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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON,

No. 20CR50067

Plaintiff,

v.

RESPONSE TO DEFENDANT'S MOTIONS TO EXCLUDE OTHER ACTS EVIDENCE AND SEVER

ALAN SWINNEY

Defendant.

Defendant has separately moved to exclude evidence other acts evidence and for severance of this case on the grounds that he would be substantially prejudiced by the same jury hearing evidence of the separate criminal episodes charged in the indictment. Because these two issues are quite inter-related, the State offers the following single response to these two motions.

SUMMARY OF ARGUMENT

There are two separate "other acts" issues presented in defendant's motions: 1) is evidence of defendant's statements both before and after the criminal conduct he's charged with, admissible evidence in his trial on this indictment; and 2) is evidence of his crimes on each date "cross-admissible" as evidence of his guilt on the other. As discussed below, the first category is admissible either as evidence of defendant's motive, his intent, or to rebut the defense of self-defense depending on the contents of each particular statements. The State agrees that the second category should not be considered by the jury and will agree to, and has proposed, an appropriately worded limiting instruction.

Defendant's primary argument in support of severance is the risk of cross pollination in the jury's mind of the evidence of the two criminal episodes in the indictment. As has very recently been reaffirmed by the Court of Appeals, this is not sufficient to establish the "substantial prejudice" necessary for the court to sever.

ARGUMENT

I. PRE-EVENT AND POST-EVENT STATEMENTS BY DEFENDANT ARE RELEVANT TO ESTABLISH HIS INTENT TO DO VIOLENCE ON THE CHARGED DATES AND REBUT SELF-DEFENSE.

The State agrees with defendant's asserted premise that other acts evidence is not admissible to prove propensity. Indeed, the Oregon Supreme Court has made very clear that the court must closely analyze evidence of defendant's conduct and the State's purported theory for introducing it to ensure that propensity is not lurking just below the waters of the purported theory for admissibility. *State v. Skillicorn* 367 Or 464 (2021). That is, if any of the links in the chain of reasoning to admissibility depends on the defendant's propensity to engage in certain conduct, the evidence is not admissible.

As to the evidence of the two charged acts even if not "cross admissible" in a joint trial they are "admissible" for a non-propensity purpose. *State v. Delany*, 314 Or App 561 (2021) ("In a consolidated trial, evidence of each case is admissible for a nonpropensity purpose—'to prove that defendant had perpetrated the particular offenses to which that evidence pertained."") (quoting *State v. Miller*, 327 Or 622 (1998)). If the counts remain joined, which as argued below should happen, evidence of each episode is admissible in the joint trial.

As to the evidence of conduct apart from the two charged episodes, which is what the State understands defendant to primarily be moving against, it is admissible if offered for a nonpropensity purpose. Were the State attempting to offer evidence of other acts of uncharged violence committed by the defendant, defendant's argument would have merit. However, the

State is not seeking to introduce other acts of violence to demonstrate defendant's propensity for violence. Rather, the State is offering Defendant's *statements* expressing what his intent would be, and was, as relevant to the two charged incident dates as well as direct admissions of culpability. Statements of a party opponent about the charged offenses are always relevant, as is evidence of defendant's motive.

For example, in the weeks leading up to the first criminal episode on August 15, 2021, the defendant writes on

July 16, 2020:

"We'll be having a flag wave in a town called Sandy on Friday and possible Saturday also depending on how Friday goes. It's a little town outside of Portland. My plan is to hit these little towns and recruit, then we all go into Portland together...THIS GROUP IS ACTIVLY FIGHTING THE LEFT. Not figuratively. We get toe to toe whith these "people". To date I've helped get 83 of these clowns arrested. 3 by way of the hospital, and 5 off to prison. Come help us! We can do more if we work together."

July 17, 2020:

"This isn't turning into a civil war. It IS a civil war. . . . The fighting has already started. . . We need numbers. I'm currently camped out (deployed) in the national forest outside of Portland. . . We need guys. We need vets. We can beat these people easily. It's time to get started"

The body of defendant's written and recorded statements made before and after his arrest, of which the quoted sections above are but two examples (See Attachment A), variously bear on his motive to engage in violent conduct in Portland, his specific intent to engage in violence in Portland on the charged dates, and as admissions that he was, in fact, present and engaged in violence on those dates. Motive, intent, and rebuttal of a defense are all firmly rooted nonpropensity bases for admissibility and are unaffected by *Skillicorn*. Directly inculpatory statements are not evaluated under OEC 404(3) as they are not evidence of "other acts" they are direct evidence of the charged acts.

