Hon. Benjamin Souede

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, PLAINTIFF, vs. JOSEPH GIBSON, DEFENDANT.	No. 19CR53042 **DEFENDANT JOSEPH GIBSON'S FIRST SET OF MOTIONS IN LIMINE** Oral argument requested per UTCR 4.050

MOTION

Comes now Joseph Gibson, by and through D. Angus Lee, and James L. Buchal, and moves this Court for an order in limine addressing the following testimony:

1. Testimony that defendant Gibson or Patriot Prayer is "violent," "right wing," "extremist," racist," "white supremacist," or similar terms.

2. Testimony that unknown individuals, allegedly associated with Patriot Prayer, planned for violence at Cider Riot on May 2, 2019, and contacted defendant Gibson.

3. Testimony that the video recordings of the events at Cider Riot contain evidence of "violent or tumultuous" conduct by defendant Gibson.

This motion is supported by the Supplemental Declaration of James L. Buchal filed herewith, as well as materials previously filed in support of defendant Gibson's motions to dismiss

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for selective prosecution (4/21/21 Buchal Decl.) and the motion for a change of venue with supporting documentation (Amended Declaration of James L. Buchal previously filed on February 21, 2021). Defendant Gibson reserves the right to present further motions *in limine* that are not directly associated with the companion motions for (1) reconsideration or dismissal in the interests of justice and (2) for leave to file the grand jury transcript.

Argument

I. TESTIMONY DISPARAGING DEFENDANT GIBSON'S POLITICAL BELIEFS SHOULD BE BARRED.

The State is expected to offer testimony asserting, in substance, that Gibson is the leader of a violent, racist, white supremacist, extreme right-wing group known as "Patriot Prayer". All of these adjectives are demonstrably false. As demonstrated in the motion for a change of venue, Portland leaders and media have worked very hard to establish this utterly false narrative.

None of the above characterizations of Gibson's political beliefs constitute relevant evidence. His beliefs are obviously not relevant to the question of whether or not he personally engaged in riotous conduct within the meaning of ORS 166.015. Evidence of "other crimes, wrongs or acts" is also not admissible to prove violent conduct on May 1, 2019 under OEC 404(3)—not that the State has any evidence of such conduct by defendant Gibson. And Gibson's character, or the character of the Patriot Prayer group, if there were one—"is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion" under OEC 404(2).

Such testimony is manifestly invoked only for the purposes of prejudicing the jury against defendant Gibson. In the Portland venire, the mere reference to the term "Patriot Prayer" is *itself* likely to elicit the prejudice the State seeks to invoke; adding adjectives such as

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"violent," "right-wing," "extreme," "racist," or "white supremacist" should be categorically forbidden by this Court. OEC 403 provides that even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

Quite apart from being irrelevant and unfairly prejudicial, allowing the false adjectives into the testimony will also create the need to rebut them, leading to undue delay. Defendant can, if required, significantly expand the trial by proving that by May 1, 2019, he had conducted nearly ninety events, which he organized through a Facebook page under the name "Patriot Prayer". (Only fifteen of those were held in Portland, and the May 1, 2019 Cider Riot event was organized by someone else.)

One of the few reporters not part of the crowd pushing the State's narrative, Oregonian columnist Elizabeth Hovde attended a rally at Washington State University in Vancouver, and reported:

> "For two hours, I watched challenging, inquisitive, respectful conversations happening on the campus plaza between people of different political persuasions. Instead of the violence predicted, Gibson brought something we need more of: talk that leads to increased understanding about opposing thoughts and the people behind them. It was the kind of conversation that helps people find common ground."

There was, as she reported, "zero violence" at the rally.[1]

Defendant Gibson can testify that none of the events he promoted on Facebook involved violence initiated by him, or even those who chose to stand with him. Defendant Gibson can also testify that by the time of May 1, 2019, events at Cider Riot Antifa attackers had shown up at nine

[1] A copy of this article is included as Exhibit 17 to the 2/21/20 Amended Declaration of James L. Buchal. Such was and is the prejudice within the Portland venire that Ms. Hovde lost her job over this column, which was attacked by multiple Portland leaders and journalists.

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events in Portland (and two outside) organized by Gibson and assaulted event participants. The truth of the matter is that Antifa is a gang of violent thugs who will initiate violence whether or not those of opposing political beliefs are present. Because this disgraceful prosecution has had its intended effect of chilling defendant Gibson's activities within Portland, while Antifa rioting continues to plague the City, the real violent criminal gang should be apparent to anyone paying attention.

II. TESTIMONY THAT UNKNOWN INDIVIDUALS ALLEGEDLY ASSOCIATED WITH PATRIOT PRAYER WERE PLANNING VIOLENCE AND CONTACTING DEFENDANT GIBSON IS INADMISSIBLE HEARSAY, IRRELEVANT, AND UNFAIRLY PREJUDICIAL.

