

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ANDY NGO,

Plaintiff,

v.

ROSE CITY ANTIFA, an unincorporated
association; BENJAMIN BOLEN, an
individual; JOHN HACKER, an individual;
CORBYN (KATHERINE) BELYEA, an
individual; JOSEPH CHRISTIAN EVANS, an
individual; MADISON LEE ALLEN, an
individual; DOES 1-50,

Defendants.

Case No. 20CV19618

**DEFENDANT BENJAMIN BOLEN'S
ORS 31.150 SPECIAL MOTION TO
STRIKE
ORAL ARGUMENT REQUESTED**

REQUEST FOR ORAL ARGUMENT

Pursuant to UTCR 5.050, defendants request oral argument. Argument is expected to
take approximately thirty (30) minutes. Official court reporting services are not requested.

I. INTRODUCTION

Plaintiff, a well-known right wing provocateur, agitator, political pundit, and social
media personality who publicly and stridently opposes the Black Lives Matter movement and
antifascists, brings suit against Rose City Antifa, *fifty* unnamed Does, and five individuals he
asserts are members of Antifa. It appears that he seeks to hold all defendants jointly liable
through association based on their political beliefs; namely, their opposition to fascism. He

1 alleges that people dressed in black clothing, whom he assumes are members of Antifa, have
2 battered, assaulted or intimidated him in several separate incidences, and therefore all defendants
3 are jointly liable to him for \$900,000 in damages.

4 The only allegation plaintiff includes against Mr. Bolen is that Mr. Bolen purportedly
5 punched plaintiff in the stomach at a political rally on May 1, 2019 in downtown Portland,
6 Oregon. Plaintiff includes a photo in his Complaint of the person he says punched him, and who
7 plaintiff alleges is Mr. Bolen. Not only is the person in the Complaint not Mr. Bolen, but Mr.
8 Bolen has never punched Mr. Ngo.

9 Mr. Ngo is aware that Mr. Bolen holds antifascist views and that he exercises his First
10 Amendment right to assemble and petition the government for a redress of grievances. Mr. Ngo
11 disagrees with Mr. Bolen's political views and seeks to hold him liable because of those political
12 views. This is *precisely* the type of claim that the anti-SLAPP statute is designed to prevent.

13 While the conduct in the Complaint regarding Mr. Bolen is an alleged punch, and
14 therefore not itself protected speech, defendant submits that this motion is appropriate because
15 Mr. Bolen did not punch plaintiff and because plaintiff has named Mr. Bolen as a defendant
16 based on his political views and his attendance at an antifascist political rally. Mr. Ngo does not
17 care if he misidentifies a defendant so long as that defendant is someone Mr. Ngo believes to be
18 an antifascist. As described in more detail below, Mr. Ngo has a well-documented history of
19 misidentifying his political opponents as wrongdoers in an attempt to malign them. Mr. Bolen is
20 entitled to a judgment now pursuant to ORS 31.150.

21 **II. MOTION**

22 Defendant Ben Bolen moves for a judgment pursuant to ORS 31.150 and 31.152 (Special
23 Motion to Strike) striking plaintiff's claims for assault, battery, and intentional infliction of
24 emotional distress ("IIED") because plaintiff named Mr. Bolen as a defendant in this action
25 because of his presence at a political rally where he was engaged in speech or petitioning

activities protected under ORS 31.150(2). This satisfies defendant’s burden under ORS 31.150, and plaintiff cannot meet his burden of producing “substantial evidence” to support a *prima facie* case against Mr. Bolen. Plaintiff cannot meet this burden because his only allegation against Mr. Bolen is based on a misidentification. Mr. Bolen did not punch Mr. Ngo, and cannot otherwise be held liable simply because of his political views or his presence at a political rally or protest.

The Anti-SLAPP¹ motion is timely because a similar motion was filed within sixty days after service of plaintiff’s original complaint, ORS 31.152(1).² All discovery is to be stayed upon the filing of the motion. ORS 31.152(2). Pursuant to ORS 31.152(1) and (3), defendants request a hearing on this motion not more than thirty days after filing, subject to any orders from the Supreme Court or this Court relating to the Covid-19 pandemic. Defendant also requests a subsequent award of reasonable attorney fees and costs should he prevail on the motion.

The motion is supported by the declaration of Ben Bolen and Shane Burley, and the points and authorities below.

III. STATEMENT OF FACTS IN SUPPORT OF THE MOTION

A. Antifa

“Antifa,” short for “antifascist,” is “a loose collection of groups, networks and individuals who believe in active, aggressive opposition to far right-wing movements. Their ideology is rooted in the assumption that the Nazi party would never have been able to come to power in Germany if people had more aggressively fought them in the streets in the 1920s and 30s.”³ See generally Mark Bray, *Antifa: The Anti-Fascist Handbook* (2017) (discussing history

¹ SLAPP is an acronym that stands for “Strategic Lawsuit Against Public Participation.” *Neumann v. Liles*, 358 Or 706, 722 (2016).

² The affidavit of service plaintiff filed regarding Mr. Bolen avers that Mr. Bolen was served through substitute service, which was completed when a copy of the summons and complaint were mailed to Mr. Bolen on August 22, 2020. ORCP 7 D(2)(b).

³ Anti-Defamation League, <https://www.adl.org/resources/backgrounders/who-are-antifa> (last visited on 9/7/2020).

1 of anti-fascist groups in Europe and the United States). “Antifa” is actually a broad term for a
2 person or group actively opposing fascism, or an anti-fascist movement.⁴ It was coined in the
3 1930s by groups who organized to counter Nazism.⁵

4 Antifa is “not a group or an organization. It’s a movement or an ideology.” FBI Director
5 Christopher Wray, testimony before a House Committee on Homeland Security hearing on
6 “worldwide threats to the homeland,” Thursday, Sept. 17, 2020.⁶ While the president and his
7 supporters characterize antifa as a domestic terrorist organization to further their agendas and
8 push their election year narratives, federal law enforcement authorities do not.

