IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff, v. JOSEPH OWAN GIBSON, Defendant.	Consolidated Case No. 19CR53042 **MOTION OF DEFENDANTS JOSEPH GIBSON AND RUSSELL SCHULTZ TO DISMISS FOR SELECTIVE PROSECUTION AND MEMORANDUM IN SUPPORT THEREOF**
STATE OF OREGON, Plaintiff, v. RUSSELL SCHULTZ, Defendant.	Consolidated Case No. 19CR53035

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

TABLE OF CONTENTS

TABLE OF AUTHORIES

Cases

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

Statutes

Other Authorities

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

MOTION

Defendants Joseph Gibson and Russell Schultz hereby move to dismiss the indictments against them on the ground that the prosecution violates their rights under the U.S. Constitution and Constitution of Oregon, including but not limited to the First, Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, §§ 1, 8, 20, and Art. III, § 10 of the Oregon Constitution.

They further move for leave to conduct discovery in further support of the motion, including but not limited to issuance, pursuant to ORS 136.580(2) and the foregoing authority, of the three subpoenas attached hereto as Exhibits 1-3, for follow-on deposition testimony of appropriate representatives of the three offices upon whom the subpoenas are to be served, and for an evidentiary hearing to resolve this motion.

This motion is supported by the accompanying Declarations of Joseph Gibson, Russell Schultz, D. Angus Lee, James Buchal and Aubrey Hoffman.

MEMORANDUM

Introduction and Summary of Argument

We begin with an overview of the relevant federal and state constitutional rights, and how the riot statute, ORS 166.015, had been judicially construed to avoid overbreadth with respect to constitutionally-protected expression. Specifically, to be guilty of riot, one must personally engage in violent physical conduct, and not mere expressive activity protected under federal and state free speech rights.

We then present the federal and state law of selective and vindictive prosecution. The "crux of both claims . . . is that the state was motivated to treat defendant[s] more severely than [they] otherwise would have otherwise been treated—and more severely than others were in fact treated—due to [their] exercise of a constitutional right". *State v. Kadderly*, 176 Or. App. 396, 401 (2001). Federal and state law establishes two relevant factors: (1) that Gibson and Schulz were treated

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

differently than others with similar conduct; and (2) that the decision to prosecute was based on constitutionally-impermissible criteria.

It is obvious that Gibson and Schulz have been treated quite differently than others similarly situated. We first present background on the political motives at work. The starting point for analysis is then the nature of their conduct being prosecuted. The police reports and videos the State had in hand when it determined to prosecute defendants Gibson and Schultz show that the State knew full well that they had not engaged in "violent or tumultuous" conduct under ORS 166.015.

What the State did have was clear evidence of criminal activity by Antifa members outside Cider Riot on May 1, 2019. Yet the State has only prosecuted anti-Antifa protesters, and continues to discriminate in favor Antifa to the point of devising a formal Non-Prosecution Policy protecting them from riot charges for conduct far, far beyond any conduct of defendants. While the State refuses to apply this Policy to defendants, after months of riots, no similarly-situated Antifa protesters face a standalone riot charge.

Defendants return to this Court after prosecuting a federal action against the office of the Multnomah County District Attorney, District Attorney Mike Schmidt, and Deputy District Attorney Brad Kalbaugh. During a recent hearing in federal court, the court asked Kalbaugh's attorney "So what does the evidence show [Schultz] did, in your view?" Kalbaugh's counsel stated: "It shows that he's yelling. It shows that he's shaking his finger at various people at the -- in the crowd." But, yelling and shaking a finger is not riot, and it is certainly not something that has been used to justify riot charges against anyone involved in a left-wing protest.

The federal court concluded that defendants Gibson and Schultz made "*compelling arguments that their conduct does not rise to the level of 'tumultuous and violent' conduct under O.R.S. 166.015*." *Gibson v. Schmidt*, No. 3:20-cv-01580-IM, 2021 U.S. Dist. LEXIS 36497, at *26 (D. Or. Feb. 26, 2021) (emphasis added). The court also noted that "Counsel for Defendants failed to provide any justification for the non-prosecution policy [relating to Antifa rioters] or explain why

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

it was not evidence of Defendants' bias against Plaintiffs." *Id*. at *31. The Court, however, held that *Younger v. Harris*, 401 U.S. 37 (1971), required the federal court to abstain from exercising federal jurisdiction to avoid interference in the state criminal proceedings.

Of particular and controlling importance to the federal court was its perception that this Court was ready, willing and able to address the claims presented by this motion. The Court stated:

> ". . . counsel informed the state court during an October 23, 2020 hearing that he intended to file a motion arguing that Gibson's prosecution was being pursued in bad faith for the purpose of chilling protected speech, and that the Constitution required the state court address this argument before Gibson stood trial on his riot charge. ECF 52 at Ex 2, p. 23, 29-30, 57-58. In response, the state court judge said 'I will certainly hear that, I will hear whatever motion you wish . . . ." *Id*. at Ex. 2, p. 54."

Given the federal court's decision to refer the matter to this Court, defendants renew those claims here.

The lack of factual bases for the charges against Gibson and Schultz requires an alternative explanation for the decision to prosecute. There is compelling evidence of constitutionally-impermissible motives, beginning with the extreme political hostility to their viewpoints, and ripening into bad faith invocation of the criminal process precisely timed to prevent Gibson and Schultz from participating in a large political rally. In the case of defendant Schultz, he was even told that he was arrested by order of the Mayor.

With the showing made on this motion, federal case law shifts the burden to the State to explain its prosecutorial decisions. Either the evidence presented herein is sufficient to sustain the motion, and produce dismissal of the indictments, or defendants Gibson and Schultz should be permitted to obtain documentary and testimonial discovery concerning the decisions to arrest and prosecute them for riot. The right to such discovery is well-recognized in state and federal law, and an evidentiary hearing is required to resolve these claims once discovery is complete.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

Argument

I. BACKGROUND PRINCIPLES OF LAW

A. The Federal and State Constitutional Rights at Issue.

1. Federal rights.

This case invokes longstanding federal constitutional rights, as articulated by the United States Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), which held that the application of laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances" constitutes a denial of equal protection and is "within the prohibition of the Constitution." *Id.* at 373-374; *see also United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973) ("The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws.")

The actions of prosecutors and police officials are subject to these constitutional constraints, which limit the scope of prosecutorial discretion as a matter of federal constitutional law. *United States v. Batchelder*, 442 U.S. 114, 125, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979); *Falk*, 479 F.2d at 618. Specifically, "selective prosecution" is prohibited by the Constitution, which occurs where "the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974); *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996).

In particular, "[t]he Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances." *Dixon v. District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968). Prosecution related to a desire to chill speech violates the prohibition on selective prosecution. *See United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

The other federal right, of course, is the First Amendment's freedom of speech and assembly, made applicable to the State through the Fourteenth Amendment. The primary First Amendment issue raised by the case is whether Gibson's verbal statements could be construed as going beyond the protection of the First Amendment. (Another Multnomah County Circuit Judge has already concluded they do not. (Buchal Decl. Ex. 1.)) It is important to note that neither Gibson nor Schultz used any "fighting words"—that is, "personally abusive epithets which, when addressed to the *ordinary citizen*, are, as a matter of common knowledge, inherently likely to provoke violent reaction". *Cohen v. California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 1785 (1971) (emphasis added); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 770 (1942) ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight"). Defendants were not addressing ordinary or average citizens; they were addressing members of a criminal gang that had repeatedly attacked Gibson and had an openly articulated strategy of "de-platforming" Gibson by responding to his speech with violence. It would be obvious to any prosecutor not pursuing a vindictive or selective prosecution that Gibson's communications to the Antifa bar patrons at all times remained within the protections of the First Amendment because, among other things, ordinary citizens would simply listen to or ignore Gibson rather than respond by physically attacking him as Antifa did.

