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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH O'SHAUGHNESSY,

Defendant.

No. 3:16-cr-00051-BR-03

DEFENDANT'S MOTION TO DISMISS COUNT 1 AS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS-APPLIED

ORAL ARGUMENT REQUESTED

Defendant Joseph O'Shaughnessy, through counsel Amy Baggio, moves the Court for an Order dismissing Count 1 as unconstitutionally vague, on its face and as-applied to the defendants, in violation of the Due Process Clause of the Fifth Amendment. This motion relies on, and incorporates by reference, the authorities and arguments set forth in the Memorandum In Support Of Motion To Dismiss Count 1 As Unconstitutionally Vague On Its Face And As-Applied, filed herewith.

Certificate of Conferral

On Monday, April 25, 2016, I conferred in real time with AUSA Ethan Knight about the issues raised in this motion. AUSA Knight responded on April 26, 2016, to report that the government objects to both the motion and the relief sought.

Respectfully submitted on April 27, 2016.

/s/ Amy Baggio
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DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT 1 AS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS-APPLIED

I. Introduction

This motion is one of several by defendants challenging the means, method, and execution of the Executive Branch's handling of the Malheur National Wildlife Refuge (MNWR) protest. This particular motion establishes how the Executive Branch has utilized an infrequently charged, patently vague, federal felony statute in order to selectively prosecute the defendants in response to their protest activities.

Specifically, Count 1, charged against all 26 defendants, is unconstitutionally vague on its face. Even if Count 1 is constitutional on its face, it is unconstitutionally vague as applied to him and the other defendants because, as used in this case, the statute exemplifies lack of fair notice and arbitrary enforcement.

II. Applicable Law

A. Statutory Vagueness In Violation Of Due Process

The Supreme Court has articulated a general vagueness test for statutes. The Court has also held that statutes creating criminal penalties and statutes that touch on constitutionally protected activities require enhanced clarity to avoid running afoul of the Due Process Clause. These holdings frame the current motion before Court.

1. The General Vagueness Test

The Supreme Court stated the general test for whether a statute is impermissibly vague under the Due Process Clause of the Fifth Amendment:

> "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." We consider whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." We have said that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.*, at 499. "But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'"

Holder v. Humanitarian Law Project, 561 U.S. 1, 18-19 (2010) (internal citations omitted).

In *Kolender v. Lawson*, the Court further explained the concept of arbitrary enforcement:

> Although the [void for vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

461 U.S. 352, 357-58 (1983) (internal citations omitted). *Kolender* went on to explain how a statute that required persons who have been subjected to a valid *Terry* stop[1] must provide a "credible and reliable" identification and to account for their presence when requested by a police officer was impermissibly vague in allowing arbitrary enforcement because:

> It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' " ...[The statute at issue] "furnishes a convenient tool for 'harsh and **discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure**,' " and "confers on police a virtually unrestrained power to arrest and charge persons with a violation."

Kolender, 461 U.S. at 358-61 (internal citations omitted) (emphasis added).

2. Criminal Statutes: An Added Requirement Of Clarity

"The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, – U.S. – , 135 S. Ct. 2551, 2556-57 (2015). As explained by the Ninth Circuit, when

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

a challenged statute authorizes criminal sanctions "the requirement for clarity is enhanced." *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013).

3. Potentially Protected Conduct: Increased Scrutiny Required

Vagueness concerns are particularly acute when criminal statutes potentially criminalize constitutionally protected activity.[2] *Humanitarian Law Project*, 561 U.S. at 18-19. "[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *See also Cal. Teachers Ass'n v. State Bd. Of Educ.*, 271 F.3d 1141, 1149-50 (9th Cir. 2001) ("To trigger heightened vagueness scrutiny, it is sufficient that the challenged statute regulates and potentially chills speech which, in the absence of any regulation, receives some First Amendment protection.").

In this case, the rights threatened by the vagueness of 18 U.S.C. §372 include the freedom of speech, the freedom of assembly, the right to possess firearms, and freedom of the press.[3]

a. First Amendment: Speech And Assembly

The First Amendment prohibits Congress from enacting laws "abridging the freedom of speech or of the press ... or the right of the people peaceably to assemble." U.S. Const. amend.

