**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| DONALD SHOOTER,<br>*Plaintiff-Appellant*,<br><br>v.<br><br>STATE OF ARIZONA; KIRK ADAMS, Husband; JANAE ADAMS, Wife; JAVAN MESNARD, Named as Javan "J.D." Mesnard, Husband; HOLLY MESNARD, Wife,<br>*Defendants-Appellees.* | No. 19-16248<br><br>D.C. No. 2:19-cv-01671-DWL<br><br>OPINION |

Appeal from the United States District Court
for the District of Arizona
Dominic W. Lanza, District Judge, Presiding

Argued and Submitted June 2, 2020
Portland, Oregon

Filed July 22, 2021

Before: Marsha S. Berzon, Daniel P. Collins, and Lawrence J. VanDyke, Circuit Judges.

Opinion by Judge Collins

## SUMMARY*

### Civil Rights

The panel affirmed the district court's dismissal, for failure to state a claim, of an action brought by Donald Shooter pursuant to 42 U.S.C. § 1983 alleging that the Speaker of the Arizona House of Representatives, Javan Mesnard, and the Arizona Governor's Chief of Staff, Kirk Adams, wrongfully engineered Shooter's expulsion as a representative from the Arizona House.

Shooter was expelled from the Arizona House by a 56-3 vote after a legislative investigation into sexual harassment allegations concluded that he had created a hostile work environment. Shooter filed suit against Mesnard, Adams, and the State of Arizona, alleging that his expulsion was the product of a conspiracy to suppress his anti-corruption efforts. Shooter's complaint alleged federal causes of action under § 1983 based on due process and equal protection violations.

Shooter conceded on appeal that the district court correctly dismissed his § 1983 claim against the State of Arizona on the grounds that the State is not a person for the purposes of § 1983. Accordingly, the only question before the panel was whether the district court properly dismissed Shooter's § 1983 claim for monetary relief against Mesnard and Adams.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel first held that even assuming that Shooter had not abandoned his violation of equal protection theory, he failed to state a claim because the complaint failed to plead sufficient facts to raise a plausible inference that Mesnard and Adams acted with a discriminatory intent based on Shooter's sex.

Addressing the procedural due process claims based on a stigma-plus theory, the panel held that even assuming that Shooter had any cognizable liberty interest, the claim failed because Mesnard and Adams were entitled to qualified immunity. The panel stated that in arguing that his due process rights to notice and a hearing were violated, Shooter relied on cases that arose in factual contexts that differed from the internal workings of a state legislature, thereby underscoring his failure to show clearly established law that was particularized to the facts of the case. Moreover, the legislative context in which Shooter's claims arose presented distinct federalism concerns that were not addressed, much less clearly resolved, by the broadly framed due process principles he invoked. Given the lack of any relevant caselaw that placed the merits of his claims beyond debate, Shooter failed to carry his burden to show that the proceedings that led to his expulsion from the Arizona House violated clearly established law.

## COUNSEL

Philip A. Byler (argued), Andrew T. Miltenberg, and Stuart Bernstein, Nesenoff & Miltenberg LLP, New York, New York; Thomas C. Horne, Horne Slaton PLLC, Scottsdale, Arizona; for Plaintiff-Appellant.

Betsy J. Lamm (argued), Ronald Jay Cohen, and Daniel P. Quigley, Cohen Dowd Quigley P.C., Phoenix, Arizona, for Defendants-Appellees Kirk and Janae Adams.

Stephen W. Tully (argued) and Bradley L. Dunn, Hinshaw & Culbertson LLP, Phoenix, Arizona, for Defendants-Appellees Javan "J.D." and Holly Mesnard.

Jeremy Horn (argued), Assistant Attorney General; Michael Tryon, Senior Litigation Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; Defendant-Appellee State of Arizona.

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## OPINION

COLLINS, Circuit Judge:

In early 2018, Appellant Donald Shooter was expelled from the Arizona House of Representatives by a 56–3 vote after a legislative investigation into sexual harassment allegations concluded that he had created a hostile work environment. About a year later, Shooter filed this suit in Arizona state court, alleging that the Speaker of the Arizona House and the Governor's Chief of Staff had wrongly engineered his expulsion in violation of his rights under federal and state law. After the action was removed to federal court, the district court dismissed Shooter's sole

federal claim and remanded the state-law claims back to state court. We agree that Shooter's federal cause of action under 42 U.S.C. § 1983 was properly dismissed for failure to state a claim upon which relief may be granted, *see* Fed. R. Civ. P. 12(b)(6), and we therefore affirm the district court's judgment.

