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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 MOTION FOR SUMMARY JUDGMENT

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LR 7-1 CERTIFICATION

Counsel for the parties have conferred on the issues herein but have been unable to resolve them; thus, this Court's assistance is required.

MOTION

Plaintiff Brian J. Boquist moves the Court under Fed. R. Civ. P. 56 for Summary Judgment against Defendants on all of his claims on the grounds that Plaintiff is entitled to judgment as a matter of law.

In support of this Motion, Plaintiff relies upon:

(a) The pleadings already on file with the Court;

(b) The Declaration of Elizabeth A. Jones (Jones Decl.); and the exhibits attached hereto;

(c) The Declaration of Betsy Johnson (Johnson Decl.);

(d) The Declaration of Peggy Boquist (P. Boquist Decl.);

(e) The Declaration of Alan Olsen (Olsen Decl.);

(f) The Declaration of Tim Knopp (Knopp Decl.); and

(g) The Memorandum of Law below.

MEMORANDUM OF LAW

INTRODUCTION

Legislative Branch Personnel Rule 27 ("Rule 27") was intended to protect employees from workplace harassment, discrimination, and retaliation, but in practice has become a political weapon wielded among elected officials. In this case, Rule 27 was misused as a vehicle to punish Senator Boquist for his First Amendment protected political speech – and the punishment itself infringed on his freedom of association.

Plaintiff's Motion for Summary Judgment will show:

- The 12-hour notice rule ("the rule") was implemented for public consumption, not public safety.
- Defendants had no legal authority to implement "interim safety measures" under Rule 27 on July 8, 2019.
- Defendants did not believe Senator Boquist's speech conveyed a true threat or that he would disobey any laws when they implemented the rule.
- No alleged Rule 27 reports against Boquist were vetted for credibility before the rule was implemented, and no one ever filed a Rule 27 complaint concerning his statements.
- Defendants did not task anyone with the increasing Oregon State Police ("OSP") presence at the Capitol when Boquist provided 12-hour notice – and no one did.
- The 12-hour notice rule remained in place for over three years and was ultimately lifted on November 28, 2022, at the advice of Defendants' counsel, after the discovery process confirmed the rule was not legally justified. The conduct committee currently possesses the legal authority to reinstate the rule when this litigation concludes.

RELEVANT FACTS

The 2019 legislative session was more contentious than usual. (Knopp Decl., ¶ 8; Johnson Decl., ¶ 4). In May, Senate Republicans (minority party) walked out to deny the Senate Democrats (majority party) a quorum to conduct Senate business.[1] Senator Peter "Courtney and other majority senators stated that the senators who walked out to prevent the Senate from having a quorum could be fined, arrested, physically detained, and imprisoned." *Boquist v. Courtney*, 32 F.4th 764, 772 (9th Cir 2022). No action was taken against the minority senators at that time. Throughout the next month, media exploded with reports about the pending cap and trade bill (HB 2020), a potential second walkout by minority legislators, and the question of whether the governor would send state troopers to arrest and return legislators if they walked out. Boquist and several other senators

[1] In 2019, Senator Boquist was a member of the Republican party. He has since left the Republican party and joined the Independent Party of Oregon. (Jones Decl., Ex. 27, p. 6).

recognized the governor's threats to arrest and fine absent legislators were nothing more than political theater. (Knopp Decl., ¶ 9; Olsen Decl., ¶¶ 7-9; Johnson Decl., ¶¶ 4, 7) (Jones Decl., Ex. 27, p. 18) (Boquist testified, "I didn't believe the Oregon State Police were going to take me or take another member."). On June 19, 2019, Boquist made two statements in response to the governor's threats and those statements are the source of this litigation.

Statement 1

During debate on the Senate floor, Boquist stated to Senate President Courtney,

> "I understand the threats from members of the majority that you want to arrest me, you want to put me in jail with the state police, and all that sort of stuff.... Mr. President, and if you send the state police to get me, Hell's coming to visit you personally." After Courtney reminded Boquist of "decorum," Boquist stated "I apologize. To you personally."

Boquist v. Courtney, 32 F.4th 764, 772 (9th Cir 2022). After Boquist apologized to the Senate President, the floor session continued without objection or incident and no one on the Senate floor or in the gallery summoned the police or left the chambers because of Boquist's statement. (Olsen Decl., ¶¶ 4-5; Knopp Decl., ¶12). Senator Courtney later testified that he did not view Boquist as a security threat after that statement was made. (Jones Decl., Ex 23, p. 16). No parliamentary objection was made by any senator, and the state troopers assigned to the chambers did not respond in any manner, as it was "a non-event." (Olsen Decl., ¶¶ 4-5) ("Right after their interaction, I was recognized by President Courtney and I spoke to another bill."). Senator Alan Olsen served on the Veteran Committee with Boquist and Courtney and "knew that they were friends – friends who saw things differently and occasionally sparred." *Id*. at ¶ 6. Senator Lee Beyer was on the floor and heard the statement and Boquist's apology, but no one expressed concerns to him about the statement. (Jones Decl., Ex. 38, pp. 5-7).

Statement 2

Later that day, during a media interview inside the Capitol, the following exchange occurred between KGW reporter Pat Dooris and Boquist:

> PAT DOORIS: As the vote for the cap and trade bill approaches in the state senate, feelings are running high. Governor Kate Brown today surprised both parties here by threatening a special session if Republicans try to leave the building to stop the vote. She also suggested the state police might be sent to round up republicans. That did not sit well with Republican Senator Brian Boquist, a former special forces lieutenant colonel in the Army.
>
> SENATOR BOQUIST: Okay, So sending the threat out, like, "Oh we're going to have a special session, or I'm going to send the state police to arrest you." Well, I'm quotable, so here's the quote. This is what I told the superintendent [months ago]. "Send bachelors and come heavily armed. I'm not going to be a political prisoner in the state of Oregon. It's just that simple."

(*Id*. at Ex. 23, pp. 15-16) (Select fragments of this interview aired on a variety of news channels.). Boquist explained on camera "that his comments on the floor were in response to the Governor's threats to use the Oregon State Police to arrest senators who walked out." 32 F.4th at 772. Despite its widespread media distribution, not a single person or Senate member summoned the police because of this statement, nor did any state troopers within the Capitol respond to this statement. "[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.'" *Id*. at 782. Critically, as the Ninth Circuit explained,

> We are not faced with (and do not address) a situation where Boquist's second statement was 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 785, n.7. The statement was nothing more than political rhetoric, in direct response to the governor's rhetoric. (Johnson Decl., ¶ 7). Senator Olsen's "initial reaction to the KGW quote was to laugh and think 'this is going to ruffle some political feathers.'" (Olsen Decl., ¶ 8). 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."). Olsen explained,

> "Senator Boquist was the Minority Whip in the Republican Caucus. It was [his] job to keep all the republican senators in line and make sure we had all of us in agreement concerning taking the difficult step of a second walk out. It was in this context that [he] made his June 19th statements, which put pressure on several of the Republican Caucus who had not committed to be part of the walk out. After [Boquist's] political statements on June 19th … the holdouts joined in the walkout."

