UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

USA

V **NO. 2:18-CR- 22**

ELIZABETH MCALISTER

DEFENDANT'S RESPONSE TO THE COURT'S 15 AUGUST 2018 ORDER DIRECTING SUPPLEMENTAL BRIEFING

> "The government's decision to prosecute me for several felonies means I am facing a long time in prison for acting consistent with my beliefs. I am faced with the choice of either following my conscience and living a life consistent with my faith and beliefs and going to jail, or denying the faith and beliefs with which I have tried to live my whole life. Going to jail for my beliefs keeps me away from my loving children and grandchildren, but these nuclear weapons and the government which protects their massive destructive power, leave me no choice, I must follow my conscience and my faith."[1]

The defendants submit supplemental briefing, as directed by the Court's Order dated 15 August 2018 (Dkt. No. 220; hereinafter "Court's Supplemental Briefing Order"), regarding the defense raised by the defendants under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. This brief responds also to the arguments contained in the government's supplemental brief in response to the Court's Order, dated 5 September 2018 (Dkt. No. 227; hereinafter "Government's Supplemental Briefing").

Under RFRA the law is clear, and the relevant facts in this case are also clear. The defendants exercised their sincerely held Catholic beliefs by symbolically disarming nuclear weapons. The government is substantially burdening the defendants' exercise of those same

[1] Elizabeth McAlister Affidavit, paragraph 1.

beliefs by seeking to enforce, through criminal prosecution, federal statutes that prohibit trespass and protect property ("trespass and property statutes"). Under RFRA, this places a heavy burden of justification on the government, which the government here fails to satisfy. First, the government has failed to produce evidence and prove that it has a "compelling marginal interest" in prosecuting any of these individual defendants. Second, the government has failed to produce evidence and prove that criminal prosecution of these defendants is the least restrictive means of furthering its "marginal and particularized interest." Eternal Word Television Network, Inc. v. Secretary of U.S. Department of Health and Human Services, 818 F.3d 1122, 1154 (11th Cir. 2016); 42 U.S.C. § 2000bb-1(b). Therefore, the Court must dismiss the criminal charges. Under RFRA, what the government cannot lawfully do is treat these defendants the same as it would treat a terrorist intruder or a common vandal.

LEGAL STANDARD

"Congress enacted RFRA ... in order to provide very broad protection for religious liberty." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. — , 134 S.Ct. 2751, 2760, 189 L.Ed.2d 675 (2014). The intent of Congress was "to provide greater protection for religious exercise than is available under the First Amendment." Holt v. Hobbs, 574 U.S. — , 135 S.Ct. 853, 859-60, 190 L.Ed.2d 747 (2015).[2]

[2] The petitioner in Holt brought a claim against the Arkansas Department of Corrections under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which is a "sister statute" to RFRA and uses the same standards for justifying religious accommodations under a facially neutral statute. Holt at 860; see also O Centro, 546 U.S. at 436. RLUIPA concerns two areas of government activity: Section 2 governs land-use regulation, § 2000cc; and Section 3 — the provision at issue in this case — governs religious exercise by institutionalized persons, § 2000cc-1. Section 3 mirrors RFRA. Holt, 135 S.Ct. at 860.

As a defense against criminal charges ("RFRA defense"), the defendants "must show that application of the laws at issue here would '(1) substantially burden (2) a sincere (3) religious exercise.'" Court's Supplemental Briefing Order at 4 (quoting Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006)). "The only exception to the religious protection afforded by RFRA," id., is if the government "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb-1(b). "The Government must 'address the particular practice at issue,' … and show that Defendants' proposed less restrictive alternatives are less effective than enforcing the statutes charged in this matter." Court's Supplemental Briefing Order at 4 (quoting and citing O Centro, 546 U.S. at 439, 429).

As the Ninth Circuit has explained:

> RFRA supplies a rule of decision in cases where a person finds himself in the unfortunate position of needing to choose between following his faith and following the law. "In general," RFRA provides, sincere religious objectors must be given a pass to defy obligations that apply to the rest of us, if refusing to exempt or to accommodate them would impose a substantial burden on their sincere exercise of religion. 42 U.S.C. 2000bb–1(a).

United States v. Christie, 825 F.3d 1048, 1055 (9th Cir. 2016). If the defendants succeed in proving the prima facie elements of the RFRA defense, then "RFRA allows the federal government to treat religious objectors the same as everyone else 'only if' the government meets [the] two-part test" as justification. Id. "If the government cannot justify its actions under that test, courts are directed to order 'appropriate relief' against the government and in favor of the religious objector." Id. (citing 42 U.S.C. § 2000bb–1(c)).

The case law on RFRA and RLUIPA set forth "the same standard" for justifying "religious accommodations" under a facially neutral statute. *See* Holt, 135 S.Ct. at 860; O Centro, 546 U.S. at 436.

ARGUMENT

I. The defendants have satisfied the prima facie elements for a RFRA defense.

The defendants have (1) articulated the scope of their beliefs and the nature of their related activities, (2) shown that their beliefs are religious, (3) proven that their beliefs are sincerely held, and (4) established that the government's enforcement actions substantially burden the exercise of their sincerely held religious beliefs.[3]

As evidence, defendants first direct this Court's attention to the testimony of defendants at the bond hearings held in this matter.[4] The second source of evidence is the affidavits and declarations submitted to the Court as attachments to this memorandum.[5] A third source of evidence will be before this Court if the accompanying Motion for Evidentiary Hearing to Provide Testimony on Defendant's Religious Freedom Restoration Act Defenses is granted and conducted.

A. The defendants have precisely identified the scope of their beliefs and the nature of their related activities.

First, the Court is required to determine the precise scope of the defendants' beliefs. Zimmerman, 514 F.3d at 854. In particular, "the use, building, or conversion of real property for

[3] *See* United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007) ("defendant must first (1) articulate the scope of his beliefs, (2) show that his beliefs are religious, (3) prove that his beliefs are sincerely held and (4) establish that the exercise of his sincerely held religious beliefs is substantially burdened").

[4] May 17, 2018 Bond Hearing Transcript, Rec. Doc. 56

[5] Mark Colville Declaration; Clare Grady Declaration; Martha Hennessy Declaration; Stephen Kelly Declaration; Elizabeth McAlister Affidavit; Patrick O'Neill Declaration; Carmen Trotta Declaration.

the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C.A. § 2000cc-5(7)(B). The Court should also determine the precise nature of the defendants' activities that are "conduct[ed] in accordance with [those] religious beliefs," *see* Hobby Lobby, 573 U.S. at — , 134 S.Ct. 2751, 2778 (2014), or that are "motivated by" those beliefs, *see* Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014).

In the present case, the defendants' sincerely-held religious beliefs motivated their nonviolent acts of prophetic witness against the government's possession of nuclear weapons, and the use of such weapons by threatening people or nations. Defendants' symbolic actions of disarmament are within the tradition of a long history of similar actions carried out by Plowshares activists who take their name from the Christian Bible verse, Isaiah 2:4:

> He will judge between the nations and will settle disputes for many peoples. They will beat their swords into plowshares and their spears into pruning hooks. Nation will not take up sword against nation, nor will they train for war anymore.[6]

Of particular religious significance to defendants are those actions that are intended to symbolically "beat swords into plowshares."[7] At Kings Bay the defendants engaged in this

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[6] Isaiah 2:4 (New International Version) (emphasis added)

[7] See Mark Colville Declaration, paragraphs 1-2, notably "I've come to regard the fulfillment of Isaiah's prophesy- hammering swords into plowshares- as an essentially inescapable commitment in the attempt to practice Catholic Christianity as a U.S. citizen."

See Martha Hennessy Declaration, paragraph 11, "As in all Plowshares actions from the beginning of the movement, inspiration comes from the Scriptural readings of Isaiah 2:4 to turn swords into plowshares and spears into pruning hooks."

See Elizabeth McAlister Affidavit, paragraph 7, "As major part of our beliefs is we have tried to follow the instruction of the prophet Isaiah (2:4) to "beat swords into plowshares" by working for peace and disarming nuclear weapons."