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[2]This is not to confuse a vagueness challenge with an overbreadth challenge. Vague statutes fail to provide sufficient notice and allow for arbitrary enforcement. Overbroad statutes permit the criminalization of constitutionally protected conduct. Not all overbroad statutes are vague, nor are all vague statutes overbroad; but either may pose a threat to constitutionally protected conduct.

[3]As to freedom of the press, Defendant Santilli will address his arguments in a separately filed document.

I. Certain types of speech are afforded greater protection than others. Political speech is at the core of the First Amendment because dissent is the backbone of our democratic system. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); *Carey v. Brown*, 447 U.S. 455, 467 (1980) ("Public-issue picketing...an exercise of ... basic constitutional rights in their most pristine and classic form...has always rested on the highest rung of the hierarchy of First Amendment values"); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion."); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009) ("Political speech is core First Amendment speech, critical to the functioning of our democratic system.").

The void-for-vagueness doctrine is particularly significant in the First Amendment context because freedom of speech is "delicate and vulnerable, as well as supremely precious in our society ... [and] the threat of sanctions may deter [its] exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also Cramp v. Bd. of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278, 287 (1961) ("The vice of unconstitutional

vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution").

Similar to freedom of speech, freedom of assembly is a right of cornerstone significance in our system: "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982). *See also Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); *United States v. Baugh*, 187 F.3d 1037, 1042 (9th Cir.1999) (the First Amendment applies with particular force to marches and other protest activities).

b. Second Amendment: Right To Bear Arms

"There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *D.C. v. Heller*, 554 U.S. 570, 595 (2008). "At the time of the founding, as now, to 'bear' meant to 'carry.' " *Id.* at 584. *See also Moore v. Madigan,* 702 F.3d 933, 942 (7th Cir. 2012) ("the [2nd] amendment confers a right to bear arsm for self-defense, which is as important outside the home as inside."). The *Heller* decision made clear that the rights conveyed under the Second Amendment include two aspects. First, *Heller* held that the keeping and bearing of arms is, *and has always been*, an individual right. *See, e.g.*, 554 U.S. at 616. Second, the right is, *and has always been*, oriented toward self-defense. 554 U.S.

at 597-99 (referring to self defense as "the *central component* of the right itself" (emphasis in original)). *See also Kolbe v. Hogan*, 813 F.3d 160, 178 (4th Cir. 2016) ("semi-automatic rifles and [large capacity magazines] are commonly used for lawful purposes, and therefore come within the coverage of the Second Amendment.").

Importantly, the Supreme Court has held that the alleged presence of a firearm does not extinguish other constitutional rights. For example, courts have held that exercise of 2nd Amendment carrying of firearms does not negate the 4th Amendment right to be free from unreasonable searches. *See Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) (rejecting a firearm exception to reasonable suspicion required for *Terry* stop); *United States v. Black*, 707 F.3d 531, 540-542 (4th Cir. 2013) (open carry of firearm in state where lawful to do so, even in high crime area, does not justify a *Terry* stop); *United States v. Garvin*, 2012 WL 1970385, *3 (E.D. Pa. 2012) *aff'd*, 548 Fed. Appx. 757 (3d Cir. 2013) ("as some individuals are legally permitted to carry guns pursuant to the Second Amendment... a reasonable suspicion that an individual is carrying a gun, without more, is not evidence of criminal activity afoot."). Similarly, in *National Rifle Ass'n of America, Inc. v. City of South Miami*, the state court denied the city access to the NRA membership lists, finding that to challenge firearm restriction laws under the 2d Amendment, did not mean that those same members waived their rights to privacy and freedom of association guaranteed by the 1st Amendment. *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 774 So. 2d 815, 816 (Fla. Dist. Ct. App. 2000) ("We are not convinced that simply because the Associations filed the action as plaintiffs, they have waived their privacy rights concerning the members' names.").

B. The Statute

18 U.S.C. § 372, Conspiracy to impede or injure officer, 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.

As noted by the only district court that appears to have delved into §372's statutory construction: "Without question, the statute could have been drafted more clearly and with more precision." *United States v. DeMott*, 2005 WL 2314134 at *1-*2 (N.D.N.Y. Sep. 22, 2005) (unpublished).