II. THE EVIDENCE OF DEFENDANT'S CONDUCT ON AUGUST 15 AND AUGUST 22 IS DISTINCT AND READILY IDENTIFIABLE BY THE FINDER OF FACT.

Just last week, the Court of Appeals issued an opinion in *State v. Delaney*, 314 Or App 561 (2021) in which it reaffirmed the principle that an allegation by defense that evidence of one crime might "cross pollinate" the other is insufficient basis to support severance where the separate criminal episodes are "simple and distinct." *Delaney* broke no new legal ground. It is, however, a timely and on point summary of the applicable legal principles. The black letter rule is that Oregon law "allows the admission of evidence related to each victim's case in a joint trial so long as the jury can determine which facts are relevant to each case." *Id.* at 565. See also, *State v. Norkeveck*, 214 Or App 553 (2007) (concluding that "the charges related to each victim were sufficiently simple and distinct that the trier of fact would have been able to separately consider the charges.") (internal quotations omitted); *State v. Cox*, 272 Or App 390 (2015) ("even if we assume[d] that the evidence in each case was not mutually admissible in the other, the evidence in the cases was sufficiently simple and distinct to mitigate the dangers created by joinder") (internal quotations omitted).

In *Delaney* defendant was charged with sexually assaulting two unrelated victims in two unrelated incidents that occurred roughly two years apart. The charges were properly on the same indictment as they were of same or similar character. Defense moved, as here, for separate trials arguing that he was at risk of substantial prejudice because the jury might take one set of allegations as evidence that he was guilty of the other. The court noted, consistent with past opinions, that the defendant bears the burden of establishing substantial prejudice and that he "must do more than merely assert conclusory allegations of substantial prejudice that would result from a joined trial." *Id.* at 570.

In the present case, the court could mitigate any of the so-called "cross-pollination" risks identified by defendant with a simple jury instruction to the effect of:

You have heard evidence of Mr. Swinney's conduct on two dates that he is charged with having committed criminal acts: August 15, 2020 and August 22, 2020. His acts on these dates must be evaluated separately and on their own merits. To that end, you may not consider evidence of Mr. Swinney's conduct on August 15, 2020 when you are deliberating on Counts 6-12, nor may you consider evidence of Mr. Swinney's conduct on August 22, 2020 when you are deliberating on Counts 1-5.

The court is required to conduct OEC 403 balancing as part of its analysis, however that hurdle should easily be cleared. The State has already redacted the most inflammatory, and irrelevant, of statements from the proffered "other acts" evidence and will be happy to explore this particular issue in more depth on the record.

III. A JOINT TRIAL OF DEFENDANT'S CONDUCT ON THESE TWO DATES WOULD NOT SUBSTANTIALLY PREJUDICE HIM.

As discussed above the "simple and distinct" rule readily supports a joint trial here. Furthermore, our courts have found defendants burden of establishing "substantial prejudice" a near insurmountable bar in seeking to sever properly joined charges.

Before 1989, Oregon law was that the defendant's choice regarding joinder or severance should be accepted unless the defendant's election was clearly improper. *State v. Meyer*, 109 Or App 598 (1991) (citing *State v. Boyd*, 271 Or 558 (1975)). The current law is that joinder is appropriate unless the defendant can demonstrate that joinder substantially prejudices him. ORS 132.560.

An early step away from the "defendant chooses" rule was *State v. Miller*, 327 Or 622 (1998) where the court applied the then-existing statutory "prejudice" standard. *Miller* held that "[t]he actual or likely impairment of that interest of a party, resulting from the joinder of multiple offenses in a single charging instrument, constitutes 'prejudice' within the meaning of ORS

132.560(3)." *Miller* relied on the language ORS 132.560 as it existed in 1998 prior to the statute being amended by HB 3374 in 1999. In *Miller*, the court declined the state's request to interpret ORS 132.560 to require that defendant be "substantially prejudiced." The legislature has since amended ORS 132.560 to require exactly that. Yet, even relying on the much lower standard of former ORS 132.560, the Miller court still declined to sever defendant's two similar crimes with different victims.