See Stephen Kelly, SJ. Declaration paragraphs 2, 4, and 7, "The religious witness of the Kings Bay Plowshares is a concerted effort, the seven of us having agreed to preach the Gospel, nonviolently, where it had to be preached: in the locale of the greatest sin… Ours was a concerted effort to preach the gospel of nonviolence directly to Navy and Marine personnel caught up in the

religious exercise on property of the United States government.[8] As the defendants' affidavits demonstrate, the defendants took great care to ensure that the actions they took would be

contagion of sin…. We were embodying the prophetic call given by God to Isaiah (Is. 2:4, "...They shall beat their swords into plowshares...") as a way out of the sin that Dr. King identified in the triplets of evil: materialism, racism and militarism."

[8] See Mark Colville Declaration, paragraph 15, "These actions were all intended as a personal commitment to withdraw my complicity with the evil being done in my name at Kings Bay, and as a public call to my nation to choose life (Deuteronomy 30:19)."

See Elizabeth McAlister Declaration, paragraphs 38 and 39, "The idolatry of these weapons of mass destruction at Kings Bay is so obvious in the layers of security that surround them and, in the horror, which is revealed when those layers are breached. It was almost shocking to me that this "idolatry" was so blatantly manifest in the "Monument" at King's Bay. The Monument at Kings Bay is a display of a series of missiles that have been the successive weapons of mass destruction for Trident Submarines. This is "The Public Face of Kings Bay" what the cameras focus on, the series of more and more deadly missiles in use by the submarines, each new one deadlier than the prior one."

understood as acts of symbolic disarmament.[9] Moreover, those are the identical actions on which the criminal charges against the defendants are based.[10]

The government, in its supplemental briefing, attempts to trivialize and mischaracterize defendants' beliefs, by referring to beliefs "such as to kill male newborns or bow down and

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[9] See Clare Grady Declaration, paragraphs 15, 22, 23 and 24, "My going to the US Naval Base at Kings Bay to symbolically disarm the Trident in an act of non-violent symbolic disarmament was an act of conscience that reflects my sincerely held religious beliefs, informed by my reading of the Bible, by Church teaching, by the signs of the times, the assistance of competent people, and the Holy Spirit."…"The symbols we used reveal the bloodshed and violence inherent in the Trident. These symbols are: Stepping over a line, of which, if I do not step over, harm will continue in my name; Carefully pouring blood to reveal the bloodshed in the Trident Weapons system and to express my personal atonement for that bloodshed; Using a hammer, as a disarmament tool invoking Isaiah's call to "beat swords into plowshares." The hammer I used was made with metal from melted down guns, weapons converted into peaceful tools. The message I spray-painted on the sidewalk in front of the administration building for the Trident (Strategic Weapons Facility Atlantic/ SWFLANT) expressed my intention to disarm Trident and heed the biblical call to and Love One Another. Crime scene tape is an obvious symbol to alert of a crime. We used this symbol to name the Trident weapons system as a crime, a crime against God, against humanity, and against all God's Creation."

See Patrick O'Neill Declaration, paragraph 4, "With hammers, blood, spray paint, Catholic lectionaries, rosary beads and other symbols of our faith, we entered Naval Station Kings Bay to beat swords into Plowshares (Isaiah 2:4) and smash idols -- false gods that are excoriated in the Old Testament Book of Exodus: "Whoever sacrifices to any god, other than the Lord alone, shall be devoted to destruction. (Exodus 22:20)."

See Martha Hennessy Declaration, paragraph 11, "The pouring of blood on the Missile Shrine and where the weapons are maintained is a symbolic act of contrition and remorse for shedding the blood of innocent victims when the bomb was used in Japan in 1945. Putting up crime scene tape over the door of SWFTANT points out the criminality of first strike nuclear weapons. Hammering on missiles is a symbolic dismantling of nuclear weapons."

[10] This distinguishes the present case from several mentioned by the Court in its Order requiring supplemental briefing. *See* United States v. Warren, 4:18-cr-223, cited in Government's Response to Defendant's Amended Motion to Dismiss Counts 2 and 3, Dkt. No. 62 at 9-10 (arguing that the defendant's belief that "he is required to render aid to people who are in distress, including people who are exhausted, hungry or injured," is unrelated to the charge of harboring people to avoid their detention by immigration authorities); United States v. Martines, 903 F.Supp.2d 1061, 1065-66 (D. Hawai'i 2012) (finding that there was no evidence in the case that "would establish that the commercial distribution of marijuana is required by Rastafarianism"); United States v. Hutson, 2018 WL 345316 at *5-*6 (Jan. 10, 2018) (finding that the prosecution's counts against the defendant did not involve actions linked to any of his beliefs or practices).

worship golden statues." Government's Supplemental Briefing at 5. In this, the Government misrepresents the words of Bishop Gumbleton, attached to each Defendants' Motion to Dismiss, whose point was that Defendants' actions were in accordance with their faith and consistent with historical acts of disobedience to laws and orders that were contrary to God's law. (See e.g., Rec. Doc. 158-4 at ¶¶ 7-8).

The defendants' affidavits clearly state the nature of their beliefs, and how those beliefs relate to the defendants' actions. In each case, the actions were prophetic witnesses against the possession or use of nuclear weapons.[11]

B. The defendants' actions were all motivated by, and were all in accordance with, beliefs that are religious in nature.

RFRA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2. Therefore, a defendant "doesn't have to show that his beliefs are central to a mainstream religion." Zimmerman, 514 F.3d at 853. RFRA's protections apply to any activities that are "conduct[ed] in accordance with religious beliefs" of the Catholic Church, *see* Hobby Lobby, 134 S.Ct. at 2778, or that are "motivated by" those beliefs, *see* Yellowbear, 741 F.3d at 55. Those protections apply regardless of whether that activity or exercise is "compelled" by the Catholic religion. *See* 42 U.S.C. § 2000cc–5(7)(A); Holt, 135 S.Ct. at 862-63. They also are "not limited to beliefs which are shared

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[11] See Clare Grady Declaration, paragraph 32, "My faith and my sincerely held religious beliefs direct me to take peaceful action in the manner that I did to expose the government's protection of weapons of mass destruction which are designed to annihilate all God's Creation."

Stephen Kelly, SJ, Declaration, paragraph 21, "The stance of Bishop Thomas Gumbleton, included among briefs for our defense, is clear: people of faith are not only urged to warn of the sin of nuclear holocaust, they are obligated in conscience to resist evil of this magnitude."

Patrick O'Neill Declaration, paragraph 12, "Disarmament is the ultimate moral imperative of our times. We cannot at once be Catholic and not seek to disarm nuclear weapons in our country. Faith without action is tantamount to silence and neutrality."

by all of the members of" the Catholic religion. *See* Holt, 135 S.Ct. at 863 (quoting Thomas, 450 U.S. at 715–716). "Nor is an individual limited to the religious doctrines of his upbringing; religious beliefs may evolve or change based upon life experiences or personal revelations." Id. at 853-54. "Congress mandated that this concept [the 'exercise of religion'] 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" Hobby Lobby, 134 S.Ct. at 2762 (quoting RLUIPA, § 2000cc-3(g)).

In the present case, the defendants have clearly and from the beginning identified their beliefs as deriving from the Catholic faith or religion. This Court has also clearly understood the defendants' position, stating in its Supplemental Briefing Order that "Defendants argue their 'symbolic disarmament' of nuclear weapons at Naval Submarine Base Kings Bay in Saint Marys, Georgia, was an exercise of their sincerely held Catholic beliefs and was thus protected by RFRA." Court's Supplemental Briefing Order at 2 (emphasis added). The government, however, in its supplemental briefing, has mischaracterized the religious nature of the defendants' beliefs, referring to the defendants' "Catholic Worker religion," Government's Supplemental Briefing at 2 and 9, and "a religion of blood throwers, lock breakers, or spray-painters," id. at 6. The defendants' affidavits should lay such offensive mischaracterizations to rest.

