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From the Desk of
Senator Brian Boquist

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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 REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

REPLY

This case is radically different from its posture before the Court at the Motion to Dismiss stage. The Ninth Circuit determined Boquist's allegations, if proven, could show a First Amendment retaliation claim. *Boquist v. Courtney*, 32 F4th 764 (9th Cir 2022). Now, evidence garnered from over twenty-thousand pages of discovery and more than a dozen depositions proves Defendants violated Boquist's First Amendment rights. Defendants fail to show they had an "objectively legitimate need to implement security measures and that justified the particular measures they chose." *Boquist v. Courtney*, 32 F4th 764, 784 (9th Cir 2022). Accordingly, this Court should rule, as a matter of law, that Defendants punished Boquist for his protected political speech and that the 12-hour notice rule further infringed on Plaintiff's freedoms of speech and association. The unenforced rule was implemented for public consumption, not public safety.

In the interest of efficiency, Plaintiff incorporates in this Reply the arguments raised in his Motion for Summary Judgment (ECF 51) and those raised in his Response to Defendants' Motion for Summary Judgment. (ECF 65).

I. Boquist's Statements Were Political Hyperbole, Not Fighting Words

The evidence shows Plaintiff's statements were *not* fighting words and the *unenforced* 12-hour notice rule was not a security measure, "justified" or otherwise. Plaintiff erred by predicting in his Motion that Defendants would argue Boquist's statements were unprotected "true threats."[1]

[1] In Response to Plaintiff's "true threats" analysis, Defendants allege *Watts* is distinguished in that he had not been drafted when he publicly declared that if he was drafted, "the first man I want to get in my sights is LBJ." (ECF 64, p. 14) (citing *Watts v. U.S.*, 394 U.S. 705 (1969)) (Defendants highlight that Watts did not "have a gun in his hands" and "was nowhere near President Johnson."). Defendants fail to recognize that "at the time Boquist [publicly] 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 (emphasis added). Further, Defendants fail to show Boquist had a gun in his hand, on his person, or even in his office that day. They simply allege his military career

(ECF 51, pp. 27-28). Instead, Defendants argue Boquist's statements were unprotected "fighting words." (ECF 59, pp. 18-20) (ECF 64, pp. 11-15). "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). As to this unprotected category of speech, the Ninth Circuit unanimously held,

> [a]t the motion to dismiss stage, we cannot say that Boquist's statements created a "likelihood that the person addressed would make an immediate violent response." []. Boquist's statement to Courtney on the floor of the Senate—"if you send the state police to get me, Hell's coming to visit you personally"—was quickly followed by Boquist's public apology. And drawing all reasonable inferences in Boquist's favor, he was not likely to incite an immediate breach of the peace by informing a reporter that he had told the police to "[s]end bachelors and come heavily armed" because he was "not going to be a political prisoner in the state of Oregon."

Boquist v. Courtney, 32 F4th at 781 (emphasis added) (citations omitted). The Court considered that "[a]s the case proceeds through discovery, additional evidence regarding the nature of Boquist's statements may emerge that will have bearing on whether Boquist's statements were a serious expression of an intent to commit unlawful violence against Courtney or the state police, or merely political hyperbole." *Id.* at 782. Now, after extensive discovery, Defendants have no evidence that Boquist's statements were a serious expression of an intent to commit unlawful violence against Courtney or the state police. Contrarily, the evidence shows his statements were merely political hyperbole.

To determine whether speech is protected under the First Amendment, courts "must examine the speech in light of its entire factual context, including the surrounding events and reaction of the listeners." *Id.* at 781 (emphasis added) (citation and internal quotation marks

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gave "him the ability, means and inclination to be more able and likely to act on such statements." (ECF 64, p. 14). Subjective and baseless bias against veterans is not evidence.

omitted). This analysis is fundamental to protecting political speech because "[e]ven a statement that appears to threaten violence may be protected if the context indicates that it only expressed political opposition or was emotionally charged rhetoric."[2] *Id.* (citations omitted). Here, there are no material disputes of fact regarding the surrounding events, reactions of the listeners (*all* listeners, not just those in the majority party), or context. The undisputed facts show:

- The political climate was heated. The majority party determined to pass the cap-and-trade bill (HB 2020) and the minority party threatened a second walk out and deny them a quorum. (ECF 55; ECF 56). Protests *against* HB 2020 were growing outside the Capitol. (ECF 053-27, pp. 7-8).

