

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RICHARD E GORDON

CASE NO. C20246741-001

DATE: April 30, 2025

JACLYN ANN HUBERSBERGER,
KATHERINE ANNA MARIE OFTEDAHL,
JOSIE L SHAPIRO, and
SETH JOSEPH WISPELWEY
Plaintiff,

vs.

STATE OF ARIZONA
Defendant

UNDER ADVISEMENT RULING

IN CHAMBERS RULING

On November 7, 2024, defendants Jaclyn Hubersberger, Katherine Oftedahl, Josie Shapiro, and Seth Wispelwey filed the pending Petition for Special Action. The defendants are charged with misdemeanor criminal trespass and are challenging the Green Valley Justice Court's denial of their motion to dismiss under Arizona's Free Exercise of Religion Act ("FERA"), A.R.S. § 41-1493.01.

On March 24, 2025, this Court heard argument on the Special Action as to whether it should accept special action jurisdiction. Supplemental briefing was completed on March 31, 2025, and the Court took the matter under advisement. The parties agreed that whether additional briefing or argument on the legal merits was needed would be left to this Court's discretion. (March 24, 2025, FTR at 3:43, 4:16-17.) Given the extensive memoranda filed here and in the Green Valley Justice Court, and the comprehensive oral argument, the Court concludes that neither additional briefing nor argument is needed.

After carefully considering the briefing, argument, and authority, the Court will accept jurisdiction and deny relief.

I. Background

The relevant facts are undisputed. On the morning of November 30, 2023, the defendants and others gathered at the west shipping entrance of the University of Arizona Tech Park where a Raytheon facility is located. The defendants were protesting Raytheon supplying weapons to Israel used in the war in Gaza.

According to the defendants, Israel is inflicting unprecedented damage in Gaza by its bombing, and

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committing atrocities including murder, crimes against humanity, and genocide. (Petition at 2-3; Exh. A at 2-4; Exh. C at 3-4.) The defendants believe Raytheon's employees are complicit in the destruction, and their protest was religiously motivated. The defendants' aim was to disrupt Raytheon employees at their work. The defendants, in fact, "proudly acknowledge[d] that by briefly blocking traffic, they sought to materially inconvenience Raytheon employees' continued complicity with ongoing war crimes." (Petition at 2-3; Exh. A at 4-Exh. C at 2-3.)

But the Raytheon facility was (and is) on private property. (Stipulation ¶ 1; Def. Mem, at 5-6.) So, by around 8:50 a.m., Pima County sheriff deputies began to arrive to address the disturbance. The protesters stood arm in arm singing, chanting, and praying. The deputies told the defendants they were trespassing. Despite this, the defendants refused to move. After waiting nearly ten minutes, deputies arrested the defendants and transported them to jail. (Petition at 2-3; Exh. A at 4-5; Exh. C at 2.)

The defendants were charged with criminal trespass, a class 3 misdemeanor, which carries a penalty of up to 30 days in jail and a \$500 fine. A.R.S. §§ 13-1502, 13-802; 13-707. On April 22, 2024, the defendants filed a motion to dismiss the prosecution under FERA, which the state opposed. On July 18, 2024, following briefing and after taking the motion under advisement, the Green Valley Justice Court denied the motion. (Exhs. A, B, C, D, E, F.) This Special Action followed.

II. Special Action Jurisdiction

Appellate special action jurisdiction is highly discretionary. *State v. Bryson*, 256 Ariz. 511, 513, ¶ 7, 541 P.3d 582, 584 (App. 2023). The Court has considered the factors in support and against accepting special action jurisdiction. Ariz. R. Spec. Act. 12(b) & (c) (2025).

Here, the Green Valley Justice Court rejected the defendants' FERA defense on a set of undisputed facts. (Petition at 3-4; Def. Mem. at 5-6.) Given the record, without a FERA defense a conviction for trespass appears inevitable. (March 24, 2025, FTR at 3:59 (referring to the defendants' affidavits essentially as a "confession")). Forcing the parties to return to the Green Valley Justice Court for a trial and then back here – just to resolve the same issue now before the Court – would serve no obvious purpose and would result in pointless delay and more expense. Under these circumstances, the Court will exercise special action jurisdiction and address the merits of the dispute. *See* Ariz. R. Spec. Act. 12(b)(7), (c)(1), (4), (5); *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 594, ¶ 16, 161 P.3d 1253, 1258 (App. 2007) (accepting special action jurisdiction because in part avoiding delay "promotes judicial economy and efficient use of the parties' and the court's resources").

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II. Legal principles

FERA has its origin in federal precedent. In response to *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), Congress enacted the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb1-4. RFRA protects against the government burdening the free exercise of religion, regardless of whether the burden arises from “generally applicable laws.” Following the United States Supreme Court’s ruling that RFRA could not be applied to the states, Arizona enacted FERA, Arizona’s own protection against the state burdening the free exercise of religion. FERA parallels RFRA. See *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 297, ¶¶ 122-124, 448 P.3d 890, 918 (2019); *State v. Hardesty*, 222 Ariz. 363, 365, ¶ 8, 214 P.3d 1004, 1006 (2009); A.R.S. § 41-1493.01(B).

