No. 24-932

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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 18-759-CJC

GOVERNMENT'S OPENING BRIEF

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I

INTRODUCTION

Defendant Robert Rundo was the founder, and Robert Boman a member, of the "Rise Above Movement," or "RAM," which billed itself as "a combat-ready, militant group of a new nationalist white supremacy and identity movement." *United States v. Rundo*, 990 F.3d 709, 712 (9th Cir. 2021) (per curiam) ("*Rundo I*"). Rioting was RAM's purpose: Rundo and his co-founder established the organization in 2017 to inflict

organized violence against their political enemies at protests. They trained for combat and then engaged in it, attending rallies where they assaulted protestors, journalists, and police officers; they then posted pictures of their assaults on social media to recruit new members. In 2018, they were indicted for violating the Anti-Riot Act, 18 U.S.C. § 2101.

A year later, the district court (the Hon. Cormac J. Carney) dismissed the indictment, holding that the Anti-Riot Act violated the First Amendment. The government appealed, and this Court reversed in *Rundo I*. On remand, however, the district court dismissed the indictment again—this time for "selective prosecution." According to the court, although defendants "likely committed violence for which they deserve to be prosecuted," their prosecution was unconstitutional because, "[b]y many accounts," the government did not also prosecute unnamed "members of Antifa and related far-left groups" who also engaged in unspecified "violence" at rallies. (1-ER-3.)

That conclusion was very far off base. Dismissal for selective prosecution is warranted only when a defendant meets a "demanding" and "rigorous" standard by establishing both discriminatory effect and

discriminatory intent. *United States v. Armstrong*, 517 U.S. 456, 463, 465, 468 (1996). Defendants established neither.

As to discriminatory effect, defendants came nowhere close to showing that the government failed to prosecute similarly situated individuals who were the same as defendants in all relevant respects. The district court relieved them of that burden by comparing impossibly broad classes of unidentified protesters and by ignoring obvious and compelling distinctions between defendants and any identified left-wing extremists who were not federally prosecuted. The court's approach was especially indefensible in light of the fact that the government is currently appealing a selective-prosecution dismissal by a different district judge in the same district who faulted the government for the *opposite* reason—for supposedly *targeting* Antifa. *See United States v. Wilson & Beasley* ("*Wilson*"), C.A. No. 23-50016.

As to discriminatory intent, defendants also came nowhere close to showing that they were prosecuted due to their political opinions. When the court recognized that defendants were prosecuted "because they committed violence at political rallies" (1-ER-5), that should have ended the analysis. The government supplied "many facially neutral

reasons why it pursued prosecutions against RAM members such as Defendants" (1-ER-34), and defendants adduced no evidence that their prosecution was motivated by an impermissible purpose. Nor could they, given that the government is allowed to prosecute rioters. Having a political motive for rioting is not a defense.

This is not a close case. Defendants fell far short of meeting the standard for dismissal, and the district court erred in ordering it. This Court should, once again, reverse.

II

ISSUE PRESENTED

Whether defendants demonstrated that their prosecution had a discriminatory effect and was motivated by discriminatory intent.

III

STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status

The district court had jurisdiction over defendants' prosecution under 18 U.S.C. § 3231. This Court has jurisdiction over the government's appeal of the district court's dismissal of the indictment under 18 U.S.C. § 3731. The district court dismissed the indictment on

February 21, 2024. (1-ER-2–36.) The government filed a timely notice of appeal the same day. (4-ER-606.) *See* Fed. R. App. P. 4(b)(1)(B). Rundo is in custody; Boman is not.[1]

B. Statement of Facts and Procedural History

1. Rundo, a Violent Felon, Founds RAM in Order to Commit Acts of Violence at Political Rallies, and Boman, Also a Violent Felon, Joins RAM

In the late 2010s, defendant Rundo was a convicted felon living in Orange County, California. He had been convicted years earlier—and sentenced to two years in state prison—for a gang attack in Queens, New York, in which he and four others confronted a man named Jose Maya at 11 p.m. for "wearing blue"; Rundo and his fellow gang members chased Maya until he tripped and fell, and Rundo then set upon him and stabbed him repeatedly in his back, neck, arms, and chest. (4-ER-574; 4-ER-582.) A fan of Adolf Hitler, Rundo got stylized "8" tattoos while in prison—one on each shoulder, corresponding to the

[1] "CR" refers to the Clerk's Record in the district court and is followed by the docket number and a specific page number if applicable. "ER-Video" refers to the video exhibits filed below as Exhibits 1-4 to CR 307, the government's opposition to the defense motion to dismiss; the government moves under Circuit Rule 27-14 to transmit those exhibits to this Court in a motion filed concurrently with this brief.

eighth letter of the alphabet twice, i.e., "HH," as "symbols of white pride"—and he kept a framed Hitler photo and other Nazi memorabilia in his home. (4-ER-561–63; 4-ER-572–73); *see Barrett v. Belleque*, 2007 WL 2688227, *6 (D. Or. 2007) (explaining that "88" and "HH" stand for "Heil Hitler").

Rundo founded the "Rise Above Movement" in late 2016 or early 2017 with his friend Benjamin Daley (2-ER-40; 2-ER-67)—they billed it as a "combat-ready, militant group of a new nationalist white supremacy and identity movement." *Rundo I*, 990 F.3d at 712. (*See also* 1-ER-8; 2-ER-42; 4-ER-589.) RAM's purpose was to inflict violence on its political enemies at rallies. Its "activism guidelines" were politically minded and designed to facilitate organized attacks: RAM members were required to dress in consistent, recognizable clothing (gray shirt and athletic pants), stay in "good physical shape and sober," and "[a]lways look defensive in [the] beginning of all scuffles or fights." (4-ER-550.) RAM's social-media account posted videos and pictures of RAM members training in hand-to-hand combat, posing in skeleton masks, and assaulting victims at political events. (1-ER-8–9; 2-ER-42–43; *see, e.g.*, 4-ER-551–60.) Given the ubiquity of digital videorecording,

however, RAM cautioned its members to avoid salutes, racial slurs, or "engag[ing] with shit libs and [the] general public" at events—violence was to be focused "only [on] antifa or serious opposition." (4-ER-550.)

Boman joined RAM as early as March 2017. (1-ER-8; 2-ER-38; 2-ER-40.) He, too, was a previously convicted violent felon. His criminal history included "convictions for violent crimes," a "lengthy juvenile record," and "disobeying prior court orders." (2-ER-65.) When he was arrested in this case, Boman was "serving two grants of probation" and was subject to a restraining order. (*Id.*)[2]

2. Defendants Attack Victims at Political Rallies

a. The Huntington Beach Riot

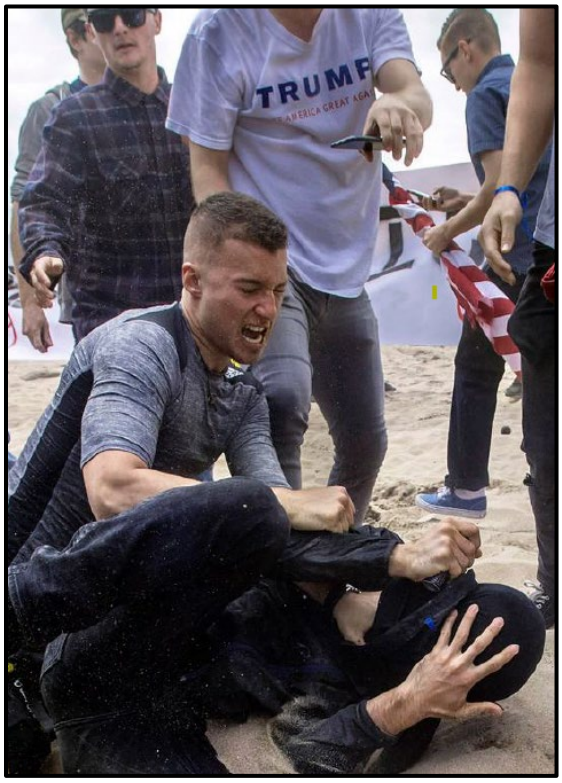
On March 25, 2017, supporters of then-President Trump held a rally in Huntington Beach, California, in Orange County. (2-ER-47–51; 2-ER-70–72; 4-ER-590.) A large counter-protest was planned too. This was Rundo's and RAM's chance to "engage" with their political enemies,