Another case decided under former ORS 132.560 and its simple "prejudice" standard is *State v. Barone*, 329 Or 210 (1999) (holding that trying defendant's two murder cases together in one trial did not prejudice defendant). In both *Barone* and *Miller*—where separate sexual assaults were tried jointly—the courts recognized that the severity of the underlying crime does not change the prejudice analysis. ORS 132.560 now requires not just "prejudice", as applied in Barone and Miller, but "substantial prejudice." So long as the state is required to prove each case separately on its own merits, there is no inherent prejudice in trying two cases of similar character, even such serious cases as murder, in the same trial. *Barone* at 217.

In the context of less serious charges the court has likewise favored consolidation. In State v. Meyer, 109 Or App 598 (1991), the court properly consolidated five major traffic offenses, three DUIIs and two DWSs, which had occurred over the course of six years. The court held that the charges were of "similar character" and thus properly joined into a single trial. "We think that the five offenses here, all major traffic crimes occurring in the same county and involving defendant's driving, are sufficiently 'similar' to meet the requirement for joinder under ORS 132.560(2) and ORS 132.560(1)(b)(A)." Id. at 603. The court found that went on to note that any risk of prejudice was sufficiently mitigated because "evidence of each traffic offense was presented separately, and the jury was instructed to consider each offense separately. The

. case was not so complex that the jury could not separate and evaluate the evidence as to each offense." *Id.* at 604.

To further explain its reasoning the *Meyer* court expressly adopted the reasoning of the Second Circuit in applying the Federal analog to ORS 132.560, Federal Rule of Criminal Procedure 8(a):

The reason why substantial prejudice from a denial of relief under Rule 14 must be shown is that to reverse on any lesser showing would undermine the policies behind Rule 8 and essentially read that rule from the books. Rule 8(a), with which we are here concerned, necessarily recognizes the adverse effect on the defendant by a joinder of counts, but considers this to be outweighed by gains in trial economy when one of the criteria of the rule are [sic] met. Granting separate trials under Rule 14 simply on a showing of some adverse effect, particularly solely the adverse effect of being tried for two crimes rather than one, would reject the balance struck in Rule 8(a), since this type of 'prejudice' will exist in any Rule 8(a) case.

Id. (quoting United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980)).

Since *Barone*, *Miller*, and *Meyer*, the legislature has further expressed its clear preference against severance with HB 3374 (1999) by adding the word "substantial" to the severance statute. Yet, even under the former wording of ORS 132.560, the charges in this case should not be severed; the state's position is all the stronger under ORS 132.560 as amended.

Defendant has articulated no case specific basis to find that he is prejudiced by a joint trial, much less substantially prejudiced. Moreover, unlike in *Barone*, *Miller*, and *Meyer* a substantial body of evidence (the pre- and post-event statements discussed above) is relevant and admissible as to both criminal episodes. The admissibility of this portion of the evidence as to all counts on the indictment makes the case for joinder that much stronger.

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CONCLUSION

Evidence of defendant's expressed intent to engage in violence and his motive to do so is admissible under OEC 404(3) for non-propensity purposes in the trial of both charged criminal episodes. As such, his motion to exclude other acts evidence should be excluded.

Because evidence of defendant's conduct on each date is itself "simple and distinct" from the conduct on the other, with an appropriate limiting instruction, there is no elevated risk under applicable appellate precedent of improper consideration by the jury. Likewise, establishing "substantial prejudice" requires more than defendant has shown here and, as such, his motion to sever should be denied.

Dated this 23rd day of September, 2021.

Respectfully Submitted,

MIKE SCHMIDT District Attorney Multnomah County

Nathan Vasquez

Sr. Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on September 23, 2021, I caused the foregoing Response to be served upon the parties hereto by the method indicated below:

Mr. Joseph Westover
Multnomah Defenders Inc
522 SW 5th Ave Ste 1000
Portland OR 97204
jwestover@multnomahdefenders.org

US MAIL
FAX
X EMAIL (courtesy copy)
X ELECTRONIC SERVICE (UTCR 21.100)

Nathan Vasquez

Sr. Deputy District Attorney

HAND DELIVERY



We need help! We are planning a flag wave in Antifa park in Portland July 11th. We all got our FB accounts disabled because we had a flag wave around CHAZ on the 4th of July. Please help by sharing this post. We need patriots to follow us. We need to be able to get the word out about these events. We're boots on the ground. The absolute tip of the spear as far as the rights answer to the lefts violence. Help us by following us. Help us get the message out. Please echo. We got 3 CHAZ terrorists arrested Saturday. Help us add to that number. Please echo.

