

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

FILED
U.S. DISTRICT COURT
BRUNSWICK DIV.

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK O'NEILL,

Defendant.

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Case No. 2:18-cr-22

Judge Wood

Magistrate Judge Cheesbro

**DEFENDANT PATRICK O'NEILL'S RESPONSE TO THE COURT'S NOVEMBER 28,
2018, ORDER DIRECTING SUPPLEMENTAL BRIEFING**

Patrick O'Neaill, defendant in this matter, submits supplemental briefing, as directed by the Court's Order dated November 28, 2018 (Dkt. No. 294), regarding the defendants' affirmative defense under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, as raised in their motions to dismiss. On November 7 and November 19, 2018, the defendants and the Government presented evidence and argument on the RFRA defense. The Court's Order directs the parties to limit their supplemental briefing "to identifying evidence submitted at the evidentiary hearing and explaining how that evidence relates to the RFRA arguments in Defendants' motions to dismiss." (Court's Order, page 1)

To avoid duplicative submissions, each defendant's supplemental brief contains two parts, in addition to the Summary. Part I addresses evidence and provides explanations common to all

defendants, and it is adopted by reference by each defendant.¹ Part II addresses evidence and provides explanations specific to the particular defendant filing the brief.²

SUMMARY

The evidence is compelling, as a matter of law, that the prima facie elements of the RFRA defense have been satisfied, and that the burden has shifted to the Government to produce evidence and prove that this criminal prosecution is justified under RFRA. The evidence also demonstrates, as a matter of law, that the Government has failed to prove that it has a compelling interest to prosecute any of these individual defendants, and that the Government has failed to prove that such prosecution is the least restrictive means of furthering any compelling governmental interests. Therefore, on this evidentiary record, the Court must grant the defendants' motions to dismiss the charges. If the Court decides not to rule on any of the prima facie factual issues as a matter of law, then the available evidence is clearly sufficient to create triable issues of fact for the jury. However, on the two factual issues for which the Government bears the burden of production and proof (marginal compelling interest and least restrictive means), the Government has failed to even produce sufficient evidence for the jury to find in the Government's favor.

The evidence of the defendants on the prima facie elements of the RFRA defense clearly shows that the teaching of the Catholic Church is that the possession of nuclear weapons is immoral, as well as the use of those weapons to threaten or cause death and destruction. Moreover,

¹ Part I in its entirety appears identically in the Supplemental Briefing submitted on behalf of each defendant. Part II explains how Patrick O'Neill's testimony corresponds to his RFRA defense.

² In analyzing his RFRA defense, Mr. O'Neill specifically incorporates his testimony at the initial appearance in this matter on May 17, 2018, his Declaration filed in support of his Motion to Dismiss, the testimony of Professor Jeanine Hill Fletcher, the testimony of Bishop Joseph Kopacz, the declaration filed in this matter by Bishop Thomas Gumbleton, and his own testimony at the hearing on November 19, 2018. Additionally, Mr. O'Neill specifically adopts and incorporates the testimony and affidavits and declarations of each and every one of his co-defendants in this matter.

a Catholic whose conscience is formed by those teachings conducts an exercise of religion when she or he engages in prophetic action to raise the consciousness of society about the immorality of those weapons. The defendants sincerely hold these Catholic beliefs, and every action of theirs for which they have been criminally charged was not only a prophetic religious action, but also a symbolic and sacramental religious action. Given the depth with which each defendant has long held these religious beliefs, imprisonment constitutes a substantial burden on her or his continued exercise of these religious beliefs.

Because the defendants have produced compelling evidence to prove their prima facie case under RFRA as a matter of law, that statute requires the Government to produce evidence and prove that, with respect to each defendant taken individually, the Government is undertaking only those actions that are the least restrictive of the defendants' exercise of religion, as a means of achieving some compelling governmental interest. The Government contends that one general interest in this case is the prevention of unauthorized entry onto the Kings Bay naval base, which entry disrupts normal base operations and risks injury to base personnel and possibly to those entering – a risk of injury not caused by any violent action by these nonviolent defendants, but possibly through accidental injury. The Government's only other claimed interest, based on the evidence, is a general interest in compensation for any injury to Government property that was caused by the defendants.

RFRA therefore requires the Government to assess, with respect to each defendant, whether the Government's general interests are so "compelling" that they justify the imposition of a substantial burden on religious exercise. RFRA also requires the Government to assess, with respect to each defendant for whom it does have a compelling interest, the range of means that

would be effective in furthering those compelling interests. Then the Government is required to use that means that is least restrictive of a defendant's continued exercise of her or his religious beliefs. What the Government can never legitimately do is use the imprisonment of these defendants as a means to deter possible religious protests in the future.

