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From the Desk of
Senator Brian Boquist

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

RESPONSE MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff would have this Court disregard the fears and concerns of those who heard him make threats of violence both on the floor of the state Senate and on KGW-TV.

Plaintiff would have this Court believe his extraordinary statements were merely political theater, and that, by not treating them as such, *defendants* committed improper actions.

Plaintiff would characterize the minor step, barely if at all enforced, of requiring 12-hour notice, as a major political attack on him. In his telling, he is the aggrieved person.

The Court should not accept these constructs.

The fears of the people in the building that day were real.

The idea that no one should have been concerned by a man known to have special military training and known to be armed telling the police to send heavily armed bachelors is simply not reasonable.

The idea that plaintiff suffered any detriment to his speech and association rights is unfounded.

The undisputed fact is that people were scared. Nonetheless, two of the defendants (Prozanski and Manning) voted for a *lesser* sanction than proposed by the investigator. The third defendant (Courtney) did nothing. Plaintiff's life went on. Plaintiff's business as a state Senator was utterly unaffected.

Accordingly, a summary judgment in favor of plaintiff cannot be based on the established facts. Moreover, plaintiff should not be allowed to obtain relief against individuals thrice protected by legislative, judicial/prosecutorial and qualified immunity.

Plaintiff's summary judgment motion should be denied, defendants' should be granted, and this case should end now.

FACTS

To avoid repetition, defendants incorporate by reference the Fact section from their corrected Motion for Summary Judgment (Docket No. 59). Deposition excerpts referenced in

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this Response are those attached to the Declaration of Marc Abrams in Support of Motion for Summary Judgment (Docket No. 58).

In addition to the facts set forth in defendants' corrected Motion for Summary Judgment, defendants offer the following analysis of plaintiff's proffered facts:

- *The declarations submitted by plaintiff do not provide support for his claims.*

Plaintiff submits, in addition to the declaration of counsel attaching exhibits, four declarations purporting to be reservoirs of fact. They are no such thing. To the contrary, they are mostly unfounded speculation and subjective statements of belief.

— *The Declaration of former Senator Olsen.*

The gist of Alan Olson's Declaration is that he never heard anyone complain or say they felt threatened, implying this means there was no real concern. Olsen Dec. ⁋ 5. However, there is no reason anyone would specifically come to Olsen. He was not a member of leadership. And, regardless, as defendants set forth in the facts in their corrected Motion for Summary Judgment, people *were* frightened and concerned and did speak about it. Olsen constructs the "it was just politics" rationale for plaintiff, without regard to the idea that the impact on the listener is what matters under the law. Olsen Dec. ⁋⁋ 8-10.

The remainder of Olsen's Declaration is devoted to the idea that he and Sen. Knopp only voted to require plaintiff to give notification because they worried otherwise Sen. Courtney would do so. Olsen Dec. ⁋⁋ 16-20. But as set forth below, this was an invalid fear as Sen. Courtney could not vote in the Conduct Committee; in any event, Olsen does not explain why he wouldn't stand up for his alleged principles and make the Democrats act without Republican support.

Nothing in Olsen's Declaration speaks to any specific act by any defendant beyond Sens. Manning and Prozanski casting the precise same vote as cast by Sens. Olsen and Knopp. Nothing in Olsen's Declaration speaks to anything Sen. Courtney *actually* did as opposed to

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Olsen's unfounded and speculative fears of what Courtney *might* do. Nothing in Olsen's Declaration addresses motivation at all, as is required for a First Amendment claim.

— *The Declaration of Senator Knopp.*

The Knopp Declaration is substantively identical to the Olsen Declaration. Knopp didn't feel threatened by plaintiff but did feel politically threatened by Democrats. It was "obvious" that [unspecified] Democrats were going to "punish" plaintiff. Knopp Dec. ⁋ 19. Knopp incorrectly stated Sen. Courtney might break a tie in the Conduct Committee (although not asserting —because it did not and could not happen— that he actually did so or *could* do so). Knopp Dec. ⁋ 23. There is not a single mention in the entire Declaration of what Sens. Courtney, Manning or Prozanski did; nor is there any support for the idea they did what they didn't actually do for improper reasons.