9 Antifa has become a right wing bogeyman and the subject of a misinformation campaign
10 used to oppose the Black Lives Matter movement and progressive leftist politics in the United
11 States. This misinformation campaign has increased in its intensity this year, in part due to the
12 presidential election, and in part due to the opposition to the Black Lives Matter movement,
13 which has seen a significant increase in activity since the highly publicized murder of George
14 Floyd by police officers in Minneapolis this last May. Most recently, conservative political
15 pundits attempted to spread misinformation blaming Antifa for the wildfires raging in the
16 western United States, spreading fear and putting people, including first responders, in harm’s
17 way because armed groups of civilians were convinced by the misinformation that Antifa was
18 setting fire to their properties or looting.⁷

20 ⁴ While some may dismiss any notion that fascism may take hold in the western world again, this is not only wrong
21 but naïve. See, e.g., Shane Burley, *Fascism Today: What It Is And How To End It*, Chico, CA : AK Press, 2017;
22 Sinclair Lewis, *It Can’t Happen Here: A Novel*, Garden City, NY : Sun Dial Press, Inc., 1935; Madeleine Albright,
23 *Fascism, A Warning*, New York, NY : HarperCollins Publishing, 2018.

24 ⁵ <https://www.merriamwebster.com/dictionary/antifa> (last visited 9/17/2020)

25 ⁶ <https://www.oregonlive.com/nation/2020/09/fbi-director-says-antifa-is-an-ideology-not-an-organization-in-testimony-on-homeland-security.html> (last visited 9/17/2020)

⁷ <https://www.latimes.com/opinion/story/2020-09-16/oregon-rumor-mill-wildfires-fault-of-antifa> (last visited 9/17/2020)

<https://www.oregonlive.com/wildfires/2020/09/authorities-work-to-stamp-out-antifa-rumors-during-wildfires.html>

Antifascists are known to wear black clothing from head to toe.⁸ This practice is known as “black bloc,” and originated in the protests against police brutality, white nationalism and neo-Nazism in West Germany in the 1980’s. It is now employed by antifascists and other political groups around the world. The reason for the practice is anonymity. While it may seem at first that their desire for anonymity has some nefarious or even criminal purpose, members dress in black and “mask up” to avoid being doxed⁹ and becoming the target of white nationalist or white supremacist terror campaigns or even violence. “The creation of mass anonymity protects practitioners from the threat of post-action doxxing by white supremacist groups, a process by which their identities and contact information, including addresses and places of employment, are publicized.”¹⁰ If the subject of the protests is oppressive state actors or white nationalists, it is important that the protestors remain anonymous and united for their own safety.¹¹

B. Andy Ngo

Andy Ngo is a right wing provocateur, right wing media pundit, agitator, and a social media personality. He is a Portland resident, and is currently an editor or contributor for a conservative Canadian online news magazine *The Post Millennial*, which focuses on politics and culture, and contains primarily opinion content in the form of recycled news stories with conservative editorializing added. It has been criticized as a conservative pamphleteering

(last visited 9/19/2020)

<https://theintercept.com/2020/09/10/oregon-police-beg-public-stop-calling-false-reports-blaming-antifa-wildfires/>
(last visited 9/17/2020)

⁸ <https://www.nytimes.com/2017/11/29/style/antifa-fashion.html> (last visited 9/17/2020)

⁹ “Dox” is sometimes spelled “doxx.” This is an alternative or slang term meaning “docs,” short for “documents.”

¹⁰ *Id.*

¹¹ Many conservatives attribute criminal motives to leftist protestors who obscure their identity at protests in the United States, but openly support the protestors in Hong Kong who employed similar methods to remain anonymous. <https://www.theverge.com/2019/10/22/20926585/hong-kong-china-protest-mask-umbrella-anonymous-surveillance> (last visited 9/18/2020)

1 organization and not a news site.¹² Its editors have also been criticized for giving platforms to
2 white nationalists and white supremacists.¹³

3 Before working with *The Post Millennial*, Mr. Ngo was a contributor for another right
4 wing online magazine, *Quillette*. Mr. Ngo left that position immediately after publication of the
5 video showing Mr. Ngo with the Proud Boys as they planned their attack on leftists at Cider Riot
6 in southeast Portland on May 1, 2019.¹⁴ Before working for *Quillette*, Mr. Ngo was an editor for
7 *Vanguard*, the student newspaper at Portland State University. He was terminated from his
8 position there for ethical violations that the university found put people in danger.¹⁵ The people
9 he put in danger while working for *Vanguard* are Muslim. Before his fixation with Antifa, Mr.
10 Ngo focused his energy on maligning Muslims.¹⁶

11 Mr. Ngo has become a celebrity among right wing conservatives, and now makes
12 appearances on Fox News programs.¹⁷ He was recently invited by Senator Ted Cruz to give

14 ¹² <https://www.cbc.ca/news/politics/the-post-millennial-journalism-conservative-advocacy-1.5191593> (last visited
15 9/17/2020)

16 ¹³ [https://www.nationalobserver.com/2019/08/22/news/he-used-work-site-promoted-racists-now-he-edits-canadian-
17 news-outlet](https://www.nationalobserver.com/2019/08/22/news/he-used-work-site-promoted-racists-now-he-edits-canadian-news-outlet) (last visited 9/17/2020)

18 ¹⁴ [https://www.portlandmercury.com/blogtown/2019/08/26/27039560/undercover-in-patriot-prayer-insights-from-a-
19 vancouver-democrat-whos-been-working-against-the-far-right-group-from-the-inside](https://www.portlandmercury.com/blogtown/2019/08/26/27039560/undercover-in-patriot-prayer-insights-from-a-vancouver-democrat-whos-been-working-against-the-far-right-group-from-the-inside)

20 <https://www.washingtonexaminer.com/news/journalist-andy-ngo-out-at-quillette-after-controversial-video-surfaces>
(last visited 9/17/2020)

21 <https://abovethelaw.com/2019/09/andy-ngo-is-journalisms-problem/> (last visited 9/19/2020)

22 ¹⁵ [https://www.wweek.com/news/schools/2017/05/23/a-dispute-over-a-muslim-students-remarks-costs-a-college-
23 journalist-his-job-and-brings-national-controversy-to-portland-state-university/](https://www.wweek.com/news/schools/2017/05/23/a-dispute-over-a-muslim-students-remarks-costs-a-college-journalist-his-job-and-brings-national-controversy-to-portland-state-university/) (last visited 9/17/2020)

