



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

June 10, 2021

Representative Duane Stark  
900 Court Street NE H372  
Salem OR 97301

Dear Representative Stark:

You have asked 12 questions concerning the December 21, 2020 Committee hearing scheduled for later today. Your questions and our brief answers are set forth below. For clarity and brevity, some questions have been reworded slightly.

*Question 1, Part 1:* Article IV, section 14, of the Oregon Constitution requires that legislative deliberations be “open”. Can you please explain how the physical Capitol building being closed to the public can be in compliance with this section of the constitution?

*Answer:* The Legislative Assembly may convene in session in compliance with Article IV, section 14, of the Oregon Constitution while leaving the Capitol building closed to the public by adopting rules that ensure the public has the ability to observe all legislative proceedings at the time they are occurring, and also to ensure that the public is able to testify at public hearings that are conducted during the session. A determination by the Legislative Assembly to adopt such rules would not be considered arbitrary or unreasonable during the COVID-19 pandemic that the state has experienced since the spring of 2020.

The starting point of our analysis is Article IV, section 14, of the Oregon Constitution, which provides:

The deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open. Each house shall adopt rules to implement the requirement of this section and the houses jointly shall adopt rules to implement the requirements of this section in any joint activity that the two houses may undertake.

Although earlier forms of Article IV, section 14, have been a part of the Oregon Constitution since statehood, the section was amended in 1974 to eliminate secret sessions and ensure that all legislative deliberations be “open”; it was amended again in 1978 to authorize each chamber to adopt rules to implement the requirements of the section.<sup>1</sup> We are not aware of any appellate court cases that have construed the meaning of Article IV, section 14. When there is an absence of case precedent governing the meaning of a provision of the Oregon Constitution, we turn to the analytical methodology the Oregon Supreme Court uses to determine what voters intended when they adopted a proposed amendment, or what the framers originally intended, if the provision has remained unchanged since statehood. Because

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<sup>1</sup> See Ballot Measure 2 (1974) and Ballot Measure 2 (1978).

Article IV, section 14, was modified by voters, the court uses a three step methodology. The first step considers the text and context of the provision in question. The second step considers the historical evidence behind the provision, which generally is voter pamphlet material. If ambiguity about voter intent remains after considering text, context and historical evidence, general maxims of constitutional construction are used to resolve the ambiguity.<sup>2</sup>

Here, the text of the first sentence of Article IV, section 14, is straightforward: all legislative deliberations are to be open. The term “deliberations” means “a discussion and consideration by a number of persons of the reasons for or against a measure.”<sup>3</sup> In other words, legislative debate, whether in committee or floor session, constitutes deliberations. The other significant word is “open”. “Open” means, in relevant part, “arranged or governed so as to permit ingress, egress or passage,” “completely free from concealment: exposed to general or particular perception or knowledge,” “not covered,” or “having no concealing cover.”<sup>4</sup> The first definition of “open” clearly suggests that the Capitol cannot be closed to the public during a legislative session. The remaining three definitions of “open,” however, focus on access to knowledge and the avoidance of concealment. We believe that voters intended the latter meanings of “open”, for two reasons. First, the purpose of legislative deliberations has nothing to do with ingress or egress, but rather concerns the use of knowledge to make decisions that the public ultimately needs to understand. Second, even during routine sessions, there are places the public is not allowed to enter, exit or pass through. The chamber floors or committee room daises are examples. It therefore follows that “open” in Article IV, section 14, does not pertain to ingress, egress and passage.

The second sentence of Article IV, section 14, directs each chamber to adopt rules to implement the provisions requirements. As you know, House and Senate Rules were adopted during all three special sessions of 2020 and for the 2021 regular session that require the Capitol to be physically closed to the public.<sup>5</sup> These rules explain the need for keeping the Capitol physically closed -- the ongoing COVID-19 pandemic -- while also expressly requiring:

- All legislative deliberations, whether in committee or floor session, to be streamed to the public on the Internet at the same time the deliberations are occurring.
- All legislative deliberations to also be contemporaneously broadcast to monitors located on the Capitol steps, to ensure that those members of the public who lack the means to access the Internet are able to observe proceedings.
- All voting be visually observable or audible by the public through the Internet and television monitors, to ensure that the public knows those who are voting are authorized to vote.
- Any public hearing conducted by a committee to allow members of the public who wish to testify the ability to do so.
- Bona fide members of the press to be in the Capitol to ensure routine reporting of legislative proceedings to the public.