(Olsen Decl., ¶ 10). "[I]t was critical that all 12 of us [minority members] stay unified. It was Senator Boquist's job to make sure that happened." (Knopp Decl., ¶ 11).

If Defendants were concerned that Boquist's statements were a "true threats," they had the authority to quickly convene a conduct committee hearing with one hour notice, but no one did. (Jones Decl., Ex. 25, p. 7) (Senator Burdick explained that she "personally had no fear" but the conduct committee would have been the proper committee to review Boquist's statements if anyone was concerned); (*Id*. at Ex. 22, p. 7) (Prozanski explained that a hearing could have convened with an hour's notice, but no one called for that); (*Id*. at Ex. 23, pp. 17-18) (Courtney testified that Boquist's statements did not necessitate calling a conduct committee hearing and he personally "did not view Brian Boquist as a security threat."). No one convened an expedited conduct committee hearing, and no one initiated a law enforcement investigation. (Knopp Decl., ¶ 12) (Jones Decl., Ex. 10, p. 9).

The following day, minority senators, supported by their constituents, walked out and denied the majority a quorum to pass their politically devisive cap and trade bill. As Boquist predicted, no senators were arrested and the absent members returned to the Capitol without incident on June 29, 2019, after negotiations between party leadership. (Knopp Decl., ¶ 9) (The

governor's threat to arrest "was [a] politically motivated threat that ultimately wasn't followed through."). When Senator Olsen returned from the walkout, he heard "from several Democrat senators who were very upset with Senator Boquist in what appeared to be a reaction to all the Republicans leaving and denying the majority a quorum." (Olsen Decl., ¶ 16). Olsen "had seen plenty of emails and evidence that the Democratic base was angry at the majority for not passing their legislative agenda and they were calling for retribution. It was obvious that the Democrats were going to punish Senator Boquist for that purpose." *Id*. at ¶ 19. Senator Knopp also "heard rumblings from Democratic Caucus members that Senator Boquist should be punished for his statements on June 19." (Knopp Decl., ¶ 15). Knopp "came to the conclusion that [his] democratic colleagues were using the Senate Special Committee on Conduct as the vehicle for punishing Senator Boquist." *Id*. Senator Laurie Monnes-Anderson testified that Senator Shemia Fagan wanted Boquist to suffer "really harsh punishment" for his statements. (Jones Decl., Ex. 31, pp. 5-6).

Senator Betsy Johnson had a unique view of the situation as a member of the Democratic Caucus who had also worked closely with Boquist over the years. (Johnson Decl., ¶¶ 2, 4, 8). She understood that he sometimes said things that were "over the top" to express his political views. *Id*. at ¶ 8. Some members of the Democratic caucus were very angry about being denied quorum. (*Id*. at ¶¶ 9, 11-14). "The 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.'" *Id*. at ¶ 9. Senator Fagan specifically wanted Boquist punished for his part in the walkout. *Id*. at ¶ 13. Johnson grew increasingly concerned that Boquist was the focus of their anger. *Id*. at ¶ 14.

Based upon discussions in the Democratic Caucus, several senators warned Boquist that he would be punished for the walkout. (P. Boquist Decl., ¶¶ 3-5, 7). ("each of them took time to warn us that the Democrat Caucus was planning to punish Brian"). Johnson specifically warned Boquist that the "long knives are out" for you. (Johnson Decl., ¶ 14; P. Boquist Decl., ¶ 3). Senator Chuck Riley came to Boquist's office to express his concerns, emphasizing "that he was opposed to what his caucus was doing" and that he was on Boquist's side. (P. Boquist Decl., ¶ 5). Later that day, on the Senate floor, Johnson again warned Boquist that her "caucus was super charged emotionally" and that they "are gunning for you." (Johnson Decl., ¶ 14; P. Boquist Decl., ¶ 5). Just before the 2019 Legislative Session closed on June 30th, Senator Floyd Prozanski notified Boquist that he was the subject of the Rule 27 hearing before the Senate Special Committee on Conduct on July 8,2019. (Jones Decl., Ex. 27, pp. 19-20).

Brief History of Rule 27 and Relevant Amendments

In 2017, accusations of sexual harassment against a senator by several women prompted investigations into how legislative leaders had failed for years to address harassment within the Capitol. *Id*. at Ex. 1. In March 2019, the investigations resulted in the Oregon Legislature paying over $1 million in damages as part of a settlement agreement to eight women who suffered harassment in the Capitol. *Id*. at Ex. 2 (settlement between the Legislature and the Bureau of Labor and Industries ("BOLI")). The settlement agreement required legislative leaders to work with the Oregon Law Commission to implement new procedures for handling harassment complaints and to expand avenues for making workplace complaints. *Id*. As part of this new strategy, lawmakers would hire outside investigators to handle and investigate complaints until a new equity office could be created to do the work. *Id*. The Legislative Equity Office ("LEO") was designed to replace human resources and/or legislative counsel's office as a place for harassment victims to voice their

concerns. *Id*. The agreement resulted in updates to Legislative Branch Personnel Rule 27 ("Rule 27") – the Oregon Legislative Branch's workplace harassment policy. *Id*. at Ex. 6. Several variations of Rule 27 apply in this case:

- Rule 27 amended by HCR 11 on January 14, 2019 (*Id*. at Ex. 6);
- Rule 27 amended by HCR 20 on June 29, 2019 (*Id*. at Ex. 7);
- Rule 27 amended by HCR 221 on August 10, 2019 (*Id*. at Ex. 8); and
- Rule 27 amended by HCR 28 on June 24, 2021 (*Id*. at Ex. 9).

Rule 27 applies to employees of the Legislative Branch, members of the Legislative Assembly, and any other person present in the Capitol. Under Rule 27 (HCR 11), "'workplace harassment means unwelcome conduct in the form of treatment or behavior that, to a reasonable person, creates an intimidating, hostile or offensive work environment." *Id*. at Ex. 6, p. 2. When Boquist was punished on July 8, 2019, "Rule 27's definition of workplace harassment [did] not contain a free speech exception." *Id*. at Ex. 10 (emphasis added) (Oct 15, 2019 Report).

