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From the Desk of
Senator Brian Boquist

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

**REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

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MEMORANDUM OF LAW

INTRODUCTION

Plaintiff's Response to this motion fails to create any issue of genuine fact as to any relevant issue. Plaintiff has not shown any wrongdoing by Sen. Courtney; he has not shown any harm; he has not shown any evidence of political motivations that violated his free speech; he has not shown his speech did not scare others (even though he insensitively scoffs at those he frightened), and he has not negated any of the three types of immunity to which the defendants are entitled.

What plaintiff has done is demonstrate that there is no issue of material fact, merely questions of law for this Court to resolve. Defendants contend that plaintiff's speech—the content and venues of which are uncontested—is as a matter of law unprotected fighting words. Defendants contend that plaintiff's own testimony shows that their actions—which are uncontested—did not abridge plaintiff's speech. Defendants contend that plaintiff has provided no support for his allegation (insufficient in itself at this stage) that defendants' actions were political in purpose. And defendants contend that nothing on the record should deter the Court from finding them protected on the basis of any or all of legislative, judicial and qualified immunity.

As set forth in defendants' initial Memorandum and below (as well as in defendants' response to plaintiff's motion for summary judgment), summary judgment in favor of defendants is the appropriate disposition for this matter.

FACTS

Defendants offer the following analysis of plaintiff's assertions of undisputed facts, and his submissions in the Declarations of Ms. Johnson and Ms. Jones.

Plaintiff wants this Court to believe that the fact it took nineteen days to act is relevant. Response at 3. It is not. A legislature is by nature not a rapid response mechanism. Doubtless

knowledge. They should be given no weight. The only facts relevant to the actions of Sen. Knopp and former Sen. Olson are that they did vote, they were not replaced, no tie was broken, and their *ex post facto* attempts to explain their motivations do not change their support for the decision to require plaintiff give notice.

ARGUMENT

Plaintiff did not organize his response in the order of defendants’ initial Memorandum. Accordingly, the following table provides the Court with a way to find the arguments that are responsive to their counterparts.

Topic	Defendants’ Memoranda	Plaintiff’s Response
First Amendment		
--Time Place & Manner	Section I(A)	Section V
--Fighting Words	Section I(B)	Section IV
--Intent Irrelevant	Section I(C)	Section VII
--Concern sufficient	Section I(D)	Section VII
--Action not “political”	Section I(E)	Section VIII
No deprivation of Rights	Section II	Section VI
Mootness	Section III	Section II
No action by Courtney	Section IV	Section IX
Legislative immunity	Section V	Section III(A)
Prosecutorial Immunity	Section VI	Section III(B)
Qualified Immunity	Section VII	Section III(C)
In addition, plaintiff has raised this new argument		
Veteran Status	Section I(B)	Section I

This then leads to the question of what plaintiff has presented that shows animus.

Plaintiff's own "best case" is to cite to his own, hand-crafted declaration from Ms. Johnson, who has no direct evidence to provide. Johnson only states that there was anger "in the Democratic caucus" and that Sen. Fagan —*not* one of the defendants— wanted plaintiff punished. Ms. Johnson has precisely *zero* to say about the intent of Sen. Courtney (who, of course, did nothing regardless of intent), Sen. Manning or Sen. Prozanski.

Absent such evidence, the 12-hour notice was minimally intrusive, narrowly tailored to assuage the concerns of others in the building, and constitutional.

B. Sen. Boquist engaged in unprotected fighting words.

Plaintiff attempts to minimize the harm his actions had on those in the Capitol building and elsewhere by claiming his threat to the Oregon State Police was only a "political statement[] that a hearer finds offensive." Response at 14. At no time has that been what this case was about. At no time did defendants assert that plaintiff's speech was politically offensive. The defense assertion —backed up by ample deposition testimony— is that numerous persons in the Capitol were *scared*, that they felt threatened, that they stopped bringing their children into the building, and that this was because plaintiff cultivated an image of danger and was known to carry a gun in the Capitol. Boquist (Ross) dep. 10:18-11:7, 27:20-28:1; Boquist dep. 17:20-18:13, 18:20-24, 22:15-23:7, 23:20-25, 26:6-14, 33:2-8, 105:7-15, 106:22-107:1; Bocker dep. 32:20-34:7, 79:16-80:2, 89:6-21; Burdick dep. 20:14-17, 23:16-18, 25:8-17, 27:15-18, 27:23-28:1, 28:14-24; Fagan dep. 16:23-17:19; Gelser Blouin dep. 16:22-18:1, 75:11-76:4; Prozanski dep. 103:19-104:2, 138:13-20.

