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

SENATOR DENNIS LINTHICUM;
REPRESENTATIVE MIKE NEARMAN;
REPRESENTATIVE E. WARNER
RESCHKE; and NEIL RUGGLES,

Plaintiffs,

v.

GOVERNOR KATE BROWN, in her
capacity as Governor of the State of Oregon,
and STATE OF OREGON,

Defendants.

Case No.

COMPLAINT
(Injunction/Declaratory Judgment)

(Filing fee \$281 pursuant to
ORS 21.135)

Claim Not Subject to Mandatory
Arbitration

Plaintiffs allege as follows:

1.

Plaintiff SENATOR DENNIS LINTHICUM is a member of the Oregon Legislature, representing Senate District 28 (Klamath Falls). He is injured by the conduct alleged herein insofar as defendant has invaded his rights and privileges under the Oregon Constitution to exercise, in concert with other legislators, the legislative power of the State of Oregon.

2.

Plaintiff REPRESENTATIVE MIKE NEARMAN is a member of the Oregon Legislature, representing House District 23 (Independence). He is injured by the conduct alleged herein insofar

1 as defendant has invaded his rights and privileges under the Oregon Constitution to exercise, in
2 concert with other legislators, the legislative power of the State of Oregon.

3 3.

4 Plaintiff REPRESENTATIVE E. WERNER RESCHKE is a member of the Oregon
5 Legislature, representing House District 56 (Klamath Falls). He is injured by the conduct alleged
6 herein insofar as defendant has invaded his rights and privileges under the Oregon Constitution to
7 exercise, in concert with other legislators, the legislative power of the State of Oregon.

8 4.

9 Plaintiff NEIL RUGGLES is a resident of Oregon and Washington County. He has suffered
10 financial losses, and has lost a martial arts practice that for thirty years provided him with physical,
11 social, and mental health benefits, by reason of the Governor's unlawful and unconstitutional orders
12 challenged herein.

13 5.

14 Defendant KATE BROWN is made a party to this action in her official capacity as the
15 Governor of the State of Oregon. Article V, § 1 of the Constitution of the State of Oregon vests the
16 " executive power of the State" in the Governor.

17 6.

18 Defendant STATE OF OREGON is a sovereign state, established under the framework of
19 the Constitution of the State of Oregon.

20 7.

21 This Court has jurisdiction pursuant to its general jurisdiction and ORS 28.010, and venue
22 over this action is appropriate pursuant to ORS 14.060 because the challenged actions occurred in
23 this County. This is not an action under the Oregon Administrative Procedure Act, because the Act
24 specifically excludes executive orders of the Governor from "rules" subject to challenge under the
25 Act. ORS 183.310(9)(e). As explained below, plaintiff challenge specific Oregon statutes as
26 facially invalid and invalid as applied through the sequence of emergency orders issued by the

27 2

28 COMPLAINT
Case No.

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1 Governor, because those statutes have purported to allow the Governor to exercise sweeping
2 legislative powers in violation of the separation of powers guaranteed to plaintiffs pursuant to the
3 sections of the Oregon constitution discussed below.

4 8.

5 Oregon has detailed legal procedures for addressing communicable diseases, and for testing,
6 treating, quarantining, or isolating individuals believed to pose a threat to public health. These
7 statutes, akin to those upheld in the U.S. Supreme Court in *Jacobsen v. Massachusetts*, 197 U.S. 11
8 (1905), express a fundamental legislative determination that the appropriate response to serious
9 communicable disease was to delegate to the State Public Health Director or others the power to
10 petition a court for an order to isolate or quarantine a person or group of persons as necessary (ORS
11 433.123) or use emergency administrative orders as needed (ORS 433.121). No violation of
12 separation of powers and other provisions of the Oregon Constitutional is required to implement
13 such procedures and protect the public welfare in cases of epidemics.

14 9.

