for Injunctive Relief and to dismiss this proceeding.

12 The parties have stipulated under ORCP Rule 79(C)(2) that the hearing on the request for
13 Injunctive Relief may be consolidated with the trial of the merits, and that the record of the
14 proceedings may now be closed.
15

16 The Oregon Constitution has always provided that the Legislative Assembly shall hold
17 biennial sessions. Or. Const. Art. IV, §10. "The sessions of the Legislative Assembly shall be
18 held biennially at the capitol of the State . . ." By statute, ORS 171.010 , regular legislative
19 sessions must "be held at the capital of the state and shall commence on the second Monday in
20 January of each odd numbered year." Thus, the Regular sessions of the Legislative Assembly
21 may be held only once every two years pursuant to the constitution, and only in odd numbered
22 years pursuant to statute.

23 However, the Legislative Assembly is also constitutionally permitted to convene itself in
24 special emergency sessions as a result of an amendment to the Constitution adopted by a vote of
25

26 ¹ Under generally recognized principles, a preliminary judgment is not a preliminary
27 adjudication on the merits, but rather a device for preserving the status quo in order to prevent an
28 irreparable loss of rights. The moving party must therefore show a likelihood of success on the
29 merits, that irreparable harm will be suffered in the absence of preliminary relief, and that the
30 "balancing of hardships" favor such relief. *See e.g. Textile Unlimited, Inc v. A. bmhand Co.*, 240
31 F.3d 781, 786 (9th Cir. 2001); *Mentor Graphics Corp. v. Quickturn Design Sys.*, 150 F.3d 1374,
32 1377 (9th Cir. 1998). Accordingly, a party seeking preliminary relief "must show (1) a
33 combination of probable success on the merits and the possibility of irreparable injury, or (2) that
34 serious questions are raised and the balance of hardships tips sharply in its favor." *Big Country
35 Foods, Inc. v. Bd. of Educ. Of Anchorage Schools Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989).
36 Even if the balance of hardships tips sharply in plaintiffs' favor, however, "it must be shown as
37 an irreducible minimum" that there is a fair chance of success on the merits. *Stanley v. Univ. of
38 S. Calif.*, 13 F.3d 1313, 1319 (9th Cir. 1994) and that the balance of public interests weighs in
39 favor of granting the injunctive relief sought.

1 the people in 1976:

2 In the event of an emergency, the Legislative
3 Assembly shall be convened by the presiding
4 officers of both Houses at the Capitol of the State at
5 times other than required by section 10 of this
6 Article upon the written request of the majority of
7 the members of each House to commence within
8 five days after receipt of the minimum requisite
9 number of requests.

10 Or. Const. Art. IV, §10a.

11 The legislature has further delineated by statute the process by which it may call special
12 sessions pursuant to its emergency powers:

13 When a majority of the members of each house of
14 the Legislative Assembly has cause to believe that
15 an emergency exists and so notifies the presiding
16 officers of each house in the manner described in
17 this section, the presiding officers shall invoke
18 section 10a, Article IV of the Oregon Constitution.

19 ORS 171.015(a).

20 Plaintiffs' challenge to the pending session focuses on the language and timing of Senate
21 Concurrent Resolution 1. The preamble to Senate Concurrent Resolution 1 recited that the
22 Public Commission on the Oregon Legislature had "found that the current structure of the
23 legislative sessions does not provide sufficient predictability or certainty for the citizens of
24 Oregon;" and that "even-year sessions will improve the legislature's handling of complex policy
25 issues and related fiscal matters." Section (3) of Senate Concurrent Resolution 1 declared that
26 pursuant to the declarations made in the preamble, "an emergency exists and will continue
27 through February 2008"

28 Section 3 also provided a timetable for convening an even year session in this biennium.
In January 2007, the presiding officers were directed to provide notice of their intent to invoke
ORS 171.015(1) and the Legislative Administrator would then "follow the special session
protocol set forth in ORS 171.015," to convene a special session on February 4, 2008. The
presiding offices were also directed to ensure that the session would be "limited to the most
pressing fiscal and policy issues," and would adjourn *sine die* "no later than February 29, 2008."
Senate Concurrent Resolution 1, Section 3 (2007).

