

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA) 2:18-CR-22
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STEPHEN M. KELLY, ET AL.)

GOVERNMENT’S POST-HEARING BRIEFING ON RFRA

The United States submits supplemental briefing, as directed by the Court’s Order dated November 28, 2018, (Dkt. No. 294), on the applicability of the Religious Freedom Restoration Act of 1993 (RFRA) to this case.

I. Criminal Prosecution Does Not Substantially Burden Defendants’ Religious Exercise of Symbolic Denuclearization Because They Can Follow Their Faith and the Law.

The Eleventh Circuit directs this Court to make a legal determination whether the government has put the Defendants to the choice of violating their religious beliefs or violating the Title 18 crimes for which they are charged. *Eternal Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 818 F.3d 1122, 1145 (11th Cir. 2016) (accepting parties’ sincere belief that regulation “puts them to a choice between honoring their religious beliefs and facing significant penalties,” but “nonetheless conclud[ing] that the accommodation imposes no substantial burden”), *vacated*, No. 14-12696-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified sub nom. Eternal Word Television Network, Inc. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, No. 14-12696, 2016 WL 11504187 (11th Cir. Oct. 3, 2016). “[I]t is for the courts to determine objectively . . . whether the government has, in fact, put plaintiffs to the choice of violating their religious beliefs

by seeking the accommodation or incurring a substantial penalty.” *Id.*; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (“Because the grooming policy puts petitioner to this choice” of engaging in conduct that violates his religious beliefs or facing serious disciplinary action, “it substantially burdens his religious exercise.”).

Here, Defendants—who must demonstrate a substantial burden—have not shown they were “in the unfortunate position of needing to choose between following [their] faith and following the law.” *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016). Defendants could have followed both; they could have engaged in symbolic denuclearization without unlawfully entering into Naval Submarine Base King’s Bay in violation of 18 U.S.C. § 1382 and without destroying or depredating Government property in violation of 18 U.S.C. §§ 1363 and 1382.

As to Defendant’s surreptitious and unlawful entry, it did not need to be so. Defendants could have complied with the trespass law and their faith by contacting the base in advance in an effort to obtain permission to enter the base lawfully. As the Public Affairs Officer for the base testified, other religious groups have come on the base’s property and engaged in religious demonstrations. Nov. 19 Hr’g Tr. at 182–84. “Historically we have approved that, and just with the request that they respect the -- they cleaned up after themselves; they don’t trash anything, and they’ve respected that.” Nov. 19 Hr’g Tr. at 183. Instead, Defendants made no effort to obtain pre-approval to enter the base lawfully. According to Defendant Mark Colville, “we wanted it to be a surprise.” Nov. 19 Hr’g Tr. at 92. “What we did was theatrical,” Defendant Patrick O’Neill testified, “because in order to get some attention to this

issue, we had to do something spectacular.” Nov. 19 Hr’g Tr. at 156. Defendant O’Neill further confirmed that surreptitious entry was not crucial to Defendants’ overall goal: “If you were given permission to allow (sic) the site, you could achieve the same goal? That’s right.” *Id.* at 168; *see also* Nov. 7 Hr’g Tr. at 151–52 (testimony of Defendant Stephen Kelly acknowledging, “perhaps we could have been persuasive in other ways that were not exhausted”).

Similarly, Defendants could have engaged in symbolic denuclearization without destroying or depredating government property. The consistent theme throughout every defense witness was that Defendants’ acts were symbolic. In so doing, Defendants acknowledge that they were not dealing with live nuclear weapons or actually disarming any real government weapon. Thus, the property destroyed or depredated during the symbolic acts did not need to be real government property. Consistent with their foundational text, Defendants could have demonstrated by destroying and depredating their own property, not the government’s. Isaiah 2:4 says nothing about destroying government property; it speaks to the owner of property altering it for his/her alternative use. *See* Isaiah 2:4 (“They will beat *their* swords into plowshares and *their* spears into pruning hooks.”) (emphasis added). Given the alternatives available to engage in symbolic denuclearization without violating the charged Title 18 crimes, Defendants have not shown they were put to the choice of violating their religious beliefs or the law. *See United States v. Stimler*, 864 F.3d 253, 268 (3rd Cir. 2017) (reasoning that district court properly considered alternative

means of engaging in a religious exercise in assessing whether the burden was substantial).

Defendants mistakenly contend that the Court should ignore the valid alternatives available to them in assessing the substantial burden. *See, e.g.*, Dkt. No. 245 at 19. In support, they rely on *Holt v. Hobbs*, 135 S. Ct. 853 (2015), which involved a Muslim inmate's challenge to a prison's grooming policy. In dismissing the inmate's complaint, the Magistrate Judge and District Court reasoned that although the grooming policy prevented the inmate from engaging in the religious exercise of growing a beard, he could "exercise his religion in other ways, such as by praying on a prayer rug, maintaining the diet required by his faith, and observing religious holidays." *Id.* at 861. The Supreme Court held that the lower courts erred in considering "the availability of alternative means of practicing a religion" *Id.* at 862.