The defendants' affidavits demonstrate that their sincerely held Catholic beliefs satisfy all of the factors that courts use to determine whether a belief is "religious" for purposes of RFRA. *See* United States v. Meyers, 95 F.3d 1475, 1482-84 (10th Cir. 1996), cert denied, 522 U.S. 1006 (1997). Their beliefs address "ultimate ideas" – such "fundamental questions" as a person's "purpose in life" and "place in the universe." *See* id. at 1483. Their beliefs are "metaphysical" – addressing "a reality which transcends the physical and immediately apparent world." *See* id. Their

beliefs prescribe a way of acting, creating duties to engage in moral conduct and to refrain from immoral conduct. *See* id. Their beliefs are "comprehensive" with respect to "the problems and concerns that confront humans." *See* id. Being Catholic, their beliefs have the "accoutrements of religion" – e.g., a founder who is considered divine, sacred scriptures, gathering places, priests and clergy, rituals, organization, holy days, recognized practices, and a mission to engage in prophetic actions for the purpose of enlightening others. *See* id. at 1483-84.

It is not for the Court to determine whether the defendants' "religious beliefs are mistaken or insubstantial. Instead, [the Court's] 'narrow function ... in this context is to determine' whether the line drawn [between conduct that is consistent with their religious beliefs and conduct that is morally objectionable] reflects an honest conviction." Hobby Lobby, 134 S.Ct. at 2779 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)); Davila v. Gladden, 777 F.3d 1198, 1204 (11th Cir. 2015), *cert. denied*, 136 S.Ct. 78 (2015).

As the Tenth Circuit has explained, "Congress made plain that we [the civil courts] ... lack any license to decide the relative value of a particular exercise to a religion." Yellowbear, 741 F.3d at 54. "Moreover, a belief can be religious even if it's not "acceptable, logical, consistent, or comprehensible to others.'" Zimmerman, 514 F.3d at 853 (quoting Thomas, 450 U.S. at 714). The situation addressed by the Ninth Circuit in Zimmerman is instructive for the present case:

> Zimmerman professes the belief that he can't provide a blood sample because the "human body is a temple," and "only God, our Creator, can call for my blood to spill." He bases this belief on his Catholic upbringing, his time spent studying other religions such as Buddhism and a passage from the Bible. *See* Genesis 9:6 ("Whosoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man."). While this may not be a mainstream religious belief or common interpretation of the Bible, Zimmerman's belief that he can't give a blood sample is based on his connection with God, not purely on secular philosophical concerns. ... As a result, the district court erred in holding that Zimmerman's refusal to give a blood sample wasn't based on a religious belief.

Zimmerman, 514 F.3d at 854.

Similarly, in the present case, Defendants' Catholic faith compelled them to each take action to "beat swords into plowshares" and symbolically disarm the nuclear weapons of mass destruction that the government is using and harboring at the Kings Bay Naval Base.[12]

The government does not appear to contest that the defendants' beliefs are religious. See Government's Supplemental Briefing at 10 ("nor does the Government dispute that the practice of Catholicism is religious"). The defendants note, however, that the government refuses to clearly address whether the defendants' motivating beliefs are religious, but it prefers to make statements all around this factual issue. Even this Court, in its Supplemental Briefing Order, believed at that time that "the Government now contends that Defendants' actions in this case were not religious in nature and thus not protected by RFRA." See Court's Supplemental Briefing Order at 3. Because

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[12] See Elizabeth McAlister Affidavit, paragraphs 42 and 43, "I went to Kings' Bay to use my body to refuse to bow down to these idols. I went to try to bring attention to the idolatry that it is requiring of our nation and its people. I went in a spirit of prayer and repentance. I went in hope that this witness might invite other people to reflect on the obscenity and on the idolatry that it is before God. I and the others with whom I came to Kings Bay, care about the future for our children, for all our world's children. We cannot stand by in face of weapons capable of destroying all of life; and it is undisputable that Kings' Bay has that capability and be silent. We must act for love's sake for God's sake. We have eyes that see, hearts that care."

As Martha Hennessy states in her attached Declaration, "I went to [the Base to] expose the nuclear arsenal for what it is, a violation of God's will for us to love one another as His has loved us (John 13:34). Hennessy Declaration at ¶13; see also ¶14: "I went to the navy base inspired by how Jesus went to Jerusalem for His last time, and then to Golgotha"; ¶18: "My Christian faith instructs me not to rely on these deadly weapons but to make visible and practice our dependence on God and love of one another. Despite my fear I entered the military base as an act of faith, hope and love."

Stephen Kelly, SJ, in paragraph 33 of his Declaration, "We felt called to provide an undeniable presence within the base, at particular locations where real humans could not deny that we were preaching the nonviolence of conversion from war-making to peaceful activity. A moral, political and economic conversion begins with turning away from the sin of targeting civilians to embody Christ's reign of God as described in Isaiah 2:4, "they shall beat their swords into plowshares and study war no more." This is at the heart of Jesus' advocacy during his arrest to "put away the sword, they who live by the sword die by the sword."

the government's brief refuses either to concede this factual issue or to present evidence against it, the defendants urge the Court to rule that the government concedes that the defendants' enumerated beliefs are religious in nature and derive from the defendants' Catholic religion.[13]

C. The defendants' religious beliefs are sincerely held.

"A secular, civil court is a poor forum to litigate the sincerity of a person's religious beliefs, particularly given that faith is, by definition, impossible to justify through reason." Davila, 777 F.3d at 1204. The Court must look only to see whether "the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold." Id. (quoting Yellowbear, 741 F.3d at 54). If the defendants sincerely believe that symbolic destruction of nuclear weapons is the defendants' exercise of their religious beliefs, then the Court's "narrow function" is to determine whether this reflects "an honest conviction." *See* Hobby Lobby, 134 S.Ct. at 2779. If the government argues that any defendant's religious beliefs are not sincerely held, then the "district court should hear directly from [the defendant], as his credibility and demeanor will bear heavily on whether his beliefs are sincerely held." Zimmerman, 514 F.3d at 853-54.

In the present case, the defendants have submitted declarations and affidavits that state why the beliefs that motivated their actions are religious. Indeed, every action for which they are being criminally prosecuted was carefully discerned and consistent with their faith.

For Mark Colville, "The existence of nuclear weapons is an ongoing, relentless assault on the human community and the planet itself. As a Catholic Christian, this reality demands my response. The government's prosecution of me has resulted in a significant strain on my family

[13] The present case is clearly distinguishable on this issue from Hutson, 2018 WL 345316, which the Court mentioned in its Order requiring supplemental briefing, Dkt. No. 220 at 5. The court in Hutson found that the defendant's beliefs were not religious in nature, 2018 WL at *3, for reasons that have no relevance to the present case.

life, as I've been incarcerated in the Glynn County Jail for 5 months, with the prospect of possibly years of prison time to come. At the same time, it is abundantly clear that the government's decision to criminalize my behavior is a direct result of its refusal to subject its own nuclear policy, which is clearly criminal, to legal scrutiny."[14]

Clare Grady explains her calling. "My religious beliefs call me to action based upon these Bible verses and direction from my Catholic faith. If I fail to take action, as the Prophet Isaiah calls us to do, I become complicit with the government's illegal activities at King's Bay which perpetuate bloodshed, violence, inequality and terror. My sincerely held religious beliefs compel me to respond to the illegal and bloody activity at King's Bay which is carried out in my name. Because I know of the illegal, violent and omnicidal nature of the work at King's Bay, I am called by the Prophet Isaiah to disarm this deadly weapons system and set right my relationship with God, neighbor and all those harmed by the Trident."[15]

For Martha Hennessy, her decision to walk onto the naval base at Kings Bay, Georgia and pour blood, hang a banner, and cut a padlock was guided by her faith. "It is idolatry to convince people that it is acceptable to destroy whole countries and other people when Jesus has called us to the greatest commandment to love God with all our hearts, souls, minds, and strength, and to love our neighbors as ourselves (Mark 12:30-31)."[16]

Stephen Kelly, SJ, wrote "From Pacem in Terris of Pope John XXIII through Vatican II, the Church has guided the conscience of myself and all Catholics. We have a clear message, the

[14] Mark Colville Declaration, paragraph 16.

[15] Clare Grady Declaration, paragraph 30.