June 25, 2019 - "Confidential" Memorandum with Interim Finding & Recommendations

On March 25, 2019, the Stoel Rives law firm was contracted by the State of Oregon (Legislative Administration Committee) to provide, in part, initial assessment and investigative services under Rule 27. (Jones Decl., Ex. 37, pp. 11-12). Attorney Brenda Baumgart, along with Melissa Healey, were the two members of Stoel Rives, LLP., who provided Rule 27 investigative services to the legislative branch. (*Id*. at pp. 9-10, 17). During the Republican senators' walkout, Brenda Baumgart sent a "Confidential Memorandum" to HR Director, Jessica Knieling, and Legislative Counsel, Dexter Johnson, containing her "Interim Finding & Recommendations" on Boquist's statements.[2] (*Id*. at Ex. 34, pp. 9-10). The report asserted that Boquist's statements, on

[2] Defendant Courtney was questioned as to why or how the confidential memorandum was publicly available on OLIS (Oregon Legislative Information System) and he replied, "I don't have an answer for that." (*Id*. at Ex. 23, p. 27). The evidence shows Baumgart requested Knieling to

their face, "constitute credible threats of violence directed at the Senate President and the Oregon State Police," in violation of Rule 27. *Id*. at p. 9. (emphasis added) (But neither Courtney nor any OSP employee reported concerns about Boquist's statements.). The report asserted that *unidentified* "people are fearful and scared to come to work" and "[t]hese reports are credible." *Id*. (emphasis added) (evidence below shows reports were *not* vetted for credibility). Baumgart recommended Boquist be prohibited from entering the Capitol "during the pendency of the remainder of the investigation." *Id*. at p. 10 (evidence below shows there was no investigation and Boquist's punishment remained in effect for over three years). Knieling, realizing she had no authority as HR director to prohibit an elected official from entering the Capitol, forwarded the memo to Senate leaders the same day, explaining that the "investigator, Legislative Counsel and Legislative Administration have no authority to implement the [] investigator's recommendations" … because under the current Rule 27, "only the full senate can undertake any such action" against Boquist. *Id*. at Ex 12, p. 1 (emphasis added). *See* Jones Decl., Ex. 6, p. 6 (Rule 27 as operative on June 25, 2019, provided, "Any sanction considered by a chamber shall be adopted by the chamber only upon receiving at least a two-thirds majority vote in favor of adoption of the sanction.") (emphasis added). Four days later, Rule 27 was amended and the provision requiring a "two-thirds majority vote [of the full senate] in favor of adoption of the sanction" was deleted. (Jones Decl., Ex. 7, HCR 20, adopted June 29, 2019). The amended version deleted all references to "sanctions" and added a new section authorizing the "committee on conduct … to impose an interim safety measure on the respondent" of a Rule 27 investigation. (*Id*. at section 13). However, as explained more thoroughly below, section 13 did not go into effect until November 25, 2019. *Id*. at Rule 33.

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remove "attorney client privilege" from the "confidential memorandum" so it could be made public. (*Id*. at Ex. 34, p. 11). On June 29, a reporter emailed Baumgart and asked if he could get a copy of the report. The next day, Knieling emailed Baumgart that the "memo is up on [OLIS]" for all to see. *Id*. at p. 12.

Until then, "the Legislative Administrator and the Human Resources Director [Knieling] may impose interim safety measures as described in Legislative Branch Personnel Rule 27 (13)," *not the conduct committee*. *Id*. (emphasis added). Accordingly, Knieling had the authority to prohibit Boquist, as an employee, from entering the Capitol with an *interim safety measure* but Defendants' conduct committee had no such authority.

Defendants' Committee Had No Authority To Implement The 12-Hour Notice Rule

Defendants' committee had no authority on July 8, 2019, to implement "interim safety measures" because the section of HCR 20 (13) that provided this authority was not effective until November 25, 2019.[3] HCR 20 amended Rule 27 on June 29, 2019, but most of it was not operative when adopted. *Id*. at Ex 7, p. 16 (Rule 33 provides the operative dates). Significantly, sections (1) to (16) were not operative until an acting or permanent Legislative Equity Officer ("LEO") was appointed. *Id*. On November 21, 2019, Jackie Sandmeyer was appointed by the committee as the first "acting" LEO. *Id*. at Ex. 14. On November 25, 2019, "the Joint Committee on Conduct notified the presiding officers that Jackie Sandmeyer was appointed to serve as the acting Legislative Equity Officer," so "[a]ll sections of Rule 27 (HCR 20 (2019)) became operational November 25." *Id*. at Ex 16; Ex 35 ("[Legislative Counsel] Dexter reminded me that the date of this memo is what triggers the operative date for section 1-16 of HCR 20."). *See also* Jones Decl., Ex. 15 @ 02:50 (08/08/2019 hearing - "we have a new Rule 27 but most of it has not come into effect because we do not yet have an equity officer…."); (Jones Decl., Ex. 10, p. 2, fn 2) ("Rule

[3] Rule 33 provided that until section (13) was in effect, "the Legislative Administrator and the Human Resources Director may impose interim safety measures as described in Legislative Branch Personnel Rule 27 (13)," *not the conduct committee*. *Id*. (emphasis added). Accordingly, the committee had no legal authority to implement any interim safety measures when Boquist was punished.

27 was recently amended, but its amendments, as are relevant to this complaint, are not yet effective.").[4]

If Defendants allowed the "Legislative Administrator and the Human Resources Director [to impose] interim safety measures [against Boquist]," the process would not have been public and, as explained by Prozanski, "…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 … for the decision as to whether some type of interim steps needed to be taken to ensure that there would be a safe workplace for all…". *Id*. at Ex. 22, p. 6 (emphasis added).

Moreover, on July 8, 2019, the provision in Rule 27 recognizing freedom of speech was not yet implemented. (Jones Decl., Ex 7, p. 1 @ (1)(c)). On October 15, 2019, investigator Ryan noted in a report about complaints against another senator that "Rule 27's definition of workplace harassment does not contain a free speech exception. For that reason, I did not consider whether [the senator's] actions were protected free speech." (*Id*. at Ex. 10, p. 3, fn 3) (Further, "I am not suggesting that Rule 27 should have a free speech exception."). Indeed, it did not, and Boquist suffered the consequences.