24 ¹⁶ <https://www.businessinsider.com/wall-street-journals-andy-ngo-writes-cowardly-islamic-england-2018-8> (last
visited 9/17/2020). Mr. Ngo was first known for his hugely Islamophobic travelogue for *The Wall Street Journal*.
<https://www.wsj.com/articles/a-visit-to-islamic-england-1535581583> (last visited 9/20/2020). He was severely
criticized for the piece. <https://splinternews.com/london-has-fallen-according-to-this-racist-wall-street-1828725242>
(last visited on 9/20/2020). And he was criticized for once again manufacturing facts to push his anti-Islamic
message. See, e.g., [https://londonist.com/london/opinion/the-wall-street-journal-spouts-nonsense-about-islamic-
london-in-this-article](https://londonist.com/london/opinion/the-wall-street-journal-spouts-nonsense-about-islamic-london-in-this-article) (last visited 9/20/2020).

¹⁷ It is defendant's position that this lawsuit is politically motivated. Indeed, even plaintiff's attorney, Harmeet
Dhillon, the former vice chairwoman of the California Republican Party and the National Committeewoman of the
Republican National Committee for California, is a regular Fox News contributor. She has vowed to "sue [Antifa]

1 testimony to the Senate Foreign Relations Committee to discuss alleged anarchist violence.¹⁸ Mr.
2 Ngo and his online content have been weaponized by conservatives during this election cycle.
3 They use Mr. Ngo and his content to push a narrative that opposes the Black Lives Matter
4 movement and trivializes the rise in white nationalism and white supremacist violence in the
5 United States by framing Antifa as the real threat to American democracy. He is frequently
6 retweeted and amplified by conservative politicians, including the president, who use his
7 material to push the Trump campaign message that if Joe Biden wins the election, then small
8 towns and suburbs will be in danger from marauding criminals, which is how the president
9 describes Antifa or advocates of the Black Lives Matter movement.

10 The president opposes the Black Lives Matter movement and refers to teaching children
11 about the history of slavery and racism in America as “child abuse,” and considers the 1619
12 Project, a New York Times project that teaches people about systemic racism and the country’s
13 history by examining the consequences of slavery, “toxic propaganda” and “ideological poison”
14 that “if not removed, will dissolve the civic bonds that tie us together” and “will destroy our
15 country.”¹⁹ Mr. Ngo helps him and his supporters push this narrative.

16 Mr. Ngo provides Trump and his supporters with prepackaged, ready-to-consume media
17 content, or rage bait, that furthers this message and appeals to this demographic of the
18 president’s supporters. Mr. Ngo’s content is perfectly suited for this purpose. He peddles in “riot
19 porn.” That is, his “videos are edited, decontextualized, and shared among audiences hungry for
20

21 into oblivion and then sow salt into their yoga studios and avocado toast stands until nothing grows there[.]”
22 Harmeet K. Dhillon, Twitter, July 1, 2019. She regularly refers to people and organizations she dislikes as “Antifa,”
23 and compares Antifa to the Covid virus. Ms. Harmeet is of course not a party to this lawsuit, but she is a political
operative who has made it clear that her intent is to damage or harm antifascists anyway she can. Defendant submits
that this is more evidence that this suit is politically motivated, and therefore the proper subject of an anti-SLAPP
motion.

24 ¹⁸ <https://theintercept.com/2020/08/05/ted-cruz-hearing-antifa/> (last visited 9/17/2020)

25 ¹⁹ <https://www.vanityfair.com/news/2020/09/donald-trump-1776-commission> (last visited 9/17/2020)

1 a new fix of ‘riot porn,’ which instantly goes viral across the right-wing media ecosystem with
2 the aid of influential pundits and politicians, including President Donald Trump.”²⁰ It is a
3 symbiotic relationship between him and his conservative political supporters and consumers.²¹

4 The way Mr. Ngo produces his content is by appearing at political rallies attended by
5 leftists to dox leftists attendees, which means to uncover their identity and then publicly post
6 personal identifying information online so white nationalist or other right wing groups can access
7 the information and use it to target leftists and their families with harassment, threats, and
8 sometimes even violence. Some have legitimately accused Mr. Ngo of creating white nationalist
9 “kill lists.”²² He is also well known locally and nationally for creatively and deceptively editing
10 his videos in a manner that makes it look like leftists are the violent instigators.²³

11 In addition to doxing leftists, Mr. Ngo appears at these rallies to agitate attendees to allow
12 him to create more of his carefully edited videos he uses to solicit donations and to malign
13 antifascists.

14 It is well known to people who attend rallies in Portland, Oregon that this is what Andy
15 Ngo does. Because of this, Andy Ngo is nearly universally reviled by many who attend these
16 rallies and who oppose the administration’s policies, fascism or white nationalism. His

18 ²⁰ <https://www.technologyreview.com/2020/09/03/1007931/riot-porn-right-wing-vigilante-propaganda-social-media/>
(last visited 9/18/20)

19 ²¹ [https://www.mediamatters.org/national-review/how-right-wing-media-embrace-social-media-generated-rage-bait-
drive-website-traffic](https://www.mediamatters.org/national-review/how-right-wing-media-embrace-social-media-generated-rage-bait-drive-website-traffic) (last visited 9/18/20)

20 ²² See, e.g., [https://www.wweek.com/news/2020/09/16/portland-protesters-say-their-lives-were-upended-by-the-
posting-of-their-mug-shots-on-a-conservative-twitter-account/](https://www.wweek.com/news/2020/09/16/portland-protesters-say-their-lives-were-upended-by-the-posting-of-their-mug-shots-on-a-conservative-twitter-account/) (last visited 9/17/2020)

21 <https://www.jacobinmag.com/2019/08/andy-ngo-right-wing-antifa-protest-portland-bigotry> (last visited 9/17/2020)

22 <https://emilygorcenski.com/post/andy-ngo-and-the-atomwaffen-kill-list/> (last visited 9/17/2020)

23 ²³ [https://www.portlandmercury.com/blogtown/2019/08/26/27039560/undercover-in-patriot-prayer-insights-from-a-
vancouver-democrat-whos-been-working-against-the-far-right-group-from-the-inside](https://www.portlandmercury.com/blogtown/2019/08/26/27039560/undercover-in-patriot-prayer-insights-from-a-vancouver-democrat-whos-been-working-against-the-far-right-group-from-the-inside) (last visited 9/17/2020)

24 <https://www.rollingstone.com/culture/culture-features/andy-ngo-right-wing-troll-antifa-877914/> (last visited
25 9/17/2020)

1 appearance at the rallies nearly always draws boos, jeers and contempt from the crowd. He is
2 sometimes pushed, punched, or has things thrown at him from many people in the crowd. Bolen
3 Decl., ¶ 10.