[16] Martha Hennessy Declaration paragraphs 13-15.

gospel kerygma is unequivocal: Nuclear weapons are not only excluded from the reign of God, they prevent us from being fully human."[17]

Elizabeth McAlister has spoken about her religious faith and nuclear weapons for decades.[18] She remains steeped in faith and resistance to nuclear weapons. "Being constantly ready to commit the nation and the planet to a war of annihilation within minutes for the sake of so-called national interests elevates these weapons over any belief in human dignity, any belief in the sanctity of human life, any belief in life itself, or any belief in God. This is idolatry. I, as a Catholic Christian, cannot bow down to these weapons. I cannot turn away from their power to destroy all the people of our earth. Our work is not to destroy but to purify and cleanse. Our work is to confront these idols and stand up for our earth, our people, and our faith."[19]

Patrick O'Neill discusses his faith based challenge to nuclear idolatry. "With a deep sense of humility, the Kings Bay Plowshares, as part of a group of seven devout Roman Catholics, relying on Sacred scripture and prayer for guidance, I have attempted to follow the teachings of Jesus, the Prince of Peace, by challenging the idolatry of a human-made idol called trident."[20]

Carmen Trotta declares "On April 4th, 2018, that is, the 50th anniversary of the assassination of the United States' pre-eminent Christian martyr, the Rev. Martin Luther King, I,

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[17] Stephen Kelly, SJ, Declaration, paragraph 29.

[18] As paragraph 33 of her declaration points out, Liz McAlister first raised religious freedom defenses in 1984. "On March 14, 19841 spoke about this to U.S. District Court Judge Howard Munson of the Northern District of New York in response to the US government's efforts to keep us from talking about freedom of religion and the idolatry of nuclear weapons. We sought to speak to the jury about the state religion of nuclear weapons. I spoke at length then about the idolatry of nuclear weapons and the religion of protecting those weapons and how that is contradictory to our belief in God. My plea to the court was published as "ON FREEDOM OF RELIGION AND CONTEMPORARY IDOLATRY," in THE TIME'S DISCIPLINE: The Beatitudes and Nuclear Resistance, (Fortkamp Press 1989) authored by myself and my husband Philip Berrigan."

[19] Elizabeth McAlister Declaration, paragraphs 30 and 31.

[20] Patrick O'Neill Declaration, paragraph 3.

Carmen Trotta, as one of a community of 7 Catholic pacifists, entered onto the Kings Bay Naval Base to symbolically disarm some portion of the nuclear arsenal, protected and maintained there, and to denounce and decry the continued existence of nuclear weapons on American soil as a violation of international humanitarian and human rights law; a violation of current treaty obligations; and, first and foremost, as a latent crime against God and Humanity. (This last phrase is drawn from Gaudium et Spes (joy and hope), promulgated in 1965 by Pope Paul VI during the Second Vatican Council; it is among the highest teaching authority of the Church. And it is the sincerely held religious belief of this Christian).[21]

In the present case, "[t]he Government does not contest that Defendants sincerely hold the beliefs regarding nuclear weapons they espouse." Government's Supplemental Briefing at 10. Nevertheless, the government seeks to disparage the defendants' sincerity, characterizing the defendants' RFRA defense as an effort to obtain public policy revisions "tinged with post-hoc religious justification." Government's Supplemental Briefing at 10. Because the government concedes that the defendants sincerely hold their relevant religious beliefs, it should not seek to influence the Court by implying the contrary.

D. The government's enforcement of trespass and property statutes by bringing criminal charges imposes a substantial burden on the defendants' exercise of their religious beliefs.

The Supreme Court has held that the District Court must determine whether the government's means of enforcement "imposes a substantial burden on the ability of the objecting parties to conduct [their actions] in accordance with *their religious beliefs*." Hobby Lobby, 134 S.Ct. at 2778 (emphasis in original). The Tenth Circuit has explained what situations constitute a "substantial burden":

[21] Carmen Trotta Declaration, paragraph 1.

> we take religious claimants as we find them, assessing the coercive impact the government's actions on the individual claimant's ability to engage in a religious exercise, as he understands that exercise and the terms of his faith. This court has explained that a burden on a religious exercise rises to the level of being "substantial" when (at the very least) the government (1) … , (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.

Yellowbear, 741 F.3d at 55 (emphasis added). The Eleventh Circuit agrees. "A law is substantially burdensome when it places 'significant pressure' on an adherent to act contrary to her religious beliefs, meaning that it 'directly coerces the religious adherent to conform ... her behavior.' … Thus, the government imposes a substantial burden when it places 'pressure that tends to force adherents to forego religious precepts.'" Eternal Word Television Network, Inc. v. Secretary of U.S. Department of Health and Human Services, 818 F.3d 1122, 1144 (11th Cir. 2016) (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir.2004), cert. denied, 543 U.S. 1146 (2005)).[22]

The government in its brief misstates the case law of the Eleventh Circuit by stating:

> An adherent demonstrates a substantial burden only by showing: (1) that the "regulation completely prevents the individual from engaging in religiously mandated activity, or [(2)] if the regulation requires participation in an activity prohibited by religion."

Government's Supplemental Briefing, at 4-5 (quoting Midrash Sephardi, 366 F.3d at 1227) (emphasis added). But the court in Midrash Sephardi in fact stated:

> We have held that an individual's exercise of religion is "substantially burdened" if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion.

[22] Although Eternal Word involved RLUIPA, the Eleventh Circuit applies "the same substantial burden analysis under both RLUIPA and RFRA." Eternal Word, 818 F.3d at 1144 fn. 23.

Midrash Sephardi, 366 F.3d at 1227 (emphasis added). The court listed two conditions under which the burden imposed would clearly be "substantial," but the court did not say that those two were the only conditions (as the government's brief states).[23] Indeed, in the paragraph preceding this quotation from Midrash Sephardi, the court discussed Supreme Court cases in which a burden was found to be "substantial" when government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Id., 366 F.3d at 1226-27.

The government's enforcement of the trespass and property statutes in the present case at the very least places "substantial pressure" on the defendants "to modify [their] behavior and to violate [their] beliefs." *See* Affidavit of Captain Brian M. Lepine, Dkt. No. 227-1 at ¶ 10, p. 6 ("Failing to prosecute these individuals criminally would only serve to embolden this group … to commit further acts of trespass, destruction, and depredation of government facilities."). It is worth noting that Oklevueha Native American Church v. Lynch, 828 F.3d 1012 (9th Cir. 2016), cert. denied, 137 U.S. 510 (2016) cited by the government, Government's Supplemental Brief at 6, is very different than the present case. In Oklevueha, the court stated that "we simply conclude that the evidence is inadequate to support the finding of a substantial burden," and so affirmed the district court's grant of summary judgment to the government. Oklevueha, 828 F.3d at 1017. The court distinguished both Hobby Lobby and Holt on this ground. Id. at 1016-17. In the present case, the defendants have produced sufficient evidence of substantial burden in their affidavits.

[23] This error in the government's brief (restricting "substantial burden" to only two situations) became the organizing principle of the government's argument on substantial burden (Government's Supplemental Briefing at 5-6), with the result that the government failed to address the third situation that also applies to the present case.

The defendants' affidavits demonstrate that enforcing the trespass and property statutes through arrest and imprisonment imposes a substantial burden on the defendants' exercise of their religious beliefs.[24]

The choice imposed on the defendants is between a very serious penalty (arrest and imprisonment) and refraining from conduct that is in accordance with, and motivated by, the defendants' sincerely held religious beliefs. Arrest and imprisonment are not only a substantial burden on the past religious exercise at Kings Bay, but also a substantial burden on future religious exercises, whether or not conducted using government property.[25]

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[24] Patrick O'Neill in paragraphs 6, 7 and 13 of his Declaration, "The facts presented in the Government's case are perhaps the best and most thorough compilation of evidence proving that the motivations of the Kings Bay Plowshares are based on sound religious principles. In fact, the Government's entire case -- based on our signed religious documents and video recordings of our alleged "crimes" -- shows that we as a group focused none of our efforts on trying to "get away with a crime." By providing the Government with all the evidence it apparently needs, the seven of us have tried to make our case be completely based on religious grounds…. By prosecuting the Kings Bay Plowshares -- and saying nothing about the criminality of nuclear weapons -- this court has opted to crush dissent and maintain a status quo that puts the very fate of the God's creation in peril."