[2] The United States Probation and Pretrial Services Office provided the district court with reports containing additional information regarding Boman's lengthy criminal record. Although those reports are required to remain confidential, *see* 18 U.S.C. § 3153(c)(1), if this Court requests, the government will move the district court to release the reports to this Court under seal.

and they did. During the protest, Rundo and Boman and other RAM members confronted and pursued counter-protestors along the beach, chanting at them—"you can't run, you can't hide, you get a free helicopter ride"[3]—and physically assaulting them. (ER-Video 1 at 0:05–0:14.) Rundo led from the front, chasing someone who appeared to be affiliated with the counter-protestors and punching him in the head (ER-Video 1 at 0:29–0:33):

[3] "Helicopter ride" is a reference to Chilean General Augusto Pinochet's killings of his political enemies by having them thrown out of helicopters. *See* "Free Helicopter Rides," KnowYourMeme.com (last accessed May 21, 2024); *see also* Luke Winkie, "Behind the Scenes at the Encyclopedia Britannica of Memes," *Wall Street Journal* (Jan. 5, 2023), *available at* https://www.wsj.com/articles/know-your-meme-11672867333 (discussing KnowYourMeme as a "scholarly source").

Rundo then attacked a second person, throwing him to the ground, pinning him, and beating him viciously while he was down. (ER-Video 1 at 0:35–0:45; 2-ER-50.)



Boman also engaged, kicking a counter-protestor in the back as he walked away. (ER-Video 2 at 9:15–9:18.)

The Huntington Beach riot was a big moment for RAM—"The day we got our start," according to a RAM social-media post that showed Rundo attacking a victim from behind (4-ER-556):

On its Facebook page, RAM posted the same photo of Rundo attacking a victim and wrote: "#riot." (4-ER-555–56.) Another post showed a photo of Rundo, Boman, and other RAM members standing behind a banner that declared "antifa was btfo"—blown the fuck out—"in Huntington Beach." (2-ER-52–53; 2-ER-78; 4-ER-590.) Boman also posted a link on his Facebook page to an article titled "Trumpenkriegers Physically Remove Antifa Homos in Huntington Beach," along with the comment: "We did it fam." (2-ER-51–52; 2-ER-71–72.)

b. The Berkeley Riot

On April 15, 2017, just three weeks after their Huntington Beach riot, Rundo, Boman, and other RAM members traveled to Northern California to riot in Berkeley. (2-ER-54–59; 2-ER-72–75; 4-ER-590–91.) They arrived ready to fight, with their hands taped and their faces partially covered by skull masks. (2-ER-54–55; 4-ER-569; 4-ER-590.) And they followed the same playbook: choosing their targets, attacking their enemies in organized assaults, and attempting to "look defensive" (4-ER-550).

Initially, RAM stayed behind the orange plastic fencing Berkeley police had erected to divide opposing protestors.

(ER-Video 4 at 9:49 (Rundo in the gray and black athletic shirt on the right side).) But when the moment was right—the crowd turned toward a disturbance deep on the left-wing side—Rundo and his comrades surged over the fencing to attack.

(ER-Video 3 at 0:05–0:11; ER-Video 4 at 4:13; *see also* 4-ER-590 (Daley admitting that he and other RAM members "crossed the barrier"); 5-ER-700 (police report noting that RAM members "were the first to cross the barriers" separating the two sides).)

Rundo, Boman, and their fellow RAM members swiftly and violently beat victims on the left side of the protest until police arrived in force about a minute later. (*See* ER-Video 4 at 4:13–5:03; 2-ER-54–56.) Boman, who had wrapped his left hand and donned a skull mask in preparation for the assault, attacked multiple victims—punching a counter-protester in the face, and hitting another victim while holding the victim down on the ground. (2-ER-54–55; 2-ER-73.)

On his Facebook page, Boman posted a photo of himself attacking and punching another group of people at the Berkeley rally. (2-ER-56–57; 2-ER-73; 5-ER-721.)

He captioned the photo, "Oooooi vey!!! Dagoyiiiiim knooooow," invoking an antisemitic trope. (2-ER-48; 2-ER-74; 5-ER-721.)

Rundo was also captured on video attacking and punching multiple victims at the Berkeley rally, including one person who was falling to the ground.

(2-ER-56; 4-ER-569.) Although a police officer ordered him to stop punching a defenseless victim in the head, Rundo did not respond. (2-ER-56.) When the officer intervened to stop the assault, Rundo punched the officer in the head twice before other officers subdued and arrested him. (*Id.*)

As one officer noted, RAM members appeared to be "tactically trained" and were "working together as cells" and "fight[ing] as a group." (5-ER-700.) Although they were "[w]atching each others' backs" during their melees, they did not appear to "protect or defend" any public speakers. (5-ER-700–01.) Instead, "throughout the day, the RAM group would antagonize and then fight," engaging in a repeated

hunting ritual in which "they would pick a person and then go after the person as a group, pulling the person out, isolat[ing] them, and then attacking them." (5-ER-703.)

Following the Berkeley event, RAM members celebrated their violence online and in text messages, with one RAM member claiming, "Total Aryan victory." (1-ER-9; 2-ER-56–59; 2-ER-74.) They boasted about "hit[ting] an antifa so hard he dislocated his shoulder," attacking a journalist, and stealing a banner from a "subhuman professor from CA" who "needs the rope." (2-ER-57–58; 2-ER-74.) They used photos and videos of the assault to recruit members and inspire future violence. (2-ER-57.) Rundo posted RAM promotional videos online, showing RAM members, including himself and Boman, assaulting counter-protesters in Huntington Beach and Berkeley. (2-ER-76–77.) Rundo thanked another RAM member for attending the riot, invited him to combat training, and offered to buy lunch for all who would attend. (1-ER-9–10; 2-ER-74.) Later, when a podcaster proposed interviewing RAM leaders, Rundo wanted to make clear "how we were the first guys to jump over the barrier and engage and how that had a huge impact." (2-ER-78.)

c. The San Bernardino and Charlottesville Riots

On June 10, 2017, less than two months after the Berkeley riot, Rundo and their RAM associates attacked victims at a rally in San Bernardino. (2-ER-59; 2-ER-75–76.) Their goal, according to one RAM member, was to "take over" a "normie" demonstration. (2-ER-75.) And they set out to achieve that goal. Police officers observed some 13 "white supremacists" who identified themselves as "Rise Above" prowling "aggressively" around counter-protesters "in an apparent attempt to provoke and intimidate" them. (5-ER-726.) When counter-protestors tried to go to their vehicles, RAM members "began chasing" them, and when two SUVs tried to leave, RAM members "began hitting their vehicles with flag poles." (5-ER-726–27.) One RAM member smashed the back window of an SUV with a flagpole, and another used his flagpole to hit the tailgate of a different SUV. (5-ER-727.)

The following day, RAM's social media account posted a photo of Rundo and other RAM members at the demonstration with the comment, "Just another block taken from #antifa cowards!!!!!!!" (2-ER-75.) Privately, Rundo offered to send one of his RAM associates a video showing "us smashing the antifa car and chas[]ing them." (2-ER-75–

76.) Another RAM member sent a similar text message to his RAM associate: "We smashed some antifa as they were leaving." (2-ER-59; 2-ER-76.) The associate responded: "If it wasn't for the White Nationalists nothing would ever get done." (*Id.*)

Meanwhile, Rundo and other RAM members started planning their travel to Charlottesville, Virginia, for the now-infamous "Unite the Right" rally, at which a white supremacist drove his car into a crowd and killed a woman named Heather Heyer. (2-ER-59–62; 2-ER-76–77; 5-ER-707); *see* DOJ Press Release, "Ohio Man Sentenced to Life in Prison for Federal Hate Crimes Related to August 2017 Car Attack at Rally in Charlottesville, Virginia" (Jun. 28, 2019), *available at* https://www.justice.gov/opa/pr/ohio-man-sentenced-life-prison-federal-hate-crimes-related-august-2017-car-attack-rally. Rundo did not end up flying out to the Charlottesville riot, although his friend and RAM co-founder Daley did go—and was subsequently prosecuted and convicted in Virginia for violating the Anti-Riot Act. *See United States v. Daley, et al.*, 3:18-CR-25-NKM-JCH (W.D. Va. 2019), *aff'd sub nom. United States v. Miselis*, 972 F.3d 518, 527 (4th Cir. 2020).

