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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- JON RITZHEIMER, Defendant	Case No. 3:16-CR-00051-02-BR MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PRODUCTION OF INFORMATION REGARDING LAW ENFORCEMENT'S USE AND DISPLAY OF FORCE

Mr. Ritzheimer, through counsel Terri Wood, respectfully submits this Memorandum of Law in support of his Motion to Compel filed on behalf of all defendants. This Memorandum addresses the facts, the law, and arguments for granting his Motion.

Summary of Facts

Mr. Ritzheimer and other defendants possessed firearms before and during the protest at the Malheur National Wildlife Refuge (hereafter, the Refuge). He and other defendants were present at the Refuge to protest the federal government's treatment of the Hammonds, local ranchers convicted of

arson on grazing lands, and to protest federal "ownership" and control over public lands that he and others believed to be unconstitutional. They intended their protest to be peaceful. Mr. Ritzheimer and other defendants carried firearms at times while at the Refuge and other locations in Harney County. Open carry is legal in Harney County, except where expressly prohibited; and persons may lawfully possess firearms and hunt at the Refuge, except where expressly prohibited.

Mr. Ritzheimer and other defendants also deeply value their Second Amendment right to bear arms as a core freedom. Mr. Ritzheimer has historically engaged in lawful open carry of firearms at protest activities as a form of symbolic speech. He and other defendants carried firearms during the protest at the Refuge in part to symbolically proclaim themselves free men with constitutional rights, in the face of perceived governmental tyranny and oppression.

At the start of the protest on January 2, 2016, there was little visible law enforcement presence. As time passed, Mr. Ritzheimer and other defendants followed news media and social media reports concerning law enforcement build-up and response to the protest; they also received information about this from militia members active outside the Refuge, as well as locals who visited them at the Refuge. In addition to learning of increased law enforcement presence, the protestors learned they were being denounced as armed extremists, resulting in school closures and the barricading of the courthouse. Mr. Ritzheimer and other defendants also made personal observations of law enforcement build-up and officers' responses to them. Although law enforcement publicly stated a desire

for a peaceful resolution, these actions—including labeling the protestors armed extremists—conveyed the opposite.

Mr. Ritzheimer and other defendants were aware that law enforcement had used excessive force in response to citizens refusing to comply with demands, including the tragic events at Waco and Ruby Ridge. On January 5th, Mr. Ritzheimer and other defendants received what turned out to be false information that the FBI planned to raid the Refuge that night, and feared they would be massacred by agents. Those fears continued as law enforcement build-up and hostilities towards the protestors increased, and Mr. Ritzheimer and other defendants heard of local hospitals preparing for a mass casualty incident. Those fears proved well-founded with the January 26th armed ambush of Ammon Bundy and other protestors, resulting in the homicide of LaVoy Finnicum and wounding of Ryan Bundy.[1]

The Law

1. Discovery Rights

The Ninth Circuit addressed Rule 16's right for a defendant to obtain records within the government's control that are material to preparing the defense in *United States v. Stever*, 603 F3d 747, 752 (9th Cir. 2010):

> Federal Rule of Criminal Procedure 16 grants criminal defendants a broad right to discovery. The government must disclose, upon defendant's request, all "documents ... within the government's possession, custody, or control ... [that are] material to preparing the defense [.]" Fed. R. Crim. P. 16(a)(1)(E)(i). Information is in the possession of the government if the prosecutor "has knowledge of and access to the documents sought by the

[1] All facts stated above are counsel's succinct summary of information from discovery and public domain sources, and not intended as an FRE 801 admission by Ritzheimer or any other defendant. The government has its facts, as well.

> defendant." *United States v. Santiago,* 46 F.3d 885, 893 (9th Cir.1995). "A defendant must make a threshold showing of materiality, which requires a presentation of facts which would tend to show that the Government is in possession of information helpful to the defense." *Id.* at 894 (internal quotation marks and citation omitted).