Read less



"Attachment A"



The last crusade has already started. Join us! Follow me.





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If you're down to do some real patriot shit, follow me. If you dont know who I am, search "Alan Swinney" in google. We're literally fighting the militant wing of the left. We need your help. We can beat them if we work together.











We'll be having a flag wave in a town called Sandy on Friday and possibly Saturday also depending on how Friday goes. It's alittle town outside Portland. My plan is to hit these little towns and recruit, then we all go into Portland together. I'll get some videos and post them here. If you're in the Portland area come on out. Flag waves are tons of fun, and there are just enough libtards around to make it even more entertaining. If you have people from oregon following, please echo this post. If all this stuff has been pissing you off, heres your chance to do something. Even if you cant be here yourself, echoing this post will boost our numbers. THIS GROUP IS ACTIVLY FIGHTING THE LEFT. Not figuratively. We get toe to toe whith these "people". To date I've helped get 83 of these clowns arrested. 3 by way of the hospital, and 5 off to prison. Come help us! We can do more if we work together.







This isnt turning into a civil war. It IS a civil war. How do I know? Because they are throwing explosives at me. The fighting has already started. When you get tired of losing, contact me. Upvote and echo this post. We need numbers. I'm currently camped out (deployed) in the national forest outside of Portland. We move between here and Rainer national forest outside of Seattle. When you have time, come join us. We backup local sheriffs and patrol the perimeter of each city. We need guys. We need vets. Patriots. Come join us. Bring a tent and bedroll. Camping in the national forest is free and its breathtaking here. Aside from kicking terrorists asses, theres hiking, gold panning, kayaking... We have an old school civil war camp set up. History is being written right now. Come be a part of it. We can beat these people easily. It's time to get started.

If you cant be here but would still like to help, echo and upvote. You can recruit from anywhere. MAGA!



This cat seriously almost got shot. He was screaming at me and started to charge me so I reached for my weapon and he stopped. He was foaming at the mouth with rage. YOU WILL NOT TERRORIZE ME! Do not violate my right to free speech. Do not violate my right to peacefully assemble. Do not violate my freedom of movement. Do not violate me... It will be hazardous to your health. You wont make me afraid to walk down the sidewalk. I fought a war for this country. I'll fight another one for it.



I am no longer a Proud Boy. I'll be back after I get Enrique voted out. The best thing the Proud Boys could do at this point is rid themselves of Enrique. At our flag wave monday, about 10 of them showed up. We had more than 70 show up total though. They had 10 but we had 60+. Our group is much larger than theirs. They really arent helping the cause. They are like a wrecking crew when they show up. They start talking to all the other Patriots and spread dessension. We've outgrown the boys. We can do this without them here. They dont just do this with our group. They do it with any patriot group that doesnt follow their orders. If you're a patriot group in the PNW, and need help dont waste your time with them. I'm getting a network together here and we can move people around. Contact me. I SAY AGAIN. I am no longer a Proud Boy. I have ZERO confidence in the leadership. ONLY THE LEADERSHIP. I have a ton of friends in the proud boys. They need a real leader in charge though.









Antifa is supposedly looking for me out here in the National Forest. They're camping out here too. They are looking for me but I already have intel that they are all camped out at Government Camp down the road. It's easy to find me. I'm going to give you a hint. Listen for all the gunfire and explosions. That's where I am.









Haha. One of the terrorists is crying to the Portland police about getting hit by a paintball. I dont know all the details but he said they were pushing assault charges. Heres the thing, I know the lefties in charge of Portland would love to hymn me up on the assault charges but if they think I'm going to turn myself in to an argy mob, they are insane lol. Whoever's in charge of Portland can fuck all the way off. You're not going to tell me how I can defend myself. I guess your just going to have to rely on your defunded police department to pick me up 😜 I say again... All you lefty judges, DAs, city council, and mayors can get bent. Americans are going to be treating you like tyrants VERY soon. Dont tread on me. "Democrats have become too extream to govern". That's what Trump says. I believe him. I dont think I'm going to let them govern me anymore. Take the charges and stick em up your ass.













