IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON, Plaintiff, v. JOSEPH GIBSON & RUSSEL SCHULTZ Defendants.	Consolidated Case No. 19CR53042 19CR53035 STATE'S RESPONSE IN OPPOSITION TO DEFENDANTS JOSEPH GIBSON AND RUSSELL SCHULTZ MOTION TO DIMISS FOR SELECTIVE PROSECUTION Oral argument requested per UTCR 4.050

Comes now Mike Schmidt, by and through Brad Kalbaugh, Deputy District Attorney, and respectfully moves the court for an order denying defendants Joseph Gibson and Russell Schultz Motion to Dismiss. Further, the State respectfully moves the court for an order denying leave to conduct further discovery. The State requests 1 hour for oral argument.

INTRODUCTION

Defendants Gibson and Schultz have been charged with riot under ORS 166.015 arising from their conduct at the Cider Riot bar in Portland on May 1, 2019. Their motion moves the court to dismiss the cases based on unconstitutional selective prosecution. In the alternative, the motion requests that the court authorize discovery on that issue. Both requests should be denied.

Defendants claim that they are subject to selective prosecution. In their motion, they seek myriad discovery regarding alleged investigative and prosecutorial decisions to prove this theory. *See, e.g., Def. Motion* at *14 (making the allegation from defendant Schultz that arresting officers told Schultz that Portland Mayor, Ted Wheeler, had "pressured" the Multnomah County District Attorney's Office to make the criminal charges—further assuming that non-denial of this issue in the federal district court case 3:20-CV-01580-IM, lends credence that this issue is in fact, true). While this is one example, defendants Gibson and Schultz make these sweeping and unfounded generalizations throughout their Motion. All roads for defendants Gibson and Schultz lead to an assumed unconstitutional and selective prosecution. However, and as illustrated in their attached affidavits, their claims are sweeping generalizations based on unfounded assumptions. *See, e.g., Def. Motion* at *34 (Defense asserting and assuming exhibits identifying defendant Gibson and Schultz in distinctive Christian shirts is "religious bias"). In support of their request for discovery, defendants assert federal and state constitutional claims based primarily on the incorrect belief that the prosecution is politically motivated.

Throughout the motion, defendants also argue that the charges against them arise from constitutionally protected conduct related to their rights to freedom of speech and freedom of assembly. This is a trial defense that is unrelated to this motion. Defendants previously advanced the same argument under a different (but also improper) legal theory: a demurrer against the indictment. After hearing argument on the issue, the court disallowed the demurrer. It's worth pointing this out, since Defendants devote considerable effort to this argument in their present motion and supporting documents. The Declaration of Attorney Buchal devotes no fewer than 48 paragraphs over 11 pages arguing against the supposed "flimsiness" of the charges and

summarizing evidence favorably for the defendants. *See* Buchal Decl. ¶ 30-78. These paragraphs are a distraction that have no bearing on the present motion before the court.

POINTS AND AUTHORITIES

I. Selective Prosecution Claims

A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. *Heckler v. Chaney,* 470 U.S. 821, 832, 105 S.Ct. 1649, 1656 (1985). In criminal cases generally, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S.Ct. 663, 668 (1978). Prosecuting a crime may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 506 (1962). A defendant may show selective prosecution on race, religion, or other arbitrary classification by showing that the prosecution the defendant is involved in is "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins,* 118 U.S. 356, 373, 6 S.Ct. 1064, 1073 (1886).

II. Burden and Standard of Proof

U.S. v. Armstrong helps establish the legal framework the court should follow in evaluating a claim for selective prosecution. 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed. 2d 687 (1996). It reads, in the context of federal criminal prosecutions:

> Of course, a prosecutor's discretion is "subject to constitutional constraints." One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons ... with a mind so unequal and

> oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law.
>
> In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." We explained in [*Wayte v. U.S.*, 470 US 598 (1985)] why courts are "properly hesitant to examine the decision whether to prosecute." Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."
>
> The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. *Armstrong* at 464-465 (internal citations omitted).