2. State rights.

Article I, § 1 of the Oregon Constitution declares that all are "equal in right," while Article I, § 20 makes even more clear that there shall be no law "which, upon the same terms, shall not equally belong to all citizens." And Article 3, § 10 compels the executive branch to "take care that the Laws be *faithfully* executed." (emphasis added). Obviously, selective prosecution is not "faithful" execution of the law. Article 1, § 15, also precludes selective prosecution by specifically limiting the founding principles of Oregon's criminal law to "protection of society, personal

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

responsibility, accountability for one's actions and reformation." All these principles are diametrically at odds with the concept of selective prosecution based on political activity.[1]

Article I, § 8 of the Oregon Constitution is a "very broad prohibition" on restraints on expression, and its "sweeping terms" extend to the kind of protest defendants engaged in here and even to "the kinds of expression that a majority of citizens in many communities would dislike." *State v. Ciancanelli*, 339 Ore 282, 293, 311, 121 P3d 613 (2005). Oregon courts "recognize the social and personal value of protest and, often, of protest at a particular time and place". *State v. Babson*, 355 Or. 383, 433, 326 P.3d 559, 588 (2014). These principles significantly limit application of the riot statute to the political protest against Cider Riot.

B. The Nature of the Riot Charge and Elements of Proof Required.

Defendants are charged under ORS 166.015, which provides that a "person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm." ORS 166.015(1). Under the Fourteenth Amendment, when a statute or regulation is extremely broad and permits near unfettered discretion in the decision to prosecute, it "sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

Presented with a facial challenge to ORS 166.015, the Oregon Supreme Court has made several narrowing constructions of the statute which are known to the State, and against which their charging decision must be evaluated. The Oregon Supreme Court concluded that the statute was not overbroad with regard to the regulation of constitutionally protected speech only by clarifying, among other things, hat:

> "It is clear under the statute that a person does not commit the crime of riot if he or she merely is part of a group and five *other* members of that group engage in tumultuous and violent conduct that intentionally or recklessly creates a grave risk

[1] Additionally, a prosecutor has a ethical duty to (1) support the Oregon and United States Constitutions (ORS 9.460), and (2) to avoid engaging in conduct that is prejudicial to the administration of justice (RPC 8.4(a)(4)).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

> of causing public alarm. Under the statute, *the state must prove that the person charged actually "engage[d] in violent and tumultuous conduct."*

State v. Chakerian, 325 Or. 370, 375 n.8, 938 P.2d 756, 758 (1997) (emphasis added).

The Court also provided the narrowing constructions that the statute refers to "*physical activity* that reasonably is perceived by others as threatening an imminent breach of the peace" and that the terms "tumultuous and violent conduct" "are a reference to *non-expressive acts*". *Id.* at 378 & n.11 (1997) (emphasis added).

The *Chakerian* Court also explained that "conduct" as used in ORS 166.015 could refer to both protected and unprotected expression under Article I, § 8. Id. at 376 n.9. The Court gave the example of "assault" as the sort of conduct that could support a prosecution, as opposed to expressive conduct. As we shall see, the State has already conceded that defendants Gibson and Schultz assaulted no one, and the State is unable to identify any non-expressive conduct that could possibly support riot charges.

In evaluating the unconstitutional motives in the selective prosecutions here, it is important to understand that the prosecuting attorney, Deputy District Attorney Kalbaugh, is fully and personally aware of the heightened judicial requirements to sustain a riot charge. At the March 6, 2020 hearing herein, he told the Court: rioters:

> ". . . .there's been a lot of discussion from Mr. Buchal about riotous conduct. That's not a term of art. Under Oregon, when you look at the riot statute and you look at the case law that explains what it means to have tumultuous and violent conduct, we have *State v. Hicks* [, 120 Or. App. 345 (1993)]. And *State v. Hicks* goes into the idea that the language is designed to imply terrorist mob behavior involving ominous threats of personal injury and property damage."

(Buchal Decl. Ex. 4, at 37.) And in discovery in the federal action, Mr. Kalbaugh has made it clear he understands that "mere proximity to people rioting does not satisfy the legal requirement of 'engaging in tumultuous and violent conduct' beyond a reasonable doubt." (Lee Decl. ¶ 18g.) That, in substance, is what defendants Gibson and Schultz are charged for.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

II. THE VINDICTIVE AND SELECTIVE PROSECUTION OF GIBSON AND SCHULTZ REQUIRES DISMISSAL.

Relief against vindictive and selective prosecution is well-rooted in Oregon precedent. As the leading Oregon case explains:

> Defendant's vindictive and selective prosecution claims, as invoked in this case, are predicated on federal constitutional principles. "Vindictive prosecution," which is rooted in the Due Process Clause, is premised on the notion that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]" Thus, a criminal charge is subject to dismissal if the state brought the charge in retaliation against a person "for exercising a protected statutory or constitutional right."
>
> "Selective prosecution" has a different constitutional source but reflects a similar value. Drawing from Equal Protection Clause standards, selective prosecution arises where a defendant demonstrates that others "similarly situated" were treated more favorably and "that the decision whether to prosecute [was] based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" One such "unjustifiable standard" is the prosecution of a particular defendant for having exercised a constitutional right. Thus, in general, "little substantive difference can be detected between selective prosecution and vindictive prosecution." *The crux of both claims here is that the state was motivated to treat defendant more severely than she would have otherwise been treated—and more severely than others were in fact treated—due to her exercise of a constitutional right.*

State v. Kadderly, 176 Or App 396, 400–01, 31 P3d 1108 (2001), *rev den*, 333 Or 260 (2002) (emphasis added; citations and footnotes[2] omitted); *see also City of Portland v. Bitans*, 100 Or.App. 297 (1990).

Federal and state case law establish two broad showings that a defendant must make: a discriminatory effect and a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 457 (1996). More specifically, this may be demonstrated by showing that: "(1) the prosecutor has not prosecuted others similarly situated for similar conduct and (2) the decision to prosecute was based on impermissible grounds, as, for example, race, religion or the exercise of constitutional rights." *Portland v. Bitans*, 100 Or. App. 297, 302, 786 P.2d 222, 225 (1990). The extensive history of this

[2] In *Kadderly*, the defendant "did not rely on any state source of law for her claims". 176 Or. App. at 400. Gibson and Schultz here advance both federal and state constitutional rights in support of their claims.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

case, which we present in chronological order below for clarity, demonstrates that defendants Gibson and Schultz easily establish these two showings.

A. The Background Political Context and its Relevance.

Though he did not organize the protest at Cider Riot (Gibson Decl. Ex. 1, ¶ 15), defendant Gibson leads right-wing protests throughout the country, and has been under continuing attack by the political leadership of Portland for many years. Conflict intensified with the election of Donald Trump as President, with the City of Portland facilitating mass protests against the President-elect (Buchal Decl. ¶ 5). As early as 2017, the political left in Portland was bragging that they could shut down the streets of Portland to prevent any conservatives from exercising free speech rights (*id.* ¶ 6).

The entire political and media complex leadership in Portland has worked very hard to blacken the name of Gibson and Patriot Prayer. (*See generally* Buchal Decl.) As defendant Gibson began to hold events in the City, there was a campaign of continuous and hostile media coverage calling him a "white supremacist" (though he is half Japanese) and a "violent, far-right extremist" (*id.* ¶ 8). These statements are entirely false.

Their campaign has created a sufficiently hostile political climate that anyone who dares support Gibson or Patriot Prayer is "cancelled". One example was Oregonian columnist Elisabeth Hovde, who actually went to hear Mr. Gibson speak and published a favorable article, which resulted in such an outcry, including another attack from the Mayor (who is also the police commissioner) accusing her of making "common ground" with "hate, extremism and violence," that she lost her job at the Oregonian (*id.* ¶¶ 12-21). A Portland policeman, Lt. Niiya suffered a similar fate, for simply communicating in a civil manner with Mr. Gibson (*id.* ¶¶ 22-26).

At all relevant times, elected officials in Portland have not only discriminated against Gibson and Patriot Prayer for constitutionally-impermissible reasons, but bragged publicly of doing so. One of the first examples of selective decision-making by the local political powers concerning

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

defendant Gibson came in May 2017, when the Mayor announced that he would not issue any permits whatsoever for "alt right events" (*id.* ¶ 9; *see also id.* ¶ 136).

