IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT RUNDO AND ROBERT BOMAN, Defendants-Appellees.	C.A. No. 24-932 D.C. No. 18-CR-759-CJC (Central Dist. Cal.) **GOVERNMENT'S EMERGENCY MOTION TO STAY DEFENDANT RUNDO'S RELEASE AND CONTINUE HIS DETENTION PENDING APPEAL; EXHIBITS**

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

RELIEF NEEDED BY FEBRUARY 22, 2024

CIRCUIT RULE 27-3(a) CERTIFICATE

Plaintiff-Appellant United States of America, by and through its counsel of record and with the authorization of the United States Solicitor General, hereby seeks an emergency order to stay the district court's forthwith release order.

I. Facts Showing the Existence and Nature of the Emergency

Defendant-Appellee Robert Rundo is the leader of a combat-ready white supremacist group who is charged with conspiracy to violate the Anti-Riot Act, and violating the Anti-Riot Act, in violation of 18 U.S.C. § 2101. The district court (the Hon. Cormac J. Carney) dismissed Rundo's indictment, and this Court reversed. *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021), *cert. denied Rundo v. United States*, 142 S. Ct. 865 (2022). Before this Court's opinion, Rundo relocated to Eastern Europe, where he lived under false identification documents. The FBI located him in Romania, and the United States secured his extradition.

Today, on remand, the district court dismissed the indictment again. The court also ordered Rundo released forthwith and denied the government's motion for a stay of that release order. Because Rundo presents a grave risk of flight, as well as a danger to the community,

the district court's forthwith release order should be reversed and Rundo's release should be stayed pending any government appeal from the district court's latest order dismissing the indictment.

Due to the district court's order, Rundo will be released imminently (if the Bureau of Prisons has not already released him), at which point he will be under no bond conditions or travel restraints. Absent an immediate order staying his release, Rundo is very likely to flee the United States, which risks vitiating the government's right to appeal from the district court's latest order dismissing the indictment.

II. Contact Information for Counsel

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III. Explanation of Timeliness and Relief Sought Below

The district court granted Rundo's motion to dismiss his indictment on February 21, 2024. The government immediately requested a stay of his release pending appeal, which the district court denied on February 21, 2024. The government filed its notice of appeal from the district court's order dismissing the indictment minutes later and is filing this emergency motion the same day.

The government requests relief by February 22, 2024 so as to safeguard against Rundo's potential flight from the United States.

IV. Notification of Opposing Counsel

The government notified defense counsel via email at 12:31 p.m. on February 21, 2024 that it would likely be filing this emergency stay

. Rundo opposes.

EMERGENCY STAY MOTION

I. Introduction

Defendant Robert Rundo ("defendant"), a leader of the combat-ready white-supremacist militant group RAM ("Rise Above Movement"), is charged with conspiracy to violate the Anti-Riot Act and rioting, in violation of 18 U.S.C. § 2101. The district court previously dismissed the indictment on the ground that the Anti-Riot Act violated the First Amendment. On appeal, this Court reversed and reinstated the indictment. *United States v. Rundo*, 990 F.3d 709, 712 (9th Cir. 2021), *cert. denied Rundo v. United States*, 142 S. Ct. 865 (2022).

Upon remand, on February 21, 2024, the district court again dismissed the indictment, this time on grounds of selective prosecution, and ordered defendant Rundo's forthwith release. (GEX 31-65.) The court also denied the government's request for a stay of its release order. (GEX 66.) The government filed a notice of appeal minutes later. (GEX 68.)

This Court should stay Rundo's release order during the pendency of the government's appeal because defendant is an extremely serious flight risk and a danger to the community.

II. Facts

The magistrate judge ordered defendant detained as both a serious flight risk and a danger. (GEX 27-30.)[1]

Defendant has many foreign contacts and has traveled extensively to foreign countries to evade arrest. First, prior to his indictment, defendant traveled to Ukraine, Germany, and Italy to meet with members of white supremacist groups. (GEX 8-9.) Second, defendant fled the United States on multiple occasions prior to his initial arrest. After four of defendant's co-conspirators were arrested on October 2, 2018, defendant booked a flight to Ukraine. (CPD 14.) Defendant was located in London a few days later and sent back to the United States. (*Id.*) Subsequently, defendant booked a flight to Moscow on October 10, 2018, but after being denied boarding, he crossed the border into Mexico and flew to Cuba, Guatemala, and then El Salvador, where he was extradited back to the United States. (*Id.*) Finally, most recently, following the district court's prior dismissal order, defendant again fled the United States, utilized false identification documents and was

[1] "GEX" refers to the government's exhibits attached hereto. "CPD" refers to the Confidential Probation Document filed under seal herewith.

ultimately arrested in Romania and extradited to the United States. (GEX 29; CPD 2, 31; Bierwirth Declaration, Exhibits 1 and 2.)

The magistrate judge found that defendant is a danger to the community based on his criminal history and the current charges. (GEX 29.) In the present case, defendant is charged with organizing and participating in RAM's combat-training sessions to prepare to engage in violence at political rallies, and then attending political rallies, where he assaulted a police officer and counter protestors. *Rundo*, 990 F.3d at 712-13. (GEX 13, 15, 19.) Defendant also has a New York prior conviction for gang assault, causing serious physical injury. (CPD 13.)

Even though this Court previously reinstated defendant's indictment, on February 21, 2024, the district court dismissed it again. (GEX 31-65.) Despite the Supreme Court's observation that "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws," a "presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties," *United States v. Armstrong*, 517 U.S. 456, 464

(1996) (cleaned up), the district court ruled that defendant had established impermissible selective prosecution. (GEX 58.) The government requested a stay of the district court's dismissal order and a stay of defendant's release, but the court denied both and ordered defendant released "FORTHWITH." (GEX 66.)

III. Argument

Given defendant's travel history and numerous foreign contacts, there is every reason to believe that if released, he will again leave the United States and will likely seek refuge in a country that lacks an extradition treaty with the United States. It is also likely that if he does not flee abroad, he will engage in further violence. This Court should stay the district court's release order during the pendency of the government's appeal of the order dismissing the indictment.

A. Defendant Should Be Ordered Detained Pending Appeal Consistent with the Bail Reform Act

Section 3143(c) of the Bail Reform Act governs the release or detention of a criminal defendant pending an appeal by the government. "The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731 of this title, in accordance with section 3142 of this title, unless

the defendant is otherwise subject to a release or detention order." 18 U.S.C. § 3143(c). Section 3731, in turn, permits the government to appeal from "a decision, judgment, or order of a district court dismissing an indictment." 18 U.S.C. § 3731.

The requirement that a court analyze the factors supporting release or detention under § 3142 "unless the defendant is otherwise subject to a release or detention order," 18 U.S.C. § 3143(c), means that if a court has already undertaken the § 3142 analysis and ordered the defendant detained, the detention order should remain in place pending appeal.

The structure of the statute confirms that interpretation. The terms "release order" and "detention order" are defined in § 3142 itself. A "release order" must set forth the conditions of release and the consequences of violating those terms. 18 U.S.C. § 3142(h). A "detention order" must include written findings of fact and a statement of the reasons for detention. 18 U.S.C. § 3142(i). Where a court has considered the § 3142 factors and entered a detention order, there is no need to repeat the analysis when the government appeals from an order

dismissing an indictment. A defendant simply should remain detained until the appeal is resolved. 18 U.S.C. § 3143(c).

That is the status of this case. The magistrate court entered a detention order on August 2, 2023 after conducting the analysis required by § 3142 and finding that defendant was both a danger to the community and a flight risk. (GEX 28-29.) The court determined that no condition or combination of conditions of release would reasonably assure the safety of the community and defendant's appearance for court proceedings. (GEX 28.) Although the district court subsequently entered an order dismissing the indictment with prejudice, the government exercised its right to appeal from that order under § 3731. (Dkt 334.) Consistent with the plain text of § 3143(c), this Court should enter an order continuing defendant's detention pending resolution of the government's appeal.

B. Defendant is a Danger and a Flight Risk

Though the statute requires continued detention based on the existing detention order alone, treating defendant "in accordance with section 3142" also warrants continued detention. 18 U.S.C. § 3143(c). The only findings in the record are that defendant is a danger and a

flight risk. The magistrate court found numerous facts warranting detention following defendant's most recent extradition—defendant was recently residing in a foreign country, previously left the United States multiple times in an effort to evade arrest, had prior DMV failures to appear, had no confirmed bail resources, has a prior conviction involving violence, and the current charges involve violence as well. (GEX 29.) The court concluded that the government had established (1) by clear and convincing evidence that no conditions of release would reasonably assure the safety of the community; and (2) by a preponderance of the evidence that no conditions of release would reasonably assure defendant's appearance as required. (GEX 28.)

Since that determination, the statutory basis for detention has not changed.

C. The Dismissal of Defendant's Indictment Does Not Require His Release

Given that § 3143(c) unequivocally permits continued detention pending an appeal by the government under § 3731—the exact scenario here—the fact that defendant's indictment was ordered dismissed does not preclude his continued detention. Pending the government's appeal, a court must simply continue the existing "detention order" or, if

necessary, "treat" the defendant the same way it treats all defendants pending trial by analyzing release or detention "in accordance with section 3142." 18 U.S.C. § 3143(c); *see also United States v. Reyes*, C.A. No. 21-50045, Dkt. No. 12 (9th Cir. 2021) (where the same district judge as here dismissed an indictment and ordered the defendant released, this Court granted the government's emergency motion to continue the defendant's detention).

The plain text is confirmed by legislative history. "Use of the term 'treated,'" Congress explained, "removes an ambiguity in the current statute and makes it clear that the judicial officer may release or detain the defendant as provided in section 3142." S. Rep. No. 98-225, at 27 (1983). (*See* Addendum 31 (attached hereto).) "In such cases, the defendant, of course, would not have been convicted, and he thus should be treated in the same manner as a person who has not yet stood trial[.]" *Id.*

That is consistent with 18 U.S.C. § 3731, which was amended in 1986 to delete a provision that had formerly required a defendant's release pending a government appeal. *See* Pub. L. No. 99-646, 100 Stat. 3592, Sec. 32 (1986) (striking out fifth paragraph of § 3731). It is also

consistent with cases continuing a defendant's detention pending the government's appeal even where a defendant completed his sentence, *see, e.g.*, *United States v. Maul-Valverde*, 10 F.3d 544, 547 & n.2 (8th Cir. 1993), or was granted a judgment of acquittal, *see, e.g.*, *United States v. Woodruff*, 941 F. Supp. 910, 930 (N.D. Cal. 1996), *acquittal rev'd* 122 F.3d 1185 (9th Cir. 1997).

Nevertheless, district courts have, on occasion, ruled that the dismissal of all counts precludes detention because "there is no longer an operative indictment." *United States v. Arteaga-Centeno*, 360 F. Supp. 3d 1022, 1024 (N.D. Cal. 2019); *United States v. Hudson*, 3 F. Supp. 3d 772, 789 (C.D. Cal. 2014), *rev'd sub nom United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014); *United States v. Sales*, 2014 WL 3728364 (D. Me. Jul. 25, 2014). That not only contravenes the plain statutory text but is also legally incorrect. Just as a conviction does not become final until it is affirmed on appeal (or the time for appeal expires), *see United States v. Gilbert*, 807 F.3d 1197, 1199 (9th Cir. 2015); *United States v. Suarez*, 682 F.3d 1214, 1220 (9th Cir. 2012), the dismissal of an indictment should not be deemed final until it is

affirmed on appeal (or the time for appeal expires).[2] That is why a district court is empowered either to continue a defendant on bail pending appeal or to continue a defendant's detention pending appeal.

The logic of that two-sided coin is reinforced by the statutes permitting reindictment of dismissed charges. Whenever a felony indictment or information is dismissed, the government may reindict within six months of the dismissal "or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information *becomes final*." 18 U.S.C. §§ 3288, 3289 (emphasis added). The rule confirms that a dismissal does not become final until after appeal. Here, the government filed its notice of appeal, and the indictment

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[2] The government's right to appeal under § 3731 is not conditioned on "finality." *United States v. Davis*, 793 F.3d 712, 717 (7th Cir. 2015) (en banc). And even if it were, the finality of a conviction or dismissal for purposes of terminating a criminal case is distinguishable from "finality" for purposes of conferring appellate jurisdiction. A judgment of conviction becomes "final" for purposes of permitting an appeal after sentencing, *United States v. Arpaio*, 951 F.3d 1001, 1004 (9th Cir. 2020), even though the conviction is not "final" for case-termination purposes until appellate proceedings are complete. The same is true of the dismissal of an indictment. It is a "final decision of the district court" for jurisdictional purposes, *United States v. Chapman*, 524 F.3d 1073, 1080 (9th Cir. 2008), but does not terminate the criminal case until appellate proceedings are complete.

remains operative until the appeal is resolved. Defendant's continued detention is permissible, and warranted, under § 3143(c).

IV. CONCLUSION

This Court should enter an order staying the district court's release order continuing defendant's detention pending appeal pursuant to 18 U.S.C. § 1343(c).