We conclude that the rules retain the qualities of openness that Article IV, section 14, guarantees that the public possess; namely, knowledge about what the legislature is doing and

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<sup>2</sup> *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 56-57 (2000).

<sup>3</sup> *Merriam-Webster Unabridged Online Dictionary* (visited January 8, 2021).

<sup>4</sup> *Id.*

<sup>5</sup> See House Rule 3.07 and Senate Rule 3.05.

transparency concerning legislative deliberations so that concealment of those deliberations is not possible.

The context of a provision of the Oregon Constitution includes other related provisions of the constitution.<sup>6</sup> Article I, section 10, of the Oregon Constitution, is contextually similar to Article IV, section 14, in that it governs how official proceedings of a different branch of government must be conducted. In relevant part, Article I, section 10, provides that “No court shall be secret, but justice shall be administered, openly ...”. In other words Article I, section 10 parallels Article IV, section 14, by requiring court proceedings to be conducted “openly.” This is significant because, during this COVID-19 pandemic, Oregon Chief Justice Martha Walters has ordered most judicial proceedings to be conducted using remote means or postponed, with physical access to courthouses curtailed.<sup>7</sup>

The historical record before voters in adopting amendments to Article IV, section 14, includes the 1974 voters pamphlet. A review of the voters pamphlet for the 1974 amendment to Article IV, section 14, yielded the following statement in support of the amendment: “[t]he people of Oregon will be guaranteed that the Legislative proceedings will stand the test of public scrutiny.”<sup>8</sup> Legislative rules requiring all legislative proceedings to be contemporaneously streamed over the Internet and broadcast to monitors on the Capitol steps is consistent with what voters intended when acting to ensure that legislative proceedings be subject to “the test of public scrutiny.”

We finally note that the COVID-19 pandemic is without precedent in modern history in this state. To protect the public generally, the Governor has declared a state of emergency and, pursuant to that authority,<sup>9</sup> issued a series of executive orders that have significantly altered day-to-day routines in this state, including closing business, government and school operations, and banning social gatherings.<sup>10</sup> Last year, the Supreme Court heard a challenge to the Governor’s ban on social gathering for worship purposes, and upheld the Governor’s actions.<sup>11</sup> In doing so, the court noted that in the circumstances presented by the COVID-19 virus, government leaders have taken actions to protect people under constantly changing circumstances. Such decisions inherently involve difficult policy choices that are properly made by the people’s representatives in the legislative and executive branches.<sup>12</sup> The court further noted, however, that court intervention is appropriate when political leaders, in attempting to protect the public in an epidemic, act in an arbitrary or unreasonable manner or go far beyond what is reasonably necessary.<sup>13</sup> Because the COVID-19 virus is transmitted through the air and between people who are in close proximity, the Legislative Assembly’s decision to keep the Capitol physically closed to the public while requiring contemporaneous broadcast of all legislative proceedings is not an arbitrary or unreasonable decision, and does not go beyond

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<sup>6</sup> *State ex rel. Kaino v. Or. Comm’n on Judicial Fitness*, 335 Or. 633, 637 (2003).

<sup>7</sup> Chief Justice Order 20-006 (issued March 16, 2020); *see also* Chief Justice Order 20-047 (issued November 18, 2020) (imposing or continuing in-person restrictions on court operations).

<sup>8</sup> Argument in Favor of Measure 2, *1974 General Election Voters Pamphlet*, at 2.

<sup>9</sup> ORS 401.165 *et seq.*

<sup>10</sup> Governor’s Executive Orders 20-03 through 20-67 available here:

<https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx>. We note that, as of the date of this letter, some restrictions have been eased although the declaration of a state of emergency due to COVID-19 has been extended until March 3, 2021.

<sup>11</sup> *Elkhorn Baptist Church v. Brown*, 366 Or. 506 (2020).