Case law on 18 U.S.C. § 372 is sparse and the cases that do exist do not provide much by way of helpful analysis. *DeMott* found that the statute set forth four distinct conspiratorial objects, to which any one a defendant could agree with another in order to violate the law. 2005 WL 2314134 at *1-*2.

Accepting the *DeMott* approach to the statute's construction, the defendants in this case are charged with the first of the four conspiratorial objects (hereafter "§372-Object One"). Specifically, the indictment charges that they "did knowingly and willfully conspire and agree together and with each other and with [others] ... to prevent by force, intimidation, and threats, officers and employees of the [USFWS and BLM] from discharging the duties of their office at the MNWR and other locations in Harney County...." (Superseding Indictment, CR-282.)

III. Facial Argument: The Statute Is Unconstitutionally Vague On Its Face For Failing To Define *Either* "Force, Intimidation, Or Threat" *Or* "Any Office, Trust, Or Place Of Confidence" Or "Duties Thereof," Thus Failing To Provide Adequate Notice And Allowing For Arbitrary Enforcement By The Government.

Section 372 is not the typical criminal law that completely proscribes certain conduct, such as a general prohibition against murder, drug dealing, or theft. This statute criminalizes broadly described conduct aimed at certain people having some connection to the federal government. There is nothing wrong with a statute that seeks to prohibit specific conduct in order to maintain the safety of federal employees; however, due to its vagueness, this statute runs afoul of the Due Process Clause.

Section 372 is a single, rambling, run-on sentence that sets forth no *mens rea* and includes no definitions. Section 372-Object One prohibits the populace from conspiring to prevent "by force, intimidation, or threat" "any person" "holding any office, trust, or place of confidence under the United States" from "discharging any duties thereof." The statute fails, however, to provide appropriate limiting language so as to avoid chilling the exercise of constitutionally protected rights, including the very core First Amendment right of gathering together to protest polices and conduct of the federal government. Accordingly, § 372-Object One is unconstitutionally void for vagueness because the statute fails to provide citizens of ordinary intelligence fair notice of what is prohibited and because it allows for arbitrary enforcement, particularly in light of the threat the statute poses to constitutionally protected conduct, such as

the rights to freedom of speech, press, assembly, and possession of a firearm. Counsel has identified no case law addressing this question.[4]

A. The Statute Is Unconstitutionally Vague For Failing To Define "Force, Intimidation, Or Threat."

Under the statute, the government can prosecute groups of people based on the manner of protest against the government. Section 372 provides no notice to a person or, as in this case, a large group, when their conduct will cross the line from dissent to intimidation – constituting lack of fair notice. Moreover, *the government* gets to determine whether the manner of protest *against the government* is sufficiently threatening and intimidating to warrant federal felony charges – "authoriz[ing] and encourag[ing] seriously discriminatory enforcement." *Humanitarian Law Project*, 561 U.S. at 18-19.

1. Insufficient Notice: Force, Intimidation, Or Threat

When a statute fails to define a term, the term is given its ordinary meaning. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407-08 (2011). The noun "**force**" is defined as: "physical strength, power, or effect"; "power or violence used on a person or thing"; and "strength or power that is not physical." Merriam-Webster, "Simple Definition of FORCE," *available at* http://www.merriam-webster.com/dictionary/force, last visited 22 Apr. 2016. "**Intimidation**" is the noun form of "intimidate" which is defined as "1. To make timid: frighten. 2. To inhibit or discourage by or as if by threats." The noun "**threat**" is defined to

[4] *United States v. Fulbright*, 105 F.3d 443 (9th Cir. 1997), provided a perfunctory denial of a defendant's challenge to the constitutionality of all three statutes under which he was convicted. Even apart from the lack of analysis in the opinion, Fulbright was convicted of violating the third and/or fourth conspiratorial object in § 372 (conspiracy to impede or injure federal officers), not Object One.

include: "a statement saying you will be harmed if you do not do what someone wants you to do"; "someone or something that could cause trouble, harm, etc." or "the possibility that something bad or harmful could happen." Merriam-Webster, "Simple Definition of THREAT," available at http://www.merriam-webster.com/dictionary/threat *last visited* 22 Apr. 2016. A statute that does not "defin[e] the terms 'threat' or 'intimidation,' is likely both overbroad and vague in violation of the First and Fourteenth Amendments to the United States Constitution." *Chaffee v. Roger*, 311 F. Supp. 2d 962, 970 (D. Nev. 2004).[5]