A person asserting a FERA violation may do so “as a claim or defense in a judicial proceeding.” A.R.S. § 41-1493.01(D). The analysis under FERA involves two steps:

First, the party raising a free exercise claim must prove that: (1) their action or refusal to act is motivated by a religious belief, (2) the religious belief is sincerely held, and (3) the government’s regulation substantially burdens the free exercise of their religious beliefs. If the claimant proves these elements, then the burden shifts to the government to show that the law (1) furthers a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.

Brush & Nib Studio, LC, 247 Ariz. at 297-98, ¶ 127, 448 P.3d at 918-19 (cleaned up). FERA may be used as a defense in a criminal prosecution. See *Hardesty*, 222 Ariz. at 369 ¶ 24, 214 P.3d at 1010.

III. Analysis

In the present case, it is uncontested that the defendants’ conduct at the November 30, 2023, protest was motivated by their religious beliefs, and that the beliefs are sincerely held. (State Mem. at 7.) The dispute, therefore, is whether the defendants have shown their arrest and prosecution substantially burdened the free exercise of their religious beliefs and, if so, whether the state has shown that any burden both furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

A. Substantial burden

The Court rejects the state’s argument that there was no substantial burden on the defendant’s religious beliefs because they could have just moved off the private property and protested nearby. (State Mem. at 7-9; Exh. B at 3-5.) The defendants have stated explicitly that “briefly disrupting the work lives of the employees of Raytheon was the central purpose of their religious exercise.” And the disruption had to be at “their entrance to the facility,” or it would not accomplish the defendants’ religious purpose. (Def. Mem. at 15-19; Exh. C at 2-3.) The Court “may not, under the guise of conducting a substantial burden analysis, examine the reasonableness of

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the [defendants'] belief.” *Brush & Nib Studio, LC*, 247 Ariz. at 300, ¶ 140, 448 P.3d at 21; *see also Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (rejecting RFRA claim in part because the plaintiffs did “not argue that the exercise of their religion requires them to physically obstruct clinic entrances”).

The threat of criminal sanctions is considered a substantial burden to religious beliefs for purposes of RFRA and FERA. *See Brush & Nib Studio, LC*, 247 Ariz at 298-99, ¶¶ 131-34, 448 P.3d at 919-20. This is what happened in the present case. The defendants were told to leave the Raytheon premises, which would have ended the religiously driven manner in which the defendants sought to protest, and they refused. Because of this, the defendants were arrested and are now defending themselves in a criminal prosecution for trespass which carries the potential of a jail sentence and a fine.

The Court finds that the defendants have met their burden of showing a substantial burden to their religious beliefs.

B. Compelling interest

Although ostensibly peaceful, the defendants have persuasively described the highly emotional nature of their November 30, 2023, protest, which was premised on their belief that Raytheon and its employees were complicit in horrific crimes. (Exh. A at 4-7; Exh. C at 2-4.) It was based on this sentiment that the defendants have candidly acknowledged their insistence on actually disrupting Raytheon employees, going as far as locking arms and then refusing to leave when they were told by sheriff deputies to do so. The defendants did all of this at the employees’ work site on private property. Under these particular circumstances, the Court agrees with the state and finds that preserving peace together with protecting against the purposeful disruption of Raytheon and its employees’ work on private property, provide a compelling interest for the arrest and prosecution. (State Mem. at 2-3, 10-13.)

A state may not unduly suppress religious speech under the “guise of conserving desirable conditions.” *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940). But “[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.” *Id.* Also the right to exclude others is “universally held to be a fundamental element” of property rights, *Kaiser Aetna v. U. S.*, 444 U.S. 164, 180 (1979); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (holding that access regulation appropriating “a right to invade the growers’ property” was a “*per se* physical taking”); *but see Yim v. City of Seattle*, 63 F.4th 783, 798 (9th Cir. 2023) (finding right to exclude is not fundamental), and the protection of property rights are preserved both by Arizona statute and the Arizona constitution. *See, e.g., Ariz. Const. art. II,*

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§ 4, art II § 17; A.R.S. §§ 12-1131 *et seq.*; *Sedona Grand, LLC v. City of Sedona*, 229 Ariz. 37, 42, ¶ 20, 270 P.3d 864, 869 (App. 2012).

It is true that the defendants had rights deserving of protection during their November 30, 2023, protest. But the state had a congruent interest in protecting Raytheon and its employees' rights too (State Mem. at 2, 11) – an interest which the Court finds compelling. “[S]afeguarding one right does not justify absolute permissiveness, particularly by the judiciary, to the extent that the exercise of such right is done at the expense of infringement upon the rights of others.” *State v. Starsky*, 106 Ariz. 329, 333, 475 P.2d 943, 947 (1970); *see also Kelly v. Gallagher*, 2025 WL 861952, at *10 (D. Ariz. Mar. 19, 2025) (slip copy) (“there is no First Amendment right to access private property for expression,” nor does “the First Amendment trump private property rights”).