Plaintiffs contend that Senate Concurrent Resolution 1 exceeds the legislative power
granted by the Oregon Constitution in that the "emergency" relied upon to justify the special
session is legally insufficient. Defendants argue that the Legislative Assembly has unlimited
authority to declare an emergency and to schedule a special session of the legislature pursuant
thereto, and that the sufficiency of any such emergency declaration is not reviewable by the
courts.

1 Defendants' argument relies, in principal part, on case law related to the exercise of
2 legislative power under a different constitutional provision, Article IV, section 28. That section
provides:

3 No act shall take effect, until ninety days from the
4 end of the session at which the same shall have
5 been passed, except in case of an emergency;
which emergency shall be declared in the
preamble, or in the body of the law.

6 Article IV, section 28 permits the Oregon Legislature to attach emergency clauses to
7 legislation for the purpose of making the legislation take effect immediately. Within this context,
8 the long-standing legal principle is that a legislative declaration of emergency precludes judicial
9 review. The Oregon Supreme Court has stated, “[w]hat may be deemed an emergency * * * is
10 purely a legislative question. The courts will not inquire into it, nor entertain any question of its
11 sufficiency.” *Cameron v. Stevens*, 121 Or. 538, 544, 256 P.2d 935 (1927). *See also Kadderly v.*
12 *Portland*, 44 Or. 118, 148-149, 74 P. 710 (1903); *But see Greenburg v. Lee*, 196 Or. 157, 166-
13 175, 248 P.2d 324 (1952).

14 It is one thing for the judicial branch to defer to the legislative branch as to the sufficiency
15 of any particular “emergency” declared to justify expediting the effective date of a statute
16 pursuant to the legislature’s constitutional authorization to do precisely that. After all, our
17 political leaders are better positioned to decide the urgency of matters of public policy, and
18 accordingly, they have been entrusted with all such responsibilities under our system of
19 democracy.²

20 ² The reluctance of courts to overturn legislative decisions of a political nature arises out
21 of separation of powers concerns. Justice Stone’s expression of this doctrine is oft quoted:

22 The power of the courts to declare a statute
23 unconstitutional is subject to two guiding principles
24 of decisions which ought never to be absent from
25 judicial consciousness. One is that courts are
26 concerned only with the power to enact statutes, not
27 with their wisdom. The other is that while
28 unconstitutional exercise of power by the executive
and legislative branches of the government is
subject to judicial restraint, the only check upon our
own exercise of power is our own sense of self-
restraint. For the removal of unwise laws from the
statute books appeal lies, not to the courts, but to the
ballot and to the processes of democratic
government.

29 *U.S. v. Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting).

1 It would be, however, quite another matter for the judicial branch to refuse to examine the
2 legislature’s legal power to convene the Legislative Assembly when an exercise of that authority
3 is challenged as violative of the Constitution of this state. It is our Constitution that establishes
4 the legal powers and responsibilities of each of the three branches of our government. And it is
5 our Constitution that provides the bedrock foundation for the rule of law that ultimately governs
6 the acts of everyone in our democracy, no matter what office they may hold, and regardless of
7 what governmental powers may have been entrusted to them.

8 Under our Constitutional form of government, it is the Judicial Branch that is charged
9 with both the primary and the final responsibility to preserve and protect the rule of law. United
10 States Supreme Court Chief Justice John Marshall clarified that authority and responsibility in
11 what has now become recognized as one of the most important legal decisions of all time,
12 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803): “It is, emphatically, the province
13 and duty of the judicial department to say what the law is.”

14 This constitutional responsibility, the power of judicial department to review the acts of
15 the other two branches of government when their constitutional authority has been called into
16 question, has been regularly exercised by our courts ever since. *See, e.g., Powell v. McCormack*,
17 395 U.S. 486, 506 (1969), citing *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881):

18 Especially is it competent and proper for this court
19 to consider whether its [the legislature’s]
20 proceedings are in conformity with the Constitution
21 and laws, because, living under a written
22 constitution, no branch or department of the
23 government is supreme; and it is the province and
24 duty of the judicial department to determine in cases
25 regularly brought before them, whether the powers
26 of any branch of the government, and even those of
27 the legislature in the enactment of laws, have been
28 exercised in conformity to the Constitution; and if
they have not, to treat their acts as null and void.

