ELLEN F. ROSENBLUM
Attorney General
MARC ABRAMS #890149
Assistant Attorney-in-Charge
TRACY ICKES WHITE #904127
Senior Assistant Attorney General
Department of Justice
100 SW Market Street
Portland, OR 97201
Telephone: (971) 673-1880
Fax: (971) 673-5000
Email: marc.abrams@doj.state.or.us

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRIAN J. BOQUIST,

Plaintiff,

v.

PETER COURTNEY, Oregon State Senate President, in his official capacity, FLOYD PROZANSKI, Senator, in his official capacity of Chairman of the Senate Special Committee on Conduct, JAMES MANNING, Senator, in his official capacity as member of the Special Senate Conduct Committee,

Defendants.

Case No. 6:19-cv-01163-MC

MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Q. Okay. You mentioned, "If it were me, I would be drug out of the capitol." Why -- why did you make that statement?

A. A Black man in the Oregon State Senate that says, "Hell is coming to visit you personally," how would you respond? What would be your -- it's not equal here. Let's be honest. It would have been treated differently. That's what I meant by

20 that.

Deposition of James Manning, 128:12-20

LR 7-1 CERTIFICATE OF CONFERRAL

Counsel certifies that they conferred with counsel for plaintiffs on the following motion in person on December 8, 2022, and by e-mail and on December 22, 2022. The parties were unable to resolve the issues presented in this motion, requiring Court intervention.

MOTION

Pursuant to Fed. R. Civ. P. 56, defendants move that this Court grant summary judgment and dismiss with prejudice the claims for relief against them. As to each of those claims, there is no issue of material fact and defendants are entitled to judgment as a matter of law. The motion is supported by the following *Memorandum of Law,* by the *Declaration of Marc Abrams* and by the *Declaration of Floyd Prozanski.*

MEMORANDUM OF LAW

INTRODUCTION

At the core of this dispute is a single fact: that due to his egregious behavior, plaintiff, state Senator Brian Boquist, was ordered to provide 12-hour notice before appearing in the state Capitol building. Plaintiff is known for being "colorful," but that color crossed the line into the unacceptable. His activities reached a point that a fellow state Senator refused to be on the Senate floor with him and another stopped bringing her son into the Capitol. Just before a walkout of his caucus from the Senate, when informed that the State Police might be sent to bring the legislators back, he told the President of the Senate that "Hell was coming to visit him personally" and gave an interview to KGW, a Portland-area television station where he said the police would need "to send bachelors and come heavily armed." From plaintiff, who has a background in Special Forces, such a threat was received by many as credible and intended. Indeed, the Superintendent of the State Police took it seriously enough that he did not send officers to the plaintiff's house. Plaintiff's actions resulted in the minor limitation that plaintiff had to let it be known when he was planning to be present in the Capitol.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

This limitation was not substantive: there was no change in when, where or how plaintiff could speak or the subject matter of his speech. The limitation was not done without process: the plaintiff's actions were discussed in a hearing, which he attended and at which he had the right to make comments.

None of this was enough for plaintiff, for whom compromise is not an option and for whom every interaction is a matter for escalation. He followed these events by bringing this suit. Despite threatening others, he alleges violations of *his* federal constitutional rights.

The law pertaining to fighting words allows restraints on speech and assembly when there is a reasonable fear of imminent danger. This is just such a case. Plaintiff, a man who used his military background to build his political image, made a threat on a network television station heard by thousands of people. That threat, had it been said by a personage without title in the streets, would doubtless have resulted in arrest. Here, he was only asked to provide notice when he was to come into the Capitol. Moreover the record shows that even that minor protocol was not enforced, and plaintiff suffered no diminution of his speech or right to assemble.

The case should not proceed.

FACTS

At the center of this case is a walkout from the Legislative Assembly by its Republican Senate Caucus, which deprived the Senate of a quorum..

Article IV, section 12 of the Oregon Constitution states:

> **Section 12. Quorum; failure to effect organization.** Two thirds of each house shall constitute a quorum to do business, **but a smaller number may meet; adjourn from day to day, and compel the attendance of absent members**. A quorum being in attendance, if either house fail to effect an organization within the first five days thereafter, the members of the house so failing shall be entitled to no compensation from the end of the said five days until an organization shall have been effected.

(Emphasis added).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Brian Boquist is a state Senator. Boquist dep. 7:6-8. Before he became a legislator, he was a member of the Special Forces (also referred to as the "Green Berets"),[1] and specialized in "unconventional warfare": that is, guerilla warfare operations. Boquist (Ross) dep. 10:18-11:7, 27:20-28:1. He was engaged in combat in the Iraq War. Boquist dep. 17:9-19. In addition to his military service, he was a contractor for the State Department, providing peacekeeping support in countries including Liberia, Sierra Leone, the Ivory Coast, Haiti, South Sudan, Uganda, Zaire and Columbia. Boquist dep. 17:20-18:13. He also trained units in Iraq and Afghanistan. Boquist dep. 18:20-24. And, as he put it, he has been shot at and shot back, in Liberia, Sierra Leona, Iraq and South Sudan, and possibly killed someone. Boquist dep. 22:15-23:7, 23:20-25. He is trained in firearms. Boquist dep. 24:9-14. He owns a "long list" of guns. Boquist dep. 25:8-16. He has a concealed weapons permit. Boquist dep. 25:17-18.

Plaintiff's military background is a well-known and publicized fact. *See, e.g., oregonlegislature.gov/boquist/pages/biography.aspx* (last accessed Dec. 21, 2022); Wikipedia, *en.wikipedia.org/wiki/Brian_Boquist* (last accessed Dec. 21, 2022).

And he carried a gun —a .45 caliber pistol— into the Capitol "on a quasi-regular basis," approximately three-quarters of the time. Boquist dep. 26.:6-14, 33:2-8. Everyone in the Legislature knew it. Boquist dep. 26:23-27:5.

Tensions between the political parties in the Oregon Legislature were high during the 2019 session. In particular, there was conflict over the carbon reduction bill, House Bill 2020, which triggered a walkout of the Republicans in the Senate, depriving that body of a quorum. Manning dep. 44:10-45:1. The bill was primarily a "cap and trade" approach to greenhouse gases. Boquist dep. 26:1-10. The Democrats felt it was very important, and the Republicans saw it as a threat to major portions of Oregon and their economies and opposed it. Boquist dep.