<sup>12</sup> *Elkhorn Baptist*, 366 Or. at 509, quoting *South Bay United Pentecostal Church v. Newsom*, 590 U.S. \_\_\_\_, \_\_ (2020)

<sup>13</sup> *Id.*, 366 Or. at 510.

what is reasonably necessary to enable the legislature to make urgent policy decisions pertaining to the state's response to the virus and other urgent matters.

*Question 1, Part 2:* Do the Speaker of the House of Representatives and the Senate President have the authority to keep the public physically out of the Capitol?

*Answer:* The Capitol is physically closed to the public during a legislative session by operation of House and Senate rules adopted by each legislative body. During interim periods, the Capitol may be physically closed to the public by the Legislative Administrator under ORS 173.720 (1)(g) (delegating to the Administrator the authority to control all space and facilities within the State Capitol).

*Question 2:* What legal weight do House rules carry? Is it a crime to break House rules?

*Answer:* Article IV, section 11, of the Oregon Constitution, grants the House the authority to adopt its own rules of proceeding. House Rule 2.01 adopts *Mason's Manual of Legislative Procedure* as rules of the House in those instances not otherwise provided for in the Oregon Constitution or House Rules. *Mason's Manual* provides that adopted House rules are granted greater precedential weight than statutory provisions.<sup>14</sup>

It is not a crime to break House rules. A crime exists only if a statute is enacted that establishes the elements of a crime. There is no statute in existence that causes the failure to follow a House rule to be a crime.

*Question 3, Part 1:* Is it the responsibility of the House of Representatives to discipline or expel its members?

*Answer:* Yes. Article IV, section 15, of the Oregon Constitution, grants exclusive authority to each legislative chamber to punish its members for disorderly behavior and, with the concurrence of two-thirds, expel a member.

*Question 3, Part 2:* Why isn't this discipline left to the courts to handle?

*Answer:* Article III, section 1, of the Oregon Constitution, establishes three separate and co-equal branches of government: the executive, judicial and legislative branches. This provision is known as the separation of powers principle. In jurisprudence that has developed under separation of powers principles, tasks that the constitution assigns to one branch to enable it to perform that branch's core constitutional function are to be performed by that branch without interference from the other branches. As discussed in the preceding question, the constitution assigns the discipline of legislators to the legislative chamber of which the accused legislator is a member. Under separation of powers principles, a court would refrain from undertaking that task. See, however, question 9 for a limited exception to this principle.

*Question 4:* How is the legislature to determine what is considered "disorderly behavior" and what discipline should be levied on an individual determined to have engaged in "disorderly behavior"?

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<sup>14</sup> Section 4 (2), *Mason's Manual of Legislative Procedure* (2020 edition).

*Answer:* Article IV, section 15, of the Oregon Constitution was placed in the constitution to ensure that the House and the Senate have the power to uphold and safeguard their integrity and reputation. To carry out this purpose, the term “disorderly behavior” as used in Article IV, section 15, is not a defined technical term, but rather a legislative determination that the House or the Senate makes as an entire body when weighing whether certain conduct imperils the integrity and reputation of the House or the Senate to function as a deliberative, representational and fair law-making body.

*Question 5, part 1:* If a member of the legislature is expelled from the legislature, can that person run for office and then return if reelected?

*Answer:* Yes. If a candidate meets the qualifications for office as set forth in Article IV, section 8, of the Oregon Constitution, a candidate may stand for election to the office of State Representative and may be credentialed and seated if the candidate is elected. Article IV, section 8, does not list expulsion as grounds for being ineligible to serve. If an individual is convicted of a felony, the individual is not qualified to serve as a legislator until the individual has completed any sentence received for the felony conviction.<sup>15</sup>

In your correspondence outlining these questions, you noted that Article IV, section 15, of the Oregon Constitution provides that a member may not be expelled a second time for the same cause. While there has not been a case considering what this clause means, we believe the clause means that if the House considers the expulsion of a member and fails to obtain the two-thirds vote needed to expel the member, a vote of expulsion that is grounded in the same facts and circumstances cannot be brought again against that member.