DATED: February 21, 2024

Respectfully submitted,

E. MARTIN ESTRADA
United States Attorney

CAMERON SCHROEDER
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/s/ *Bram M. Alden*

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UNITED STATES OF AMERICA

GOVERNMENT'S EXHIBITS

GOVERNMENT'S EXHIBITS

DESCRIPTION **PAGE**

ORIGINAL

AO 91 (Rev. 11/82)

CRIMINAL COMPLAINT

FILED
CLERK, U.S. DISTRICT COURT
10/20/2018
CENTRAL DISTRICT OF CALIFORNIA
BY: _____ DEPUTY

UNITED STATES DISTRICT COURT	CENTRAL DISTRICT OF
UNITED STATES OF AMERICA v. ROBERT PAUL RUNDO, ROBERT BOMAN, TYLER LAUBE, and AARON EASON	DOCKET NO. MAGISTRATE'S CASE NO. 18MJ02791

Complaint for violation of Title 18, United States Code, Sections 2101, 371

NAME OF MAGISTRATE JUDGE		LOCATION
THE HONORABLE STEVE KIM	UNITED STATES MAGISTRATE JUDGE	Los Angeles, California

DATE OF OFFENSE	PLACE OF OFFENSE	ADDRESS OF ACCUSED (IF KNOWN)
March 25, 2017 – February 2018	Los Angeles County	

COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION:

[18 U.S.C. §§ 2101, 371]

Between at least March 25, 2017, and February 12, 2018, in Los Angeles County, within the Central District of California, and elsewhere, defendants ROBERT PAUL RUNDO, ROBERT BOMAN, TYLER LAUBE, and AARON EASON were part of an agreement to use, and in fact used facilities of interstate or foreign commerce with intent to incite, organize, promote, encourage, participate in, or carry on riots, or to commit acts of violence in furtherance of a riot, or to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot, and during such use, performed or attempted to perform an overt act for one or more of the purposes specified above, in violation of Title 18, United States Code, Sections 2101, 371.

BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED:

(See attached affidavit which is incorporated as part of this Complaint)

MATERIAL WITNESSES IN RELATION TO THIS CHARGE: N/A

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge.

SIGNATURE OF COMPLAINANT
SCOTT BIERWIRTH

OFFICIAL TITLE
Special Agent, Federal Bureau of Investigation

Sworn to before me and subscribed in my presence,

SIGNATURE OF MAGISTRATE JUDGE[1]

DATE
October 20, 2018

[1] See Federal Rules of Criminal Procedure 3 and 54

AUSA David Ryan x4491 REC: Detention

AFFIDAVIT

I, SCOTT J. BIERWIRTH, being duly sworn, declare and state as follows:

I. INTRODUCTION

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") in Los Angeles, California and have been so employed for approximately ten months. I am currently assigned to a counter-terrorism squad, where I specialize in the investigations of domestic terrorist groups. I attended 21 weeks of New Agent Training at the FBI Academy in Quantico, Virginia. Prior to joining the FBI, I was an Infantry Officer in the United States Army, where I trained for counter-terrorism related missions across the globe for over four years.

2. Through my training and experience in the FBI and the United States Army, I am familiar with terrorist organizations' methods of operations, including their use of social media to communicate regarding coordination of strategic ideological goals, recruit and radicalize individuals, and coordinate violent extremist activities and other criminal activities to generate funds for the terrorist organization.

II. PURPOSE OF THE AFFIDAVIT

3. I make this affidavit in support of criminal complaints and arrest warrants for Robert Rundo ("RUNDO"), Robert Boman ("BOMAN"), Tyler Laube ("LAUBE"), and Aaron Eason ("EASON") for violations of Title 18, United States Code, Sections 2101 (Riots) and 371 (Conspiracy).

4. The facts set forth in this affidavit are based upon my personal observations, my training and experience, and information obtained from other agents and witnesses. This affidavit is intended to show merely that there is sufficient probable cause for the requested complaints and warrants and does not purport to set forth all of my knowledge of or investigation into this matter. Unless specifically indicated otherwise, all conversations and statements described in this affidavit are related in substance and in part only with original typographical errors and all dates are approximate.

III. SUMMARY OF PROBABLE CAUSE

5. As described more fully below, RUNDO, BOMAN, LAUBE, and EASON (collectively, the "defendants") are members of the "Rise Above Movement" ("RAM"), a white supremacy extremist group headquartered in Southern California. Throughout 2017, the defendants and other RAM members traveled to political rallies, including in Huntington Beach, California on March 25, 2017, Berkeley, California on April 15, 2017, San Bernardino, California on June 10, 2017, and Charlottesville, Virginia on August 11-12, 2017. RAM members violently attacked and assaulted counter-protestors at each of these events.

6. On October 10, 2018, four RAM members were indicted in the Western District of Virginia for Conspiracy to Riot and Riots, in violation of 18 U.S.C. §§ 371, 2101, as a result of their participation in the events at Huntington Beach, Berkeley,

and Charlottesville, Virginia. See United States v. Daley et al., 3:18-CR-00025 (W.D. Va.).[1]

7. The defendants and other RAM members used facilities of interstate commerce with the intent to organize, promote, encourage, participate in, or carry on riots in at least two ways. First, the defendants used the Internet to coordinate combat training in preparation for the events, to arrange travel to the events, to coordinate attendance at the events, and to celebrate their acts of violence in order to recruit members for future events. Second, the defendants and other RAM members traveled to the April 15, 2017 event in Berkeley in a van that EASON rented using his Visa credit card.

IV. STATEMENT OF PROBABLE CAUSE

8. Based on my training and experience, my personal investigation into this matter, my conversations with other law enforcement officers, and my review of open-source materials and law enforcement reports, I know the following:

A. Background on RAM

9. RAM was founded in or around the winter of 2016-2017 by several founding members, including RUNDO and Ben Daley ("Daley"). According to private Facebook messages sent by Daley in or around June 2017, RAM was originally branded as the "DIY

[1] On October 2, 2018, United States Magistrate Judge Jean P. Rosenbluth issued search warrants for the premises of several RAM members, including RUNDO and BOMAN, in Case Numbers 2:18-MJ-2592, and 2:18-MJ-2598 (C.D. Cal.). During those searches, agents received physical evidence of RUNDO and BOMAN's participation in RAM, as well as several digital devices, which are still being reviewed.

DIVISION," but formally rebranded to the Rise Above Movement in 2017.[2]

10. RAM represents itself publicly, through videos and other public online postings, as a combat-ready, militant group of a new nationalist white supremacy/identity movement. For example, RAM members maintained a Twitter account with the user name "@RiseAboveMvmt" (the "RAM Twitter account"), which posted videos and pictures of RAM members conducting training in hand-to-hand combat, often interspersed with video clips of RAM members assaulting people at political events, with their faces partially obscured by distinctive skeleton or American flag masks. RUNDO, BOMAN, and LAUBE appear in several of these videos and photographs. The photographs below, posted by the RAM twitter account, depict RUNDO and Daley training above the words "WHITE UNITY," and several RAM members, with RUNDO front and center, posing in skeleton masks.

[2] I reviewed contents from Daley's Facebook page pursuant to a search warrant issued on April 4, 2018 from the Honorable Joel C. Hoppe, United States Magistrate Judge, Western District of Virginia, in Case Number 3:18-MJ-00007 (W.D. Va.).

11. Based on my review of private messages sent by the RAM Twitter account, I believe the account was operated by RUNDO. For example, on April 11, 2018, the RAM Twitter account sent a direct message to another Twitter user stating, "I am going over to Europe next week and will be competing in a pan European [mixed martial arts] event." Based on my review of Customs and Border Protection ("CBP") records, law enforcement databases, and subsequent interviews with RUNDO, I know that RUNDO traveled to Europe in April 2018 and participated in a mixed martial arts event.

12. The RAM Twitter account regularly posted content in support of the group's white supremacy extremist ideology. For example, on February 5, 2018, the RAM Twitter account posted a photograph of RAM members covering their faces with books with the accompanying text, "When the squads not out smashing commies . . . #nationalist #lifestyle." On March 9, 2018, the RAM Twitter account posted a photograph of RAM members posing with their faces partially covered with black skeleton masks and the hashtags, "#nationalist #ultraright." On March 20, 2018, the RAM Twitter account posted a photograph of a man doing physical exercises next to a banner depicting one person kicking another and the text, "GOOD NIGHT LEFT SIDE," appearing to endorse the use of physical violence against others who do not share RAM's "ultraright" ideology.

13. Based on my review of private social media communications between RAM members, I know that RAM leaders discourage RAM members from using explicitly violent or

extremist language in public social media postings in order to avoid generating unwanted attention or dissuading potential recruits. For example, in private Facebook messages on August 25, 2017, an associate of Daley's complimented Daley on a recent RAM promotional video and said he was interested in getting involved with RAM. Daley wrote, "Yeah man. If your still in LA area it'll probably be me meeting up with you. We go for the implicit look so you'll have to change your [style] up a bit when your with us." The associate responded, "Yea that's fine [I] can grow my hair out if need be, drop the boots and braces look etc." Daley responded with an image of an "OK" symbol, and stated, "Trust I did it for a long time too but ultimately the 80s in that style of nationalism proved to be ineffective. . . . [I] think its time to reimagine the nationalist look and playbook, we have become predictable that needs to change." In January 2018, in private Facebook messages to another associate, Daley wrote: "I would be mindful of saying anything that could be misconstrued as a call to violence. I know people who literally have had feds show up at there door over posts. [J]ust food for thought. Trust I'm not speaking in terms of morality rather practicality."

14. Notwithstanding Daley's admonishment, RAM and its members documented their white supremacy extremist ideology in both private and public Internet postings. In a video taken by a RAM associate, later posted online, the RAM associate asked RUNDO to say the "14 words." Based on my training and experience, I know that "14 words" refers to a slogan commonly

known and used by white supremacy extremists and neo-Nazis that states: "We must secure the existence of our people and a future for white children." RUNDO responded, "I'm a big supporter of the fourteen, I'll say that."

15. RAM members also used graffiti to promote their white supremacist ideology. On January 12, 2018, law enforcement officers took photographs of graffiti in the Aqua Chinon Wash Tunnel in Irvine, California, where RAM members have posted videos of the group conducting physical training exercises. The photographs showed the words "RAM" and "RISE ABOVE" written in yellow spray paint inside the tunnel, as well as a Celtic cross with the number "14" over the top in black spray paint. As discussed above, the number "14" is commonly used among white supremacy extremists and neo-Nazis to refer to the "14 words." Based on my training and experience, I know that the image of the Celtic cross, combined with the number 14, is commonly used by white supremacy extremists and neo-Nazis to express their ideology.

16. In the Spring of 2018, according to reports of interviews conducted by Customs and Border Protection officers as well as public posts on social media accounts of RAM and several of its members, several RAM members, including RUNDO, Daley, and Michael Miselis ("Miselis") traveled to Germany, Ukraine, and Italy to celebrate Adolf Hitler's birthday and meet with members of European white supremacy extremist groups, including a group known as White-Rex. Shortly after that trip, the RAM-affiliated clothing company Right Brand Clothing, of

which RUNDO is the registered owner, posted several photographs on its Instagram page of RUNDO and other RAM members in Germany, Ukraine, and Italy, slap-tagging stickers on various buildings and poles with the RAM logo and the words "RAPEFUGEES ARE NOT WELCOME HERE," "FCK ANTIFA," and "REVOLT AGAINST MODERN . . . ACTIVITISM-ATHLETICS-VIRTUE . . . RIGHT SIDE." RAM members also posted online a video showing Daley in the Ukraine performing a salute known to be associated with the western Hammerskins, a well-established violent white supremacy extremist group that is associated with RAM, and of which Daley was a member before co-founding RAM.

17. On August 1, 2018, an Instagram user "tagged" Right Brand Clothing's account in a post containing a photograph of RAM members during their trip to Germany, Ukraine, and Italy meeting with Olena Semenyaka, the leader of the International Department for the National Corps, which is a political party in the Ukraine that was founded in 2016 out of a regiment of the Ukranian military called the Azov Battalion. Based on my training and experience, I know that the Azov Battalion is a paramilitary unit of the Ukranian National Guard which is known for its association with neo-Nazi ideology and use of Nazi symbolism, and which is believed to have participated in training and radicalizing United States-based white supremacy organizations. The text associated with the post stated, "@rightbrandwear it was an honor to meet the singer and patriot from #818th #nationalist #blackmetal #ukraine #antiantifa."

B. March 25, 2017: RUNDO, BOMAN, LAUBE, and Other RAM Members Attacked Counter-Protestors at a Political Rally in Huntington Beach, California

18. Based on my review of law enforcement reports, videos and photographs posted online, and public and private communications between RAM members, I know that groups of RAM members have attended public rallies together, acted in concert to commit acts of violence, and planned such acts in advance using the Internet.

19. For example, I reviewed a recording of a December 2016 RAM group phone call in which Daley shared RAM's strategic plan to attend rallies in 2017 in order to provide "security." Based on my training and experience, evidence gathered in this investigation, and the context of this discussion, Daley and the RAM group, who had no official role in the rallies they planned to attend, appeared to be discussing appearing as security personnel at the rallies so they could be prepared to engage in violent confrontations that may erupt at the rallies. On the call, Daley instructed listeners to wear specific clothing, such as polo-style shirts and khakis, to get military style haircuts, and to maintain an organized presence at the events.