Curiously, however, there *is* a concession that the security measures at issue were never followed up on. Knopp Dec. ⁋ 28. Defendants agree and suggest that is a concession (submitted by plaintiff) that there was no restraint on plaintiff's speech or right of association.

- *The Declaration of former Senator Johnson.*

Betsy Johnson was a state Senator who caucused with the Democrats until she left the party to run as an independent in the 2022 race for Governor. She has frequently been at odds with the Democratic Party. The gravamen of her Declaration is that she, too, makes insensitive remarks without any concern for how they affect those who hear them. Johnson Dec. ⁋ 8. Accordingly, she insensitively discounts the fears of her former colleagues, Sens. Fagan and Gelser, calling them "irrational." Johnson Dec. ⁋ 11. But beyond showing her lack of compassion, Johnson has little to offer. She alleges that Sen. Courtney was "plenty mad" at plaintiff. Johnson Dec. ⁋ 11. She says "President Courtney, Pro Tem [sic] Manning and Conduct Committee Chair Prozanski were not working to calm anyone down." Johnson Dec. ⁋ 13. As if that was their job when plaintiff riled things up. Beyond that, she can offer nothing that indicates the defendants did anything wrong and makes no statement relevant to their intent.

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The Johnson Declaration has no value in the determination of these motions.

- *The Declaration of Peggy Boquist.*

Peggy Boquist is plaintiff's administrative assistant and spouse. Boquist Dec. ⁋ 2. Her Declaration contains *no* first-hand knowledge, but only inadmissible hearsay. In essence, all she says is that three Democratic Senators came to plaintiff's office allegedly to warn him that, *generically*, "they" or "the [Democratic] caucus" were "coming" for plaintiff. But the Democratic Caucus is not the defendant here. Such out of court statements are therefore not hearsay exception admissions when applied specifically to Sens. Courtney, Prozanski or Manning.

In the remainder of the Declaration, Sen. Courtney is not mentioned. Sen. Manning is not mentioned. Boquist says Sen. Johnson said Sen. Prozanski was "pushing to have Brian punished," but does not specify whether that was for political reasons or because he was legitimately concerned about the impact of plaintiff's actions. And, again, to the extent this purports to be something Sen. Prozanski said, this is double hearsay.

The Boquist Declaration does not support plaintiff's claims.

- *The Conduct Committee had the authority to take action.*

In plaintiff's fact section, at 14-15, he contends that the Conduct Committee had no power to require the 12-hour notice.[1] This is actually a legal argument, not a recitation of facts, but defendants will respond here as it keeps the Response in the order of the materials in plaintiff's motion.

House Concurrent Resolution ("HCR") 20 was adopted by the House on June 13, 2019, and by the Senate on June 29, 2019. Thus, HCR 20 became effective on June 29, 2019. By its terms, HCR 20: (1) repealed that version of Legislative Branch Personnel Rule ("LBPR") 27 set

[1] Even if plaintiff were correct, that might nullify the *action* but it would not be any support for the idea any of the defendants intentionally violated his First Amendment Rights. This contention is, effectively, irrelevant to plaintiff's claims.

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forth in HCR 11 and adopted a new version of LBPR 27; and (2) adopted a new rule —LBPR 33— that provided transitional guidance for the rule change from HCR 11 to HCR 20.[2]

Specifically, LBPR 33 (1) provides that subsections (1) to (16) of LBPR 27, as set forth in HCR 20, became operative on the date that a Legislative Equity Officer or acting Legislative Equity Officer has been appointed. The referenced subsections contain most of the substance of the rule, including processes for imposing interim safety measures. Subsection (17) of LBPR 27, however, was not suspended pending appointment of an equity officer; instead, it has been completely operative and in effect since June 29, 2019. That subsection establishes both the Senate and the House Committees on Conduct.

The other portion of the transition rule is also significant. LBPR 33 (2) provides that, for periods after the adoption of HCR 20 and before appointment of an acting or permanent Legislative Equity Officer, the Legislative Administrator and the Human Resources Director could impose interim safety measures to protect any person present in the State Capitol from harassment, sexual harassment, and retaliation.