With only limited discovery, defendants have already obtained circumstantial evidence of the political pressure reaching the prosecutor's office to go after conservative participants in Portland demonstrations. By March of 2019, at least one article was entitled, "Assault arrest made after Portland mayor complains," referring to the Mayor's demand that action be taken against right wing protestors. (*Id.* ¶ 28 & n.26). More importantly, defendant Schultz has testified that, one of the arresting officers tells him that the Mayor had "pressured" the District Attorney to make the criminal charges. (Schultz Decl. ¶ 10.) The Multnomah County District Attorney's office did not deny these claims when presented in federal court.

It is precisely circumstances such as these, involving the prosecution of those outspoken against government political positions, that form a consistent theme in successful motions to dismiss vindictive or selective prosecution. Three leading federal cases make this clear. First, *In United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), the court found that evidence of discriminatory intent based upon First Amendment speech was "compelling" where only four individuals in Hawaii were chosen for prosecution for refusing to answer census report questions in violation of 13 U.S.C. § 221(a). Each of the individuals, including Steele, had each participated in a census resistance movement urging the public to not comply with the census. Steele, a "vocal offender," had led protests, held press conferences, and distributed leaflets as part of the resistance. *Id.* at 1151. "An enforcement procedure that *focuses upon the vocal offender* is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right." *Id*. (emphasis added).

In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), the defendant was charged with refusing to submit to induction into the Armed Forces and with failure to possess a draft registration card. *Id.* at 617. The court found that Falk, like the defendant in *Steele*, was a "vocal offender"

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

who had been actively involved in advising others on methods of legally avoiding military service and protesting American actions in Vietnam. *Id.* at 621.

The court found that Falk was prosecuted for the prior, minor infractions (namely, violation of the card carrying requirements) "only because he had exercised his First Amendment privilege to claim a statutory right as a conscientious objector." *Id.* at 622-623. The court held that a *prima facie* showing had been made that the government engaged in an "invidious discrimination between violators who acquiesced to the power of the Selective Service System and those who continued to assert their rights to be classified as conscientious objectors." *Id.* at 624.

And in *United States v. Crowthers.* 456 F.2d 1074 (4th Cir. 1972), the court found that the regulation under which the defendants had been prosecuted granted uncontrolled discretion to governmental officials and had been selectively and unequally applied. Defendants, who had participated in several "Masses for Peace" protesting the Vietnam War at the Pentagon, were charged with and convicted of disorderly conduct in violation of 41 C.F.R. § 101-19.304.

While "there was substantial evidence to support the magistrate's findings that the defendants created loud and unusual noise and obstructed the usual use of entrances, corridors" at a Pentagon concourse, the court found that discriminatory intent to suppress a viewpoint was evident because "[i]n choosing whom to prosecute, it is plain that the selection [was] made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused." *Id*. at 1078-79. The court held that the government may not apply an extremely broad statute to "permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy." *Id*. at 1079. As we shall see, it is impossible to conclude that the selection of Gibson and Schultz for prosecution was based on the degree to which their personal conduct was "riotous."

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

B. Defendants' Conduct on May 1, 2019 Event at Cider Riot and its Relevance to the Claims.

In evaluating defendants' claims for vindictive and selective prosecution, a starting point is examining "the relative strength of the prosecutor's evidence against defendants accused of comparable crimes". *United States v. Laneham*, No. CIV 16-2930 JB, 2017 U.S. Dist. LEXIS 176486, at *87 (D.N.M. Oct. 25, 2017). For this reason, we review the evidence of exactly what happened at Cider Riot on May 1, 2019 in considerable detail.

There is no dispute that the charges arise from a political demonstration at Cider Riot late in the day on May 1, 2019. Defendant Gibson has provided extensive testimony considering his political motives and goals for being present. (Gibson Decl. ¶¶ 1-9 & Ex. 1). Neither defendant damaged any property, threw anything, or committed any assaults. (Gibson Decl. ¶ 12; Schultz Decl. ¶ 3.)

Indeed, Deputy District Attorney Kalbaugh has repeatedly admitted this. At the March 6, 2020 hearing, he said: "Your Honor, if the State was charging Mr. Gibson with assault, the State can see that Mr. Gibson would have a very good basis to say, "How am I being charged with assault? I don't see anything of me assaulting anyone."" (Buchal Decl. Ex. 14, at 56.) When counsel for defendant Schultz complained that there was no evidence of misconduct by Schultz, Mr. Kalbaugh responded that "Schultz was being prosecuted because he, and numerous others, stood around a fist fight between two other individuals at the time of the protest". (Hoffman Decl. ¶ 18.)

The entire event at Cider Riot was recorded by multiple videographers, including Gibson himself, who taped a continuous livestream of the entire event (Gibson Decl. Ex. 10). Mr. Schultz can be seen on the videos as the man with the beard and the black shirt over the red shirt. (Hoffman Decl. ¶ 11.) There is also an extensive investigatory report of the Oregon Liquor Control Commission (Buchal Decl. Ex. 12), which relied in part upon Police Reports, all filed herewith (*id.* Exs. 5-8).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

As Mr. Gibson approaches the bar, it is important to understand that everyone in the bar, in substance the members of a criminal gang known as Antifa, came outside to meet him. It was blindingly "obvious," to quote the OLCC report, that "both groups were making the choice to be there and that any time the Patriot Prayer group could have walked away and the Antifa group could have walked inside the bar or walked away". The report from the only officer on scene even repeats this: "the people directly involved in the disturbance were there by choice and were free to leave at any time". (Buchal Decl. Ex. 5, at 15; see also Ex. 7, at 2).

With the arrival of Mr. Gibson at Cider Riot, Antifa people yelling at Mr. Gibson as he arrived and one particular individual, later identified as David Chaltraw, attacks Mr. Gibson as he arrives (Buchal Decl. Ex. 2, 10:08 (to 11:05)), with more violent and repeated attacks later on. At one time the Portland Police expressed an interest in locating him, and his name and address were supplied to both Deputy District Attorney Kalbaugh and Detective Traynor, but no arrest or prosecution was ever undertaken. (Buchal Decl. ¶ 39 & Ex. 3A.)

The initial portion of Mr. Gibson's video live feed would make it clear to any prosecutor that he is engaged in a political demonstration. DX10 0:45 (to 1:38) Mr. Gibson believes that Antifa is likely to behave badly, and he is there to record the events if they do. The political message he wishes to convey is that Antifa is a disorderly, violent group that should be met with public approbation. Significantly, Gibson does not use "fighting words;" he is not saying things that would arouse any reasonable citizen to attack him. Yet Antifa throws things at Gibson and spit on him.[3] In short, it should have been obvious to any prosecutor operating in good faith that Gibson

[3] The State has previously highlighted an incident where Mr. Gibson wiped that spit on someone's shirt, and Deputy District Attorney Kalbaugh will later cite the incident as part of his bad faith attempt to support riot charges. The OLCC Report (Exhibit 7 to 1/8/21 Buchal Decl.) sums it up:

"1:33 Patron spits on Joey Gibson

"1:41 Joey Gibson wipes spit on patron." (Ex. 7, at 11.)

The video evidence may be seen in DX10, at 1:57 to 2:15. There one can see the patron with whom Gibson is interacting is smiling; there is no riotous conduct. The scene continues from another angle, DX11 8:08 (to 8:32), resulting in the sort of Antifa behavior Gibson wishes to capture and broadcast.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

and Schultz were free speech rights of a type entitled to the highest degree of constitutional protection.

In assessing the total failure to prosecute any Antifa participants in the event, it is important to understand that it was an Antifa member who first escalated the situation to the point where individuals began pepper-spraying each other—not defendants Gibson or Schultz. Gibson Decl. Ex. 11 ("DX11"), at 8:33 to 8:53, demonstrates that it was a woman in a red sweatshirt standing on the patio, who threw her beer in the face of demonstrator. Gibson used the events to engage in further political commentary. (Gibson Decl. Ex. 10 ("DX10"), 4:01 to 4:31.)