20. On March 25, 2017, at least several hundred people attended a "Make America Great Again" rally at the Bolsa Chica State Beach in Huntington Beach, California. The rally, and the violence that ensued, were captured on video by numerous journalists and participants. Throughout the morning, the attendees engaged in various activities, including chanting and

making speeches. As those activities were ongoing, a small group of counter-protestors gathered nearby on the beach.

21. Videos uploaded online show hundreds of rally attendees marching south along the beach. At the same time, to the north of the marchers, videos show a small group of rally attendees, including several RAM members carrying signs that read "DEFEND AMERICA" and "Da Goyim Know," did not march south, but instead confronted the counter-protestors. Based on my training and experience, I know that the phrase "da goyim know" is commonly used by white supremacist extremists to refer to their supposed knowledge of a Jewish conspiracy to control world affairs.

22. Videos show several rally attendees confronting, pushing, and then punching two journalists from a local news publication. As the journalist stumbled backward, LAUBE grabbed the journalist's shoulder with his left hand, and punched him three times in the face. A counter-protestor then released pepper spray, leading the crowd to momentarily disperse. LAUBE is depicted assaulting the journalist in the screenshot below.

23. Videos show a group of approximately three to five counter-protestors then turned away from the group of rally attendees and walked north along the beach while a small group, led by RUNDO, BOMAN, LAUBE, Daley, and other RAM members pursued them.

24. Approximately 20 seconds later, videos show that BOMAN caught up to one of the counter-protestors and kicked him in the back, as depicted below.

25. A second counter-protestor turned and approached Daley, who shoved the counter-protestor in response. The counter-protestors continued walking north away from the RAM members, as the RAM members continued pursuing them. Another rally attendee walking alongside the RAM members approached one of the counter-protestors and punched him in the face, knocking him to the ground.

26. Seconds later, videos show RUNDO approached another of the counter-protestors from behind and punched him in the back of the head. BOMAN ran up behind RUNDO toward the counter-protestor, but turned back after a second counter-protestor released pepper spray. RUNDO then turned to the second counter-protestor, punched him in the back of the head, grabbed the back of his neck, and threw him to the ground, landing on top of him. RUNDO then held the counter-protestor down with his left hand and threw several punches at the counter-protestor's head while other RAM members looked on, cheered, and prevented others from intervening, as depicted in the screenshot below.

27. After several seconds, video shows the counter-protestor released pepper spray, leading RUNDO to back away from him. The counter-protestor then ran northeast from the beach into a parking lot, while other rally attendees pursued him, pushing him and hitting him with flag poles. According to

eyewitnesses, another RAM member pursued the counter-protestor and threw a large rock at him, striking him in the chest.

28. During and after these violent confrontations, videos show the majority of the rally attendees continued peacefully marching south down the beach, while RUNDO, BOMAN, LAUBE, Daley, and other RAM members, remained in the same area with a group of other rally attendees. Approximately 20 minutes later, approximately five counter-protestors arrived at the beach near where the location where the RAM members remained gathered. The RAM members, including RUNDO, BOMAN, LAUBE, and Daley, led a group of 15-20 men who pursued the counter-protestors for over a minute as the counter-protestors walked north along and the beach to the parking lot.

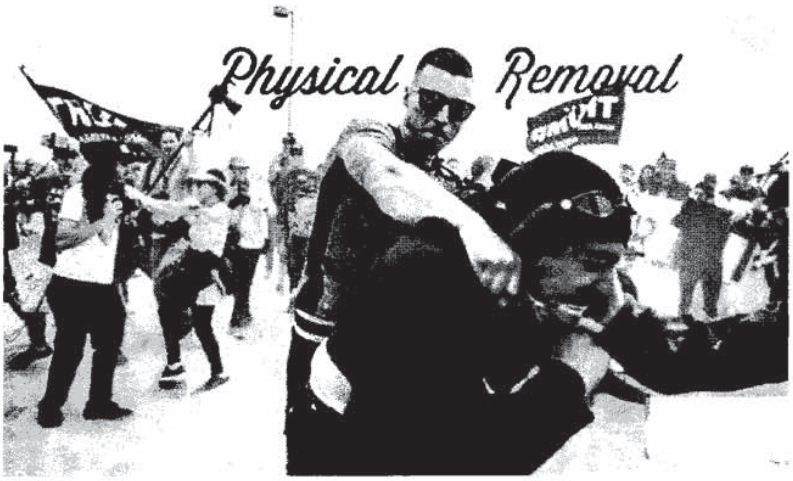
C. March-April 2017: RAM Members Celebrated Their Assaults at Huntington Beach and Prepared for Berkeley

29. Based on my review of the contents of Daley's cell phone, I know that later on March 25, 2017, Daley sent a text message to another RAM member, stating, "Front page of the stormer we did it fam." Based on my training and experience, I know that the "Daily Stormer" is a news website and online community forum that is well known among neo-Nazis and white supremacy extremists, which published an article after the Huntington Beach event titled "Trumpenkriegers Physically Remove Antifa Homos in Huntington Beach."[3] Based on my review of the

[3] Based on my training and experience, I know that "Trumpenkriegers" is intended to mean "Fighters for Trump." "Physical removal" is a term commonly used by white supremacy extremists to refer to the goal of separating or "physically

contents of BOMAN's Facebook account, I know that BOMAN posted the Daily Stormer article on his Facebook page, along with the comment, "We did it fam."[4]

30. I reviewed photographs of the Huntington Beach rally published on the Internet. One image, which appears to have been posted by the DIY Division's Instagram account, depicts RUNDO punching a counter-protestor, with the words "Physical Removal" superimposed across the top. That image is depicted below.



31. The RAM Twitter account later posted a picture of RAM members, including RUNDO, BOMAN, and Daley, at the Huntington Beach rally, standing behind a sign stating "Defend America," with the accompanying text, "Shortly after this pic antifa was

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removing" those with viewpoints or lifestyles that are viewed as undesirable.

[4] I reviewed contents from BOMAN's Facebook page pursuant to a search warrant issued on September 4, 2018 from the Honorable Paul L. Abrams, United States Magistrate Judge, Central District of California, in Case Number 2:18-MJ-02307 (C.D. Cal.).

btfo in Huntington Beach." Based on my training and experience, I know that "BTFO" stands for "Blown The Fuck Out."

32. Based on my review of the contents of Miselis's cell phone, I know that, on March 27, 2017, EASON sent a text message to Miselis, who appears to have first been introduced to the other RAM members at the Huntington Beach rally, inviting him to the rally in Berkeley on April 15, 2017. EASON wrote, "It's Aaron from the HB rally. I wanted to let you know that the organizers of the free speech rally at Berkeley on April 15 are paying for rooms for our guys. . . . We're expecting about 15 solid guys in our caravan coming up from So Cal and we can accomodate as many as you can give. Quality only of course. If you have good people who aren't cut out for security, the organiziers are looking for people to fill roles like photography. Anyone who doesn't come will wish they had. Oh and we have hand to hand and formation fighting training in San Clemente this Saturday. It's not required, but we'd like to get everyone we can there."

33. Later on March 27, 2017, Daley wrote to Miselis to invite him to the Berkeley rally, and Miselis replied, "Right on, Aaron from the rally mentioned some folks were going up. I'll drop the line on our end and see if anyone else can make it." Daley replied, "Preciate we need all heads we can get."

34. On March 29, 2017, EASON wrote to MISELIS again, stating, "Training is a go. Saturday at 11 am. Marblehead Park, San Clemente. . . . We'll probably have equipment for shield and stick training and our formation tactics ready."

35. On April 12, 2017, Daley wrote to Miselis, "Got a 11 van reserved for Friday." Asking everyone to kick in 20 or 40. Thinking of leaving around 1130. Does that time work for you?" Miselis replied, "Absolutely."

36. According to records received from Airport Van Rental, on April 14, 2017, EASON rented a 12-15 passenger van for $493.87, using a Visa credit card with account number ending in 0807. Photographs posted online show BOMAN, Daley, Miselis, and other RAM members posing in front of the van following the event in Berkeley on April 15, 2017.

D. April 15, 2017: RUNDO, BOMAN, EASON, and Other RAM Members Attacked Counter-Protestors at a Political Rally in Berkeley, California

37. On April 15, 2017, RUNDO, BOMAN, EASON, Daley, and other RAM members attended a political rally at Martin Luther King Jr. Civic Center Park in Berkeley, California. Videos posted online also show RUNDO, BOMAN, EASON, and Daley standing alongside other RAM members displaying a sign that stated "Defend America" with their hands taped in the manner of a boxer or mixed martial arts fighter, wearing grey and black athletic shirts with their faces partially covered by the distinctive skeleton masks shown in RAM training videos. Videos posted online show that rally attendees and counter-protestors were initially separated by orange fencing. After several minutes, several RAM members crossed the orange fencing and assaulted counter-protestors. In one video, BOMAN is shown punching a counter-protestor in the face. In another video, BOMAN is shown punching a person while holding the person down on the ground.

The images below depict BOMAN at the Berkeley rally preparing to fight with his hands taped and then BOMAN punching a counter-protestor while EASON, Miselis, and other RAM members stood beside him.

38. In another video, another RAM member is shown repeatedly punching a person while two unidentified people and a second RAM member appear to hold the person down in a crouched position. In another video, Miselis, Daley, and two other RAM members are shown repeatedly kicking and punching a counter-protestor who was crouching in a defensive position, until police intervened and pushed them away. In another video, RUNDO is shown approaching a counter-protestor and punching him in the side of the head.

39. Minutes later, after several RAM members and rally attendees had crossed the orange fencing separating them from the counter-protestors, RUNDO, BOMAN, EASON, Daley, Miselis confronted several counter-protestors. Videos show RUNDO, BOMAN, and Daley attempting to pull away a banner held by several of the counter-protestors. After one of the counter-

protestors fell to the ground, videos show RUNDO began throwing punches at multiple different people, including one person who was falling to the ground. According to Berkeley Police Department ("BPD") officers, a BPD officer saw RUNDO punching the apparently defenseless person in the head, and ordered RUNDO to stop, but RUNDO did not respond. The BPD officer knocked RUNDO to the ground to stop the ongoing assault, and RUNDO punched the officer twice in the head before BPD officers subdued and arrested him.

40. Several minutes later, EASON, Daley and other RAM members and rally attendees pursued counter-protestors out of the park through public streets, chanting "hey, hey, hey, Goodbye." Videos show BOMAN confronting counter-protestors and hitting a counter-protestor in the face. Videos show Daley climbing over over a barricade separating protestors and counter-protestors, kicking counter-protestors as they fall down due to the falling barricade, and then chasing a counter-protestor and kicking him in the back. Pictures posted online from after the event show BOMAN, Daley, Miselis, and other RAM members holding up in celebration the banner that they pulled away from counter-protestors during the rally.

E. April-August 2017: RAM Members Celebrated Their Assaults at Berkeley and Prepared for More Events

41. On April 16, 2017, the day after the Berkeley rally, BOMAN posted a photograph on his Facebook page showing him punching counter-protestors at what appears to be the rally in Berkeley the previous day. BOMAN then "liked" the photograph on

Facebook. Another RAM member commented on the post, "You can't like your own photo you idiot," and BOMAN responded, "Offff couuuuurssseeee you can,!!!"

42. On April 16, 2017, BOMAN posted a photograph on his Facebook page showing himself and fellow RAM members pulling what appears to be a banner or poster away from counter-protestors at the Berkeley rally.

43. On April 16, 2017, another RAM member sent a text message to Miselis describing a video showing Miselis at the Berkeley event, and Miselis replied, "Hell yeah man. I was about to jump into that but our guys were just wrecking them, like not even any room to get a hit in. I was like alrite, u guys got it handled then lol."[5] Later that day, Miselis sent another text message describing how one of the guys "up their fighting with us . . . was pretty based too, apparently he hit an antifa so hard he dislocated his shoulder." Miselis wrote, "I've been dealing with my hand all day. Just found a video on that site where you can see me breaking it on a guys head lol." The other RAM member responded, "I've been looking at videos. There's a grey-shirted storm trooper at the fucking front every, single, time. You guys were lions." Miselis replied, "Total Aryan victory."

44. On April 21, 2017, EASON sent a text message to Miselis asking if his broken hand was strong enough to attend

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[5] "Lol" is an acronym meaning "laugh out loud."

another event at Berkeley on April 27, 2017, stating, "I'm driving up to deny antifa a face-saving victory."

45. On May 15, 2017, the RAM Twitter account sent a message to another Twitter user who had proposed interviewing RAM leaders for a podcast. The RAM Twitter account replied, "Maybe if there [is] enough time could mention berekly how we were the first guys to jump over the barrier and engage and how that had a huge impact."

46. On June 1, 2017, Daley sent a private Facebook message to an associate stating that he and his group "stole yevet farlarkas banner at the April 15th riots lol." Daley's associate responded, "That subhuman professor from CA. . . . She needs the rope[,]" appearing to suggest that the professor should be hanged. Daley responded, "Yep lol." The associate responded, "My boy supposedly kicked her in the face." Based on my review of publicly available media accounts of the rally in Berkeley on April 15, 2017, Yvette Felarca was a leader of a local group of antifa counter-protestors who attended the rally.