15 Article IV, § 1 of the Oregon Constitution provides: "The legislative power of the state,
16 except for the initiative and referendum powers reserved to the people, is vested in a Legislative
17 Assembly, consisting of a Senate and a House of Representatives." No legislative powers are
18 vested in the Governor.

19 10.

20 Article I, § 21 of the Oregon Constitution provides: ". . . nor shall any law be passed, the
21 taking effect of which shall be made to depend upon any authority, except as provided in this
22 Constitution".

23 11.

24 Article I, § 22 provides "The operation of the laws shall never be suspended, except by the
25 Authority of the Legislative Assembly."

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12.

Article III, § 1 of the Oregon Constitution provides:

"The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

There is "in th[e] Oregon Constitution expressly provided" specific emergency powers to the Governor, set forth in Article X-A, including the "public health emergencies" that constitute "catastrophic disasters". Oregon Const., Art. X-A, § 1(2)(d).

13.

Defendant has declined to exercise the constitutional emergency powers granted by Oregon Constitution in response to the COVID-19 pandemic. Article X-A requires defendant to follow procedures providing for procedural and substantive rights for the legislative assembly members who are plaintiffs, and for the citizens of Oregon in general, including

- (a) A requirement that defendant "issue a proclamation convening the Legislative Assembly" (*id.* § 1(3));
- (b) Special rights of the Legislative Assembly to convene in places other than the Capitol, and operate with less than the usual quorum (*id.* § 3);
- (c) An ability to legislate without certain constitutional restrictions (*id.* § 4);
- (d) An ability for legislators to participate remotely in the Legislative Assembly by electronic means (*id.* § 5); and, most importantly;
- (e) A requirement that the Legislative Assembly affirmatively extend the thirty-day limit for the emergency, by three-fifths majority, without which extension the total duration of any emergency cannot exceed sixty days (*see id.* ¶ 6).

14.

This provision requiring the Legislative Assembly to affirmatively extend the emergency beyond any sixty-day period is vital to maintain the separation and balance of constitutional power.

1 Although the Legislature retains theoretical power to end by statute an emergency, thereby
2 overturning a Governor's declaration of an emergency and orders issued thereunder, this does not
3 prevent or adequately mitigate the harm caused by the unconstitutional delegations of power
4 challenged herein. Much of the time the Legislature is not in session, and the procedures in Oregon
5 Const. Art. IV, §§ 10-10a for calling it into session are cumbersome. More importantly, if the
6 Legislature wishes to end an emergency by statute, legislature must obtain a two-thirds majority in
7 each house in order to override a potential veto. This places a significant burden on the Legislature
8 to regain its own Legislative powers once the Governor declares an emergency. For example,
9 recently in Pennsylvania, the power supposedly granted to the legislature to end the emergency by a
10 simple majority vote of both houses in a joint resolution (*cf.* ORS 401.204) failed because the
11 governor vetoed the bill.

12 15.

13 On March 8, 2020, the Governor issued Executive Order No. 20-03, the first of a series of
14 Executive Orders concerning COVID-19, in which she has exercised powers purportedly granted
15 under two chapters of the Oregon Revised Statutes: Chapters 401 and 433.

16 16.

17 The principal focus of this action is to challenge defendant's exercise of power under
18 Chapter 401. ORS 401.165(1) provides, "The Governor may declare a state of emergency by
19 proclamation . . . after determining that an emergency has occurred or is imminent."

20 17.

21 ORS 401.025 defines "emergency as "a human created or natural event or circumstance that
22 causes or threatens widespread loss of life, injury to person or property, human suffering or
23 financial loss". This language, particularly insofar as it uses the word "threatens," imposes no
24 intelligible limitations on the Governor's power to declare an emergency. Similarly, the word
25 "widespread" in its conventional interpretation places no obvious limitations on the emergency
26 declaration. Any common causes of death, injury, or suffering that affects people generally, such as

1 cancer, heart disease, drug overdoses, medication side effects, automobile accidents, or alcoholism,
2 might easily meet the “widespread” criteria, and all cause death, personal injury or human suffering.
3 The Governor has purported to exercise powers under Chapter 401 for such events as a total solar
4 eclipse (Executive Order No. 17-14, issued August 14, 2017) or a one-day demonstration in a park
5 in Portland by those opposing the political party of the Governor (Executive Order No. 20-54,
6 issued September 25, 2020).

