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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
AMMON BUNDY, **JOSEPH O'SHAUGHNESSY,** **RYAN BUNDY,** **SHAWNA COX,** **PETER SANTILLI,** **DAVID LEE FRY,** **JEFF WAYNE BANTA,** **KENNETH MEDENBACH, and** **NEIL WAMPLER,**	**GOVERNMENT'S TRIAL MEMORANDUM**
Defendants.	

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The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, respectfully submits its trial memorandum in this case.

I. Case Status

On March 8, 2016, defendants were indicted by a grand jury in a Superseding Indictment. Trial for defendants Ammon Bundy, Joseph O'Shaughnessy, Ryan Bundy, Shawna Cox, Peter Santilli, David Fry, Jeff Banta, Kenneth Medenbach, and Neil Wampler is currently scheduled to begin on September 7, 2016. Trial for defendants Jon Ritzheimer, Jason Patrick, Duane Leo Ehmer, Dylan Anderson, Sean Anderson, Sandra Lynn Anderson, Darryl William Thorn, and Jake Ryan is currently scheduled to begin on February 14, 2017. The Superseding Indictment alleges that all defendants Conspired to Impede an Officer of the United States, in violation of 18 U.S.C. § 372. The Superseding Indictment further alleges that, of the defendants scheduled for trial on September 7, 2016, Ammon Bundy, Ryan Bundy, Shawna Cox, David Fry, and Jeff Banta possessed a firearm in a federal facility, in violation of 18 U.S.C. § 930(b). The Superseding Indictment further alleges that defendant Kenneth Medenbach committed a theft of government property, in violation of 18 U.S.C. § 641. Finally, the Superseding Indictment alleges that defendant Ryan Bundy committed a theft of government property, in violation of 18 U.S.C. § 641.

Defendant Joseph O'Shaughnessy is scheduled to enter a change of plea before the Court on Monday, August 1, 2016, at 9:00 a.m. As a result, the government has not provided any information about defendant O'Shaughnessy in Section II.

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II. Statement of the Facts

"It is much more than a protest." —Ammon Bundy, December 31, 2015

On Saturday, January 2, 2016, days after he uttered these words on Facebook, Ammon Bundy led a group of armed men in a takeover of the Malheur National Wildlife Refuge, a sprawling federal property 32 miles south of Burns, Oregon, operated and staffed by the United States Fish and Wildlife Service. The takeover began swiftly. After leading a protest in the parking lot of the Safeway in downtown Burns, Bundy took a group to the Refuge, which had already been secured by his associates. By Monday morning, Bundy and his men had settled into the Refuge for a period that Bundy predicted would last "several years." Out of concern for their safety, the seventeen employees who worked at the Refuge were ordered to stay home. Those employees—and many other federal employees in the surrounding area—would stay away from the Refuge until the last occupant, defendant David Fry, surrendered to law enforcement on February 11, 2016.

Over the course of the 41-day occupation, many people came and went from the Refuge. Some visited out of curiosity, while others were active members of the conspiracy. Through their combined efforts, these men and women would steadily fortify their hold on the property, as its employees stayed away in fear. They replaced Fish & Wildlife Service signs with their own signs. They received personal mail at the Refuge. They took over the kitchen, slept in the bunkhouse, and drove vehicles that belonged to the Refuge. They took property that belonged to the Refuge, broke into safes at the Refuge, attempted to access employee computers, used employee workspaces, and stole gas from a tank on the property. They used heavy equipment on the grounds, built a road out of the existing property, built a bunker, and dug a

trench that they filled with trash. They left weapons, ammunition, and explosives throughout the property, and engaged in target practice on Refuge grounds. They left hundreds of pounds of trash, debris, and personal items throughout the property. In a short period of time, they had completely transformed the Refuge. The Fish & Wildlife work compound became a makeshift flop house and garbage heap for the occupiers, and no regular, official work was conducted at the Refuge throughout the course of defendants' siege.

In an effort to fortify their hold on the Refuge, defendants also set up military style teams to enforce security. They placed armed guards in a tower on the property, armed guards at the front and rear gates, and had armed teams patrolling different parts of the Refuge. In the end, they collectively did their best to live up to the words uttered by Ammon Bundy on January 4th when asked about his plans for the Refuge: "[S]tatements are not good enough . . . we have a lot of work to be able to unwind the unconstitutional land transactions that have taken place here."

The occupation had effects that extended well beyond the Refuge. The town of Burns closed its schools and canceled events because of the occupation. On January 9, 2016, a group of defendants traveled to the nearby Bureau of Land Management District Office west of Burns where they placed signs that read "CLOSED PERMANENTLY." On January 11, 2016, a group removed an FBI camera from a nearby utility pole. Meanwhile, many local residents were harassed and felt threatened because of the increased militia presence in Burns that was brought about by the occupation. And while there is no dispute that some residents supported the goals of the occupation, defendants' presence was fundamentally disruptive to the community.