3. Defendants Are Identified and the FBI Finds Evidence of Their Internet Communications and Riot Plans

The government's investigation of RAM began a couple weeks after the Charlottesville riots, when the FBI Los Angeles office received a tip from someone who had heard Daley bragging in a bar about "causing havoc" in Charlottesville and "punching a girl in the face during the protests." (5-ER-704.) The investigation led the FBI to defendants, and the government obtained search warrants for their electronic communications and homes. (*See, e.g.*, 2-ER-41–42 nn.1–2 (complaint, citing search warrants).) Through those searches, the government collected evidence of RAM's organization, social-media recruitment efforts, and online communications and credit-card purchases leading up to the Huntington Beach, Berkeley, and San Bernardino riots. (*See, e.g.*, 2-ER-70–75 (overt acts 2, 4, 5, 12, 14, 15, 16, and 28).)

Rundo fled to Europe shortly after his home was searched. (*See* 2-ER-211–13.)

4. Defendants Are Charged, the District Court Dismisses the Indictment, and this Court Reverses

Defendants were charged with conspiring to violate and violating the Anti-Riot Act (CR 47), which makes it a crime to travel in interstate commerce or use a facility of interstate commerce to incite or organize a riot. *See* 18 U.S.C. § 2101; *see also* 18 U.S.C. § 2102 (defining "riot"). The district court dismissed the indictment on the theory that the Anti-Riot Act was overbroad in violation of the First Amendment. (CR 145.) The government appealed, and this Court reversed in a published opinion. *See Rundo I*, 990 F.3d 709.

This Court held that although the statute was overbroad to the extent it prohibited "organizing," "promoting," or "encouraging" a riot, those overbroad provisions were severable. *See id.* at 714–19. The Court also severed part of the definition of "inciting" that "expands the prohibition to 'urging' a riot and to mere advocacy." *Id.* at 719. The Court thereby narrowed the statute, consistent with the imminence requirement of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and upheld the statute on that basis. So narrowed, the Anti-Riot Act "prohibits unprotected speech that instigates (incites, participates in, or carries on) an imminent riot, unprotected conduct

such as committing acts of violence in furtherance of a riot, and aiding and abetting of that speech or conduct." *Rundo I*, 990 F.3d at 721.

The case was remanded to the district court in March 2021. But by then, both defendants had absconded and their lawyers could not get in touch with them. (CR 169 at 2.) While attempting to locate defendants, the government obtained a superseding indictment consistent with this Court's decision limiting the scope of the Anti-Riot Act. (2-ER-67–80.)[4]

5. Boman Reneges on His Plea Agreement, and Rundo Is Extradited

Boman was re-arrested in May 2022 and detained for ten months. (CR 196, 231.) He signed a plea agreement (CR 224) but then reneged on parts of the factual basis at his change of plea hearing (3-ER-253–56). Among other things, Boman claimed that at the Berkeley riot, he and Rundo had entered the fray only to rescue "this Black kid, he was about 18 years old," who was being attacked by Antifa. (3-ER-253–54.) Boman also claimed to have forgotten "the name of the group that we

[4] The original indictment charged Rundo, Boman, and two others. (CR 47.) The superseding indictment removed one of them, and another subsequently pleaded guilty (CR 268), leaving only Rundo and Boman.

went up there with" but said that he and his associates were there "as acting security." (3-ER-255.) Listening to Boman's shifting narrative, the district court cited its own recollection of hearing "that this was really the confrontation with Antifa" and "seeing photographs of Antifa" at a riot, though the court could not remember "whether it was the Huntington Beach or the Berkeley rally." (3-ER-257; 3-ER-260.) Nevertheless, the court opined that the targets RAM attacked were "not sympathetic victims," suggested that Boman could claim self-defense, and refused to accept his guilty plea because he "might be innocent." (3-ER-257; 3-ER-260; 3-ER-269.) The court then invited Boman to apply for pretrial bond (3-ER-266–69), which the court subsequently granted (CR 231).

Rundo, meanwhile, had relocated to Romania, beyond the district court's jurisdiction. The government filed an extradition request in April 2023 (CR 243), and he was recaptured in August 2023 (CR 251).

6. On Remand, the District Court Again Dismisses the Indictment, This Time for Purported Selective Prosecution

In January 2024, Rundo moved to dismiss the indictment again. (2-ER-81–125.) Boman joined the motion. (CR 295.) The government opposed. (2-ER-126–66.)

In addition to asserting new First Amendment claims (CR 286), which the district court rejected (1-ER-21–28), defendants advanced a new allegation of selective prosecution (2-ER-81–125). If not dismissal, they proposed extraordinarily broad discovery requests. (2-ER-123; 3-ER-516–19.) Those requests were copied and pasted from the requests propounded in *United States v. Wilson*, C.A. 23-50016, Docket No. 18-3, 2-ER-287–89. That case is the mirror image of this one. Here, the claim is that the United States Attorney's Office for the Central District of California selectively prosecuted right-wing extremists who opposed Antifa; there, the claim is that the United States Attorney's Office for the Central District of California selectively prosecuted left-wing extremists, including Antifa. (*See* Gov't Opening Brief, *Wilson*, C.A. 23-

50016, Docket No. 17.)[5] As the government pointed out below (2-ER-156), it makes no sense to allege that the same office is discriminating both for and against the same group.

Nevertheless, the district court granted defendants' selective-prosecution motion, dismissing the indictment for a second time. (1-ER-2–36.) The court based its decision on various unsubstantiated sources cited by the defense, including nearly 200 pages of articles culled from the internet (3-ER-324–514 (Ex. S to defendants' motion)), which the Court relied upon "for background information" (1-ER-5 n.1). Based on those sources, the court concluded that "[b]y many accounts, members of Antifa and related far-left groups engaged in worse conduct and in fact instigated much of the violence" at the protests and rallies where defendants attacked victims. (1-ER-3.) According to the court, it was "constitutionally impermissible" for the government to prosecute "far-right, white supremacist nationalists" but not "members of Antifa and related far-left groups." (*Id.*)

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[5] *Wilson* involves arson charges, and in copying and pasting the discovery requests from that case, Rundo's counsel forgot to change one occurrence of the word "arson" to match the facts of this case. (*Compare* 4-ER-517 (item 4) *with Wilson*, C.A. 23-50016, 2-ER-287.)

In reaching that conclusion, the court painted in the broadest of brushstrokes. It began by describing the national political climate and offering generalizations regarding unspecified "demonstrations, rallies, and protests" at unspecified locations involving unspecified participants. (1-ER-6.) "At times," the court opined, "far-right groups were responsible for causing or escalating violence, but at others, far-left groups were equally or more responsible." (*Id.*)

Next, the court analyzed "Antifa" and conduct attributed to unnamed "Antifa extremists" and "another far-left group" called "By Any Means Necessary," or "BAMN." (1-ER-6–7.) The court described rallies and demonstrations that predate and are unrelated to this case. Specifically, the court pointed to a Ku Klux Klan rally in Anaheim in February 2016 (1-ER-6), a neo-Nazi rally in Sacramento in June 2016 (1-ER-7), and an "event at UC Berkeley" in February 2017 (1-ER-8). Defendants, however, are indicted for a conspiracy beginning in February 2017 and specifically targeting victims at rallies in Huntington Beach in March 2017, the city of Berkeley in April 2017, San Bernardino in June 2017, and Charlottesville in August 2017. (2-ER-67; 2-ER-70–76.)