## I

### A

For purposes of reviewing the district court's dismissal for failure to state a claim, we "accept[] all factual allegations in the complaint as true and constru[e] them in the light most favorable to the nonmoving party." *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018) (citations and internal quotation marks omitted). "We may also consider 'materials incorporated into the complaint by reference' and any 'matters of which we may take judicial notice.'" *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1185 (9th Cir. 2021) (citation omitted). Applying these rules, we take the following facts as true.

Donald Shooter served in the Arizona Senate from January 2011 until January 2017 and thereafter in the Arizona House of Representatives until his expulsion in February 2018. Shooter alleges that while he was Chairman of the Senate Appropriations Committee, he discovered "questionable practices" relating to the State's use of "no-bid" contracts in making technology purchases—*i.e.*, contracts "where the State does not engage in a competitive bidding process, but rather chooses a vendor" who is then "able to dictate many of the contract terms including price and service level agreements." In response, Shooter introduced legislation in the Arizona Senate to address such

practices. Shooter's proposed legislation passed both the Arizona House and Senate, but the Governor vetoed it.

After beginning his term in the Arizona House during the next legislative session in 2017, Shooter reintroduced his proposed legislation and continued to work for its passage. Shooter claims that, during this time, he learned that a private investigator was "following his every move." He also alleges that, every time he raised objections about no-bid contracts to the Governor's Chief of Staff, Kirk Adams, a few days later "a local television reporter" named Dennis Welch "would show up at the Legislature with a camera man and aggressively follow and film" Shooter and "then run a story derisive" of him. Shooter began to suspect that the reporter's actions resulted from collaboration with Adams.

In early November 2017, while serving as Chairman of the House Appropriations Committee, Shooter informed Adams that he intended to use his subpoena power to launch an investigation into the State's use of no-bid contracts. Five days later, Welch conducted and publicized an interview with another member of the Arizona House, Representative Michelle Ugenti-Rita, in which the latter accused Shooter of sexual harassment. Shooter claims that Ugenti-Rita's comments in the interview "misconstrued" her "past friendship" with him. Shooter alleges that, at the time of the interview, Ugenti-Rita was engaged to a lobbyist who had previously worked for Adams in the Governor's office, and he asserts that Ugenti-Rita collaborated with Welch in conducting and promoting the interview.

After the interview, Speaker of the House Javan ("J.D.") Mesnard began pressuring Shooter to resign. Rather than resign, Shooter called for a "complete investigation" into the sexual harassment claims against him as well as into "allegations that had surfaced concerning malfeasance and

sexual misconduct by Representative Ugenti-Rita." Shooter expected that the two investigations would be assigned to the Arizona House's Ethics Committee, but Speaker Mesnard instead appointed "a hand-selected committee *of his staff*" to oversee the matter. On November 15, 2017, those staff members hired the outside law firm of Sherman & Howard to conduct the investigations of both Shooter and Ugenti-Rita. Mesnard suspended Shooter from his position as Chairman of the Appropriations Committee pending the investigation, but he did not suspend Ugenti-Rita from her committee chairmanship. Shooter alleges that although the two representatives were each partly reimbursed for their attorneys' fees during the investigation, Ugenti-Rita's attorney was paid 25 percent more than Shooter's.

Shooter also asserts that, in November 2017, Speaker Mesnard unilaterally "created a substantially more restrictive" sexual harassment policy that he then provided to Sherman & Howard to apply retroactively and selectively in assessing the misconduct allegations against Shooter.

After interviewing more than 40 people, Sherman & Howard prepared a detailed 75-page report in late January 2018. Speaker Mesnard released the report to the public shortly thereafter. The report concluded that Shooter "created a hostile working environment" by engaging "in a pattern of unwelcome and hostile conduct toward other Members of the Legislature and those who have business at the Capitol." Specifically, the report found credible evidence that Shooter had "made unwelcome sexualized comments to and about Ms. Ugenti-Rita, including about her breasts"; that he "grabbed and shook his crotch" in front of a female government affairs officer from the Arizona Supreme Court; that he had physically embraced a female newspaper intern "in a prolonged, uncomfortable, and

inappropriate manner"; that he made "sexualized comments" about the appearance of a female lobbyist; and that he made a sexual joke to a newspaper publisher and lawyer. The report also summarized the allegations against Ugenti-Rita and concluded that there was no "credible evidence" that she had violated the harassment policy.