However, the Government's evidence conclusively proves, as a matter of law, that it has met none of these RFRA requirements in this case. It has not produced sufficient evidence to prove that its general interests are "compelling" as to any individual defendant. It has undertaken no assessment, for any individual defendant, of any effective but less restrictive means of achieving its interests, other than criminal prosecution. The only relevant evidence is the testimony of Captain Lepine that his policy is to ignore the religious nature of protests altogether, that he has no authority to implement alternatives to criminal prosecution, and that he regarded his only option to be turning the defendants over to the Camden County Sheriff's Department for prosecution. Indeed, the evidence shows that no decision process exists at Kings Bay for implementing RFRA in the case of religious protestors, that there is no policy for treating religious protestors any differently.

Finally, there is no evidence at all that, in the considerable time since the arrests of these defendants, anyone in the federal government has conducted an individualized assessment of less restrictive means. Indeed, there is positive evidence that Captain Lepine has the authority to issue "ban and bar" ("debarment") letters to the defendants, but that Captain Lepine did not even consider using this or any other less restrictive means. There is also positive evidence indicating that Captain Lepine has a policy of disregarding the religious nature of protests generally, which helps to prove that the Government has failed to address its RFRA responsibilities in this case.

While this Court has no authority to create or implement RFRA policies for the Executive Branch, it does have the obligation to conclude, on this evidence, that the Government has violated RFRA in bringing these criminal charges against these defendants. The Court must therefore dismiss these charges.

I. EVIDENCE AND EXPLANATIONS COMMON TO ALL DEFENDANTS

This part of the brief presents the evidence and explanations common to all defendants, insofar as that evidence relates to the actions of the defendants that are the basis for the criminal charges (hereinafter, “defendants’ actions at Kings Bay”). This evidence was presented at the hearing on Nov. 7 by Professor Jeannine Hill Fletcher (Hill Fletcher Tr. 29:11–97:16), Bishop Joseph Kopacz (Kopacz Tr. 99:1–123:12), and Captain Brian Lepine (Lepine Tr. 211:13–287:6); and at the hearing on Nov. 19 by Mr. Scott Bassett (Bassett Tr. 177:17–198:19).

A. Evidence Relevant to the Prima Facie Elements of the RFRA Defense

1. Each action of the defendants at Kings Bay constituted an “exercise of religion.”

The evidence clearly identifies the nature of all of the defendants’ actions at Kings Bay as an exercise of religion, and clearly articulates the religious principles underlying those actions. Each action of the defendants at Kings Bay bore those characteristics that mark it as an exercise of religion that is in accordance with the beliefs, principles and practices of the Catholic Church. As Professor Hill Fletcher testified, the actions of which the defendants are accused – “trespassing onto military property, cutting a lock, cutting a fence, and spreading blood and paint on symbols of nuclear weapons” – “are in accordance with Catholic practice and Catholic faith.” (Hill Fletcher: 40:21–41:3, emphasis added; also 39:8-9, 43:7-9) In addition, the testimonies of individual

defendants, discussed in Part II of defendants' briefs, show that all of the defendants' actions at Kings Bay were motivated by those Catholic religious beliefs.

a. Each action was in accordance with the beliefs and principles espoused by the Catholic Church at its highest levels. "[T]he belief of the defendants that nuclear weapons are immoral is, in fact, the teaching of the [Catholic] Church" – "not just when [those weapons] have been used in the past," and "not just the threat of their being used now," but "the very possession of these weapons of mass destruction" is immoral. (Hill Fletcher: 38:13–39:1; Kopacz: 104:12–20) The bases for this conclusion are the teachings of Pope John XXIII (in the encyclical *Pacem in Terris*), of the Second Vatican Council of Catholic bishops (in *Gaudium et Spes*), and of Pope Francis ("The threat of their use as well as their very possession is to be firmly condemned"). (Hill Fletcher: 37:11–38:12; Kopacz: 104:15–20)

b. Each action was a sacramental action in accordance with the Catholic tradition. In general, an action that is sacramental within the Catholic tradition is more than merely symbolic: it is "not just a symbol of Christ's grace but actually mak[es] it a reality in the world." (Hill Fletcher: 94:7–23) The idea of sacramental action "within the Catholic tradition is that, in following Christ, those who follow him become ... sacramental signs of Christ." (Hill Fletcher: 41:14–17) "[T]he actions that we undertake in the world are not just ... symbolic, but they actually make the presence of God's grace a reality in the world." (Hill Fletcher: 41:17–20)