When describing the rallies at which defendants committed their coordinated attacks, the court continued to focus on groups and unidentified individuals. The vast majority of the "far-left activists" (1-ER-30) in the court's analysis were unnamed, including:

- "members of Antifa and related far-left groups" (1-ER-11; 1-ER-12; 1-ER-29; 1-ER-30; 1-ER-31; 1-ER-32; 1-ER-33; 1-ER-34; 1-ER-35);
- "nearly 30 protesters" (1-ER-10);
- "[o]rganizers on the left" (1-ER-12);
- "[m]embers of far-left groups like Antifa and BAMN" (*id.*);
- "an Antifa member" (1-ER-13; 1-ER-14);
- "[o]ne man" (1-ER-13);
- "[a]nother" (*id.*);
- "[a] young woman" (*id.*);
- "one Antifa member" (*id.*);
- "20 people" (1-ER-14);
- "left-wing counter-protestors" (1-ER-15);
- "[t]hree people" (*id.*);
- "far-left activists" (1-ER-30);

- "anarchist extremists" (*id.*);
- "the far left" (*id.*);
- "individuals associated with the left" (1-ER-33);
- "members of the far left" (1-ER-35; 1-ER-36); and
- "Antifa and other extremist, far-left groups" (1-ER-36).

With respect to *known individuals*, however, the defense and district court were able to identify only three purported aggressors, two men and a woman, who were not federally prosecuted: "J.A.," "J.F.," and "J.M.A." (1-ER-32–33.)[6] All three of them were at the Huntington Beach rally. (*Id.*) The court did not name or analyze a single non-prosecuted individual involved in any of the other rallies at which defendants and their RAM associates committed attacks, including the Berkeley and San Bernardino riots.

The district court's analysis of J.A., J.F., and J.M.A. was superficial. (*See* 1-ER-32–33.) Those three individuals, the court reasoned, went to the Huntington Beach rally "dressed in typical Antifa

[6] The defense cited a total of 13 individuals as "similarly situated," but the government pointed out that only three of them engaged in any act of violence in the Central District of California. (2-ER-143–45.) The district court discussed only those three.

clothing" and assaulted "Trump supporters" by "pepper spraying and punching" them. (1-ER-31.) Although the district court pronounced that "J.A., J.F., and J.M.A. clearly committed a Riotous Act" (1-ER-32), that conclusion was premised exclusively on three police reports (*see* 5-ER-676–98 (sealed exhibits C, D, and E)). And those reports did not prove that J.A., J.F., or J.M.A. instigated violence; engaged in coordinated, extensive attacks; inflicted serious injuries; or publicly bragged about their illegal conduct after-the-fact.

J.A., J.F., and J.M.A. were all arrested by local police at the scene, and J.F. said "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." (1-ER-32.) J.F. also reportedly said that he had "contacted" the others "before the event to make sure that they were going." (*Id.*) The district court assumed that they used a facility of interstate commerce, as required to violate the Anti-Riot Act, because of J.F.'s statement that he "contacted" J.A. and J.M.A. before the rally. (*Id.*)

The court said nothing about (and the defense produced no evidence regarding) those three individuals' criminal histories, whether

they were actually involved in Antifa or any other far-left group, what their roles were within any such group or vis-à-vis each other, or whether (like defendants) they repeated or continued their criminal conduct at other rallies. Nor was there any evidence of the substance of their communications with each other.

Based on that limited record, the government explained why these three alleged Antifa members were not comparable to defendants. Most obviously, there was no evidence that J.A., J.F., or J.M.A. rioted multiple times or coordinated with each other over any extended period. (2-ER-145–50.) By contrast, "[d]efendants did not merely commit a single act of battery at an isolated protest; they worked together as a violent extremist group to engage in a coordinated campaign of violence throughout 2017." (2-ER-148.)

But the district court rejected this distinction, filling in the absence of evidence establishing that at least one of the three—J.A., J.F., or J.M.A.—was similarly situated with conclusory, aggregate claims about "Antifa and related far-left groups." (1-ER-32–33.) To rebut the government's explanation for why it had prosecuted Rundo and Boman—i.e., because they "used social media to recruit new

members, trained together to engage in combat fighting, traveled throughout the state and across the country to deliberately assault those who did not share their viewpoints, and bragged in person and online about their victories" (2-ER-148)—the district court, citing only defendants' briefs, claimed that "Antifa and related far-left groups did the same" (1-ER-34–35). The court, however, did not identify any specific, prosecutable member of Antifa who had done the same.

At bottom, the court expressed little more than a policy disagreement, believing that Antifa as a whole should have received as much attention as RAM: "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." (1-ER-32–33.) In announcing that conclusion, however, the court did not point to any specific Antifa rioter who had been referred to federal authorities for potential prosecution, nor did the court acknowledge or consider any of the many right-wing rioters who were seen in videos of the various demonstrations but who were *not* prosecuted.

The court also cited no evidence that the prosecution of the two RAM members in this case (but not Antifa) was because the government "believe[d]" theirs to be the "more offensive speech." (1-ER-3.) The court drew that conclusion based only on two circumstances: (1) the fact that defendants' prosecution followed the riot and murder in Charlottesville, and (2) the lack of federal prosecution of Antifa members (or other left-wing extremists) who committed violent acts at the rallies where defendants rioted. (1-ER-30.) Returning to the same group-to-group comparison, the court reiterated its assertion that "RAM and Antifa . . . are identical in material respects," and because the government had prosecuted RAM members but not Antifa members, the court decided that it "must conclude" that the government was motivated by discriminatory intent. (1-ER-29–30.) The court therefore dismissed the indictment for a second time. (1-ER-35.)

IV

SUMMARY OF ARGUMENT

The district court abused its discretion. There is no First Amendment right to riot. Even to obtain discovery on their selective-prosecution claim—much less outright dismissal of the indictment—

defendants were required to adduce evidence of both discriminatory effect and discriminatory intent. They did neither.

The discriminatory-effect prong required defendants to identify a similarly situated control group of non-prosecuted lawbreakers who were the same as defendants in all relevant respects except that defendants were exercising their constitutional rights. The district court did none of this, instead defining a vastly overinclusive and non-specific control group of all (not even federally) prosecutable left-wing protesters who attended California rallies. And for the three individual rioters the district court did identify, there was no evidence they even violated the Anti-Riot Act, much less were similarly situated to defendants in all relevant respects.

The discriminatory-intent prong required defendants to show that they were targeted because of their *non-criminal* protest activity. Defendants here had no such protest activity; the district court erred by conflating speech with rioting. There was no evidence that defendants were targeted for prosecution because of their political views separate and apart from the motives for their crimes. The government is allowed to prosecute violence, regardless of whether it is politically motivated.

Either of the district court's legal errors independently warrants reversal.

V

STANDARD OF REVIEW

This Court has not settled on the appropriate standard for reviewing selective-prosecution claims. It has "employed both a de novo and a clear error standard," *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007), and also has reversed a dismissal order for abuse of discretion, *United States v. Turner*, 104 F.3d 1180, 1181 (9th Cir. 1997).

Here, little, if any, deference is appropriate. Typically, "pure questions of law and mixed questions of law and fact are reviewed de novo." *United States v. Estrella*, 69 F.4th 958, 964 (9th Cir. 2023). That standard should apply to the mixed question of law and fact here. In any event, however, a district court necessarily abuses its discretion "when it applies the incorrect legal standard or if its application of the correct legal standard was illogical, implausible, or without support from the facts in the record." *United States v. Williams*, 68 F.4th 564, 571 (9th Cir. 2023). "Reversal is warranted when the district court

misperceives the law or does not consider relevant factors and thereby misapplies the law." *Id.* (quotation marks omitted).