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As January wore on, defendants showed no signs of leaving. On January 21, 2016, Ammon Bundy told an FBI negotiator that "the last thing we want to do is leave the Refuge" and reiterated the group's complaints about federal employees who administered the federal government's land management policies. On January 26, 2016, a small group of defendants left the Refuge to travel to a meeting in John Day, Oregon. During the trip, law enforcement intercepted and arrested members of the group including Ammon Bundy, Ryan Bundy, Ryan Payne, and Shawna Cox. After the arrests, many other defendants left the Refuge immediately at the urging of law enforcement. They were later arrested. Four defendants remained at the Refuge: Sean Anderson, Sandra Anderson, Jeff Banta, and David Fry. In the days that followed, the four would fortify their position until law enforcement were able to convince them to surrender roughly two weeks later.

In the late morning hours of February 11, 2016, David Fry, the last holdout at the Refuge, surrendered to law enforcement. After he was taken into custody, law enforcement and Fish and Wildlife employees began the laborious process of cleaning up the Refuge. The occupation's physical and financial toll was significant. The Department of the Interior estimates that the total cost of the occupation exceeded $6,000,000. Evidence teams processing the scene recovered dozens of firearms, over 20,000 rounds of ammunition, and over 1000 spent shell casings. There was also a massive amount of trash and personal property scattered throughout the Refuge. The property also sustained significant damage. After cleaning up and processing the scene, the Refuge was ready to reopen. In March 2016, the property reopened. However, to this day the Refuge headquarters buildings remain closed because of damage caused by defendants.

A. The Malheur National Wildlife Refuge

The Malheur National Wildlife Refuge is a unique property that sits to the south of Burns, Oregon. Established by President Theodore Roosevelt in 1908, it is comprised of more than 187,000 acres of habitat, including 120,000 acres of wetlands that are a stop for waterfowl traveling along the Pacific Flyway. It also hosts over 320 bird species and 58 species of mammals and supports over 20 percent of the Oregon population of breeding Sandhill cranes. The property contains over 2000 miles of water delivery ditches, 7 major irrigation dams, 450 miles of fence, and 200 miles of roads. It contains 13 historic buildings. The Refuge also contains more than 300 recorded prehistoric sites from ancestors of the Burns Paiute Tribe, including burial grounds, ancient villages, and petroglyphs dating back 9800 years. The Refuge is open and fully staffed year-round.

B. The Sentencing of Dwight and Steven Hammond

One of the primary motivations for defendants' takeover of the Refuge was the sentencing of Dwight and Steven Hammond. On June 6, 2012, Dwight and Steven Hammond were convicted of two counts of arson by a jury in the District of Oregon. The convictions arose out of incidents in which the two had deliberately set fire to BLM lands to improve their own grazing conditions. The two were originally sentenced on October 30, 2012. Dwight Hammond was sentenced to serve three months in prison, and Steven Hammond was sentenced to serve twelve months. On February 7, 2014, the Ninth Circuit Court of Appeals overturned the District Court's sentences because those sentences fell below the five-year mandatory minimum prison terms required by statute. On October 7, 2015, Dwight and Steven Hammond

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were resentenced to serve five-year prison terms. On January 4, 2016, the Hammonds reported to a Federal Correctional Institution in California to serve the remainder of their sentences.

Prior to surrendering to serve their sentences, the Hammonds, through their attorney, distanced themselves from Ammon Bundy and his group. Nonetheless, in a video on an Internet website titled "Citizens for Constitutional Freedom News Conference" posted on January 4, 2016, Ammon Bundy said their purpose was to restore and defend the Constitution, and that they had spent two months petitioning the state and county representatives to stand for the Hammonds against the "unconstitutional actions."

C. Bunkerville, Nevada—2014

Defendants were also inspired by the events that occurred in Bunkerville, Nevada, in April 2014. Bunkerville is a small town in southern Nevada. In March and April of 2014, the Bureau of Land Management initiated an operation to execute federal court orders to impound cattle belonging to Cliven Bundy—Ammon and Ryan Bundy's father—that were grazing unlawfully on federal public lands. About a week after initiating the impoundment, the BLM suspended operations after receiving information that hundreds of people had travelled to Bunkerville, Nevada, with guns, to support Cliven Bundy and to force the cessation of the impoundment. After the BLM announced publicly that it had stopped the impoundment operations for safety reasons and that it would leave the area, hundreds of Bundy supporters, including many openly carrying firearms, converged on the impoundment site demanding that the BLM law enforcement officers leave the site immediately and release the impounded cattle.

Defendants repeatedly referred to the events in Bunkerville as a justification for challenging the federal government and occupying the Refuge. On multiple occasions,

defendants claimed through social media and press conferences and to witnesses that the occupation of the Refuge was "another Bunkerville." Defendants described the occupied Refuge as the "second freest place on earth," after the Bundy Ranch.

