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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. **SHAWNA COX, JAKE RYAN, et al.,** Defendants.	Case No.: 3:16-CR-00051-BR-26 **DEFENDANT'S MOTION TO DISMISS COUNT 1 AS OVERBROAD**

Certificate of Counsel

Undersigned counsel for Jake Ryan conferred in real time with AUSA Craig Gabriel about the issues raised in this motion. The government opposes the motion and the relief sought.

Motion

Defendants Jake Ryan and Shawna Cox, by and through counsel Jesse Merrithew and Tiffany Harris, and on behalf of all other defendants, respectfully moves this Court for an order

dismissing count one of the indictment because the criminal statute on which it is based is overbroad in violation of the Fifth and First Amendments to the U.S. Constitution.

This motion challenges 18 U.S.C. § 372—a conspiracy statute—as substantially overbroad because it targets speech and criminalizes statements entitled to protection under the First Amendment. The related doctrine of vagueness is addressed in a companion motion, filed by counsel for co-defendants O'Shaughnessy and Ryan.

Memorandum of Law

All defendants are charged with violating 18 U.S.C. § 372 by conspiring to interfere with federal officers in the performance of their official duties. That statute is unconstitutional because it seeks to criminalize speech and assembly without any limitation consistent with the First Amendment. In this case, the conflict between the statute and the First Amendment is particularly glaring because the statute is aimed at people directing grievances at public servants, thereby threatening one of the core values of the First Amendment. *See Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion.")

I. Overbreadth Challenges Generally

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Defendants may challenge a statute as overbroad in violation of the First Amendment "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601,

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612 (1973); *Arce v. Douglas*, 793 F.3d 968, 984 (9th Cir. 2015) (same). A statute is facially invalid under the overbreadth doctrine if it prohibits a substantial amount of freedoms protected by the First Amendment as compared to its plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 473 (2010).

To determine whether a statute is overbroad, a court first must identify the meaning of the statute. *United State v. Williams*, 553 U.S. 285, 293 (2008).

II. History of 18 U.S.C. § 372

The text of the statute provides:

> If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined under this title or imprisoned not more than six years, or both.

18 U.S.C. § 372.

To say that that § 372 was drafted and passed in a time of tension would be an enormous understatement. The bill was passed in July of 1861, three months into the Civil War, and after the secession of the Confederate States. Steven C. Neff, Justice in Blue and Gray: A Legal History of the Civil War 20 (Harvard Univ. Press 2010).[1] Seats vacated by southern senators and House members left the 37th Congress with large Republican majorities bent on preserving the Union. *Id*. This very same Congress would go on to pass the Habeas Corpus Suspension Act of

[1] Professor Neff explains in his book that the bill grew out of the philosophy that President Lincoln and the Radical Republicans in control of the 37th Congress shared—that the crisis in the Southern states was not a war, it was "a law-enforcement action … to enforce the *ordinary* law of the land against recalcitrant *individuals* in the Southern states." Neff, at 20 (emphasis in original).

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1863. The conspiracy statute was one of several wartime powers extended to the executive branch as part of the effort to put down the rebellion. *Id*.

Congress enacted 18 U.S.C. § 372 to give the federal government a tool to arrest and prosecute people in the South who resisted the power of the federal government. 56 Cong. Globe, 37th Cong., 1st Sess. 277 (1861) (quoting the statements of Senator Trumbull in support of the bill).[2] The bill provoked an official protest from the remaining Democrats and Whigs in the Senate. *Id*. at 276-77. Seeing the bill through the lens of the current war, they argued that the bill was an unprecedented and undue expansion of prosecutions for treason that would water down the constitutional requirements for bringing those cases—specifically, proof of an overt act by two witnesses. *Id*. They worried that the bill "would give, from the uncertainty of the offense charged, and the proof requisite to sustain it, the utmost latitude to prosecutions founded on personal enmity and political animosity and the suspicions as to intention which they inevitably engender." *Id*. at 277.

Senator Trumbull and the bill's proponents rejected critiques of the bill based on the law of treason because they rejected the premise that a legitimate war had been declared. In the majority Republican view, there was no "war," only a limited insurrection in the Southern States. Therefore, Trumbull argued, "the object of this bill is not under another name to punish traitors, but it is to punish persons who conspire together to commit offenses against the United States not analogous to treason." *Id*. He cited the cases of (1) a "land officer" in a territory being "driven off by the settlers who are opposed to any sale of the public lands taking place"; (2) a postmaster St. Joseph, Missouri, who was prevented from "performing the duties of his office" by "threats

[2] A copy of this legislative history is included as Appendix A for the convenience of the Court and parties.