Put more simply, when HCR 20 took effect on June 29, 2019, the Legislative Administrator and the Human Resources Director were authorized to impose interim safety measures. Implicitly and necessarily, the authority to take interim safety measures includes the authority to investigate allegations or other circumstances to determine if interim safety measures are needed. It is worth noting that the Legislative Administrator and Human Resources Director are nonpartisan staff who work on an at-will basis for the members of the Legislative Assembly.

[2] HCR 20 also amended two other rules that are irrelevant to this case.

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ARGUMENT

Defendants incorporate by reference all arguments made in their corrected Motion for Summary Judgment (Docket No. 59).

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 each individual defendant's decisions. *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 make this showing, 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 greater 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*,

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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 actually regulate speech at all. The only limitation placed upon plaintiff was that he provide 12-hour notice of his intent to be in the Capitol. There was no limit on how long he could 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 workday for the next workday every day, and there would be no consequence that touched on his speech. Indeed, that is essentially 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 improve security and assuage the fear many members and staff of the Legislative Assembly felt in plaintiff's presence after plaintiff's apparent threats of violence to the Senate President and to the State Police. This minor limitation on plaintiff —a limitation that could be met with a single e-mail—allowed people who worked at the Legislature the opportunity to feel safer and to make informed decisions about their workday.

Finally, the individuals responsible for this notification requirement did *not* include Sen. Courtney. They were Sen. Prozanski, Sen. Manning, and two Senators plaintiff has chosen (presumably due to party affiliation) not to include in this suit: Sens. Knopp and Olsen. 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*

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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.

As predicted in defendants' motion for summary judgment, plaintiff is contending that his speech was political theater and should have been understood as such. However, it fits neatly with the kind of taunting that qualifies as fighting words.

Contrary to plaintiff's assertion, the Ninth Circuit expressly did not determine whether the 12-hour notice was "motivated by legitimate security concerns." *Boquist v. Courtney*, 32 F.4th 764, 772 (9th Cir. 2022). However, 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). If plaintiff's behavior was not intended to be threatening, that was news to Sen. Fagan, Sen. Gelser, Lori Brocker, Jessica Knieling, and numerous other staff. Brocker dep. 32:20-34:7, 89:6-21; Burdick dep. 20:14-17, 23:16-18, 25:2-6, 25:8-17, 27:15-18, 27:23-28:1, 28:14-24; Fagan dep. 19:12-15, 20:9-15, 39:8-13; Gelser Blouin dep. 75:11-76:4; Knieling dep. 91:2-4, 91:9-16; Prozanski dep. 47:17-25. Even Capt. Travis Hampton of the Oregon State Police took plaintiff seriously enough that he declined to send OSP troopers to plaintiff's home, despite sending them to the homes of other Republican legislators. Hampton dep. 13:1-11, 34:23-36:20; 44:11-20, 99:20-100:1.

That said, 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 would be received. It is

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an objective standard. 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).[3]

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

Sen. Knopp and former Senators Johnson and Olsen may claim they were not scared, but that is irrelevant to whether others were. And they were. Brocker dep. 32:20-34:7, 89:6-21; Burdick dep. 20:14-17, 23:16-18, 25:2-6, 25:8-17, 27:15-18, 27:23-28:1, 28:14-24; Fagan dep. 19:12-15, 20:9-15, 39:8-13; Gelser Blouin dep. 75:11-76:4; Knieling dep. 91:2-4, 91:9-16; Prozanski dep. 47:17-25.

There was ample reason to consider plaintiff to be a threat even once the immediate intensity of that threat may have somewhat subsided. Again, plaintiff made a threat to the President of the Senate. Courtney dep. 53:19-54:14 Boquist dep. 76:6-19. Plaintiff told a reporter —who in turn broadcast to 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. And there is no dispute that plaintiff was known to have the capability of carrying out his threats. 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. Boquist dep. 17:20-18:13, 18:20-24.

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[3] 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. v. Kazal*, 13 F.4th 736 (9th Cir. 2021).

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The fact no one called the police or filed a subsequent formal report is irrelevant. 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, particularly when dealing with a person known to carry a gun. And that is with regard to the floor comments. Of course, no one knew about the KGW comments until they were broadcast, at which time it wasn't merely the people at the legislature hearing them (or learning of them), 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. Indeed, for many people, the opposite reaction may be more likely (*e.g*, fight, flight, freeze, or fawn).