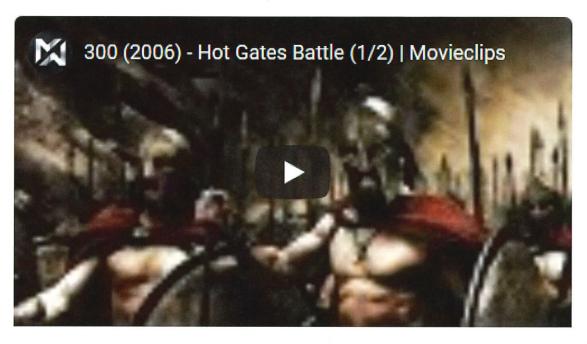
100s of patriots will be converging on the Justice center this Saturday August the 22nd. D-Day. The left has always said we were lucky we were that the cops were there protecting us. You have successfully removed the cops. Now you get to deal with "We the People". You let your mouth overload your ass. What on earth will we do without the cops there protecting us? You wont want to miss this Saturday. Follow and turn on notifications. It's time to take this country back.







Portland Oregon. Saturday August 22, 2020 Justice Center. THIS IS WHERE WE HOLD THEM! THIS IS WHERE WE FIGHT!



300 (2006) - Hot Gates Battle (1/2) | Movieclips

Hot Gates Battle Scene | 300 (2006) Movie info: https://www.imdb.com/title/tt0416449/ Buy it on Blu-ray: https://www.amazon.com/300-Blu-ray-Gerard-Butler/dp/B000VE2NQ4 Starring: Gerard Butler, Lena H...

https://youtu.be/2ba2ZinGLl4



I guess stuff like this is why I'm getting followers in England. I've always said when this kicks off it's going to be global. It's going to be a global civil war between patriots and left wing extremists. The difference between America and England though is that the governments of Europe have made it almost impossible for conservatives to defend themselves. The left has been set up in the United States. They've been made to believe that they can beat conservatives here. Even though American conservatives are the largest free standing army in the world. The lefties here are too stupid to understand that when they successfully start the civil war here, they'll be crushed in a week. It's not going to be so easy for Patriots in Europe. No worries though. After we crush the lefties here, we'll come there and help you if I have anything to say about it. It's time to purge this world from the evil that's infested it.





Study the picture. The blood from this peaceful protestor is what they want you to see, but the reason for the blood is in his hand. I had no fewer that 15 death threats Saturday. Probably many more that I didnt hear. 3 people said they had guns and were going to kill me. Probably more that I didnt hear. You will not terrorize me. I'm going to wave flags in every square inch of this country that you say I cant. I know people want to kill me and that's ok. None of us are getting out of here alive. I made my piece with dying for this country 30 years ago in Iraq. If they get me, 100 pissed off Americans will take my place. They wont win this. Even if Im not here to see this through, I know what the final result will be. This is America. We're Americans. We'll beat you. There is no scenario where you win this. Our victory is a mathematical certainty.



All my heros kill terrorists.



Ok so if you guys want to go to a rally to wave American flags, and you dont let the left attack you, this is what you can expect from our justice system. There is a grand jury deciding today whether or not to prosecute me for hitting a guy in the eyebrow with a paintball. PLEASE ECHO! This is very important! Moments like these are what determine the course of our country. WILL OUR GOVERNMENT LET US DEFEND OURSELVES? Will they make us submit to mob rule? Go through my timeline and judge me. Dont let a liberal justice system railroad me. I'm taking these chances for all of us. It's your turn to help. We're louder as a group. Make some noise! After they get me, they're coming for you.

How you can help.

Follow me @alwuzhere

Upvote this post

Echo this post

If you ...



