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From the Desk of
Senator Brian Boquist

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

BRIAN J. BOQUIST,

Plaintiff,

v.

OREGON STATE SENATE PRESIDENT PETER COURTNEY, in his individual and official capacities; SENATOR FLOYD PROZANSKI, in his individual and official capacities as Chairman of the Senate Special Committee on Conduct; SENATOR JAMES MANNING, in his individual and official capacities as member of the Special Senate Conduct Committee,

Defendants.

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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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RESPONSE

Plaintiff incorporates the arguments, facts, and evidence raised in his Motion for Summary Judgment. (ECF 51). It appears the parties agree on the following facts but differ on their import:

1. **Plaintiff's June 19, 2019 Statements**. Boquist's first statement was made on the Senate floor, to Courtney, during debate. Boquist immediately apologized to Courtney and the apology was accepted. There was no immediate breach of the peace and no one reported concerns to law enforcement. Boquist's second statement was made later that day during a media interview inside the Capitol with KGW News reporter, Pat Dooris. There was no immediate breach of the peace and no one reported concerns to law enforcement before or after portions of the statement aired on the news.

2. **No Immediate Action Taken**. The parties agree that the Senate Special Committee on Conduct could have convened to address Boquist's statements with one-hour notice but chose to wait nineteen days, until July 8. No one implemented any safety measures at any time related to Boquist's statements.

3. **No Rule 27 Complaints**. The parties agree that there have never been any informal or formal Rule 27 complaints related to Boquist's statements. Anonymous "reports" were made but those reports were not vetted for political motivation. Regardless, Defendants did not consider these reports when implementing the rule.

4. **Boquist Was Not a Threat**. The parties agree that Defendants' committee implemented the rule without determining Boquist violated Rule 27 or was a threat to anyone. The

motion passed unanimously by the committee on July 8 because the minority members feared sanctions would be worse if Courtney intervened as an *ex officio* member to break a tie vote.[1]

5. **Plaintiff Subject to "12-Hour Rule" for Over Three Years**. The parties agree that the rule remained in effect from July 9, 2019 to November 28, 2022.

ARGUMENT

I. "Veteran Status" is a Protected Class Under Rule 27

Under Rule 27, "Veteran status" is a protected class, along with sex, race, religion, sexual orientation, and gender identity or expression. (ECF 053-9, p. 3) ("a classification established by law that offers protections to members of the classification."). Sadly, Defendants' Motion for Summary Judgment makes it clear why this protected status for veterans is necessary. Defendants – state senators represented by the Oregon Department of Justice – shamelessly ask this Court to consider that Boquist's veteran status is evidence that his statements were true threats:

> …consider plaintiff's personal background. He served in the special forces. [] He has possibly killed people. [] 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.

[1] Defendants erroneously argue the "79th Legislative Assembly" rules, adopted January 9, 2017, provide "This [*ex officio*] provision does not apply to the Senate Committee on Conduct." (Defs' MSJ, p. 27, fn.11). No such provision exists in that rule, and even if it did, the 2017 rules were not applicable in 2019. In fact, under the operative Senate Rules on July 8, 2019, President Courtney was an *ex officio* member of all Senate Committees. (Jones Decl., Ex. 1, p. 5, Rule 8.05, adopted January 14, 2019). It was not until February 3, 2020, that an amendment to this rule provided - "This provision does not apply to the Senate Committee on Conduct." (ECF 053-13, p. 12). Accordingly, on July 8, 2019, President Courtney was an *ex officio* member of the committee with the power to break a tie vote. Senator Betsy Johnson testifies that Courtney executed this power in 2019/20. (Johnson Decl., ¶¶ 4-6) (on June 12, 2019, Courtney removed Johnson from a committee and executed his *ex officio* authority because she was a "no" vote on the cap-and-trade bill, HB2020; again in 2020, Courtney joined the Ways and Means committee to break a tie to get the majority party's legislation passed).

(Defs' MSJ, pp. 19-20).[2] Defendants provide that Lori Brocker "was aware of plaintiff's 'skill' and 'background,'" and worried this may cause others to fear him. *Id.* at p. 10 ("individuals [were] concerned about the heated language, particularly because they knew of plaintiff's military training."). Secretary Fagan expressed 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." (Defs' MSJ, p. 10) ("plaintiff had 'a kind of military ops background' and that he made 'people feel like he just didn't seem like a stable person.'").