- Boquist was the minority whip, charged with putting "pressure on several of the Republican Caucus who had not committed to be part of the walk out." (ECF 57, ¶ 10).

- Boquist's first statement was made on the Senate floor, to Courtney, during debate. 32 F.4th at 772. Boquist immediately apologized to Courtney and the apology was accepted. *Id.* **There was no violent response or breach of the peace. Courtney testified, "I would say personally on the record I didn't view him as threatening me."** (ECF 53-23, p. 19) (emphasis added).

- 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 violent response or breach of the peace.** 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 53-30, p. 7) (emphasis added).

- "After [Boquist's] political statements on June 19th … the holdouts joined in the walkout." (ECF 57, ¶ 10).

- Courtney testified, there was no "need to call the Senate Conduct Committee into a meeting within one hour to address the alleged threats by Brian Boquist" (ECF 53-23, p. 18)

- **At the advice of Legislative Counsel, Boquist knew before he made his statements on June 19 that OSP would *not* arrest any member for denying a quorum.**[3] (Boquist Decl., Ex. 1) (ECF 53-27, pp. 17-18). **And they did not.** (ECF 56, ¶ 9).

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[2] The *Dahlia* factors do not apply "to an elected official's claim of First Amendment retaliation by the official's elected peers." 32 F4th at 780.

[3] Before the June 2019 walkout, Boquist submitted a written request to Legislative Counsel, asking if the Sergeant at Arms has authority under Art. IV, sec. 16, to order OSP to arrest legislators for walking out and denying a quorum. (Boquist Decl., ¶ 2, Ex. 1). On May 24, 2019, Legislative Counsel, Dexter Johnson, replied, "ORS 181A.090 requires gubernatorial approval before the state

- "[A]t 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 (emphasis added).

- Citizens reacted by testifying: **"[m]any of us actually cheered when we heard what he had said…"** (Ex. 17, p. 112) (emphasis added); "Boquist spoke what most of us wanted to say. … I appreciate his words, his pure frustration, as well as his standing up for 'the people' of Oregon!" *Id.* at p. 78; "Much of Oregon agrees with him, his words, his actions right now." *Id.* at p. 35.

Defendants fail to show Boquist's statements were unprotected fighting words. As a matter of law, his statements were nothing more than political hyperbole.

II. The Rule Was Implemented For Public Consumption, Not Public Safety

Defendants claim Plaintiff "has not one direct shred of evidence" that the 12-hour notice rule was implemented for political purposes. (ECF 64, p. 15). Plaintiff "may establish motive using direct or circumstantial evidence." *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F3d 858, 870 (9th Cir 2016) (emphasis added). *See Eng v. Cooley*, 552 F.3d 1062, 1074 (9th Cir. 2009) (holding that an employer's retaliation against an employee by "systematic investigations, prosecution, suspensions, and demotion" after the employee's protected conduct demonstrated that the conduct was a "substantial or motivating factor in the adverse employment action") (internal quotation marks omitted).

The evidence shows Defendants never intended to enforce the 12-hour notice rule because it was created solely for political purposes. Defendants were so committed to publicly punishing Boquist that they implemented the rule without lawful authority. (ECF 51, pp. 14-15). Defendants contend this fact is "irrelevant." (ECF 64, pp. 8-9, n.1). As Plaintiff showed in his Motion,

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police may be called upon by any other branch of government. Also, even with the Governor's approval, the state police may be called upon to enforce only criminal laws or regulations of the other branch of government. A determination by the Senate or the House to hold a contemnor in contempt is a civil action, not a criminal action, and does not amount to a regulation as used in ORS 181A.090." *Id.* at Ex. 1, p. 7 (emphasis added).