VI

ARGUMENT

A. Successful Selective-Prosecution Claims Are Extraordinarily Rare, As They Should Be, Because Claimants Must Demonstrate Both Discriminatory Effect and Discriminatory Intent

Because "[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." *Armstrong*, 517 U.S. at 464 (cleaned up). As a result, "[i]n the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.*

That presumption of regularity "also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Id.* at 465. "[T]he Executive Branch has exclusive authority

and absolute discretion to decide whether to prosecute a case," *United States v. Nixon*, 418 U.S. 683, 693 (1974), and in all but the most extraordinary circumstances, the separation of powers commands "that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions," *United States v. Olson*, 504 F.2d 1222, 1225 (9th Cir. 1974). "Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also United States v. Banuelos-Rodriguez*, 215 F.3d 969, 977 (9th Cir. 2000) ("We repeatedly have echoed that theme," citing cases).

To overcome these separation-of-powers concerns and obtain dismissal of criminal charges on a theory of selective prosecution, a defendant must present "clear evidence" that the government's decision to prosecute was "based on an unjustifiable standard such as race,

religion, or other arbitrary classification." *Armstrong*, 517 U.S. at 464–65 (citations omitted). "Mere selectivity in prosecution creates no constitutional problem." *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972). *Armstrong*'s "demanding" and "rigorous" standard, 517 U.S. at 463, 468, requires proof "that the federal prosecutorial policy had a discriminatory effect *and* that it was motivated by a discriminatory purpose." *Id.* at 465 (emphasis added). "Both prongs must be demonstrated for the defense to succeed." *Turner*, 104 F.3d at 1184. Defendants bear "the burden of proving both elements," and this Court "view[s] the evidence in the light most favorable to the government." *United States v. Culliton*, 328 F.3d 1074, 1080-81 (9th Cir. 2003).

***

The district court misunderstood and misapplied these principles. As set forth in the following two subsections, the court erred in its analysis on both prongs.

B. Defendants Failed to Demonstrate Discriminatory Effect

To prove discriminatory effect, a defendant must show that "others similarly situated generally have not been prosecuted for

conduct similar to that for which he was prosecuted." *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975); *see also United States v. Arias*, 575 F.2d 253, 255 (9th Cir. 1978) (same). The similarly situated comparison or "control group" must be the same as the defendant "in all relevant respects, except that defendant was, for instance, exercising his first amendment rights." *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989), *superseded by statute on other grounds as stated in United States v. Gonzalez-Torres*, 309 F.3d 594, 599 (9th Cir. 2002). Lawbreakers are not "similarly situated" unless they "committed the same basic crime in substantially the same manner," such that their prosecutions "would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan." *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000).

The standard therefore requires defendants to demonstrate a close fit between themselves and their proposed control group. Thus, in *Turner*, this Court rejected the argument that large-scale crack-cocaine defendants associated with violent street gangs could compare themselves to crack-cocaine defendants who may not have been "gang

members who sold large quantities of crack." 104 F.3d at 1185. By omitting that "principal characteristic"—gang membership—the defendants failed to show they were "similarly situated" to the other crack dealers they cited. *Id.*

The district court made an even more serious error here. It defined an impossibly broad comparator class of unidentified "members of Antifa and related far-left groups" that engaged in any measure of criminal violence at any rally or protest in California. (1-ER-11; 1-ER-12; 1-ER-29; 1-ER-30; 1-ER-31; 1-ER-32; 1-ER-33; 1-ER-34; 1-ER-35.) The court dismissed the indictment on the theory that "RAM and Antifa, which both appear to use violence to silence protected speech, are identical in material respects." (1-ER-30.) The proper comparison is not between right-wing and left-wing rioters generally or even between RAM and Antifa. A "claimant must show that similarly situated *individuals* . . . were not prosecuted." *Armstrong*, 517 U.S. at 465 (emphasis added). That "showing of failure to prosecute similarly situated *individuals*" is an "absolute requirement." *Id.* at 467 (emphasis added). The control group of "similarly situated *persons*" must be equivalent to defendants "in all relevant respects," *Aguilar*, 883

F.2d at 706 (emphasis added), having committed "the same basic crime in substantially the same manner," *Smith*, 231 F.3d at 810.

1. Defendants Failed to Identify a Single Similarly Situated Individual Who Was Not Prosecuted

Defendants identified no similarly situated individuals at all. The district court considered only three known individuals, J.A., J.F., and J.M.A. (1-ER-31–32), and they were not similarly situated. In fact, defendants failed to show that J.A., J.F., or J.M.A. even *could have been* prosecuted under the Anti-Riot Act, much less that there was similarly strong evidence against any of them or similar factors bearing on the decision whether to federally prosecute them.

The only evidence against J.A., J.F., or J.M.A. was set forth in three police reports regarding the Huntington Beach rally. (5-ER-676–98.) Those reports indicated:

- J.F. pepper-sprayed a woman in the face "causing temporary injury," before "running away from the altercation, being followed by a group from the event." (5-ER-678.) Others claimed J.F. "had pepper sprayed them too." (5-ER-679.) J.F. said he only began pepper spraying "in self-defense" after he saw J.A. get punched in her face. (*Id.*) He reported that he was

"punched and knock[ed] to the ground by multiple people" before he managed to run away. (*Id.*)

- J.A. pepper-sprayed a woman and punched a man in the face—perhaps with "an open palm strike"; a photo of the man's face revealed a very small cut on the bridge of his nose. (5-ER-684–85; 5-ER-689; 5-ER-692.) A man then "grabbed" J.A., "held onto [her]," and "handed her off to law enforcement." (5-ER-684; 5-ER-691.)
- J.M.A. was involved in a physical altercation that involved 30-40 people, and he "pepper sprayed multiple Trump supporters." (5-ER-695.) The arresting officer said that J.M.A. was "an anti-Trump protester," "one of the primary combatants that incited the riotous situation," and "physically assaulting people within the larger fight." (5-ER-695; 5-ER-697.) The officer believed that J.M.A. was engaged "in a physical fight with [] pro-Trump supporters" and "was trying to hit other people with [a] flag pole as he kicked and punched others around him." (5-ER-697.) However, J.M.A. complied with the officer's commands first to lie on his back with his hands in the air and then to roll onto

his stomach. (5-ER-695; *see also* 5-ER-697 (arresting officer alleging that J.M.A. complied "reluctantly" and "appeared to be confused").) While he was complying, the arresting officer's patrol dog bit J.M.A.'s foot, causing "minor punctures." (5-ER-695.) The officer found a folding knife and a pipe with a "leafy green substance" in J.M.A.'s pocket. (5-ER-698.)

That evidence would not have established a violation of the Anti-Riot Act, much less similarly strong factors weighing in favor of federal prosecution. The statute requires travel in interstate or foreign commerce or the use of a facility of interstate commerce with intent to engage in one of the prohibited rioting purposes. 18 U.S.C. § 2101(a); *Rundo I*, 990 F.3d at 715-16; *United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992) ("The use of a facility of interstate commerce is an essential element of an anti-riot act offense."). The district court assumed the interstate-commerce element could be satisfied because a single police report indicated that J.F. said he "contacted" "the man and woman that he came with" to the Huntington Beach rally. (1-ER-32; 5-ER-679.) Based on that double-hearsay "admission" of contact, the court drew the "assumption" "that J.F., J.A., and J.M.A. communicated

by using a facility of interstate commerce." (1-ER-32.) But assumptions are not evidence—let alone proof beyond a reasonable doubt, as would be required to convict J.A., J.F., and J.M.A.—and the district court had no basis to rule out the possibility that they communicated in person. (*See* 3-ER-320 (government's argument that prosecutors would not present an Anti-Riot Act complaint to a magistrate judge based on the mere *assumption* that defendants must have coordinated using the internet or phone lines, even if that seems likely as a practical matter).)