Holt is inapposite here because the government is not asking the Court to consider alternative ways for Defendants to practice Catholicism; instead, the government is pointing to alternative ways for Defendants to engage in the religious exercise at issue, symbolic denuclearization, without violating federal criminal laws. *See Stimler*, 864 F.3d 259 (noting that the record did not support a finding that the act of kidnapping was essential to the religious exercise at issue). Accordingly, in light of the alternatives available for Defendants to engage in symbolic denuclearization that did not run afoul of the Title 18 crimes, they have not shown

they were put to the choice of complying with the law or their faith; no substantial burden thus exists.

II. Prosecuting These Seven Defendants Furthers Compelling Government Interests.

The government has a compelling interest in: (1) preventing unauthorized personnel from gaining access to Naval Submarine Base King's Bay, and (2) ensuring the security of the base's facilities, assets, and personnel. The Court heard testimony from Captain Lepine regarding these compelling interests. Defendant offered no witness or testimony to rebut him.

Naval Submarine Base King's Bay is a vitally important military installation. The base is homeport to eight Ohio class submarines. Nov. 7 Hr'g Tr. at 215. These submarines provide the United States the assurance of a possible second strike should an adversary launch an attack on her or her allies. *Id.* at 219. This second strike capability serves the compelling and existential interest of deterring such attacks. *Id.* at 220. In connection with its mission of strategic deterrence, the base is home to 43 tenant activities, including a heavy industrial maintenance facility, the largest covered dry dock in the western hemisphere, the Strategic Weapons Facility Atlantic (caretakers for the Trident II d5 missile system and its trajectory guidance systems), and a Trident training facility. *Id.* at 212, 215-16. The base is the largest employer in Camden County, with more than 10,000 persons working on the base. *Id.* at 217.

Prosecuting each of these Defendants furthers the government's compelling interests. All seven Defendants have engaged in similar previous criminal acts,

making the government's interest in prosecuting recidivists even greater. *See Kaemmerling v. Lappin*, 553 F.3d 669, 681 (D.C. Cir. 2008) (noting "society's enormous interest in reducing recidivism"). All Defendants took part in the years-long planning of the offenses with which they are charged. Nov. 7 Hr'g Tr. at 149–51. Each one was an active participant in unlawfully coming onto the base; none waited outside. Nov. 19 Hr'g Tr. At 116-117. They came under the cover of darkness, creating a greater danger to themselves and those on the base. Nov. 7 Hr'g Tr. at 162–63 (testimony of Defendant Stephen Kelly regarding his concern about the safety of his co-defendants and the "soldiers" on the base); at 243 (testimony of Captain Lepine concerning the greater danger posed to the security of the installation and the assets on the base when the trespass and depredation occurs at night). They came equipped with tools to forcibly enter the base destroy base property. Nov. 7 Hr'g Tr. at 153. Once on the base, all seven Defendants acted in concert by splitting up into various groups separated across the base, causing greater difficulty for base personnel to respond. Nov. 7 Hr'g Tr. at 194-95 (testimony of Defendant Claire Grady); at 244 (Captain Lepine noting the greater danger when multiple individuals act in concert, split up, and go to different locations on the base). Moreover, they took part in entering into restricted areas and destroying and depredating government property. Nov. 7 Hr'g Tr. at 157 (testimony of Defendant Kelly).

Defendants' concerted entry and property destruction was not innocuous. As Judge Baker recognized at Defendants' detention hearing:

It is significant, the danger that they imposed, by an act of, quote/unquote, civil disobedience. The civil disobedience in this case

posed a danger to the community, danger to themselves, danger to those that they were with, danger to those who were charged with guarding the base. I can't overemphasize the danger that was imposed and that was posed by the alleged acts in this case, which they are presumed innocent of.

Dkt. No. 81-2 at 7; *see also* Nov. 19 Hr'g Tr. at 118 (Trotta, "So for myself, the concern was not so much dying. It was the likelihood of sort of getting maimed instead.").

Unsurprisingly, Defendants have pointed to no case in which RFRA has been used as a successful defense to crimes, as those committed here, involving force or violence. *See United States v. Epstein*, 91 F. Supp. 3d 573, 585 (D.N.J. 2015) ("I have been unable to find a single case where RFRA has been used as a successful defense against prosecution for crimes involving force or violence."); *United States v. Lourdes Santiago*, 194 F. Supp. 2d 82, 84 (D.P.R. 2002) (finding that § 1382 is a crime of violence since it involves the use, attempted use, or threatened use of force). In light of the significant danger posed by each of Defendants' unlawful incursion and property destruction, criminal prosecution is warranted to further the government's compelling interests.

III. Prosecuting These Seven Defendants Is the Least Restrictive Means of Furthering the Government's Compelling Interests.