It is one thing for Secretary Fagan to subjectively believe this nebulous threat exists, but it is entirely different for Defendants to highlight and rely upon her implicit bias as if it adds anything to the legal issues before the Court. It does not. Defendants' argument is discriminatory, inappropriate, and no different than asking the court to consider all people of color or all transgender people share a propensity for a negative attribute of Defendants' choosing – without any evidence other than their status. "Today's civil rights leaders face a new challenge: to expose the subconscious and subtle forms of bias and fear that exist in us and of which we often are unaware." (Jones Decl., Ex. 3 p. 5). This Court should reject Defendants' invitation to consider military members and veterans are innately threatening.[3]

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[2] Defendants assert that Boquist "used his military background in his campaigns to build his image and brand himself." (Defs' MSJ, p. 20) (no citation). Defendants cannot support this assertion by showing Boquist "mentioned [his military background] in the Voters' Pamphlet" and in "campaign brochures and advertisements." *Id.* Political candidates are required by law to provide their "[o]ccupation, educational and occupational background, and prior governmental experience" in the Oregon Voters' Pamphlet. ORS 251.085. Moreover, one would be hard-pressed to find a candidate who does *not* mention their honorable military service in campaign materials. In fact, Manning's campaign website shows a photo of him in military uniform on the home page. *See* http://www.floyd4senate.com/about-floyd.html. Unlike Manning, Boquist has no website or social media account showing him in uniform. Defendants' allegation that Boquist branded himself as a threatening veteran to build his image is not well-taken.

[3] This Court should also reject Defendants' attempt to hold Boquist's legal gun ownership against him. ("He is trained in firearms. [] He owns a 'long list' of guns. [] He has a concealed weapons

II. This Case is *Not* Moot

Defendants contend this case is moot because the 12-hour notice rule was rescinded on November 28, 2022 (after *three years* of litigating the issue). (Defs' MSJ, p. 20). "The party asserting mootness bears the heavy burden of establishing that there remains no effective relief a court can provide." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F3d 853, 862 (9th Cir 2017) (citation omitted). "An action becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (citation omitted). In this case, Plaintiff seeks declaratory relief, injunctive relief, and nominal damages against all defendants in their individual and official capacities. (ECF 45). This case is not moot for several reasons: Plaintiff asserts nominal damages against state officials in their individual capacities, the issue is capable of repetition, and the voluntary cessation doctrine applies.

First, "[b]y making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed...." *Carey v. Piphus,* 435 U.S. 247, 266 (1978). It is well-established in the Ninth Circuit that "[a] live claim for nominal damages will prevent dismissal for mootness." *Bernhardt v. Cnty. of Los Angeles*, 279 F3d 862, 872 (9th Cir 2002) (citing *Lokey v. Richardson,* 600 F.2d 1265, 1266 (9th Cir.1979) (per curiam)) (holding that although claim for injunctive relief was mooted, case was not moot because plaintiff could still be entitled to nominal damages); *Knight v. Kenai Peninsula Borough Sch. Dist.,* 131 F.3d 807, 812 (9th Cir.1997) (holding that, although actual damages claim might be rendered moot, case was not moot because plaintiff could still obtain nominal damages); *Chew v. Gates,* 27 F.3d 1432, 1437

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permit."). Defendants fail to show Boquist has ever unlawfully used or brandished a firearm. In fact, "defendants assumed plaintiff would obey the law and the lawful directives of the state Senate" because he is a law-abiding man. (ECF 053-18-20).