It is also clear from the tape that Gibson's goals do not include wanting any violence from the demonstrators at all. "Don't throw anything. Let them be violent." He doesn't want the people protesting Antifa to be throwing things. It is about letting Antifa act out and broadcast the message. The tapes also demonstrate that Gibson was the victim of multiple, legally-unjustified attacks by other individuals besides David Chaltraw. Examples include DX10, at 5:35, DX11, at 10:51, Buchal Decl. Ex. 3, at 29:10 to 29:39 (attacks at 29:12 and 29:32).

Gibson continues to attempt to keep the demonstrators on his side peaceful, shouting "calm down", and we see more political speech in DX10, at 12:27 (to 13:10). At one point, there is even some music, and more political speech. DX10, at 15:00 to 15:45. The Antifa crowd attempted to provoke Gibson, saying all his friends are pedophiles. But he doesn't take the bait. He is committed to nonviolence. (*See also* Gibson Decl. Ex. 1, ¶ 13.)

Deputy District Attorney Kalbaugh would later attempt to support probable cause for riot by mentioning that Gibson and Schultz were standing around a fight. (Hoffman Decl. ¶ 18.) Gibson got involved after the fight had started, and his role was clearly to prevent escalation of the dispute; Schultz was just standing there. This is very obvious from the videos, and it is also confirmed in the OLCC report.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

Gibson's own camera shows the moment he perceives the fight. DX10 17:17 (to 18:01). It has already started up the block away from where Gibson is. Gibson is repeatedly telling people to put weapons away. Another camera, beginning with Gibson crossing the screen, shows how far away he was when the fight started. PX6 26:34 (to 27:00). One can see Schultz walking there too, as he too was not involved in the start of that fight.

Gibson's own camera show more clearly how Mr. Gibson was trying to avoid escalation. DX10, 18:15 (to 18:32). The one-on-one fights ends with handshakes all around. DX10, 20:38 (to 20:57). No reasonable prosecutor could have charged Gibson and Schultz for "violent and tumultuous conduct" which "creates a grave risk of causing public alarm" (ORS 166.015) while not charging the people who were fighting—at least one of whom was known to police and interviewed by OLCC investigators. This point bears repeating: the State knew the identity of at least one of the two men engaged in a fist fight in the street (the one on the Antifa side), yet the State took no legal action against him.

Later, there was an injury to Ms. Heather Clark, which occurred after she attacked Gibson and others when he was trying to leave. The background is a confrontation with another defendant, Mr. Cooper. The tape, Buchal Decl. Ex. 3, 39:06 (to 39:35), appears to show that an Antifa bar patron punches Mr. Deme Cooper, the black man wearing the black, white and green striped shirt, Mr. Cooper retreats, and comes back, beaconing with his hand. It is important to understand that at this point, Ms. Clark is at this point shouting "Deme is a fucking coward". *Id.* Ex. 2, 31:32 (to 31:54). The Antifa patron who attacked Mr. Cooper was also never arrested or charged.

Ms. Clark is goading Cooper, and Gibson does not appear on the scene until after the hostilities have already started, egged on by Ms. Clark. Gibson's live feed confirms this; he is away from Cider Riot, across the street and a little way down the street talking to some of the other demonstrators when he hears something going on, and turns around and walks back where Mr. Cooper is interacting with Antifa. DX10 21:59 (to 22:38).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

Cooper, was not happy to leave, and wanted to fight. *Id.* (to 22:58). Gibson again was seeking de-escalation by saying "one, one, one". When no one wanted to fight, Gibson turned away; he wanted to try and limit any violent conduct by others to consensual behavior, in a one-on-one way. *Id*. (to 23:54)

Cooper continues to interact with Antifa, and one woman in particular. *Id*. (to 24:48). Gibson and Schultz are both urging people, including Cooper, to leave, but Cooper goes back, and is again interacting with the Antifa woman and Ms. Clark. A few seconds later, Ms. Clark will attack and then will be injured on the ground, as seen from other camera angle. Buchal Decl. Ex. 3, 42:05 (to 42:30).

Gibson is trying to defuse Cooper's encounter with Ms. Clark, Cooper pushes Clark, and she simply goes berserk, charging at the demonstrators and breaking right through to them, until she is pepper sprayed, and turns away, and while she is turning, someone hits her. Gibson is moving away from her when she attacks.

Despite numerous recorded attacks by Antifa bar patrons, who initiated and escalated the conflict, there were no prosecutions of any bar patron at all. Case law confirms that the absence of prosecutions for others involved in substantially the same conduct is powerful evidence of vindictive or selective prosecution. Here, where others involved in the same incident, but with far worse conduct (physical attacks on Gibson, beating up and pepper-spraying journalists, etc.), the case is even stronger. In *Steele*, it was sufficient for the defendant to show "six other offenders who had not been prosecuted, as well as a governmental information gathering system that should have apprised the Regional Technician of the names of all who refused to comply with the census." *Steele*, 461 F.2d at 1152; *see also Falk*, 479 F.2d at 621 (other Selective Service registrants had disposed themselves of their draft registration cards but had not been prosecuted).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

C. The Decision to Initiate Criminal Proceedings.

1. Background and timing.

After May 1st, the wave of false publicity concerning defendants continued, and leading politicians specifically made false attacks against defendants based on the Antifa narrative of what happened at Cider Riot that day, falsely accusing defendants of "terrorizing" the bar patrons and engaging in hateful conduct. (Buchal Decl. ¶¶ 79-86.) And after May 1st, the Mayor personally attacked Mr. Gibson and said that Mr. Gibson's core political message he was trying to present—that Antifa was a violent and dangerous criminal group—was called an "unsubstantiated narrative" presented only by "extreme media sources". (*Id.* ¶ 86.) The Mayor even attacked counsel for Gibson. (*Id.* ¶ 82.)

Three months passed with no law enforcement action taken against Gibson or Schultz. The authorities know who they were. The authorities had criminal complaints from two of the people beaten up or pepper-sprayed by Antifa members that day: Andy Ngo and Noah Bucchi. (*Id.* ¶ 47.) And no action was taken whatsoever against the perpetrators of those crimes other than taking the reports. (*Id.*)

Over the summer of 2019, local opposition to any demonstration of right wing messages intensified, and grew to a fever pitch as the Proud Boys planned an August 17, 2019 "End Domestic Terrorism" rally, "the purpose of which was to promote the idea that the 'antifa' antifascist movement should be classified as 'domestic terrorism,' [and which achieved national attention]."[4] The Oregonian reported that as early as August 2nd, meetings were occurring among the offices of the U.S. Attorney, the Mayor, City Attorney, the District Attorney, the FBI, the Federal Protective Service and others "to help prepare for the Aug. 17 protests."[5]

[4] https://en.wikipedia.org/wiki/End_Domestic_Terrorism_rally (accessed 4/1/21).

[5] https://www.oregonlive.com/crime/2019/08/federal-state-and-local-law-enforcement-teaming-up-to-help-portland-police-staff-planned-protests-on-aug-17.html (accessed 4/1/21.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

In advance of the rally, on August 12, 2019, the District Attorney issued secret criminal informations against Gibson and Schultz. The criminal charges allowed the issuance of arrest warrants directly to stop defendants from participating in the demonstration. Both defendants believe the issuance of these arrest warrants were to deter them and others from attending the anti-Antifa rally. (Gibson Decl. ¶ 19; Schultz Decl. ¶ 9.) This also was the impression the public had, and it was so reported, with media reports that "the arrests of Gibson and five other far-right activists appear to be a signal from cops to organizers to keep their events peaceful. (Buchal Decl. ¶ 89.)

The MCDA has never disputed that the timing of the charges was to deter political activity. Though discovery herein, Gibson and Schultz seek communications between the Mayor and others concerning the decision to charge them. The timing of an indictment is among the circumstantial evidence to be considered in assessing a vindictive or selective prosecution claim, and federal courts have not hesitated to order discovery on the timing of an indictment. .