[1] At least at one point, his web page listed him as a "career Special Forces officer." Boquist dep. 27:12-16.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

46:11-13; Courtney dep. 26:12-27:7. Each party was "willing to go to the mat." *Id.* In this context, plaintiff made a speech on the Senate floor. And he said:

> But I just want to point out to you, we are effectively in the midst of a political coup. Let me say that again. We're effectively in the midst of a political coup. And, yes, I understand the threats from members of the majority that you want to arrest me, you want to put me in jail with the state police and all that sort of stuff. You don't think we haven't heard it directly from you and media and the press. Happy to meet with you the [sic] afternoon and give the quotes. Happy to show you in the rules one after the next have been violated. Let's not waste any time here. We're at the 11th hour. If you don't think these boots are for walking, you're flat wrong, Mr. President. And you send the state police to get me, hell's coming to visit you personally.

Courtney dep. 53:19-54:14 Boquist dep. 76:6-19.

Plaintiff did not pre-plan his comments. Boquist dep. 77:17-25.

Plaintiff very shortly thereafter was recognized again and said, simply, "Mr. President, I apologize to you personally. Thank you." Courtney dep. 59:24-60:1. Nothing more. Never any further expression of regret. Boquist dep. 86:17-19. And then immediately turned it on the Democrats to show he was not in the least contrite: "If any of you are offended, that's fine. I'm fine with that. If any of you would like to hear the threats that have been personally made to me by your members, I'd be happy to explain that too." Courtney dep. 60:4-9.

Secretary of State Shemia Fagan was in the state Senate in 2019. Fagan dep. 8:2-9:2. She recalls plaintiff telling Senate President Courtney that "hell was coming to visit [Courtney] personally." Fagan dep. 12:12-21. She considered it alarming and felt it was a threat; indeed, a threat of violence against Sen. Courtney that plaintiff would act on. Fagan dep. 12:22-13:5, 16:17-22. Indeed, Sen. Courtney actually asked Sen. James Manning, who is, like plaintiff, a

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

former military man, whether Manning thought Boquist would shoot him. Manning dep. 10:18-19, 76:25-77:16. Manning said "[t]he Senator's statement on the floor was a jaw dropper to a lot of people." Manning dep. 120:15-23. "[N]obody understood his state of mind." Manning dep. 131:7-10. Senator Prozanski thought plaintiff "had just threatened the president to take, like, violent — or bring violence on him based on that statement." Prozanski dep. 48:1-6.

Lori Brocker is the Secretary of the Senate. Brocker dep. 7:2-4. Although she did not fear for herself, she was aware of plaintiff's "skill" and "background" and though she felt that plaintiff would "have her back personally," she "[did not] know that about her staff." Brocker dep. 32:20-34:7. Secretary Fagan also noted in her deposition that it was well known in the Capitol that plaintiff had a military background and that "there was kind of just a general sense of threat from him." Fagan dep. 16:23-17:19. She recalled plaintiff had "a kind of military ops background" and that he made "people feel like he just didn't seem like a stable person.. Fagan dep. 18:15-19:3.

Sen. Sara Gelser[2] expressed her discomfort with plaintiff to Brocker. Brocker dep. 79:16-80:2. Gelser had already developed a feeling that the political discourse had reached a point where she feared for her own personal safety and that of her staff, which she mentioned to Sen. Prozanski. Gelser Blouin dep. 16:22-18:1; Prozanski dep. 103:19-104:2. Staff was coming to Gelser and saying they were afraid. Gelser Blouin dep. 58:14-59:25. Brocker also recalls other individuals being concerned about the heated language, particularly because they knew of plaintiff's military training. Brocker dep. 89:6-21. Sen. Prozanski said he also heard from lobbyists with concerns. Prozanski dep. 138:13-20.

But it did not end there. In addition to making his comments on the Senate floor, plaintiff, within the next hour, also sought out and gave a quote to Pat Dooris, a reporter for KGW television. Boquist dep. 86:20-87:3. He said:

[2] Now Sara Gelser Blouin.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

> "Okay. So sending the threat out, like, 'Oh, we're going to have a special session, or I'm going to send the state police to arrest you.' Well, I'm quotable, so here's the quote. This is what I told the superintendent. 'Send bachelors and come heavily armed.' I'm not going to be a political prisoner in the state of Oregon. It's just that simple."[3]

Courtney dep. 86:4-12; Boquist dep. 87:10-17.

This comment also created concerns and fear. And the comments were received as doubtless intended. "He threatened to shoot police officers on TV," Secretary Fagan testified, "I perceived that he was unstable and I knew that he carried a weapon at the Capitol, and he felt like a dangerous unstable person." Fagan dep. 19:12-15, 20:9-15. As she noted, that "was a sitting state senator threaten[ing] to shoot police officers."[4] Fagan dep. 79:1-7. Similarly, Sen. Gelser noted "I have been concerned for Senator Boquist because there are times that he does not seem himself and completely connected to reason. On those days, I — I would have a fear." Gelser Blouin dep. 75:11-76:4.

At that time, Ginny Burdick was also a state Senator. Burdick dep. 6:22-7:3. Although Sen. Burdick did not fear for her personal safety, she did believe plaintiff's KGW statement created the potential he had to physically harm others. Burdick dep. 20:14-17, 23:16-18, 25:8-17. And she recalled general discussions of concern as to whether plaintiff was going to harm to someone. Burdick dep. 27:15-18, 28:14-24. The discussions were widespread and taking place everywhere in the Capitol. Burdick dep. 27:23-28:1. Pretty much everyone was expressing concern. Burdick dep. 25:2-6. Part of the fear was because it was widely known that plaintiff was armed. Burdick dep. 28:22-24.

---

[3] It is not contested that the presiding officer of the Senate cannot direct the Oregon State Police to return members to the Capitol, but that only the Governor can do so. Courtney dep. 36:15-22.

[4] Even Travis Hampton, the Superintendent of the Oregon State Police, who has served on committees with plaintiff, did not discount plaintiff's threat: "I did not believe he was a threat to come to the capitol to harm individuals, but I did take him at his word that if we tried to grab him off street or, you know, come to his home at the governor's directive, that there might be use of force involved." Hampton dep. 13:1-11, 99:20-100:1. Indeed, Superintendent Hampton testified that he did not send an officer to plaintiff's home because "that would not have been a prudent move." Hampton dep. 44:11-20. In other words, even the chief of the Oregon State Police was concerned about plaintiff's potential for violence.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Jessica Knieling is the Legislature's interim Human Resources Director. Knieling dep. 7:13-15. People were coming to her "expressing a genuine sincere fear of Senator Boquist." Knieling dep. 91:2-4. They were "visibly shaking." Knieling dep. 91:9-16.