One of the witnesses before the grand jury was Officer Jerry Cioeta, whose report is included in Exhibit 5 to the 4/21/21 Buchal Declaration. He describes working undercover on May 1, 2019, and writes: "I spent part of my day in Chapman Square Park where I overheard a group of men associated with a group commonly known as Patriot Prayer talking to each other. They were very clear they wanted to find the Antifa group, and fight them." (4/21/21 Buchal Decl. Ex. 5, at 17.)

A. Associational Prejudice and the First Amendment.

The first problem with this testimony is the term "associated with a group commonly known as Patriot Prayer". There will be no evidence at trial of any formal group, with membership, bylaws, etc. Mr. Gibson operated a FaceBook page called "Patriot Prayer," and established events on it, to which the public was invited, and put up no such posting for a May 1, 2019 event at Cider Riot. The State will offer testimony that defendant Gibson was the leader of a Patriot Prayer group.

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In this context, it is important to understand that it is a well-established principle under the First Amendment to the U.S. Constitution (and Article I, § 8 of the Oregon Constitution) that constitutional free speech requirements prohibit criminal liability based on an individual's mere association with a group. *See NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 918-19, 102 S. Ct. 3409, 3429, 73 L. Ed. 2d 1215, 1240 (1982); *Scales v. United States*, 367 U.S. 203, 224-25, 81 S. Ct. 1469, 1484, 6 L. Ed. 2d 782, 799 (1961) (finding unconstitutional a statute making it unlawful to be a knowing member in any organization that advocated the violent overthrow of the United States because. "in our jurisprudence guilt is personal" and "membership without more, in an organization engaged in illegal advocacy" is insufficient to satisfy personal guilt). Under this principle, an individual cannot be punished for mere membership in an organization, even if that organization has legal and illegal goals. *See Scales*, 367 U.S. at 229, 81 S. Ct. at 1486, 6 L. Ed. 2d at 802 (a "blanket prohibition of association with a group having both legal and illegal aims … [would pose] a real danger that legitimate political expression or association would be impaired"). Here, of course, defendant Gibson had no illegal goals—he aimed to draw attention to the rising menace of Antifa which would later metastasize into City-wide riots and the murder of at least one Antifa opponent.

In particular, federal constitutional law protects political leadership from liability for the acts of followers. In the *Claiborne Hardware* case, for example, the Supreme Court also reversed liability for the leader of a boycott that was marred by extreme violence,[2] Mr. Evers, which the lower court had premised on his "emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism," involving "highly charged political rhetoric". *Id.*

[2] Violence included two incidents of shots being fired at a house, slashing of tires, beatings, and a brick thrown through a windshield. *Claiborne Hardware*, 458 U.S. at 904-05.

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at 926. Mr. Evers had even made "references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night". *Id.* at 927. As was the case here, the speech involved fell within the scope of the First Amendment, and there was "no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence". *Id.* at 929.

In a context where the controlling precedent requires proof that defendant Gibson engaged personally in violent and tumultuous conduct, testimony concerning asserted conduct by members of a Patriot Prayer group should be barred under Rule 403. This conclusion is underscored by the Court's finding that "[t]he actors at the May 1 incident acted so particularly individually that they could only be evaluated on their individual behavior". (Order, July 23, 2021, at 6.)

B. Irrelevant, Hearsay Statements by Alleged Associates

The second problem with the Officer Cioeta testimony is the statement that these individuals "wanted to find the Antifa group, and fight them". Sergeant Cioeta is expected testify that this statement is based upon his overhearing a conversation between these individuals. He is offering pure hearsay, from an unknown source: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". OEC 801(3).

The testimony is also obviously irrelevant, insofar as cannot be said "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". OEC 401. That other individuals might intend to come to Cider Riot and commit violence has no bearing on whether or not defendant Gibson engaged in riot that day. Again, as this Court has already held, "[t]he actors at the May 1 incident acted so

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particularly individually that they could only be evaluated on their individual behavior". (Order, July 23, 2021, at 6.)

In fact, the State knows full well, as one of the police reports documents, that "Gibson liked to show he was exercising his First Amendment rights and was attacked . . . a fight or a 'riot' by the [Patriot Prayer] group destroyed Gibson's 'narrative'". (4/21/21 Decl. Ex. 5, at 32.) Evidence at trial will confirm that defendant Gibson was highly displeased that some individuals on the Patriot Prayer side had committed acts of violence.

Perhaps anticipating these objections, Sgt. Cioeta is expected to expand on his police report to testify that he observed an individual talking on a cell phone, who said: "I'm talking to Joey Gibson." This too is hearsay, offered for the truth of the matter asserted. It is also irrelevant, insofar as it has no bearing on the probability of any particular conduct by Gibson.