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

This is not altered by *Watts v. U.S.*, 394 U.S. 705 (1969), referenced 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. 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. Watts was nowhere near President Johnson.

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. Moreover, unlike Watts, who had not been drafted, 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 carried a gun in the Capitol.[4] Boquist dep. 26:6-14, 33:2-8.

[4] Sen. Knopp has irrelevantly noted that he has "never seen or known of Senator Boquist carrying a weapon [in the Capitol] since it became prohibited." Knopp Dec. ¶ 4. That prohibition was the result of Senate Bill 554 from the *2021* session, and banned guns from the Capitol effective September 25, 2021, more than two years after the events in question. 2021 SB

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

C. 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 notification requirement for plaintiff, even if he chose not to include them in this lawsuit. The Committee, including Sen. Prozanski, voted down the more severe sanction of exclusion from the Capitol recommended by Ms. Baumgart.

Nor should this Court give any credence to the theory that the 12-hour notice requirement was, itself, political theater aimed at an external audience. The plaintiff has not one direct shred of evidence to that effect, but only the partisan, *ex post facto* speculations of two Republican state Senators, *both of whom voted for the requirement*, and one state Senator, Betsy Johnson, who resigned the Democratic caucus and Democratic Party. Their declarations, as demonstrated above, are devoid of actual, legally relevant facts.

D. There was no wrongful "but for" causation.

Even assuming plaintiff could make a *prima facie* showing that the 12-hour notice was political retaliation, his claim would still fail because 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

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554, Oregon bans guns from Capitol, demands safe storage in homes | AP News.

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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 very real concerns were the bases for defendants' actions, and not some political motivation. Boquist dep. 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. Neither Brocker, nor Knieling, nor the legislative staff is partisan.

There is simply no evidence that creates an issue of material fact, which precludes plaintiff's summary judgment.

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

E. 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 still nothing happened. Boquist dep. 187:11-188:7, 188:22-189:13, 189:24-190:3.

Moreover, plaintiff admits the following:

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- 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.[5] 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.
- 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 the Judiciary Committee, but that was his choice. *Id.*

Additionally, plaintiff himself submitted evidence there was no enforcement. Knopp. Dec. ⁋ 28. And plaintiff does not show 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, 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).

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[5] 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.

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Accordingly, summary judgment should issue — for defendants.

F. There is no evidence of improper motivation, and no evidence Sen. Courtney acted at all.

Plaintiff appears to forget that he is not suing the Legislative Assembly, but three individuals.

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. *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).

What evidence has plaintiff presented that any of the three were motivated to take their actions for political reasons? In this regard, plaintiff offers nothing but unsubstantiated hearsay in the declarations he has submitted. None of it is specific to any of the three defendants.

Sen. Knopp had "grave concerns" Sen. Courtney might break a tie in the committee. Knopp Dec. ⁋ 23. But, as noted below, the Senate President is *not* a member of the Conduct Committee. Senate Rule 8.05(4). He says nothing about Sen. Prozanski or Sen. Manning.

Former Sen. Olsen states only that both Sens. Manning and Prozanski made motions that contained language that plaintiff was a threat, but that the motions did not pass. Olsen Dec. ⁋ 16. Beyond that, he offers nothing but unfounded fears and speculation about what *might* have passed out of Committee, but did not. Olsen Dec. ⁋ 20. He makes no other statements about any of the three Senator defendants.

Former Sen. Betsy Johnson adds only that "President Courtney, Pro Tem [sic] Manning and Conduct Committee Chair Prozanski were not working to calm anyone down." Johnson Dec. ⁋ 13. This, of course, is immaterial as well as Johnson's purely subjective belief.

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In other words, plaintiff lacks even a scintilla of evidence of intent or motivation. And even if he had some, defendants' testimony is to the contrary on this essential element of the claim, and for that reason alone, let alone all the others discussed in this Response, the plaintiff's summary judgment should be denied.

Separate from all the above, it is unclear why Senator Courtney is even a defendant in this action. Plaintiff does not point to *any* action taken by former Senator Courtney. 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 rule. FAC ¶¶37, 42. Sen. Courtney is not a member of the Senate Conduct Committee.[6] Sen. Courtney did not vote for the 12-hour notice requirement. Boquist dep Exh. 224. Indeed, although Olsen and Knopp make many subjective statements about their concern as to potential action by the Senate President, Courtney, like Godot, never showed up. Indeed, this claim smacks of victim-blaming: the only thing Courtney did was be the subject of one of plaintiff's threatening comments.