Defendants did *not* allow the Legislative Administrator or the Human Resources Director [5] to impose safety measures as required by Rule 33 because they wanted Boquist publicly punished (ECF 51, pp. 14-15). Prozanksi testified, **"...it 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..."** (ECF 53-22, Ex. 22, p. 6) (emphasis added). This evidence, in conjunction with the following undisputed facts, shows Defendants acted out of retaliatory animus toward Boquist.[6]

- Sen. Johnson warned Boquist that the majority party was targeting him for instigating the second walkout. (ECF 55, Johnson Decl., ¶ 14).
- Defendants waited almost three weeks to convene a conduct committee meeting when they could have done so with one-hour notice. (ECF 53-25, p. 7).
- "The majority party did not take any action against [Sen. Johnson]" when she "told various audiences that 'if they plan to come on my property to cut down old growth pine, they better not come alone!'" – in reaction to Senate Bill 762. (ECF 55, ¶ 8).
- Baumgart's June 25, 2019 "confidential memo" was publicized soon after a reporter asked if he could read it. (ECF 53-34, pp. 17-18).
- Prozanski amended the public hearing notice to add Boquist's name, while the names of Rule 27 respondents in the *majority* party were concealed. (ECF 53-36, pp. 3, 5, 8-10). Courtney approved this agenda. (ECF 65, pp. 22-24).
- Defendants did not believe Boquist was a threat when they implemented the rule. (ECF 51, p. 34) (ECF 53-24, p. 13).
- Defendants ignored dozens of citizens' testimony in support of Boquist at the July 8, 2019 committee hearing. (ECF 53-17, Ex 17).
- No reports against Boquist were vetted for credibility before the rule was implemented, and no one ever filed a Rule 27 complaint concerning his statements. (ECF 51, pp. 17-18).

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[5] Jessica Knieling, Interim Human Resource Director, testified that the "Senate Conduct Committee. They are the -- they are the body that imposed the safety measure." (Jones Supp. Decl., Ex. 40, tr. p. 94). Defendants fail to create a dispute of fact on this issue.

[6] Defendants' time, place, and manner argument "misses the point." 32 F4th at 785. Even if "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...." *Id.*

- No one who claimed to be fearful testified at the July 8th hearing, and no one on the committee considered any actual reports of fear when implementing the rule. (ECF 57, ¶ 12) (ECF 51, pp. 33-35) (ECF 6-3, p. 52) ("we will not be taking any action at this point regarding any merits of any reports…").

- Prozanski emailed the committee after the hearing, "I believe we have sent a strong message both inside and outside of the Capitol …." (Jones Supp. Decl., Ex. 41) (sending a public "message" in response to Boquist's public statements was Defendants' motivation).

- Defendants did not task anyone with the increasing OSP presence at the Capitol when Boquist provided 12-hour notice – and no one did. (ECF 51, pp. 21-22) (ECF 64, p. 16).

- After Boquist stopped providing daily notice, someone related to the conduct committee determined **the "media's not picking it up, [so] let it lie."** (ECF 53-34, pp. 10-11, 15) (emphasis added) (Defendants redacted the names).

- Defendants left the "temporary" 12-hour notice rule active for over three years, until counsel in this case advised them to lift it. (ECF 53-21).

If Defendants' motive for implementing the 12-hour notice rule was "security," they would have acted sooner, acted lawfully (under Rule 33), involved law enforcement, determined Plaintiff was a security risk, and increased OSP presence when Boquist provided notice. Defendants took none of these actions. The undisputed facts show Defendants were motivated by retaliatory animus and media attention, not safety.

III. Plaintiff Suffered a Deprivation of His Speech and Association Rights

Defendants argue "Plaintiff suffered no deprivation of his rights" because the rule "was barely and only briefly enforced." (ECF 64, p. 16). To clarify, the rule was never enforced. (ECF 51, pp. 21-22). Boquist chose to obey for months until recognizing it was a farse. (ECF 053-34, p. 9). Defendants allege, without legal authority, there is no constitutional violation unless Plaintiff is entirely prevented from doing his job. (ECF 64, pp. 16-17). [7]

[7] LR 56(a) requires that a "party's factual positions must be supported by citations, by page and line as appropriate, to the particular parts of materials in the record." The court should ignore the numerous places where defendants' arguments assert facts without citations, or even more egregious, cite legislation which was not even in effect at the time of these events.