To show materiality under this rule the defendant must demonstrate that the requested evidence " 'bears some abstract logical relationship to the issues in the case . . . . There must be some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor.'" *United States v. Lloyd*, 992 F.2d 348, 350-51 (D.C. Cir. 1993)(citations omitted). This materiality standard normally "is not a heavy burden"; rather, "evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.' " *Id.*

The Court in *United States v. Poindexter,* 727 F.Supp. 1470, 1474-77 (1989) ordered the government to produced documents that would help show the defendant did not have the specific intent to enter into an agreement to commit the object of the conspiracy, because he had no motive to do so.

Due Process guaranteed by the Fifth Amendment requires disclosure of evidence that impeaches the credibility of law enforcement officers under *Brady* and *Giglio*. Evidence of a witness' bias or interest also must be disclosed. *See United States v. Bagley*, 473 U.S. 667 (1985).

Stever, supra, discusses the Fifth and Sixth Amendment guarantee of the right to "a meaningful opportunity to present a complete defense," which was

violated by the trial court's failure to compel production of discovery and exclusion of what evidence the defense had on the same subject. This right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt," and "the right to present the defendant's version of the facts." *Stever*, 603 F.3d at 755 (citations omitted).

2. Theory of Defense

The Second Amendment right to bear arms in self-defense is broader than the common law defense of self-defense. In short, the Second Amendment "right to bear arms" is the right to bear arms in self-defense. This constitutional right to self-defense is ongoing, requires no current or imminent threat, and allows one to defend oneself not only against an individual or individuals, but against the government. *District of Columbia v. Heller*, 544 U.S. 570 (2008).

An individual has a Second Amendment right to keep and bear arms for the purpose of self-defense without being a member of a militia. *Id.,* at 595. Indeed, the right to defend oneself is a "central component of the right itself." *Id*. at 599. The right to self-defense is in the context of the right to keep and bear arms against both public and private violence. *Heller*, 554 U.S. at 594.

In contrast to the Second Amendment, the defense of self-defense requires a *prima facie* showing by the defendant that he had a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force, and that the defendant used no more force than was reasonably necessary under the circumstances. *United States v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006). The defense of self-defense requires an immediate threat to justify the use of force, while the Second Amendment right

to possess firearms in self-defense does not require an immediate threat, nor does it justify the use of a deadly force against another. Defendants in the case at bar are not alleged to have used or attempted to use deadly force.

The right to self-defense includes the Fourth Amendment right to defend oneself against excessive force by the government. *U.S. v. Span*, 970 F.2d 573, 577 (9th Cir. 1992). Excessive force by government officers violates the Fourth Amendment. *Id*; *see also Graham v. Connor*, 490 U.S. 386 (1989).

Open carry of firearms during a protest is also protected symbolic speech under the First Amendment. The First Amendment protects not only speech, but also conduct that is "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) *citing Spence v. Washington*, 418 U.S. 405-409 (1974). "[T]he equivalence of symbolic expression and verbal expression has been part of American law since the Framing era." Eugene Volohk, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 Georgetown L.J. 1057, 1063 (2009)(footnotes omitted). The defense has not found a reported case that expressly held firearm possession to be protected symbolic speech, but *Brandenburg v. Ohio*, 395 U.S. 444 (1969), involved a cross burning by armed protestors who represented violence as likely if the federal government did not change its ways.

Mr. Brandenburg, a member of the Ku Klux Klan, and 12 others, some of whom were armed, burned a cross in a remote area to express racist views and suggest that violence was possible "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race." *Id*. at 446. At the trial, the evidence consisted of two films showing the cross burning; testimony

identifying Brandenburg as the person who spoke to a reporter and spoke at the rally; and a rifle, a shotgun, ammunition, a bible and a red hood worn by the speaker at the rally. *Id.* at 445. Mr. Brandenburg was convicted under Ohio's Criminal Syndicalism statute that outlawed "advocat(ing) the duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembl(ing) with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.*, *quoting* Ohio Rev. Code Ann. §2923. The Supreme Court reversed Brandenburg's conviction because the statute impermissibly "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action." *Id.* at 449.