And Senator Manning's response to the KGW comments was "Senator Boquist is a special forces U.S. Army commander. If he says that he is going to do something or he — then I take him at his word." Manning dep. 122:9-16.

Plaintiff himself was untroubled by the potential impact of his statements. He did not even consider how it might be received in the West Hills of Portland or in Salem when broadcast, "nor did [he] care what Portland would think." Boquist dep. 90:1-12. Indeed, later that afternoon, plaintiff emailed the Oregonian newspaper regarding a reporter's description of his earlier statement as a "thinly veiled" threat; he clarified, "'Nothing thinly veiled *** I have been in political coup attempts. I have been held hostage overseas…Not going to be arrested as a political prisoner in Oregon period.'" Oregonlive.com (June 19, 2019), *https://www.oregonlive.com/politics/2019/06/oregon-republican-senator-issues-threat-to-state-troopers.html* (last accessed Dec. 21, 2022).

Apparently, it was only later that he came to understand that there were people he had made afraid. Boquist dep. 94:25-95:7.

Complicating the situation was that, at that point late in the session, there were citizen rallies outside the Capitol from groups like Timber Unity and the Proud Boys. "[P]eople were coming to the Capitol, and — and they, you know, they appeared threatening. These were gun activist people." Fagan dep. 77:19-78:25. The Senate even briefly closed due to the threat from militias. Boquist dep. Exh. 213. This was before guns were barred from the Capitol. *Id.*

These people were making Sen. Boquist their hero. *Id.* Sen. Manning noted that "I did receive a lot of angry, threatening e-mails from supporters of the Republican Senate walkout * * * A lot of threats, name calling, just horrible things." Manning dep. 62: 5-13. He added, "a few senators * * * They don't use firearms. They don't want to be around firearms, and of course,

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

they were nervous and they were concerned." "Q: And what was their concern?" "Being shot." Manning dep. 119:3-17. As Secretary Fagan noted, there were "people rallying around [plaintiff] at the Capitol and coming — it felt like a threatening place after those comments* * *." Fagan dep. 18:15-19:3.

Special security arrangements were made to protect those in the building. Knieling dep. 84:8-85:19, Knieling Exh. 5. Even Superintendent Hampton felt that plaintiff's comments to KGW "fanned the flames" of what was going on outside the building. Hampton dep. 58:24-59:15. His officers felt that plaintiff's "send bachelors" comment was a betrayal that "would needlessly endanger those men and women for political purpose." Hampton dep. 59:20-60:15.

As a result of these fears, Secretary Fagan, who had frequently brought her son to the Capitol, stopped doing so as she wasn't "going to take a chance or a risk of my son" because she "felt like Mr. — Senator Boquist was a dangerous and unstable person." Fagan dep. 33:3-34:2. She "did not feel safe coming to the Capitol if Senator Boquist was going to be there. Fagan dep. 35:23-36:3. Similarly, Sen. Gelser did not want to be on the floor at the same time as plaintiff. Fagan dep. 35:13-18; Monnes-Anderson dep. 25:22-25. A fellow senator, Gelser was "extremely afraid" of plaintiff, and Sen. Monnes-Anderson told plaintiff this. Monnes-Anderson dep. 26:4-12. Although Monnes-Anderson was not personally afraid, she thought to herself "Brian, you shouldn't have said that, it's because it can incite fear in people." Monnes-Anderson dep. 29:23-30:17.

That was June 19th. On June 20th, the Republicans walked out of the Senate over HB 2020. Boquist dep. 46:23-47:1. In fact, the Republican Senate caucus walked out twice during the 2019 session. Prozanski dep. 32:22-25. This was the second time, with the Republicans walking out on June 20th, 2019, and returning on the 29th. Boquist dep. 50:9-14; Monnes-Anderson dep. 22:6-9. During that time, the Oregon State Police never came to plaintiff's door. Boquist dep. 83:18-21.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Senator Burdick made a motion that the absent senators each be fined $500/day for every day they were not present. Monnes-Anderson dep. 18:15-19; Boquist dep. Exh. 210. The fines, however, were never enforced and were ultimately withdrawn. https://www.statesmanjournal.com/story/news/politics/2019/08/23/oregon-senate-drops-plan-to-collect-fines-from-republicans-who-walked-out-salem/2099522001/.

Plaintiff sent in a payment for $3,500, but it was returned. Boquist dep 125:18-20, 131:7-12, Exhs. 216, 218.

As a result of these events, the issue of plaintiff's behavior was referred to the Senate Conduct Committee for a Rule 27 process. Rule 27 sets forth the mechanism by which the Legislative Assembly governs misconduct within the body. Fagan dep. Exh. 1. The Committee is a bipartisan group, with two Democrats and two Republicans. Boquist dep. Exh. 226. The Committee was asked to determine whether there was a need to take immediate steps for the protection of those who worked and did business within the Capitol. Prozanski dep. 64:1-25. The issue was whether Sen. Boquist posed a threat of violence or intimidation. Prozanski dep. 94:12-95:7.

The Committee met on July 8, 2019. Boquist dep. Exh. 224. Plaintiff attended the meeting, read a statement, and left. Boquist dep. 146:9-13, Exh. 223. The investigator for the Committee, Brenda Baumgart, an attorney at the Stoel Rives law firm, found the threat posed by plaintiff was credible and recommended that plaintiff be kept out of the Capitol Building "to ensure that the Capitol is free from threats of (or actual) violence and intimidation." Baumgart dep. 76:14-77:3, 112:11-14, Exh. 6; Knieling dep. Exh. 5; Prozanski dep. 95:8-96:15, 109:7-110:4.

The Conduct Committee did not accept that recommendation, voting it down three to one. Boquist dep. 153:20-154:2, Exh. 224; Baumgart dep. 111:23-112:9. Rather, they required plaintiff to provide notice prior to coming into the building, "to enable those who were not comfortable or did not feel safe in his presence to make arrangements." Knieling dep. 55:14-20.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Both of the Democratic senators and both of the Republican senators on the Committee agreed that banning plaintiff was a step too far, but that notice was a necessary step. Prozanski dep. 97:19-98:13. The vote was unanimous, with Republican Senators Olson and Knopp joining Democratic Senators Prozanski and Manning. Boquist dep. 154:23-155:3, Exh. 224.