4 Mr. Ngo feeds on this attention, even if it is negative. While he is booed or jeered, he
5 continues his attempts to unmask or identify members in the crowd, and he then posts this
6 personal identifying information online for white nationalist groups to consume. Right wing
7 local and national political figures and pundits then shine a spotlight on Mr. Ngo, which he uses
8 to sell his books or to drive viewers to his online content, and once there, he solicits donations.
9 He raises money online by getting as much attention as he can, so he attends the rallies and
10 provokes confrontations with people in the crowd to provide him material to post online to get
11 more views and more donations. He has raised hundreds of thousands of dollars using this
12 method. On one single GoFundMe fundraiser, he made close to \$200,000.²⁴ And he has many of
13 these fundraisers, potentially dozens. Indeed, he is using this lawsuit as a means to raise
14 money.²⁵

15 Mr. Ngo is a strident opponent of the Black Lives Matter movement and leftist politics,
16 and has a quixotic fixation with Antifa. He believes that racially motivated crimes are hoaxes,
17 much to the delight of white nationalists and white supremacists.²⁶ He posts dozens of tweets on
18 Twitter nearly every day, and nearly every one of those tweets relates to Antifa or Black Lives
19 Matter, and in particular his posts reveal identifying information about people with whom Mr.
20 Ngo disagrees. The information in his tweets is presented in a manner designed to build hatred or
21 resentment of leftists, Black Lives Matter supporters and Antifa. Mr. Ngo then posts personal

22
23 ²⁴ <https://www.gofundme.com/f/protect-andy-ngo-fund> (last visited 9/17/2020)

24 ²⁵ <https://www.dhillonlaw.com/justice-andy-ngo/> (last visited 9/17/2020)

25 ²⁶ <https://www.youtube.com/watch?v=95zyeLryNWY&list=UUmfmfVSRVwMSfHdRf6v3lPxQ&index=96>

1 identifying information on those posts so some of his rogue followers know who to target with
2 their harassment and threats.

3 Many people, including Mr. Bolen, consider Mr. Ngo's tactics in this regard to amount to
4 stochastic terrorism²⁷ by both demonizing leftists and posting their personal identifying
5 information online, when he knows how this information is used. He masquerades as a journalist
6 to lend him credibility and plausible deniability when one of his followers begins threatening or
7 harassing his opponents. He knows that this information is used to target his opponents, but he
8 calls his work journalism and argues he cannot be held responsible for what people do with the
9 information he posts. Mr. Ngo has engaged in this tactic since he was fired from the student
10 newspaper at Portland State University for similar practices, which the university found had
11 placed people in danger. He continues to place people in danger every single day, and remains
12 intransigent even when he is informed of how his content is being used to put people in danger.

13 Mr. Ngo has a working relationship with right wing or white nationalist groups like the
14 Proud Boys, Patriot Prayer, The Three Percenters and potentially Atomwaffen. Bolen Decl., ¶
15 14. He has a practice of embedding with people from one of these groups, and reaches
16 agreements with them whereby they provide him protection while they instigate a skirmish or
17 physical confrontation that Mr. Ngo films and deceptively edits in a manner to further his agenda
18 and his online content. *Id.* This too has been well documented both locally and nationally.²⁸

19 So quixotic is Mr. Ngo's fixation with leftists and Antifa, that he repeatedly uses his
20 online platform to publish misinformation in his attempt to malign Antifa. Following the mass

21
22 ²⁷ <https://www.dictionary.com/e/what-is-stochastic-terrorism/> (last visited 9/20/2020)

23 <https://www.wired.com/story/jargon-watch-rising-danger-stochastic-terrorism/>

24 ²⁸ <https://www.portlandmercury.com/blogtown/2019/08/26/27039560/undercover-in-patriot-prayer-insights-from-a-vancouver-democrat-whos-been-working-against-the-far-right-group-from-the-inside> (last visited 9/17/2020)

25 <https://www.rollingstone.com/culture/culture-features/andy-ngo-right-wing-troll-antifa-877914/> (last visited 9/17/2020)

1 shooting attack at a Walmart in El Paso, Texas, Mr. Ngo was responsible for a misinformation
2 campaign that attributed the attack to Antifa. His tweets were picked up by right wing media
3 outlets, who then ran the story. The story was false, and appears to have been created by Mr.
4 Ngo.²⁹ This is a dangerous practice and plaintiff knows it. He just does not care if people are
5 harmed so long as he pushes his narrative and receives both attention and donations.

6 Because it is so well known that Mr. Ngo facilitates harassment and threats from white
7 nationalist groups targeting leftists, Mr. Ngo is despised by most leftist protestors. Bolen Decl., ¶
8 10. He is immediately recognized by the crowd when he appears at protests, and is promptly
9 booed, jeered and harassed by people who legitimately, and for good reason, think he is there to
10 put their lives in danger. *Id.*

11 C. Shane Burley

12 Mr. Burley is a well-regarded journalist and author who resides in Portland. Burley Decl.
13 He covers far right politics and the antifascist movement, and has written a book on the subject
14 entitled, *Fascism Today: What It Is And How To End It*.³⁰ *Id.* He is familiar with Mr. Ngo's
15 tactics and has attended most of the rallies and protests in Portland in the last few years,
16 including those described in Mr. Ngo's Complaint. *Id.* He has personally observed Mr. Ngo's
17 dangerous tactics, and has in fact been a victim of Mr. Ngo himself. *Id.*

18 D. Ben Bolen

19 Defendant Ben Bolen is a Portland resident and a graduate student at Portland State
20 University. Bolen Decl., ¶ 3. He is a PhD candidate in mechanical engineering. *Id.* Mr. Bolen is
21 politically engaged, and has been since his youth. *Id.* at ¶ 4. He is a leftist on the political
22 spectrum. *Id.* He opposes fascism, and so, is antifascist. Notwithstanding his antifascist beliefs,

24 ²⁹ <https://www.rollingstone.com/culture/culture-features/el-paso-dayton-shooting-fake-news-antifa-charlottesville-867499/> (last visited 9/17/2020)

25 ³⁰ See footnote 4 for citation to Mr. Burley's book.