D. The Defendants

1. Ammon Bundy

Ammon Bundy was the occupation's primary leader and organizer. Bundy first arrived in Burns, Oregon, almost two months before the occupation began. On November 5, 2015, Bundy and Ryan Payne met with Harney County Sheriff Dave Ward at Ward's office in downtown Burns. The two told Sheriff Ward that the federal government had no authority to own or manage land. They also told Sheriff Ward that he had a constitutional duty to stand up to the federal government and protect the Hammonds from the federal government. Bundy explicitly told Sheriff Ward that if he did not prevent the Hammonds from returning to prison, "we will bring thousands of people here to do your job for you." Bundy further threatened to create "extreme civil unrest in the community." Throughout late 2015, Bundy continued to meet with Sheriff Ward and others in the community in an effort to persuade them to interfere with the Hammonds' return to custody. He repeated his claim that the Hammonds had been victimized by the BLM and the federal government. During this time, Bundy also called and emailed Sheriff Ward in a continued effort to increase his rhetoric regarding federal control of lands in Harney County, Oregon.

On January 2, 2016, Bundy led a convoy from the Safeway parking lot to the Refuge. In a video taken from the Safeway lot, Bundy can be seen telling a small group "for those who understand that they came to make a hard stand—those who know what's going on here . . . I'm

asking you to follow me and go to the Malheur National Wildlife Refuge and we're going to make a hard stand," flatly contradicting any claim that the takeover was unplanned. Once the occupation began, Bundy became the group's most visible spokesperson, repeatedly speaking to the press on behalf of the defendants. On January 3, 2016, Bundy claimed that they have "taken over the MNWR, and this will become a base place for patriots from all over the country to come and be housed here, and we are planning on staying here for several years." He further announced to viewers that "we need you to bring your arms." Throughout the month of January, Bundy spoke frequently to the press and on video, making similar statements.

On January 4, 2016, Ammon Bundy addressed the media and stated that he had named his group the "Citizens for Constitutional Freedom" (CCF), and they were acting in support of the Hammonds. Bundy told a national morning news show that members of CCF were armed because: "We are serious about being here. We're serious about defending our rights, and we are serious about getting some things straightened out." When asked on the show if he anticipated it would lead to violence, Bundy responded, "Only if the government wants to take it there."

Until his arrest on January 26, 2016, Bundy was unwavering in his position regarding the takeover of the Refuge. On January 13, 2016, Bundy announced that the occupiers had changed the name of the Refuge to the "Harney County Resource Center" and that the group was "working through records" located at the Refuge. He told negotiators that the group had no plans to leave, and until his arrest, did nothing to suggest otherwise.

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2. Ryan Bundy

Ryan Bundy was an occupation leader who was present during the initial takeover of the Refuge. While Bundy was a strong presence on the Refuge during the occupation, his role in the conspiracy extended beyond the property. On January 9, 2016, Bundy and others drove to the BLM Burns District Office. They attached a sign to the door and one to the main sign that read "CLOSED PERMANENTLY." On January 11, 2016, Bundy helped others remove a fence on Refuge property in order to allow cattle to graze on the Refuge. On January 15, 2016, Bundy was part of a group that removed a government-owned surveillance camera from a utility pole on a public road near the Refuge.

Bundy frequently spoke to the press during the occupation, reiterating the defendants' position that the federal government could not lawfully own property and explained why the group was armed. Throughout the occupation, Bundy also used social media, including his Facebook account, to communicate with indicted coconspirators and others and to recruit others to support the occupation. Bundy also carried firearms throughout his time on Refuge property. Law enforcement recovered a revolver from the floorboard of the truck that Bundy was in at the time of his arrest on January 26, 2016.

3. Shawna Cox

Shawna Cox occupied the Refuge from January 2, 2016, until her arrest on January 26, 2016. She served as a spokesperson for the group and worked closely with its leadership. On January 4, 2016, Cox addressed the media as a representative for Citizens of Constitutional Freedom. At that time, she read a "Notice of Redress of Grievances" which detailed the group's position about the federal government's authority over federal lands and the Hammond

case. She could frequently be seen working closely with both Ammon and Ryan Bundy. In a video recovered from Ammon Bundy's phone, Cox and Ammon Bundy can be seen with a small group inside an office at the Refuge. The group discussed the placing of a "closed" sign at the BLM District Office. Cox says that as a result the employees are "scared."

After her arrest on January 26, 2016, Cox told investigators that she was at the Refuge because God sent her. She explained her belief that the federal government could not own land. She said the occupiers intended to seize the Refuge from the federal government and return it to the people. Cox also said that the occupiers used weapons for defense against the federal government, explain that she and the others anticipated that federal agents would eventually seek to reclaim the Refuge. She flatly stated that the weapons would have been used to stop the federal government from entering the property.

4. Peter Santilli

Peter Santilli was a spokesperson and recruiter for the occupation. He is a longtime associate of many of his co-defendants, and throughout January he actively recruited people to achieve the occupation's stated goals. Santilli made a number statements—before and during the occupation—about the need to mobilize resources against the federal government in support of the occupation. While Santilli self-identifies as a journalist (the government does not dispute that he has a loyal following), his role during the occupation extended beyond that of a member of press responding to the takeover: he incited others to engage in unlawful activity.