Shooter claims that he was "assured both orally and in writing during the investigation and on the day the report was made available to the public that he was entitled to five days to provide a written response to the investigative report." However, four days later—assertedly before Shooter was able to issue a written reply to the report—the House voted 56–3 to expel him.

**B**

On January 29, 2019, Shooter filed suit in state court against Mesnard, Adams, and the State of Arizona, alleging that his expulsion was the product of a conspiracy among Mesnard and Adams to suppress his anti-corruption efforts. Shooter's complaint asserted a cause of action under 42 U.S.C. § 1983 based on alleged due process and equal protection violations, as well as three state-law causes of action: (1) defamation, (2) false light invasion of privacy, and (3) wrongful termination. The complaint sought only damages and declaratory relief.[1]

[1] As the district court noted, Shooter's complaint also named the spouses of Adams and Mesnard as defendants "for the sole purpose of preserving claims against their respective marital communities." Whether Arizona law would render the spouses liable for satisfaction of any judgment Shooter might obtain against Mesnard and Adams under the § 1983 claim has nothing to do with whether Shooter can state a *direct* claim under § 1983 against the spouses themselves in this context.

In his complaint, Shooter argued that his expulsion deprived him of "a protected liberty interest" and "property right" without due process of law. According to Shooter, his investigation was "the first time in the Arizona Legislature's history" that a "special investigation team" consisting only of the Speaker's staff was used, rather than the Arizona House's "Ethics (or Special) Committee[,] to evaluate conduct complaints." Shooter claims that the investigation and subsequent expulsion proceedings deprived him of "the opportunity to meaningfully defend himself in a hearing before his peers," and that he should have been afforded "the protections of the traditional Ethics Committee" and given "the complete investigative file including the investigators' notes describing the testimony of material witnesses." Shooter alleges that Mesnard violated his due process rights by failing to provide him with these procedural protections and by unilaterally adopting a November 2017 policy that improperly sought to impose a retroactive "zero-tolerance" sexual harassment standard "solely" against Shooter.

On March 11, 2019, Adams and Mesnard removed the action to federal court, with the State's consent. Shortly thereafter, Adams moved to dismiss the complaint for failure to state a claim on which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). With respect to Shooter's § 1983 claim, Adams argued, *inter alia*, that the claim raised a nonjusticiable political question and was barred by absolute and qualified immunity. Mesnard filed a separate motion to dismiss in which he argued, *inter alia*, that Shooter's § 1983 cause of action was barred by absolute immunity. Mesnard's

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Shooter cites no authority supporting the latter proposition, and we are aware of none. In evaluating the § 1983 claim, we therefore disregard Shooter's purported naming of the spouses as defendants.

motion also stated that he "join[ed] in the arguments" of Adams's motion. The State joined both motions to dismiss.

On June 7, 2019, the district court dismissed Shooter's § 1983 claim with prejudice and remanded the remaining state-law claims. The court dismissed Shooter's § 1983 claim against the State of Arizona because, under established precedent, the State is not a "person" within the meaning of that section. The court dismissed Shooter's due process § 1983 claim against Mesnard and Adams on the ground that they were entitled to qualified immunity. According to the district court, Shooter had "utterly fail[ed]" to carry his burden of demonstrating that the rights allegedly violated by Mesnard and Adams were "clearly established." The court dismissed Shooter's equal protection § 1983 claim against these same two defendants on the grounds that it had been abandoned and lacked merit. The district court accordingly granted the motions to dismiss without leave to amend.

Shooter timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

## II

Shooter concedes on appeal that the district court correctly dismissed his § 1983 claim against the State of Arizona on the grounds that the State is not a "person" for the purposes of § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). Accordingly, the only question before us is whether the district court properly dismissed Shooter's § 1983 claim for monetary relief against Mesnard and Adams.[2] That claim was based on the

[2] Shooter's complaint did not seek injunctive relief, and he has not contended on appeal that his request for declaratory relief provides any

contention that, acting under color of state law, Mesnard and Adams had "deprived Shooter of his rights to due process and equal protection." Reviewing de novo, *see Keates v. Koile,* 883 F.3d 1228, 1234 (9th Cir. 2018), we separately consider Shooter's equal protection and due process theories, and we conclude that the district court properly dismissed Shooter's § 1983 claim under either theory.