(9th Cir 2022) (quoting *Blair v. Bethel Sch. Dist.*, 608 F3d 540, 545, n.4 (9th Cir 2010)). In *Blair*, school board members voted to remove a fellow member as vice president after he criticized the school superintendent to a reporter. 608 F3d at 543 ("Blair's statements to the reporter were the last straw for his fellow Board members."). There, the defendants' actions did *not* violate the First Amendment because "the Board's action didn't prevent Blair from continuing to speak out, vote his conscience, and serve his constituents as a member of the Board." *Id.* (Blair was not entitled to be vice president of the board by having been publicly elected to the board). But the Ninth Circuit made clear that "retaliatory acts of elected officials against their own can [] violate the Constitution" when an elected official is deprived "of authority he enjoyed by virtue of his popular election," or otherwise prevented from enjoying "the full range of rights and prerogatives that came with having been publicly elected." *Id.* at 544, n.4 (citing *Bond v. Floyd*, 385 U.S. 116 (1966)). In remanding Plaintiff's First Amendment claims here, the Ninth Circuit explained the 12-hour notice rule "prevents Boquist from exercising authority he enjoyed by virtue of his popular election, and interferes with Boquist's ability to meet with constituents, elected officials, and others at the State Capitol Building on short notice, and therefore prevent[s] [Boquist] from doing his job." 32 F4th at 776–77 (internal quotation marks omitted). Defendants were on notice that preventing Boquist from enjoying "the full range of rights and prerogatives that came with having been publicly elected," in retaliation for his provocative statements, violates the First Amendment. Accordingly, they are not entitled to qualified immunity.

IV. Boquist's Statements Were Not "Fighting Words" Under Any Legal Precedent

Defendants allege Plaintiff's speech is not protected by the First Amendment because his statements constitute fighting words. (ECF 59, pp. 18-19). "Fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*

v. State of New Hampshire, 315 U.S. 568, 572 (1942). Since *Chaplinsky*, the Supreme Court has narrowed the grounds upon which fighting words may apply. Fighting words must be insults personally directed at the person they are addressed to, and do not include political statements that a hearer finds offensive.

In *Brandenburg v. Ohio*, a Ku Klux Klan leader called a television reporter and invited him to film a KKK rally. 395 US 444, 445 (1969). "Portions of the films were later broadcast on the local station and on a national network." *Id.* Several divisive objects appeared in the film, "including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films." *Id.* "No one was present other than the participants and the newsmen who made the film." *Id.* at 445-446. The film showed Brandenburg making the following statements "derogatory of Negroes and … of Jews":

> 'This is what we are going to do to the ni**ers.'
> 'A dirty ni**er.'
> 'Send the Jews back to Israel.'
> 'Let's give them back to the dark garden.'
> 'Save America.'
> 'Let's go back to constitutional betterment.'
> 'Bury the ni**ers.'
> 'We intend to do our part.'
> 'Give us our state rights.'
> 'Freedom for the whites.'
> 'Ni**er will have to fight for every inch he gets from now on.'

Id. at 446, n.1. The hostile and offensive words did not end there. The media aired Brandenburg, in full Klan regalia, making the following statement threatening the President, Congress, and Supreme Court, "… The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken…." *Id.* at 446. For his publicized speech, Brandenburg was criminally

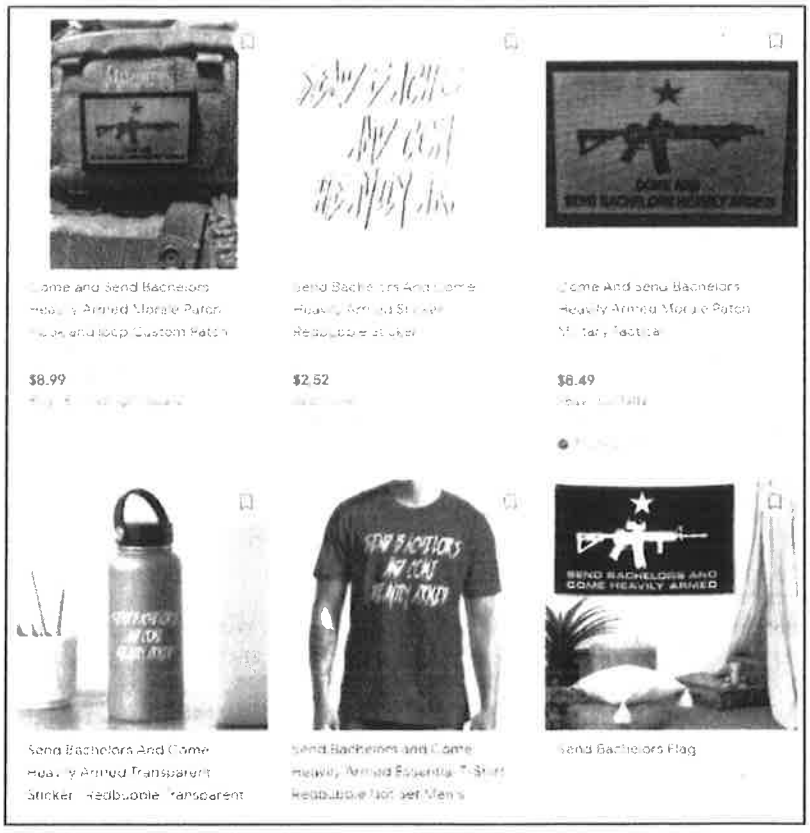
convicted. *Id.* at 444–45. The Supreme Court reversed his conviction, holding in part that the Act under which he was convicted unlawfully "punishes persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'" *Id.* at 448. The Court determined Brandenburg's words were protected speech - "mere advocacy." *Id.* at 449.