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

II. Plaintiff essentially abandons his association claim.

Plaintiff devotes only one paragraph to his freedom of association claim. In that paragraph, he asserts —in direct contradiction to his deposition testimony— that he could not

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[6] Plaintiff argues 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 not attend or vote, and took no part in the action to create the 12-hour notice requirement. Boquist dep. Exh. 224.

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meet with constituents.[7] But plaintiff testified that he was never prevented from entering the Capitol, Boquist dep. 187:24-188:7, and that he cannot recall if he was ever prevented from meeting with a constituent. Boquist dep. 190:20-23. Accordingly, plaintiff has not presented any case to this Court that his associational rights were infringed. Not only should plaintiff's summary judgment be denied, his lack of a showing mandates a grant of summary judgment for defendants on this count.

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

Plaintiff is not entitled to summary judgment because, the notice requirement having been repealed, the matter is moot. Defendants incorporate in their Response the arguments presented in Section III of their Motion and Memorandum, and therefore will not repeat them here.

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

Plaintiff is not entitled to summary judgment because summary judgment cannot be granted as to persons entitled to absolute legislative immunity and thus not subject to suit at all. Defendants incorporate in their Response the arguments presented in Section V of their Motion and Memorandum, and therefore will not repeat them here.

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

Plaintiff is not entitled to summary judgment because summary judgment cannot be granted as to persons entitled to judicial/prosecutorial immunity and thus not subject to suit at all. Defendants incorporate in their Response the arguments presented in Section VI of their Motion and Memorandum, and therefore will not repeat them here.

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

Plaintiff is not entitled to summary judgment because the defendants are entitled to a grant of qualified immunity. Defendants incorporate in their Response the arguments presented in

[7] Statements that conflict with sworn deposition testimony should be disregarded. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir. 1995); *Dardanell v. Target Stores*, 16 F.3d 174 (7th Cir. 1994).

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Section VII of their Motion and Memorandum, and therefore will not repeat them here.

CONCLUSION

Plaintiff continues to assert that the modest and essentially unenforced measures taken in response to his threats of physical violence somehow make him the victim. This utter lack of self-awareness is additional support for the idea that what he said and did was not within the realm of normal political discourse; rather it legitimately scared people. Indeed, two of the persons who submitted declarations on his behalf would have this Court forget they voted for those minimal restrictions . . . or at least offer rationalizations for those votes.

Senator Olsen claims he needed to find a "compromise" or plaintiff might be banned from the Capitol. Olsen Dec. ⁋ 18. That is demonstrably false, because —as Sen. Olsen knows— Sen. Prozanski voted with the Republicans against the proposed ban. Boquist dep. Exh. 224. Sen. Olsen also makes the false statement that Sen. Courtney was an *ex officio* member of the Conduct Committee. Olsen Dec. ⁋ 17. He was not. Senate Rule 8.05(4). Regardless, it is uncontested that Sen. Courtney —member of the Conduct Committee or not— never showed up to cast the feared tie-breaking vote.

Similarly, Sen. Knopp at least has the honesty to admit nothing can pass the Conduct Committee without some bipartisan agreement, though he, too, goes on falsely to state the Senate President could break a tie. Knopp Dec. ⁋ 22.

Unexplained —except by political affiliation— is why these two Senators are not defendants.

The facts are simple. People were scared. Many people. Not all of them Democrats. Fear of being in range of gunfire is not a partisan issue.

The facts are simple. Plaintiff made threats. They were received as such and no number of competing declarations can negate the legitimately held fears testified to in the depositions in this matter.

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The facts are simple. The allegation that this was done for political purposes both ignores the non-partisan staff's testimony and is an *ex post facto* rationalization for this lawsuit.

And the law is simple. Plaintiff's threats are not protected speech, and defendants' actions are legislatively, judicially and qualifiedly immune. And this matter is moot.

For the foregoing reasons, the Court should deny plaintiff's motion for summary judgment.

DATED March 27, 2023.

Respectfully submitted,

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