The required notice by plaintiff was to be given to the Secretary of the Senate. Brocker was given the responsibility for alerting the Oregon State Police and the staff in the Capitol when plaintiff intended to be present. Brocker dep. 44:4-15. The OSP Superintendent would then handle anything relating to an increased law enforcement presence. *Id.* at 44:16-19 Knieling dep. 55:21-56:1. Although the vote was unanimous, Boquist dep. Exh. 224, plaintiff has sued only the two Democrats on the Conduct Committee.

For a while, plaintiff provided the requested notices. Boquist dep. Exhs. Exhs. 227, 230, 231, 232, 233, 234, 235, 236. Then he simply declared, "I will be in every day until my term expires." Boquist dep. 237. That was the last notice he sent. After the final notice from plaintiff, Brocker never received further notifications, even after plaintiff's term expired and a new term began. Brocker dep. 103:8-104:4. Once Covid impacted operations, Brocker viewed it as irrelevant. *Id.* Knieling viewed plaintiff's "notice forever more" as not in the spirit of the safety measures. Knieling dep. 77:15-25.

Plaintiff was elected to a new term in the 2020 election that commenced at the beginning of 2021 but did not provide any further notice of when he was coming in; he continued to ignore the requirement for the next two years. Boquist dep. 43:14-18. There was no action taken against plaintiff as a result. Boquist dep. 187:11-188:7, 188:22-189:13, 189:24-190:3.

On November 28, 2022, the Senate Conduct committee met and rescinded the 12-hour notice requirement. Prozanski Dec. ¶ 2.

LEGAL STANDARDS

Summary judgment is appropriate when there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The purpose of summary judgment is to "pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." *Matsushita,* 475 U.S. at 586, n. 11. The moving party must show the absence of a genuine dispute as to a material fact. *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and point to "specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "This burden is not a light one * * * The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *Id.* (citation omitted).

The test is whether a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989). Subjective belief — speculation — is also insufficient. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983); *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986).

ARGUMENT

"Prudence dictates that a federal court should exercise a respectful reluctance to interfere in the measures taken by a state legislature to regulate its affairs, discipline its members, and protect its integrity and good name." *Monserrate v. New York State Senate*, 599 F.3d 148, 157 (2d Cir. 2010).

I Plaintiff's speech threatened the safety of members and staff of the Legislative Assembly and was not protected by the First Amendment.

In order to state a claim for First Amendment free speech or assembly retaliation, plaintiff must show that he spoke out, that the speech was protected, and that the protected speech was a "substantial" or "motivating" factor in any individual defendant's decisions.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Soriano's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989), *citing Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). It must be the intent of a defendant specifically to interfere with a plaintiff's First Amendment rights. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Skoog v. Clackamas County*, 2004 WL 102497 (D. Or. 2004), *rev'd in part on oth. grounds*, 469 F.3d 1221 (9th Cir. 2006). If the plaintiff can do so, the burden then shifts to the defendants to establish that they would have reached the same decision in the absence of the protected speech. *Id; Keyser v. Sacramento City Unified School District*, 265 F.3d 741, 750 (9th Cir. 2001).

Plaintiff alleges that the speech in question is 1) his comment on the Senate floor that "if you sent the state police to get me, Hell's coming to visit you personally," and 2) his comments, broadcast to the great Portland metropolitan area on KGW-TV, that the state police should "[s]end bachelors and come heavily armed." However, the requirement that plaintiff give 12-hour notice prior to coming to the Capitol was a minimal and reasonable time, place and manner limitation; moreover, the speech is not protected.

A. The actions taken are reasonable time, place and manner regulations.

Assuming for the moment that plaintiff's speech was protected, there is still no viable claim for relief. Governments are allowed to implement reasonable time, place and manner restrictions on speech. *Madison School Dist. v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176 (1976). The power to exercise reasonable regulation must narrowly protect important interests unrelated to the content of the speech.

The purported regulation of speech here does not regulate speech at all. The only limitation placed upon plaintiff was that he give 12-hour notice of his intent to be in the Capitol. There was no limit on how long he can stay once there. There was no limit on how many times he could visit. There was no limit on what he could say — on the floor of the Senate or otherwise. Hypothetically, he could call at the end of the work day for the next work day every day, and there would be no consequence that touched on his speech. Indeed, that is essentially

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

what plaintiff did. Once he did so, he was never again required to give notification, and was never prohibited from coming into the Capitol. Prozanski dep. 99:17-100:6. Indeed, the Chair of the Committee has stated "[t]here is not a restriction there. It is just a notification." Prozanski dep. 98:18-25.

Moreover, the regulation, if any, was both narrow and reasonable: It was an action taken to ensure the safety of others after plaintiff's apparent threats of violence to the Senate President, to the State Police, and to other members and staff of the Legislative Assembly who felt unsafe in plaintiff's presence. This minor limitation on plaintiff —a limitation that could be met with a single e-mail— was designed to protect the safety and security of the people at the Capitol.

Given the concerns plaintiff himself created, given the fear he caused others to feel, the notice requirement is clearly minimally intrusive and therefore permitted.

B. Sen. Boquist engaged in unprotected fighting words.

Plaintiff's speech was not protected. The basic rule is quite simple. "[A]dvocating violence is protected, threatening a person with violence is not." *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1072 (9th Cir. 2002).

Government regulation of speech is typically allowed when the purpose is to proscribe "fighting words." Although in an absolutist sense, regulation of fighting words is regulation of speech, it is more typically analyzed as action rather than speech as fighting words convey no intellectual content, merely an emotional message intended to provoke a response.

Such has been the approach of the courts since at least *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The state's interests are said to overshadow the minimal protection due such speech, which has only "slight social value," if any. *Id.* at 572.

Plaintiff contends that his speech is protected.[5] However, it neatly fits in with the kind of taunting that qualified as fighting words. The Ninth Circuit expressly did not determine whether

[5] Plaintiff may also contend that his comments to Sen. Courtney are protected by Article IV, section 9 of the Oregon Constitution that states that "Nor shall a member for words uttered in

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

the 12-hour notice was "motivated by legitimate security concerns." *Boquist v. Courtney*, 32 F.4th 764, 772 (9th Cir. 2022).[6] Defendants suggest that the concerns were clear. Words that create an immediate panic are not entitled to constitutional protection. *Schenck v. United States*, 249 U.S. 47 (1919).

Consider that, in the context of an imminent walkout of the Oregon Senate by the minority party, plaintiff tells the Senate President that "if you send the state police to get me, Hell's coming to visit you personally." Courtney dep. 53:19-54:14 Boquist dep. 76:6-19. Notwithstanding plaintiff's contention, there is no realistic interpretation of that as a theological statement. The meaning is clear. It is a threat. It is telling a fellow member of the state Senate that there is violence at hand.