More recently, the Supreme Court, in *Virginia v. Black*, held that cross burning does not constitute "fighting words" unless "carried out with the intent to intimidate." [4] 538 US 343 (2003) ("the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."). In *Black*, a Ku Klux Klan rally "occurred on private property with the permission of the owner, who was in attendance." *Id.* at 348. A neighbor heard a speaker announce that "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Id.* at 349. Understandably, the neighbor "testified that this language made her 'very ... scared.'" *Id.* "At the conclusion of the rally, the crowd circled around a 25– to 30–foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross 'then all of a sudden ... went up in a flame.'" *Id.* at 349. The neighbor witnessed the cross burning and testified that it "made her feel 'awful' and 'terrible.'" *Id.* But, despite the

[4] Defendants assert "the Ninth Circuit has struggled with whether the test should be objective or subjective in *criminal* cases, [and] the court has never moved off this objective test for civil matters." (ECF 59, p. 21, n.7) (citing *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736 (9th Cir. 2021)). This is partially correct. In *Thunder Studios*, the Ninth Circuit explained that "[c]ases in this circuit have long employed an objective test for determining when speech is a 'true threat.'" *Id.* at 746. However, in 2005, the Court determined that *Virginia v. Black* "defined true threats as when a speaker 'means to communicate' serious intent." *Id.* (citing *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005)). The Court has "not yet determined whether the subjective test in *Black* applies in civil cases…" because it has not had an opportunity to do so. *Id.* In *Thunder Studios*, the speech did not satisfy *either* test, so the Court still did not get an opportunity to "decide [] whether a true threat in civil cases requires both an objective threat and a subjective intent to threaten." Likely, when presented with an opportunity, the Court will determine the subjective standard applies to all First Amendment speech cases. Protected speech is rooted in the First Amendment itself, not in whether it is being used as a sword or shield. There is no indication from the Ninth Circuit that it would use different protected speech tests for different types of cases.

divisive nature of the act, and the neighbor's fear, the Court held that cross burning is protected speech in this context. *Id.* at 357 ("the burning of a cross is a 'symbol of hate,' … regardless of whether the message is a political one or whether the message is also meant to intimidate."). The Court recognized that "cross burnings have been used to communicate both threats of violence and messages of shared ideology." *Id.* at 354.

Likewise, Boquist's statement to the reporter was a message of shared ideology, not a threat of violence. In fact, a Google search of the phrase "send bachelors and come heavily armed" returns the following products for sale:



(*Retrieved from* Google search for "send bachelors and come heavily armed" on March 18, 2023). Regardless of whether some in the majority party members thought Boquist was communicating

a threat of violence, his statement was a protected message of shared ideology with many constituents.

Defendants also fail to show Boquist was likely to incite an immediate breach of the peace when his statement to Courtney "was quickly followed by Boquist's public apology." *Boquist v. Courtney*, 32 F4th 764, 781 (9th Cir 2022). There was no reaction by the listeners, and the floor session continued as usual. (ECF 057, Olsen Decl., ¶¶ 4-5). Courtney testified, "I would say personally on the record I didn't view him as threatening me." (ECF 054-23, pp. 11, 17) (emphasis added).