7 18.

8 Most specifically, plaintiffs challenge ORS 401.168(1), which provides that, during a state
9 of emergency, the Governor has "the right to exercise, within the area designated in the
10 proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate
11 the purposes of this chapter." The statute contains no requirement that the exercise of police powers
12 be reasonable or necessary, and confers essentially all power of the State upon the Governor upon
13 her emergency proclamation. The Governor's exercise of authority to legislate by Executive Order
14 pursuant to ORS 401.168(1), as specified below, constitutes a violation of the separation of powers
15 guaranteed by the Oregon Constitution, and as invasive of their rights as citizens and legislators.

16 19.

17 Plaintiffs also challenge ORS 401.192(1) insofar as it expands the authority of legislative
18 action taken by the Governor to override all legislation previously issued by the Legislative
19 Assembly, and provides:

20 "All rules and orders issued under authority conferred by ORS 401.165 to
21 401.236 shall have the full force and effect of law both during and after the
22 declaration of a state of emergency. All existing laws, ordinances, rules and
orders inconsistent with ORS 401.165 to 401.236 shall be inoperative during the
period of time and to the extent such inconsistencies exist."

23 20.

24 While the Legislature has the power to allow specific statutory authority to take effect upon
25 the declaration of an emergency, the Legislature has here gone further and turned the Governor into
26

1 a super-legislature, who might strike down "all existing law" at will after such a declaration of
2 emergency, making the effect of all outstanding laws dependent upon the whim of the Governor.

3 21.

4 ORS 433.441(1) provides that, "[u]pon the occurrence of a public health emergency, the
5 Governor may declare a state of public health emergency as authorized by ORS 433.441 to 433.452
6 to protect the public health." To do so, the Governor must issue a "proclamation" that identifies,
7 among other things, the nature of the public health emergency and the political subdivision or
8 geographic area subject to the proclamation. ORS 433.441(2). "A proclamation of a state of public
9 health emergency expires when terminated by a declaration of the Governor or no more than 14
10 days after the date the public health emergency is proclaimed unless the Governor expressly extends
11 the proclamation for an additional 14-day period." ORS 433.441(5). Thus, a proclamation of a
12 public health emergency pursuant to ORS Chapter 433 alone expires no later than 28 days from the
13 day it is proclaimed.

14 22.

15 Plaintiffs do not challenge defendant's exercise of emergency power under Chapter 433,
16 except insofar as Chapter 433 imports the Chapter 401 powers challenged herein, and except insofar
17 as that authority has expired.

18 23.

19 Specifically, ORS 433.441(3)(f) provides that during a public health emergency, the
20 Governor may "take any other action that may be necessary for the management of resources, or to
21 protect the public during a public health emergency, including any actions authorized under ORS
22 401.168, 401.185, 401.188 and 401.192." The extraordinary general powers of 401.168 and
23 401.192 are beyond those specifically crafted to assist the State of Oregon in responding to a public
24 health emergency, and are invalid as exercised in violation of the separation of powers as alleged
25 herein.

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24.

In *Elkhorn Baptist Church v. Brown*, 366 Or. 506, 517, 466 P.3d 30, 38 (2020), the Supreme Court ordered the Baker County Circuit Court to dissolve an injunction against continued exercise of powers by defendant on the ground, among others, than the 28 day period had expired. The Supreme Court found that the Governor's emergency could be sustained under Chapter 401 without regard to the Chapter 433 time limits or regard to Article X-A. The Supreme Court did not have occasion to consider the constitutional arguments made herein.