1 Mr. Bolen is not a member or associated with Rose City Antifa, nor was he at any time in 2018-
2 2019.

3 Mr. Bolen is deeply concerned with the current presidential administration's family
4 separation policy, implemented by the Immigration and Customs Enforcement ("ICE") and
5 designed by white nationalist Stephen Miller. *Id.* at ¶ 5.³¹ He finds this practice inhumane and
6 unacceptable. *Id.* He strongly opposes many of the policies the current administration has either
7 created or broadened, and attends political rallies and protests to raise awareness and voice his
8 dissent. *Id.* at ¶ 6.

9 Mr. Bolen has personally witnessed Mr. Ngo appears at rallies and dox leftist protestors
10 online. *Id.* at ¶ 9. It is well known, both locally and nationally, that this is what Mr. Ngo does. *Id.*
11 at ¶ 9. Mr. Ngo and his dangerous practice of doxing leftists are known by the people who attend
12 the rallies and protests in Portland. *Id.* at ¶ 10. Because of this, Mr. Ngo is nearly universally
13 reviled by those who attend the leftist protests. *Id.* Mr. Bolen has personally witnessed Mr. Ngo
14 being jeered, booed, pushed, shoved or punched by people in the crowd. *Id.*

15 While Mr. Bolen disagrees with Mr. Ngo's politics and abhors his practice of putting
16 people in danger, Mr. Bolen did not punch Mr. Ngo on May 1, 2019, or at any other date. *Id.* at
17 ¶¶ 23, 31.

18 E. The May 1, 2019 ICE Protest, the Alleged Punch, and the Case of Mistaken Identity

19 On May 1, 2019, there was a protest in downtown Portland by the ICE detention center.³²
20 The target of the protest was the federal government's family separation policy or practice in
21 which the government forcibly separates members of families seeking to enter the United States
22

23 ³¹ <https://www.theguardian.com/us-news/2019/nov/24/stephen-miller-white-nationalist-trump-immigration-guru>
24 (last visited 9/17/2020)

25 ³² <https://www.wweek.com/news/2019/05/01/afternoon-anti-ice-may-day-protest-unfolds-peacefully-in-portland/>
(last visited 9/18/20)

1 as refugees or immigrants and detains these people in deplorable and inhumane conditions. *Id.*

2 The protestors consider this practice unacceptable, indefensible and at the least, quasi-fascist. *Id.*

3 Mr. Bolen attended this protest. Bolen Decl., ¶ 23. He was dressed in black clothing to
4 protect his identity. *Id.* Most of the attendees were dressed in a similar manner. *Id.* Mr. Ngo
5 attended the rally, and Mr. Bolen saw him in attendance. *Id.* Mr. Ngo was met with jeers and
6 derision, as he normally is at events like this. *Id.*

7 Mr. Ngo alleges that he was “set upon by mask-clad Rose City Antifa members and
8 others.” Complaint, ¶ 21. He alleges that Mr. Bolen was one of these people and that Mr. Bolen
9 punched him. *Id.* at ¶¶ 22, 23.³³

10 Mr. Bolen follows Mr. Ngo’s tweets, and was able to piece together how Mr. Ngo
11 misidentified him as the person who allegedly punched Mr. Ngo. Bolen Decl., ¶ 24. On May 1,
12 2019, Mr. Ngo tweeted that he had been punched in the stomach by an unknown masked man.
13 *Id.* at ¶ 25. The following day, May 2, 2019, Mr. Ngo posted on Twitter seeking help identifying
14 the person who allegedly punched him. *Id.* at ¶ 26. His twitter post included a screen grab from
15 video that depicts a person wearing all black, with no identifying features shown whatsoever. *Id.*

16 In response to this tweet from Mr. Ngo, a Twitter user named “SomeBasedGuy” tweeted
17 at Mr. Ngo stating that he was “pretty sure” that Mr. Bolen was the person who punched Mr.
18 Ngo based on the photograph in which no identifying characteristics can be seen. *Id.* at ¶ 27.
19 SomeBasedGuy included pictures in that tweet of a man he says is Ben Bolen and who appears
20 to be dressed in a similar manner as the person Mr. Ngo identified as the person who allegedly
21 punched him. *Id.* That is, both people are participating in black bloc protest.

22 ///

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24 ³³ The complaint alleges the punch was to the stomach, but also refers to the punch as a “rabbit punch,” which is a
25 boxing term for an illegal punch or chop *to the back of the neck or base of the skull*. <https://www.merriam-webster.com/dictionary/rabbit%20punch> (last visited 9/18/20). Defendant suspects that plaintiff and his counsel are simply unaware of the meaning of the term they used.

1 Mr. Bolen does not know the person who calls himself “SomeBasedGuy” on Twitter. *Id.*
2 at ¶ 28. Moreover the person in the photographs posted by SomeBasedGuy, which the poster
3 states is Ben Bolen, is not in fact Ben Bolen. *Id.* He is dressed in a similar manner to how Mr.
4 Bolen and others dresses for protests or rallies, but it is not Mr. Bolen. *Id.* The person in the
5 pictures posts by SomeBasedGuy appears older than Mr. Bolen, heavier than Mr. Bolen, and has
6 shorter and lighter colored hair than Mr. Bolen. His facial features differ as well.