July 8, 2019 Committee Hearing

On June 30th, Senator Prozanski informed Boquist that the Special Committee on Conduct would not meet until "July 8th to consider a workplace harassment complaint against [him] and 'to potentially censure and bar' [him] from the State Capitol."[5] 32 F.4th at 773. The committee consisted of two minority members (Knopp and Olsen), two majority members (Chair Prozanski

[4] The prior version of Rule 27 (HCR 11) did not provide the committee authority to implement interim safety measures either. (Jones Decl., Ex. 6).
[5] Prozanski clarified during the hearing that there were *not* actually any Rule 27 "complaints" against Boquist. (ECF 6-2, p. 8).

and Senator James Manning), and majority member President Courtney as an *ex-officio* member who also had the power to vote in the event of a tie.[6] Again, the committee had no authority to implement security measures against Boquist and, as recognized by Chair Prozanski during the hearing, "this is probably something that you've [colleagues] never experienced in the sense of being a legislative hearing, let alone this type of hearing." (ECF 6-3, p. 17).

Public Notice of the July 8th Hearing Shows Political Motivation

Prior to November 18th, 2020, when a Rule 27 complaint was before the conduct committee, the public agenda would exclude the name of the respondent to the complaint. (Jones Decl., Ex. 36, pp. 3, 5, 8-10) ("To address complaint filed under Legislative Branch Personnel Rule 27 [against unidentified respondent]"). But Prozanski wanted Boquist's punishment to be public, so, at his request, the draft agenda for the July 8th hearing was changed to add his name as follows – "Consideration of Interim Finding and Recommendation from Outside Counsel Related to Sen. Boquist." (*Id*., compare p. 1 to p. 2) (emphasis added); *Id*. at Ex. 26, p. 3 ("Senator Prozanski wants to reference Boquist's name on the agenda.") (emphasis added). Further, the November 21, 2019 committee agenda lists Rule 27 complaints against numbers 30, 31, 32, and 39, but identifies Boquist by name, as Prozanski requested, and Courtney approved.[7] *Id*. at p. 8. After Republicans pushed for equity on this issue, the majority *retroactively revised* the 2019-2020 agendas to reveal previously concealed names, showing numbers 30, 31, 32, and 39 were all members of the Democratic party. *Id*. at p. 9. (Courtney [39], Manning [30], Burdick [31], and

[6] In January 2019, Senate Rule 8.05 provided - "The President shall be an *ex officio* member of each committee and have the power to vote." (Jones Decl., Ex. 13, p. 8). On February 3, 2020, a proposed amendment to 8.05 provided - "This provision does not apply to the Senate Committee on Conduct." (*Id*. at 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. (*Id*. at Ex. 23, pp. 13-14).

[7] Under Senate Rule 8.15 (3), (4), and (5), Courtney must have approved the hearing agenda with Boquist's name on it. (Jones Decl., Ex. 39).

Gelser [32]). Further, Representative Tina Kotek and Courtney's names were later revealed on other agendas. (*Id*. at pp. 4, 6). The November 21, 2019 agenda leaves no doubt that this hearing was intended to publicly identify only Boquist. *Id*. at Ex. 27, p. 8.

No First Amendment Rights Under Rule 27

Brenda Baumgart testified several times during the July 8 hearing that Boquist's First Amendment rights were irrelevant to whether he could be expelled from the Capitol for his speech under Rule 27. (ECF 6-2, p. 14) ("…with respect to the conduct of a sitting senator who does have certain First Amendment rights. I'm not here to speak about those. That's not my role."); *Id*. at p. 43 ("I'm not here in any capacity to render an opinion one way or the other on that."). Chair Prozanski, also an attorney, questioned Baumgart on whether Boquist, as an elected official, had constitutionally protected speech here. *Id*. at p. 45. Baumgart explained that Boquist should be held to a *higher* standard as an elected official, like the CEO of an organization would be in an employment action.

> … if we're looking at this and comparing a senator to the CEO of an organization, a private organization, if these comments were made by a CEO, undeniably that CEO would be put out on leave pending investigation, and if these proved true, would be fired.
>
> And I view -- I guess if we're looking at the pecking order here at the capital – that certainly a senator -- a sitting senator – an elected public official in Oregon -- there are there's a heightened level of obligation.

Id. at p. 49. Boquist was held to a legally fictitious "heightened level of obligation" for his statements.

No Complaints Vetted for Credibility

As explained above, Rule 27 investigator Baumgart's June 25, 2019 memo stated that unidentified legislative members and branch employees reported concerns about Boquist's statements and they were fearful and scared to come to work. (Jones Decl., Ex. 12; Ex. 34, pp. 17-

18). Baumgart unilaterally determined "[t]hese reports are credible." *Id*. When questioned about these reports during the committee hearing, Baumgart testified that she had personally heard Boquist's statements on the news, so they were credible threats. (ECF 6-2, pp. 21-22). However, "to the extent that they are —you know, that these are somehow not credible reports, that will be vetted." *Id*. at pp. 26-27 ("there's a process by which it needs to be vetted"). But the reports were *never* vetted for credibility. Investigator Baumgart testified "the investigation did not move forward [or begin] because a complainant would not sign … their name publicly." (*Id*. at Ex. 33, p. 8). HR Director Knieling testified, "I don't know that an investigation was begun." (Jones Decl., Ex. 32, p. 6). Ultimately, the substance or credibility of any complaint was irrelevant because, as Prozanski explained in the hearing, the committee was not tasked "with taking any action at this point regarding any merits of any reports …." (ECF 6-3, p. 52) (emphasis added).

Knopp "was quite incredulous about [Baumgart's] recommendation, particularly that it was based solely on her opinion." (Knopp Decl., ¶ 21).

> "No one on the committee presented any firsthand accounts from anyone who had reported concerns about Senator Boquist's statement. I still don't know who made the anonymous reports, what their motivations were, and whether they had a political ax to grind against Senate Republicans or Senator Boquist."

Id. Olsen explained that as he listened to Baumgart's testimony,

> "[he] became quite concerned that this hearing was a 'conclusion searching for evidence.' None of the four senators on the committee had any actual reports from anyone who felt 'threatened' or perceived they were placed at risk of violence by Senator Boquist's comments…."

(Olsen Decl., ¶ 12). Olsen concluded they were "being asked to take a drastic step and bar a sitting Senator from the Oregon State Capitol because he chose to express a political viewpoint … contrary to the governor's original threat to arrest any senator who would choose to constitutionally deny a quorum in the Senate." *Id*.

