IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
vs.	*	**Case No. 21-cr-0175-3 (TJK)**
	*	
ZACHARY REHL	*	
Defendant	*	
	*	

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ZACHARY REHL'S MOTION FOR LEAVE TO RESPOND TO THE PRESS RELEASE ISSUED BY THE DEPARTMENT OF JUSTICE

Zachary Rehl, by his undersigned counsel, respectfully moves this Honorable Court for leave to respond to the press release issued by the Department of Justice today in connection with the filing of the Third Superseding Indictment, which apparently was returned by the Grand Jury some time today. Under the Local Rules of this Court, counsel are limited in comments they may make to the media about pending cases. *See* Local Criminal Rule 57.7. Nonetheless, the government by issuing a press release, effectively is able to get around the Local Rule whereas Mr. Rehl does not have the ability to respond in kind.

Without adding a single factual allegation concerning Mr. Rehl, the government today filed the Third Superseding Indictment in the instant case, nearly 1-1/2 years after Mr. Rehl was first indicted and detained pretrial and just two months before he is scheduled to begin trial. Mr. Rehl is now charged with seditious conspiracy, an offense that requires the government to prove that Mr. Rehl "conspire[d] to overthrow, put down, or to destroy by force the Government of the United States." Yet, the Third Superseding Indictment does not allege that Mr. Rehl used force at any time nor encouraged anyone to do so.

The last time the United States Government charged seditious conspiracy outside the al Qaeda context and more recently against some of the Oath Keeper defendants, was in 2011, against the Hutaree militia. In that case, the federal district court granted a judgment of acquittal at the end of the government's case. Before then, the charges had only been filed a handful of times in the 20th Century. *See, United States v. Stone*, 2012 WL 1034937 (E.D. Mich. 2012).

As the Court is well aware, Mr. Rehl is a married family man, whose youngest daughter will be one year old this month. He has extensive ties to the community and has contributed his time and energy to various local causes. He served his country honorably, as a member of the United States Marine Corps. After his service, he used GI benefits to obtain a bachelor and masters degree at Temple University. He is the son and grandson of Philadelphia police officers, both deceased. He has never been charged or convicted of any violent or serious conduct.

He is not alleged to have entered the Capitol until after the proceedings had been suspended and then-Vice President Pence had left the Capitol. He is alleged to have entered the United States Capitol along with hundreds of other persons through an open door. There is no allegation that Mr. Rehl injured any person, possessed any weapons, or used mace or irritants. He did not damage, loot, or take away any property. He did not fight with police, throw things, or attempt to do so. And he did not direct or help anyone to do any of those things. In a recent bench trial, Judge McFadden found that such conduct does not support a finding that a defendant acted with the intent to impede or disrupt the orderly conduct of government business. *See United States v. Griffin,* 21-cr-92.

The worst that has been alleged against Mr. Rehl is that he has associated himself with the Proud Boys, a lawful fraternal association as is his right protected by the First Amendment.[1]

He is also alleged to have made a handful of statements of a type that the D.C. Circuit in *United States v. Munchel*, 991 F.3d 1273, 1287 (D.C. Cir. 2021) has characterized as "rhetorical bravado" when measured against a defendant's lack of actual violence. And, the Supreme Court has characterized similar statements as "offhand remarks" of hostility protected by the First Amendment. *See Noto v. United States*, 367 U.S. 290, 297 (1961).[2]

To bring such serious charges against Mr. Rehl at this late date without alleging a single new fact against him is simply wrong and deserves a response. Indeed, in counsel's decades of defending persons accused of federal criminal offenses, much of my career spent as a public defender representing indigent persons and persons of color, I should not be surprised at the heavy hand of federal prosecutors.[3] *See, e.g.*, OVERCOMING LAW by Richard A. Posner, Chief Judge of the

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[1] *See Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2382 (2021); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982).

[2] [T]his element of the membership crime, like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

[3] See, e.g., National Association of Criminal Defense Lawyers ("Overcriminalization is a dangerous trend that NACDL battles daily. With over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions, our nation's addiction to criminalization backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk. This inefficient and ineffective system is, of course, a tremendous taxpayer burden.") at https://www.nacdl.org/Landing/Overcriminalization

United States Court of Appeals for the Seventh Circuit, retired. ("Our statute books overflow with vicious, exploitive, inane, ineffectual and extravagantly costly laws." We are "the most penal of civilized nations," with our exploding prison population, our thirst for execution, the severe penalties we impose, often "for intrinsically minor, esoteric, archaic or victimless offenses."). Yet, it is still disconcerting to see the heavy hand of the Justice Department at work.

For only the second time in recent memory, I am compelled to cite *Berger v. United States*:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

WHEREFORE, Zachary Rehl, by his undersigned counsel respectfully requests that this Honorable Court authorize his counsel to publish to the press a statement in response to the press release issued by the Department of Justice in connection with the Third Superseding Indictment brought against Mr. Rehl.

Respectfully submitted,

/s/ *Carmen D. Hernandez*

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CERTIFICATE OF SERVICE

I hereby certify that the instant notice was served on all counsel of record this 6th day of June, 2022 on all counsel of record via ECF.

/s/ *Carmen D. Hernandez*
Carmen D. Hernandez