In particular, "the actions that the defendants undertook [at Kings Bay], ... [were] sacramental signs that are aimed at making holy what had been desecrated." (Hill Fletcher: 41:21–23) "[I]n breaching that false security of those fences [at Kings Bay], ... they entered the space to announce the message of Pope Francis." (Hill Fletcher: 42:14–16) "[B]y entering that space,

announcing that message, and reminding us that the call of the Catholic is to simply love one another ..., those actions are in continuity with ... a Catholic sacramental understanding of our job, our role as Catholics to be part of a world and to continue to make it God's holy creation.” (Hill Fletcher: 42:20-25; also 89:9–90:6)

In addition, the defendants’ actions at Kings Bay have “a pattern that is outlined within Catholic canon law, ... [W]hen sacred places are violated by gravely injurious actions done in them, then ... the Code of Canon Law 1211 has a penitential rite by which that sacred space is repaired.” (Hill Fletcher: 65:5-13) To be a sacramental action, it cannot be performed simply anywhere: “the reality of what’s in front of us [is] part of the sacramental moment” – “in terms of really being connected with the site of the desecrated location ... then it has to be performed in that location.” (Hill Fletcher: 67:20–68:6) Also, the use of blood as a material “for making holy what has been desecrated, is a tradition that we can see within both the Old Testament and the New Testament.” (Hill Fletcher: 87:17-20)

c. Each action was also a prophetic action in accordance with the Catholic tradition.

In general, “prophetic action is designed to call a community or a nation back to justice and righteousness” (Hill Fletcher: 93:9-19) “The role of the prophet is to look at the signs of the times, what’s going on, and to call the community back to justice and righteousness.” (Hill Fletcher: 53:10-12) A sacramental action may simultaneously be a prophetic action, if it “authentically makes present Christ’s grace in a situation of injustice,” and “it is denouncing injustice and bringing about justice and righteousness.” (Hill Fletcher: 96:3-10) “In the history of the Catholic and the Christian tradition the prophetic role is one that often necessarily violates unjust laws in order to see those laws transformed.” (Hill Fletcher: 53:14-16)

In particular, “the actions of the defendants [at Kings Bay] are in accordance with Catholic faith on the understanding of what prophetic action is and ... their actions are in accordance with the Catholic faith on this.” (Hill Fletcher: 44:10-13; Kopacz: 109:4-15, 116:6-21) “[T]he actions that the defendants undertook were actions that were attempting to reveal our own idolatry in protecting that warhead. They cut the fence to break that symbolic hold of Trident over those of us who are kind of just going along our day and not even aware that that idol is so clearly in place.” (Hill Fletcher: 42:8-13) “Their prophetic call in that action was at the heart of the Christian Gospel.” (Hill Fletcher: 46:17-22) “[T]he reality that the prophetic action reveals is a reality that some among us as human beings have made the claim that we can decide the future of the planet. ... [N]uclear weapons could destroy humanity as we know it, the earth as we know it.” (Hill Fletcher: 58:24–59:3)

Moreover, the location of the defendants’ actions at Kings Bay is important to the prophetic action. “I would also underscore that the kind of complacency that our nation has adopted with respect to nuclear arms is contrary to what the Catholic Church is teaching, that is, that ... the possession of nuclear arms is firmly condemned. So ... this particular sacramental action was also directed at what the prophet does in terms of waking up the rest of society to the injustice that has become the status quo.” (Hill Fletcher: 72:7-15; also 83:7-24) And “the location is very important here in terms of a sacramental action that called a prophetic call to transform that particular reality of idolatry and to reclaim that particular location as part of God's creation and to transform that reality.” (Hill Fletcher: 81:21-25)

d. Each action was also in accordance with the Catholic beliefs and principles about the moral primacy of an individual’s conscience. In accordance with the concept of prophetic