2. The police reports and their significance.

Only one of the police reports produced by the State and identified in their "Bill of Particulars" is focused on the events giving rise to the riot charges. The reports also demonstrate that there were multiple crime victims on May 1, 2019, who were the victims of Antifa attackers, and not defendants Gibson or Russell.

A narrative from Officer Traynor, assigned to investigate on May 2nd, and completing his narrative on May 22nd (Buchal Decl. Ex. 5), noted five victims: Heather Clark, Andy Ngo, Crystal Pritchett, Margaret Maxey, and Noah Bucchi. (*Id.* at 7.) Two had personal injuries from the Antifa side, one had a car damaged by a rock thrown from the Antifa side, and two had personal injuries from the anti-Antifa side, none caused by defendants Gibson or Schultz.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

Mr. Bucchi took the trouble to go to the Central Precinct to make a detailed report, which included allegations that one Antifa member broke his camera and then a man, possibly the owner of Cider Riot, pushed him multiple times with his fist. (Buchal Decl. Ex. 6, at 3.) The police report also confirms defendant Gibson was a crime victim, with the police report also notes at least one attack on Mr. Gibson (*id.* Ex. 5, at 28; *see also id.* Ex. 8, at 7.)

By May 30th, Officer Traynor conducted an interview of Ms. Clark (*id.* Ex. 5, pp. 23-24), which is the primary information in the police reports concerning defendant Gibson (other than video reviews). She says Gibson "appeared intent on provocation". Ms. Clark, however, made no accusations of any violent conduct against Mr. Gibson, much less Mr. Schultz.

Based on discovery received to date, the police investigation closed with Officer Traynor interviewing Robert West on August 8th, four days before charges were filed. Mr. West confirmed what an earlier witness also told Officer Traynor: "Gibson's plan was go to Cider Riot to seek a reaction;" (*id.* at 31.) Mr. West confirmed that "Gibson likes to play the sympathy card". He "liked to show that he was exercising his First Amendment rights and was attacked. Mr. West said a fight or a 'riot' by the group destroyed Gibson's 'narrative'" (*id.* at 32.) In other words, impartial witnesses told the police (and thus prosecutors) that what they should have been seeing on the tapes was correct: Gibson did not want any of the anti-Antifa demonstrators to engage in violent conduct.

The police reports establish facts known to the prosecutors, and confirm not only the lack of probable cause to prosecute Gibson and Gibson, but also the disparate and discriminatory treatment they received as compared to actual assailants in the very same event.[6]

[6] The police even let the Antifa bar owner get away with destroying evidence of what happened that day. We know that from the OLCC Report (Exhibit 12), because the OLCC staff was outraged that the owner of Cider Riot promised on May 1st to produce tapes of the event to the police, and then told them he had recorded over them all. (*Id.* at 10.) The investigator recommended charges on that, but of course nothing ever happened. Nor did police make any real effort to identify patrons of Cider Riot on the Antifa side. (*See* Buchal Decl. ¶ 39 & Ex. 3A)

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

3. The False Probable Cause Affidavit.

Prosecutorial discretion is available only "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute". *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). This makes review of the State's probable cause determination particularly important. Here, comparing the statements made in the probable cause Declaration submitted by Deputy District Attorney Kalbaugh (Buchal Decl. Ex. 11) and the information available to him in the police reports provides powerful evidence of a vindictive and selective prosecution.

The first problem is the statement that defendants were "taunting and physically threatening members of the Antifa group". The definition of taunting is ""to reproach or challenge in a mocking or insulting manner; jeer at". *Webster's Third New Int'l Dictionary* 2344 (1981). Taunting is not a crime, it is speech. As to "physically threatening," that is fiction. *No officer's report or any other information available to prosecutors accuses Gibson or Schultz of physically threatening anyone.* Not even Ms. Clark makes the claim; only Deputy District Attorney Kalbaugh does.

The affidavit also says that that Mr. Gibson was "challenging members of the Antifa group to fight him as he says 'do something'". This too is at best highly misleading. It was obvious that Gibson did not want to fight himself and had no intention of fighting Antifa, and anyone who looked at the videos or read the police reports could see that. These are not "fighting words," but free speech that cannot be the basis for probable cause to issue felony riot charges.

The most egregious false statement in the affidavit is the totally false claim that there is "video showing Gibson physically pushing Heather Clark, the woman who eventually was knocked unconscious". We discussed the video footage above in detail, and file it herewith, because Deputy District Attorney Kalbaugh grossly misrepresented this footage in his probable cause affidavit, saying: "video observed by Detective Traynor shows Gibson physically pushing Heather Clark."

The hearing in this matter will confirm there can be no good faith excuse for that false assertion, not just because of the video, but also because of the police reports. The report says *four*

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

times that it was defendant Cooper pushing Ms. Clark, not Gibson or Schultz (1/8/21 Buchal Decl. Ex. 3, a t 24 & 30 (Clark says Cooper pushed her).) The Oregon Liquor Control Commission had no problem seeing what was going on, and labeled a screen shot of the video as "HEATHER CLARK …ATTACKING JOEY GIBSON":

Buchal Decl. Ex. 7, page 1 of 1

ATTACHMENT 34
PICTURE OF VICTIM HEATHER CLARK
(PPB REPORT Redacte
ATTACKING JOEY GIBSON

(Buchal Decl. Ex. 13.) Heather Clark is the attacker here, but neither she nor anyone else on the Antifa side was prosecuted for assault.

This is not a case where ambiguous facts are resolved by the reasonable discretion of the charging prosecutor; this is a case where the prosecution is *making up facts* to support a probable

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

cause determination under circumstance that should destroy any presumption of an ordinary exercise of prosecutorial discretion and demand inquiry into the real motives of the prosecution.

At the same time Deputy District Attorney Kalbaugh filed the false probable cause affidavit, he also filed an affidavit stating that "Because interviews with witnesses are still pending and because law enforcement is still investigating this case, the integrity of the investigation will be best served if certain information remains under seal until the investigation is completed. I therefore move the Court to seal the Arrest Warrant Affidavit and Arrest Warrant in this case."

As noted above, the police had interviewed their last witness four days before Kalbaugh filed his declaration, and there was no good faith reason to seal the arrest warrant affidavit. The whole case was on video and all over the Internet. Testimony from Kalbaugh may well confirm that the Arrest Warrant Affidavit was sealed because it was fundamentally misleading, and had it not been sealed, defendants we could and would have challenged it, and gotten immediate relief at the time.

4. Grand jury and post-arrest issues.

As Soon as the arrest warrant against Gibson became public, counsel for Gibson contacted Deputy District Attorney Kalbaugh, attempted to educate him as to the free speech nature of Gibson's conduct, and asked that testimony from Gibson to this effect be put before the grand jury. (Buchal Decl. Ex. 9.) Kalbaugh refused. (*Id.* Ex. 10.) Deputy District Attorney Kalbaugh proceeded with a grand jury (for which there was no apparent purpose other than to cut off the right to a preliminary hearing), and refused to provide the grand jury with Gibson's testimony.

The grand jury proceeding was a farce. There was no testimony particular to Schultz *at all* beyond a single question asked of Detective Traynor: an improper, compound question listing out all the defendants, and asking whether they were engaging in acts that Detective Traynor would describe as violent and tumultuous. (Lee Decl. ¶ 20; *see also* Buchal Decl. ¶¶ 105-06.)

ORS 132.320 says that "the grand jury shall receive no other evidence than such as might be given on the trial," but the transcript is laced with such improper testimony. No competent trial

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

judge would have allowed this and other questions asked by the District Attorney. The critical question providing "evidence" of "violent and tumultuous conduct" was compound, leading, called for a legal conclusion, and was an opinion on the ultimate question. It was the *only question and answer related to the conduct of Russell*, and was totally impermissible. No prosecutor operating in good faith could have prosecuted Russell or Gibson.