25.

The Legislature has provided no ascertainable standard for defendant to exercise "all police powers vested in the state by the Oregon Constitution" other than a general command "to effectuate the purposes of this chapter". ORS 401.168(1).

26.

The purposes of Chapter 401 are set forth in ORS 401.032:

"(1) The general purpose of this chapter is to reduce the vulnerability of the State of Oregon to loss of life, injury to persons or property and human suffering and financial loss resulting from emergencies, and to provide for recovery and relief assistance for the victims of emergencies.

"(2) It is declared to be the policy and intent of the Legislative Assembly that preparations for emergencies and governmental responsibility for responding to emergencies be placed at the local level. The state shall prepare for emergencies, but shall not assume authority or responsibility for responding to an emergency unless the appropriate response is beyond the capability of the city and county in which the emergency occurs, the city or county fails to act, or the emergency involves two or more counties."

27.

This language contains no intelligible principles providing guidance to the Governor. In particular, the Legislature has provided no guidance as to how to balance "vulnerability" to "loss of life" and "injury to persons or property" threatened by an emergency as against "human suffering and financial loss" resulting from the restrictions intended to respond to the emergency. These are

1 inherently Legislative judgments, particularly to the extent that they address persistent
2 circumstances.

3 28.

4 The Legislature has provided no procedures regulating the Governor's use of emergency
5 powers under Chapter 401 that provide any safeguards against the arbitrary exercise of such powers.
6 The only direct recourse for Oregon citizens aggrieved by the exercise of such powers is in the
7 Oregon courts. The Oregon courts provide no effective remedy against any specific emergency
8 measures adopted by the Governor as violative of due process or equal protection concerns, for
9 most such measures can only be challenged under a standard of review for evaluating legislative
10 acts not harming protected classes, wherein to pass the challenge, the measure need only have some
11 relationship, however tenuous, to the control of communicable disease.

12 29.

13 The Legislature has purported to provide in ORS 401.168 for the entire concentration of
14 State power in a single individual, defendant, who has since March 8, 2020, been performing
15 numerous legislative functions committed by the Constitution to the Legislative Assembly.

16 (a) Most fundamentally, defendant cast aside the entire legislative structure for
17 addressing the spread of communicable disease by focusing state power upon individuals posing a
18 particularized risk through orders and rules issued pursuant to specific statutory authorizations. In
19 place of this structure, the Governor has legislated massive and general restrictions on all citizens.

20 (b) Defendant delegated to the Oregon Health Authority and the state Public Health
21 Director the power to issue "guidelines for private businesses regarding appropriate work
22 restrictions, if necessary" (Executive Order No. 20-03), of a legislative nature.

23 (c) Defendant purported to ban "large social, spiritual, and recreational gatherings"
24 (Orders No. 20-05, 20-07), a legislative act distinguished from orders issued concerning particular
25 citizens or groups of citizens.

1 (d) Defendant closed Oregon's schools and banned in-person instruction (Order Nos. 20-
2 08, 20-09, 20-17, 20-20), later allowing in-person instruction under compliance with rules
3 developed by the Oregon Health Authority (Order Nos. 20-28, 20-29), displacing the entire
4 statutory structure for Oregon education previously developed by the Legislative Assembly.

5 (e) Defendant set aside the Legislature's balance of tenant and landlord rights by
6 banning all evictions (Order No. 20-11), forbidding the termination of residential leases for
7 nonpayment (Order No. 20-13), and suspending certain garnishment proceedings (Order No. 20-
8 18), again in purely legislative acts.

9 (f) Defendant closed entire sectors of Oregon business based on generalized assertions
10 of risk (Order Nos. 20-12, 20-25, 20-27), later allowing some but not all to re-open under stringent
11 and evolving regulatory restrictions devised by the Oregon Health Authority, all of which were
12 legislative in nature.