**A**

The district court addressed Shooter's equal protection theory only in a footnote, concluding that it was both "abandoned" and meritless. The court's abandonment holding is doubtful, because Shooter's opposition to Adams's motion to dismiss expressly, albeit briefly, defended the viability of that theory. But even assuming that the theory was not abandoned, we agree with the district court that Shooter failed to state a claim under § 1983 based on an equal protection theory.

"'To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment[,] a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.'" *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)). On appeal, the only protected class that Shooter invokes is sex, and he argues that his complaint alleged

basis for avoiding the district court's conclusions. Any such contention is therefore forfeited. *See Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016).

sufficient facts to state a claim for sex discrimination. We disagree.

Although the complaint adequately pleads that Ugenti-Rita was treated differently from Shooter in a variety of respects, it fails to plead sufficient facts to raise a plausible inference that Mesnard and Adams acted with a "discriminatory intent" *based on Shooter's sex*. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009). On the contrary, the complaint affirmatively alleges that the differential treatment was due to Mesnard's and Adams's asserted desire "to end Representative Shooter's attempts to uncover evidence of corruption related to high priced no-bid contracts and other non-competitive procurement processes." Because the complaint's allegations do not raise a plausible inference of sex discrimination, Shooter's equal protection claim based on such a theory was properly dismissed.

**B**

Shooter contends that he was deprived of a "protected liberty interest" without due process of law in that he "lost his seat" in the Arizona House "and was defamed at the same time." He thus relies on what we have called a "stigma-plus" theory, under which procedural due process protections extend to "reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of a right or status previously recognized by state law." *Endy v. County of Los Angeles*, 975 F.3d 757, 764 (9th Cir. 2020) (citations and internal quotation marks

omitted).[3] Mesnard and Adams deny that Shooter has any such cognizable liberty interest here, but we need not resolve that dispute. Even assuming *arguendo* that Shooter has such a liberty interest, we conclude that Shooter's due process claim fails because Mesnard and Adams are entitled to qualified immunity.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation omitted). A government official "violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id*. at 741 (simplified). Although there need not be a case directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. "The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). We have discretion to address the "'clearly established' prong" of the qualified immunity test first; if we conclude that the relevant law was not clearly established, we need not address the other prong concerning the underlying merits of the constitutional claim. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *James v. Rowlands*, 606 F.3d 646, 651 (9th Cir. 2010).

[3] Although Shooter's complaint alternatively relied on the theory that he had a "property right" in his seat, he abandoned this theory in his opening brief on appeal.

Here, Shooter asserts two distinct due process theories. We conclude that both are barred by qualified immunity.

**1**

Shooter first asserts that his procedural due process rights were violated during the proceedings leading up to his expulsion from the Arizona House of Representatives. Specifically, Shooter asserts that he had the right to access to the evidence against him, a pre-expulsion hearing before a committee of his peers at which he would have the opportunity to cross-examine his accusers, and the additional protections of Ethics Committee procedures. We find the "clearly established" prong dispositive as to this particular claim, and we therefore do not address whether, under the facts as pleaded, Mesnard and Adams actually violated Shooter's constitutional rights.

**a**

In contending that he had a clearly established right to certain additional procedural protections, Shooter relies primarily on caselaw enunciating generalized due process principles, such as the right to "notice" and an "'opportunity to be heard'" in connection with the deprivation of a liberty or property interest, *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (citation omitted); the need for "some form of hearing" before "an individual is finally deprived of a property interest," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); and the right "to an impartial and disinterested tribunal in both civil and criminal cases," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). *See generally Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (citation omitted)); *Greene v. McElroy*, 360 U.S. 474, 493 (1959) (emphasizing "the

traditional procedural safeguards of confrontation and cross-examination"). But in light of two considerations, we find this caselaw inadequate to establish that Shooter had a "clearly established" right to the particular procedural protections he asserts.

First, in addressing qualified immunity, the Supreme Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citations and internal quotation marks omitted); *see also City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015); *al-Kidd*, 563 U.S. at 742. "As th[e] Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case," because "[o]therwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (simplified). Shooter's arguments contravene this teaching by relying entirely on overarching principles that define his due process rights at a very "high level of generality." *Kisela*, 138 S. Ct. at 1152. In arguing that his due process rights to notice and a hearing were violated, Shooter relies on cases that arose in factual contexts that differ from the internal workings of a state legislature, thereby underscoring his failure to show "clearly established law" that is "'particularized' to the facts of the case." *White*, 137 S. Ct. at 552.