The law is clear. "[T]he 12-hour notice rule is a materially adverse action." 32 F4th at 783.

As best explained by the Ninth Circuit,

> Although criticism alone is unlikely to be material, the 12-hour notice rule issued by Boquist's political opponents was not a mere exchange in "the give-and-take of the political process," *Blair*, 608 F.3d at 543, or a "rather minor indignity," *id.* at 544. And the adverse action before us—the 12-hour notice rule—is not itself merely "a form of speech" from Boquist's opponents, or an expression of their political views. *Wilson*, 142 S. Ct. 1253, 2022 WL 867307, at *5. **To the contrary, the 12-hour notice rule is a form of punishment which deprives Boquist of "authority he enjoyed by virtue of his popular election," *Blair*, 608 F.3d at 545 n.4, and "prevent[s] [Boquist] from doing his job,"** *Wilson*, 142 S. Ct. at 1261–62. The advance notice requirement "eliminates the possibility of spontaneous speech," including a senator's ability to immediately respond to and address political issues arising on the floor of the Oregon state senate. *Cuviello v. City of Vallejo*, 944 F.3d 816, 832 (9th Cir. 2019). Indeed, the 12-hour notice rule prevents Boquist from entering the Capitol for any purpose unless he gives twelve hours advance notice. Thus, the 12-hour notice rule "disproportionately burden[s] political speech that must respond to changing current events." *Id.*; *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics ... [and] it is often necessary to have one's voice heard promptly, if it is to be considered at all."); *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) **("[A]ll advance notice requirements tend to inhibit speech. The simple knowledge that one must inform the government of his desire to speak ... discourages citizens from speaking freely.").The 12-hour notice rule therefore prevents Boquist from exercising "authority he enjoyed by virtue of his popular election,"** *Blair*, 608 F.3d at 545 n.4, namely, having timely access to the physical seat of government where "governmental debates" take place, *Bond*, 385 U.S. at 136, 87 S.Ct. 339; *see also Republican Party of Minnesota v. White*, 536 U.S. 765, 788, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (explaining that states must accord participants in the democratic process "the First Amendment rights that attach to their roles"). **The rule likewise 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."** *Wilson*, 142 S. Ct. at 1261–62. These significant burdens would "chill a person of ordinary firmness from continuing to engage in the protected activity." *Blair*, 608 F.3d at 543.

Id. at 783–84 (emphasis added). For months, Defendants' rule unconstitutionally prevented Boquist from having timely access to the physical seat of government and from meeting with

anyone at his office on short notice.[8] For years, Boquist endured the public stigma of being under the rule. Defendants' failure to recognize the constitutional rights of elected officials reinforces why injunctive and declaratory relief are necessary to prevent future constitutional harms to Plaintiff and the entire legislative assembly.

IV. This Action is *Not* Moot And Defendants Are *Not* Entitled to Any Immunity

Plaintiff incorporates the arguments raised in his Response to Defendants' Motion for Summary Judgment. (ECF 65, pp. 6-13). This case is not moot, and Defendants are not entitled to legislative, judicial, or qualified immunity.

CONCLUSION

This Court should declare, as a matter of law, that all Defendants punished Boquist for his protected political speech and that the 12-hour notice rule further infringed on Plaintiff's First Amendment freedoms of speech and association. Defendants Prozanski and Manning must be judicially precluded from taking similar action against Plaintiff in the future because they fail to recognize such conduct is an affront to the U.S. Constitution, and their conduct is capable of repetition.

DATED this 10th day of April, 2023.

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

[8] Defendants allege Boquist "testified that he was never prevented from entering the Capitol" and "cannot recall if he was ever prevented from meeting with a constituent." (ECF 64, p. 20). This misses the point. Boquist was not "prevented" from meeting with others at all places, at all times, but the rule interfered with his ability to meet in the Capitol on short notice – preventing him from doing his job.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S 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 10th day of April, 2023.

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