No person of ordinary intelligence could possibly know what is prohibited by this statute. The statute suffers a host of problems, including:

- The statute fails to provide any *mens rea* requirement;
- The statute fails to provide notice whether threat or intimidation will be evaluated from a subjective or objective perspective;
- The statute fails to provide any definitions, such as what conduct encompasses "force, intimidation, or threat";
- The statute contains no limiting language –
  - In terms of possible charges related to "force," the statute fails to state whether physical force is required, or whether the mere presence of a multitude of people – such as a gathering of like-minded individuals – can sufficiently imply force;

[5]In *Chaffee*, the court considered a state statute that employed broad terms: "A person who directly or indirectly, addresses any threat or intimidation to a public officer, public employee, juror, referee, arbitrator, appraiser, assessor or any person authorized by law to hear or determine any controversy or matter, with the intent to induce him, contrary to his duty to do, make, omit or delay any act, decision or determination, shall be punished . . . ." 311 F. Supp. 2d at 965 (quoting Nev. Rev. Stat. 199.300). The court indicated that the statute was likely invalid because it provided no definition of "threat" or "intimidation" and gave no real guidance on the threats it covered. *Id.* at 970 (certifying to the Nevada Supreme Court the question "What is the definition of the terms 'threat' and 'intimidation' as used in Nevada Revised Statute 199.300(1)(b)?").

- In terms of "threat," the statute fails to define what is to be considered a threat, such as a limiting term of threat of violence, and instead could include broader conduct such as the threat of a lawsuit;

- The term "intimidation" is particularly problematic in that the statute provides no standard by which intimidation is measured. One employee might be intimidated by the possibility of a civil suit, another by the physical size of the protester criticizing the employee/his department, another by the fact that the protester is armed at the time of the interaction.

Because of these problems, the statute fails to provide "clearly marked" "boundaries of the forbidden areas" as to when speech crosses the line from disagreement and criticism to intimidation. *Grayned*, 408 U.S. at 109. Accordingly, there is an unconstitutional lack of notice as to when a group of like minded protesters practicing civil disobedience against the federal government becomes a group of criminal conspirators.

2. Arbitrary Enforcement

Section 372-Object One is also void for vagueness because it permits arbitrary enforcement. Like the unconstitutional statute in *Kolender*, § 372 furnishes a convenient tool to the federal government for harsh and discriminatory enforcement against particular groups that merit its displeasure. 461 U.S. at 361. One of our most precious privileges as Americans is to be permitted to vehemently disagree with, and protest the actions of, our government. It is "more than self-expression; it is the essence of self-government." *Garrison*, 379 U.S. at 75. Section 372 permits the criminalization of dissent. The statute is simply too obtuse in its language as to who is protected and to what it takes to "prevent, by force, intimidation, or threat" that protected person from "discharging of the duties of his office." This encourages

discriminatory enforcement and invites federal prosecutors to weigh the perceived political threat, the number and makeup of protesters, the growth of a movement or cause, public opinion toward that movement or cause, and to subjectively assess the validity of the grievance claimed, thus allowing the prosecutors "to pursue their personal predilections." 461 U.S. at 358.

This is not the first time § 372 has been used by the Executive Branch to quash political dissent against the federal government. On June 1, 2004, the FBI opened an investigation under the domestic terrorism classification on four individuals for entering a military recruiting station in Ithaca, New York, and pouring human blood on the walls, pictures, and an American flag. The vandalism occurred just days before the beginning of the Iraq War. Protesters read a declaration encouraging military members to "refuse the order to go to war," and to "leave the military before it is too late." OIG Report, *A Review of FBI's Investigations Of Certain Domestic Advocacy Groups* at 146 (Sept. 2010).[6]

The four defendants, known as the "St. Patrick's Four" were originally charged with trespass and criminal mischief in state court, but a hung jury resulted in a mistrial. Federal prosecutors then filed charges alleging conspiracy to impede an officer of the United States by force, intimidation and threat, 18 U.S.C. § 372; injury or damage to government property, 18 U.S.C. § 1361; and two counts of trespass on a military station, 18 U.S.C. § 1382. *United States v. DeMott et al.*, 05-cr-00073 (N.D.N.Y. 2005) (CR-1). The defendants were ultimately acquitted

[6]The full OIG report is available at https://oig.justice.gov/special/s1009r.pdf *last visited* 25 Apr. 2016.

by a jury of the § 372 charge, but convicted of the other counts.[7] Thus, like the *Bundy* defendants, the *DeMott* defendants were charged with § 372 based on their protest activity on government property.