On July 8, 2019, Defendants Did Not Determine Boquist Posed a Threat

The committee members received copies of three potential motions recommended by "the staff," and one alternative motion drafted by Chair Prozanski. (ECF 6-3, p. 4). Senator Manning offered the first motion – moving that Boquist's statements are credible threats and requesting him to voluntarily stay out of the Capitol. (*Id*. at pp. 19, 23-25). The motion failed 1-3, with only Manning voting "yes." *Id*. Later, Manning concluded that Boquist did *not* pose a threat to anyone in the Capitol because the session was over. *Id*. at p. 30. Olsen offered the second motion – moving that they advise Boquist of Rule 27 requirements but do not impose any type of discipline. (*Id*. at pp. 26, 28-29). This motion failed 2-2, with minority members in favor and majority members against. Olsen did not believe any punishment was appropriate before an investigation. *Id*.

Chair Prozanski offered a third motion – to "accept the findings of the outside counsel that Senator Boquist's statements on June 19th constituted credible threats of violence directed at the Senate President and the Oregon State Police" but to "reject the recommendations of outside counsel **based on new information and testimony clarifying that Senator Boquist does not currently pose a threat to staff, public, or members of the Capitol**."[8] *Id*. at p. 29 (emphasis added). Prozanski further explained,

> **"it [] is my belief that because of the amount of time that has passed, the lack of other issues coming forward, knowing that Senator Boquist has been in the building multiple times since this incident back on June 19th, that I do not believe that he poses a current threat as he did back on the 19th of June based when the statements were made."**

Id. at p. 34. Knopp "agree[d] that Boquist does not currently pose a threat to staff or public or members of the Capitol." *Id*. at p. 30. Manning considered "that we're trying to rush to a conclusion

[8] Baumgart also acknowledged that weeks had passed since Boquist made the statements and they "have not been acted upon." *Id*. at pp. 46-47.

when the evidence or interviews, stuff, are yet to be explored…." *Id*. at p. 31. Knopp and Olsen were also concerned that the committee was basing their decision on "an incomplete report," … "without interviews, without reports in hand, without documents," and with "a slight amount of bias." (*Id*. at pp. 32-33) ("[Y]es, the statements were probably not appropriate, but other people may have made statements that are similar, if not more egregious than these.").[9] Prozanski's motion failed 2-2, with the majority members voting "yes," and minority members voting "no."

Olsen then recommended the committee increase police presence in the Capitol but not place any restrictions on Boquist himself. *Id*. at p. 35. With that recommendation, "Chair Prozanski suggested a modified version of the staff's suggested motion," which provided in relevant part, "require Senator Boquist to give at least 12 hours' advanced notice in writing" … "and limit his access to the following -- *fill in the blank there*." *Id*. at p. 36 (emphasis added); (Olsen Decl., ¶ 20). Olsen disagreed with limiting Boquist's access to the Capitol. *Id*. at pp. 37-38. The committee discussed that Boquist must notify the Secretary of the Senate before he enters the Capitol because "she really is kind of our air traffic controller for the business of the Senate…." *Id*. at pp. 38-42.

Prozanski presented the final motion as follows:

> Require Senator Boquist to give at least 12 hours' advanced notice in writing to the Secretary of the Senate if he intends to be at the Capitol. That while he is at the Capitol, there would be an increased presence of OSP troopers or officers while Senator Boquist is in the Capitol. … That's the motion that's before us.

Id. at pp. 49-50. Prozanski stated that "the increase [of OSP] has got to be across the building." *Id*. at p. 50. With that, the committee unanimously voted to implement the 12-hour notice rule.

[9] Indeed, Johnson explained that "[t]he majority party did not take any action against [her]" 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. (Johnson Decl., ¶ 8).

Manning later testified that he only voted for the 12-hour notice rule "to show solidarity for the committee itself." (Jones Decl., Ex. 24, p. 13). Olsen explained that he "did not think the 12-hour notice was necessary at all, but needed to find a compromise, or risk seeing a hard punishment be passed by having President Courtney break the tie in his *ex officio* status." (Olsen Decl., ¶ 20). Knopp also "didn't think any action was warranted" but he compromised to prevent Senator Courtney from voting as an *ex officio* member on a harsher punishment. (Knopp Decl., ¶¶ 23-24). No Defendant believed Boquist would violate laws, or even Senate rules, but they punished him regardless. (Jones Decl., Exs. 18-20, Responses to Rog No. 6) (Defendants admitted in their responses to Plaintiff's Interrogatories that "[t]here 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)). Not only were there no consequences contemplated, OSP presence never increased at the Capitol when Boquist provided notice.

OSP Presence at The Capitol Never Increased When Boquist Provided Notice

Defendants did not *ever* increase OSP presence at the Capitol when Boquist provided 12-hour notice. Defendants contend the Secretary of the Senate, Lori Brocker, was delegated to enforce the rule, but the evidence shows otherwise. (Jones Decl., Exs. 18-20) (Defs' Responses to Pltf's Interrogatory No. 2). Lori Brocker testified that she was not given any instructions "about increasing Oregon State Police presence when Senator Boquist had given his 12-hour notice." (Jones Decl., Ex. 29, p. 6). She assumed someone else would handle that. *Id*. Moreover, OSP Superintendent, Travis Hampton, has no knowledge of OSP increasing its presence when Boquist provided notice. *Id*. at Ex. 30, p. 10). 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….” *Id*. at p. 7. OSP did not even 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. I [Superintendent Hampton] am not.”). Moreover, Knopp, minority leader for the Republican Caucus, has “never seen or been informed that [OSP] actually increased its presence at any time while Senator Boquist was at the Capitol since the hearing on July 8, 2019.” (Knopp Decl., ¶¶ 26-28) (“the Democrat majority never carried through on any so-called security measures, to my knowledge.”).

Months later, out of frustration, Boquist sent an email declaring that he “will be in every or any day until my term [of] office expires in January 2021 in performance of my constitutional duties.” (Jones Decl., Ex. 34, p. 9). Baumgart did not believe this “notice” complied with the spirit of the rule but no action was taken because someone related to the conduct committee determined the “media’s not picking it up, [so] let it lie.” (*Id*. at pp. 10-11, 15) (emphasis added). Defendants did not task anyone with increasing OSP presence because the “interim safety measure” was unlawfully created for publicity and political points, nothing more.

Public Testimony at The Hearing Passionately Favored Boquist

The Boquist hearing attracted large amounts of public testimony. There were approximately 100 testimonies supporting Boquist and only two encouraging the committee to punish him. (Jones Decl., Ex. 17). Below is an excerpt, reflective of most testimonies:

> I do not see any threat to anyone in the Capital by Brian Boquist's comments. His statement was in response to a verbalized threat by the Governor. Many of us actually cheered when we heard what he had said… - Ruth A Martens. *Id*. at p. 112.
>
> … the media and Democratic lawmakers twisted Brian's phrase … with a headline aimed at making Brian sound violent - Brett Hochstetler. *Id*. at pp. 28-29.