More importantly, mere "communication" would not suffice, even if it was accomplished using a facility of interstate commerce. A defendant must use the interstate facility *with intent* to commit one of the enumerated riot acts, and thereafter commit or attempt an enumerated act. 18 U.S.C. § 2101(a). That requires both "proof of intent and proof that the overt act was committed for the purpose of a riot." *Rundo I*, 990 F.3d at 719 (cleaned up); *accord Markiewicz*, 978 F.2d at 813 (the government must "prove a defendant's intent at two points in time—when the defendant uses a facility of interstate commerce with the intent to incite a riot, and when the defendant commits an overt act"); *United States v. Dellinger*, 472 F.2d 340, 394

(7th Cir. 1972) (same). Defendants presented zero evidence that any of the three supposedly comparable Antifa rioters harbored the requisite intent at the time they (assumedly) used a facility of interstate commerce, and the district court had no basis to assume they did. In contrast, the government compiled extensive evidence of defendants' intent at the time they used interstate facilities, based on numerous electronic communications, their training sessions, their social-media posts, and their repetitive conduct at multiple protests.

But even if there had been any evidence that J.A., J.F., J.M.A., or anyone else actually could have been prosecuted under the Anti-Riot Act, defendants came nowhere close to identifying any unprosecuted lawbreaker who was "the same" as defendants "in all relevant respects." *Aguilar*, 883 F.2d at 706. That requirement is rigorous by design. The Executive's charging decisions are "particularly ill-suited to judicial review" because prosecutors must evaluate "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte*, 470 U.S. at 607. Charging decisions entail "careful professional judgment as to

the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated." *United States v. Redondo-Lemos,* 955 F.2d 1296, 1299 (9th Cir. 1992).

While the government may not defeat a selective-prosecution claim by invoking distinctions that have no bearing on the decision whether to prosecute, a "multiplicity of factors legitimately may influence the government's decision to prosecute one individual but not another," *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008), and defendants are not similarly situated unless "their circumstances present *no* distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them," *United States v. Venable*, 666 F.3d 893, 900-01 (4th Cir. 2012) (emphasis added).

Here, multiple such factors set defendants apart.

First, the evidence in this case is strong and the crimes serious: defendants are on video starting fights and beating multiple victims, and on record plotting to do so ahead of time and celebrating their violent achievements—including by publicly referring to their conduct

as a "riot" (4-ER-555–56). The evidence against J.A., J.F., and J.M.A., and the severity of their crimes, pales in comparison: three police reports indicate that they were arrested at a single rally after engaging in moderate violence—and sustaining their own injuries too. The district court ignored that disparity when treating J.A., J.F., and J.M.A. as similarly situated comparators and when equating Boman's "assertion" of self-defense (made years after his indictment and while reneging on his plea) with J.F.'s contemporaneous statement that he brought pepper spray to the Huntington Beach rally for self-defense. (1-ER-32.) The government, in making charging decisions, can and should distinguish between defendants whose claims are belied by recorded evidence, including their own boastings, and individuals with potentially more credible defenses.

Second, defendants were organized and effective: they were tactically trained and dangerous criminal associates who joined together in a "combat-ready, militant group," *see Rundo I*, 990 F.3d at 712, as their online bragging reflected. By contrast, J.A., J.F., and J.M.A. went together to a single rally. (5-ER-679.) There is nothing improper about prioritizing the prosecution of organized criminals who

commit violence on multiple occasions and publicize their intent over three individuals who attended a single public demonstration. The federal government is entitled to focus its resources on ongoing, organized crime.

Third, defendants are both previously convicted violent felons. Rundo stabbed a man multiple times without provocation in a gang attack. (4-ER-574.) Boman also had a criminal history that included convictions for violent crimes and a lengthy juvenile record. (2-ER-65.) The district court identified no evidence that J.A., J.F., or J.M.A. had similarly violent criminal pasts.[7] Absent "a criminal history as substantial" as defendants', J.A, J.F., and J.M.A. were not "similarly situated." *See United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011).

Fourth, the record does not reflect whether J.A., J.F., J.M.A., or any other alleged Antifa rioter was prosecuted by state or local

[7] One statement in a police report suggests that J.F. had a prior conviction for "remain[ing] at the scene of a riot." (5-ER-679.) Nothing in the record suggests J.F. engaged in violence on that occasion, and there is no record evidence that J.A. or J.M.A. had any prior convictions.

authorities. "J.A., J.M.A., and J.F. were all arrested for inciting a riot, battery, and illegally using tear gas" (1-ER-12), but there is no information in the record as to whether the state pursued those charges. If the state did prosecute them, that would be a valid reason to decline federal charges. *See Petite v. United States*, 361 U.S. 529, 530 (1960) (noting Department of Justice policy generally to avoid "duplicating federal-state prosecutions" out of "fairness to defendants and of efficient and orderly law enforcement"); *Venable*, 666 F.3d at 901 (federal charging decisions may consider whether the state is prosecuting). And if the state elected not to prosecute, that might reveal deficiencies in the evidence or other legitimate bases to forgo federal prosecution.

The absence of information on these subjects demonstrates that defendants came nowhere close to satisfying their burden of identifying any similarly situated individual who was not federally prosecuted.

2. Defendants' Claim Fails Even if Comparing Groups, Not Individuals

Even if groups, rather than individuals, were the correct level of analysis (which, as noted, is wrong), defendants did not establish that focusing prosecutorial resources on RAM rather than Antifa would have

been impermissible. The "deterrence of widespread" criminal activity is a "proper prosecutorial consideration," *United States v. Ness*, 652 F.2d 890, 892 (9th Cir. 1981), and there may be deterrence value in focusing on particular criminal organizations at a particular time. On other occasions and in other cases, the government has focused resources on Antifa. *See, e.g.*, Attorney General William P. Barr, "Task Force on Violent Anti-Government Extremists" (June 26, 2020) (mentioning Antifa by name), *available at* https://www.justice.gov/archives/ag/page/file/1327271/download.

Indeed (and incongruously), the government has been accused of selective prosecution for *charging* Antifa and other left-wing lawbreakers. *See e.g.*, *United States v. Wilson,* C.A. No. 23-50016; *United States v. Harold*, 23-CR-49, Docket No. 39 at 9-11 (D. Or. Apr. 12, 2024) (seeking discovery to support the assertion that federal law enforcement targeted "individuals who were protesting in support of left-wing causes"). But, regardless, there is nothing improper about prioritizing the prosecution of a particular extremist group on a particular occasion for any legitimate law-enforcement reason. *Cf. Wood v. Moss*, 572 U.S. 744, 761–62 (2014) (Secret Service agents can

treat different groups of protestors differently if they have any "objectively reasonable security rationale for" doing so and are not "act[ing] solely to inhibit the expression of disfavored views").

In fact, even if the government consistently and exclusively focused its resources on RAM over Antifa—which it has not—there could be legitimate reasons for doing so. Antifa is a "loose affiliation" of "activists" (1-ER-6); RAM is an organized "combat-ready, militant group," *Rundo I*, 990 F.3d at 712, whose leadership lived and operated within the Central District of California. Focusing resources on a criminal enterprise within the prosecuting office's jurisdiction is sensible. That would fall comfortably within the wide range of legitimate factors that influence charging decisions, and which the district court was ill-suited to second-guess. *See Wayte*, 470 U.S. at 607.

Recent decisions dealing with the January 6, 2021 Capitol riot illustrate this principle. Multiple defendants in those cases have unsuccessfully argued that they were the victims of selective prosecution because rioters who attacked the federal courthouse in Portland were not prosecuted. *See, e.g.*, *United States v. Padilla*, 2023 WL 1964214, at *4-7 (D.D.C. Feb. 13, 2023); *United States v. Brock*, 628

F. Supp. 3d 85, 99-103 (D.D.C. Aug. 31, 2022); *United States v. Rhodes*, 2022 WL 3042200, at *5 (D.D.C. Aug. 2, 2022); *United States v. Judd*, 579 F. Supp. 3d 1, 3–4 (D.D.C. 2021). That claim has consistently failed, *see Padilla*, 2023 WL 1964214, at *4 ("no selective prosecution claims by January 6th Defendants have been granted to date, even in the request for discovery"), because there are "distinguishable legitimate prosecutorial factors that might justify different prosecutorial decisions," including the time of day of each riot, the threat each riot posed to others, the planning involved, and the methods employed. *Id.* at *6; *Brock*, 628 F. Supp. 3d at 99; *Rhodes*, 2022 WL 3042200, at *5; *Judd*, 579 F. Supp. 3d at 8.