action within the Catholic Church, it “is enjoined on Catholics that they, too, must read the signs of the times and interpret them in the light of the Gospel.” (Hill Fletcher: 46:9-12, emphasis added) “[T]he teaching of the Church is that conscience binds us to those human laws that are in accordance with the moral law, or the law of God written on our hearts, and that conscience is not binding on those laws that are determined to be unjust laws.” (Hill Fletcher: 35:2-6) “Laws and decrees passed in contravention of the moral order, and hence of the divine will, can have no binding force in conscience since it is right to be obey [sic] God rather than men.” (Hill Fletcher: 40:15-19, quoting Pope John XXIII’s encyclical *Pacem in Terris*; Kopacz: 108:19–109:3) Moreover, “it’s not just doing wrong actions [for which we are responsible]; it’s actually simply participating in a status quo that is unjust.” (Hill Fletcher: 60:5-12) “[E]very Christian, every Catholic is responsible for the justice or injustice of the world that we live in and ... Catholics are called to be part of the transformation of unjust structures.” (Hill Fletcher: 60:18-22; Kopacz: 121:11-24) Conscience can compel action in the sense that, given “an internal listening to the law of God that’s written on human hearts,” the action is “compelled by a deep spiritual, internal understanding of what one’s conscience is bound to do.” (Hill Fletcher: 92:1-7; Kopacz: 106:25–107:25)

In particular, “the actions of the defendants [at Kings Bay] are in accordance with Catholic social teaching on the primacy of conscience.” (Hill Fletcher: 34:18-20) And “the unjust law in this case is the proliferation of nuclear weapons that is not directed towards the global common good and that, from Catholic perspective, overreaches the power of any human lawmaker to have that sort of an arsenal that can destroy life on this planet.” (Hill Fletcher: 82:9-13)

2. The religious beliefs of the defendants are “sincerely held.”

Part II of this supplemental brief combined with previous submissions and testimony presents persuasive evidence that Patrick O'Neill has sufficiently shown that he followed his sincerely held Catholic beliefs and was compelled to follow his faith or be complicit in sin. Mr. O'Neill was acting consistently with Catholic teachings by engaging in a prophetic and sacramental act on April 4-5, 2018 to call attention to the government's immoral and idolatrous proliferation and use of nuclear weapons at the Naval Base at Kings Bay, Georgia.

3. The Government's bringing criminal charges imposes a "substantial burden" on the defendants' exercise of religion.

As the evidence discussed in Part II helps to show, the Government's bringing criminal charges for the defendants' actions at Kings Bay places considerable pressure on the defendants to violate their sincerely held religious beliefs. As the Government's evidence shows, this criminal prosecution is intended to place pressure on defendants not to exercise their sacramental religious actions: "failing to prosecute them would only reinforce that behavior" (Lepine: 230:11-13). But imprisonment places a substantial burden not only on sacramental religious actions involving unauthorized entry onto Government land, but it also places a substantial burden on future prophetic religious actions by the defendants that are permitted on public or private land. Imprisonment places a substantial burden on the defendants' religious actions that protest the immoral possession of nuclear weapons. "If they're being restricted from acting, then that is, in effect, compelling them not to act." (Hill Fletcher: 77:14-17)

B. Evidence Relevant to the Government's Asserted Justification under RFRA

1. The Government's evidence is insufficient, as a matter of law, to establish a "compelling governmental interest" against any one of these individual defendants.

As the defendants have explained in their earlier supplemental briefs on the RFRA defense, 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. (Dkt. No. 245, pages 24–27.) First, the Government must Clearly identify the legitimate interest that it seeks to achieve through criminal prosecution. Second, the government must prove, with respect to each individual defendant, that its "marginal interest" in not accommodating that individual defendant's nonviolent religious exercise is itself "compelling."

a. The Government claims a general interest in (1) preventing unauthorized entry onto the Kings Bay naval base and in (2) recovering compensation for injury to government property. First, according to the testimony of Captain Lepine, "there is absolutely a compelling interest to prevent unauthorized access to Naval Submarine Base Kings Bay" (Lepine: 226:15-16). The presence of such unauthorized personnel "may ... endanger the safety of base personnel" (Lepine: 226:17-20), and "those intruders [are] endangering ... their own safety" (Lepine: 228:13-18). Moreover, "it puts the entire security contingent on that installation on alert, which is disruptive to normal day-to-day operations associated with the operation of the base. Disruption of those operations has the ability to impact operations that are directly in support of our nation's strategic deterrence programs, timelines, and policies and procedures." (Lepine: 227:16–228:2) Second, there is testimony by Scott Bassett that a fence was cut on the base, that concertina wire was cut, that a padlock was cut, and that the static missile display suffered some defacement – all of which required some repair. (Bassett: 197:15–198:16)

b. The Government has presented insufficient evidence, however, that it has assessed the religious actions of individual defendants, and that its interests are so "compelling" as to justify

not accommodating these particular religious exercises. As the case law and this Court has made clear, “the inquiry under RFRA for the compelling interest has to be focused specifically on the individual defendants” (Nov. 7 transcript, 234:25–235:5). The Government in this case confirms this requirement: “there has to be an individual basis, particularly with the compelling interest that needs to be articulated as to each specific defendant” (Nov. 7 transcript, 240:17-19). The Government, however, has produced insufficient evidence to prove that, with regard to each individual defendant’s particular religious exercise, it has an interest that is so compelling as to warrant not accommodating these individual defendants. Indeed, there is good evidence to suggest that an individualized assessment would have demonstrated that the Government’s two general interests are not compelling as to at least some defendants.