> 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! - Leanne Stoneberg. *Id*. at p. 78.
>
> The comment he made is not a threat, veiled or otherwise … Much of Oregon agrees with him, his words, his actions right now. – Cara Tapken. *Id*. at p. 35.
>
> I saw that interview, I heard what [Boquist] said, and I do not think any reasonable person could possibly see this as a threat to law enforcement. … – Jeanne Robinson. *Id*. at p. 63.
>
> What is being presented, particularly in the media and on the Senate floor, is only a small portion and has been taken out of context to the extreme. – Austin and Tina Herman. *Id*. at p. 11.

No Investigation Began and The Rule Was Not Temporary

During the hearing, Defendants made clear that the 12-hour notice rule was simply a "temporary" or "interim" action until the investigation concluded. (ECF 6-3, p. 41) (Manning stated, "bear in mind that this [12-hour notice rule] is not a conclusion. This is just an action to take while the investigation or the inquiry proceeds. So I don't want to get that lost in this."); *Id*. at p. 28 (Prozanski clarified with Baumgart that they were talking about "interim steps" during the pendency of the investigation and Baumgart replied, "Correct."). *Id*. at p. 46. But the "interim safety measure" was <u>not temporary</u> and <u>no investigation ensued</u>.

<u>The 12-hour notice rule remained active for over three years without an investigation</u> - until November 28, 2022, when Defendants "received legal advice on the issue both from DOJ counsel and Legislative Counsel (Dexter Johnson)." (Jones Decl., Ex 21, 12/20/22 email from Defendants' counsel to Plaintiff's counsel). Defendants' counsel advised Defendants to remove the rule after several months of extensive discovery by Plaintiff. *Id*.

> "The Counsel's <u>decision to remove the requirement [12-hour notice rule] long after it was imposed was obviously made as a response to litigation after advice of counsel</u>. While the [November 28, 2022] hearing to vote on the decision was open to the public, a quick strategy meeting ahead of time with a defendant to this lawsuit and Attorney Johnson was not."

Id. Investigator Baumgart testified that "the investigation did not move forward because a complainant would not sign … their name publicly." (*Id*. at Ex. 33, p. 8). HR Director Knieling stated, "I don't know that an investigation was begun." (*Id*. at Ex. 32, p. 6). Investigator Baumgart was not aware of any work done on the Boquist matter after 2019. (*Id*. at Ex. 37 pp. 7, 18-19).[10] Three years later, because of this lawsuit, Defendants finally inquired into the status of the investigation. (Jones Decl., Exs. 18-20, Defs' Responses to Pltf's Rog No. 1; Ex. 21).

Rule 27 – Used as a Political Weapon.

Rule 27 was "designed to provide members and employees with informal and formal options to correct harassing conduct before it rises to the level of severe or pervasive harassment or discrimination." (*Id*. at Ex. 6, (1)(b)). Unfortunately, Rule 27 has become politicized to the point that it is being used as a political weapon instead of a tool against harassment and discrimination. As Johnson explained,

> [d]uring my last 18 months in the Oregon Senate, I watched in disappointment as the Rule 27 process devolve into a complete mess. The investigative process and the Conduct Committee hearings became a political tool to assault people – especially members who were disliked or stepped out of line. This is what I saw happen to Senator Boquist. He made political statements, not unlike those of several others during their careers – including me – but because he did so right before the walkout, he became a target. I saw rage from the Democrat Caucus expressed via the Conduct Committee process, resulting in what was intended to be public shaming of Senator Boquist, instead of a search for the truth. The basic message the Democrat Caucus conveyed was "say or do things we deem out of line, and we will punish you like we did Boquist."

(Johnson Decl., ¶15).

[10] Baumgart did not "conduct[] any witness interviews or [meet] with any complainants." *Id*. at p. 20.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

"A Summary Judgment Motion cannot be defeated by relying solely upon conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). It is only the material facts that come into play. A fact is "material" when it is relevant to an element of a claim or when its existence might affect the outcome of the suit. *TW Elec. Service Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the non-moving party's facts, together with undisputed background or contextual facts, do not show the non-moving party is justified to a jury verdict in its favor, summary judgment is appropriate. *Id.* at 631. Summary judgment is mandated where the facts and the law will reasonably support only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250-251 (1986). Where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita,* 475 U.S. at 587. There are no material issues of fact in this matter and Plaintiff Senator Boquist is entitled to summary judgment on his First Amendment claims.

PLAINTIFF'S CLAIMS

I. First Amendment Retaliation

A. The Law

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech … or the right of the people peaceably to assemble…." U.S. Const. amend. I. (applies to state governments by way of incorporation). "[T]he First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech. *Houston Cmty. Coll. Sys. v. Wilson*, 142 S Ct 1253, 1259 (2022) (quoting *Nieves v. Bartlett*, 139 S Ct 1715, 1722 (2019)). As explained by the Ninth Circuit,

> [an] elected official bringing such a legal action has the initial burden of pleading and proving: (1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action.

Boquist, 32 F.4th at 775 (quoting *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 542–43 (9th Cir. 2010)) (internal quotation marks omitted). "It is well-established that the First Amendment protects speech that others might find offensive or even frightening. Speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging." *Fogel v. Collins*, 531 F.3d 824, 829–30 (9th Cir 2008) (quoting *Terminiello v. City of Chicago,* 337 U.S. 1, 4 (1949)) (internal quotation marks omitted). "Courts have long recognized that speech may need to be abrasive or upsetting in order to draw attention to the speaker's cause." *Id*. *See NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.").

Americans have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). "Political hyperbole" is "protected by the First Amendment." 531 F.3d at 830. "Even ostensibly threatening statements directed at specific individuals can be protected." *Id*. In *Watts*, the Supreme Court addressed a Vietnam War protester's public proclamation at a rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts v. United States,* 394 U.S. 705, 706–708 (1969). The statement "literally threatened the life of the President, yet the Supreme Court held that the First Amendment protected it as political speech because of the context in which it was spoken." 531 F.3d at 831. Likewise, here, Senator Boquist's "ostensibly threatening statements" were spoken in the Capitol to draw attention to the Republican's cause.