47. In May 2017, BOMAN posted a picture on Facebook showing himself and another RAM member boxing in a garage with various white supremacist signs and banners posted on the walls. One of the signs states, "Da Goyim know," and appears to be the same sign BOMAN and other RAM members were photographed carrying at the Huntington Beach rally in March 2017. Another of the banners appears to be the same banner that Daley claimed he and his associates stole from Yvette Felarca during the Berkeley rally in April 2017.

48. On August 10, 2017, BOMAN posted a photograph on his Facebook page showing himself punching a counter-protestor. Another Facebook user later commented on the photograph, "U in Charlottesville?" BOMAN responded, "Naw that was in Berkley."

F. August 11-12, 2017: Other RAM Members Committed Violent Assaults at the Unite the Right Rally in Charlottesville, Virginia

49. Based on my review of RAM members text messages and Facebook communications, photographs and videos posted online, and law enforcement reports, I know that, between April and August 2017, RAM members engaged in regular combat training sessions and attended additional political events where they confronted counter-protestors and others who do not share their ideology. For example, videos posted online show that, on June 10, 2017, RUNDO, Daley, and other RAM members attended an "Anti-Islamic Law" rally in San Bernardino, California, where they engaged in violence against counter-protestors, leading to arrests of three RAM members. On June 13, 2017, Daley wrote a text message to an associate stating, "We smashed some antifa as they were leaving." The associate responded, "If it wasn't for the White Nationalists nothing would ever get done. Daley replied, "This is true would've been no victory in Huntington or Berkeley."

50. On August 12, 2017, several RAM members, including Daley and Miselis, attended the "Unite the Right" rally in Charlottesville, Virginia. RAM members coordinated their attendance at that rally in the previous months. For example, I reviewed a screenshot from a group chat on the chatroom hosting

service Discord, from a subgroup labeled "lodging_wanted" within a group labeled "Charlottesville 2.0," in which a user named "Ben Daley" stated on July 24, 2017, "need room for at least three Goys from CA. For Friday and Saturday night. Solid sober respectful experienced at these events all were in Berkeley riots. Plz let me know." Based on my training and experience and facts learned in this investigation, I believe that in this message, "Ben Daley" was offering his and his associates' "experience" and presence at the "Berkeley riots" as bona fides, demonstrating his intent to travel to Charlottesville to create another riot there, and seeking lodging amongst other white supremacists willing to host "Goys."

51. I reviewed another statement posted using Discord, in a chat subgroup labeled "general_1," within the "Charlottesville 2.0" group, in which unknown users discussed whether the permit for the Unite the Right rally had been revoked. After the users confirmed that the permit had been renewed, user "Ben Daley" responded, "Good stuff. Regardless we should all still go. Im flying out from CA with a handful regardless. Fuck these jews."

52. On July 25, 2017, RUNDO sent a text message to Miselis stating, "Hey, if you can get in touch with ben, I may have a place for you guys to stay in Charlottesville."

53. Videos uploaded to YouTube and published by individuals and news organizations show Daley, Miselis, and other RAM members at the rally in Charlottesville with their hands taped in the manner of a boxer or mixed martial arts fighter, committing multiple assaults against multiple victims.

One video shows Daley approaching a man from behind as the man stood still on the side of the street watching the protestors march down the street. Daley raised his right hand and punched the man in the back of the head, causing him to fall to the ground. Daley then walked up to various counter-protestors who were standing in the path of the Unite the Right protestors, punched some counter-protestors in the face, and threw others to the ground.

G. August 2017-February 2018: RAM Members Celebrated Their Assaults and Prepared for More Events

54. Based on my review of RAM members text messages and Facebook communications, photographs and videos posted online, and law enforcement reports, following the Charlottesville event, RAM members continued to engage in regular combat training sessions and post photographs and videos on social media promoting their assaults at prior rallies. For example, on September 14, 2017, the RAM Twitter account posted a picture of RUNDO and another RAM member assaulting counter-protestors at the Berkeley rally, with the accompanying text: "#antiantifa, #goodnightleftsisde, #riseabovemovement."

55. On September 25, 2017, EASON sent a text message to Miselis stating, "Im back in a position to go hard with activism. I got sidetracked after Berkeley." Miselis responded that "for the time being I think everyone is laying a little low on account of [Charlottesville] fallout."

56. In November 2017, RUNDO and Miselis exchanged several text messages about creating a video promoting RAM. On December

17, 2017, the "Rise Above Movement" YouTube account posted a RAM promotional video combining video of RUNDO, BOMAN, LAUBE, and other RAM members assaulting counter-protestors with photographs and video of RAM members training in hand-to-hand combat. Based on my review of text messages between RUNDO and Miselis, in which RUNDO described putting together a RAM promotional video and the clips he was using for the video, I believe that RUNDO orchestrated the creation of the video.

57. On January 10, 2018, the RAM Twitter account wrote, "What's up with giving a shoutout to the only alt right crew that actually beats antifa senseless and wins rallies."

58. On January 17, 2018, the RAM Twitter account wrote, "From the guys that [won] very rally they ever attended and always chased out antifa."

59. On February 12, 2018, Daley sent a private Facebook message to an associate stating, "We're not going be going to rally's for a few months cause we got a big trip planned but definitely after that we'll be back on the scene. Some good scenes from the April 15 Berkeley riots halfway thru this video." The associate responded, "I've never heard of you guys. Just nationalists or white nationalists?" Daley responded, "Huwhite. We were the only reason shit was popping off at socal right wing events. Were not hostile to non whites we just do our thing the way all other races do theirs. Didn't want you thinking I was just some lop critiquing from the sidelines lol."

60. As described above, RUNDO, BOMAN, LAUBE, and EASON along with other RAM members, have used the Internet to prepare

to incite and participate in violence at various political events, have committed violent assaults while at those events, and have applauded each other for it and publicly documented their assaults in order to recruit more members to engage in further assaults.

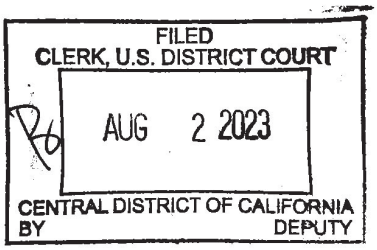
V. CONCLUSION

61. Based on the foregoing, there is probable cause to believe RUNDO, BOMAN, LAUBE, and EASON violated Title 18, United States Code, Sections 2101 (Riots) and 371 (Conspiracy).

SCOTT J. BIERWIRTH, Special Agent
Federal Bureau of Investigation

Subscribed to and sworn
before me on October 20, 2018

THE HONORABLE STEVE KIM
UNITED STATES MAGISTRATE JUDGE



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Robert Paul Rundo,

Defendant.

Case No.: 18-759(A)-CJC

ORDER OF DETENTION

I.

A. ( ) On motion of the Government in a case allegedly involving:

1. ( ) a crime of violence.
2. ( ) an offense with maximum sentence of life imprisonment or death.
3. ( ) a narcotics or controlled substance offense with maximum sentence of ten or more years.
4. ( ) any felony - where defendant convicted of two or more prior offenses described above.
5. ( ) any felony that is not otherwise a crime of violence that involves a minor victim, or possession or use of a firearm or destructive device or any other dangerous weapon, or a failure to register under 18 U.S.C. § 2250.

B. (✓) On motion by the Government/( ) on Court's own motion, in a case allegedly involving:

(✓) On the further allegation by the Government of:

1. (✓) a serious risk that the defendant will flee.

2. ( ) a serious risk that the defendant will:

a. ( ) obstruct or attempt to obstruct justice.

b. ( ) threaten, injure or intimidate a prospective witness or juror, or attempt to do so.

C. The Government ( ) is/( ) is not entitled to a rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance as required and the safety or any person or the community.

II.

A. (✓) The Court finds that no condition or combination of conditions will reasonably assure:

1. (✓) the appearance of the defendant as required.

(✓) and/or

2. (✓) the safety of any person or the community.

B. ( ) The Court finds that the defendant has not rebutted by sufficient evidence to the contrary the presumption provided by statute.

III.

The Court has considered:

A. (✘) the nature and circumstances of the offense(s) charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

B. (✘) the weight of evidence against the defendant;

C. (✘) the history and characteristics of the defendant; and

D. (✘) the nature and seriousness of the danger to any person or the community.

IV.

The Court also has considered all the evidence adduced at the hearing and the arguments and/or statements of counsel, and the Pretrial Services Report/recommendation.

V.

The Court bases the foregoing finding(s) on the following:

A. (✓) As to flight risk:

- apparently Defendant was recently residing in a foreign country, and he previously left the United States several times, seemingly trying to evade arrest
- prior DMV failures to appear
- no confirmed bail resources
- unknown recent background information

B. (✓) As to danger:

prior conviction involving violence as well as current allegations

VI.

A. ( ) The Court finds that a serious risk exists the defendant will:

1. ( ) obstruct or attempt to obstruct justice.

2. ( ) attempt to/ ( ) threaten, injure or intimidate a witness or juror.

B. The Court bases the foregoing finding(s) on the following:

_____

_____

_____

VII.

A. IT IS THEREFORE ORDERED that the defendant be detained prior to trial.

B. IT IS FURTHER ORDERED that the defendant be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.

C. IT IS FURTHER ORDERED that the defendant be afforded reasonable opportunity for private consultation with counsel.

D. IT IS FURTHER ORDERED that, on order of a Court of the United States or on request of any attorney for the Government, the person in charge of the corrections facility in which defendant is confined deliver the defendant to a United States marshal for the purpose of an appearance in connection with a court proceeding.

DATED: Aug. 2, 2023

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

JS-3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **ROBERT RUNDO AND ROBERT BOMAN,** **Defendants.**	**Case No.: CR 18-00759-CJC-1-2** **ORDER REGARDING MOTIONS TO DISMISS [Dkts. 281, 286]**

I. INTRODUCTION

Freedom of speech and the right to assemble are bedrocks of our Nation. The First Amendment guarantees those freedoms and ensures that the people of the United States may always advocate for what they believe is right. Our Founders recognized that true liberty and justice cannot be achieved without free speech and assembly.

Protecting First Amendment rights, however, is not always easy. People sometimes use their First Amendment rights to spread vitriolic and hateful ideas and beliefs. The struggle of preserving the First Amendment in the face of speech many find outright dangerous is pronounced during times of uncertainty, division, polarization, and fear—challenges we unfortunately face today. But the answer cannot be for the government to single out and punish the speech that it and many in the country understandably find repugnant. As Justice Brandeis recognized nearly 100 years ago, "[i]f there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

This case puts our Nation's fidelity to that principle to the test. In it, the government uses the Anti-Riot Act, a once-rarely-used criminal statute, to prosecute members of the Rise Above Movement ("RAM"), a group of far-right, white supremacist nationalists, who attended several rallies and protests during which they engaged in violent acts. At the same time, the government chose not to prosecute far-left extremist groups, such as Antifa, that went to the same protests and rallies and engaged in the same violent acts as alleged against the Defendants in this case, Robert Rundo and Robert Boman. By many accounts, members of Antifa and related far-left groups engaged in worse conduct and in fact instigated much of the violence that broke out at these otherwise constitutionally protected rallies to silence the protected speech of the supporters of President Trump. That is constitutionally impermissible. The government cannot prosecute RAM members such as Defendants while ignoring the violence of members of Antifa and related far-left groups because RAM engaged in what the government and many believe is more offensive speech.

While Defendants openly promoted ideas the Court finds reprehensible, and likely committed violence for which they deserve to be prosecuted, this case is about something more important. It is about upholding the free speech and assembly rights guaranteed to all of us. It does not matter who you are or what you say. It does not matter whether you are a supporter of All Lives Matter or a supporter of Black Lives Matter. It does not matter whether you are a Zionist professor or part of Students for Justice in Palestine. It does not matter whether you are a member of RAM or Antifa. All are the same under the Constitution, and all receive its protections. It is those protections that will ensure our democracy endures. We must never abandon any of them.

Now before the Court are two motions to dismiss. In their first motion, Defendants argue the First Superseding Indictment must be dismissed because the Anti-Riot Act is unconstitutionally vague. Constitutional due process requires that criminal statutes give people fair notice of prohibited conduct and provide sufficient standards to limit arbitrary enforcement by the government. But Defendants' challenge to the Anti-Riot Act on vagueness grounds is barred because their conduct is clearly covered by the Anti-Riot Act. Though there may be questions in another case as to what constitutes a violation of the Anti-Riot Act, this is not that case. Defendants clearly used a facility of interstate commerce shortly before they engaged in riotous activity as proscribed by the Anti-Riot Act.

In their second motion, Defendants argue the First Superseding Indictment also must be dismissed because the government selectively prosecuted them for their far-right, white supremacist speech and beliefs. The equal protection component of the Due Process Clause of the Fifth Amendment does not allow the government to prosecute certain individuals over similarly situated people on unjustifiable bases such as race, religion, or the exercise of constitutionally protected rights. Rightly, out of respect for

the separation of powers, the bar is high for a court to exercise judicial power over charging decisions, a special province of the executive branch. To meet that bar criminal defendants must submit clear evidence that their prosecution violates equal protection. Defendants have done so here.