Plaintiff compares this case to *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Virginia v. Black*, 538 U.S. 343 (2003). Neither of those cases presented a situation similar to what occurred here: a specific threat to a specific group of individuals based on a series of events that was likely to occur. Plaintiff attempts to minimize the seriousness of his action by (literally) saying "see? I'm not the Klan!" True. However, there was no reason to believe any of the threats in those

once again showing his lack of self-awareness. Response at 5. Bragging about your lethal skills is a choice. Race or gender identity are not.

Regardless, plaintiff appears to have forgotten his only claim is a First Amendment free speech claim. Whether people viewed him negatively or feared him because of his career choices and his volitional crafting of his image is not actionable and not part of this case.

C./D. Plaintiff's intent is irrelevant./ The demonstrations of concern were more than sufficient.

As plaintiff has merged these arguments, so too do defendants in this Reply.

Plaintiff incorrectly asserts that defendants provide no case support for the idea that the fear of the hearer is relevant in a First Amendment claim. Response at 19. Plaintiff appears not to have seen defendants' citation to *Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002) (the "test is what a reasonable speaker would foresee the listener's reaction to be under the circumstances * * *."), Indeed, plaintiff then proceeds to provide support for precisely defendants' proposition by citing to *Corales v. Bennett*, 567 F.3d 553, 563-64 (9th Cir. 2009), for the idea that the "reaction of the listeners" matters.

Plaintiff asserts that the Court should share his belief that his words were just "hyperbole." But context matters and the context is not the same as in *Watts* or *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). That *Watts* is distinguishable was addressed in defendants' initial Memorandum, Section I(B). *Claiborne*, similarly, did not present a situation in which the person making the utterance had a demonstrated capacity to carry out his threat, had a history of building up his image regarding that capacity, and had undisputedly created fear in many individuals for themselves or their employees. Notably, those afraid were *not* only "partisan" Democrats as the plaintiff suggests but included non-partisan staffers such as human resources director Jessica Knieling and Secretary of the Senate Lori Brocker.⁴ Brocker dep

⁴ In addition, plaintiff misinterprets Sen Prozanski's statement that the Committee would not take action on the reports to mean they did not *consider* the concerns. Obviously those are not

was generally out to get plaintiff. Nothing specific is said about the motivations of the three actual defendants —Sen. Courtney, Sen. Prozanski and Sen. Manning— as opposed to a hypothetical Democrat caucus mob, replete with torches and pitchforks, but nary an identifiable face.

Plaintiff claims no one considered him a threat when the action was taken. That is untrue. The members of the Committee were reacting to the reports including from human resources that workers in the building remained scared. They remained concerned for their safety.

Regardless, given that plaintiff has the burden in this motion as he would at trial, *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), plaintiff needs to show that this alleged retaliation was the “but for” cause of defendants’ actions. *Mt. Healthy City School District Bd. Of Education v. Doyle*, 429 U.S. 274, 287 (1977); *Boquist v. Courtney*, 32 F.4th at 778. Plaintiff has made no showing, let alone one that rises to “but for.” The unfounded speculation of Sen. Knapp, Ms. Boquist, Ms. Johnson and Mr. Olsen about what unspecified Democratic Party members might have intended is not sufficient to meet plaintiff’s burden.

II. Plaintiff suffered no deprivation of his rights.

Plaintiff contends that the Ninth Circuit has already decided in his favor through its discussion that an adverse action is one that prevents an elected official from doing this job. *Boquist v. Courtney*, 32 F.4th 764, 777 (9th Cir. 2021). This is simply incorrect. The Ninth Circuit was discussing whether such an allegation, in the abstract and assuming the statements to be true, would be a violation. There was no determination on a factual record —because there could not be on a motion to dismiss— that what happened in the instant case prevented plaintiff from doing his job.

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). That did not happen here. Plaintiff stopped providing notice, and nothing happened. Boquist dep. 187:11-

that Sen. Manning might be reappointed to the committee is not sufficient. “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).