13 30.

14 The state of emergency proclaimed by defendant has been repeatedly extended, and
15 currently extends to November 3, 2020 (Order No. 20-38)

16 31.

17 As the scope of powers the Legislative Assembly has purported to confer upon the Governor
18 become increasingly broad, both in subject matter and duration, the degree of specificity required
19 by the Oregon Constitution in any delegation of power rises.

20 32.

21 The Governor's exercise of Chapter 401 emergency powers has arrogated unto herself
22 legislative powers of sweeping scope to reorder social life and destroy the livelihoods of residents
23 across the state, which powers are reserved exclusively for the Legislative Assembly by the Oregon
24 Constitution.

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33.

The above deficiencies operate to nullify the federal constitutional guarantee of a republican form of Government, as guaranteed to plaintiffs under Article IV, § 4 of the U.S. Constitution. This clause requires the United States to prevent the State of Oregon from imposing rule by a single executive authority, even one elected through majority vote.

FIRST CAUSE OF ACTION: INJUNCTION

34.

Plaintiffs reallege paragraphs 1 through 33 as if set forth herein.

35.

Plaintiffs are suffering irreparable injury by reason of defendant's continuing violation of the Oregon Constitution to seize and exercise legislative powers pursuant to the purported delegation of "all police powers" in ORS 401.168 and the purported suspension of legitimately enacted laws at the Governor's discretion under ORS 401.192.

36.

Plaintiffs have no adequate remedy at law.

SECOND CAUSE OF ACTION: DECLARATORY JUDGMENT

37.

Plaintiffs reallege paragraphs 1 through 36 as if set forth herein.

38.

Plaintiffs are suffering irreparable injury by reason of defendant's continuing violation of the Oregon Constitution to seize and exercise legislative powers pursuant to the purported delegation of "all police powers" in ORS 401.168, and the purported suspension of legitimately enacted laws at the Governor's discretion under ORS 401.192.

Plaintiffs are entitled, pursuant to ORS 28.020, for a declaration from this Court as to the scope of their rights to an Oregon government that operates in accordance with the separation of powers as established by the Oregon Constitution.

WHEREFORE, Petitioner prays,

A. For relief on the First Cause of Action in the form of orders temporarily and preliminarily enjoining: defendant from:

- 1. Exercising the power granted in ORS 401.165 to declare an "emergency;"
- 2. Exercising the power to issue general rules, legislative in nature, pursuant to ORS 401.168(1), directly, or as incorporated in ORS 433.441(3)(f);
- 3. Exercising the power to override all preexisting law and rules pursuant to ORS 401.192(1), directly, or as incorporated in ORS 433.441(3)(f); and,
- 4. Enforcing executive orders relying upon these unconstitutionally exercised powers.

B. For relief on the Second Cause of Action in the form of a judgment declaring:

- 1. The power granted in ORS 401.165 to declare an "emergency" violates the separation of powers by granting legislative powers to the Governor without any time limit after which the power of the Legislature is not unduly impaired;
- 2. The Legislature cannot constitutionally delegate "all police power," including the power to issue general rules, legislative in nature, to the Governor in ORS 401.168(1);
- 3. The Legislature cannot constitutionally delegate the power to override all preexisting law and rules to the Governor in ORS 401.192(1);
- 4. The Governor's executive orders relying upon these unconstitutionally exercised powers are void;
- 5. ORS 433.441(3)(f) cannot constitutionally incorporate the above portions of ORS Chapter 401; and,

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6. Allowing the Governor to exercise all police power of the state for an extended period of time beyond the statutory limits of ORS Chapter 433 and the Constitutional limits of Article X-A violates the federal rights of Oregonians to a Republican form of government under Article IV, § 4 of the U.S. Constitution.

C. For such other and further relief as may be just and proper.

Respectfully submitted this _____ day of October 2020.

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