7 SomeBasedGuy states in his tweet that the photos depicting who he mistakenly identifies
8 as Mr. Bolen were taken in June and August of 2018. *Id.* Mr. Bolen has provided photos from
9 around that time period in his declaration showing that he is not the person in the tweet from
10 SomeBasedGuy. *Id.* at ¶¶ 28, 29.

11 Mr. Bolen did not punch Mr. Ngo and does not know who punched him, if he was
12 punched as he alleges. *Id.* at ¶ 32. If Mr. Ngo was punched by a person wearing a black hoodie,
13 black hat, black bandana, sunglasses and black gloves at the protest downtown, it could have
14 been any number of dozens or hundreds of attendees because this is how most people at the
15 protest dress. *Id.* at ¶ 32.

16 **IV. STANDARD ON MOTIONS UNDER ORS 31.150**

17 Oregon’s Anti-SLAPP statute was enacted in 2001. ORS 31.150 reads in relevant part:

18 (1) A defendant may make a special motion to strike against a
19 claim in a civil action described in subsection (2) of this section.
20 The court shall grant the motion unless the plaintiff establishes in
21 the manner provided by subsection (3) of this section that there is a
22 probability that the plaintiff will prevail on the claim. The special
23 motion to strike shall be treated as a motion to dismiss under
24 ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting
25 the special motion to strike, the court shall enter a judgment of
dismissal without prejudice. If the court denies a special motion to
strike, the court shall enter a limited judgment denying the motion.

(2) A special motion to strike may be made under this section
against any claim in a civil action that arises out of:

1 (a) Any oral statement made, or written statement or other
2 document submitted, in a legislative, executive or judicial
proceeding or other proceeding authorized by law;

3 (b) Any oral statement made, or written statement or other
4 document submitted, in connection with an issue under
5 consideration or review by a legislative, executive or
6 judicial body or other proceeding authorized by law;

7 (c) Any oral statement made, or written statement or other
8 document presented, in a place open to the public or a
9 public forum in connection with an issue of public interest;
or

10 (d) Any other conduct in furtherance of the exercise of the
11 constitutional right of petition or the constitutional right of
12 free speech in connection with a public issue or an issue of
13 public interest.

14 (3) A defendant making a special motion to strike under the
15 provisions of this section has the initial burden of making a prima
16 facie showing that the claim against which the motion is made
17 arises out of a statement, document or conduct described in
18 subsection (2) of this section. If the defendant meets this burden,
19 the burden shifts to the plaintiff in the action to establish that there
20 is a probability that the plaintiff will prevail on the claim by
21 presenting substantial evidence to support a prima facie case. If the
22 plaintiff meets this burden, the court shall deny the motion.

23 (4) In making a determination under subsection (1) of this section,
24 the court shall consider pleadings and supporting and opposing
25 affidavits stating the facts upon which the liability or defense is
based.

ORS 31.152(4) states:

The purpose of the procedure established by this section and ORS
31.150 and 31.155 is to provide a defendant with the right to not
proceed to trial in cases in which the plaintiff does not meet the
burden specified in ORS 31.150 (3). This section and ORS 31.150
and 31.155 are to be liberally construed in favor of the exercise of
the rights of expression described in ORS 31.150 (2).

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1 The Court of Appeals recently summarized the procedure Oregon courts follow when
2 deciding Special Motions to Strike:

3 When a defendant files a special motion to strike under ORS
4 31.150, the trial court must apply a two-step burden-shifting
5 process. First, the court must determine whether the defendant has
6 met its burden of showing that the claim against which the motion
7 is made arises out of statements or conduct protected by ORS
8 31.150(2). Second, if the defendant meets that burden, then the
burden shifts to the plaintiff ‘to establish that there is a probability
that the plaintiff will prevail on the claim by presenting substantial
evidence to support a *prima facie* case. If the plaintiff meets this
burden, the court shall deny the motion. ORS 31.150(3).

9 *Wingard v. Or. Family Council, Inc.*, 290 Or App 518, 521-22 (2018).

10 “Oregon modeled its anti-SLAPP statute on California’s.” *Handy v. Lane Cty.*, 360 Or
11 605, 618 (2016).³⁴ California cases that predate Oregon’s adoption of the statutes in 2001 are
12 controlling in that the legislature intended to follow those cases, and California cases decided
13 after 2001 are persuasive. *Id.* at 623 n 12.

14 Regarding the first step, the Court must determine whether the defendant that filed the
15 motion met its *prima facie* burden to show that the claim arises out of conduct described in ORS
16 31.150(2). ORS 31.150(3).

17 Regarding the second step: “[T]he plaintiff must submit sufficient evidence from which a
18 reasonable trier of fact could find that the plaintiff met its burden of production.” *Handy v. Lane*
19 *Cty.*, 360 Or 605, 622-23 (2016). A plaintiff cannot avoid the motion by “doing less than that.”
20 *Id.* The evidence submitted in response to an anti-SLAPP motion must be admissible. *Or. Educ.*
21 *Ass’n v. Parks*, 253 Or App 558, 567 (2012), *rev den*, 353 Or 867 (2013) (“[A]ffidavits[,] for
22 purpose of ORS 31.150(4)[,] shall be made on personal knowledge, shall set forth such facts as
23 would be admissible in evidence, and shall show affirmatively that the affiant or declarant is

24 _____
25 ³⁴ See also Testimony of Dave Heyndericks, Legislative Counsel, to House Committee on Judiciary, Subcommittee
on Civil Law, March 19, 2001E (referenced in *Page v. Parsons*, 249 Or App 445, 461 (2012)).

competent to testify as to the matter stated therein.”). *See also Evans v. Unkow*, 38 Cal. App. 4th 1490, 1496 (1995) (evidence must be admissible); *Metabolife Int’l v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (“Under the anti-SLAPP statute, a plaintiff must meet its burden of proving *prima facie* falsity with admissible evidence.”).

V. MR. BOLEN HAS MET HIS BURDEN UNDER THE FIRST STEP OF THE ANALYSIS

Mr. Bolen has met his burden under the first step of the analysis because plaintiff named him as a defendant due to a misidentification that resulted from Mr. Bolen’s presence at a political rally and protest. This satisfies the standard under ORS 31.150(2)(d) and potentially (c).