On December 27, 2015, Santilli broadcasted that "patriots" should come to Burns, Oregon. He did the same on December 28th. On January 2, 2016, Santilli was at the protest in the Safeway parking lot. On January 7—after the occupation had begun—Santilli called for

"100,000 men" to come to the Refuge. On January 9, 2016, Santilli is seen filming at an FBI checkpoint and then leaving shortly thereafter with militia members. On January 12, 2016, on his show, Santilli threatened to crush the FBI and called for "reinforcements." On January 15, 2016, Santilli videotaped the theft of FBI cameras, but is also seen handling one of the cameras. The next day, Santilli told fellow occupiers "not to bring a butter knife to a gun fight." Santilli's efforts on behalf of the Refuge occupants continued throughout the occupation. On January 21, 2016, his rhetoric escalated. In a broadcast, he told "all you good patriots out there, it's time to staff up."

Santilli's efforts on behalf of his fellow conspirators were not limited to his broadcasts. He was seen threatening counter-protestors at different times during the occupation and aggressively accused one of being an FBI plant. Witnesses report that Santilli appeared to know information about planning and preparation that was privy only to other co-defendants. Additionally, Santilli posted, in association with his show, approximately 682 pages of stolen BLM paperwork relating to the Hammonds. This material was unlawfully removed from the Refuge during the occupation from the office of an archeologist working at the Refuge. Most of these materials were never released lawfully and were only accessed by the occupiers prior to their appearing on Santilli's website.

5. David Fry

David Fry was the last occupant of the Refuge and played an integral role in prolonging the occupation. Fry drove to the Refuge from his home in Ohio to support the other occupants. On January 8, 2016, he sent a private message through Facebook to a friend that read: "I been [sic] driving to Oregon. To go fight the good fight." He arrived at the Refuge shortly

thereafter, and he soon began to move freely among the buildings at the Refuge with many of his co-defendants. Videos depict Fry handling a number of firearms during his time at the Refuge. Many of these firearms were seized from his car after the conclusion of the occupation.

Fry's intentions on the Refuge are amplified by his social media posts. On January 24, 2016, Fry wrote to a friend that "he is probably going to be shot by the feds for real." Many of the videos depicting Fry during the occupation appeared on his own YouTube channel, "Defendyourbase.net." Fry appeared increasingly violent and possibly suicidal as the occupation continued, particularly after January 26, 2016. On January 27, 2016, he posted a video in which he stated, "[you're] going to watch me die live on defend your base." In the video, Fry can also be seen carrying a shotgun. Finally, on February 10, 2016, Fry told an FBI negotiator that he was not coming out. He said he was getting his gun and "we're not doing this peacefully."

6. Jeff Banta

Jeff Banta was one of the Refuge's last four occupants. As he explained to an FBI negotiator, he was drawn to the Refuge after the initial occupation because of the Hammond sentencing. He served as a guard during his time at the Refuge and was often armed. Banta's Remington Model 870 12-gauge shotgun was recovered from the Refuge. On February 9, 2016, Banta told an FBI negotiator that he traveled to the Refuge, met with Ryan Bundy and was put to work on "signs." Later, Banta attended a security meeting and received general military training and worked at the Refuge in a security detail. In a January 27, 2016, video, the group discusses how they will respond to law enforcement efforts to remove them from the Refuge.

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Banta also says that he has an assault rifle, and the group discusses how to defend their position. Banta ultimately surrendered to law enforcement on February 11, 2016.

7. Kenneth Medenbach

Kenneth Medenbach was an active member of the conspiracy and was in charge of "signage" at the Refuge. Videos taken from the occupation show him on the property with his co-defendants. On January 9, 2016, Medenbach joined a group of defendants who drove to the BLM Burns District Office. After arriving, they attached a sign to the BLM door and to the BLM's main sign that read "CLOSED PERMANENTLY." On January 11, 2016, Medenbach worked with his co-defendants again, this time to tear down a fence in order to allow cattle to graze on the Refuge; Medenbach also used Refuge property during the occupation. On January 15, 2016, Medenbach unlawfully stole a 2012 Ford truck belonging to the Refuge by driving it from the Refuge to Safeway in Burns, Oregon. He was arrested at that time.

8. Neil Wampler

Neil Wampler arrived at the Refuge shortly after the occupation began because of his longstanding support of Ammon Bundy. In a November 21, 2015, email to Sheriff Ward, Wampler told Ward that "I assure you that our determination to protect the Hammonds is no bluff." In an interview with law enforcement after the conclusion of the occupation, Wampler likened its leaders to Ghandi and Martin Luther King. While his primary role at the Refuge was to serve as the occupation's chief cook, he made clear his intentions regarding the occupation in a video taken from the Refuge in early January, in which he says: "The only circumstances that any gunshots would be fired is if the federals try to root us out of here. They would find out then that we are not playing. We're not going to give an inch and I say that very seriously."