Martha Hennessy in paragraph 13 of her Declaration, "What was temporarily damaged on the base doesn't compare to blasting whole modern cities and killing millions of people if or when the purpose and preparedness of the base is carried out. It is near impossible for citizens to emphasize and prove this point in an alternative setting. If one were to cut the lock or fence to a concentration camp, the act of entering such a place would not become more of a crime than the purpose of the lock/fence to protect what is being done on the other side. I did not go to the base with violent intentions to put anyone at risk of harm. I went to expose the nuclear arsenal for what it is, a violation of God's will for us to love one another as His has loved us (John 13:34)."

Stephen Kelly, SJ, in paragraphs 67 and 68 of his Declaration, "According to what I understand to be biblical faith, there is simply no way to worship God authentically without addressing idols, or specifically that with which we have replaced God in the grasping for personal power and ultimate security. Direct resistance to idolatry is a foundational Christian responsibility that finds its origin in the First Commandment given by God directly to Moses: "I Am the Lord your God… You shall have no other gods before Me" (Exodus 20:1-6)."

[25] The government states in a footnote that the mere act of prosecution itself is not sufficient to establish a substantial burden. Government's Supplemental Briefing at 6 n. 3. It quotes to this effect United States v. Jeffs, 2016 WL 6745951 at *7 (D. Utah Nov. 15, 2016). But the defendants in the present case, unlike the defendants in Jeffs, are not arguing that the mere fact of prosecution

The government argues that "even if peaceful symbolic protests are a mandated religious activity, [the defendants] had ample alternatives to engage in such activity without violating federal criminal laws," and therefore "this prosecution did not impose a substantial burden on the practice of their religion." Government's Supplemental Briefing at 7-8. The short answer to this argument is that it is the very argument unanimously rejected by the Supreme Court in Holt. The Supreme Court in Holt stated that RFRA provides protection if a religious exercise is substantially burdened, regardless of whether the defendants are "able to engage in other forms of religious exercise." Holt, 135 S.Ct. at 862 (unanimous court) (holding that the district court erred by concluding that the grooming policy being challenged under RLUIPA did not substantially burden petitioner's religious exercise, because the district court reasoned that the petitioner had alternative means of practicing religion).[26] If courts were allowed to decide that violating one religious belief but following an alternative would still allow defendants to "meet their religious duties," this would draw the courts into the business of deciding which beliefs are central to which religion.

A longer answer is that the cases cited by the government as support for this argument are in fact either unhelpful or inapplicable.[27] The government primarily relies on United States v.

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alone constitutes the substantial burden. It is the enforcement of the trespass and property statutes by means of criminal prosecution that imposes the substantial burden. The court in Jeffs recognized this distinction, stating: "To be sure, statutes and regulations carrying criminal penalties may impose a substantial burden. But the Court must look at how those statutes and regulations relate to Defendants' religious exercise to determine whether a substantial burden exists." Id. at *7.

[26] As the dissent in Eternal Word has summarized: "a burden is no less substantial if the burdened party 'is able to engage in other forms of religious exercise,' if the exercise in question is not 'compelled' by the burdened party's religion, or if the burdened party's belief is 'idiosyncratic.'" Eternal Word, dissenting opinion, 818 F.3d at 1181 (quoting Holt, 135 S.Ct. at 862).

[27] The unhelpful cases (which are the only other cases cited by the government besides the two discussed in the text) are United States v. Acevedo-Delgado, 167 F.Supp.2d 477 (D. Puerto Rico 2001); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); and United States v. Amer, 110 F.3d 873 (2nd Cir. 1997) cert. denied, 522 U.S. 904(1997). *See* Government's Supplemental Briefing at 7-8. These three cases are not helpful at all in the present case, for various reasons.

Epstein, 91 F.Supp.3d 573, 580-83 (D.N.J. 2015), *aff'd*, United States v. Stimler, 864 F.3d 253 (3rd Cir. 2017). In Epstein, the defendants were charged with kidnapping and beating their victims. Epstein, 91 F.Supp.3d at 579. The court found that even if the relevant Jewish law were to permit the use of violence or force in similar situations, the government's application of the kidnapping laws did not substantially burden the defendants' religious exercise if the defendants had "acceptable religious alternatives." Id. at 582-83. The court went on to find a "compelling [governmental] interest in uniformly applying kidnapping laws to prevent serious crimes of violence," id. at 585. The court distinguished O Centro because in Epstein the "Defendants' purported use of force to effectuate a mitzvah ["religious commandment"] involves kidnapping and even physical violence to others." Id. at 584, 580. Moreover, the court found no "other effective means than prosecuting those who commit a crime of violence, such as kidnapping, to enforce the Government's compelling interest." Id. at 586. The Court of Appeals for the Third Circuit affirmed, also emphasizing the violent nature of the kidnappings. However, the court also

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In Acevedo-Delgado, which was decided many years before the clarification of "substantial burden" by Hobby Lobby and Holt, the court presented no reasoning on this issue at all, beyond listing alternative possible actions open to the defendant and concluding that there was no substantial burden imposed by the statute and regulation. Acevedo-Delgado, 167 F.Supp.2d at 480-81. This is therefore not persuasive treatment of this issue.

Second, it is not clear how Cheffer is relevant to the present case. In that case, two plaintiffs brought suit challenging the Freedom of Access to Clinic Entrances Act on multiple grounds, including that the Act violated RFRA. The plaintiffs did not argue that the Access Act substantially burdened their religious practice. Cheffer, 55 F.3d at 1522. Nevertheless, the Eleventh Circuit held that the Access Act itself did not substantially burden the only religious practices that the plaintiffs asserted before the court. Id. Thus, whatever the court had to say about substantial burden is dictum.

Third, in Amer, the defendant, who was convicted of international parental kidnapping in violation of the International Parental Kidnapping Crime Act, failed to raise a RFRA defense in the district court and therefore forfeited it. 110 F.3d at 879 n. 1. The few additional statements by the court about RFRA are therefore dicta, and they were written over 15 years before the Supreme Court's clarification of the substantial burden element of RFRA in Hobby Lobby and Holt.

noted that the defendants did not challenge on appeal the lower court's determination of no substantial burden. Stimler, 864 F.3d at 267-69. Therefore, the statements of the court in Stimler are dicta.

First, it is doubtful that Epstein and Stimler were correctly decided under Holt. It was unnecessary in that case to carve out any exception from the rule of Holt on substantial burden, because that case could be completely decided on the government's justification based on a least restrictive means of furthering a compelling interest. This Court should not follow the reasoning in Epstein (or the dictum in Stimler).

Second, Epstein and Stimler involved religious actions that caused harm to others, and should be distinguished from the present case.

In the present case, the defendants are nonviolent religious protestors who never posed any threat of harm to others, in keeping with their religious beliefs.[28]

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[28] Patrick O'Neill, paragraph 9, "Our Catholic, Christian faith has compelled us to take action in defense of life and God's creation. As a global community, human beings have come to accept the prospect of nuclear annihilation of the planet as an acceptable risk. Because the world has opted to embrace war -- even nuclear war -- as what might be a "normal" course of action in a human conflict, it is up to people of conscience to say no to such insanity, and take subsequent action to expose the lie that weapons of mass destruction are acceptable as tools of warfare."

See Carmen Trotta, paragraphs 20 and 24, "During the Second Vatican Council, the Church too recognized the portent of WWII. In paragraphs 77 through 82 of Gaudium et Spes…the Church's analysis, 50 years ago, is meticulously rational, calling for stronger international legal authorities to eliminate weapons of mass destruction. It is also boldly passionate calling for 'unequivocal and unhesitating condemnation' of nuclear weapons, and supreme commendation for those who 'fearlessly and openly resist' their use…Any act of war aimed indiscriminately at the destruction of entire cities of their extensive areas along with their population is a crime against God and Man himself. It merits unequivocal and unhesitating condemnation."

Elizabeth McAlister in paragraph 8 of her affidavit, "We agree with the 1981 statement of Roman Catholic Archbishop Raymond Hunthausen, a friend and spiritual advisor, who wrote "Our security as a people of faith lies not in demonic weapons that threaten all life on earth. Our security is in a loving, caring God. We must dismantle our weapons of terror and place our reliance on God.'"