Nor was Boquist likely to incite an immediate breach of the peace by informing a reporter that he had previously told the OSP superintendent to "[s]end bachelors and come heavily armed" because he was "not going to be a political prisoner in the state of Oregon." *Id.* Critically, as explained by the Ninth Circuit, this statement was not "directed at state police officers intending to detain Boquist and transport him to the State Capitol against his will. Indeed, at the time Boquist made his second statement on June 19, 2019, no state official had authorized or requested the state police to arrest absent senators." *Id.* at 782, n.7. The context and circumstances do not justify denying Boquist's First Amendment protections.

V. "Reasonable Time, Place, and Manner" Argument Does Not Apply Here

Defendants argue that even if Boquist's speech was protected, "Governments are allowed to implement reasonable time, place and manner restrictions on speech." (ECF 59, p. 17). As previously explained by the Ninth Circuit, "[t]his argument misses the point." *Boquist v. Courtney*, 32 F4th 764, 785 (9th Cir 2022). "[E]ven assuming that a 12-hour notice requirement was constitutional as a reasonable time, place, and manner restriction, the defendants could not impose that requirement on Boquist out of a retaliatory animus, as plausibly alleged in the complaint." *Id.*

Plaintiff has now shown, in his Motion for Summary Judgment, that the rule was political retaliation for his part in denying the majority party a quorum to vote on its cap and trade bill in 2019. (ECF 51). As former Senator Betsy Johnson testified, "[t]he stress and anger within the Democrat Caucus towards the Republicans was vocal and hostile – frankly, and excuse the phrase, but it caused some of my Democrat colleagues to go 'bat-shit crazy.'" (ECF 055, ¶ 9). Senator Fagan specifically wanted Boquist punished for his part in the walkout. *Id.* at ¶ 13. Several senators warned Boquist that he would be punished for the walkout. (ECF 054, ¶¶ 3-5, 7) ("each of them took time to warn us that the Democrat Caucus was planning to punish [Boquist]"). Defendants cannot shield themselves with "reasonable time, place, and manner regulations" when the regulation punished Boquist for his protected speech.

VI. Defendants Deprived Boquist of Authority He Enjoyed by Virtue of His Popular Election

Defendants allege their conduct caused Boquist "no harm" because the rule "was barely and only briefly enforced." (ECF 59, p. 23) ("No one remembers ever calling in additional law enforcement."). Defendants miss the point. As determined by the Ninth Circuit, the 12-hour notice rule "prevents Boquist from exercising authority he enjoyed by virtue of his popular election, and interferes with Boquist's ability to meet with constituents, elected officials, and others at the State Capitol Building on short notice, and therefore prevent[s] [Boquist] from doing his job." 32 F4th at 776–77 (internal quotation marks omitted). The requirement to provide 12-hours-notice before entering the Capitol constitutes "adverse action against an elected official." *Id.* at 777.

The evidence shows Boquist complied with the rule for months, until recognizing Defendants never intended to enforce it. Out of frustration, Boquist sent an email on September 27, 2019, declaring, "I will be in every or any day until my term [of] office expires in January 2021 in performance of my constitutional duties." (ECF 053-34, p. 9). No enforcement action was taken

because the media did not pick up on the email. (*Id.* at pp. 10-11, 15) (emphasis added). Defendants candidly admit, "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." (ECF 59, p. 23). The rule chilled Plaintiff's speech and the speech of other elected officials who would consider supporting another walkout. Boquist complied with the letter and spirit of the 12-hour-notice rule for 80 days.

VII. Unvetted Concerns Within The Majority Party do Not Convert Boquist's Political Statements Into True Threats

Defendants provide that some in their political party were fearful of Boquist's statements, so his speech is not protected by the First Amendment. (Defs' MSJ, pp. 21-22). They fail to support this theory with any caselaw.[5] This Court must examine Boquist's speech in light of its "entire factual context, including the surrounding events and reaction of the listeners." *Corales v. Bennett*, 567 F.3d 554, 563–64 (9th Cir. 2009). "Even a statement that appears to threaten violence may not be a true threat if the context indicates that it only expressed political opposition or was emotionally charged rhetoric." 32 F4th at 781 (internal quotation marks omitted) (quoting *Kazal*, 13 F.4th at 746); (citing *Watts*, 394 U.S. at 706–08 (holding that the defendant engaged in protected speech where he stated, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J," during speech at Washington Monument opposing military draft); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982) (holding that the statement "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck" at a rally was "emotionally charged rhetoric" protected under the First Amendment)).