III. OPINION TESTIMONY CONCERNING THE VIDEO RECORDINGS OF THE EVENTS AT CIDER RIOT IS NOT HELPFUL.

Defendant Gibson anticipates that the State will ask its witnesses whether or not they saw defendant Gibson, on the video recordings, engaging acts which in the opinion of the witnesses were "violent and tumultuous"—this being the ultimate issue put forth in the riot statute, ORS 166.015 ("the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm").

It is of course true that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact". OEC 704. However, the Supreme Court has made it clear that "OEC 704 does not provide that an opinion embracing an ultimate issue to be decided by the trier of fact is admissible; rather,

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it states that such an opinion is not objectionable *solely for the reason that it embraces an ultimate issue." State v. Wille*, 317 Or. 487, 500, 858 P.2d 128, 136 (1993).

In particular, under OEC 701 and 702, the opinions must be helpful to the trier of fact, and under OEC 403, they must not be unfairly prejudicial. Thus the *Wille* Court upheld exclusion of a doctor's testimony as to whether defendant's act in killing his wife was "intentional" and whether he acted under the influence of "extreme emotional disturbance". *Wille*, 317 Or. at 501, 204 Or. 538, 545; 284 P2d 348 (1955) ("it is improper for a witness to give his opinion 'that the testator had capacity to make a will'"). Testimony that a police officer watched video recordings and concluded that defendant Gibson engaged in violent and tumultuous conduct is "pure opinion which merely tells the jury which result to reach" and is "directly condemned" under Oregon law. *Tiedemann v. Radiation Therapy Consultants, P.C.*, 299 Or. 238, 243, 701 P.2d 440, 444 (1985). As the video evidence literally speaks for itself, the jury can form its own opinions, and the opinions of a witness who was not there and just watched videos later is irrelevant.

Nothing prevents the State from pointing out and highlighting specific conduct on the recordings, but to allow police officers or others to broadly assert that somewhere on the tapes is evidence of "violent and tumultuous" conduct is unfairly prejudicial and invades the province of the jury. Even if the question of "violent and tumultuous conduct" required expert testimony—which it does not—the Supreme Court has long made it clear that expert testimony on such an ultimate issue can only be allowed "if the ultimate fact cannot be equally well decided by the jury from the same evidence upon which the expert has based his opinion." *Shields v. Campbell*, 277 Or. 71, 78, 559 P.2d 1275, 1280 (1977) (quoting *Ritter v. Beals*, 225 Or. 504, 525, 358 P.2d 1080 (1961)).

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To make matters worse, defendants anticipate that Officer Traynor, will, for example, testify that there are other tapes beyond those that will be viewed by the jury, and the jury may assume (as the grand jury presumably did) that even though they see nothing "violent and tumultuous" in what they see, they should just trust the officer. This is a tactic the State has repeatedly used with this Court, repeatedly asserting that there is additional evidence the Court has not seen—though the State's Exhibit List, the contents of which are filed herewith, should put an end to these claims.

Officer Traynor is expected to offer additional, more specific objectionable testimony. He is expected to testify that when defendant Gibson said "do something" to the Antifa contingent, he was trying to provoke a fight. Officer Traynor has no personal knowledge of the intentions of defendant Gibson at that or any other moment, making the testimony inadmissible under OEC 602. It is also unfairly prejudicial since the videos all confirm that defendant Gibson did not engage in any fighting despite being kicked, spat upon, repeatedly pepper-sprayed, and targeted with projectiles. It would undermine his entire message that Antifa was (and is) a violent criminal gang that should not be tolerated in Portland if he were personally to stoop to their level.

Ultimately, the State's astounding inversion of good and evil appears to be groping toward the position that where a group of violent thugs are likely to become violent merely because of conduct protected under the First Amendment, criminal liability can attach to the conduct because of the foreseeability of the response. But defendant Gibson never 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

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intelligence would understand would be words likely to cause an average addressee to fight"). *The testimony about "do something" is barred by the First Amendment itself.* Not only should the State be forbidden from offering the expected testimony interpreting constitutionally-protected speech of defendant Gibson; if the case does go to trial the jury should be instructed that it cannot convict Gibson on the basis of "do something" and other constitutionally-protected speech.

Conclusion

The foregoing evidence is, in substance, the core of the State's case against Gibson, and none of it is admissible. A motion *in limine* should be entered excluding the evidence so that the State (and this Court) may reconsider the interests of justice in prosecuting defendant Gibson on the basis of the remaining evidence, which anyone sensitive to the First Amendment can recognize is protected conduct.

DATED: November 24, 2021

s/ D. Angus Lee
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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 November 24, 2021, I caused the following document to be served:

DEFENDANT JOSEPH GIBSON'S FIRST SET OF MOTIONS IN LIMINE

in the following manner on the parties listed below:

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