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of violence and intimidation" by "a number of persons"; and (3) "Other instances have occurred where route agents upon some of the railroads have been deterred from performing their duties." *Id*. Senator Trumbull did not offer any details as to how the offending parties prevented the execution of official duties—whether, for example, through picketing, petitioning, and peaceful protest or by direct threats of violence. Again, integral to Senator Trumbull's reasoning was his claim that the United States was not, in fact, at war, and therefore prosecuting acts of resistance in the South (while vital to the military objectives of the Union) did not require the evidence or legal formalities of prosecuting treason. *Id*. (explaining that the acts of resistance in the South that he cites were not treason because treason "consists in levying war against the United States… .").

The concern raised by the Congressional minority is that, in lessening the standards for proving a crime analogous to treason, Congress blurred the line between treason and protected conduct under the First Amendment. That blurred line is dangerous because it invites criminal prosecutions "in times of high excitement" based on political beliefs. *Id*.[3]

III. Application

The statute proscribes a substantial amount of protected speech and is therefore overbroad in violation of the First Amendment. In particular, by punishing "two or more persons" who "conspire to prevent, by . . . threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties

[3] During Reconstruction, Congress enacted a civil analogue in an attempt to reign in the activities of the Ku Klux Klan. *See Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977) (discussing the legislative history of the Civil Rights Acts of 1871 generally); *see also* 77-68 Memorandum Opinion for the Attorney General 276 (Dec. 14, 1977) (discussing the relationship between this act and the Civil Rights Acts).

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thereof," § 372 expressly punishes speech protected by the First Amendment. *See Watts v. United States,* 394 U.S. 705 (1969) (statute that punished "knowingly and willfully . . . (making) any threat to take the life of or to inflict bodily harm upon the President," expressly criminalized pure speech); *see also Chaffee v. Roger*, 311 F.Supp.2d 962, 970 (D. Nev. 2004) (noting that a Nevada statute "by not defining the terms 'threat' or 'intimidation'" to exclude constitutionally protected speech, "is likely both overbroad and vague… .").

The First Amendment protects threats that, given their context and the speaker's intent, are hyperbolic political statements. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1072 (9th Cir. 2002) (*en banc*). It does not protect "true threats." *Id*. A true threat is "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." *Id*. at 1077. "It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat." *Id*. at 1075.

Section 372 makes no distinction between "true threats" and threatening language that is otherwise protected. Congress' intention to apply § 372 broadly, without regard for this critical distinction, is plain in the language of the statute. The statutory language contains no requirement that the actionable "threat" or "intimidation" evidence a serious expression of intent to inflict bodily harm. *See also, Virginia v. Black*, 538 U.S. 343, 364 (2003) (holding that a provision of Virginia law eliminating any mental state requirement in relationship to cross burning was unconstitutional). It also contains no requirement that the speaker intentionally or knowingly communicate the threat. The statute's wartime history and emergent circumstances

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may explain its lack of precision, but cannot justify its unlawful curtailment of protected speech. In 1861, hyperbolic political threats against federal officials made by those who sympathized with the Confederacy may have been enough to prevent a federal official from carrying out his duties. A statement that today would clearly be protected speech might have seemed more dangerous with the country headed into a bloody Civil War. For example, the sweeping text of § 372 would punish the Vietnam War protester's statement to a group in *Watts* that "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 706. The Supreme Court held that *Watts* threat was protected First Amendment speech and not a "true threat." *Id*. at 708. That statement, made to a group of fellow protestors who agreed with it, however, would violate § 372 because "two or more persons" would have "conspire[d] to prevent, by . . . threat" the President of the United States "from discharging any duties" of his office.

Conclusion

The protection of government employees from threats of violence for performing their jobs is a legitimate, legislative goal. However, that goal must be balanced with the rights of citizens to lodge grievances against government officials—often loudly and in large groups. The Supreme Court has clearly stated where that line between protected speech and unlawful speech must be drawn—with the "true threat". In order to suppress the secessionists, Congress aimed § 372 directly at thoughts, speech, and expression. It did not require any overt act or mental state with regard to the use of "force, threat, or intimidation." The intent was to give the executive branch the means to prosecute the inchoate crime in order to aid the federal government in its

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political goal of winning the Civil War. The statute came into existence as a political tool to suppress and criminally punish political speech disfavored by the federal government, and its broad sweep allows the government to use it in the same manner today. .

The 37th Congress, in attempting to retain federal control over states that were in open rebellion, failed to adequately balance the need to police true threats against the right of the people to speak and assemble under the First Amendment. In doing so, it passed a law that is facially unconstitutional. This Court should so hold and dismiss count one of the indictment.

DATED this 27th day of April, 2016

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