Argument

That the requested records are within the government's control should be beyond dispute. The specificity of the 18 particularized requests in the Motion To Compel derives from the limited information regarding those matters that the defense has so far found in discovery, as well as in emails published by Governor Brown's office and other information in the public domain. From those sources it is clear that the FBI was in charge of the law enforcement response to the protestors, and highly likely to have information responsive to all of the 18 requests in its possession.

The requested information is material to the defense theory that protestors were peaceful, non-violent, and armed for lawful reasons and in exercise of their constitutional rights. That defense negates the criminal intent

the government must prove beyond a reasonable doubt, i.e., that defendants' possession of firearms was intended as a "true threat" to intimidate federal employees to abandon their workplace. *See, Poindexter, supra.*

The information sought by Mr. Ritzheimer on behalf of defendants presents a clear, logical relationship to central issues in this case. *Cf., Lloyd, supra* (the information must bear "some abstract logical relationship to the issues in the case"). For example, the details concerning the number of armed officers present, the tactical gear worn, the types of weapons displayed, and the use of military-style vehicles and aircraft are necessary to show the threat of excessive force defendants' perceived and justly feared.[2] The same is true for information concerning snipers, SWAT teams, and planning for a Mass Casualty Incident. Similarly, the information concerning school closure and converting the courthouse to a military-style compound logically shows law enforcement viewed the protestors as dangerous individuals warranting a violent response. That defendants' fears of law enforcement using excessive force were rationally-based gives strength to their carrying of arms in self defense, as well as their

[2] The government intends to use evidence regarding Mr. Ritzheimer's wearing of combat dress and carrying an AR-15-style rifle with a sling, and a photo of him "in tactical gear with what appears to be an AR-15-style weapon," as well as "evidence seized from the Refuge, including over 20,000 rounds of ammunition, [and] over 40 firearms" in its case-in-chief. The government intends to use similar evidence detailing other defendants' possession and display of firearms. What is good for the goose, is good for the gander.

carrying of firearms as symbolic speech proclaiming themselves free men rightly defiant of governmental tyranny and oppression. Without the facts to fully show this, the risk is great that the jury will dismiss their First and Second Amendment defenses as abstract legal theories.[3]

Limited information in discovery and from the public domain shows the FBI actively involved in the public relations campaign to portray defendants as armed extremists. What is not in the public domain but likely to be in the requested discovery is information relevant to establishing the motive to do so. Defendants have a right to know whether law enforcement deployed covert operatives to harass or threaten citizens of Harney County to inflame public sentiment against the protestors. Defendants likewise have a right to know whether law enforcement used covert operatives and other methods of spreading misinformation to raise protestors' fears of ambush or massacre, and cause them to respond with a display of force that played into the government's portrayal of defendants as armed extremists. This is evidence going to motive and bias of law enforcement. The FBI's institutional bias and hostility against defendants and their supporters is material to the defense as argued in Defendant Fry's related Motion To Compel, incorporated here by reference.

The information sought will also corroborate defense witnesses who state the police presence was intimidating, and assist in impeaching police claims of being outnumbered and followed by protestors and their supporters. *Lloyd,*

[3] The information is also material for those defendants who elect to raise common-law self defense as justification for firearm possession at specific points in time, e.g., when protestors feared imminent death on January 5th, or once protestors were fired upon by law enforcement on January 26th.

supra (information is material if it assists in corroboration or impeachment of witnesses).

Regardless of which law enforcement agents the government calls as witnesses, the defense has the right to compulsory process. The defense may call as witnesses government agents involved in the public relations campaign or other counter-terrorism measures. The requested information is necessary to make informed decisions about who to subpoena as well as to conduct meaningful cross-examination. *Stever, supra* (information is material if it is helpful to defendant's presentation of his version of the facts); *Lloyd, supra* (information is material if it will "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.").

CONCLUSION

The requested discovery is within the government's possession and helpful to the defense. *See, Stever, supra.* It is vital to the presentation of Mr. Ritzheimer's and other defendants' defense at trial. The Court should order production forthwith and by a date certain.

RESPECTFULLY submitted this 14th day of June.

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