And while plaintiff attempts to distinguish *Hernandez*, he offers no other case for this Court to follow.

As to evading the mootness doctrine, plaintiff offers nothing but unfounded speculation as to what might occur in the future without providing any support for the idea it *will* occur. Even the case plaintiff cites to, *Rosemere Neighborhood Ass’n v. U.S. Environmental Protection Agency*, 581 F.3d 1169 (9th Cir. 2009), requires a “reasonable” expectation of repetition. *See also American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118, 1123 (9th Cir. 1997). If plaintiff claims this situation is “capable of repetition,” the burden of proof is upon him. *Belitskus v. Pizzigrilli*, 343 F.3d 632, 648 (3^d Cir. 2003). Guesswork is insufficient.

The current situation does not fit within the exceptions to mootness, and, accordingly, all injunctive relief should be dismissed.

IV. Sen. Courtney has done nothing.

Plaintiff attempts to retain Peter Courtney in this action by alleging, without any factual support, that “he set in motion, or acquiesced to, a series of acts by other defendants that violated Boquist’s free speech rights.” Response at 22. Plaintiff cites to *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989), for the idea that a “supervisor” may be liable for the constitutional violations of others.

That statement is essentially an admission that Sen. Courtney took no action himself.

Plaintiff provides no evidence that Peter Courtney, albeit President of the Senate at the time, was a “supervisor” to Sens. Manning and Prozanski, independently elected officials. As

any further credibility, and Sen. Courtney should be dismissed even if any other component of this case remains.

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

Plaintiff agrees that the structure for determining legislative immunity is that set forth in *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (“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.”).

Plaintiff’s entire argument as to why he should fall outside this analysis and why *Hernandez v. Oregon House of Representatives*, 2021 WL 5570112, *7 (D. Or., Nov. 29, 2021), should not bind his circumstances, is that he alleges the Conduct Committee was acting in an “employer-employee matter.” Response at 9. However, he makes this contention utterly without factual support. To the extent Rule 27 describes or defines employer-employee relations, legislators are not in the latter half of that phrase. In the definitions, Section 3(g) says:

“Employee” means an employee who is performing services on behalf of the Legislative Branch. “Employee” includes any intern, extern or volunteer who is affiliated with a Legislative Branch office.

By contrast, a legislator is defined entirely separately from “employee” in Section 3(l):

“Legislative Branch” means **members and employees** of the Legislative Assembly, the parliamentary offices, Legislative Administration, the Legislative Counsel Office, the Legislative Enrolled House Concurrent Resolution 28 (HCR 28-A) Page 2 Equity Office, the Legislative Fiscal Office, the Legislative Policy and Research Office, the Legislative Revenue Office and the Commission on Indian Services.

Abrams Second Dec. Exh. A (emphasis added).

In other words, legislators are *not* considered employees, and clearly not for Rule 27 purposes. When that is understood, the Court should then turn to the language of *Hernandez*, in which Judge Aiken wrote “*in contrast to* a more conventional employer-employee matter, the process for expelling a member of the Oregon Legislature is decidedly legislative in both form

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

Plaintiff argues against the application of qualified immunity without any reference to how qualified immunity is determined.

First, it is necessary to show a deprivation of a federal right. *Monroe v. Pape*, 365 U.S. 167 (1961). Here, plaintiff keeps asserting without presenting a record that his speech was impeded. The evidence is to the contrary, given that he admitted in deposition none of his role as a legislator was ever hindered. 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, 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 was not prevented from meeting with a constituent, Boquist dep. 190:20-23; and he was never prevented from attending committees or caucuses. Boquist dep. 188:22-189:13. Plaintiff makes no showing of deprivation.

Second, defendants are still entitled to 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). As previously noted, the legislative committee members had the ability to regulate plaintiff's conduct in a manner they had every right to believe was protected. Case law before and after the actions continue to show their propriety. *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).

Even the one case relied on by plaintiff, *Blair v. Bethel School Dist.*, 608 F.3d 540 (9th Cir. 2010), is a case in which *no* violation was found. In other words, plaintiff cannot point to any decisional law which in any way might have put defendants on notice that it was clearly established they should not act as they did.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in defendants' Response to plaintiff's motion for summary judgment and in their initial Memorandum in this motion, the Court should issue summary judgment dismissing this case with prejudice.

DATED April 10, 2023.

Respectfully submitted,

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