III. Elements of the Offenses

The elements of the relevant offenses are set forth below and separately contained in portions of the parties' Joint Submission Regarding Jury Instructions (ECF No. 716).

A. Count 1: Title 18 U.S.C. Section 372

All defendants are charged in Count 1 of the Superseding Indictment with violating Section 372 of Title 18 of the United States Code. The Indictment alleges that defendants "did knowingly and willfully conspire and agree together and with each other . . . to prevent by force, intimidation, and threats, officers and employees of the United States Fish and Wildlife Service and the Bureau of Land Management, agencies within the United States Department of Interior, from discharging the duties of their office at the Malheur National Wildlife Refuge and other locations in Harney County, Oregon."

To satisfy its burden of proof, the government must establish each of the following elements beyond a reasonable doubt:

First, that beginning on or about November 5, 2015, and ending on or about February 12, 2016, there was an agreement between two or more persons to prevent an officer of the United States from discharging any duties of the United States; and

Second, that the agreement was to impede federal officers by force, intimidation, or threat.

B. Count 2: Title 18 U.S.C. Section 930(b)

Defendants Ammon Bundy, Ryan Bundy, Shawna Cox, David Fry, and Jeff Banta are charged in Count 2 of the Superseding Indictment with violating Section 930(b) of Title 18 of the United States Code. The Indictment alleges that defendants "did knowingly possess or cause to

be present a firearm or dangerous weapon in a federal facility located at the Malheur National Wildlife Refuge, and counseled, commanded, induced and procured the commission thereof, with the intent that the firearm or dangerous weapon be used in the commission of a crime, to wit: 18 U.S.C. § 372, Conspiracy to Impede Officers of the United States."

To satisfy its burden of proof, the government must establish each of the following elements beyond a reasonable doubt:

First, the defendants possessed or caused to be present, a firearm or dangerous weapon in a federal facility, or attempted to possess or cause to be present, a firearm or other dangerous weapon;

Second, that such weapons were possessed in a federal facility;

Third, the defendants did so knowingly; and

Fourth, that the defendants did so with the intent that the firearm or other dangerous weapon be used in the commission of the crime, in this case Conspiring to Impede Officers of the United States (18 U.S.C. § 372).

C. Count 4: Title 18 U.S.C. Section 641

Defendant Kenneth Medenbach is charged in Count 4 of the Superseding Indictment with theft of government property in violation of Section 641 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly stole, purloined, or converted to defendant's use property, a 2012 Ford F350 Truck, license plate I581021, with the intention of depriving the owner of the use or benefit of the property;

Second, the property belonged to the United States; and

Third, the value of the property was more than $1000.

D. Count 5: Title 18 U.S.C. Section 641

Defendant Ryan Bundy is charged in Count 5 of the Superseding Indictment with theft of government property in violation of Section 641 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly stole, purloined, or converted to his own use property, cameras and related equipment, with the intention of depriving the owner of the use or benefit of the property;

Second, the property belonged to the United States; and

Third, the value of the property was more than $1000.

IV. Legal Issues

A. Self-Defense

Defendants have not formally provided notice that they are seeking a self-defense instruction (Uniform Ninth Circuit Uniform Instruction 6.9). However, defendants have sought an instruction authorizing them to "possess and carry firearms in self-defense" and to use firearms "against excessive use of force by the government." (Joint Sub. re Jury Instr. 11, ECF No. 716). This Court has separately rejected this argument in the context of discovery (July 15, 2016, Order, ECF No. 888, at 4-6), and, consistent with that ruling, defendants should be precluded from arguing to the jury that they possessed firearms in lawful self-defense during the course of the conspiracy or as otherwise proscribed by 18 U.S.C. § 930(b).

Self-defense raised in the context of a defendant's response to law enforcement is recognized in two, limited circumstances: (1) when there is evidence to support a defendant's reasonable belief that his attacker is not a law enforcement officer; or (2) when defendant employs reasonable force to resist an officer's excessive use of force. *See, e.g.*, *United States v. Streit*, 962 F.2d 894, 898-99 (9th Cir. 1992). There is no credible dispute in this case that defendants knew that they were in direct confrontation with law enforcement agents and officers during their occupation. Thus, only the second theory is even potentially available, and it fails in this case for several reasons.

First, resistance to an officer's excessive use of force is a defense only available in a "narrow range of circumstances," and completely unavailable when a defendant is the one on the offensive. *See United States v. Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012) (affirming trial court's rejection of self-defense when defendant was the attacker); *see also United States v. Branch*, 91 F.3d 699, 717 (5th Cir. 1996) ("One cannot provoke a fight and then rely on a claim of self-defense." (quoting *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966) (per curiam))). In this case, defendants' armed occupation cannot be justified as a reasonable response to an excessive use of force by law enforcement; when defendants took over the Refuge offices, they did so without interference by law enforcement or employees of the Fish and Wildlife Service. Defendants did not, for example, arm themselves only after law enforcement responded to the scene.