1. Boquist's Statements Were Protected Political Speech, Not "True Threats"

The Ninth Circuit determined, "[t]aking the allegations in Boquist's complaint as true, and drawing all reasonable inferences in Boquist's favor, we cannot say that Boquist's statements were a 'serious expression of an intent to commit an act of unlawful violence' against Courtney or the state police." 32 F.4th at 782. However, the Court contemplated that during 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*. Defendants will argue Boquist's statements were unprotected "true threats" against Courtney and OSP, but the evidence shows his statements were constitutionally protected political speech.

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 (quoting *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." *Kazal*, 13 F.4th at 746; *see also Watts*, 394 U.S. at 706–08, 89 S.Ct. 1399 (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, 928, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (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).

Id.

In May 2019, Republicans walked out, denying Democrats a quorum, so Democrats threatened to fine and arrest absent minority members. *Id*. at 772. Tempers flared on June 19th because another walkout was looming. A group of peaceful protesters was growing outside the Capitol, encouraging the minority party to deny the majority a quorum on a contentious piece of legislation. (Jones Decl., Ex. 27, pp. 7-8) ("protesters [were] outside honking their horns"). Boquist was asked by his caucus to help ensure Republicans walked out to prevent a vote on House Bill 2020, and to provide "cover for Democrats that … did not want to vote [on the bill]." *Id*. at p. 8. Boquist's goal was to "get [Courtney] to come to his senses to even avoid a walkout." *Id*. Boquist reasoned that if he could get Courtney to block HB 2020 from going to the floor for a vote, there would be no need for a walkout. (*Id*. at pp. 8, 11). In this context, Boquist stated on the Senate floor, **"I understand the threats from members of the majority that you want to arrest me, you want to put me in jail with the state police, and all that sort of stuff.... Mr. President, and if you send the state police to get me, Hell's coming to visit you personally."** 32 F.4th at 772.

Boquist addressed Courtney specifically because he was the Senate President with the power to stop the walkout by blocking HB 2020 from going to a vote. (Jones Decl., Ex. 27 pp. 7-11) ("Senator Courtney has previously blocked bills after passage of a committee from going to the floor."). Boquist said "hell's coming to visit you personally" in reference to the "hell" experienced by elected officials when protesters assemble in front of their homes. *Id*. at 78. At that moment, protesters supporting the minority party could be heard honking outside the Capitol. *Id*. at 76-78. Boquist explained that "[t]he protesters that were peacefully protesting would increase, and those same protesters [would] come to my house regardless of this bill and [] go to other peoples' houses on other issues and bills, and nobody wants to have an issue in which people come knock on your door constantly or when you go to dinner or to Walmart or to Safeway and … some are haranguing you for voting or not voting." *Id*. at 78. Further, Boquist and Courtney attended the same church, so Boquist wanted to convey his belief that Courtney's political conduct put his soul in danger. *Id*. at 79.

Immediately, Courtney "reminded Boquist of 'decorum,' [and] Boquist stated 'I apologize. To you personally.'" 32 F.4th at 772. There was no reaction by the listeners after this statement, and the floor session continued as usual. (Olsen Decl., ¶¶ 4-5). The OSP troopers present on the floor did not react and no one called for a conduct committee hearing to address the statement. Manning thought Boquist's statement "was very inappropriate" but "it's open free speech on the floor." (Jones Decl., Ex. 24, p. 7). Senator Burdick did not view Boquist's statement as a threat to Courtney or anyone in the chamber. *Id*. at Ex. 25, p. 5. Courtney could tell Boquist was upset but the statement did not "hit [him] that hard or anything like that." (*Id*. at Ex. 23, pp. 11, 17) ("I would say personally on the record I didn't view him as threatening me."). Olsen "never heard any

senator, staff member, visitor, or Oregon State Trooper [mention] that they feel threatened or somehow unsafe because of the comment…." (Olsen Decl., ¶ 5).

Later that day, "[a]fter explaining [to reporters in the Capitol] that his comments on the floor were in response to the Governor's threats to use the Oregon State Police to arrest senators who walked out, Boquist told a reporter, **'[w]ell, I'm quotable, so here's the quote. This is what I told the [state police] superintendent: Send bachelors and come heavily armed. I'm not going to be a political prisoner in the state of Oregon. It's just that simple.**'" 32 F.4th at 772. This was a small portion of a fifteen-minute interview. (Jones Decl., Ex. 27, p. 12). Boquist was "talking about the governor threatening to send people to arrest us and that we are facing a potential … special session. And [the reporter] was frankly not happy with the interview because, as he said multiple times, you're not giving me anything quotable." *Id*. at pp. 12-13. Boquist was "trying to convince members to stay out [of the Capitol] and focus on protesters [who supported a walkout]." *Id*. at p. 14. He made the statement "so the constituents of the fellow members would support them at walkout." *Id*. Boquist considered the statement would be well-received by his "rural districts" but did not "care what Portland would think." *Id*. at p. 15. He was paraphrasing a conversation he had with the OSP superintendent months prior to remind "citizens, … state troopers and other representatives and senators that it's not legal for [the governor] to use extra judicial force … to try and return members." *Id*. at pp. 16-17. It did not occur to Boquist "at any time that [his statement] would be interpreted as a threat" because he "didn't believe the Oregon State Police were going to take [him] or any other member." *Id*. at pp. 17-18 (emphasis added). Indeed, they did not, because it was a "politically motivated threat that ultimately wasn't followed through." (Knopp Decl., ¶ 9).

This Court and the parties are well aware of the attention Boquist's statement received from local and national media. Despite the media coverage, there is no evidence that anyone contacted law enforcement with concerns about Boquist's statements. There is no evidence that any law enforcement agency or officer initiated a threat assessment because of the statements. In fact, elected officials had the authority to convene a conduct committee hearing with one hour notice but not a single member initiated such a hearing. (Jones Decl., Ex. 25, p. 7) (Sen Burdick explained that the conduct committee would have been the proper committee to review Boquist's statements); (*Id*. at Ex. 23, pp. 15-16) (Courtney testified that Boquist's statements did not necessitate calling a conduct committee hearing); (*Id*. at Ex. 22, p. 7) (Prozanski agreed that a hearing could have convened with one-hour notice, but no one called for that). After hearing the media reports, Manning "wasn't focused on Senator Boquist or anyone else … [because legislators] had a lot of work to do, and that's why [he] was in Salem, not to go and look to witch-hunt or anything like that." (*Id*. at Ex. 24, pp. 9-10). Burdick did not believe Boquist "threatened anybody in the Capitol" and "personally had no fear." (*Id*. at Ex. 25, pp. 6-7). Johnson explained that Boquist "made political statements, not unlike those of several others during their careers – including me – but because he did so right before the walkout, he became a target." (Johnson Decl., ¶ 15).