Now consider that, again in the context of an imminent walkout and where the Governor has said she is considering sending state police to round up truant legislators, plaintiff tells a reporter —who in turn tells the citizens of the state's largest media market— that he has told the police superintendent to "Send bachelors and come heavily armed. I'm not going to be a political prisoner in the state of Oregon." Boquist dep. 87:10-17. Which, in fact, caused the Oregon State Police superintendent to refrain from sending men to the plaintiff's home. Hampton dep. 13:1-11, 44:11-20, 99:20-100:1. This statement thus confirms the reality of the previous threat. As does plaintiff's e-mail to the Oregonian confirming that the threat was real and not a metaphor. Finally, consider plaintiff's personal background. He served in the special forces. Boquist (Ross) dep. 10:18-11:7, 27:20-28:1. He has possibly killed people. Boquist dep. 22:15-23:7, 23:20-25. Even after retiring from the military, he professionally maintained a force of "trainers" who travelled to hot spots such as Columbia and Iraq to support troops in those places.

---

debate in either house, be questioned in any other place." However, the Senate Conduct Committee is part of the Legislature; it is not "any other place."

[6] Retaliatory grounds for adverse actions are actionable. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). Although plaintiff's counsel asked most witnesses whether the actions at issue here might have been taken for political motives, plaintiff will have only speculation and no evidence of any such retaliation. The record is clear the action was based entirely on fears for physical safety.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Boquist dep. 17:20-18:13, 18:20-24. And he acknowledges that he has used his military background in his campaigns to build his image and to brand himself. He has mentioned it in campaign brochures and advertisements. Boquist dep. 105:7-12. He's mentioned it in the Voters' Pamphlet. Boquist dep 105: 12-15. When plaintiff ran for Congress his television ads mentioned that he was a veteran. Boquist dep. 106:22-107:1.

As Senator Gelser put it, "it's not the words, it's the context in which they are stated * * * there are these unstable elements outside the building that hear these things as a call to action." Gelser Blouin dep. 38:14-41:2. And there were people with guns outside the building. Fagan dep. 77:19-78:25.

Because plaintiff's comments were fighting words, they are unprotected.

This is not altered by *Watts v. U.S.*, 394 U.S. 705 (1969), which will undoubtedly be relied upon by plaintiff. In *Watts*, the Supreme Court found no actual threat in a comment that if defendant were drafted and they put a gun in his hands "the first man I want to get in my sights is LBJ." *Id.* at 706. But Watts made this comment to a group at a protest march, and was "a kind of very crude offensive method for stating political opposition the President." *Id.* Watts was *not*, at that time, drafted. *Id.* Watts did *not*, at that time, have a gun in his hands. By contrast, plaintiff here made the direct threat right to Senator Courtney's face, and then went out to television reporters and made the additional threat against the Oregon State Police. The intent was very different. The setting was very different. Also different is that Watts was talking about *if* he were drafted and Sen. Boquist has long bragged about his military and special forces background, which give him the ability, means and inclination to be more able and likely to act on such statements.

And Sen. Boquist carries a gun in the Capitol. Boquist dep. 26:6-14, 33:2-8.

Plaintiff's threats of violence, given the context and his history, are the classic "fighting words" which lack social value and should not be deemed protected. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

C. Plaintiff's intent is irrelevant.

Defendants expect, based on what has occurred in discovery, that plaintiff will argue his "motivation" matters, that he was serving as point person for the GOP caucus, or some similar rationale. When you are scaring people, *why* you are doing it really doesn't matter to them. And it doesn't matter to the law. What matters is how the threats are received, and it is objective. The "test is what a reasonable speaker would foresee the listener's reaction to be under the circumstances * * *." *Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists,* 290 F.3d 1058, 1076 9th Cir. 2002).[7]

Whatever plaintiff may argue he was trying to achieve, therefore, simply is of no concern. When he made threats to the President of the Senate, when he threatened the state police on the air,[8] he reasonably should have expected the reactions would be fear, dismay, concern, fright. And they were.

D. The demonstrations of concern were more than sufficient.

It is likely that plaintiff will contend that no one was really scared of him because they didn't immediately march over to the State Police or didn't make an objection on the floor to his comments. Plaintiff's counsel repeatedly asked witnesses in deposition whether, after his client's comments, they raised an objection on the Senate floor or spoke to the police. Brocker dep. 15:7-22, 37:20-24; Fagan dep. 22:11-25, 23:22-25.

This suggestion is simply not credible. The First Amendment does not require a formal objection. There is no case law defendants can find that requires a specific act of reporting. People respond differently. People think others may be taking steps. People want to keep their heads down. And that is with regard to the floor comments. Of course, no one knew about the

[7] Although the Ninth Circuit has struggled with whether the test should be objective or subjective in *criminal* cases, the court has never moved off this objective test for civil matters. *Thunder Studios, Inc.*, 13 F.4th, 736 (9th Cir. 2021).

[8] Defendants also expect plaintiff to contend that because he referenced "as I told the Superintendent" that somehow made his comments less scary. Defendants are at a loss as do how that would be, given the hearers only know the threat is being repeated to them, in real time.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

KGW comments until they were broadcast, at which time it wasn't merely the persons present at the legislature, but a considerable portion of the state's population.

You don't have to personally take any particular action —call the police or object from the floor— to be afraid. There is no requirement that people being threatened have to take actions in the heat of the moment to demonstrate opposition to a threat. Indeed, as Senator Prozanski noted, "a lot of people were in shock to hear what was just said* * * I think there is a disbelief as to what something has occurred and it's just people are kind of in a freeze frame as to what just happened. Prozanski dep. 47:17-25. That said, Secretary Fagan did talk to the state police at the time of these incidents about not feeling safe at the Capitol. Fagan dep. 39:8-13.

E. There is no support for any claim the Committee's action was "political."

There is no evidence that any of the defendants took whatever actions they took for a partisan or political purpose. No other Republican who walked out was the subject of a Conduct Committee inquiry. The two Republicans on the Committee supported the action again plaintiff, even if he chose not to include them in this lawsuit. The Committee voted down the more severe sanction of exclusion from the Capitol recommended by Ms. Baumgart.