Second, self-defense requires some evidence that the threatened force defendants responded to was itself unlawful. Defendants claim that their occupation was a direct response to the Hammonds' prosecution and resentencing and federal land ownership policies; even if

their objections were objectively valid (a point the government does not concede), none of these issues constitute a threatened use of force that would justify self-defense. Third, self-defense requires proof that the defendants' need to use force was required because the threat posed was "imminent." *United States v. Keiser*, 57 F.3d 847, 850-51 (9th Cir. 1995) (discussing the model 9th Circuit jury instruction on self-defense). There is no evidence in this case that defendants needed to arm themselves for self-defense or that they even knew the scope of the law enforcement presence; instead, the undisputed evidence will show that defendants had numerous opportunities to abandon the occupation without any threat of physical harm. Indeed, the standoff lasted as long as it did precisely because federal law enforcement hoped to avoid an armed conflict. This case has nothing to do with self-defense, and this Court should reject any defense effort to insert this ill-founded theory into the trial.

B. First Amendment

Defendants are charged with conspiring to impede officers of the United States in violation of 18 U.S.C. Section 372. Defendants' speech constitutes a significant amount of the evidence in this case. Defendants' group activity—their assembly—and their speech incited illegal activity and are integral to this charge. Because of the role defendants' speech plays in the underlying occupation, this Court cannot lawfully advise the jury (nor can defendants argue) that these defendants are not on trial for their words or assembly. Nor can this Court advise the jury that if defendants intended to engage in expressive conduct or activity that the jury should acquit. The First Amendment affords no defense to words or actions that incite imminent criminal activity and it cannot shield a defendant from criminal liability when the words or actions are themselves integral to the crime. *See United States v. Clum*, 607 F. App'x 922 (11th

Cir. 2015) (discussing the two distinct aspects of the criminal exceptions to First Amendment protection relying upon Ninth Circuit authority).

For cases involving speech that the government claims incited imminent lawless action, a defendant is entitled to a First Amendment jury instruction only if the speaker's words "are directed to ideas or consequences remote from the commission of the criminal act." *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985). Courts have reasoned that First Amendment protection should apply to "critical, but abstract, discussions of existing laws," but it does not apply to "speech which urges the listener" to violate the law. *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996). The government's case will rest in part upon speech that incited imminent lawless action.

The government also intends to rely upon speech and activity that are integral to the crimes charged. "[W]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." *Freeman*, 761 F.2d at 552. Conspiracies necessarily "usually involve speech; they always involve association." *United States v. El-Hindi*, No. 3:06CR719, 2009 WL 1373268 (N.D. Ohio May 15, 2009). But the fact that a conspiracy involves speech and association "does place [it] within the penumbra of the First Amendment, which is not applicable to statements made and associations in furtherance of a crime." *Id*. (citing *Freeman*, 761 F.2d at 551-52; and *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990)).

The Ninth Circuit's ruling in *United States v. Meredith*, 685 F.3d 814 (9th Cir. 2012) is particularly helpful on this point. Meredith disagreed with the tax laws and urged others to file false information with the IRS using "trusts" in lieu of social security numbers. In examining

Meredith's First Amendment defense, the court identified the case as one that fell within the "speech integral to criminal conduct" exception to First Amendment protected activity. *Meredith*, 685 F.3d at 819. The court then examined whether the defense was viable as applied to each charge, and it held that the First Amendment did not prohibit Meredith's fraud convictions, which were based on discussions "integral to the crime." *Id*. at 821-22. The court also sustained Meredith's conviction for conspiracy, holding that the evidence showed the charged conspiracy "involved far more than mere advocacy of tax evasion." *Id*. at 823.

In this case, defendants ostensibly came to Burns, Oregon, to protest the Hammonds' sentences and, eventually, the government's public land ownership. Those were lawful pursuits entitled to First Amendment protection. Once defendants' words and actions turned to the armed takeover of the Refuge, however, their actions and words are no longer entitled to First Amendment protection because they were integral to illegal activity. A right to protest does not include a right to prevent federal employees from performing their jobs. The only constitutionally protected speech and assembly in this case would thus have to involve activity that did not incite imminent lawless action or constitute activity integral to the criminal charge.

To the extent defendants claim that they were exercising their First Amendment right to free expression by—and while—carrying guns, this Court should reject that claim outright. Taking a gun into a government office is not First Amendment protected activity. *Chesney v. City of Jackson*, No. 14-11097, ___ F. Supp. 3d ___, 2016 WL 1090372 (E.D. Mich. Mar. 1, 2016). The Ninth Circuit has recognized that gun possession may be expressive activity if, for example, someone sets fire to a gun or waves a gun at a gun rights rally, but that is not what happened in this case. *See Nordyke v. King*, 319 F.3d 1185, 1189-90 (9th Cir. 2003). Nothing

about defendants' gun possession in this case either directly or implicitly addressed gun rights or gun ownership and no one in Burns, Oregon, interpreted defendants' gun possession that way. Whether carrying a gun falls within the First Amendment's protection for expressive activity depends on two interrelated considerations: (1) the speaker's intent to "convey a particularized message"; and (2) whether there is a great likelihood the message would be so understood by those who heard or viewed it. *Id.* at 1189.