The government prosecutes Defendants because they committed violence at political rallies with the alleged intent of shutting down speech with which they disagreed. While the allegations against Defendants may well be true, Defendants offer considerable evidence that members of Antifa and related far-left groups did the same, if not worse, at those same political rallies. Members of Antifa and related far-left groups attended the political rallies and physically assaulted and injured innocent civilians, many of whom were supporters of President Trump and were peacefully exercising their First Amendment rights. Nonetheless, the government did not use the Anti-Riot Act to prosecute *any* members of Antifa or related far-left groups. Such selective prosecution leaves the troubling impression that the government believes speech on the left more deserving of protection than speech on the right. The government remains free to prosecute those, like Defendants, who allegedly use violence to suppress First Amendment rights. But it cannot ignore others, equally culpable, because Defendants' speech and beliefs are more offensive. The Constitution forbids such selective prosecution.

II. BACKGROUND

A. *Factual Background*

The lead up to and aftermath of the 2016 United States presidential election were marked by growing division between the left and right.[1] As our country grew

[1] Unless otherwise indicated, the Court references Dkt. 281-3 Exhibit S for background information.

increasingly polarized, extremists on both sides emerged and grew in prominence. Factions of both the far left and far right entered the mainstream. These two groups frequently opposed each other in public demonstrations, rallies, and protests. Sadly, despite political speech being a lynchpin of our Nation, these events often ended in violence. At times, far-right groups were responsible for causing or escalating violence, but at others, far-left groups were equally or more responsible.

Antifa is a "loose affiliation of mostly far-left activists." (Dkt. 281 at 4.) A manual with instructions on how to form an Antifa group lays out the obligations of anyone in a local Antifa group. (Dkt. 281-5 Ex. U.) These directives include "[t]racking white nationalist, Far Right, and fascist activity," "[o]pposing public Far Right organizing," and "[b]uilding a culture of non-cooperation with law enforcement" because "[t]he cops will be Trump supporters." (*Id.* at 3–4.) But the directives are not limited to political organizing—they also "recommend regular martial arts training for anti-fascists, as well as for the larger radical community" and "to practice with, and carry, everything that is legal, whether that is pepper spray, retractable clubs, or other devices." (*Id.* at 7–8.) By way of example, in February 2016 at a Ku Klux Klan rally in Anaheim, "[s]everal dozen Antifa extremists initiated an altercation with the Klansmen that led to multiple injuries and three stabbings." (Dkt. 281-4 Ex. T at 1.)

(Dkt. 281-3 Ex. S at 184 [an individual armed and dressed as a member of Antifa].)

Another far-left group, By Any Means Necessary ("BAMN"), engages in similar tactics. In opposing a planned June 2016 neo-Nazi rally in Sacramento, California, which it linked to the rise of "Trumpism," BAMN instructed its members that "[t]hese racist, would-be murderers have no right to organize their racist violence in California or anywhere. Their rally must be stopped by any means necessary. . . . Only an organized, mass militant, integrated youth-led movement that is politically independent can mobilize the social forces necessary to defeat the Nazis/KKK, stop the rise of 'Trumpism,' and finally put this nation on the road to progress once more." (Dkt. 281-6 Ex. V at 2.) At that rally, violence broke out "almost immediately," and seven people were stabbed. (Dkt. 281-3 Ex. S at 2.) When asked by a reporter about what transpired, a leading BAMN member bragged, "They were not able to hold any kind of demonstration on the west steps or any steps of the Capitol. And that was absolutely because of the militant, integrated, direct action of the people who came out. BAMN mobilized to get people out here to shut them down. . . . To us, there's no free speech for fascists." (Dkt. 281-7 Ex. W at 1.) When asked if BAMN members "may have traveled from all over the state," the member confirmed, "Absolutely. This was a very widespread mobilization. People came from all over California. In fact, some places outside of California. . . . [T]hat's what building a mass militant movement takes." (*Id.* at 2.) Finally, responding to the reporter's observation that lives were threatened, the member doubled down, explaining the neo-Nazis "are dangerous and we need to keep building this movement. . . . This is about building a militant integrated movement that's independent, organizes masses of people and takes militant direct action to stop it." (*Id.* at 3–4.)

These acts of violence continued throughout 2016 and onwards. And they were not solely directed at Klansmen and neo-Nazis (which the far-left activists frequently linked to Trump supporters). Violence erupted at election and other political events,

where it was directed at Trump supporters and other conservatives to purposefully shut down speech-oriented events. In February 2017, BAMN encouraged its members to shut down an event at UC Berkeley hosting Milo Yiannopoulos, a controversial right-wing political commentator. Shortly before the event was set to begin, "100 to 150 agitators had smashed a half a dozen windows with barricades, launched fireworks at police and toppled a diesel-powered klieg light, which caused it to burst into flames." (Dkt. 281-3 Ex. S at 50.) They "marched onto UC Berkeley's Sproul Plaza like a paramilitary force armed with bats, steel rods, fireworks, and Molotov cocktails," where they proceeded to "tackl[e] and assault[] Yiannopoulos supporters." (*Id.* at 49, 59.) The result: UC Berkeley canceled the speech and removed Yiannopoulos from the campus out of concern for public safety. (*Id.* at 63.) A BAMN flier later reviewed by the FBI proudly proclaimed, "Victory! Neo-Fascist Milo Yiannaopoulos *Shut Down*" and "invite[d] all who support building the mass, militant movement that can defeat Donald Trump and win full equality to join BAMN." (Dkt. 281-9 Ex. Y.)

This pattern of far-left violence directed at Trump supporters and others associated with the right continued to the three events that form the basis for the charges against Defendants.

Beginning in or around February 2017, Defendants, along with others, participated in a white nationalist organization that came to be known as the "Rise Above Movement" or "RAM."[2] (Dkt. 209 at 1.) Defendants presented RAM through various social-media platforms and other means "as a combat-ready, militant group of a new nationalist white supremacy and identity movement." (*Id.*) They used the internet to show themselves

[2] The Court accepts the government's factual allegations as true unless otherwise indicated. *See United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014) ("accept[ing] the truth of the allegations in the indictment" in reviewing an order on a motion to dismiss).

training in hand-to-hand combat, interspersed with pictures and clips of themselves assaulting members of Antifa and related far-left groups at political events. (*Id.* at 2.)

Beginning around March 2017, Defendants agreed to riot at political rallies and organized demonstrations, where they would assault individuals they believed were associated with Antifa and related far-left groups. (*Id.* at 3–4.) Defendants carried out this plan at a minimum of three events: March 25, 2017, in Huntington Beach, California; April 15, 2017, in Berkeley, California; and June 10, 2017, in San Bernardino, California.[3] (*Id.* at 4–10.)

For instance, the indictment alleges that "[o]n or about April 15, 2017, defendant RUNDO exchanged messages on a social media platform with the leader of another organization to coordinate [RAM's] activities at the Berkeley Rally." (*Id.* at 7.) On the same day, Defendants "committed, participated in, and aided and abetted one or more acts of violence against individuals at the Berkeley Rally[.]" (*Id.*) And notably, the alleged uses of interstate commerce were not limited to speech: "On or about April 14, 2017, defendants RUNDO and BOMAN used and caused to be used a Visa credit card belonging to an associate to reserve hotel rooms for themselves at a Courtyard by Marriott hotel in Richmond, California, to facilitate their attendance at the Berkeley Rally." (*Id.*)

After engaging in rioting, RAM bragged about their violence and touted themselves as victors in a bevvy of social media posts. (*See, e.g., id.* at 8 ["Total Aryan victory."].) Defendant Rundo used these perceived successes to recruit trainees to commit violence. (*See, e.g., id.* ["On or about April 19, 2017, defendant RUNDO sent a text message to another RAM member to thank him for attending the Berkeley Rally, and

[3] The First Superseding Indictment does not appear to allege that Defendant Boman attended the San Bernardino event. (Dkt. 209 at 9–10.)

then invited him to combat training and offered to buy lunch for all who attend."].) RAM's combat training continued after the events described above, and RAM and Defendant Rundo planned future actions. (*Id.* at 11–12.)

But members of RAM were not the only ones using violence to silence their opposition. Antifa and related far-left groups did it too.

On March 25, 2017, supporters of President Trump came together for a "Make America Great Again" rally to march through Huntington Beach. An organizer of the march explained that it was a "means to support local police, fire, and fire responder agencies." (Dkt. 281-2 Ex. D. at 11.)

(Dkt. 104-6 Ex. 9 [an image of Trump supporters at the Huntington Beach rally, including an alleged RAM member (center, wearing red MAGA cap) charged in this case who has since passed away].)

Prior to the event, law enforcement officers were "warned that protesters may try to stop the event and may use violence or riotous techniques to stop the event." (Dkt. 281-2 Ex. C at 3.) Ultimately, there were nearly 30 protestors who "appeared to want to agitate and annoy the participants of the march." (Dkt. 281 at 9–10.) In the words of a

police officer at the event, "a riotous situation erupted." (Dkt. 281-2 Ex. E at 3.) Fights broke out and a video captured the violence that members of Antifa and related far-left groups inflicted upon the Trump supporters. (*Id.* at 10.) A black-clad protestor, J.A., pepper sprayed a 48-year-old Trump supporter, the march organizer, who was trying to break up a fight, and then when another 56-year-old tried to grab J.A., she pepper sprayed him, too. (*Id.*)

(Dkt. 104-7 Ex. 9A [an image of a pepper spray victim at Huntington Beach]; *see also* Dkt. 281-2 Ex. D [an image of the same victim shortly after being sprayed].)

J.A. was not at the rally alone. She was joined by, at least, J.M.A. and J.F., who had coordinated to attend the event together. (Dkt. 281 at 10–11.) As skirmishes broke out, they continued to pepper spray Trump supporters, in addition to kicking and punching those around them. (*Id.*) One law enforcement officer observing J.M.A. and his compatriots "began to become seriously concerned for members of the public in and around the incident." (Dkt. 281-2 Ex. E at 5.) When J.M.A. was eventually detained, law enforcement officers searched him and found a black colored pepper spray canister, a black folding knife, a grey mask, and black goggles. (*Id.* at 6.)

(*Id.* at 4 [an image of the seized Antifa paraphernalia].)

J.A., J.M.A., and J.F. were all arrested for inciting a riot, battery, and illegally using tear gas. (Dkt. 281 at 10–11.) But none were charged federally for violating the Anti-Riot Act. (*Id.*) Only Defendants and other members of RAM were charged with violating it.

A few weeks after the Huntington Beach rally, supporters of President Trump planned a pro-Trump rally on April 15, 2017 in Berkeley styled as a "free speech" rally. The event was related to a previous "March 4 Trump" rally also in Berkeley, which had ended in violence and arrests. Antifa and related far-left groups decided they needed to "shut this down." (*Id.* at 13.) Organizers on the left "urge[d] all in Northern California and beyond to converge in Berkeley on Saturday April 15th and deny the far-Right an opportunity to grow and expand their movement that is killing, burning, and bombing its way across the U.S." (Dkt. 281-13 Ex. CC at 2.) Members of far-left groups like Antifa and BAMN heeded the call.

(Dkt. 104-4 Ex. 7 at 2 [an Antifa member pouring water on a disabled veteran at the Berkeley rally].)

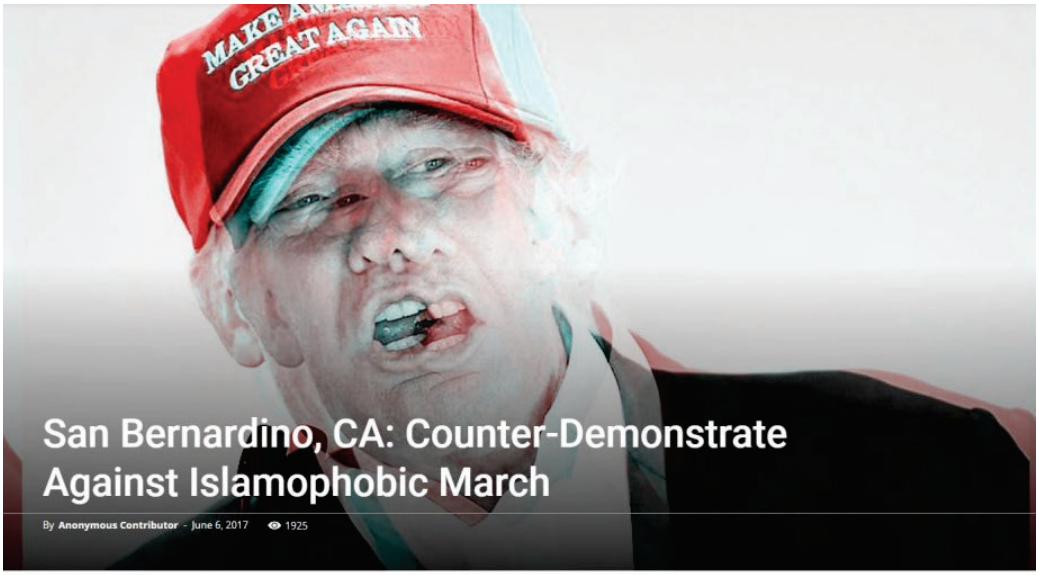
They came prepared for violence, bringing weapons including pepper spray, fireworks, knives, and homemade bombs. (Dkt. 281 at 14–15.) And they used those weapons, as well as their bodies, against Trump supporters and law enforcement. (*Id.* at 14–16.) One man punched a Trump supporter, threw him onto a park bench to continue the beating, and was in the process of striking him until law enforcement intervened. (*Id.* at 16 [collecting evidence].) Another threw eggs across fences to where Trump supporters had congregated. (*Id.*) A young woman used pepper spray and hit Trump supporters, explaining that she felt "like fighting a white bitch today." (*Id.*) Police detained one Antifa member who had an improvised explosive device and was planning "to do what it took because the police weren't 'doing shit.'" (*Id.*) "[H]e wasn't inciting the riot, he was going to end the riot." (*Id.*)

(Dkt. 104-3 Ex. 5 [an Antifa member striking a Trump supporter with a skateboard at the Berkeley rally].)