But even assuming plaintiff could make a *prima facie* showing that the 12-hour notice was political retaliation, his claim would still fail if this Court finds that retaliation was not the "but for" cause of defendants' action. *Mt. Healthy City School District Bd. Of Education v. Doyle*, 429 U.S. 274, 287 (1977). "Government officials do not violate a plaintiff's First Amendment rights if they had an objectively legitimate need to implement security measures in response to information conveyed by the plaintiff's speech and would have implemented the same security measures in the absence of any retaliatory motive." *Boquist v. Courtney*, 32 F.4th at 778; *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

Here, the multiple expressions of uncontested fear and concern, coupled with the widely held knowledge that plaintiff walked about the Capitol armed, make clear that theirs very real concerns were the bases for defendants' actions, and not some political motivation. Boquist dep.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

26.:6-14, 26:23-27:5, 33:2-8; Brocker dep. 32:20-34:7; Burdick dep. 20:14-17, 23:16-18, 25:2-17, 28:22-24; Fagan dep.12:22-13:5, 16:17-22, 19:12-15, 20:9-15; Gelser Blouin dep. 16:22-18:1, 58:14-59:25; Knieling dep. 91:2-4, 91:9-16; Prozanski dep. 48:1-6, 103:19-104:2.

The parties have no dispute about any of these material facts. They differ only in how they believe the case law should be applied to those facts. Accordingly, it should be clear that summary judgment should issue and this matter should not go to trial.

II. Plaintiff suffered no deprivation of his rights.

Inherent in any lawsuit is that the plaintiff must suffer harm. Here there has been no harm.

Plaintiff admits as much. The 12-hour notice requirement was barely and only briefly enforced. No one remembers ever calling in additional law enforcement. Plaintiff sent a handful of notices that he would be coming in and then simply announced, "I will be in every day until my term if [sic] of office expires in January 2021 in performance of my constitutional duties." Boquist dep. 170:15-171:3, 171:22-24, Exhs. 227, 230, 231, 232, 233, 234, 235, 236, 237. No one did anything to stop him. Then, after he was re-elected to another term in the Senate, he did not resume providing notice…and nothing happened. Boquist dep. 187:11-188:7, 188:22-189:13, 189:24-190:3.

Moreover, plaintiff admits the following:

- He was never prevented from going on the Senate floor. Boquist dep. 187:11-17.
- He was never prevented from speaking on the Senate floor.[9] Boquist dep. 187:18-23.
- He was not prevented from voting in committee or on the Senate floor. Boquist dep. 189:24-190:3
- He was never prevented from entering the Capitol. Boquist dep. 187:24-188:7.

[9] Plaintiff claims he didn't speak to the successor cap and trade bill that came up in 2020, but not because of anything any defendant did, but "because I would not speak against the bill that we're in litigation on," Boquist dep. 166:12-18. This is not only inaccurate, in that this litigation is not "on" the cap and trade bill, but also clearly a personal choice not related to any action by defendants.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

- He cannot recall if he was ever prevented from meeting with a constituent. Boquist dep. 190:20-23.

- He was never prevented from attending committees or caucuses. Boquist dep. 188:22-189:13. He did choose to recuse himself from Judiciary, but that was his choice. *Id.*

Nor has there been any expulsion, any discipline, any reprimand.

Indeed, there was precisely zero impediment to his exercise of speech or assembly. An adverse action is material only when it prevents a public official from doing his job. *Houston Community College System v. Wilson*, 142 S. Ct. 1253, 1261-62 (2019). As the above should make clear, plaintiff was not prevented from doing his job. Which leaves the question of how an unenforced 12-hour notice honored mostly in the breach with no sign of impact can be a restraint on free speech or assembly. As established by the plaintiff's own admissions, it was not.

As a matter of law, then, the plaintiff was not "chilled" from engaging in any protected activity. He thus has not and cannot establish one of the required elements of his claim. *Blair v. Bethel School Dist.*, 608 F.3d 540, 543 (9th Cir. 2010).

Accordingly, summary judgment should issue.

III. The 12-hour notice has been rescinded and the matter is moot.

It is uncontested that, on November 28, 2022, the Senate Conduct Committee rescinded the 12-hour notice requirement placed on plaintiff. Prozanski Dec. ¶ 2; Oregonlive.com (Nov. 28, 2022), https://www.oregonlive.com/politics/2022/11/oregon-lawmakers-lift-2019-limits-on-state-senator-who-warned-send-bachelors-when-rounding-up-republicans.html (last accessed Dec. 21, 2022).

Generally, an action is mooted when the issues presented are no longer live and, therefore, the plaintiff lacks a legally cognizable interest for which the courts can grant a remedy. *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d 851, 854 (9th Cir. 1999). "The doctrine of mootness, which is embedded in Article III's case or controversy requirement,

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011) (*citing* Burke v. Barnes, 479 U.S. 361, 363, 107 S. Ct. 734 (1987)). In this situation, the matter is moot. With the exception of a request for "nominal damages" (presumably one dollar), the entire claim for relief is a request for equitable remedies to be applied to the 12-hour notice. That notice, however, was rescinded by action of the Senate Conduct Committee on November 28, 2022.

If a claim is moot, a federal court lacks subject matter jurisdiction. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). "The question of mootness focuses on whether we can still grant relief between the parties." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1000 (9th Cir. 2004) (internal quotation marks and citation omitted).

"A request for injunctive relief remains live only so long as there is some present harm left to enjoin." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1502 (D.C. Cir. 1995). "Despite being harmed in the past, the [plaintiffs] must still show that the threat of injury in the future is 'certainly impending' or that it presents a 'substantial risk' of recurrence for the court to hear their claim for prospective relief." *Munns v. Kerry*, 782 F.3d 402, 411-412 (9th Cir. 2015) (citation omitted).

There is an exception to the mootness doctrine. It exists where an issue is "capable of repetition yet evading review." This is a limited exception that applies "only to extraordinary circumstances where (1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again." *American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118, 1123 (9th Cir. 1997).

This is not such a case. In virtually identical circumstances, this Court found the complaint of another Oregon legislator moot and dismissed it. *Hernandez v. Oregon House of Representatives*, 2021 WL 5570112 (D. Or., Nov. 29, 2021).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

If plaintiff claims this situation is "capable of repetition," the burden of proof is upon him. *Belitskus. v. Pizzingrilli*, 343 F.3d 632, 648 (3d Cir. 2003). Speculation is insufficient. Aside from hyperbole, there is no reason to believe that plaintiff will be subjected to the same action again, and certainly not for this episode of his utterance of fighting words in 2019. As to any contentions that the Senate Conduct Committee might re-institute identical restraints based on an unknown future utterance of fighting words by plaintiff, such contentions are not facts and they are not proof. And plaintiff, regardless, has not sued the Senate Conduct Committee. He has sued three senators, one of whom (Sen. Courtney), as of this writing, is no longer in the Senate, another of whom (Sen. Manning) is no longer on the Conduct Committee.[10] Both are incapable of repeating the actions at issue here even should they want to.