Second, and relatedly, the legislative context in which Shooter's claims arise presents distinct federalism concerns that are not addressed, much less clearly resolved, by the broadly framed due process principles he invokes. Shooter

asserts, in effect, that the Fourteenth Amendment's Due Process Clause constrains the ability of a state legislature to exercise its authority, under the state constitution, to determine the procedures for the expulsion of one of its members. *See* Ariz. Const. art. IV, Pt. 2 § 11 ("Each house may punish its members for disorderly behavior, and may, with the concurrence of two-thirds of its members, expel any member."); *id*. § 8 ("Each house, when assembled, shall choose its own officers, judge of the election and qualification of its own members, and determine its own rules of procedure."). Such a claim presents unique federalism concerns given that "the authority of the people of the States to determine the qualifications of their most important government officials" "lies at the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (simplified). The Supreme Court has recognized that this authority is "not without limit," as "[o]ther constitutional provisions, most notably the Fourteenth Amendment, proscribe certain qualifications." *Id*. But the Court has also expressly "recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." *Id*. at 468. Because application of due process principles in the context of the internal operations of a state legislature raises distinctive concerns, the more general due process caselaw that Shooter invokes cannot be understood as having "clearly established" that his rights were violated in connection with his expulsion. *al-Kidd*, 563 U.S. at 741.

**b**

We turn, then, to caselaw specifically addressing the application of due process principles in the context of a legislative expulsion. The parties have not pointed us to any

such case in this court or in the Supreme Court, and we have not located any such precedent.[4] Given this absence of "binding precedent," we "may look to decisions from the other circuits" to determine whether they reflect a "consensus of courts" that can be said to clearly establish the relevant law. *Martinez v. City of Clovis*, 943 F.3d 1260, 1276 (9th Cir. 2019) (citations and internal quotation marks omitted); *see also al-Kidd*, 563 U.S. at 742 ("absent controlling authority," "what is necessary" to show clearly established law is "a robust 'consensus of cases of persuasive authority'" (citation omitted)). The relevant out-of-circuit precedent, however, falls far short of clearly establishing that the manner of Shooter's expulsion violated due process.

The parties have identified only one circuit decision that has squarely addressed the merits of a federal procedural due process challenge to a legislative expulsion, and that decision rejected the claim. In *Monserrate v. New York State Senate*, 599 F.3d 148 (2d Cir. 2010), the New York Senate convened a select committee to investigate one of its members, Senator Monserrate, after he was convicted of misdemeanor reckless assault. *Id*. at 152. The committee met on six occasions over a two-month period, but Monserrate "declined the invitation to present arguments and evidence in person, through counsel, or in writing." *Id*. at 153. The committee ultimately issued a report recommending either censure or expulsion of Monserrate.

[4] Shooter cites *Powell v. McCormack*, 395 U.S. 486 (1969), but that case addressed a refusal to *seat* a member of the House of Representatives, and the decision says nothing about the adequacy of the procedures applicable to an *expulsion*. Indeed, the *Powell* Court expressly rejected the argument that the refusal to seat Powell could be characterized as an expulsion or that it "should be tested by whatever standards may govern an expulsion." *Id*. at 512.

*Id.* Approximately four weeks later, the Senate voted overwhelmingly to expel him. *Id*. Monserrate and six voters from his district sought to enjoin the special election to replace him, arguing, *inter alia*, that his due process rights had been violated during the proceedings leading to his expulsion, but the district court denied a preliminary injunction. *Id*. at 152, 158. The Second Circuit affirmed, holding that the district court had properly concluded that Monserrate was unlikely to succeed on the merits. *Id*. at 160.

Specifically, the court held that, because Monserrate had been notified of "the parameters of the Select Committee's investigation" and was aware that "expulsion was a possible recommendation," he had received sufficient notice for due process purposes. 599 F.3d at 158–59. Moreover, because Monserrate had been afforded an "'opportunity to present reasons, either in person or in writing, why [the] proposed action should not be taken,'" he "received a sufficient opportunity to be heard." *Id*. (citation omitted). Monserrate complained that he had not been given access to all of the materials on which the committee relied and that "he was not able to cross-examine the two witnesses that Select Committee staff attorneys interviewed," but the court rejected the notion that these circumstances amounted to a due process violation: "Even if the process Monserrate received did not include these features, he nevertheless received a sufficient opportunity to clear his name—and that is all the Constitution requires." *Id*. at 159–60.