Of the 20 people arrested at the April 2017 Berkeley rally, the government charged only Defendants and other members of RAM under the Anti-Riot Act. (Dkt. 281 at 17.) The government charged no members of Antifa, BAMN, or other far-left groups under the Anti-Riot Act for their use of violence to shut down the rally.

(Dkt. 104-11 Ex. 13F [a man injured by Antifa at the Berkeley rally].)

Nearly three months later, on June 10, 2017, demonstrators held protests across the country against Islamic law, including in San Bernardino, California. Organizers on the left in the San Bernardino area put out the call to "SHUT the anti-muslim march DOWN." (Dkt. 281-17 Ex. GG.) They linked the protest to President Trump and his supporters. (*Id.*)



(*Id.* [an image of the website organizing a response to the San Bernardino demonstration].)

Members of RAM and left-wing counter-protestors attended the event, which led to violence and acts of vandalism. (Dkt. 281 at 17–18.) Three people were arrested for vandalism. The government did not charge any members of Antifa or related far-left groups under the Anti-Riot Act. Once again, the government charged only Defendants and other members of RAM with violating the Anti-Riot Act.

B. *Statutory and Procedural Background*

The Anti-Riot Act, passed in 1968, is a once-rarely-used statute with a checkered history. The 1960s, the backdrop for the Anti-Riot Act, were defined by the Civil Rights Movement, the Vietnam War and antiwar protests, and political assassinations. Much like today, tensions were high, and society was faced with the difficult task of balancing legitimate political speech with the significant and real risk of violence.

Congress, perhaps because of differing views as to the cause of the social unrest, struggled to pass anti-riot legislation. *See* Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 Vill. L. Rev. 897, 911 (1975). Despite earlier attempts, Congress did not adopt federal anti-riot legislation until 1968, when Senators Frank Lausche and Strom Thurmond offered their proposal, which Congress passed as part of the Civil Rights Act of 1968. *Id.* at 912.

In short, the Anti-Riot Act was "focus[ed] on establishing a federal mechanism to target the speech and conduct of so-called 'outside agitators,' specifically, Black political leaders and Communists, who were supposedly able to evade existing state anti-riot statutes." *First Amendment—Federal Anti-Riot Act—Fourth Circuit Finds the Anti-Riot Act Partially Unconstitutional.*—United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020)*, 134 Harv. L. Rev. 2614, 2617 (2021); *see also* Zalman, *supra*, at 916 ("[T]he legislative history of the Anti-Riot Act manifests an intent on the part of a legislative faction to destroy what was believed to be a close-knit group of outside agitators fomenting disorder. Although some legislators believed that certain individuals and groups were communist inspired traitors, they could not muster the strength to directly repress their conduct by branding them as traitors. . . . The only method to legally repress these groups was indirectly through the use of the American counterpart of constructive treason—

criminalize their behavior behind the screen of a measure overtly attempting to deal with the problem of massive urban rioting.").

While by no means exhaustive, representative examples of legislators' views on the target of federal anti-riot legislation make clear that they intended to use the eventual Anti-Riot Act as a weapon against political dissidents, with a focus on Black leaders. Representative Albert W. Watson, a Republican from South Carolina, stated in his support of anti-riot legislation, "[c]ertainly we are aware of who we are dealing with. The opening pronouncements of anarchy by so-called black power advocates clearly indicate that they are dedicated to the overthrow of law and order in this country." *Congress & Federal Anti-Riot Proposals, Pro-Con*, 47 Cong. Dig. 99, 118 (1968) (hereinafter *Anti-Riot Pro-Con*). Or in the words of Representative William G. Bray, a Republican from Indiana, "[h]aranguing his audience with the cry of 'police brutality,' the wandering agitator is deliberately inciting and invoking the infinitely more hideous brutality of the riot, with its attendant horrors of arson, looting, death, and destruction. . . . It is time to bring the full weight of the law to bear on those who would destroy us from within as surely as foreign enemies would destroy us from without." *Id.* at 110. In explaining his support for a federal anti-riot act, Representative Henry C. Schadeberg, a Republican from Wisconsin, stated, "[c]ommunists and other subversives and extremists strive and labor ceaselessly to precipitate racial trouble and to take advantage of racial discord in this country." *Id.* at 120. Representative Fletcher Thompson, a Republican from Georgia, argued that federal anti-riot legislation, rather than funding for education or welfare, was necessary, noting "[s]ome of the worst riot-inciters in the country are relatively well-educated individuals. For example, arrested included an assistant school principal, a public school teacher, a board of education custodial engineer, a Navy management analyst, and a welfare department clerk. The charges against these Negroes ranged from plotting murders to advocating anarchy. None of them was educationally deprived or poverty stricken." *Id.* at 126.

In general, the legislative history, clearly motivated by racial bias, is rife with words like "harangue," "spew," "promote," "preach," and "rant"— rather than focusing on the violence of riots, many legislators were focused on speech. *See generally id.* It thus appears that the Anti-Riot Act is "a law designed not to quell riots, against which there were adequate state laws, but to discourage legitimate political dissent." Zalman, *supra*, at 910.

One year after Congress passed the Anti-Riot Act, the United States Supreme Court decided the landmark First Amendment decision, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Brandenburg*, a Klu Klux Klan leader was convicted under the Ohio criminal syndicalism law for his participation in a Klu Klux Klan rally. *Id.* at 444–45. The Supreme Court considered a film of the rally, in which the leader stated:

> This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

Id. at 446. In addition to the speech, the film also showed various guns and ammunition. *Id.* at 445. Despite the speaker's hateful and inflammatory rhetoric coupled with the presence of weapons, the Supreme Court declared Ohio's criminal syndicalism law violated the First Amendment. *Id.* at 449. *Brandenburg* established "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy

is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added).

It is not difficult to see that *Brandenburg* was inconsistent with a law "aimed at those professional agitators and their organizations who either operate from States outside the jurisdiction of local law enforcement officials or who come into a jurisdiction, inflame the people therein to violence, and then leave the jurisdiction before the riot begins or, remain in the jurisdiction but away from the riot area as well as those who participate." *Anti-Riot Pro-Con* at 112. Therefore, it is unsurprising that the Anti-Riot Act, though rarely used, has been repeatedly challenged on First Amendment and other constitutional grounds.

One of the earliest challenges involved three related cases stemming from the prosecution of the group that has come to be known as the "Chicago Seven"—a group of anti-Vietnam war protesters and proponents of the 1960s counterculture. *See Nat'l Mobilization Comm. to End War in Viet Nam v. Foran*, 411 F.2d 934 (7th Cir. 1969); *United States v. Hoffman*, 334 F. Supp. 504 (D.D.C. 1971); *United States v. Dellinger*, 472 F.2d 340, 348 (7th Cir. 1972) (describing case against the Chicago Seven). In *Dellinger*, after conducting the most thorough analysis of the Anti-Riot Act, the Seventh Circuit overturned the defendants' convictions but split two to one to uphold the constitutionality of the Anti-Riot Act. 472 F.2d at 364, 409. The Seventh Circuit construed the act narrowly to survive scrutiny under *Brandenburg* but "acknowledge[d] the case is close," recognizing "the first amendment problems presented on the face of this statute." *Id.* at 362.

Since *Dellinger* and until recently, the Anti-Riot Act was rarely used. (Dkt. 281 at 21); Petition for Writ of Certiorari, *Miselis v. United States* (hereinafter "Miselis Petition"), 2021 WL 916349 (U.S.), at *13 ("Prior to the prosecution of the petitioner,

only one prosecution under the law had ever produced a conviction not overturned on appeal. Instead, the more typical use of the law has been to obtain search warrants or compel grand jury testimony where no charges ever resulted. The number of times this broad law has been used in these ways is knowable only to the government."). But that changed when the government decided to charge members of RAM.

In the fall of 2018, the government charged two groups of RAM members under the Anti-Riot Act. The government charged one group for interstate travel with the intent to riot related to their attendance at the Unite the Right Rally in Charlottesville, Virginia. The government charged Defendants in this case, who did not attend the Unite the Right Rally, for using facilities of interstate commerce with the intent to riot at the political rallies in Huntington Beach, Berkeley, and San Bernardino. (*See* Dkt. 1 [Complaint]); Miselis Petition, 2021 WL 916349, at *13. Both groups challenged the constitutionality of the Anti-Riot Act.[4]

In this case, the Court found that the Anti-Riot Act criminalized a substantial amount of protected speech and assembly and was thus facially overbroad in violation of the First Amendment. (*See* Dkt. 145); *United States v. Rundo*, 497 F. Supp. 3d 872 (C.D. Cal. 2019), *rev'd and remanded*, 990 F.3d 709 (9th Cir. 2021). On appeal, the Ninth Circuit agreed that the Anti-Riot Act "ha[s] some constitutional defects" but determined the "remainder of the Act may be salvaged by severance." *United States v. Rundo*, 990 F.3d 709, 714, 720 (9th Cir. 2021). The Ninth Circuit reversed this Court's dismissal of the indictment and remanded.

So severed, the Anti-Riot Act now criminalizes:

[4] The Fourth Circuit ultimately held portions of the Anti-Riot Act were overbroad but concluded it was constitutional after severance. *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020).

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent–
>
> (1) to incite a riot; or
> (2) to participate in, or carry on a riot; or
> (3) to commit any act of violence in furtherance of a riot; or
> (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph [1], [2], [3], or [4].

Rundo, 990 F.3d at 720–21. In short, the Anti-Riot Act now criminalizes interstate travel or the use of any facility of interstate commerce (the "Commerce Act") with the intent to commit one of the four listed overt acts (the "Riotous Acts") whenever somebody either during *or after* the Commerce Act performs or attempts to perform one of the Riotous Acts (which themselves all require specific intent related to a riot). The Riotous Acts consist of either conduct or "closely connect[] speech and action" such that "*Brandenburg*'s imminence requirement is not violated." *Id.* at 716.

III. MOTION TO DISMISS FOR VAGUENESS AND FAILURE TO STATE AN OFFENSE

Defendants move to dismiss the First Superseding Indictment on the grounds that the Anti-Riot Act is both facially and as applied impermissibly vague in violation of the Due Process Clause, and in the alternative, the First Superseding Indictment fails to state an offense under Federal Rule of Criminal Procedure 12(b)(3)(B)(v). The Court addresses each argument in turn.

A. *Vagueness*

"The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 576 U.S. 591, 595 (2015) (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926)). Indeed, "a stricter vagueness test applies where criminal penalties are involved." *United States v. Doremus*, 888 F.2d 630, 635 (9th Cir. 1989).

A statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the Supreme Court] ha[s] recognized . . . that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Notably, the Supreme Court has explicitly rejected the proposition that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602; *see Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018) ("Specifically, the Court rejected the legal standard that a statute is void for vagueness only if it is vague in all its applications.") (internal quotation marks and citation omitted).

"Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free

speech or of association, a more stringent vagueness test should apply." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982). This is because "the freedoms to speak and assemble which are enshrined in the First Amendment are of the utmost importance in maintaining a truly free society." *Rundo*, 990 F.3d at 721.

Defendants argue the Anti-Riot Act is unconstitutionally vague on its face because the definition of "riot" requires guessing at the abilities and intentions of other people, "participate" or "carry on" do not inform individuals of what is prohibited, and the statute fails to establish within what time frame after a Commerce Act a person must commit a Riotous Act to be convicted. (Dkt. 286 at 7–11.) Under binding precedent, Defendants' arguments fail.

First, Defendants' vagueness challenges are barred because "even to the extent a heightened vagueness standard applies, a [defendant] whose speech [or conduct] is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010). The Ninth Circuit continues to recognize this longstanding rule outside of narrow exceptions not applicable here. *See Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019) ("In sum, we are not persuaded by plaintiffs' contention that we may cast aside the longstanding rule that a litigant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge."); *see also United States v. Espinoza-Melgar*, 2023 WL 5279654, at *14 (D. Utah Aug. 16, 2023) (summarizing state of the law across circuits).

There is no real dispute that Defendants' alleged conduct falls clearly within the scope of the Anti-Riot Act. The First Superseding Indictment charges Defendants with committing actual acts of violence at multiple rallies. It further charges that they attended those rallies with the advertised goal of committing violence—that is they

intended exactly what ultimately happened. And it charges that they used facilities of interstate commerce in the days leading up to the rallies with that same clear intent to commit violence in furtherance of riots. It is hard to imagine any conduct that would be a clearer violation of the Anti-Riot Act.