D. The Unconstitutional Decision to *Continue* the Prosecutions.

1. Antifa Riots and the response of the Office of the Multnomah County District Attorney.

A few months later, defendants' warnings about Antifa became unmistakably true. In the wake of the death of George Floyd in the custody of the Minneapolis police, large-scale Antifa and Black Lives Matter riots occurred in the City of Portland for many months. The first fact to emerge of significance to defendants' claims here is that the Multnomah County District Attorney's office proved to be riddled with prosecutors highly sympathetic with those who engaged in riots with Antifa nearly every night for months. Discovery will confirm that favoritism to Antifa goes hand in hand with invidious opposition to patriotism and Christianity advanced by defendants.

Over forty people in the MCDA office asking for the Office to issue a "public, unequivocal statement in support of [the political organization] Black Lives Matter that acknowledges and apologizes for the role our office has played in the system". (Buchal Decl. ¶ 131 & Ex. 16, at 19.) The Office issued a statement publicly calling for the public to supply "mitigating evidence" to justify release of Antifa and BLM rioters. (*Id*. at 18.)

District Attorney Mike Schmidt was elected in May 2020, and was soon on Twitter promoting an interview given with whom he called his "buddy," a known Antifa activist. (Buchal Decl. Ex. 15.) By early June, District Attorney-Elect Schmidt was engaged in developing a policy to protect Antifa rioters from being held accountable for criminal violations during the ongoing protests. By July, he was meeting with local officials making unspecified "commitments," but, again, very little was produced. (Buchal Decl. ¶ 118 & Ex. 16 at 17.)

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

District Attorney Schmidt took office on August 1, 2020, and on August 11th announced his policy on riot cases. (Buchal Decl. ¶ 119 & Ex. 17.) The policy says defendants will "presumptively decline to charge cases where the most serious offenses are city ordinance violations and crimes that do not involve deliberate property damage, theft, or the use or threat of force against another person". (*Id.* Ex. 17, at 2.) And in particular, it says that riot charges fall within this presumption unless accompanied by a charge outside a specific list of public order charges. It is undisputed that the charges against Gibson and Schultz fall within the plain language of this Non-Prosecution Policy.

The policy also states: "[T]he prosecution of cases relating solely to protest activities, most of which have a weak nexus to further criminality and which are unlikely to be deterred by prosecution, draws away from crucially needed resources." (*Id.*) It is undisputed that charges here relate solely to protest activities. This motion is premised not only upon they fact that they would not be pursued by the State but for the unlawful attempt to punish or regulate speech by defendants, but also that the refusal to apply the Policy to defendants is itself an unconstitutional continuation of the prosecution that requires dismissal.

Federal courts have recognized that failure to apply a general policy of non-prosecution not applied to a defendant has been recognized as powerful evidence of vindictive or selective prosecution. In *Falk*, the court found compelling the fact that the government had an admitted policy not to prosecute violators of the card possession regulations, but to handle them administratively. *Falk*, 479 F.2d at 621. In that case, the policy statement of the Selective Service Director stated, "registrants who turned in cards (as contrasted to those who burned cards) *were not prosecuted under Section 12(a) of the Military Selective Service Law of 1967*, but were processed administratively by the local boards." *Id.* (emphasis added). But Falk was.

Consistent with the letter and purpose of the policy, defendants requested dismissal within a day or two of the issuance of the policy. The request even points out that the State had just released

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

Demetria Hester, who was a recognized protest leader engaged in speech during events that turned into riots. (Buchal Decl. Ex. 18, at 3.)

The State, however, refused to apply the policy according to its plain terms to dismiss the charges against defendants. Deputy District Kalbaugh has testified that he met with District Attorney Schmidt personally "to clarify if whether the policy was retroactive specifically with respect to the criminal charges pending against [defendants]". (Buchal Decl. Ex. 19, ¶ 23.) It was, however, retroactive for all of the Antifa and BLM protestors arrested between the late May start of the riots and the August 11th date of the policy. When the State says that a policy is only retroactive for those sharing one political viewpoint only, it is obvious that the State's prosecution decision is fatally afflicted with unconstitutional animus.[7]

The District Attorney's personal role in refusing to dismiss the riot charges here on the basis of the Non-Prosecution Policy is yet another circumstance supporting a finding of vindictive or selective prosecution. In the *Falk* case, for example, the government reported that the indictment against Falk had also been approved "by the Chief of the Criminal Division of the United States Attorney's Office, the First Assistant United States Attorney, the United States Attorney and the Department of Justice in Washington." *Falk*, 479 F.2d at 622. The court found that this list of approvals was evidence that Falk had been singled out, stating, "It is difficult to believe that the usual course of proceedings in a draft case requires such careful consideration by such a distinguished succession of officials prior to a formal decision to prosecute." *Id.*

[7] Defendants request that this Court take judicial notice of the political ideologies of those who have benefitted from the new non-prosecution policy implemented by the District Attorney are aligned with Antifa and BLM, and against the political views of defendants, as this is "generally known within the territorial jurisdiction of the trial court". ORE 201(b)(1). If necessary, this fact can be established at the evidentiary hearing.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

2. How the prosecutorial response to Antifa defendants demonstrates unconstitutional prosecution of defendants.

On September 16, 2021, defendants Gibson and Schultz commenced an action in the United States District Court for the District of Oregon against the office of the Multnomah County District Attorney, District Attorney Schmidt, and Deputy District Attorney Kalbaugh, seeking an injunction against the continuation of these proceedings. The State defended on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), required the federal court to abstain from exercising federal jurisdiction to avoid interference in the state criminal proceedings.

The federal court allowed limited discovery concerning the non-prosecution policy and how riot charge had been handled in other cases. In particular, materials were divulged from 196 cases from the District Attorney's CRIMES database, with CRIMES fact sheets. The results of that discovery have been summarized in the accompanying Declaration of Angus Lee, filed herewith. (The materials themselves are subject to a federal protective order that requires a follow-on protective order to be entered in this case .)

Defendants anticipate bringing this material before the Court at an evidentiary hearing on this motion, and this memorandum merely gives highlights of the evidence. The first salient point is that with hundreds if not thousands of other rioters running wild in Portland, *no other rioters face a standalone charge of riot like defendants here.* (Lee Decl. ¶ 17) It cannot be understated just how unique and extreme a decision is represented by the decision to charge defendants for the conduct discussed above.

The theory of law that the State purports to pursue in good faith here, that individuals like Schultz can be prosecuted for standing around while others are rioting, has been rejected repeatedly as the State refuses to prosecute other such rioters based on "lack of evidence". This is not an application of the Non-Prosecution Policy, but a straightforward and constitutionally-compelled interpretation of ORS 166.015. Significantly, this very interpretation of the law has been advanced by Deputy District Attorney Kalbaugh, who has said that (at least as far as Antifa and BLM

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

defendants are concerned), the law clearly requires proof that the individual who was part of the group "personally engaged in tumultuous and violent conduct". *State v. Chakerian*, 325 Or. 370, 375 n.8, 938 P.2d 756, 758 (1997). This straightforward interpretation of ORS 166.015 was invoked repeatedly when the State declined to prosecute Antifa members. (Lee Decl. ¶ 18(u), ¶ 18(v)).