These defendants' actions were designed solely to symbolically "disarm" the nuclear weapons. Defendants cut fences, a padlock, poured blood, spray painted, and hung a banner. (See generally Government's Indictment, Rec Doc. 1).

The evidence in this case already provided at the bond hearing indicates defendants' actions were not seen as a threat. As Agent Clinedinst testified at Martha Hennessy and Elizabeth McAlister's bond hearing, he did not perceive the defendants to be "threatening." (May 17, 2018 Bond Hearing Transcript p. 33:11-13, Rec. Doc. 56). Rather than claiming that the defendants were a threat to anyone else, the government claimed that defendants themselves could have gotten hurt in their action. (Rec. Doc. 56, Tr. 50:3-8) Also, a spokesperson for the Kings Bay Naval Base stated to the press shortly after Ms. Hennessy and her codefendants' arrest, "At no time was anybody threatened," adding that there were no reported injuries and that no military personnel or "assets" were in danger. See Lindsey Bever, "Activists raid Kings Bay sub base with hammers and 'baby bottles of their own blood'," The Washington Post (Apr. 5, 2018) available at https://www.stripes.com/news/us/activists-raid-kings-bay-sub-base-with-hammers-and-baby-bottles-of-their-own-blood-1.520546 (last visited June 17, 2018). Clare Grady proffered this article later in the day on May 17, 2018 during all pro se defendants' detention hearing.

Cases in which a defendant's religious actions detrimentally affect others are fundamentally different than the present case.[29]

The Eleventh Circuit has "made clear that, in order to constitute a 'substantial burden' on religious practice, the government's action must be 'more than ... incidental' and 'must place more

[29] *Cf.* the concurring opinion in Holt by Justices Ginsburg and Sotomayor, 135 S.Ct. at 867 (concurring opinion) (stating that "[u]nlike the exemption this Court approved in [Hobby Lobby], accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief").

than an inconvenience on religious exercise.' That is, to constitute a substantial burden [ ], the governmental action must significantly hamper one's religious practice." Davila, 777 F.3d at 1205 (quoting Smith v. Allen, 502 F.3d 1255, 1277 (11th Cir.2007) (citation omitted) (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir.2004)), *abrogated on other grounds by* Sossamon v. Texas, 563 U.S. ——, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011)).

As the defendants state in their affidavits, engaging in the prophetic witness of symbolically disarming nuclear weapons is acting in accordance with the defendants' core religious beliefs.[30] Preventing such actions, or putting substantial pressure on defendants to violate such beliefs, is to impose a substantial burden.

The Eleventh Circuit has also held that the inquiry into "substantial burden" "involves both subjective and objective dimensions." Id., 818 F.3d at 1144. In the subjective dimension, "courts must accept a religious adherent's assertion that his religious beliefs require him to take or abstain from taking a specified action." Id. "The objective inquiry requires courts to consider whether the

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[30] Clare Grady, paragraph 32, "My faith and my sincerely held religious beliefs direct me to take peaceful action in the manner that I did to expose the government's protection of weapons of mass destruction which are designed to annihilate all God's Creation."

Martha Hennessy Declaration at paragraph 10, "To truly reveal Jesus in my heart, I must attain acts of mercy and good works. My careful discernment within the context of community, my primacy of conscience and free will in the service to others led me to the naval base at Kings Bay."

Mark Colville Declaration at paragraph 13, "The motivations that informed my decision to trespass onto Kings Bay are plainly evident in the photographs taken at the scene of the missile shrine there. The messages I wrote on those frightening monuments to death - "Idol", "Love your enemies", "Blasphemy", "Resist Evil", "Swords Into Plowshares", "Turn Away From Sin", "Disarm", "IDOLATRY" - speak for themselves."

Patrick O'Neill Declaration, paragraphs 10 and 11, "It is my belief that Jesus is here present today, though not in body, and my beliefs compel me to do what Jesus would do if He were here in person: I believe He would organize, as he did, and he would literally try to disarm that which would destroy all of His Earthly creation. Therefore, our action is an attempt to allow the Holy Spirit and the will of God to act through the seven of us to protect all of God's creation."

government actually 'puts' the religious adherent to the 'choice' of incurring a 'serious' penalty or 'engag[ing] in conduct that seriously violates [his] religious beliefs.'" Id. (quoting Holt, 135 S.Ct. at 862). There is no doubt that in the present case, both the subjective and objective dimensions of "substantial burden" have been satisfied.

II. The government has failed to produce evidence and prove the two conditions necessary for justifying imposing this substantial burden.

Because the defendants have established all the prima facie elements of a RFRA defense, the burden shifts to the government to produce evidence and prove (1) that it has a compelling marginal interest in prosecuting any of these individual defendants, and (2) that criminal prosecution is the least restrictive means of furthering that marginal and particularized interest. The government fails to carry this burden on either proposition.

A. The government has not established a compelling governmental interest.

1. Under governing law, the government must prove that it has a marginal interest that is compelling, and it must do so against each particular defendant.

The Supreme Court has held that under the RFRA requirement of a "compelling governmental interest," the government has the heavy burden of establishing, against each defendant as an individual, the government's "marginal interest in enforcing" the statutes under which it has criminally charged that defendant. Eternal Word, 818 F.3d at 1154. If the government fails to carry this burden, then the Court must dismiss the criminal charges.

First, the "compelling governmental interest" must be analyzed with respect to each defendant, taking that defendant's individual circumstances into account. Broad claims of "protecting naval installations from trespass and property destruction" (see Government's Supplemental Briefing at 2) are inadequate, as a matter of law. "RFRA … contemplates a 'more

focused' inquiry: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened." Hobby Lobby, 134 S.Ct. at 2779 (quoting O Centro, 546 U.S. at 430–431, and 42 U.S.C. § 2000bb–1(b)). As stated by the Eleventh Circuit, "a compelling interest alone is insufficient to satisfy RFRA; we must also assess 'the marginal interest in enforcing' the challenged law against the religious adherents in question." Eternal Word, 818 F.3d at 1154.

Second, with respect to each defendant, the government must demonstrate "'the asserted harm of granting specific exemptions to particular religious claimants' — in other words, … the marginal interest in enforcing" the statutes in the particular case. Hobby Lobby, 134 S.Ct. at 2779 (quoting O Centro, 546 U.S. at 431). The government must prove that its "marginal interest" in not accommodating the religious exercise of this particular defendant is itself "compelling." *See, e.g.*, Holt, 135 S.Ct. at 863 (holding that the compelling interest test required the government to prove its marginal interest in enforcing the departmental policy of preventing a prisoner from growing a ½-inch beard); *see* Eternal Word, 818 F.3d at 1154.

In order to carry its burden, the government must produce evidence and prove that its "interest would be seriously compromised by allowing" an exception or accommodation in the case of each particular defendant. *See* Holt, 135 S.Ct. at 863 ("We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a ½–inch beard is hard to take seriously.") The Eleventh Circuit has recognized that the government must produce substantive evidence to prove that making any exception for a particular defendant would "seriously compromise" the government's ability to promote its

interest. *See, e.g.*, Davila, 777 F.3d at 1206-07 ("On this record, we are left to wonder about the number of prisoners who may similarly request religious objects; any processes the prison currently has for screening objects from outside sources; past incidents of mailed contraband that justify the warden's security fears; and the actual costs and time the prison would need to spend on screening. … But prison officials cannot simply utter the magic words 'security and costs' and as a result receive unlimited deference from those of us charged with resolving these disputes. … [W]here the prison has offered no evidence to justify its cost and safety concerns, the requirements of RFRA have not been met."). Moreover, "policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RFRA's] requirements." Davila, 777 F.3d at 1206 (quoting Rich v. Secretary, Florida Dept. of Corrections, 716 F.3d 525, 533 (11th Cir. 2013) (internal citations and quotation marks omitted)).