What this court is required to determine, then, is whether the Oregon legislature has
properly complied with the provisions of the Oregon Constitution in calling itself into this
forthcoming special session; that which has sometimes been described as a “supplemental
session.”

The Oregon constitution acts as both a grant and a limitation on legislative authority.
Wright v. Blue Mt. Hospital Dist., 214 Or. 141, 144-145, 328 P.2d 314 (1958). As directly
applicable here, the legislative power is limited to the conduct of biennial sessions pursuant to
Article IV, Section 10 of the Oregon Constitution. The only currently applicable exception to
this single session per biennium limitation on the legislative power is the Legislative Assembly’s
authority to call itself into an additional special session “in the event of an emergency,” pursuant
to Article IV, Section 10a.³

³ By a separate constitutional provision that is not implicated in this case, the governor
also has the independent power to call the Legislative Assembly to session. Or. Const. Art. V,
section 12.

1 What constitutes a sufficiently substantial emergency is not delineated in our
2 constitution. Accordingly, that decision should be, in nearly all instances, one for the Legislature
3 alone to determine. However, if the only “emergency” invoked by the Legislature to justify a
4 special emergency session is that the constitutionally prescribed biennial regular sessions are
5 insufficient and inefficient, then the exception is being allowed to swallow up the rule, thereby
6 circumventing the entire Constitutional limitation. Clearly, this gives too much leeway to the
7 emergency exception and too little credence to the underlying biennial restriction. *See Home*
8 *Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 439, 54 S.Ct. 231 (1934):

 The reserved power cannot be construed so as to
destroy the limitation, nor is the limitation to be
construed to destroy the reserved power in its
essential aspects. They must be construed in
harmony with each other.

9 If Senate Concurrent Resolution 1 were the only available legal basis for the present
10 invocation of the legislature’s emergency powers to call a special session under Article IV,
11 section 10a of the Oregon Constitution, then this court would be obliged to grant Plaintiffs the
12 relief they have requested. But it is not.

 Subsequent to the filing of this lawsuit, the legislative leadership, Peter Courtney,
12 President of the Senate and Jeff Merkley, Speaker of the House of Representatives, issued a
13 “Notice of Intent to Invoke ORS 171.015(1).” This occurred on January 18, 2008. The
14 “statement giving justification of the need for a special session” required by ORS 171.015(2)
15 includes, but is not limited to, the legislature’s enumeration of the need for an emergency session
16 declared in Senate Concurrent Resolution 1. Significantly, the January 18, 2008 Notice of Intent
17 to Invoke ORS 171.015(1) adds the following supplemental justification:

 In addition, interim committees of the Legislative
16 Assembly have identified specific budget and policy
17 issues that need resolution without delay. We find
18 that these matters constitute an emergency
warranting immediate attention by the Legislative
Assembly.

19 This brief additional justification for an emergency session, while couched in only very
20 vague and general terms, is nevertheless, sufficient to meet the basic threshold requirements of
21 Article IV, section 10a of the Oregon Constitution, at least in the judgment of this court.

 Importantly, it is the Notice of Intent to Invoke ORS 171.015(1) that actually gives rise to
22 the Request for Convening a Session of the Oregon Legislative Assembly, and in turn, to the
23 requisite canvassing of the entire membership of each House for concurrence. Moreover, the
24 ballot forms utilized to determine concurrence with the leadership’s request for a special sessions
refer only to the Statement of Justification made in the notice described in ORS 171.015(2), and
not to that set forth in Senate Concurrent Resolution 1 a year earlier. See generally, Affidavit of
David E. Leith dated January 23, 2008, and Exhibit 1 attached thereto.

25 It is this court’s conclusion that no more than this is required to establish the necessary
26 Constitutional authority for the upcoming special emergency session of the Legislative
27 Assembly. Assuming that the requisite majority of each House responds favorably to the
leadership’s request for concurrence by February 4, 2008, the pending session will be in full

1 compliance with Article IV, Section 10a of the Oregon Constitution.

2 It follows, then, that Defendants are entitled to an Order Dismissing Plaintiff's
3 Complaint, and since the parties have stipulated under ORCP Rule 79(C)(2) that the record
before this court is complete, to a Final Judgment on the merits as well.

4 It is hereby so Ordered this 28th day of January, 2008.

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Hon. Paul J. Lipscomb
Presiding Judge

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