*Question 5, Part 2:* Can an expelled member be reappointed by through the PCP/County Commissioner appointment process?

*Answer:* The answer to this question is unknown. The county commissioner appointment process is itself an inherently political process which renders it unlikely, in our view, that these circumstances would actually present themselves.

*Question 6:* What bearing might the December 21, 2020 Committee public hearing and any discussion and decision by this body have on a pending criminal case on the same matter?

*Answer:* This proceeding will have no direct bearing on a pending criminal case concerning the same facts and circumstances as a House expulsion proceeding. The criminal case will consider whether the elements of a crime were present in the events leading up to and during the protest activities on December 21, 2020, and will not consider events that post-date those activities by months.

There may be an indirect relationship between the expulsion proceedings and the pending criminal matter if the criminal matter is tried before a jury. This is because the expulsion proceedings are likely to bring substantial negative publicity to the defendant in the criminal matter. Courts employ extensive voir dire procedures, however, to ensure that an empaneled jury is capable of acting with impartiality.

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<sup>15</sup> Article IV, section 8 (3) and (4), of the Oregon Constitution.

**Question 7:** House Resolution 3 provides, on page 2, line 39, that “Representative Nearman be expelled” but does not include the word “immediately”, and does not contain a date. When does HR 3 become effective?

**Answer:** House Resolution 3 becomes effective immediately, so that Representative Nearman will be expelled immediately upon the requisite two-thirds majority vote being cast in favor of expulsion and the gavel falling to close the vote.

**Question 8:** Does this committee action or an action of the full chamber on the resolution make the conduct committee proceeding moot?

**Answer:** Action by the December 21, 2020 Committee does not render action by the House Committee on Conduct moot. The House Committee on Conduct is considering whether conduct by Representative Nearman violated the standards of conduct set forth in Legislative Branch Personnel Rule 27, which is a separate basis for determining disorderly behavior. If this committee sends HR 3 to the floor with a “be adopted” recommendation and the House expels Representative Nearman, the House Committee on Conduct proceeding would be moot and need not proceed. If Representative Nearman resigns before an expulsion vote is taken, however, the House Committee on Conduct is required to continue with its proceeding.<sup>16</sup> Finally, if an expulsion vote is taken on HR 3 and fails to obtain the required two-thirds vote, the House Committee on Conduct proceeding would not be moot and could proceed, but the House Committee on Conduct could not recommend expulsion as a remedy to be imposed.<sup>17</sup>

**Question 9:** If the House violates the due process rights of a member in this proceeding, can the House or the State of Oregon be held liable for a remedy including overturning our expulsion?

**Answer:** Cases have found that an elected official has a “liberty interest” in the elected official’s reputation that may not be deprived without adequate due process of law. The decisive factor that a court considers in determining the amount of process that is due in an expulsion proceeding concerns the risk that false charges against the accused elected official will go unrefuted, resulting in the official’s name remaining stigmatized.<sup>18</sup> The touchstone of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against the person and an adequate opportunity to refute that case.<sup>19</sup>

Thus, for the House to violate the due process rights of a member who is expelled, the member must demonstrate that the member was not given notice of the case against the member and was also not given an opportunity to refute the case. If the accused member can demonstrate to a court a lack of notice or a lack of opportunity to refute claims, the member could potentially get the expulsion overturned or could be awarded damages for any injury that occurred. However, this is a high threshold to meet; notice and a sufficient opportunity to clear one’s name is all the United States Constitution requires.<sup>20</sup> If damages were awarded, the State of Oregon indemnifies the House and its members for any damages that may be awarded.

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<sup>16</sup> Legislative Branch Personnel Rule 27 (14)(f).

<sup>17</sup> Article IV, section 15, of the Oregon Constitution.

<sup>18</sup> *Monserate v. N.Y. State Senate*, 599 F.3d, 148, 158 (2010); cited in *Hernandez v. Oregon Legislature*, 2021 U.S. Dist. LEXIS 31721.

<sup>19</sup> *Monserate*, at 158.

<sup>20</sup> *Id.*, at 159-160.

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Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter A. Johnson", with a long horizontal flourish extending to the right.

Dexter A. Johnson  
Legislative Counsel