The Court finds that the state has met its burden of showing a compelling interest in the arrest and prosecution of the defendants – that being preserving the peace during the protest and the protection of Raytheon's property rights.

C. Least restrictive means

In assessing the least restrictive means, the state must show “only that the proposed alternatives are ‘ineffective or impractical,’” including “considering the harm an exemption may have on benefits the law confers on third parties.” *Brush & Nib Studio, LC*, 247 Ariz. at 302, ¶¶ 149, 152, 448 P.3d at 923. The defendants argue that to be compliant with FERA, the state should not have arrested them nor pursued a prosecution for trespassing. (Exh. B at 4.)

Initially, the Court rejects the contention that another police agency's handling of protest, even some involving the same subject matter, sufficiently undermines the state's showing of a least restrictive means. (Petition at 16.) That the Tucson Police Department chose a different strategy, during different protests, in different locations, does not affect the decision here. (Exh. B at 6; Exh. C at affidavit of Abigail Jensen); FTR at 4:57). The cited examples are too general to conclude that less restrictive means were available in this case, given the particularity that the Court must employ to the analysis. *See Brush & Nib Studio, LC*, 247 Ariz. at 302, ¶ 149, 448 P.3d at 923 (the analysis of proposed alternatives “is a focused inquiry, requiring the government to ‘establish that applying the law in the *particular circumstances* is the least restrictive means’”) (emphasis in original).

The defendants have argued that “deputies on the scene were advised by the protesters['] point of contact, after she consulted with the protesters, that if cited and released, the protesters would leave and not

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come back.” (Exh. C at 5.) Even assuming the defendants were within the group willing to leave, the record shows the offer came only after arrests began. (Exh. C at 2, & n. 4.) There is no indication that during the protest the defendants were willing to stop their interference had deputies simply waited longer before making arrests. The record, in fact, shows the opposite. *See Brush & Nib Studio, LC*, 247 Ariz. at 303, ¶¶ 156-58, 448 P.3d at 924 (requiring evidence of exemption’s effect).

The Court has considered the state’s decision to prosecute separately from the arrest. The Court must assess whether the state’s compelling interest of preserving public peace and protecting Raytheon’s property rights could be accomplished while simultaneously allowing the defendants an exemption to a prosecution for their trespass. *See United States v. Grady*, 18 F.4th 1275, 1287 (11th Cir. 2021). On this record the answer is no, given the defendants’ explicit commitment to material disruption (Exh. B at 2-3; Exh. C (defendants’ affidavits)), and the absence of evidence or argument that the defendants have told prosecutors that they will abandon future protests on private property if the prosecution is dropped.

The Ninth Circuit Court of Appeals in *United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016), addressed a similar argument in the context of RFRA involving a marijuana prosecution:

The Christies next assert that a less restrictive alternative would have been for the government to bring these prosecutions under a less punitive provision of the [Controlled Substances Act], ideally a provision that would not have triggered statutory mandatory minimum penalties. The Christies cite nothing for the proposition that a (potentially) less punitive charging decision qualifies as a “less restrictive” alternative.

We find such lack of authority unsurprising, for at least two reasons. First, when the government exposed the Christies to the threat of a mandatory minimum, it did not restrict their religion to a greater degree than if the government had forgone such charges, for either prosecution would trigger an outright ban on their ability to use and to distribute cannabis. Such alternative prosecutions are equally *restrictive of religion*, even if they might not be equally *punitive*. *Cf. [Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 731 n.40 (2014)]* (explaining that to qualify as a less restrictive means, a proposed alternative must “accommodate[] the religious beliefs asserted in these cases”). Second, given the broad array of charges prosecutors can choose to bring or not to bring in any given case, recognizing the Christies’ theory would plunge courts far too deep into the business of reviewing the most basic exercises of prosecutorial discretion.

Christie, 825 F.3d at 1048, 1061-62. Like *Christie*, the defendants here are banned from practicing their religious beliefs via an illegal trespass on private property both with or without a criminal prosecution, and the Court is unwilling to challenge the prosecutorial discretion employed here, where there is nothing otherwise violative of FERA.

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The Court finds that the state has met its burden of showing that the arrest and misdemeanor prosecution is the least restrictive means in furthering its compelling interests in this case.

IV. Conclusion

FERA does not require dismissal of the underlying prosecution. The Green Valley Justice Court, therefore, appropriately denied the defendants' motion to dismiss.

Accordingly,

IT IS ORDERED ACCEPTING special action jurisdiction.

IT IS FURTHER ORDERED DENYING relief on the merits.

IT IS FURTHER ORDERED REMANDING the case back to the Green Valley Justice Court.

IT IS FURTHER ORDERED that no matter remains pending, and this ruling/judgment is entered pursuant to Ariz. R. Civ. P.54(c). *See Bridgeman v. Certa*, 251 Ariz. 471, 475, ¶ 12, 493 P.3d 898, 902 (App. 2021).


/s/
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