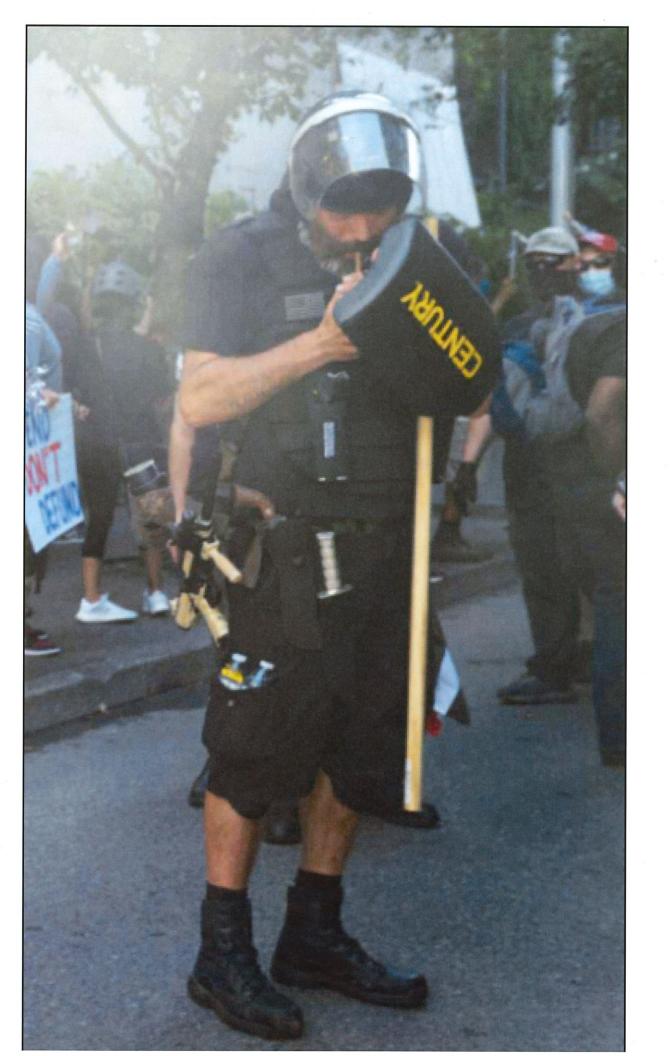
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So you want to wave flags at the justice center? Get suited up. They wont make it easy. I was in the Army and played football for a couple years when I got out. This is the perfect blend of the two.











They thought the 22nd was rough? The 26th will be 10 fold.



Prt.2 Alt-Right Agitators vs BLM & Antifa

Prt.1 Alt-Right Agitators vs BLM & Antifa https://youtu.be/DE9KYZF9UnU "Alt-right 'agitators' clash violently in downtown Portland, unlawful assembly declared" "PORTLAND, Ore. — Alt-Right and white n...

https://youtu.be/gBPUrdEQp2Y







people are terrorists. Really real terrorists pulling my weapon, then someone getting hit by a paintball would be incidental. These already been dropped. If the results of the grand jury investigation were that I was justified in started drone strikes on them by now. I wont go to jail for this and I hear the lawsuit has Domestic enemies of the constitution. If they were in another country, we would have violently shut down our right to peacefully assemble and support our political candidate are around me, I'll pull a gun. EVERY time. Without question. These people who show up to now means they dropped it most likely. If my lifes in danger or the lives of innocent people either. The Grand Jury started a couple of weeks ago. It has to be over by now. No warrant by TERRORISTS. Literal terrorists. They arent Americans. They are seditionists. Insurrectionists. Lefties are losing their minds that I'm not in jail right now for this. I wont be going to jail





In Iraq our unit destroyed over 4000 trucks and jeeps, 220 armored personnel carriers, 48 artillery pieces, 24 tanks, and 26 jets. I wonder how many lawsuits Iraqis have pending on me? Oh yeah... I dont care about that either. WE'RE GOING TO TAKE THIS COUNTRY BACK FROM YOU. What you experienced Saturday at the Justice Center was just the tip of the iceberg. You're in our country. We're not in yours.







We have a unit large enough now that we have specialized teams inside our unit. Combat and support. 90% of people who come out here want to be on the front line, but the front line isnt for everyone. I'm not even best suited for the front line. I'm too tall. 66% of any combat mission is support. A frontline soldier couldn't do his job without it. He cant carry enough weight in with him to properly do his job or do his job to the fullest without support. Coming to one of our rallies doesnt mean you have to directly fight the people who come to attack us. There are MANY ways you can help.

It's no secret where we'll be. Come here and help us. You can have as much or as little action as you want. We'll help you find the job that matches your skills. 🔥