While the conduct at issue in the Complaint, as it relates to Mr. Bolen, is an alleged punch to the stomach, which would otherwise not be protected under ORS 31.150³⁵, the reason Mr. Bolen has been named as a defendant and accused of punching Mr. Ngo is simply because Mr. Bolen attended the same protest and dressed in the same manner as many others, including the person plaintiff alleges punched him. Plaintiff does not know Mr. Bolen, and did not and could not have identified him by name as the person who allegedly punched plaintiff. Instead, plaintiff relies on the fact that Mr. Bolen was present at the protest, and has a similar appearance to a person Mr. Ngo misidentified by crowd sourcing on social media.

The Court should not permit plaintiff to name essentially random attendees of a leftist protest, based on their appearance or dress, by alleging the attendees were the ones who allegedly injured plaintiff, and then permit plaintiff to search through defendants’ personal belongings and devices in discovery to search for the identity of the people who allegedly injured plaintiff. Allowing the plaintiff to conduct his litigation using this method unquestionably violates defendants’ constitutional right to petition.

³⁵ *San Diegans for Open Gov’t v. San Diego State Univ. Research Found.*, 13 Cal. App. 5th 76, 106 (2017); *Flatley v. Mauro*, 39 Cal. 4th 299, 139 P.3d 2 (2006).

1 The purpose of the procedure set forth in the anti-SLAPP statutes is to prevent lawsuits
2 that chill the valid exercise of constitutional speech and petition rights. ORS 31.150(2);
3 31.152(4). *See also Navellier v. Sletten*, 29 Cal. 4th 82, 94, 52 P.3d 703, 712, 124 Cal. Rptr. 2d
4 530, 540 (2002) (stating that the legislature’s purpose in enacting the anti-SLAPP statutes was to
5 address claims that chill the valid exercise of constitutional speech and petition rights).

6 It is difficult to imagine a right more fundamental than petitioning the federal government
7 through protest. Moreover, subjecting a defendant to a civil lawsuit simply because that
8 defendant holds different political views, or because that defendant attended a political protest
9 wearing black clothing, unquestionably chills the valid exercise of constitutional speech and
10 petitioning activities. There is no question that this lawsuit is designed to chill leftist speech.

11 **VI. PLAINTIFF CANNOT MEET HIS BURDEN OF PRODUCING SUBSTANTIAL**
12 **EVIDENCE TO SUPPORT *PRIMA FACIE* CLAIMS AGAINST MR. BOLEN**

13 A. Mr. Bolen did not Punch Plaintiff

14 All three claims asserted against Mr. Bolen require that plaintiff establish that it was Mr.
15 Bolen that allegedly punched plaintiff and not someone else wearing similar-looking clothing, or
16 with a similar appearance. Mr. Bolen did not punch plaintiff, so plaintiff will not be able to
17 establish that Mr. Bolen is the one who allegedly punched him. Mr. Bolen does not appear like
18 the person in the photos from Mr. Ngo or SomeBasedGuy³⁶, and is not “heavy set,” as plaintiff
19 alleges in his Complaint when describing the person who allegedly punched him.

20 Mr. Bolen did not punch plaintiff, and he does not know who punched plaintiff. Plaintiff
21 does not know who punched him, and bases his allegation on speculative hearsay that
22 misidentifies defendant as the person who allegedly punched him. Mr. Ngo is reviled by
23 hundreds, if not thousands of people who attend these rallies and who dress similarly,

24 _____

25 ³⁶ The person in the photos posted by SomeBasedGuy appears older and heavier than Mr. Bolen, and has lighter colored and shorter hair. His facial features differ from Mr. Bolen’s as well.

specifically to remain anonymous to avoid the white supremacist terror campaigns that Mr. Ngo eagerly facilitates. These people nearly all dress the same, and in a manner similar to how Mr. Ngo describes the person who allegedly punched him on May 1, 2019.

B. Mr. Bolen Cannot be Held Liable for the Actions of Others Under a Theory of Guilt by Association

Next, it appears from the Complaint that plaintiff seeks to recover from Mr. Bolen for the conduct of other people based on the allegation that Mr. Bolen and the others are allegedly members of Antifa. To the extent that plaintiff seeks to hold Mr. Bolen liable for the alleged actions of any other defendants, that claim must fail under fundamental First Amendment analysis.

It is not clear what plaintiff is attempting to do in the Complaint because while he only includes Mr. Bolen in the claims for battery, assault and intentional infliction of emotional distress, he does not separate damages at all, and in his prayer for relief, he prays that an award for all of his damages be entered against all defendants. Of course, the prayer is not part of the causes of action. *Employers' Fire Ins. Co. v. Love It Ice Cream Co.*, 64 Or App 784, 792 (1983). But it may be used to explain other parts of the Complaint. *Finch v. Miller*, 271 Or 271, 275 (1975) (“Despite frequent statements that the prayer is not part of the complaint, we recognize that the prayer is relevant when it ‘tend[s] to explain or qualify’ other parts of the pleading.”) (quoting *Marsh v. Davidson*, 265 Or 532, 537 (1973)).

Mr. Bolen is not now a member of or associated with Rose City Antifa, nor was he at any time relevant to this lawsuit. Bolen Decl., ¶ 7. To the extent that plaintiff seeks to hold Mr. Bolen liable for an alleged association with other Antifa, that claim must fail both factually and legally. Liability cannot be imposed on Mr. Bolen through guilt *by* association or guilt *for* association.

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1 *See, e.g., Gregg Schumacher & Linda Schumacher v. City of Portland*, CV-07-601-MO, 2007
2 WL 9809070, at *3 (D. Or. Sept. 20, 2007) (granting an anti-SLAPP motion in favor of all
3 defendants because plaintiff's theory amounted to guilt by association or guilt for association).

4 The U.S. Supreme Court analyzed this issue decades ago in a case involving a boycott led
5 by the N.A.A.C.P. *See N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct.
6 3409, 3425, 73 L. Ed. 2d 1215 (1982). There, the Court said:

7 Civil liability may not be imposed merely because an individual
8 belonged to a group, some members of which committed acts of
9 violence. For liability to be imposed by reason of association
10 alone, it is necessary to establish that the group itself possessed
11 unlawful goals and that the individual held a specific intent to
further those illegal aims. In this sensitive field, the State may not
employ means that broadly stifle fundamental personal liberties
when the end can be more narrowly achieved.