The district courts in those cases have appreciated how extraordinary it is for judges to second-guess prosecutorial charging decisions. In *Judd*, for example, the court appeared to agree with the defendant's policy objection to the government's differential treatment of the Capitol rioters compared to the Portland rioters—yet the court still denied defendant's selective-prosecution claim, because it fell short of the "rigorous" showing (even for discovery) required by *Armstrong*. 579 F. Supp. 3d at 5, 7–9. The *Judd* court acknowledged that "[f]ew

subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings." *Id.* at 4. The district court here did not abide by that principle.

Moreover, the district court compounded its error by painting in broad brushstrokes and substituting rhetoric for evidence. Without any "solid, credible evidence" to go on about whether any other riot suspect was similarly situated to defendants in "all relevant respects," *Bourgeois*, 964 F.2d at 940; *Aguilar*, 883 F.2d at 706, the court resorted to "personal conclusions based on anecdotal evidence" of the sort rejected in *Armstrong*, 456 U.S. at 470. The court thought it adequate to point out that the government had failed to prosecute any unnamed "member of Antifa or related far-left groups" who committed any unidentified "violent conduct" at any unspecified "pro-Trump events." (1-ER-34.) But the Supreme Court has condemned such a 30,000-foot-view approach. "[R]aw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*." *United States v. Bass*, 536 U.S. 862, 864 (2002). Speculating that some left-wing rioters must have violated the Anti-Riot Act at some point in some

way that merited federal prosecution simply will not do. The district court erred by evaluating "discriminatory effect" based on the sort of generalized, overbroad statistics and suppositions that precedent prohibits. For this reason alone, its decision should be reversed.

C. Defendants Failed to Demonstrate Discriminatory Intent

Defendants also failed to carry their burden to demonstrate discriminatory intent.

1. Defendants Failed to Establish Any Discriminatory Motive

Defendants, in fact, did not produce *any* evidence of the government's intent, and the district court pointed to none. Indeed, the court began its analysis by recognizing that defendants' prosecution was *not* the product of discriminatory intent: "The government prosecutes Defendants because they committed violence and political rallies with the alleged intent of shutting down speech with which they disagreed." (1-ER-5.) The government, moreover, proffered "many facial neutral reasons why it pursued prosecutions against RAM members such as Defendants," who "likely committed violence for which they deserve to be prosecuted." (1-ER-3; 1-ER-34.) That should have ended the analysis. The government supplied ample legitimate reasons for its

decision to charge defendants, and defendants did not carry their burden to show that those reasons were pretextual.

Instead, defendants and the court again resorted to speculation, citing just two circumstances: the timing of the investigation and the purported discriminatory effect. (1-ER-30–31; 2-ER-117–21.) Neither holds water.

The timing argument is a non-starter. The government began investigating defendants' crimes shortly after they committed them, based on an incoming tip that RAM members were publicly bragging about their involvement in a lethal event, and defendants were indicted only after the government compiled extensive evidence of their planning, coordination, and violence. The fact that the investigation began from a tip about Rundo's co-founder, Daley—who, as described above, traveled to Charlottesville, rioted there, and was prosecuted for it—does not somehow taint defendants' prosecution. Nor was there anything improper or unreasonable about the fact that defendants were investigated after a victim died in Charlottesville.[8] Launching an

[8] In any event, although there also is no evidence of improperly discriminatory motive on the part of the federal agents who

(continued . . . .)

investigation in response to a tip about a murder is evidence of good law enforcement, not bias.

Furthermore, while there is nothing suspicious about investigating and prosecuting crimes soon after they happen or in response to a murder, even suspicious "timing" is not alone sufficient to establish "actual discriminatory intent." *See Advanced Life Sys., Inc. v. NLRB*, 898 F.3d 38, 48-49 (D.C. Cir. 2018); *Mitchell v. Superior Ct.*, 312 F. App'x 893, 895 (9th Cir. 2009) ("timing" was inadequate "to rebut" facially neutral reason supported by the record); *Pugh v. City of Attica*, 259 F.3d 619, 628–29 (7th Cir. 2001) ("timing alone does not create a genuine issue as to pretext"); *Sherman v. Runyon*, 235 F.3d 406, 410 (8th Cir. 2000) ("timing on its own is usually not sufficient to show" that a non-discriminatory rationale "is merely pretext"); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 330 (5th Cir. 1998) ("Timing standing alone is not sufficient absent other evidence of pretext."). The fact that white supremacists were investigated after a different white supremacist

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investigated this case, the selective-prosecution analysis turns on the government's charging decision, not its underlying investigation. *See United States v. Sellers*, 906 F.3d 848, 852–53 (9th Cir. 2018) (distinguishing between selective prosecution and enforcement).

killed someone (at an event RAM attended) does not prove that the government made any "charging decisions based solely on Defendants' reprehensible speech and beliefs." (1-ER-30.)

Apart from timing, defendants and the court reverted to their preceding (and erroneous) discriminatory-effect analysis. (*Id.*; 2-ER-118–20.) Based on the fact that the government prosecuted members of RAM but not Antifa, the court reasoned that it "must conclude" the government was motivated by an unconstitutional purpose. (1-ER-30–31.) That approach effectively collapsed the two required prongs of the "demanding" and "rigorous" selective-prosecution standard—discriminatory effect *and* discriminatory intent—into a single prong. *See Armstrong*, 517 U.S. at 463, 465, 468 (requiring proof "that the federal prosecutorial policy had a discriminatory effect *and* that it was motivated by a discriminatory purpose" (emphasis added)); *Turner*, 104 F.3d at 1184 ("Both prongs," discriminatory effect and discriminatory purpose, "must be demonstrated for the defense to succeed.").

Even assuming defendants demonstrated discriminatory effect (which they did not), that evidence was far too thin a reed to support a showing of discriminatory intent. Although evidence of discriminatory

impact may contribute to an inference of discriminatory purpose, impact "is not the sole touchstone," and a facially neutral policy serving legitimate ends is not unconstitutional "solely because" a disparate impact results. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 242 (1976); *see also Crawford v. Bd. of Ed. of Los Angeles*, 458 U.S. 527, 537-38 (1982) ("[T]his Court previously has held that even when a neutral law has a disproportionately adverse effect . . . [the Constitution] is violated only if a discriminatory purpose can be shown.").

The lone (nineteenth century) case the district court cited to support its inference of discriminatory intent, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (1-ER-31), is not remotely comparable. The racial discrimination in *Yick Wo* was obvious, stark, and complete. San Francisco revoked the laundry-business permits of 200 Chinese nationals but allowed "80 others" who were "not Chinese" "to carry on the same business under similar conditions." *Yick Wo*, 118 U.S. at 374. The Chinese petitioners "complied with every requisite" under the law "to carry on, in the accustomed manner, their harmless and useful

occupation," and since "[n]o reason" for the disparate racist treatment could be shown, "[t]he fact of this discrimination [was] admitted." *Id.* Nothing of the sort happened here. Proof that a handful of militant white supremacists were federally prosecuted for organized attacks while unidentified and readily distinguishable left-wing protestors were not prosecuted (at a particular place and time) does not even establish discriminatory effect, much less allow a circumstantial finding of discriminatory intent under *Armstrong*'s demanding standard.

2. There Is Nothing Impermissible About Prosecuting Politically Motivated Violence

Defendants also cannot meet the discriminatory-intent requirement because they cannot show they were targeted based on their *non-criminal* protest activity. Even if the government had focused on RAM over Antifa in the aftermath of the deadly Charlottesville riot, there was still no evidence that defendants were targeted for prosecution because of their political views *separate and apart* from the motives for their crime.