Simply because defendants used words while carrying firearms does not implicate the First Amendment; if that were true, every bank robber who used a note to demand money or a gun to imply a threat would be entitled to raise the defense. *See United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (holding that First Amendment did not protect defendant's sale of printed PCP manufacturing instructions). Instead, when defendants' possession of and brandishing of firearms was reasonably interpreted by all present as a threat, their actions were no different from the threat posed by the bank robber who enters the bank with a gun in his waistband. In that case the bank robber does not need to point or shoot his gun to make his point. In this case, defendants similarly made their point to law enforcement, and Refuge workers stayed away from their workplace in fear.

C. Second Amendment

Defendants have repeatedly invoked the Second Amendment as a possible defense and justification for their conduct. (*See* Joint Sub. re Jury Instr. 11, ECF No. 716). The government does not dispute that defendants (assuming they are not otherwise prohibited by law from doing so) have a constitutional right to bear arms under the Second Amendment of the United States Constitution. The Second Amendment to the United States Constitution provides

in part that "the right of the people to keep and bear arms shall not be infringed." This right includes the right to possess and carry firearms in self-defense. However, this right is not absolute. *See United States v. Miller*, 307 U.S. 174 (1939) (upholding a federal statute prohibiting interstate transportation of sawed-off shotguns); *Lewis v. United States*, 445 U.S. 55 (1980) (upholding federal prohibition on gun ownership by convicted felons). In *District of Columbia v. Heller*, the Court struck down a District of Columbia law banning handguns and requiring any firearms in the home be kept "unloaded and disassembled or bound by a trigger lock." 554 U.S. 570, 575 (2008). Although *Heller* overturned the District of Columbia law, the Court maintained that the traditional restrictions on firearm possession remain intact. *Id.* at 626-27.

Most importantly for this Court, *Heller*, and later *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010), hold that the Second Amendment secures lawful use or possession of a firearm but the Amendment does not protect use or possession connected with criminal activity. *See also United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) ("[T]he right to bear arms does not preclude laws disarming the unvirtuous citizens." (quoting Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 Law & Contemp. Probs. 143, 146 (1986))). The Ninth Circuit further amplified this principle in *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011). In *Potter*, the court held that while the defendant possessed a firearm in his home for defense of himself, his family, and his property, the possession was simultaneously unlawful because of its connection to the defendant's other criminal activity. The court also upheld the district court's refusal to give a "Second Amendment defense" jury instruction that stated in part

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that the defendant did not possess the same weapon "for the defense of [himself], his family, and his property." *Id.*

Defendants in this case are not protected from prosecution because they can lawfully possess firearms. That a defendant possesses a firearm for personal protection purposes does not immunize his criminal conduct. *See United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009). While it may be reasonable for defendants to argue that the Second Amendment protects their general right to possess a firearm for self-defense, any further argument or instruction beyond this simple principle (that is conceded by the government) is not supported by law and would confuse the jury.

D. Multiple Conspiracies

Count 1 in this case involves a single conspiracy. The charge involves a single "overall agreement" in which each defendant knew or had reason to know the conspiracy's purpose—that is, to impede the lawful functions of employees of the United States Fish and Wildlife Service and the Bureau of Land Management. Accordingly, a single conspiracy jury instruction is all that is required. *See United States v. Lapier*, 796 F.3d 1090, 1100-01 (9th Cir. 2015) (when indictment is broad enough to encompass multiple and distinct conspiracies rather than an overall single agreement, a specific unanimity instruction is needed to avoid juror confusion). For purposes of proof at trial, a large, single conspiracy may include several "sub-agreements" or "subgroups of conspirators." *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984). No formal agreement to conspire is required; instead, courts look to factors such as the nature of the scheme, identity of the participants, the quality, frequency, and durations of each conspirators'

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transactions, and the commonality of time and goals. *Id*. The government intends to argue that defendants were all, in varying degrees and capacities, participants in this single conspiracy.

V. Evidentiary Issues

A. Hearsay

1. Coconspirator Statements—Fed. R. Evid. 801(d)(2)(E)

The government intends to introduce a number of statements against defendants under Federal Rule of Evidence 801(d)(2)(E). Rule 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. This is not an exception to the hearsay rule, but instead, non-hearsay. The rationale underlying the rule is that each conspirator is an agent for every other conspiracy member, and an agent's admissions and actions are binding on the principal. The rule reflects a "common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not." *United States v. Peralta*, 941 F.2d 1003, 1006-07 (9th Cir. 1991). Statements falling within this exception are not "testimonial," and therefore they do not trigger Confrontation Clause concerns. *United States v. Bridgeforth*, 441 F.3d 864, 868-69 (9th Cir. 2006).