Second, even if the Court overlooked Defendants' bar from challenging the statute on vagueness grounds, Defendants' most compelling vagueness argument conflates Due Process vagueness with First Amendment overbreadth. The Anti-Riot Act criminalizes the commission of a Commerce Act with the intent to commit a Riotous Act, when the Riotous Act is performed either "during" the Commerce Act or "thereafter." "Thereafter" means "[a]fterward; later." *Black's Law Dictionary* 1517 (8th ed. 2004). On its face, the relative timing of the Commerce Act and the Riotous Act is quite clear—the Riotous Act just needs to happen either during *or* after the Commerce Act.

Defendants, notwithstanding the clear meaning of "thereafter," argue that "thereafter" cannot mean *any time* after a Commerce Act because that would violate *Brandenburg*. (*See* Dkt. 286 at 13 [arguing that if "'thereafter' literally means *anytime* after someone uses the phone or the internet to share their thoughts or intentions to do something that could be riotous at a distant time in the future," then that "is the exact type of speech the Ninth Circuit said was protected under *Brandenburg*"]; *see also* Dkt. 324 at 4 [arguing that the "interpretation of 'thereafter' is by no means obvious" because of *Brandenburg*'s imminence requirement].) But in *Holder*, the Supreme Court held that the Ninth Circuit erred when it "merged [a] vagueness challenge with . . . First Amendment claims, holding portions of the . . . statute were unconstitutionally vague because they applied to protected speech—regardless of whether those applications were clear." 561 U.S. at 19. That is what Defendants urge the Court to do here. The meaning of "thereafter" is clear, but Defendants believe that it runs afoul of the First Amendment. *Holder* teaches that "[s]uch a [person] may have a valid overbreadth claim under the First

Amendment, but [the Supreme Court's] precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression." *Id.* at 20.

Third, even if the Court were to treat Defendants' challenge as a facial First Amendment overbreadth challenge to sidestep *Holder*, it is bound by the Ninth Circuit's ruling in this case. The Ninth Circuit expressly considered Defendants' argument "*that the travel in or use of any facility of interstate or foreign commerce* and 'any other overt act for any purpose specified in subparagraph [(1), (2), (3), or (4)] of [subsection (a)]' are *too far removed in time from any rio*t to satisfy *Brandeburg*'s imminence requirement." *Rundo*, 990 F.3d at 715 (emphases added). The Ninth Circuit rejected that argument and stated that, after severance, "the Act is not facially overbroad." *Id.* at 715–16, 721. While the Ninth Circuit's analysis focused on the timing of the Riotous Act relative to violent conduct, it also necessarily rejected the argument that *Brandenburg* applies to the Commerce Act such that the Commerce Act (to the extent it consists of speech at all) must immediately precede or accompany violent conduct.

That is not to say, though, that there is no necessary relationship between the intent at the time of the Commerce Act and the intent at the time of the Riotous Act.[5] In *Dellinger*, the Seventh Circuit held that the Anti-Riot Act "[r]easonably construed . . . surely does not require that the situation, nature, and details of the riot contemplated at the time of travel remain exactly identical until the time of the overt act, but does . . . require that they be sufficiently similar so that it is reasonable to say the later is the same

[5] *But see Dellinger*, 472 F.2d at 414 (Pell, J., concurring in part) ("There is no required causal relationship between the travel with intent and the riot actually incited. No necessary connection whatsoever need be shown between them nor is there any time limitation as to when the overt act shall take place with relationship to the travel. I cannot conceive the constitutional validity of a statute which in this open-ended manner punishes a person at the federal level for what would otherwise be a local crime only because at some time in his past he had crossed a state line or had used a facility of interstate commerce with a nefarious intent.").

as or the evolving product of the one intended earlier. This substantial identity is essential to avoid having this statute impinge on the right to travel, and to tie the interstate travel, which is the basis of federal legislative jurisdiction, to some socially harmful consequence." 472 F.2d at 394–95; *United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992) (holding the same). Though not expressly articulated by the Ninth Circuit, the government concedes that such a reading of the Anti-Riot Act is necessary. (Dkt. 306 at 14.) The Court is unaware of the textual basis for such an interpretation, yet cannot help but conclude, particularly given the Ninth Circuit's adoption of *Dellinger*'s reasoning, that the Ninth Circuit would agree that the intended riot at the time of the Commerce Act must be sufficiently similar so that it is reasonable to say the actual riot is the same as or the evolving product of the one intended earlier. *See United States v. Daley*, 378 F. Supp. 3d 539, 551 (W.D. Va. 2019), *aff'd sub nom. United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), *and aff'd sub nom. United States v. Gillen*, 2022 WL 4395695 (4th Cir. Sept. 23, 2022) ("Other courts have interpreted the statute as requiring a substantially similar intent both at the point of interstate travel or the use of facilities thereof and at the time of the requisite overt act(s), and the Court finds these longstanding interpretations of § 2101 persuasive."). With such an understanding, Defendants' conduct is clearly proscribed by the Anti-Riot Act.

At the end of the day, the parties are well aware that the Court has significant concerns about the constitutionality of the Anti-Riot Act. *See Rundo*, 497 F. Supp. 3d at 874–75. But Defendants' vagueness challenges are squarely foreclosed by United States Supreme Court precedent. *See Holder*, 561 U.S. at 19–20. And to the extent Defendants in effect re-raise a First Amendment overbreadth challenge, the Ninth Circuit has already addressed that issue. "[D]istrict courts are not free to decide issues on remand that were previously decided either expressly or by necessary implication on appeal." *Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988). The Ninth Circuit squarely held

that the Anti-Riot Act, as severed, "is not unconstitutional on its face." *Rundo*, 990 F.3d at 72.

B. *Failure to State an Offense*

Defendants argue that because, in their mind, the most straightforward reading of the Ninth Circuit's interpretation of the Anti-Riot Act is unconstitutionally vague, the only alternative is a strained reading of the Anti-Riot Act, which would require the Commerce Act occur at essentially the same time as the Riotous Act. (Dkt. 286 at 18–23.) In other words, Defendants argue the Ninth Circuit held that the Commerce Act itself must also be a Riotous Act. And under that reading, the First Superseding Indictment fails to allege Defendants committed sufficient Commerce Acts.

The Ninth Circuit defined "overt act" as a Riotous Act, one of the specific acts listed in the Anti-Riot Act, rather than "a step toward" those acts. *Rundo*, 990 F.3d at 716. Defendants argue that Congress's use of the phrase "any *other* overt act" means that the Commerce Act, and not just the Riotous Act, must be an overt act because otherwise, "other" is rendered superfluous. (Dkt. 286 at 19.) If the Commerce Act must also be an "overt act" to give "other" meaning, Defendants assert "the term 'overt act' cannot mean one thing with respect to the interstate commerce element and something else with respect to the conduct element." (*Id.*) According to Defendants, the Commerce Act itself must also be one of those listed acts, e.g., the use of a facility of interstate commerce must also constitute an act of inciting a riot. (*See id.* 18.) But this contradicts other text of the Anti-Riot Act, which states that the relevant timing of the Riotous Act is "either *during* the course of any such travel or use *or thereafter*." *See* 18 U.S.C. § 2101(a) (emphases added). Defendants' interpretation of the statute effectively deletes "or thereafter" because it requires the Commerce Act to take place "imminently before and during the riot," which is the same time frame for a Riotous Act. (*See* Dkt. 324 at

13.) And as explained above, the Ninth Circuit held that "or thereafter" does not pose any *Brandenburg* problem. Defendants' reading also largely eliminates interstate travel as a basis for a Commerce Act, as it is difficult to conceive of interstate travel which would itself include, for instance, participating in a riot.[6]

The Ninth Circuit never stated that the Commerce Act must itself be a Riotous Act. And to read the Ninth Circuit's opinion that way would so narrow the scope of the statute such that it would border on non-existent. Such a reading would be inconsistent with the Ninth Circuit's holding that the Anti-Riot Act, including the language regarding interstate travel, "is not unconstitutional on its face" because the government must be allowed to "act before it is too late." *Rundo*, 990 F.3d at 721.

Because the Court rejects Defendants' reading of the statute, it likewise rejects their argument that the First Superseding Indictment fails to state a claim. As explained above, the allegations, assuming their truth, represent conduct that clearly violates the Anti-Riot Act.

IV. MOTION TO DISMISS FOR SELECTIVE PROSECUTION

Defendants also move to dismiss the First Superseding Indictment because of selective prosecution. (Dkt. 281.) In short, Defendants argue that the government chose to charge only Defendants for their conduct at political rallies even though Antifa and related far-left groups engaged in identical, if not worse, misconduct at those same

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[6] Confusion regarding Congress's choice to use the word "other" may stem from the Seventh and Ninth Circuit's specific definition of "overt act" as compared to how the phrase is typically understood. *Compare Rundo*, 990 F.3d at 715 ("We adopt the Seventh Circuit's approach to the 'overt act' provisions."), *with Miselis*, 972 F.3d at 534 ("In our view, the presence of an overt-act element (or two, in fact), together with specific intent to incite or engage in a riot, simply indicates that the Anti-Riot Act was drafted as an attempt offense, of which it bears all the classic hallmarks, rather than a commission offense.").

political rallies. (*Id.* at 23.) The reason for this disparity, according to Defendants, is that the government targeted them for their far-right and white supremacist speech. (*Id.* at 27.)

"In our criminal justice system, the executive branch has broad discretion to decide whom to prosecute. However, prosecutorial discretion is not unfettered, and selectivity in the enforcement of criminal laws is subject to constitutional constraints." *United States v. Culliton*, 328 F.3d 1074, 1081 (9th Cir. 2003) (internal quotation marks and citation omitted). "[A]n indictment that results from selective prosecution will be dismissed." *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007). "To establish a claim of selective prosecution, a defendant must show both discriminatory effect and discriminatory purpose." *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018). A defendant "must demonstrate that (1) other similarly situated individuals have not been prosecuted and (2) his prosecution was based on an impermissible motive." *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007). Impermissible motives "includ[e] the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Out of respect for the separation of powers, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

Defendants have established selective prosecution. There is no doubt that the government did not prosecute similarly situated individuals. Antifa and related far-left groups attended the same Trump rallies as Defendants with the expressly stated intent of shutting down, through violence if necessary, protected political speech. At the same Trump rallies that form the basis for Defendants' prosecution, members of Antifa and related far-left groups engaged in organized violence to stifle protected speech. And, unsurprisingly in the modern age, they used facilities of interstate commerce to carry out their goals.

The closer question is whether Defendants have demonstrated that their prosecution was based on their protected political speech and beliefs. But in light of the record before the Court, the only conclusion is that they have. First, the timing of the investigation into Defendants suggests that they were prosecuted, at least in part, for their speech. The far-right Charlottesville rally resulted in tragedy when a white supremacist not affiliated with RAM killed a counter-protester. Rightfully, after Charlottesville, there was a backlash against white supremacist groups in the United States. During that period, the government investigated, and ultimately chose to prosecute, members of RAM.[7] And while the public backlash against white supremacist speech and ideology is exactly how our country should react to such hateful beliefs, the government cannot make charging decisions based solely on Defendants' reprehensible speech and beliefs.

Second, the federal government did not prosecute far-left activists who were also responsible for violence at political rallies in the period and places at issue. Indeed, shortly before Charlottesville, the Department of Homeland Security issued a bulletin stating "that anarchist extremists' use of violence as a means to oppose racism and white supremacist extremists' preparation to counterattack anarchist extremists are the principal drivers of violence at recent white supremacist rallies." (Dkt. 281-18 at 1.) The bulletin explained that far-left "[a]narchist extremists planned to violently oppose the rallies via social media and flyer campaigns." (*Id.*) Despite the involvement of both the far left and far right, the federal government never charged far-left activists under the Anti-Riot Act for their violence at these political rallies. To put it simply, RAM and Antifa, which both appear to use violence to silence protected speech, are identical in material respects—the only difference is their speech and beliefs. Because the government has only prosecuted RAM members and not prosecuted *any* members of Antifa or related far-left groups in connection with violence at pro-Trump and far-right political rallies, the Court must

[7] The government makes clear that the investigation into RAM was initiated because of Charlottesville. (*See* Dkt. 307 at 2–3.)

conclude that the government prosecuted RAM members because of the sole distinguishing feature between them and members of Antifa and related far-left groups—their far-right and white supremacist speech and ideology. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (explaining discriminatory intent can be inferred from disparate treatment when "[n]o reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the [protected characteristic].")