This analysis is akin to defendants' arguments: that similarly situated individuals of a different ideology (namely the amorphous term "Antifa" or "Leftist") were not prosecuted. They have failed to meet that burden.

III. Defendants' federal and state constitutional rights were not violated

Discriminatory application of a generally applicable law can violate Article I, section 20, or even the Equal Protection Clause of the Fourteenth Amendment. *See State v. Clark,* 291 Or. 231, 239, 630 P.2d 810 (1981) (Article I, section 20, "reaches forbidden inequality in the administration of laws"); *United States v. Armstrong,* supra, at 465 (selective prosecution claim cognizable under Fourteenth Amendment equal protection principles). Defendants Gibson and Schultz must show that the State's alleged decision not to prosecute alleged Antifa members, or

other left-wing persons at the Cider Riot event, had a discriminatory effect and that these decisions were because of a discriminatory purpose against defendants. *See Hunter v. State of Oregon,* 306 Or. 529, 533, 761 P.2d 502 (1988) (Article I, section 20, prohibits, among other things, prosecution based on "impermissible factors such as race or personal animosity or the absence of any standards that could ensure consistency").

Defendants' Motion is also based on the allegation that their state and federal constitutional rights were violated. Defendants believe that the State prosecutes those with right-leaning or conservative political views while not prosecuting those with left-leaning or left-wing political views. Essentially, the argument is that the Multnomah County District Attorney's Office has created two classes of criminal defendants: those on the right who are prosecuted—and those on the left who are not. This assumption is wrong and is rooted entirely in speculation.

Defendants have shown only that they believe that this prosecution is "vindictive and selective," a belief based on sweeping generalizations and assumptions. They have not demonstrated that the State has a policy of prosecuting those that are politically right-leaning while not prosecuting those that are politically left-leaning. The State rejects the claim that there is any unconstitutional selective prosecution, under either the United States or Oregon constitutions.

IV. Defendants Gibson and Schultz have not presented facts sufficient to shift the burden to the State for leave to conduct additional discovery

To prevail on a selective prosecution claim based on equal protection under the federal constitution, it is Defendants' burden to show both that the government's prosecution policy had a discriminatory effect and that it was motivated by a discriminatory purpose. *See Armstrong,* supra, at 465; *Wayte,* 470 U.S. at 608, 105 S.Ct. 1524; *United States v. Olvis,* 97 F.3d 739, 746 (4th Cir.1996) ("defendants bear the burden of establishing all elements of their selective-prosecution

claim and, to obtain discovery on such a claim, the burden of making a credible showing of 'some evidence' on each element").

Here, Defendants allege selective prosecution based on: political context, police reports relating to the case, probable cause affidavits, grand jury indictment, post-arrest issues, and the Multnomah County District Attorney's Offices prosecutorial response to the George Floyd protests in the summer of 2020.

Again, a defendant must present "clear evidence to the contrary" to rebut the presumption that the prosecution violated equal protection. *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14–15, 47 S.Ct. 1, 6 (1926). Defendants Gibson and Schultz have failed to meet this burden.

V. Defendants Gibson and Schultz fail to establish discriminatory effect

Defendants must establish discriminatory effect by showing that people similarly situated were not prosecuted. *See Armstrong,* 517 U.S. at 465, 116 S.Ct. 1480; *United States v. Hastings,* 126 F.3d 310, 315 (4th Cir.1997). Such a showing is an "absolute requirement." *Armstrong,* 517 U.S. at 467, 116 S.Ct. 1480. They have failed to make such a showing. As illustrated in the *Opinion and Order* for case 3:20-CV-01580-IM, the court opined "*Plaintiffs have not presented evidence that the District Attorney's Office has applied the non-prosecution policy to any protestors charged with riot outside of the George Floyd protest.*" *Gibson v. Schmidt,* 3:20-CV-01580-IM, 2021 U.S. Dist. LEXIS 36497, at *8 (D. Or. Feb. 26, 2021) (emphasis added).