The most extreme *verbal* conduct one can imagine, on a whole different level than that demonstrated by defendants, is not sufficient for riot under ORS 166.015 where Antifa or BLM defendants are concerned. This includes defendants telling officers, "I am going to kill your families" and "I am going to kill your kids," but that's not violent and tumultuous conduct enough for defendants. (*Id.* ¶ 18(k); ¶ 18(t).) It includes Antifa defendants trying to provoke the police by yelling "Let's go" or "Why don't you put down your badge and meet me down the street and we can handle this, bitches" and try to provoke other protestors to incite violence; no charges are ever filed based on verbal conduct, even when accompanied by threatening gestures. (*Id.* ¶ 18(z), ¶ 18(dd), ¶ 18(jj))

To make matters worse, the State has refused to apply the riot statute to very large numbers of Antifa and BLM rioters, who, unlike defendants Gibson and Schultz, engaged in actual violent conduct. This includes defendants working together to form a shield wall against law enforcement, while behind the shield wall others throw things at the officers and try to blind them with lasers. (*Id.* ¶¶ 18(b), (d)) The State has declined to prosecute Antifa defendants if they are peacefully driving cars to supply other rioters with weapons. (*Id.* ¶ 18(h)) It has declined to prosecute Antifa defendants who are part of a riot where they are peacefully carrying explosive devices or other things (paint, water bottles, or rocks) of the type thrown at officers all night. (*Id.* ¶ 18(i), ¶ 18(n), ¶ 18(s), ¶ 18(w), ¶ 18(ll), ¶ 18(qq)). Mr. Schultz carried nothing here, and Mr. Gibson carried only his cell phone. One of the decisions not to prosecute is explained as follows: "I recognize that him being outfitted with a plywood shield and goggles puts him in the front line aggressively confronting the police, and allow provided cover to those in the crowd that were launching

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

projectiles that broke car glass and dented the metal of multiple police cars," but that was not enough. (¶ 18(cc))

At hearing, defendants can present example of physical misconduct, far beyond anything involved in this case, is not sufficient to riot charges where Antifa and BLM defendants are concerned, including:

- Defendants witnessed "beating up security guard" and "assaulting victim" (¶ 11(b)), no riot charges.
- Rioters in a crowd, pulling people away from the police that the police are trying to arrest, and when the officer will not let go, punching the officer in the face. (¶ 11(g), ¶ 18(r))
- Defendants using shields to protect people firing mortars and shining lasers at the police, and then fighting with the police when arrested. (¶ 11(i))
- A suspect in a crowd of rioters throwing a shield at an officer and hitting him in the face or chest. (¶ 11(j), ¶ 18(ff), ¶ 18(gg), ¶ 18(hh), ¶ 18(ii))
- Throwing rocks or bottles at an officer. (¶ 18(e), ¶ 18(o), ¶ 18(ee))
- Throwing frozen eggs are not enough. (¶ 18(bb))
- Striking officers, pushing on officers and pulling on officers. (¶ 18(c), ¶ 18(f), ¶ 18(j), ¶ 18(l), ¶ 18(p), ¶ 18(q), ¶ 18(y), ¶ 18(aa), ¶ 18(mm))
- Attempts to hit an officer are not enough. (¶ 18(kk))
- Using a laser or flashlight or strobe to distract officers. (¶ 18(nn), ¶ 18(oo))
- Even lighting the police building on fire. (¶ 18(pp)).

In the Antifa/BLM decisions, the State has also emphasized that ORS 166.015 also requires an element of a "grave risk of causing public harm". For example in ¶ 18(x), an MCDA prosecutor explained the lack of sufficient evidence to file charges in an internal memo, stating: the suspect "threw a water bottle at police officers while yelling 'fuck you pigs.' Although this would certainly be viewed as 'tumultuous and violent conduct' I believe the state would not be able to prove that this act created a 'grave risk of causing public harm'".

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

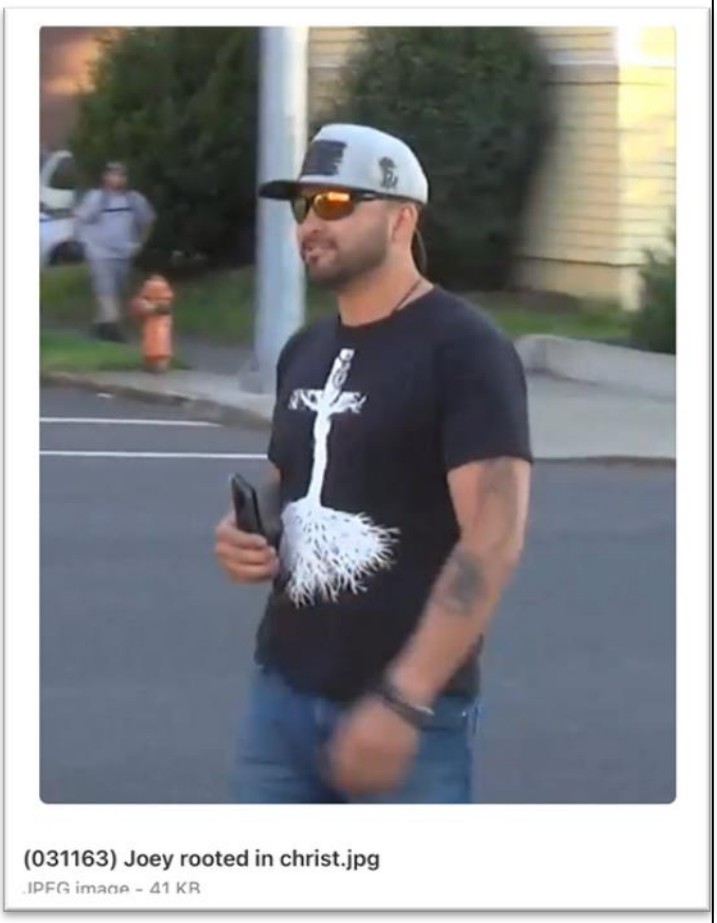
The degree to which Deputy District Attorney Kalbaugh has insisted upon direct and substantial evidence of personal violent conduct in the other riot cases is remarkable. In one e-mail to a police officer, he asks: "Was the water bottle frozen? Was there anything about the defendant's actions that led you to conclude that the defendant was throwing the water bottle at you in particular, or was the water bottle just lobbed in the general direction of a line of officers in riot gear?" (Buchal Decl. Ex. 16, at 1.)

At the evidentiary hearing on this motion, the Court should take interest in how Kalbaugh could interpret ORS 166.015 straightforwardly for Antifa, yet interpret it contrarily, and contrary to *Chakerian*, *supra*, where defendants Gibson and Schulz are concerned. Outside the unique prosecutions of defendants, the State recognizes that the riot statute and free speech protections are to be interpreted in good faith to allow a considerable range of expressive conduct. Thus even if the Court believes that there is some evidence of "violent and tumultuous conduct" on the part of Gibson and Schultz—and it should not---that is insufficient to defeat a claim of vindictive or selective prosecution where defendants can point to numerous other examples of conduct that was not prosecuted.

These are precisely the sort of circumstances that support dismissal on constitutional grounds. For example, in *Crowthers,* for example, the court concluded the Mass for Peace participants had violated the regulation at issue, but that the Pentagon concourse had been used 16 other times in the latter half of 1969 for both political and religious ceremonies including band recitals. *Id.* at 1078. In sustaining the claims of selective prosecution, the court concluded: "the record establishes that the level of noise and obstruction attributed to [the Mass for Peace participants] could not possibly have exceeded the level of noise and obstruction previously permitted by the government on numerous prior approved occasions." *Id. at* 1079. While the Court may take judicial notice of the extraordinary disorder associated with a year of Antifa/BLM riots, an evidentiary hearing herein will confirm that the conduct by defendants on May 1, 2019, "could not

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

possibly have exceeded" the level of disorder the MCDA permitted by Antifa on numerous occasions before and after the events at Cider Riot.



Further, it appears that Gibson and Schultz have been targeted for their Christian faith and that the prosecution even labeled a trial exhibit they intended to use against Gibson as "*Joey rooted in Christ.jpg*." (emphasis added). (Lee Decl. ¶¶ 19-20.) There is no reason to label a photo of Mr. Gibson as "rooted in Christ" except religious bias.

This photo was obtained during discovery in the parallel civil case. It was provided as "(031163) Joey rooted in christ.jpg" in a folder entitled "GIBSON_MCDA_029977-032683." *Id.* In that folder were other jpegs and videos clearly prepared for presentation at trial against Gibson and Schultz. In that same folder was a photo of Russell Schultz titled "(032246) *Schultz rooted in Christ*.jpg." (emphasis added). (*Id.*) These photos of Gibson and Schultz, both called attention to their Christian faith and had no legitimate prosecution purpose.