The government denies selectively prosecuting Defendants and contends that Defendants have failed to present credible evidence of both discriminatory effect and discriminatory purpose. It focuses on three individuals, J.A., J.F., and J.M.A., which it asserts are the only relevant comparators to Defendants in assessing discriminatory effect because they are the only individuals who have a connection to the Central District of California. (Dkt. 307 at 15.) Even accepting the premise of the government's argument as true, the government's failure to prosecute J.A., J.F., or J.M.A. still demonstrates discriminatory effect.[8]

As an initial matter, the Court notes that the government was aware of these three individuals and their misconduct because the government produced their police reports in discovery. (Dkt. 323 at 8.) Therefore, the government knew that J.A., J.F., and J.M.A. were at the Huntington Beach rally, dressed in typical Antifa clothing to hide their identities (for example, a long sleeve black hooded jacket with a hood, a black bandana to cover the face, and swim style dark googles), identified as "activists," and engaged in violence to stifle political speech, such as pepper spraying and punching Trump supporters in the face. (Dkt. 281-2 Exs. C–E.)

[8] The government argues that the only relevant comparators are those with ties to the Central District of California because "a selective prosecution claim focuses on the decisionmakers in a particular case." (*See* Dkt. 307 at 14–15 n.6.) The Court notes, however, that the prosecution of RAM was coordinated across multiple United States Attorney's Offices, thus the relevant decisionmakers are not limited to a single United States Attorney's Office. (*See id.* at 7.)

J.A., J.F., and J.M.A clearly committed a Riotous Act. They pepper sprayed and punched Trump supporters to disrupt the Huntington Beach rally, leading to their arrest for, among other crimes, inciting a riot. (*Id.*) And they also committed a Commerce Act. J.F., who had previously been convicted under state law for remaining at the scene of a riot, admitted that he was an activist who had been to numerous protests and attended the Huntington Beach rally with the other people that had been arrested for pepper spraying the crowd. (*Id.* Ex. C at 4.) He "contacted them before the event to make sure that they were going." (*Id.*) The only logical assumption from such an admission is that J.F., J.A., and J.M.A. communicated by using a facility of interstate commerce. Using a facility of interstate commerce to coordinate attendance at a political rally is precisely the type of act the government believes is a sufficient federal hook to bring an Anti-Riot Act charge in this case. Indeed, J.F.'s admission mirrors many of the Commerce Act allegations in the First Superseding Indictment. (*See, e.g.*, Dkt. 209 at 13 ["defendant BOMAN sent Facebook messages to recruit RAM members and others to attend an organized demonstration in Berkeley, California, on April 15, 2017"].)

The government attempts to distinguish J.A., J.F., and J.M.A. from Defendants by arguing that J.A., J.F., and J.M.A. may not have intended to commit violence and were less violent and less organized than RAM. (Dkt. 307 at 18–20.) This assertion is belied by the police reports, which unequivocally state that the far-left activists present at the Huntington Beach rally intended to commit violence. To the extent one of the group claimed to be prepared for violence only for self-defense, Defendant Boman made that same assertion but faces prosecution nonetheless. (*See* Dkt. 238 at 26–28 [claiming that Defendants Boman and Rundo acted to defend a young Black man wearing a "Defend America" hat from being attacked by 10–15 Antifa members, and Defendants "never went there to have a mind to fight or have an altercation"].) And the government cannot view J.A., J.F., and J.M.A's acts at the Huntington Beach rally in isolation, just like it does not view RAM's acts in isolation. Antifa and related far-left groups were, at a

minimum, at least as organized and widespread as RAM, and the record is clear that both state and federal law enforcement were aware that Antifa and related far-left groups were equally culpable in starting riots at pro-Trump and conservative events across California by committing acts of violence against Trump supporters.

The government also argues that Defendants have failed to demonstrate a discriminatory purpose. (Dkt. 307 at 21.) Specifically, the government asserts that it did not prosecute Defendants for their beliefs and protected speech but rather "because they engaged in repeated acts of coordinated violence." (*Id.* at 25; *see also id.* at 29 [referencing "Defendants' violent and coordinated conduct"].) But this completely ignores that Antifa and related far-left groups did precisely the same thing. What is more, Antifa and related far-left groups attended pro-Trump or far-right political events to disrupt protected political activity. Defendants did not attend a Trump rally at Huntington Beach to shut down the rally—it was J.F., J.A., and J.M.A. who intended to disrupt the rally, following Antifa's playbook.

The government points to other cases in which the Office of the Federal Public Defender has taken the position "that the USAO has consistently prosecuted individuals associated with Black Lives Matter, Antifa, and the 'radical left' where those individuals engaged in illegal conduct within this District that allowed for and warranted federal prosecution." (Dkt. 307 at 26 [internal quotation marks and citation omitted].) But those cases are inapposite—they involved arson and anti-government behavior. (*See* Dkt. 323 at 18–19.) The issue in this case is the use of violence to disrupt protected First Amendment speech at political rallies. The government only targeted individuals, like Defendants, who expressed far-right beliefs. No individuals associated with the left, who engaged in anti-far-right speech and violently suppressed the protected speech of Trump supporters, were charged with a federal crime for their part in starting riots at political events. That is textbook viewpoint discrimination. *See Rosenberger v. Rector & Visitors*

of Univ. of Virginia, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

Lastly, the government argues that Defendants have failed to "point to any pattern of prosecution or prosecutorial policy." (Dkt. 307 at 28.) This argument may hold water when dealing with a commonly deployed criminal statute. But in this case, it misses the mark. Until recently, the Anti-Riot Act was almost never used. If the Court were to accept the government's position, it would mean that the government could prosecute somebody based wholly on a constitutionally protected characteristic or activity, but so long as the government brought the charges under a rarely used statute, that individual could never prevail on a selective prosecution motion. To the extent a pattern is required, it only makes sense for such a pattern to include the non-prosecution of similarly situated individuals, rather than multiple cases in which defendants were selectively prosecuted.

Most telling in this case is the government's silence as to why it never pursued a case against a single member of Antifa or related far-left groups with respect to their violent conduct at pro-Trump events. To be sure, the government provides many facially neutral reasons why it pursued prosecutions against RAM members such as Defendants. But when examined, each of those reasons apply, often to a greater extent, to Antifa and related far-left groups. The government alleges RAM used social media to recruit new members. (*See id.* at 18.) Antifa and related far-left groups did the same. (*See* Dkt. 281 at 4, 13–14.) The government alleges RAM trained together to engage in combat fighting. (*See* Dkt. 307 at 18.) Antifa and related far-left groups did the same. (*See* Dkt. 281 at 4, 10–11, 14, 16–17.) The government alleges RAM traveled throughout the state and across the country to deliberately assault those who did not share their viewpoints. (*See* Dkt. 307 at 18.) Antifa and related far-left groups did the same. (*See* Dkt. 323 at 16.) The government alleges RAM bragged in person and online about their victories.

(*See* Dkt. 307 at 18.) Antifa and related far-left groups did the same. (*See* Dkt. 323 at 16–17.)

In sum, RAM members, such as Defendants, and members of Antifa and related far-left groups, such as J.F., J.A., and J.M.A., are mirror images of each other. They use violence to shut down political speech with which they disagree. Really, Defendants are not just similarly situated to members of Antifa and related far-left groups, they are materially identical. At least based on the allegations in this case, the only difference appears to be that they did not attend far-left rallies; rather they went to pro-Trump and far-right rallies planning to inflict violence on counter protesters. It was groups like Antifa that went to pro-Trump rallies with the intent to use violence to disrupt protected political speech.

Unprovoked violence is always abhorrent. The use of violence to shut down speech is particularly dangerous and runs counter to the basic principles upon which our Nation is founded. The Court cannot and does not fault the government for using the Anti-Riot Act, which the Ninth Circuit held to be constitutional, to address the real problem of dangerous violence breaking out at political events. Indeed, the Court commends the United States Attorney's Office for its goal of "us[ing] the federal statutes at its disposal to protect the public in this District from violence or public disturbances," particularly when protected political speech is threatened. (*See* Dkt. 307 at 27 [internal quotation marks and citation omitted].) But prosecuting *only* members of the far right and ignoring members of the far left leads to the troubling conclusion that the government believes it is permissible to physically assault and injure Trump supporters to silence speech. It is only when those tactics are deployed against those on the left that the government brings charges under the Anti-Riot Act. That is not permissible under our Constitution. There seems to be little doubt that Defendants, or at least some members of RAM, engaged in criminal violence. But they cannot be selected for prosecution because

of their repugnant speech and beliefs over those who committed the same violence with the goal of disrupting political events. Because Defendants and members of the far left engaged in the same conduct at political rallies and "are the same in all relevant respects," their prosecution "gives rise to an inference of discrimination." *See United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989).

V. CONCLUSION

When announcing this case, the United States Attorney for the Central District of California at the time explained this case was initiated because of "an orchestrated effort to squelch free speech as members of the conspiracy travelled to multiple locations to attack those who hold different views." Press Release, Four Local Members of White Supremacy Group Face Federal Charges in Attacks at Political Rallies across California, U.S. Att'y's Off., Cent. Dist. of Cal. (Oct. 24, 2018), available at https://www.justice.gov/usao-cdca/pr/four-local-members-white-supremacy-group-face-federal-charges-attacks-political-rallies. The problem in this case, though, is that sentiment equally describes Antifa and other extremist, far-left groups. Neither RAM nor Antifa have "the right to violently assault their political opponents." *Id.* Although Defendants' motion to dismiss for vagueness and failure to state an offense is **DENIED**, their motion to dismiss for selective prosecution is **GRANTED**.

DATED: February 21, 2024

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES – GENERAL

Case No.	CR 18-00759-CJC-1-2	Date	February 21, 2024

Present: The Honorable CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

Interpreter None

Rolls Royce Paschal	Deborah Parker	Kathrynne Seiden; Solomon Kim; Anna Boylan
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
1) Robert Paul Rundo	X	X		1) Julia Deixler, DFPD; Erin Murphy, DFPD	X	X	
2) Robert Boman	X		X	2) Peter Swarth, CJA	X	X	

PROCEEDINGS: **DEFENDANT ROBERT RUNDO'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION [281]**
DEFENDANT ROBERT RUNDO'S MOTION TO DISMISS UNDER THE DUE PROCESS CLAUSE AND FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B) [286]
DEFENDANT ROBERT RUNDO'S MOTION TO STRIKE [287]
DEFENDANT ROBERT BOMAN'S JOINDER IN DEFENDANT ROBERT RUNDO'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION (DOC. 281) [293]
DEFENDANT ROBERT BOMAN'S JOINDER IN DEFENDANT ROBERT RUNDO'S MOTION TO DISMISS UNDER THE DUE PROCESS CLAUSE AND FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B) [294]
DEFENDANT ROBERT BOMAN'S JOINDER IN DEFENDANT ROBERT RUNDO'S MOTION TO STRIKE [295]

Motions hearing are held. The Court hears oral argument from the parties.

Order issued. For the reasons stated on the record, Defendant Robert Paul Rundo ordered released FORTHWITH. Clerk issued electronic remand order (see attachment).

Bond is exonerated as to Defendant Robert Boman.

The Court denies the government's request for detention and stay.

1 : 08

Initials of Deputy Clerk rrp

cc: PSA, USPO, USM, BOP

UNITED STATES DISTRICT COURT
THE CENTRAL DISTRICT OF CALIFORNIA

TO UNITED STATES MARSHAL:

PURSUANT TO AN ORDER OF COURT, YOU ARE AUTHORIZED AND DIRECTED TO:

Check one box:

☒ RELEASE FROM CUSTODY ☐ TAKE INTO CUSTODY

Check one box:

☒ FORTHWITH
☐ TO PROBATION/PRETRIAL SERVICES ONLY
☐ TO IMMIGRATION AND CUSTOMS ENFORCEMENT
☐ OTHER:

NAME: Robert Paul Rundo

CASE NO: 2:18-cr-00759-CJC-1

CHARGES: 18:371: Conspiracy;
18:2101: Riots: 18:2(a): Aiding and Abetting

Check one box:

☐ Defendant Acquitted of Charge(s)
☐ Defendant Restored to Probation Status
☐ Defendant Sentenced to a Period of Incarceration
☐ Defendant Sentenced to a Period of Probation
☐ Defendant's Prior Bond Reinstated
☐ Bond Revoked Pending Trial/Sentencing/other hearing
☐ Supervised Release/Probation Violation
☐ Defendant Sentenced to Time Served
☒ Motion to Dismiss Indictment/Information granted
☐

CLERK, U.S. DISTRICT COURT

Issued on: February 21, 2024

at 10:40 AM

BY: /s/ Rolls Royce Paschal
(signature)

Deputy Clerk: Rolls Royce Paschal
(print name)

ORDERED BY THE HONORABLE Cormac J. Carney

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Fax (213) 894-0141
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☐ FPD ☐ Appointed ☐ CJA ☐ Pro Per ☐ Retained

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA PLAINTIFF(S), v. ROBERT RUNDO AND ROBERT BOMAN DEFENDANT(S).	CASE NUMBER: CR 18-00759-CJC **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that United States of America hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

~~**Civil Matter**~~

☒ Order (specify):
Order Regarding Motions to Dismiss; CR No. 333; Filed on 2-21-24
☐ Judgment (specify):

☐ Other (specify):

Imposed or Filed on 2-21-24. Entered on the docket in this action on 2-21-24.

A copy of said judgment or order is attached hereto.

2-21-2024
Date

s/ Solomon Kim
Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-932

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Description of Document(s) *(required for all documents)*:

Confidential Probation and Pretrial Services Report

Signature /s/ Bram M. Alden **Date** 02/21/2024

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