Conspirator statements should be admitted when the government establishes by a preponderance of the evidence that: (1) the conspiracy existed when the statement was made; (2) defendant had knowledge of and participated in the conspiracy; and (3) the statement was made in furtherance of the conspiracy. *United States v. Bowman*, 215 F.3d 951, 960-61 (9th

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Cir. 2000) (citing *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)). The statement need not have been made to a conspiracy member. *United States v. Williams*, 989 F.2d 1061, 1068 (9th Cir. 1993). And the statement may have been made before a particular defendant joined the conspiracy. *United States v. Segura-Gallegos*, 41 F.3d 1266, 1271 (9th Cir. 1994).

Although "mere conversations" between conspirators will not fit this exemption, statements made to keep conspirators abreast of the ongoing conspiracy's activities will satisfy the "in furtherance of" requirement. *United States v. Tamman*, 782 F.3d 543, 553 (9th Cir. 2015); *United States v. Larson*, 460 F.3d 1200, 1211 (9th Cir. 2006); *see also United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007) (statements of personal objectives outside the conspiracy's scope fall outside of 801(d)(2)(E), but statements keeping conspirators abreast of the conspiracy fall within the rule's purview).

2. Defendants' Prior Statements—Fed. R. Evid. 801(d)(2)

The government intends on introducing defendants' prior statements which are variously found in Facebook posts, writings, online postings, recorded audio and video, sworn testimony, and phone calls. A statement is not hearsay if the statement is offered against a party and is the party's own statement in either an individual or representative capacity. Fed. R. Evid. 801(d)(2); *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir. 1981).

As a preliminary matter, in the case of written material, the proponent must offer evidence to show that a document in question is what he claims it is to establish the relevancy of documentary evidence. *See* Fed. R. Evid. 901(a). Rule 901(a) requires the government to make only a prima facie showing of authenticity "so that a reasonable juror could find in favor of authenticity or identification." *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985)

(quoting 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(a) [01], at 901-16 to -17 (1983)). Authenticity may be based entirely on circumstantial evidence, including "appearance, contents, substance . . . or other distinctive characteristics" of the writing. Fed. R. Evid. 901(b)(4). "[A] document . . . may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him." *United States v. Console*, 13 F.3d 641, 661 (3d Cir. 1993) (quoting Fed. R. Evid. 901 advisory committee's note ex. (4)). A letter shown to have been mailed in reply to a previous mailing, moreover, is authenticated without more. *United States v. Reilly*, 33 F.3d 1396, 1407-08 (3d Cir. 1994) ("Where letters fit into a course of correspondence or a progressive course of action, proof of the letters' relationship to these events can authenticate any of the letters." (quoting 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(4) [04], at 901-75 (1993))).

However, when the government offers some of the defendants' prior statements, the door is not opened to the defendants to put in all of their out-of-court statements, because when offered by the defendant, the statements are hearsay. *Burreson*, 643 F.2d at 1349. The only limitation of this principle is the "doctrine of completeness" which has been applied by some courts to require that all of a defendant's prior statements be admitted where it is necessary to explain an admitted statement, to place it in context or to avoid misleading the trier of fact. Fed. R. Evid. 106. The principles underlying this doctrine do not permit the unfettered admission of a defendant's statements when offered by a defendant. In this case, for instance, the rules of evidence would not permit defendant Santilli to introduce his own selection of videos containing his recorded statements to advance his own theory of the case.

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B. Judicial Notice

Federal Rule of Evidence 201 permits a court to make findings of facts that are not subject to reasonable dispute. Jurors in criminal cases are not required to accept judicially noticed facts as conclusive against the defendant. Fed. R. Evid. 201(g). The rules of evidence do not apply to requests for judicial notice. Fed. R. Evid. 104(a). Judicial notice is typically taken of a variety of facts, including but not limited to: geographic facts, such as distances and locations; historical facts; business facts; government matters; and public records, such as recorded deeds and tax liens. *See* Michael H. Graham, 2 Handbook of Federal Evidence § 201:3 (7th ed. 2014).

The government requests that the Court take judicial notice of three issues. First, the government asks the Court to take judicial notice that the Malheur National Wildlife Refuge is a federal property located on federally owned land, operated and managed by the United States Department of Fish and Wildlife Service on behalf of the United States Department of the Interior.

Second, the government asks the Court to take judicial notice that on June 6, 2012, Dwight and Steven Hammond were convicted of two counts of arson by a jury in the District of Oregon. Further, on October 30, 2012, Dwight Hammond was sentenced to serve three months in prison, and Steven Hammond was sentenced to serve twelve months in prison. On February 7, 2014, the Ninth Circuit Court of Appeals overturned the District Court's sentences. On October 7, 2015, Dwight and Steven Hammond were resentenced to serve mandatory, five-year terms of imprisonment. On January 4, 2016, the Hammonds reported to a Federal Correctional Institution in California to serve the remainder of their sentences.

Third, the government asks the Court to take judicial notice that employees of the United States Department of the Interior, including the Fish & Wildlife Service and the Bureau of Land Management, are officers of the United States. All three requests fall well within this Court's authority under Fed. R. Evid. 201.

Dated this 29th day of July 2016.

Respectfully submitted,

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