Persons with any political ideology that engage in riotous behavior have been and are being prosecuted by the Multnomah County District Attorney's Office. The accusation or inference that the non-prosecution policy is retroactive for some, or even applied and enforced differently based

on political ideology, is wrong. Defendants have failed to show discriminatory effect in prosecution.

VI. Defendants Gibson and Schultz fail to establish discriminatory purpose

To prevail on a claim of selective prosecution, Defendants must establish that the prosecution is motivated by a discriminatory purpose and that the prosecutorial decision was invidious or in bad faith. *U.S. v. Berrios,* 501 F.2d 1207 (2nd Cir. 1974); *Joseph v .City of San Jose,* Case No. 19-CV-01294-LHK, 2020 WL 1031899, at *16 (N.D. Cal Mar. 3, 2020) ("A plaintiff must provide something more than *conclusory allegations* that the state proceeding is the product of bad faith or harassment.") (emphasis added).

Defense shows no legitimate evidence that the decision to prosecute is based on race, religion, or a desire to prevent defendants Gibson and Schultz from exercising any of their federal or state constitutional rights. Mere 'conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.' Further, in case 3:20-CV-01580-IM, the *Opinion and Order* stated that *"Based on this record, this Court finds that Plaintiffs have not proven that Defendants filed the charges against them without reasonable expectation of obtaining a valid conviction. Gibson v. Schmidt,* 3:20-CV-01580-IM, 2021 U.S. Dist. LEXIS 36497, at *18 (D. Or. Feb. 26, 2021) (emphasis added).

Overall, Defendants have failed to offer any clear evidence for a successful selective prosecution claim. Defendants have not met *their high burden* of establishing either discriminatory effect or discriminatory purpose. And, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their duties." *Armstrong,* 517 U.S. at 464 (quoting *Chemical Foundation,* 272 U.S. at 14—15, 47 S.Ct. 1).

VII. Defendants Gibson and Schultz misinterpret "similarly situated"

Defendants Gibson and Schultz contest generally that by being charged with riot, they are being treated differently from other uncharged individuals who Defendants claim are similarly situated. However, Defendants characterize anyone they identify as "Lefist," "Antifa," or "Rioter" as similarly situated. In reality, the cases cited in Defendant Gibson's declaration are not remotely similar in the way that the controlling authority requires.

In *Yick Wo v. Hopkins*, supra, the US Supreme Court determined that prosecution related to a fire warden permitting scheme for laundry businesses violated equal protection when only Chinese nationals were charged. Of roughly 320 laundries in San Francisco, 240 were owned by Chinese nationals, and the court pointed out that "80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions." *Id.* at 374. The Supreme Court held that this discrimination based on race and nationality violated the equal protection clause of the 14th Amendment. *Id.* In that case, the situations of the charged and uncharged parties were virtually identical: owners of (wooden) San Francisco laundries. Chinese owners were denied permits and charged, others were not.

In *U.S. v. Steele*, 461 F2d 1149 (9th Cir 1972), the defendant was accused of violating the law requiring individuals to answer census questions. The facts established that the defendant and three other vocal objectors to the law were prosecuted, only four in the state of Hawaii. *Id.* at 1151. At least six who had violated the same law but not taken an outspoken stand against it were not recommended for prosecution by the census technician staff. *Id.* The 9th Circuit held that "since no valid basis for the selection of defendants was ever presented" after Steele "presented evidence creating a strong inference of discriminatory prosecution," the only plausible explanation was purposeful discrimination by the census authorities and reversed Steele's conviction. Like

operating an unpermitted laundry in *Yick Wo*, the crime at issue in *Steele* invites no meaningful factual variance: just that one did not answer a census questionnaire.