To the extent that it provides any guidance here, *Monserrate* suggests that Shooter's due process claim may lack merit. For each specific allegation addressed in the report prepared by outside counsel in Shooter's case, the report summarizes the evidence on which its conclusions are based, as well as counsel's description of Shooter's response

to each of those allegations.[5] Shooter's complaint disputes many of the conclusions of the report, objects to the lack of access to all of the investigative files on which the report was based, and protests that the House voted to expel him four days after the release of the report, assertedly before he had an opportunity to submit a written response. But the complaint notably does not deny that Shooter was given an opportunity to present his side of the matter to the outside counsel conducting the investigation. Moreover, the complaint specifically acknowledges that the report absolved Shooter of more than half of the claims of sexual harassment made against him. Shooter's opportunity to address with investigators each of the specific allegations against him arguably provided him with a "sufficient opportunity to clear his name," and Shooter's own allegations confirm that he knew the "parameters" of the investigation concerning him. *Monserrate*, 599 F.3d at 159–60. We nonetheless need not and do not decide whether Shooter's due process claim has merit. For purposes of qualified immunity, it suffices to note that *Monserrate* certainly does not establish—much less place "beyond debate"—the view that Shooter should *prevail* on his due process claim. *al-Kidd*, 563 U.S. at 741.

We have identified only one other published federal court decision in which a three-judge panel addressed the merits of a direct challenge, on federal due process grounds, to a legislative expulsion. In *McCarley v. Sanders*,

[5] The report was extensively referenced in Shooter's complaint and was submitted to the district court, without objection from Shooter, in support of Adams's motion to dismiss. We therefore may properly consider the statements made in the report, although we do not assume their truth. *See United States v. Corinthian Colleges*, 655 F.3d 984, 998–99 (9th Cir. 2011).

309 F. Supp. 8 (M.D. Ala. 1970), a three-judge district court held that the Alabama Senate violated the procedural due process rights of Senator McCarley when it expelled him, and the court ordered his reinstatement. *Id*. at 11–12. Even assuming that this decision is entitled to any significant weight in the clearly-established-law inquiry, *but cf*. *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1315 n.24 (9th Cir. 1981) ("An unappealed decision of a statutory three-judge court has the same precedential weight for other courts of the district or circuit as any district court decision."), it is of no assistance to Shooter. On the contrary, because the extreme facts of *McCarley* bear no resemblance to this case, that decision underscores the *absence* of any clearly established law governing Shooter's claim.

In *McCarley*, an Alabama newspaper reported that McCarley was implicated in an alleged bribery scandal, and later that same day the Alabama Senate established an investigating committee. 309 F. Supp. at 9–10. The very next day, the committee began holding hearings, which were closed to the public. *Id*. at 10. McCarley was allowed to testify, but neither he nor his attorney were present at the ensuing hearings at which 18 other witnesses testified. *Id*. No transcript of these hearings was prepared before the Senate expulsion vote, which occurred only eight days after the newspaper article was published. *Id*. at 9, 11. The full Senate itself took no evidence and acted based only on a brief five-page report released by the committee shortly after midnight on the day McCarley was expelled. *Id*. at 10–12. At 9:30 PM that same day, the Senate's Rules Committee reported a resolution recommending McCarley's expulsion, *id*. at 10–11, and "[a]pproximately twenty minutes after the introduction of the resolution it was passed by a vote of 32 in favor of expulsion and one against," *id*. at 11. Noting the lack of any evidentiary record before the Senate and the

denial of any meaningful "opportunity" for McCarley "to defend himself," the court concluded that the expulsion proceedings failed to "accord[] even the barest rudiments of due process." *Id*. at 11–12.

The facts of Shooter's case are materially different. Here, an outside law firm was retained to conduct an investigation of Shooter and, more than 10 weeks later, it submitted a detailed 75-page report that, for each specific allegation, summarized the relevant evidence and a purported response from Shooter. *See supra* at 7–8. Regardless of whether Shooter is correct that the procedures afforded to him were deficient, they substantially exceeded the hasty, secretive, and summary expulsion proceedings in *McCarley*. Because the latter decision is so "readily distinguishable," it does not place the merits of Shooter's claim "beyond debate." *Stanton v. Sims*, 571 U.S. 3, 10–11 (2013) (citation omitted).