As the Ninth Circuit has explained, "a prosecutor obviously cannot base charging decisions on a defendant's . . . religion, or exercise of a statutory or constitutional right". *United States v. Nance*, 962 F.2d 860, 865 (9th Cir. 1992). By all appearances, the State did both here.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

III. IT IS THE STATE'S BURDEN TO DEFEAT THIS MOTION.

As a matter of federal constitutional law, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, the government is compelled to accept the burden of proving nondiscriminatory enforcement. *Falk*, 479 F.2d, at 620-21. When a *prima facie* case of selective prosecution has been made, "the burden of going forward with proof of nondiscrimination *will then rest on the government*." *Id*. at 624 (emphasis added). "[T]he government will be required to present compelling evidence to the contrary if its burden is to be met." *Id.* (emphasis added).

Noting that it is neither novel nor unfair to require the party in possession of the facts to disclose them, the court in *Crowthers* stated:

> We think when the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint, and where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence as to what extent loud and unusual noise and obstruction of the concourse may have occurred on other approved occasions.

Crowthers, 456 F.2d at 1078.

IV. DEFENDANTS GIBSON AND SCHULTZ ARE ENTITLED TO DISCOVERY AND AN EVIDENTIARY HEARING ON THESE CLAIMS.

A. Defendants Have Made the Case for Discovery.

In the areas of vindictive prosecution and selective prosecution, a defendant must show a colorable basis for his or her claim before discovery against the government is permitted. *See United States v. Goulding*, 26 F.3d 656, 662 (7th Cir. 1994); *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990), *United States v. Utecht*, 238 F.3d 882, 887 (7th Cir. 2001). This motion easily establishes that basis, and the federal court has already concluded there was sufficient basis for limited discovery into the Non-Prosecution Policy.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

ORS 136.580 provides the procedure for pretrial documentary discovery of third parties:

> "(1) If books, papers or documents are required, a direction to the following effect shall be added to the [subpoena] form provided in ORS 136.575: "And you are required, also, to bring with you the following: (describing intelligibly the books, papers or documents required)."
>
> "(2) Upon the motion of the state or the defendant, the court may direct that the books, papers or documents described in the subpoena be produced before the court prior to the trial or prior to the time when the books, papers or documents are to be offered in evidence and may, upon production, permit the books, papers or documents to be inspected and copied by the state or the defendant and the state's or the defendant's attorneys

Defendants propose to engage in limited documentary discovery of three involved entities: the Office of the Mayor, the Office of the District Attorney, and the Portland Police Bureau as set forth in the draft subpoenas attached as Exhibits 1-3 hereto. They also wish to reserve the right, after review of those documents, to identify witnesses identified from the materials for deposition questioning, which might also minimize burdens with trial scheduling of witnesses to the extent stipulations can be reached to utilize the resulting transcripts and videos.

In the leading case of *State v. Babson*, 355 Or. 383 (2005), the Supreme Court confirmed that criminal defendants similarly situated to defendants Gibson and Schultz—arrested for participation in a political protest—were entitled not only to be heard on whether application of the criminal prohibition in quest was unconstitutionally applied to them, but also to discovery in the nature of deposition questioning to determine the motives of those applying the prohibition. The case involved a protest against the deployment of Oregon National Guard troops to the Middle East, and took place on the Capitol steps, in violation of a facially neutral prohibition limiting the hours visitors might be present ("no overnight use"). *Id.* at 387-88. Arrested for criminal trespass (ORS 164.245(1)), defendants challenged the restriction as violative of their free speech rights.

The Oregon Supreme Court confirmed that the case presented a question of whether the rule had been enforced against defendants "because of their expression". *Babson*, 355 Or. at 404. The case was presented as an "as applied" challenge to the rule, leading the *Babson* Court to invoke a framework of three categories of speech-related challenges developed in *State v. Robertson*, 293 Or.

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

402 (1982). *Babson*, 355 Or. at 404 ("third category analysis involves an inquiry into whether enforcement was directed at suppressing defendants' expression").

The *Babson* Court thus issued an order allowing defendants to "question the LAC co-chairs [Oregon State legislators] about their involvement, if any, in enforcing the guideline against defendants." *Babson*, 355 Or. at 428. So too should defendants Gibson and Schultz be permitted to question the Mayor, Chief of Police and District Attorney about their involvement in the belated determination to enforce the riot statute against defendants Gibson and Schultz.

And in *State v. Kadderly*, 176 Or. App. at 399, the prosecutor "who had presented witnesses to the grand jury" was called to testify at hearing as to his basis for the decision to prosecute. So too should Deputy District Attorney Kalbaugh be called to testify as to the initial decision to prosecute conservative protestors but not Antifa. Likewise, Mike Schmidt and Deputy D.A. Kalbaugh should be called to testify as to the private discussion they had in which they decided they would not apply the Non-Prosecution Policy to conservative protestors even though they had applied it retroactively to left-wing protestors.

While there has been limited discovery already in the federal case, it came exclusively from the Office of the Multnomah County District Attorney, was manifestly incomplete, and focused only upon the Non-Prosecution Policy and charging decisions between May and September 2020, as discovery was limited to discovery in aid of the federal courts jurisdictional determination. (Buchal Decl. ¶ 115.)

The discovery sought herein is narrowly focused upon the unconstitutional motives of the prosecution, including political interference in the decision-making involving defendants Gibson and Schultz. It is hornbook law that because of the unique nature of the selective prosecution claim, a trial judge may even "require the prosecutor to turn over for in camera inspection by the judge memoranda prepared by the prosecutor dealing with the decision to prosecute the defendant." Ferguson, *Wash. Crim. Prac. and Proc.*, § 2114 (3d ed.) (citing *United States v. Berrios*, 501 F.2d 1207 (2d Cir.1974); *State v. Mitchell*, 164 N.J. Super. 198, 395 A.2d 1257 (App.Div.1978)). For

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

these reasons, it will be important to require that logs of any documents withheld on privilege grounds be produced.

B. An Evidentiary Hearing Is Required to Resolve this Motion.

The *Babson* Court remanded the action for discovery, which was to be followed by an evidentiary hearing in which the trial court could "determine whether enforcement of the guideline was neutral. *Babson,* 355 Or. at 432. While no evidentiary hearing was afford in *Bitans,* defendants there failed to prove that the similarly situated individuals should have been prosecuted. *Bitans,* 100 Or. App. at 302 ("Counsel's affidavit is primarily conclusory . . ."). Here there is indisputable direct video evidence, filed herewith and as confirmed in the police reports, that multiple Antifa members engaged in physical and pepper-spraying attacks upon Gibson, while none were prosecuted, even after they were identified to law enforcement.

Conclusion

This Court can, on the basis of the evidence submitted with this motion, determine that these prosecutions should be dismissed as unconstitutional selective prosecution. In the alternative, this Court should issue an order allowing issuance of the attached subpoenas, and authorize deposition questioning of the witnesses to be identified after the responsive materials are produced. Thereafter, this Court should hold an evidentiary hearing on this motion.

Dated this 21st day of April 2021.

s/ James L. Buchal
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
Of Attorneys for Defendant Gibson

s/ Aubrey R. Hoffman
Aubrey R. Hoffman, OSB No. 164034
LAW OFFICE OF AUBREY HOFFMAN, LLC
Attorney for Defendant Schultz

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

CERTIFICATE OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal LLP and my business address is P.O. Box 86620, Portland, Oregon 97286..

On April 21, 2021, I caused the following document to be served:

MOTION OF DEFENDANTS JOSEPH GIBSON AND RUSSELL SCHULTZ TO DISMISS FOR SELECTIVE PROSECUTION AND MEMORANDUM IN SUPPORT THEREOF

in the following manner on the parties listed below:

Brad Kalbaugh	( )	(BY FIRST CLASS US MAIL)
Multnomah County District Attorney's Office	(X)	(BY E-MAIL)
600 Multnomah County Courthouse	( )	(BY FAX)
1021 SW 4th Ave	( )	(BY HAND)
Portland OR 97204	(X)	(E-Service, UTCR 21.100)
E-mail: brad.kalbaugh@mcda.us		

/s/ Carole Caldwell

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939