12 *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 102 S. Ct. 3409, 3429, 73 L. Ed.
13 2d 1215 (1982) (internal citations and quotations omitted).

14 The plaintiff had sought to hold a defendant liable for business losses due to picketing in
15 front of the store that allegedly included some isolated acts of violence. The Court was clear that
16 this is insufficient to impose civil liability through association:

17 Still it is of prime importance that no constitutional freedom, least
18 of all the guarantees of the Bill of Rights, be defeated by
19 insubstantial findings of fact screening reality. That is why this
Court has the ultimate power to search the records in the state
20 courts where a claim of constitutionality is effectively made. And
21 so the right of free speech cannot be denied by drawing from a
trivial rough incident or a moment of animal exuberance the
conclusion that otherwise peaceful picketing has the taint of force.

22 *Id.* at 923–24 (internal citations and quotations omitted).

23 Also similar to here, the plaintiff sought to base the theory of liability—through
24 association—on the similarity of clothing worn by the protestors: black hats.

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1 Respondents also argue that liability may be imposed on
2 individuals who were either “store watchers” or members of the
3 “Black Hats.” There is nothing unlawful in standing outside a store
4 and recording names. Similarly, there is nothing unlawful in
5 wearing black hats, although such apparel may cause apprehension
6 in others. As established above, mere association with either
7 group—absent a specific intent to further an unlawful aim
8 embraced by that group—is an insufficient predicate for liability.

9 *Id.* at 925–26.

10 So too here. It is not illegal to wear black clothing or even a mask.³⁷ And it is not illegal
11 to hold antifascist views, or even be a member of an antifascist club or association.

12 The Court discussed the danger in holding individuals liable for their associations, even
13 when the allegation is that the group to which the defendant is associated has members who are
14 violent:

15 The First Amendment similarly restricts the ability of the State to
16 impose liability on an individual solely because of his association
17 with another. In *Scales v. United States*, 367 U.S. 203, 229, 81
18 S.Ct. 1469, 1486, 6 L.Ed.2d 782, the Court noted that a “blanket
19 prohibition of association with a group having both legal and
20 illegal aims” would present “a real danger that legitimate political
21 expression or association would be impaired.” The Court
22 suggested that to punish association with such a group, there must
23 be “clear proof that a defendant ‘specifically intend[s] to
24 accomplish [the aims of the organization] by resort to violence.’”
Ibid. (quoting *Noto v. United States*, 367 U.S. 290, 299, 81 S.Ct.
1517, 1521, 6 L.Ed.2d 836). Moreover, in *Noto v. United States* the
Court emphasized that this intent must be judged “according to the
strictest law,” for “otherwise there is a danger that one in sympathy
with the legitimate aims of such an organization, but not
specifically intending to accomplish them by resort to violence,
might be punished for his adherence to lawful and constitutionally
protected purposes, because of other and unprotected purposes
which he does not necessarily share.” *Id.*, at 299–300, 81 S.Ct., at
1521.

25 *Id.* at 918–19.

³⁷ Indeed, the governor has *mandated* that residents wear masks while in public right now in an attempt to slow the spread of the Covid virus.

1 Mr. Bolen cannot be held liable for an alleged association with antifascists because that
2 would amount to an infringement on Mr. Bolen's fundamental First Amendment rights. These
3 are the very rights that the anti-SLAPP statutes are designed to protect.

4 **VII. THE ANTI-SLAPP STATUTE APPLIES TO EQUITABLE CLAIMS AS**
5 **WELL**

6 The anti-SLAPP statutes apply to equitable claims as much as they do legal claims.
7 *Handy v. Lane Cty.*, 360 Or 605 (2016) (applying statutes to equitable claims). *See also Equilon*
8 *Enterprises v. Consumer Cause, Inc.*, 29 Cal 4th 53, 52 P3d 685 (2002) (applying the anti
9 SLAPP statute to equitable claims). While it is defendant Bolen's position that plaintiff has not
10 adequately alleged any equitable claims in his Complaint, those claims, to the extent there are
11 cognizable equitable claims in the Complaint, are subject to this anti-SLAPP motion just the
12 same as the legal claims.

13 **VIII. CONCLUSION**

14 Mr. Bolen did not punch plaintiff. Plaintiff has named him as a defendant based on an
15 inaccurate misidentification from an anonymous person online and does not care if he has
16 misidentified Mr. Bolen so long as he is confident that Mr. Bolen is antifascist because plaintiff
17 has a documented obsession with maligning antifascists he is ideologically opposed to. Mr.
18 Bolen has been named in this lawsuit because of his political beliefs and his attendance at
19 antifascist protests. The lawsuit is a clear attempt to chill antifascist political speech. This makes
20 relief under ORS 31.150 appropriate here because Mr. Bolen has been added to this suit for
21 political reasons relating to his petitioning activities, and because plaintiff cannot establish that
22 there is a probability that he will prevail by presenting substantial evidence to support a *prima*

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1 *facie* case. The Court should therefore grant the motion and enter judgment in favor of Mr.
2 Bolen. It should then award Mr. Bolen his reasonable fees and costs incurred in defending
3 against Mr. Ngo's claims.

4 DATED this 21st day of September, 2020.

5 DAVIS ROTHWELL
6 EARLE & XÓCHIHUA, P.C.

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10 *Of Attorneys for Defendant Bolen*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **DEFENDANT BEN BOLEN'S ORS 31.150**

3 **SPECIAL MOTION TO STRIKE** on the following attorney(s) of record:

4 James L Buchal (OSB #921618)
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7 by mailing to the foregoing a true copy thereof, placed in a sealed envelope, with postage
8 prepaid, addressed as listed above, and depositing the same in the United States mail through a
9 post office at Portland, Oregon, on this day, and by e-filing and service through the Oregon e-
10 court file and serve system if registered as a service contact.

11 DATED this 21st day of September, 2020.

12 DAVIS ROTHWELL
13 EARLE & XÓCHIHUA, P.C.

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