It also should be noted that even if the Court were inclined to give credence to plaintiffs' allegations, this is not the kind of "exceptional situation" in which "future repetitions of the controversy will necessarily evade review as well." *Protectmarriage.com Yes on 8 v. Bowen,* 752 F.3d 827, 836-37 (9th Cir. 2014). If, hypothetically, a new Conduct Committee order were issued next December under new circumstances, a new suit specific to the wording of such an order and specific to the facts on the ground and specific to a different set of members of the Conduct Committee as of that date would not evade review.

The current situation does not fit within the "capable of repetition" exception to mootness.

IV. Sen. Courtney has done nothing.

Separately from all the above, it is unclear why Senator Courtney is even a defendant in this action. Indeed, the Fourth Amended Complaint states, "Senator Courtney did not file a Rule 27 report, complaint, or civil or criminal charges of any kind in response to Senator Boquist's statement on the floor. FAC ¶ 10. This lawsuit is about —and *only* about— the 12-hour notice

[10] Moreover, Senator Courtney is now no longer a member of the state Senate, and Sen. Manning is no longer on the Conduct Committee. Longtime Oregon Senate President Peter Courtney is retiring - OPB; Abrams Dec. Exh. N, Manning Response to Interrogatory Nos. 1, 7, 15.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

rule. FAC ¶¶37, 42. Sen. Courtney is not a member of the Senate Conduct Committee.[11] Sen. Courtney did not vote for the 12-hour notice requirement. Boquist dep Exh. 224.

Regardless of this Court's other rulings, Sen. Courtney should not be maintained as a party in this action.

V. The actions complained of are entitled to absolute legislative immunity.

Even if there were any cognizable Constitutional violations, "Under the doctrine of legislative immunity, members of Congress and state legislators are entitled to absolute immunity from civil damages for their performance of lawmaking functions." *Jones v. Allison*, 9 F.4th 1136, 1139-40 (9th Cir. 2021). That absolute immunity applies to both official and individual capacity suits, to both damages and requests for equitable relief. *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997).

Activities within the sphere of legislation are distinguished from ministerial duties, which are not afforded immunity. Ministerial acts are those that are mandatory or not within the discretionary function of the legislator. *Bogan v. Scott-Harris*, 523 U.S. 44, 50 (1998). In the Ninth Circuit, determining whether an act is legislative requires the consideration of four factors: (1) whether the act involves ad hoc decision-making, or the formulation of policy; (2) whether the act applies to a few individuals, or the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears "all the hallmarks of traditional legislation." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003).

In the consideration and ruling of the House Conduct Committee on the conduct of former Representative Diego Hernandez, this Court concluded that the activities of the House Conduct

[11] It is expected plaintiff will argue Sen. Courtney is an *ex officio* member who could vote to break ties. He is not. Courtney dep. 70:15-17; Senate Rule 8.05(4), which states "(4) The President shall be an *ex officio* member of each committee and have the power to vote. As an ex officio member on committees the President does not increase the size of the respective committee, but is counted for purposes of a quorum. *Ex officio* membership does not increase the number of members required to provide a quorum. **This provision does not apply to the Senate Committee on Conduct**." (Emphasis added.) RULES OF THE SENATE (oregonlegislature.gov). Regardless, Sen. Courtney did so attend or vote, and took no part in the action to create the 12-hour notice requirement. Boquist dep. Exh. 224.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Committee were "ad hoc decision making." *Hernandez v. Oregon House of Representatives*, 2021 WL 5570112, *7 (D. Or., Nov. 29, 2021). As with plaintiff, the allegations against Hernandez were considered by the Committee, which reached a unanimous vote. This Court in *Hernandez* found the activities in question to be "legislative in character" and entitled the members of the Committee to absolute immunity. *Id.* In the Ninth Circuit, determining whether an act is legislative requires the consideration of four factors: (1) whether the act involves ad hoc decision-making, or the formulation of policy; (2) whether the act applies to a few individuals, or the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears "all the hallmarks of traditional legislation." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003). This Court, relying most heavily on the final two factors, found action by the House Conduct Committee recommending a sanction of a member to be legislative in character and therefore immune. *Id.*

Other courts have reached the same conclusion in similar situations. *Courser v. Michigan House of Representatives*, 831 Fed. Appx. 161 (6th Cir. 2020); *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997).[12] The same outcome should apply here, ending this matter.

VI. The actions complained of are entitled to judicial/prosecutorial immunity.

Similarly, "[I]mmunity is generally accorded to judges and prosecutors functioning in their official capacity." *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (a board of medicine absolutely immune); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (prosecutorial and judicial function absolutely immune). "[T]his immunity reflects the long-standing 'general principle of the highest importance to the proper administration of justice that a

[12] *See also Powell v. McCormack*, 395 U.S. 486, 501-506, 550 (1969) (discussing legislative immunity under Speech or Debate Clause of Constitution, and allowing dismissal of claims against Congressmen —but not their agents— where Congress did not allow elected Representative to be sworn in; Court declined to decide "whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available."); *Rangel v. Boehner*, 785 F.3d 19, 23-24 (D.C. Cir.), *cert. denied*, 577 U.S. 873 (2015) (Speech and Debate clause prevented claim by member of Congress against other members for censuring him; disciplinary proceeding is a legislative matter).

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Olsen*, 363 F.3d at 922, *quoting Bradley v. Fisher*, 80 U.S. 335 (1871).

Certain classes of state officials who are not judges or prosecutors in the regular courts are also entitled to absolute immunity. In deciding whether to extend absolute immunity to officials who are not traditionally considered judges, a court considers what function the official performs and examines whether that function is similar to a function that would have received absolute immunity when Section 1983 (the governing statute here) was enacted by Congress. *Mishler v. Clift*, 191 F.3d 998, 1002 (9th Cir. 1999). Under this functional approach, an official who "functions as the equivalent of judge or prosecutor will likely be entitled to absolute immunity for any acts committed in that role." *Yoonessi v. Albany Med. Center*, 352 F. Supp. 2d 1096 (C.D. Cal. 2005) (citing *Olsen*, 363 F.3d at 923).