As in the present case, the facts underlying the charged crimes in *US v. Armstrong* can vary widely. The defendants in *Armstrong* were indicted for selling crack cocaine and similar drug trafficking charges. *Id.* at 456. They made a similar motion as Defendants Gibson and Schultz: for dismissal or discovery, alleging that they were selected for prosecution because they are black. *Id.* The 9th Circuit affirmed dismissal of the case after the government refused to comply, but the Supreme Court reversed that decision. *Id.* To support their motion for discovery, Defendants offered an affidavit originating from the Office of the Federal Public Defender stating that in each of the 24 cases with the same charges that their office had handled, each defendant was black. *Id.* at 459. Accompanying the affidavit was a "study" listing the defendants, their race, and whether they were being prosecuted for powder cocaine in addition to crack cocaine. *Id.* The Supreme Court noted the burden on defendants when making a selective prosecution claim, requiring "clear evidence to the contrary" of the presumption that the prosecutor has not violated equal protection. *Id.* at 465, *citing Chemical Foundation*, supra, at 14-15. The Court viewed with skepticism the defendants' "study" concluding that it "did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim." *Id.* at 470. It pointed out that a newspaper article discussing the discriminatory effect of federal drug sentencing laws was not relevant to an allegation of discrimination in decisions to prosecute. *Id.*

Like the flawed reliance on a news article in *Armstrong*, Defendants Gibson and Schultz urge the court to impute unrelated negative media coverage about Defendants to the State and use it to reach an inference of bias and selective prosecution. Like the deficient "study" in *Armstrong*, Defendants Gibson and Schultz urge the court to consider wildly different factual scenarios

involving protest skirmishes with police as "similarly situated" to the facts of the present case and therefore evidence of bias supporting their claim of selective prosecution. As in *Armstrong*, the evidence is insufficient to order discovery or dismiss the case. Unlike in *Yick Wo* or *Steele*, which had virtually identical facts treated differently only because of nationality (*Yick Wo*) or outspoken objection (*Steele*), the purported similarly situated individuals identified by Defendants are engaged in vastly different conduct involving a complex issuing determination. To the extent Defendants' examples of those arrested and not charged give rise to an inference of selective prosecution (they do not), any inference is erased by the fact that those cases are not similarly situated at all.

SPECULATION CANNOT SUPPORT A CLAIM OF SELECTIVE PROSECUTION

Defendants Gibson and Shultz seek to support their motion with numerous declarations. The five declarations reveal that the grievances they argue are evidence of disparate treatment by the state are speculative at best. They range from attenuated and irrelevant, to genuinely bizarre and conspiratorial. For example:

I. Buchal Declaration

Attorney Buchal suggests that the general political climate in Multnomah County is evidence of bias against defendants. As evidence of this he cites his own experience as chairman of the Multnomah County Republican Party and refers to an incident where threats were made against a planned parade. *See* Buchal Decl. at ¶ 5. It criticizes the lack of investigation and prosecution, but reading the article cited in the footnote reveals that the threat existed only in an anonymous email. Attorney Buchal neatly arranges policy and actions taken by city and county leaders into two camps which he has termed "Leftist" and "Right wing." *Id.* at ¶ 7. The declaration seeks to recruit an unrelated protest in 2018 (with no apparent connection to Defendants) as