[5] In reality, a lot of the fear was caused by protesters outside the building. Senator Gelser testified that she personally did not fear Senator Boquist: "**I did not personally have a fear that Brian Boquist himself was going to come to harm me.**" (Jones Decl., Ex. 2, p. 6) (emphasis added).

Defendants' expressions of bias-based fear are not sufficient to overcome the context here.[6] The statements were made during a heated legislative session, inside the Capitol, after the governor threatened to arrest minority members if they walked out and denied the majority party a quorum to vote on the cap-and-trade bill. The Ninth Circuit recognized that "at least one reporter who observed Boquist's second statement interpreted it 'as hyperbole, a response to a hypothetical event [Boquist] knew would never happen.'" 32 F4th at 782. Senator Tim Knopp heard the news and "knew that Senator Boquist was engaging in political rhetoric as he was pushing back on the [governor's] threat of arrest." (Knopp Decl., ¶ 13) ("I also knew that he was attempting to rally those inside and outside the Capitol to support a walkout of the Republican senators."). No one reacted by convening an emergency conduct committee meeting or reporting his statements to law enforcement. His statements were not "directed at state police officers intending to detain Boquist and transport him to the State Capitol against his will. Indeed, at the time Boquist made his second statement on June 19, 2019, no state official had authorized or requested the state police to arrest absent senators." 32 F4th at 782, n.7. OSP Superintendent Hampton testified, "[Boquist] has a right to say what he wanted to say. He's an Oregon senator during session at the Capitol. Even though I might find it offensive, it was within his right…." (ECF 053-30, p. 7). No one at OSP felt it was necessary to initiate a threat assessment regarding Boquist's statements. *Id.* at p. 9 ("Q. … Are you aware of any assessment of Senator Boquist being a threat to the legislative branch that was conducted based upon either statement one or statement two? A. [Hampton replied,] I am not.").

[6] "Implicit bias has an undeniable impact on our policies and decisions …. If we believe that certain people are more frightening and dangerous, then we may want to create more policies to protect ourselves from them. If we believe that certain people are more threatening, then we may be less willing to protect them from unjust laws." (Jones Decl., Ex. 3, pp. 4-5).

As Boquist predicted, no senators were arrested and the absent members returned to the Capitol without incident on June 29, 2019. (ECF 056, Knopp Decl., ¶ 9) (The governor's threat to arrest "was [a] politically motivated threat that ultimately wasn't followed through."). Close to 100 Oregonians submitted public testimony in support of Boquist and his statements at the July 8th committee hearing. (ECF 053-17) (compared to merely two people who advocated for him to be punished). Moreover, Defendants' "evidence" that Gelser, Fagan, and unknown others were afraid is irrelevant because Defendants did not consider these reports when implementing the rule. (ECF 6-3, p. 52) (Prozanski stated, "we will not be taking any action at this point regarding any merits of any reports…"). The surrounding events coupled with the reactions and support of constituents, minority legislators, and a journalist here shows Boquist's statements are protected political speech.

VIII. The Rule Was Enacted For Public Consumption, Not Public Safety

Defendants assert "there is no evidence that any of the defendants took actions they took for a partisan or political purpose." (ECF 59, p. 22). And even if the rule "was political retaliation, [they assert Plaintiff's] claim would still fail if this Court finds that retaliation was not the 'but for' cause of defendants' action." *Id.* Defendants fail to recognize the undisputed evidence shows political retribution was the only cause for their actions. There was no "objectively legitimate need" for safety measures, particularly the 12-hour notice rule. Defendants did not consider Boquist a "threat" when they implemented the rule, and it was not even a "safety measure" because OSP presence never increased at the Capitol. (Defs' MSJ, p. 23). Defendants boldly concede that "[n]o 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.' [] 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." *Id.* If safety was Defendants' motivation, they would have implemented and enforced safety measures. They did not.