Here, the Senate Conduct Committee was clearly performing functions that were both prosecutorial and judicial in nature.[13] The Committee's role under Rule 27 is analogous to that of a court in interpreting and enforcing lawsuits about (among other matters) sexual retaliation and harassment. Courtney dep. Exh. 12 at 1. A formal complaint process is delegated to an investigator, who makes a report to the Committee. *Id.* at 4. The Committee has the authority to recommend sanctions (punishment). *Id.* at 6. Although Committee actions are referred to the chamber of the Legislature involved, that is no different from, say, the process of Findings and Recommendations of a U.S. Magistrate Judge.

The work of the Conduct Committee is, unambiguously, judicial. It should be deemed to be such and, accordingly, judicial immunity should attach.

VII. The actions complained of are entitled to qualified immunity.

[13] The Committee's actions are also explicitly envisioned under the Oregon Constitution. *See* Oregon Const. art. IV, § 15 ("Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause.").

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

In the event the Court does not apply mootness, legislative immunity or judicial immunity to end this case, it should at the least apply qualified immunity.[14]

Plaintiff sues the defendants in their "individual" capacities as well as their official capacities. Fourth Amended Complaint, caption. Accordingly, this Court should apply qualified immunity and bar the damages claims.

Personal capacity suits seek to impose personal liability on government officials for the actions they take under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974). To establish personal liability in a Section 1983 action, it is necessary to show that the official, acting under color of state law, caused the deprivation of a federal right. *Monroe v. Pape*, 365 U.S. 167 (1961). Even if plaintiff can make such a demonstration, individual State defendants may be found qualifiedly immune by this Court if they have objectively reasonably relied on existing law. *Imbler v. Pachtman*, 42 U.S. 409 (1976) (absolute immunity); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity).

Qualified immunity shields government officials from liability for damages when they make decisions that, even if constitutionally deficient, reasonably misapprehend the law governing the circumstances confronted. *Brosseau v. Haugen*, 543 U.S. 194, 202 (2004); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Officials are denied qualified immunity only when "[t]he contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Qualified immunity is immunity from suit, not merely a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Like absolute immunity, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *Id.* Consequently, the Court has

[14] Defendants are, in the Fourth Amended Complaint, sued in both their individual and official capacities, and "nominal damages," fees, and costs are sought by plaintiff. It should be noted that if plaintiff contends the nominal damages prevent an application of the mootness doctrine, *Bayer v. Neiman Marcus Group, Inc.* 861 F.3d 853 (9th Cir. 2017), application of qualified immunity prevents the award of damages and maintains the mootness of this action.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

repeatedly stressed resolving immunity questions at the earliest possible stage in litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Just recently, the Supreme Court in two cases clarified that a matter has to have been decided with a fairly high level of specificity in order to preclude an application of qualified immunity. *Rivas-Villegas v. Cortesluna*, 2021 WL 4822662, 595 U.S. ___, 142 S. Ct. 4 (Oct. 18, 2021); *City of Tahlequah v. Bond*, 2021 WL 4822664, 595 U.S. ___, 142 S. Ct. 9 (Oct. 18, 2021). In *Rivas-Villegas*, the Supreme Court overturned a denial of qualified immunity for an excessive force case. The Court stated that a right is only clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." 2021 WL 4822662, *8. Immunity existed because "Neither [plaintiff] nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here." *Id.* at *9. The Supreme Court in the companion case, *City of Tahlequah*, noted that "We have repeatedly told courts not to define clearly established law at too high a level of generality." 2021 WL 4822664, *11.

Under *Saucier*, the Supreme Court developed a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The first question that must be answered in deciding if qualified immunity should be permitted: did the official violate the plaintiff's constitutional rights? *Id.* If the answer to this question is no, then the official is entitled to qualified immunity. *Id.*

If the answer to the first questions is yes, then the court must answer an additional question before granting qualified immunity: was the law governing that right clearly established? *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. If the answer to the second question is no, then the official is entitled to qualified immunity. *Id.*

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

In *Pearson*, the Court explicitly held that the sequence of steps required under *Saucier* "should no longer be regarded as mandatory." *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). Accordingly, while courts *may* continue to use the *Saucier* ordered test, courts have the discretion to determine "whether that procedure is worthwhile in particular cases." *Id.* at 821.

Regardless of whether this Court decides to use one or both *Saucier* steps, defendants are entitled to qualified immunity because there was no constitutional or statutory violation, and there was no clearly established law alerting reasonable officials that their actions violated plaintiff's rights. Indeed, as noted above, the case law clearly establishes that the legislative committee members had the ability to regulate plaintiff's conduct in a manner they had every right to believe was protected. *Hernandez v. Oregon House of Representatives*, 2021 WL 5570112, *7 (D. Or., Nov. 29, 2021); *Courser v. Michigan House of Representatives*, 831 Fed. Appx. 161 (6th Cir. 2020); *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997). And the case law makes clear that the plaintiff's fighting words were subject to regulation as causing imminent fear of violence, as set forth in Section I, above.

Accordingly, defendants did not violate any well-established law of which they should have been aware, and qualified immunity should follow.

CONCLUSION

Plaintiff created a justified sense of fear in members of the Legislature and its staff. That some may not have felt that fear (disproportionately members of his own party who were co-conspirators in the boycott of legislative business) is irrelevant. The decision-makers and those they heard from viewed Sen. Boquist as a danger.

In addition, there has been no suppression of the Senator's speech. He has not been told what he could or could not say. He has not suffered any prior restraint, nor any subsequent punishment. He has only been subject to the mildest of regulations: a directive he tell the Legislature before he shows up, a dictate he has easily evaded and which has not brought any

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

further reaction or enforcement. Indeed, plaintiff admits he has come and gone from the Capitol as he pleases. Accordingly, as a matter of law there has been no adverse action.

Moreover, the notice requirement has been rescinded. And Senator Courtney had no involvement at all.

In addition, the actions of the members of the Senate Conduct Committee were not in violation of well-established law and were in their roles both as legislators and adjudicators, and thus triply entitled to immunity.

Finally, qualified immunity protects the individual senators from any damages.

For the foregoing reasons, the Court should issue summary judgment dismissing this case with prejudice.

DATED February 27, 2023.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Marc Abrams

MARC ABRAMS #890149
Assistant Attorney-in-Charge
TRACY ICKES WHITE #904127
Senior Assistant Attorney General
Trial Attorney
Tel (971) 673-1880
Fax (971) 673-5000
marc.abrams@doj.state.or.us
Of Attorneys for Defendants

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000