Part of the government's burden in proving its compelling interest in making no exception for defendants is proving that prior incidents involving trespass and injury to property have been fully prosecuted under the statutes involved in the present case. If the government has made any exceptions or accommodations for other persons who may have violated any of these statutes, then this is strong evidence that there is no "compelling interest" in enforcing that statute in the present case. *See, e.g.*, O Centro, 546 U.S. at 432-34 (considering a past exception for religious use to Schedule I of the Controlled Substances Act); Rich, 716 F.3d at 533 (considering Florida's therapeutic diet program as relevant to whether Florida had a compelling interest in not providing kosher meals).

The government discussed the Supreme Court's decision in United States v. Albertini, 472 U.S. 675 (1985), a case that was decided before RFRA was enacted. Government's Supplemental Briefing at 12-14. It is not surprising, therefore, that the case is not especially helpful on RFRA

issues. While the Supreme Court in Albertini did discuss the statutory interpretation and legislative history of 18 U.S.C. § 1382, Albertini, 472 U.S. at 680-82, the question in that case was the relation of First Amendment rights to enforcement of the statute. In the present case, however, the issue is whether generalities about compelling interests satisfy the requirements of RFRA.[31]

Similarly, the case of United States v. Allen, 760 F.2d 447 (2nd Cir. 1985), another case relied upon by the government, Government's Supplemental Briefing at 13-15, was decided the same year as Albertini, and years before RFRA was enacted. The general articulation of a governmental interest in Allen does not satisfy the requirement of proving a marginal, particularized interest under O Centro, Hobby Lobby, Holt and Davila. Indeed, in Allen, the court referred to the interest quoted by the government as a "general interest [that] is apparent from the statute's broad scope." Allen, 760 F.2d at 451. Such a general interest is far from the marginal, particularized interest required under RFRA.

If the government does not make an accommodation for the defendants' religious exercise, then the Court is required to do so. "RLUIPA, like RFRA, 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'" Holt, 135 S.Ct. at 864 (quoting O Centro, 546 U.S. at 434). "RFRA, however, plainly contemplates that *courts* would recognize exceptions — that is how the law works." O Centro, 546 U.S. at 434. If the government does not create an evidentiary record sufficient for the Court to rule in the government's favor on this issue, then the Court must dismiss the charges against the defendants.

[31] The government quoted at length from Acevedo-Delgado, 167 F.Supp.2d at 481, concerning the government's general interest in military readiness. Government's Supplemental Briefing at 12-13. That case was decided years before O Centro, Hobby Lobby, Holt and Davila. It is no surprise, therefore, that the court in Acevedo-Delgado, in summarily finding a compelling governmental interest, paid absolutely no attention to the particulars of the defendant's actions relative to the military installation, or to the government's marginal interest in not making any accommodation in that particular case. The district court's approach in Acevedo-Delgado is no longer acceptable.

2. In the present case, the government has failed to produce evidence and prove that it has a compelling marginal interest in prosecuting any of these defendants.

The government has charged the defendants with four counts alleging unlawful entry onto government land and unlawful injury to government property. The government's general interest therefore is the protection of its land from trespass and the protection of its property from injury. In addition, at Naval Submarine Base Kings Bay, the government asserts "a compelling interest to prevent unauthorized personnel from gaining access to the base" because such personnel "may potentially endanger the safety of base personnel, the security of the vital facilities and assets on base, and even their own safety." Affidavit of Captain Brian M. Lepine, Dkt. No. 227-1 at ¶ 10, p. 6. As a matter of law, however, such general interests alone do not satisfy the government's burden under RFRA to justify enforcement of these statutes against these particular defendants by means of criminal prosecution.

First, the government must provide evidence and explain why it has a compelling marginal interest in prosecuting the religious exercise of these particular defendants. These defendants never posed a danger to "the safety of base personnel" or to "the security of the vital facilities and assets on base."[32]

[32] Recall that a spokesperson for the Kings Bay Naval Base stated to the press shortly after Ms. Hennessy and her codefendants' arrest, "At no time was anybody threatened," adding that there were no reported injuries and that no military personnel or "assets" were in danger. Lindsey Bever, "Activists raid Kings Bay sub base with hammers and 'baby bottles of their own blood'," The Washington Post (Apr. 5, 2018) available at https://www.stripes.com/news/us/activists-raid-kings-bay-sub-base-with-hammers-and-baby-bottles-of-their-own-blood-1.520546 (last visited June 17, 2018). Clare Grady proffered this article later in the day on May 17, 2018 during the pro se defendants' detention hearing.

Thus, prosecution of these defendants at most furthers the property interest of the government in protecting such property as a section of chain-link fence or a padlock – but not an interest in protecting the safety of base personnel or the security of any vital facilities or assets.[33]

Second, the affidavit of Captain Lepine furnishes only general statements with regard to governmental interests – e.g., the interest in deterring a surprise nuclear attack on the United States (Dkt. No. 227-1 at ¶ 4, p. 3), protecting a submarine when in port (id. at ¶ 6, pp. 3-4), or ensuring the safety of base personnel or the security of vital facilities and assets (id. at ¶ 10, p. 6). The affidavit provides no evidence that the actions of these particular defendants posed any danger to the security interests of the United States or the safety of base personnel.

Third, the government must produce evidence and prove that it has not made exceptions from criminal prosecution in the past, when faced with trespass to government land or injury to government property. To be clear, the defendants are not raising in this context the claim of discriminatory use of prosecutorial discretion. Rather, in the context of RFRA, the defendants are arguing that if the government has made any exceptions to criminal prosecution in the past under

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[33] The lack of any danger to others distinguishes the present case from two cases mentioned by the Court in its Order requiring supplemental briefing. *See* Epstein, 91 F.Supp.3d at 585 (finding a "compelling [governmental] interest in uniformly applying kidnapping laws to prevent serious crimes of violence"); Martines, 903 F.Supp.2d at 1066 ("If Defendant's beliefs afforded him the right to distribute marijuana with impunity, his beliefs would paralyze the federal government's enforcement of its drug laws.").

Also distinguishable is Acevedo-Delgado, 167 F.Supp.2d at 481 (finding that, "since certain areas on Camp García are used by the Navy for military training, there also exists a compelling need to protect the general public from possible injuries resulting from such training"). In the present case, the defendants' actions posed no dangers to the general public.

Similarly, in United States v. Oliver, 255 F.3d 588 (8th Cir. 2001), cited by the government, Government's Supplemental Briefing at 17, the compelling governmental interest was in preserving the bald eagle population from uncontrolled harvesting of eagle body parts. Id. at 589. In the present case, the defendants' actions posed no danger to life of any kind.

these statutes, then this is good evidence that the government has no compelling interest in not making an accommodation in the present case.

Finally, the government has no compelling interest, or even lawful interest, in using criminal prosecution for the purpose of silencing the defendants' future exercise of their religious beliefs against the possession or use of nuclear weapons. RFRA forbids imprisoning any defendant for the express purpose of silencing her or his future religious exercise, for this would constitute a prior restraint by imposing a substantial burden, with no compelling interest and no attempt at using a less restrictive means.

B. The government has not established that criminal enforcement is the least restrictive means.

1. Under governing law, the government must prove that criminal prosecution for trespass and injury to property is the least restrictive means in the case of these particular defendants.

Even if the government could demonstrate that it has a compelling marginal interest in protecting its property interests against these particular defendants, the government must also produce evidence and prove that criminal prosecution is "the least restrictive means" of achieving its interest against these defendants. The Supreme Court has said that "[t]he least-restrictive-means standard is exceptionally demanding." Hobby Lobby, 134 S.Ct. at 2780. To satisfy RFRA, the government must show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." Hobby Lobby, 134 S.Ct. at 2780; *see* Eternal Word, 818 F.3d at 1158 ("When a less restrictive alternative serves the government's compelling interest 'equally well,' the government must use that alternative."). If the government cannot do so, then

it must fashion some accommodation or exception for these defendants, and not treat the defendants as it would treat a terrorist intruder or a common vandal.[34]

What the government cannot do, as a matter of law, is insist generally on making "no exceptions." O Centro, 546 U.S. at 436. The Supreme Court has held any such blanket insistence inadequate, calling such argument an appeal to "slippery-slope concerns." Id. "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" Id. (quoting 42 U.S.C. § 2000bb–1(a)). As the Supreme Court added in Holt: "We have rejected a similar argument in analogous contexts, … and we reject it again today." Holt, 135 S.Ct. at 866. The government cannot merely claim that making an exception would "lead to a flood of religious objections," for the Supreme Court has rejected such a vague argument in other

[34] Several cases mentioned by the Court in its Order requiring supplemental briefing are distinguishable from the present case on the issue of less restrictive means. Those cases involved the government's interest in protecting others from harm caused by acts of the defendant(s). In Epstein, the court found no "other effective means than prosecuting those who commit a crime of violence, such as kidnapping." Epstein, 91 F.Supp.3d at 586. In Hutson, the court rejected the defendant's sole proposed alternative, that of training the entire public to recognize and deal with the fraudulent acts that he engaged in. Hutson, 2018 WL 345316 at *6-*7. In Martines, the court found that the government "has a compelling interest in preventing the distribution of marijuana, and that the universal application of federal laws prohibiting distribution is the least restrictive means of furthering that interest." Martines, 903 F.Supp.2d at 1066.

