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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. ROBERT RUNDO, ROBERT BOMAN, AARON EASON, and TYLER LAUBE Defendants	**CASE NO.: CR 18-759-CJC** **REPLY BRIEF OF PROPOSED AMICUS CURIAE FREE EXPRESSION FOUNDATION, INC. IN SUPPORT OF ITS APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

The Free Expression Foundation, Inc. ("FEF") respectfully submits this reply brief in response to the brief filed by the Government in opposition to FEF's application for leave to file an amicus curiae brief in support of the Motion to Dismiss the Government's Indictment filed by defendants Robert Rundo, Aaron Eason, and Tyler Laube.

INTRODUCTION

Defendants, as one of their arguments in their Motion to Dismiss the Indictment, have made a facial challenge to the Anti-Riot Act based on its effects on protected conduct and speech, i.e., a challenge for "overbreadth. " The Indictment presents a fixed factual account which would allow an overbreadth facial challenge, in contrast to an "as applied challenge" that

requires development of the facts as applied to particular defendants. FEF's proposed amicus brief is intended to call the Court's attention to a "roadmap" for the complex question of dealing with laws that have a broad impact on First Amendment protected speech but also may have proper applications to criminal acts. The roadmap is language in *United States v. Williams*, 553 U.S. 285 (2008), language which neither the Government nor the defense cited in their briefs. FEF, accordingly, submits that its discussion of the *Williams* balancing test is useful to the Court in providing a perspective, and a critically important one, not developed by the parties.[1]

ARGUMENT: The Williams Guidelines Are Useful

The *Williams* decision states:

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks,* 539 U.S. 113, 119-120, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional— particularly a law directed at conduct so antisocial that it has been made criminal— has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. See *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L. Ed. 2d 388(1989); *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Invalidation for overbreadth is "`"strong medicine"'" that is not to be "casually employed." *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) (quoting *Ferber,* 458 U.S., at 769, 102 S. Ct. 3348). The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.

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[1] [1] The government asserts that FEF is aligned with the defendants and is not a true Friend of the Court, as purportedly shown by the few matters to which FEF has so far sought to contribute its advocacy. FEF, however, has been an approved 501c3 for less than a year. It is open to defending the First Amendment rights of persons across the political spectrum. The government's assertions notwithstanding, it has never engaged in "private consultations." It has never received money from any persons or entities it has sought to help.

Williams thus requires the Court to make a series of decisions regarding the Anti-Riot Act. The case instructs that the "first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." The court must also look at the statute's "plainly legitimate sweep." As part of assigning the proper "weight" to the cost of invalidating the Anti-Riot Act, FEF's proposed amicus brief suggests that the law has rarely used. This very contention was made by the government itself at a hearing in Virginia, as appears in Exhibit 1 (Opinion by Judge Moon) to Government's opposition to the Motion to Dismiss: "Relatedly, the Government suggested at oral argument that the Court could rest easy with respect to Defendants' First Amendment challenges because prosecutions under § 2101 have been rare." Exhibit 1, page 15, footnote 16. The Government's present response to FEF's Application seems to contradict this assertion. FEF does not object to the introduction of new information if it is potentially useful to court. The fact that the Government takes one position in one court and a different one in another court, however, is symptomatic of the great uncertainty that infects this statute. Moreover, such factual matters as the frequency of use of the Anti-Riot statute, and many others – e.g., the extent to which "facilities of interstate commerce" have expanded in the last 50 years, the current cause of many or most riots as opposed to 50 years ago, and the actual intentions of people as they organize or participate in a legal assembly, lie outside the the proper scope of a motion to dismiss and indictment. These very wide ranging complicated factual matters would be useful to the court in considering if there is a valid judicial construction which avoids abridgment of First Amendment interests, as suggested by the Seventh Circuit in *United States v. Dellinger*, 472 F.2d 340, 357 (7th Cir. 1972).

FEF also wishes to call the attention of the Court to 18 U.S.C. §2101 (d) and its potential to disrupt the proceedings. 18 U.S.C. §2101 (d) provides:

> Whenever, in the opinion of the Attorney General or of the appropriate officer of the Department of Justice charged by law or under the instructions of the Attorney General with authority to act, any person shall have violated this chapter, the Department shall proceed as speedily as possible with a prosecution of such person hereunder and with any appeal which may lie from any decision adverse to the Government resulting from such prosecution**.**

This suggests that the government will be applying for an interlocutory appeal if the amicus brief is allowed. Here again, this shows the statute in its true light: a mixture of broad scope, massive uncertainty, and governmental overkill.

CONCLUSION

FEF respectfully submits that its discussion of the *Williams* road map is helpful and appropriate for an amici brief and the Court should accept it at this time. FEF acknowledges, however, that application of *Williams* might engage the Court in the search for information on a wide range of social issues, and accordingly the Court might also conclude that the interests of defendants, the Government, and the Court may be to delay ruling on FEF's application until the context for a full *Williams* balancing analysis is present.

Respectfully submitted,
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Andrew Allen
Attorney for The Free Expression Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of May, 2019, I caused a true and correct copy of the foregoing document to be served via the court's Electronic Case Filing system on all parties to the case.

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Andrew Allen