"The First Amendment does not protect violence." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Rioting is not protected merely because it may be politically motivated, nor is it protected because it's

expressive, and the government is allowed to prosecute politically motivated violence without adhering to an ideological quota—and cannot be assumed to have been motivated by an unconstitutionally discriminatory purpose merely because some politically motivated rioters were prosecuted while others were not.

The district court was correct about this much: "Neither RAM nor Antifa have the right to violently assault their political opponents." (1-ER-36.) The government had discretion to prosecute members of RAM; it also had discretion to prosecute members of Antifa. Focusing prosecutorial resources on specific groups of violent anti-government extremists is a legitimate exercise of prosecutorial discretion, not illicit discrimination, because having a political motive for one's crime is not a defense. Neither law nor common sense prevents federal prosecutors from using a federal riot statute against politically motivated rioters. And, again, the government is allowed to have "enforcement priorities," *Wayte*, 470 U.S. at 607, including deterring politically motivated criminal conduct, *see Ness*, 652 F.2d at 892 (tax defiers). Speech and political activity are constitutionally protected; political *motives* for crime are not.

The district court erroneously conflated the two, finding that defendants (and other members of RAM) "engaged in violent acts" at rallies and protests but nonetheless faulting the government for "singl[ing] out and punish[ing]" RAM's "speech." (1-ER-3; *see also id.* ("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.").) That was a critical mistake: what defendants did was *rioting*, not speech. There was no evidence defendants were targeted for their speech. Violence is not constitutionally protected *even when* it is expressive. *See Mitchell*, 508 U.S. at 484.

As the government argued before the district court, the constitutionally protected expressive activity must be *separate* from the crime. (2-ER-151–55.) Otherwise, the government could not prosecute defendants who openly refused to register for the draft or pay taxes. *But see Wayte*, 470 U.S. 598 at 610; *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981); *Ness*, 652 F.2d at 892. To be sure, the government cannot engage in "content discrimination" that is "unrelated" to the

"proscribable" conduct at issue. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992). But a criminal's "motive" for committing a crime is not protected by the First Amendment. *Mitchell*, 508 U.S. at 485–86.

That is true even when the motive is political. "Content discrimination" does not violate the First Amendment when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Virginia v. Black*, 538 U.S. 343, 361 (2003) (cross-burning with intent to intimidate). By the same token, the government can treat threats against the President differently from normal threats, even if there might be (and likely is) some political motive to those threats. *See R.A.V.*, 505 U.S. at 388; *see also Mitchell*, 508 U.S. at 489 (noting that there is no First Amendment right to commit treason, citing *Haupt v. United States,* 330 U.S. 631 (1947)). "[A]cts are not shielded from regulation merely because they express a[n] . . . idea or philosophy." *R.A.V.*, 505 U.S. at 390. Were the rule otherwise, hate crimes would be shielded by the First Amendment. *But see Mitchell*, 508 U.S. at 485–86. Other crimes would be too. The government would be unable to prioritize the prosecution of any politically motivated criminals, from tax defiers, *see Ness*, 652 F.2d at

892, to January 6 rioters, *see Rhodes*, 2022 WL 3042200, at *5; *Judd*, 579 F. Supp. 3d at 3-4. The implication of defendants' claim here is that their extremist right-wing views insulate them from prosecution. "On principle, such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law." *Wayte*, 470 U.S. at 614. Being a fan of Adolf Hitler (or, for that matter, Che Guevara or Joseph Stalin) may be constitutionally protected, but it confers no "immunity from prosecution." *Id.*

This distinction between speech and crime is also clear from the lone precedent of this Court finding merit to a selective-prosecution claim. In *Steele*, the government prosecuted four defendants for refusing to answer the census, in violation of 13 U.S.C. § 221. 461 F.2d at 1150. Those four defendants were the only people in Hawaii chosen for prosecution, even though "Steele himself located six other persons who had completely refused on principle to complete the census forms" but who were not prosecuted. *Id.* at 1151. The four defendants selected for prosecution "had participated in a census resistance movement, publicizing a dissident view of the census as an unconstitutional

invasion of privacy and urging the public to avoid compliance with census requirements." *Steele*, 461 F.2d at 1150–51. The six non-responders who were not prosecuted had not "taken a public stand against the census." *Id.* at 1151.

The facts in *Steele* also met the discriminatory-intent standard because, according to this Court, the four prosecuted defendants were targeted for *actually protected* conduct. They had exercised their First Amendment rights by holding a press conference, leading a protest march, distributing pamphlets criticizing the census, broadcasting editorials, and speaking out against the census on the radio. *Id.* at 1151. They could not be selected for prosecution based on that *separate*, non-criminal, protected expression. The defendants in *Steele* did not punch and kick the census-taker. Although their refusal to respond to the census was itself expressive—the point was to convey the same census-opposition message—it was the *separate speech* that was protected, not the crime itself. *Steele* was the rare case where a defendant was able to show that "the Government prosecuted him *because of* his protest activities," as opposed to any expressive content inherent in his crime. *Wayte*, 470 U.S. at 610.

In *Wayte*, by contrast, both the Supreme Court and this Court rejected a selective-prosecution claim brought by a defendant who refused to register for the Selective Service. *See Wayte*, 710 F.2d 1385, *aff'd*, 470 U.S. 598. The question was not whether the crime of refusing to register had expressive content—it obviously did, especially in 1980 when there was no draft. The question was whether the defendants were targeted for some separate, constitutionally protected, *non-criminal* expression. They were not, despite the government's "passive enforcement system" under which only people who admitted to failing to register were prosecuted. 470 U.S. at 608–09. Whatever "discriminatory effect" that system may have had against anti-draft protestors, there was no discriminatory intent, because the government's target was the crime (and how efficiently it could prove the crime) rather than any protected speech *separate* from the crime. *Id.* at 610. The defendants in *Wayte* were prosecuted because the government could readily prove their crime, not because they "publicy protest[ed] the draft." *Id.* at 609–10 (citation omitted). This system "did not subject vocal nonregistrants to any special burden" but simply allowed the government to prosecute the cases for which it had the

"strong[est]" and most readily available evidence. *Id.* at 610, 612; *see also Wilson*, 639 F.2d at 505 (government can prosecute vocal criminal "tax protestors[] who seek by various attention-getting devices to attract enforcement attention" because their admissions present the government with "the strongest cases"). That is analogous to what happened here.

In this case, the defense and district court pointed to no separate, non-criminal speech at all. Defendants do not claim that they were targeted for prosecution because of a social-media post, press conference, or distributing pamphlets. *Cf. Steele*, 461 F.2d at 1151. Defendants' expressive conduct was almost entirely related to rioting and conspiring to do so. And like the defendants in *Wayte* and *Wilson*, they were caught because they bragged about it after the fact.[9] Even accepting defendant's factual allegations as true, they were not prosecuted based on any expressive activity separate and apart from

[9] Meanwhile, as the government noted before the district court, plenty of right-wing and left-wing rioters were arrested at the various rallies and not federally charged. (2-ER-155.)

their crimes. *See Black*, 538 U.S. at 361; *Mitchell*, 508 U.S. at 485–86; *R.A.V.*, 505 U.S. at 390.

In short, there is no evidence of discriminatory intent. Defendants were charged because the government had damning evidence that they plotted extreme violence and committed it, attacking their political opponents at multiple political rallies after conspiring online and via text messages to do so. Defendants violated the Anti-Riot Act in brutal fashion. This case should be sent back to the district court so they can be prosecuted.

VII

CONCLUSION

This Court should reverse the district court's order dismissing the indictment and remand the case for prosecution.

DATED: April 22, 2024

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STATEMENT OF RELATED CASES

As noted above, *United States v. Wilson & Beasley*, C.A. No. 23-50016, is a mirror-image case where the district court dismissed an indictment on the ground that the government was discriminating *against* (rather than in favor of) "Antifa and related far-left groups." (1-ER-2.) Oral argument in *Wilson* is scheduled for May 6, 2024, in Pasadena Courtroom 3.

The prior appeal in this case was C.A. No. 19-50189.

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the brief contains 11,070 words, including 39 words manually counted in any visual images and excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: April 22, 2024

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