The *DeMott et al.* and *Bundy et al.* prosecutions demonstrate a disturbing, developing trend of the government to use this statute to quash political dissent. This trend is permitted and invited by the vague, undefined, and unlimited terms of the statute. The Court should strike down § 372 as impermissibly vague under the Due Process Clause.

B. The Statute Is Unconstitutionally Vague On Its Face For Failing To Define "Officer" Or "Duties," Thus Failing To Adequately Define The Scope Of Individuals Against Whom The Conduct Is Prohibited

Further obfuscating the reach of the statute is the repeated use of the words "officer" and "duties." The government appears to assume that the statute prohibits interference with any federal employee conducting any part of their job and that there is no difference between an "officer of the United States" and an employee of any agency of the United States. In the indictment, the government charges the defendants with interfering with "officer and employees of the United States Fish and Wildlife Service and the Bureau of Land Management, agencies within the United States Department of the Interior… ." The indictment does not allege which specific "official duties" the defendants interfered with, leading to the conclusion that the government believes "official duties" is equivalent to whatever the employee's job is. If the government was correct, the sweep of the statute would be breathtaking. There are currently

[7]The "St. Patrick's Four" defendants did not raise a vagueness challenge to § 372, but did litigate which phrases in the statute constituted elements of the offense (hence, the four conspiratorial objectives district court opinion referenced *infra* at 7-8). *DeMott, supra,* 2005 WL 2314134.

over 2.7 million federal employees. U.S. Office of Personnel Management, Annual Performance Report: Fiscal Year 2014 2 (February 2015) (hereafter "OPM Report"). Those employees do everything from flying Air Force One to emptying garbage cans on the national mall.

There is good reason to believe that congress did not intend the law to sweep so broadly. When the statute was enacted in 1861, the size of the federal government was a tiny fraction of what it is today. There was no standing army, no federal law enforcement agency, no national parks, monuments, or refuges, no social security administration, no real civil service, and no federal income tax to fund those efforts. Indeed all federal employees at that time gained their positions by official appointment which emphasized "political affiliation [and] personal connections, rather than one's knowledge, skills and abilities." OPM Report, at 5. In short, the role of the federal government was extremely limited. Congress' understanding of the terms "officer" and "duties" was likely similar to the understanding of Judge Jackson, writing from the middle district of Tennessee in 1893: "An office is a public employment, conferred by appointment of government, and in the performance of its functions the citizen selected to represent the sovereign is in the exercise of both a private right or privilege and a public duty." *United States v. Patrick*, 54 F. 338, 349 (C.C.D. Tenn. 1893); *see also United States v. Hartwell*, 6 Wall. 385, 393 (1867) ("An office is a public station, or employment, conferred by appointment of the government. The term embraces the ideas of tenure, duration, emolument, and duties.").

Counsel has been unable to find any other cases discussing the meaning of "federal officer" or "official duties." However, one obvious place to look is the interpretation of Article II, Section 2, paragraph 2. An understanding has developed between Congress and the president

as to which federal employees qualify as "Officers of the United States," requiring the advice and consent of the Senate in order to take their positions, and which employees the president (or anyone else) may simply hire at their sole discretion. As of 2012, there were between 1200 and 1400 positions that qualify and therefore require advice and consent of the Senate. Maeve P. Carey, Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress 7 (Congressional Research Service 2012), available online: http://www.fas.org/sgp/crs/misc/R41872.pdf. The list of those positions is publicly available and may help to cure some of the vagueness problems with the statute should the Court find that Congress intended the phrase in the same way it had always been used. However, it does not completely cure the problem as the ordinary person is still left to wonder what any individual officer's "official duties" are. For example, is it an official duty to be in one's office from 8 AM to 5 PM Monday through Friday? Or are the official duties only those duties specifically laid out by Congress or the President?

