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OREGON LEGISLATURE
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To: Co-Chair Anderson, Acting Co-Chair Woods and Members of the Committee

From: Floyd Prozanski

Date: February 23, 2023

Re: Senate Conduct Committee Mtg (2/24/23) Pertaining to Complaint Dated 12/5/22, Pursuant to SR 3.33

Thank you for taking time to consider this matter. In addition to the Legislative Counsel opinion dated February 13, 2023, posted to meeting materials for the agenda item listed above, I ask that you please also review an email that accompanies this memo from Marc Abrams, Assistant Attorney in Charge of the Civil Litigation Section, Trial Division, at the Oregon Department of Justice, who is representing Sen Manning, former President Courtney and me in re the matter of Boquist v. Courtney. Thank you.

A handwritten signature in blue ink, appearing to read "F. Prozanski", is centered below the text.

From: [Abrams Marc](#)
To: [Sen Prozanski](#)
Subject: Individual Capacity and lack of liability in Oregon
Date: Monday, December 12, 2022 3:07:54 PM

CAUTION: This email originated from outside the Legislature. Use caution clicking any links or attachments.

To Whom it May Concern:

I am the attorney of record for Boquist v. Courtney, Prozanski and Manning, Case No. 6:19-cv-01163-MC. All three defendants are sued “in his individual and official capacities.” This does *not* mean that, should plaintiff prevail, any of them would be responsible personally for any fees, costs or awards. They would not.

The distinction of individuals in government being sued individually or officially stems from a legal fiction created in *Ex parte Young*, 209 US 123 (1908). In that decision, Justice Oliver Wendell Holmes wished to undercut the sovereign immunity of states, to stop it from being used to prevent recovery for injuries. But because states were immune, he invented the distinction that one could – essentially in place of the State – sue the individual state official. When one sues a state official in the “official” capacity, it is done to obtain equitable relief in the form of an injunction or a declaration, matters that control the actions of the State. When such a person is sued in their “individual” capacities, it is for the purpose of obtaining money damages.

In Oregon, regardless of which capacity one is sued in, except for rare circumstances, they have no personal liability whatsoever. In Oregon, both the costs of defending a lawsuit and the sums awarded, if any, are paid by a fund run by Risk Management of the Department of Administrative Services. ORS 278.120.

Unless the Department of Justice determines not to defend and/or indemnify an individual, such individual has no actual personal liability for the costs or wards of a lawsuit. Such an incidence is extremely rare, and has not taken place in this case. Accordingly, the three defendant state Senators have no personal liability for any outcome in this lawsuit.

Marc Abrams

Marc Abrams

Assistant Attorney in Charge | Civil Litigation Section | Trial Division

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