Defendants candidly expressed they did not believe Boquist was a safety threat when they punished him. **"… I do not believe that he poses a current threat …"** – Prozanski. (ECF 6-3, p. 34) (emphasis added). **"I only voted for [the 12-hour notice rule] to show solidarity for the committee itself."** – Manning. (ECF 053-24, pp. 12-13) (emphasis added). Further, Defendants did not believe Boquist would break the law – or even Senate rules. (ECF 053-18-20) (**"There were no 'consequences' contemplated or implemented [if Boquist entered the building without providing notice] because defendants assumed plaintiff would obey the law and the lawful directives of the state Senate.**") (emphasis added). There is simply no "safety" justification for implementing a rule that was never enforced and was not responsive to the merits of any alleged reports of concern. The rule was created for public consumption, not public safety. (ECF 053- 22, p. 6) (**"…[I]t was imperative based on the news coverage that had occurred as to this issue that everyone knew that the Oregon Senate took up the issue …"**) (emphasis added). The rule was simply "political theater by Democrats." (ECF 056, Knopp Decl., ¶ 29). The process "was intended to be public shaming of Senator Boquist…." (ECF 055, Johnson Decl., ¶ 15). Defendants have no defense for violating Boquist's First Amendment rights.

IX. President Courtney Set in Motion a §1983 Violation

Defendants' counsel is perplexed as to "why Senator Courtney is even a defendant in this action." (Defs' MSJ, p. 21). Senate President Courtney is liable because he set in motion, or acquiesced to, a series of acts by other defendants that violated Boquist's free speech rights. *Hansen v. Black,* 885 F.2d 642, 646 (9th Cir.1989) ("A supervisor may be liable if there exists

either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.") (emphasis added). "The requisite causal connection can be established ... by setting in motion a series of acts by others," or by "knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury." *Dubner v. City & Cnty. of San Francisco,* 266 F.3d 959, 968 (9th Cir.2001). "[A]cquiescence or culpable indifference" may sufficiently show that a supervisor "personally played a role in the alleged constitutional violations." *Menotti v. City of Seattle,* 409 F.3d 1113, 1149 (9th Cir.2005).

Senate Rule 8.15 provides that "All committees shall meet at the call of the committee chair," and requires "Approval of the President [Courtney] must be obtained if the location of a meeting will require the expenditure of state monies for travel." (Jones Decl., Ex. 1, 2019 Senate Rules 8.15(1)(5)). Indeed, the meeting required the expenditure of state monies, so Courtney was required to approve the meeting. (Jones Decl., Ex. 4) (Stoel Rives LLP invoiced the Oregon State Legislative Assembly for Brenda Baumgart's time on the July 8, 2019 hearing, $4141.00); (ECF 053-23, p. 22) (Courtney also testified that "per diem travel for senators" is also a "form of state monies."). There was no legal authority for Courtney to approve the committee's meeting to impose a Rule 27 "interim safety" rule against Boquist.[7] As an elected Senate President, Courtney knew or reasonably should have known the Senate Rules. Defendants Prozanski and Manning

[7] As previously examined, HCR 20 was adopted by the Senate on June 29, 2019, but the section authorizing the committee to impose interim safety measures (13) was not effective until November 25, 2019. (ECF 053-7, p. 16, Rule 33). On July 8, 2019 only the Legislative Administrator and the Human Resources Director had authority to impose interim safety measures. (ECF 51, pp. 14-15, thorough examination of this issue in Plaintiff's Motion for Summary Judgment).

violated Boquist's First Amendment rights when they implemented the rule, and Courtney approved their unconstitutional conduct. Likewise, between June 30, 2019, and July 8, 2019, Courtney did not use his authority to terminate the noticed meeting. Thus, Courtney is a proper defendant.

CONCLUSION

It appears there are still no material disputes of facts. Defendants fail to show either of Boquist's statements are unprotected fighting words, that the 12-hour notice rule was a legitimate safety measure, or that they are entitled to any alleged immunity. For those reasons, this Court should deny Defendants' Motion for Summary Judgment in its entirety.

DATED this 27th day of March, 2023.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Vance D. Day, OSB #912487
Of Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on:

Tracy Ickes White
Marc Abrams
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
Attorneys for Defendants

by the following indicated method or methods:

☒ by **electronic means through the Court's Case Management/Electronic Case File system** on the date set forth below;

by **emailing** a copy thereof to each attorney at each attorney's last-known email address on the date set forth below;

by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to plaintiff's last-known address listed above and depositing it in the U.S. mail at Salem, Oregon on the date set forth below.

DATED this 27th day of March, 2023.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Vance D. Day, OSB #912487
Of Attorneys for Plaintiff