evidence of a broader pattern "to promote a preferred Leftist point of view." *Id.* The "Extreme Political Hostility" section of his declaration concludes with an unsupported assertion that "all of the media coverage" was "falsely painting Defendant Gibson as the wrongdoing[sic] in any interaction with Antifa counterprotesters." Id. at. ¶ 29. Through this lens, Attorney Buchal argues that a death investigation where no charges have been filed is evidence of what he terms "Anti-Anti-Antifa Bias." *See Id.* at p. 32, l. 1. He seems to suggest that the only possible suspects in a homicide must have been "presumably all Antifa members or other Leftists." Which to him explains why no charges were filed. *Id.* at ¶ 110. His declaration misleadingly suggests that this was despite two arrests being made, but fails to reveal that the very article to which it attributes the arrest information reads "[Willamette Week] has also learned that two people have been taken into custody in relation to the case – but neither are believed to be the driver." Under a heading he calls "Other Continuing Efforts to Aid Antifa and Violate Rights of Conservatives" an unrelated city ordinance banning facial recognition technology is another smoking gun in an imagined conspiracy against Defendants. *See Id.* at ¶ 131.

II. Gibson Declaration

Defendant Gibson supports his motion with a lengthy declaration generated in defense of a civil case. He acknowledges that "despite there being no single "Antifa" entity" the people he broadly refers to as "Antifa" may make up numerous groups that "probably have no formal membership." Gibson Decl. Ex. 1 at ¶ 7. This lays bare the fundamental deficiency in the defendants' strategy: they have grouped every conceivable opponent (politician, media, anonymous emailer, protester), into a convenient category of "Antifa" or "Leftist." To accept Defendants' argument is to believe that any action taken against the defendants is a scheme perpetrated by this group. He likens himself to Martin Luther King, Jr.'s, declaring that "one might

argue that MLK "baited" Bull O'Connor into turning his fire hoses upon the marchers in Birmingham, Alabama, just as our appearance brings forth the evil within Antifa supporters so that it is manifest and visible to the American Republic. *Id.* at ⁋ 25. The declaration then devotes roughly 23 paragraphs to explaining the alleged incident from Gibson's perspective. *Id.* at ⁋ 57-80. Again, this is irrelevant to this motion's claim of disparate treatment.

III. Hoffman Declaration

Attorney Aubrey Hoffman offers that she has seen no "tumultuous of violent" act by Defendant Schultz in the discovery. *See* Hoffman Decl. at ⁋ 7. It then summarizes video from her perspective. *Id.* at ⁋ 8-12. It is irrelevant to the issues raised in Defendants' motion because it seeks to contest the underlying facts as opposed to offering any evidence of an improper motive in charging.

IV. Schultz Declaration

Defendant Schultz asserts that "a law enforcement officer" who was arresting him told him that Portland Mayor Ted Wheeler had pressured the Multnomah County District Attorney into prosecuting him. Schultz Decl. at ⁋ 11. It strains credulity that an unknown or anonymous law enforcement officer arresting Defendant Schultz also happened to be privy to a supposed pressure campaign by one elected official against another, and that the arresting officer shared that insight with the defendant he or she was arresting.

V. Lee Declaration

The declaration of Attorney Angus Lee seeks to explore records of different riot charge cases referred between 5/31/2020 and 9/28/2020. Lee Decl. at ⁋ 1-3. (Notably, over a year after the incident alleged against defendants, and apparently related only to George Floyd protests.) The records are all strikingly different from the type of conduct Defendants Gibson and Schultz are

accused of. None of the cases referenced in Attorney Lee's declaration can reasonably be considered similarly situated.

CONCLUSION

Defendants have failed to provide the court with *compelling* evidence that the pending litigation against them is constitutionally impermissible, they have failed to provide *compelling* evidence that there is a discriminatory effect in the pending litigation against them, and they have failed to provide *compelling* evidence that there is a discriminatory purpose driving the pending litigation against them.

For the aforementioned reasons and the record before this court, the State respectfully requests that Defendants' Motion to Dismiss be denied, and that Defendants' alternative motion for further discovery also be denied.

Respectfully submitted this 19th day of May, 2021.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

By _/s/ Brad Kalbaugh_____
Brad Kalbaugh, 074335
Deputy District Attorney

Certificate of Service

I certify that on May 19, 2021, I caused the foregoing motion to join cases to be served upon the parties hereto by the method indicated below, and addressed as follows:

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