At the hearing, Defendants proposed several alternatives to criminal prosecution. Nov. 7 Hr'g Tr. at 25. They proposed: (1) "ban and bar letters" that would ban the Defendants from the military base; (2) "civil fines against the defendants"; (3) charging Defendants with "a misdemeanor"; or (4) charging Defendants with "one felony." *Id.* Their briefing also talks about pretrial diversion that includes supervision, restitution, and community service. Dkt. No. 245 at 34.

None of these proposed alternatives accommodates Defendants' religious exercise. Banning Defendants from the base, fining them, imposing restitution, or charging them with other (or fewer) crimes would not exempt them from compliance with generally applicable laws. *See United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016) ("Could the government achieve its compelling interest to the same degree while exempting the Christies from complying in full with the CSA? That is the question RFRA requires us to confront."). Instead, Defendants' proposed alternatives are all "equally *restrictive* of religion, even if they might not be equally *punitive*." *Christie*, 825 F.3d at 1062 (emphasis in original); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 n.40 (2014) (explaining that to qualify as a less restrictive means, a proposed alternative must "accommodate[] the religious beliefs asserted in these case"); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 n.2 (2015) (noting that "to accommodate" means to allow plaintiff to engage in her religious practice despite "normal rules to the contrary"). None of these are "less restrictive" alternatives under RFRA.

Similarly, Defendants alternatives, including the proposal to "provide a space on the government's land where the defendants could exercise their nonviolent religious beliefs" (Dkt. No. 245 at 34), are not plausibly capable of allowing the government to achieve all of its compelling interests. Courts "may not blind [themselves] to who 'the person' seeking a religious exemption actually is in a given case." *Christie*, 825 F.3d at 1063.

Here, Defendants are individuals with a lengthy criminal history. Their leader, Stephen Kelly, has spent 100 months in prison and engaged in five prior “plowshare actions” before his instant arrest that all involved government military installations in Maine, Maryland, and Washington. Nov. 7 Hr’g Tr. at 134–35, 161. Kelly made clear that he had not had “any change of heart since [his] fifth arrest and prosecution for this sort of activity.” *Id.* at 159. Defendants Clare Grady and Elizabeth McAlister have federal convictions for conspiracy and destruction of government property relating to their protests dating back to the early 1980s. *See United States v. Allen*, 760 F.2d 447, 449 (2d Cir. 1985). McAlister testified that it was “probably true” that her criminal oeuvre includes more than 30 arrests as early as 1971. Nov. 19 Hr’g Tr. at 136. Defendant Patrick O’Neill testified that he had been arrested seven times at the Pentagon alone, spent several years in federal prison for a prior Plowshares action in Orlando, and had received ban and bar letters from other military bases before his instant arrest at King’s Bay. *Id.* at 145, 161, 171. Defendant Mark Colville had prior arrests and convictions for criminal contempt, obstruction, and trespass relating to events at “the Hancock Airfield where there’s a drone base,” in Connecticut “[w]here they build the Black Hawk Helicopters,” in North Carolina “[w]here Blackwater” has an office, and in Maine for a Plowshares event. Nov. 19 Hr’g Tr. at 87–90. Defendant Carmen Trotta testified that he had been arrested a number of times with offenses related to disorderly conduct, unlawful entry, obstructing passage, and trespass relating to prior demonstrations. Nov. 19 Hr’g Tr. at 122. Lastly, Defendant Martha Hennessy, a self-proclaimed anarchist

who has been associated with the Plowshares since 1980, testified that she had been arrested “not enough times,” including at a nuclear power plant in New Hampshire and for various arrests related to Guantanamo Bay protests. Nov. 19 Hr’g Tr. at 47-48, 52-53.

Considering each of the Defendants “precepts and longstanding patterns” of engaging in disruptive and criminal protests involving trespass and destruction of government property, the Court or government cannot be reasonably assured that Defendants would comply with any exemption afforded to them on the naval base. *Christie*, 825 F.3d at 1063. Even prior criminal prosecution has not proven an effective deterrent for these Defendants, so the notion that a civil remedy or ban and bar letter would equally serve the government’s interest is far-fetched. Likewise, Defendants ask for a “space on the government’s land” where they could protest, (Dkt. No. 245 at 34), but that space was already available to them at the Bancroft Memorial; they made no attempt to use it lawfully. Nov. 19 Hr’g Tr. at 183–84. Perhaps that was because a lawful demonstration would garner less attention. *See* Nov. 19 Hr’g Tr. at 156 (“[I]n order to get some attention to this issue, we had to do something spectacular. So, indeed, this was a spectacular thing.”); Nov 19 Hr’g Tr. at 170 (“We had to be dramatic because that’s the only way that we got the attention of the government.”).

Since Defendants have pointed to no less restrictive means that would equally serve the government’s substantial interests, their Motion to Dismiss under RFRA is properly denied.

Respectfully submitted, this 19th day of January 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the notice of electronic filing (“NEF”) which was generated as a result of electronic filing in this Court.

This 19th day of January 2019.

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