Defendants' committee did not meet to discuss Boquist's speech for almost three weeks. By that time, the parties had negotiated for the Republicans to return, and the session was over – but Boquist's punishment was just beginning.

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July 8, 2019 Hearing

As thoroughly examined above, Defendant's conduct committee met on July 8, 2019, to discuss the Rule 27 investigator's recommendation to expel Boquist from the Capitol. Chair Prozanski explained,

> **"it [] is my belief that because of the amount of time that has passed, the lack of other issues coming forward, knowing that Senator Boquist has been in the building multiple times since this incident back on June 19th, that I do not believe that he poses a current threat as he did back on the 19th of June based when the statements were made."**

(ECF 6-3, p. 34) (emphasis added). Manning did not even know what his committee was meeting about. (Jones Decl., Ex. 24, p. 11) ("Senator Prozanski was chairing [the] special conduct committee, and again, I wasn't aware of anything until we had the first meeting, you know, what it was about or anything."). Manning "only voted for [the 12-hour notice rule] to show solidarity for the committee itself." *Id*. at p. 13. No one, including Defendants, increased OSP presence while Boquist was in the Capitol. (Knopp Decl., ¶¶ 26-28) ("the Democrat majority never carried through on any so-called security measures, to my knowledge."). They assumed Boquist would obey the rule because he is a law-abiding person – not a safety threat. (Jones Decl., Exs. 18-20. Defs' Responses to Rog No. 6) ("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."). The evidence obtained during discovery in this case confirms that Boquist's statements were protected political speech, not "true threats."

2. Boquist Was Subjected To Material Adverse Action By Defendants

The Ninth Circuit explained, "an adverse action against an elected official is material when it 'prevent[s] [the elected official] from doing his job,' [] 'deprive[s] him of authority he enjoyed

by virtue of his popular election,' or otherwise prevents him from enjoying 'the full range of rights and prerogatives that came with having been publicly elected.'" []. 32 F.4th at 777 (citations omitted). Here, the 12-hour notice rule "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.'" *Id*. at 784 (quoting *Wilson*, 142 S Ct 1253, 1261-62 (2022)). "These significant burdens would chill a person of ordinary firmness from continuing to engage in the protected activity." *Id*. (citation and quotation marks omitted). Accordingly, the evidence shows Defendants engaged in retaliatory conduct that qualifies as a materially adverse action. Moreover, the rule itself infringed on Boquist's First Amendment freedom of association.

3. Boquist's Speech Played A Part In The Retaliation

The Ninth Circuit determined "Boquist's complaint meets the third prong of the prima facie test." 32 F.4th at 784.

> Prozanski's statements to Boquist in his office, and those before the Senate Special Committee on Conduct, make clear that the Special Committee imposed the 12-hour notice rule in response to Boquist's protected speech. Therefore, Boquist's complaint plausibly alleges that his speech "played a part, substantial or otherwise," in the retaliation. *Nieves*, 139 S. Ct. at 1722 [].

Id. Defendants took action against two separate statements and the first statement had additional protections through the Oregon Constitution. Article IV, sec. 9, provides that no legislative member shall be questioned in any other place for words uttered in debate in either house. Accordingly, when Boquist made his first statement during debate on the Senate floor, that was Defendants' proper opportunity to address it – not in a committee hearing three weeks later.

B. Defendants' Affirmative Defense Fails Because The Rule Was Created For Public Consumption, Not Public Safety

The Ninth Circuit considered that even if Boquist has a prima facie case for First Amendment retaliation, Defendants may assert an affirmative defense that they were "motivated

by 'vital information' conveyed by Boquist's speech, [] that raised an objectively legitimate need to implement security measures and that justified the particular measures they chose." *Id*. at 784 (emphasis added) (quoting *Nieves*, 139 S. Ct. at 1724). In that situation, "an unconstitutional motivation [would not be] the but-for cause of the adverse action." *Id*. at 785. Here, 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.

Defendants 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. (Jones Decl., Ex. 24, pp. 12-13) (emphasis added). Further, Defendants did not believe Boquist would break the law – or even Senate rules. *Id*. at Exs. 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). Moreover, Defendants did not consider the substance of any alleged report(s) when they arbitrarily executed the rule. (ECF 6-3, p. 52) **("we will not be taking any action at this point regarding any merits of any reports…**") (emphasis added).

There is simply no "safety" justification for implementing a rule that was never enforced – for over three years – and was not responsive to the merits of any particular concern. The rule was created for public consumption, not public safety. (Jones Decl., Ex. 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 … for the decision as to whether some type of interim steps

needed to be taken to ensure that there would be a safe workplace for all…") (emphasis added). The rule was simply "political theater by Democrats." (Knopp Decl., ¶ 29). The process "was intended to be public shaming of Senator Boquist…." (Johnson Decl., ¶ 15). Defendants have no defense for violating Boquist's First Amendment rights.

II. Boquist's Freedom of Association Was Violated

The 12-hour notice rule "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 F.4th at 784 (quoting *Wilson*, 142 S Ct 1253, 1261-62 (2022)). Boquist explained that constituents generally want to meet on short notice *and* there was a stigma attached to him being under a 12-hour notice rule. (Jones Decl., Ex. 27, p. 19). Some "constituents didn't want to meet in the Capitol because there was a 12-hour notice and they didn't want everybody to know they were coming to the Capitol … And so for the most part we tried to meet outside the Capitol with constituents to make them feel more comfortable." *Id*. The 12-hour notice rule infringed on Boquist's ability to meet with those he would normally meet with on short notice in the Capitol; therefore, it violated his freedom of association.

CONCLUSION

The evidence shows the 12-hour notice rule was unlawfully implemented for public consumption, not public safety. Defendants did not believe Senator Boquist's speech conveyed a true threat when they implemented the rule on July 8, 2019. No one interviewed or received complaints from Senator Courtney or anyone at OSP related to Boquist's statements. OSP presence never increased at the Capitol when Boquist provided notice of entry. No one ever filed a complaint against Boquist. Public testimony at the July 8, 2019 hearing strongly favored Boquist and his protected speech. The rule was not lifted for over three years of litigation. Accordingly, Plaintiff

respectfully requests the Court grant his Motion for Summary Judgment in its entirety and declare Defendants violated his First Amendment rights by restricting his access to the Capitol in response to his protected speech.

DATED this 27th day of February, 2023.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,933 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

DATED this 27th day of February, 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 MOTION FOR SUMMARY JUDGMENT on:

Tracy Ickes White
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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 February, 2023.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
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