Combined with the failure to define "threat, intimidation, or force," the vagueness as to which persons are protected by the statute results in an unconstitutional lack of notice and opens the gates to arbitrary enforcement, epitomized by the current charges.

IV. As-Applied Argument – The Statute Is Unconstitutional As Applied For Failing To Provide Adequate Notice And For Subjecting Defendants To Arbitrary Enforcement In This Case.

Considering § 372 in the context of this particular case makes the statute's constitutional infirmity all the more plain.

A. The Defendants Were Deprived Sufficient Notice

Citizens have the right to exercise multiple constitutional rights at the same time – rights to speak out against the government, to assemble with other like-minded individuals, and to possess a firearms if not otherwise prohibited. There can be no question but that those simple privileges exist today just as they did when the Founding Fathers first established them as fundamental rights. Mr. O'Shaughnessy and other of the charged defendants participated in many rallies, protests, parades, and assemblies over the years at which they regularly voiced their concerns about the over-reach of federal government, increased gun control measures, the efficacy of border security, misuse of federal funds by Congress, corruption in the BLM, and the unfair treatment of ranchers in the west. When they have their rallies, they often carry their firearms with them, as they are entitled to do. In fact, in light of efforts to increase federal regulation of firearms, carrying firearms today is often more an exercise of First Amendment free speech and political expression than under the Second Amendment. *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."). As held by the Ninth Circuit, possession of a firearm "can be speech where there is 'an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it.'" *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

Despite repeated protests in a variety of districts and on a variety of topics, they have never been threatened with federal felony conspiracy charges. They had no notice that such a

law might be invoked to cast a felony web such as this.[8] Accordingly, § 372 is impermissibly vague because it fails to provide fair notice of potential federal felony penalties to the protesters in this case.

B. The Defendants Have Been Subjected To Arbitrary Enforcement

This case exemplifies the arbitrary enforcement problem with § 372. The government has acknowledged in proceedings before this Court that hundreds of people traveled to Burns in order to protest the federal government's treatment of the Hammond family. As evidenced in discovery and in the many reports in the media, hundreds of people traveled to and from the refuge during the protest. The protesters themselves came and went from the refuge, traveling to meet with law enforcement officers and community members in order to articulate the reasons for their protest and to allay fears raised in the media that the protest posed any sort of threat to the community. Whatever the audience, the protesters maintained the message that they were not a threat, that they would use force only to defend themselves from the excessive use of force by federal authorities, and that they were there to peaceably protest the imprisonment of the Hammonds and other grievances related to what they believed to be illegal federal government – primarily BLM – policy and practice.

Moreover, as specific to Mr. O'Shaughnessy, he was not one of the original group of men who went up to the MNWR on January 2, 2016. To the contrary, he refused to go with the

[8]To the contrary, *if anything*, the defendants were on constructive notice of a much different potential law violation when they protested at the MNWR-that they may have been trespassing. *See* 50 C.F.R. §26.21 "General trespass provision" which provides: "(a) No person shall trespass, including but not limited to entering, occupying, using, or being upon, any national wildlife refuge, except as specifically authorized in this subchapter C or in other applicable Federal regulations."

initial group of protesters and never spent the night at the MNWR. He remained in Burns (30 miles from the MNWR) or in Princeton at "The Narrows" RV Park (7 miles from the MNWR). Moreover, he was not alone. Many people supportive of the protesters' message stayed in the general vicinity, but disagreed with the decision to "occupy" the refuge. As detailed in detention proceedings, O'Shaughnessy's trips to the MNWR during the protest were for the purpose of convincing the protesters to leave the refuge. Of this group, O'Shaughnessy alone was charged.

These facts form an ample basis for the Court to conclude that as-applied, § 372 is unconstitutionally vague due to the arbitrary enforcement exemplified in this case, if not to all defendants, at least to Joseph O'Shaughnessy.

V. Conclusion

Whether on its face or as-applied to the defendants in this case, the problem is the same: 18 U.S.C. §372 is a violation of Fifth Amendment Due Process. Count One should be dismissed.

Respectfully submitted on April 27, 2016.

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