In addition, the government cited Oliver. Government's Supplemental Briefing at 17. In Oliver, decided years before the Supreme Court's clarifications of RFRA in O Centro, Hobby Lobby and Holt, the compelling governmental interest was in preserving the bald eagle population, and the court held that "a one-man exemption" for the defendant would have "no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting." Oliver, 255 F.3d at 589.

RFRA contexts where the government "has made no effort to substantiate this prediction." *See* Hobby Lobby, 134 S.Ct. at 2783.[35]

The government argues that the Court should not apply RFRA to this case, because doing so "would plunge the courts far too deep into the business of reviewing the most basic exercises of prosecutorial discretion." Government's Supplemental Briefing at 16 (quoting Christie, 825 F.3d at 1062). But the defendants have not argued, as the defendants did in Christie, that the government should have made "a (potentially) less punitive charging decision." *See* Christie, 825 F.3d at 1061-62. The defendants in the present case argue that the government must prove that any means that is less restrictive on religious exercise is also less effective in furthering the government's compelling interest. That is clearly the law under RFRA. The government argues that whenever it chooses to bring criminal charges against a defendant who has exercised her or his religious beliefs, then that governmental decision eliminates all judicial power to question the government's action. If that argument were to prevail, then RFRA would be nullified in such cases, and it would have the perverse effect of encouraging criminal prosecution whenever a defendant might raise a RFRA defense. As the Supreme Court has held, however, "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." O Centro, 546 U.S. at 434 (emphasis added).

Any past exceptions made by the government in enforcing the statutes charged against these defendants would prove that there are in fact less restrictive means that achieve the

[35] The government's citation to Acevedo-Delgado, 167 F.Supp.2d at 481, is not availing. Government's Supplemental Briefing at 15, 17. That case, decided years before O Centro, Hobby Lobby and Holt, summarily concluded that any religious exception "will result in significant administrative problems to the Navy, and open the door to a myriad of religious exceptions, as well as to endless constitutional claims of discrimination." Acevedo-Delgado, 167 F.Supp.2d at 481. There was no reference at all to an evidentiary record. Now, however, the Supreme Court has made it clear that this Court may not take such a sweeping approach.

government's asserted interest. As the Eleventh Circuit stated in a case involving RLUIPA, "the fact that Florida administers a therapeutic meal program and a pilot kosher meal program suggests that there are less restrictive means by which Florida's Department of Corrections can further its interests." Rich, 716 F.3d at 534. The burden is on the government to produce evidence that it has made no such exceptions in the past.

2. In the present case, the government has failed to produce evidence and prove that criminal prosecution against these particular defendants is the least restrictive means of furthering the government's compelling interest.

The government has failed to justify its criminal prosecution against the defendants in the present case, because it has failed to produce evidence and prove that alternative means that are less restrictive would not serve its compelling interest equally well.

First, the government has produced no convincing explanation why it proceeded to criminally prosecute these defendants, when the government has in its possession overwhelming evidence that the defendants' actions constituted a religious exercise as defined by RFRA. Either (1) the government has a policy for appropriately treating any persons conducting religious exercises on government property without permission, and the government failed to follow that policy in the present case, or (2) the government has no such policy, in violation of the government's own implementing policies under RFRA (*see, e.g.*, U.S. Attorneys' Manual, 1-15.100 et seq., "Principles of Religious Liberty"). Under either alternative, the government has violated RFRA by its past actions.[36]

[36] At the Motions Hearing held on Aug. 2, 2018, with regard to the issue of discovery, preservation and production of "any and all documents, memorandums or emails or other communications by the agents involved in this case to further explore what least restrictive alternatives or means" the government has pursued or examined in lieu of criminal prosecution, the government's attorney responded that "it would be my surmise [that] there has been no such communication concerning least restrictive means with regard to trespass on the installation or the alleged destruction of

Moreover, the government now has alternative means of furthering its property interest that it is not taking. One alternative means would be a civil action for damages to compensate for any injury to property. This is the normal remedy in the United States for protecting such interests. Such an alternative to criminal prosecution could include an injunction that places reasonable conditions on the defendants' future activities. For example, in O Centro, the injunction required the church to import tea pursuant to federal permits, to restrict control over the tea, and to warn some members of the dangers of the tea. O Centro, 546 U.S. at 437. The government has failed to produce substantive evidence and explain why a civil action against these defendants for compensation would not satisfy the government's interest in protecting its land and property.

A second alternative means, within the context of a criminal case, is that the prosecution could enter into a pretrial diversion agreement with the defendants, which could include supervision, restitution or forms of community service. U.S. Attorneys' Manual, CRM 712 (Pretrial Diversion). The government has failed to produce substantive evidence and explain why a pretrial diversion agreement against these defendants would not satisfy the government's interest in protecting its land and property.

A third alternative means is to provide a space on the government's land where the defendants could exercise their nonviolent religious beliefs against the possession of nuclear weapons, or the use of such weapons by threatening people or nations. Similarly, the government could issue permits to perform religious protests on particular portions of the land at particular times. While cost may be a factor to consider, RFRA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." Hobby

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property, real and situated thereon." Transcript of the Aug. 2, 2018, Hearing, at 81-82, 91. Therefore, in the absence of such evidence, it is reasonable to infer that no such communications occurred in this case.

Lobby, 134 S.Ct. at 2781. The government has not produced evidence of the cost of so accommodating these defendants, nor has it produced evidence of any expected number of religious protestors on its property in the future. Thus, the government has failed to explain why such a space or permit system is not feasible.

Finally, the government asserts a compelling interest in using the punishment of these defendants to deter future religious protests on military installations.[37] "Failing to prosecute these individuals criminally would only serve to embolden this group and other like-minded individuals to commit further acts of trespass, destruction, and depredation at government facilities." Affidavit of Captain Brian M. Lepine, Dkt. No. 227-1 at ¶ 10, p. 6 (emphasis added). If the government's fear that making an exception or accommodation in the case of these particular defendants would unleash a flood of similar religious protestors in the future, then the Government must provide more than just speculation. Rather, the Court must require that the government produce substantial evidence about the number of such religious protestors, or about the actual costs of making such accommodations. The government must produce substantive evidence of such expected numbers and such costs.

The conclusory assertion in Captain Lepine's affidavit that "[c]riminally prosecuting unauthorized personnel that unlawfully access the base is the least restrictive means of furthering the government's interest" does not satisfy the government's burden of producing substantive evidence, especially because the affidavit provides no foundation for concluding that such an assertion is within the scope of Captain Lepine's expertise.

[37] "[T]here is a substantial risk that, left unaddressed, it will encourage these Defendants and others to engage in similar conduct at other military installations." Government's Supplemental Briefing at 14.

As the Eleventh Circuit held in Davila, the government "cannot simply utter the magic words 'security and costs' and as a result receive unlimited deference" from the courts. Davila, 777 F.3d at 1206.

CONCLUSION

Because the defendants have established the prima facie elements of a RFRA defense, and the government has failed to prove either of the two necessary conditions that could together justify such a substantial burden, *see* 42 U.S.C. § 2000bb-1, this Court must dismiss the criminal charges.

Respectfully submitted September 26, 2018.

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I certify that this document was served on all parties by filing it electronically on September 26, 2018.

/s William P. Quigley

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