BILLY J. WILLIAMS, OSB #901366
United States Attorney
District of Oregon
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
Assistant United States Attorneys
ethan.knight@usdoj.gov
geoffrey.barrow@usdoj.gov
craig.gabriel@usdoj.gov
1000 SW Third Ave., Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000
Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
AMMON BUNDY, et al.,	**GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS COUNT 1 AS OVERBROAD (#474)**
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendants' Motion to Dismiss Count 1 As Overbroad (ECF No. 474), filed by defendants S. Cox and Ryan on behalf of all defendants.

I. Title 18 U.S.C. § 372 Is Not Unconstitutionally Overbroad

A. Overbreadth Generally

The standard for determining whether a statute is facially overbroad in violation of the First Amendment is necessarily high. In *United States v. Salerno*, 481 U.S. 739, 746 (1987), the

Supreme Court held that to succeed on a facial challenge the plaintiff must show that "no set of circumstances exists under which the Act would be valid." The *Solerno* Court gave meaning to this standard when it stated that a "facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully." *Id.* at 745.

In the First Amendment context, the Supreme Court has recognized a type of facial challenge in which a statute will be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring)). To mount a successful facial challenge to a statute on overbreadth grounds, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

B. 18 U.S.C. § 372

Title 18 U.S.C. § 372 (Section 372) provides in its entirety that:

> 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.

Originally enacted in the 1861, Section 372 is a long-standing statute that has been charged in fewer than a hundred published cases over the last fifty years. The cases that do

interpret Section 372, however, differ substantially from the "threat" cases defendants rely upon. *See, e.g., United States v. Fulbright,* 105 F.3d 443 (9th Cir. 1997) (evidence to support conviction for violating Section 372 sufficient where defendant filed "arrest warrant"), *overruled on other grounds by United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007); *United States v. Myers*, 524 F. App'x 479 (11th Cir. 2013) (refusing to permit defendant to testify about his theory why he, as a sovereign citizen, was not obligated to pay federal income taxes was not abuse of discretion); *United States v. Brown*, 669 F.3d 10 (1st Cir. 2012) (defendant's belief that the warrant on which he was being arrested was invalid is not a defense to resisting arrest); *United States v. Hopper*, 436 F. App'x 414 (6th Cir. 2011) (conspiracy to rob mail carrier delivering mail did not require proof of specific intent to prevent mail delivery).

C. Section 372 Is Not Overbroad

Defendants argue that Section 372 is overbroad because it "proscribes a substantial amount of protected speech." (Defs.' Mot. 5). Defendants further offer that Section 372 "expressly punishes speech protected by the First Amendment." (Defs.' Mot. 6). Defendants' arguments are misplaced and not supported by a plain reading of the statute or the cases they rely upon. In short, defendants' arguments rely on the faulty premise that Section 372 was constructed principally to unlawfully target speech.

Overbreadth challenges are narrowly circumscribed and disfavored. Because of the wide-ranging effects of striking down a statute on its face at the request of one whose own conduct may be punished consistent with the First Amendment, the Supreme Court has recognized that the overbreadth doctrine "is, manifestly, strong medicine," to be employed

"sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Thus, the Court requires that, "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" in order for the statute to be struck down as facially overbroad. *Id.* at 615.

The defendants therefore face a very high hurdle; to prevail, it is not enough for them to show merely "some" overbreadth. *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002). Rather, "[o]nly a statute that is substantially overbroad may be invalidated on its face." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (citing *New York v. Ferbe*r, 458 U.S. 747, 769 (1982)). Indeed, the Supreme Court has "never held that a statute should be invalid on its face merely because it is possible to conceive of a single impermissible application." *Id.* (reversing overbreadth ruling).

In addition, "overbreadth scrutiny has generally been less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Broadrick*, 413 U.S. at 614-15. The Supreme Court has cautioned against application of the overbreadth doctrine to laws like Section 372 that are directed at conduct and only incidentally sweep expressive conduct within their scope:

> [F]acial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the state to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a

> prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. at 615.

Here, Section 372 is plainly directed at conduct: agreeing to prevent federal officials from discharging their duties by force, intimidation, or threat. Defendants have failed to demonstrate that Section 372's prohibition on such an agreement reaches a substantial amount of constitutionally protected activity, or to explain why the statute should not be construed to avoid any constitutional difficulties. Contrary to defendants' claim, agreeing to prevent federal officials from performing their job by taking over the Malheur National Wildlife Refuge by force, while using and carrying firearms plainly goes beyond a simple "threat." So construed, and when any potential overbreadth is "judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, there is no danger, let alone a substantial one, that Section 372 will be applied to infringe upon legitimate rights of free speech.

In support of their argument, defendants erroneously analogize Section 372 to statutes that exclusively address threatening speech. Defendants conflate the "threat" cases with Section 372's clear restrictions on threatening conduct that prevents federal officials from discharging their official duties: *Watts v. United States*, 394 U.S. 705 (1969) (holding that federal statute that criminalized threats to the President *is* constitutional on its face but not as applied to defendant); *Chafeee v. Roger*, 311 F. Supp. 2d 962, 970 (D. Nev. 2004) (holding statute facially overbroad for criminalizing threatening behavior that went beyond "true threats"); and *Virginia v. Black*, 538 U.S. 343 (2003) (holding that a Virginia statute that banned cross burning is

constitutional, however, when statutory language eliminated the attendant mental state, statute was unconstitutional). (Defs.' Mot. 6). *Watts*, *Chaffee*, and *Black* analyze statutory schemes that are materially different from Section 372 and should not be relied upon by this Court.

In support of their position defendants also rely heavily upon Section 372's legislative history. (Defs.' Mot. 5). Even assuming that this "minority report" correctly interpreted the purpose of the statute, rather than the majority which actually voted to enact it, this history of Section 372 cannot contradict the plain language of the statute when determining whether Section 372 is facially overbroad. The standard for determining overbreadth requires the Court find whether a substantial number of Section 372's "applications" are plainly illegitimate—it does not require the Court to divine congressional intent from the mid-nineteenth century.

However, what little legislative activity regarding Section 372 there has been since its enactment further proves that the statute does not criminalize a broad swath of otherwise protected speech. The statute is structured to criminal conspiracies that impede the working of government. Indeed, Congressional efforts to modify the statute after its enactment underscore its purpose—namely to proscribe forceful, threatening conspiratorial conduct, not to broadly limit speech. The statute has withstood Congressional efforts to remove specific conspiracy statutes. H.R. Rep. No. 80–304 (1947), *reprinted in* 1948 U.S.C.C.A.N. 2475, 2476. The statute has only been changed twice in its history, to expand jurisdiction: once in 1909 to include "District[s]" and again in 1948 to include "Possession[s]." H.R. Rep. No. 80-304, 1948 U.S.C.C.A.N. at 2477.

/ / /

D. Conclusion

For the reasons described above, this Court should deny defendants' Motion.

Dated this 11th day of May 2016.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

s/ Ethan D. Knight
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
Assistant United States Attorneys