Shooter cites only one other case that squarely addressed the merits of a federal due process challenge to a state legislative expulsion, namely, the Pennsylvania Supreme Court's decision in *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). But like *Monserrate*, *Sweeney* rejected the legislator's claim. In *Sweeney*, a member of the Pennsylvania House of Representatives was summarily expelled after his conviction on federal mail fraud charges. *Id*. at 700–01. Nine days before his expulsion, Representative Sweeney was notified "by telegram" that the House would meet a week later "to discuss his future status as a House member" and he was invited "to attend alone or with counsel." *Id*. (simplified). After the House Ethics Committee concluded it had no jurisdiction over Sweeney's case, *id*. at 701 & n.9, the House proceeded to a vote on a resolution to expel Sweeney, which was adopted by a 176–1

vote, *id*. at 701–02. Citing "the circumscribed nature of a legislator's private interest in his elected office and the overriding need for the Legislature to protect its integrity through the exercise of the expulsion power," the court observed that "it may be that the requirement of a two-thirds vote to expel by *itself* satisfies procedural due process." *Id*. at 713 (emphasis added). The court nonetheless did not need to resolve that issue, because it concluded that, in light of the "competing interests at stake in legislative expulsion," Sweeney received "adequate notice of the impending House action." *Id*. *Sweeney* provides little guidance one way or the other in Shooter's case, because *Sweeney* involved an expulsion that was based on a *criminal conviction* after a jury trial in which Sweeney presumptively received the full panoply of due process protections. *Id*. at 700. To the extent that *Sweeney* has any arguable relevance here, its holding that the "competing interests at stake in legislative expulsion" must be considered in assessing the adequacy of the procedures, *id*. at 713, cuts *against* Shooter's claim.

Given the lack of any relevant caselaw that places the merits of his claims beyond debate, Shooter has failed to carry his burden to show that the proceedings that led to his expulsion from the Arizona House violated clearly established law.

**2**

Shooter also asserts a right under the Due Process Clause "not to be subjected to a retroactively applied" "zero-tolerance" sexual harassment policy. In addressing whether this particular claim was properly dismissed, we rely only on the first prong of the qualified immunity inquiry, *viz.*, whether the defendants "violated a statutory or constitutional right." *al-Kidd*, 563 U.S. at 735. Even assuming *arguendo* that the Due Process Clause may place some limit on a

Legislature's ability to retroactively change the substantive standards that govern its members' conduct, the allegations of Shooter's complaint fail to raise a plausible inference that there was any *materially* retroactive tightening of the applicable standards here. *See Iqbal*, 556 U.S. at 678–80.

To state a claim that he was subjected to a retroactive change in the Legislature's sexual harassment policy, Shooter would have to plead sufficient facts to raise a plausible inference that, at the time he acted, the Arizona Legislature's policy *allowed* the sort of conduct of which he was accused. Shooter has utterly failed to do so. As noted earlier, the allegations against Shooter included the following: that he "grabbed and shook his crotch" in front of a female government affairs officer from the Arizona Supreme Court; that he made "sexualized comments" about a female lobbyist's appearance; and that he hugged a female newspaper intern "in a prolonged, uncomfortable, and inappropriate manner." *See supra* at 7–8. The notion that the Arizona Legislature previously *permitted* this type of conduct is simply implausible, and nothing in Shooter's complaint supports such an inference. Because Shooter has not pleaded enough facts to raise a threshold question of retroactivity, we need not address whether an actual retroactive tightening of standards would be permissible in this context.[6]

[6] Because we affirm the district court's dismissal of Shooter's due process claim on qualified immunity grounds, we need not address Mesnard's and Adams's other arguments, including their contentions that they are entitled to legislative immunity.

## III

In light of the foregoing, Shooter has failed to demonstrate a clearly established right to any due process protections beyond those already afforded to him by the Arizona House of Representatives. The district court therefore correctly held that Mesnard and Adams were entitled to qualified immunity. And because Shooter has failed to show that he could plead any additional facts that would warrant a different conclusion, the district court did not abuse its discretion in failing *sua sponte* to grant him leave to amend. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1144 (9th Cir. 2015). We therefore affirm the judgment of the district court dismissing Shooter's § 1983 claim with prejudice.

**AFFIRMED.**