First, the Government’s own evidence demonstrates that, in the context of the defendants’ actions at Kings Bay, “at no time was anybody threatened,” “there were no reported injuries,” and “no military personnel or ‘assets’ were in danger” (statement of Scott Bassett to *The Washington Post*, reported on April 5, 2018, and reaffirmed by Scott Bassett, Bassett: 190:16-23, 191:5–192:4; 179:3-16). Thus, the Government acknowledges that the defendants’ religious exercises on April 4-5 were in fact nonviolent and posed no harm.

Second, several of these defendants conducted their religious exercise on April 4-5 at the static missile display inside the base perimeter fence. (Lepine: 244:14–245:1; Bassett: 198:1-3) This missile display is such a popular destination for the general public and of such little military importance that Scott Bassett, as public affairs officer, has the authority to take members of the general public on tours to see it, and does so probably two or three times per week. (Bassett:

189:22–190:15, 192:13–22) Given this fact, the Government owes a specific explanation for how “compelling” it is to keep any defendants away from this specific location.

Third, the Government’s practice of merely turning all trespassers over to the Camden County Sheriff’s Department, normally without further follow-up as to the fate of those trespassers, undermines the Government’s claim that its interest is so “compelling.” In the case of another trespasser who was turned over to the Sheriff in a prior incident, Captain Lepine testified that he did not know whether federal charges were brought against that trespasser (Lepine: 258:20–259:4), and Captain Lepine apparently did not even issue a debarment letter in that case (Lepine: 286:4–20). Indeed, the evidence would support a finding that the Government has in fact singled out these defendants in bringing a federal criminal prosecution in their case – the very opposite of what RFRA requires. At the very least, the Government owes an explanation of how “compelling” its interests are in the case of these nonviolent religious protestors.

Fourth, the Government has produced no evidence proving that a decision to accommodate the religious exercises of these defendants will lead to an increase of similar religious actions in the future, by these defendants or by others. The unsupported generalizations of Captain Lepine in this regard are precisely the kind of “slippery-slope” argument that the Supreme Court has rejected as a matter of law. (See Dkt. No. 245, page 31, using the wording of Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006))

Finally, the Government’s evidence not only shows that no individual weighing occurred of religious interests against governmental interests, it shows a policy of ignoring the religious nature of protests altogether. For example, when groups have requested permission to conduct anti-nuclear protests at the Bancroft Memorial, located on the real property of the base but outside the perimeter fence, those requests have not been treated any differently, whether they have a

religious purpose or not. (Bassett: 187:13-23, 183:7–184:21; Lepine: 249:18–250:8) If a group were to request permission to conduct a religious exercise at the static missile display, located inside the perimeter fence, it would not receive permission, and the religious nature of the exercise would be considered irrelevant. (Lepine: 271:10-22) This shows a mistaken understanding of what RFRA requires, and generally undermines the Government’s evidence about whether its interests are “compelling” when weighed against the individuals’ religious interests.

2. The government’s evidence is insufficient, as a matter of law, to establish that criminal enforcement is “the least restrictive means” with respect to any one of these individual defendants.

As the defendants have explained in their supplemental briefs on the RFRA defense, the government must produce evidence and prove, against each individual defendant, “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion” of that defendant (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. — , 134 S.Ct. 2751, 2780 (2014)). (Dkt. No. 245, pp. 30–33) The defendants have proposed the following as means that are less restrictive than imprisonment: civil injunction against future trespass, and civil damages or community service for injury to property; “ban and bar” (or “debarment”) letters issued by the base commander; a pretrial diversion agreement by federal prosecutors; and a policy and practice to permit religious exercises on the Kings Bay naval base under certain circumstances. The Government acknowledges that it “has the obligation to respond to the alternative proposals that are put forward by the defense” (Nov. 7 transcript, 236:6-10). Nevertheless, the Government has not presented any such particularized evidence in relation to even a single defendant.

The only evidence even remotely on point is Captain Lepine’s general and unsupported speculation that “prosecution is the least restrictive means of securing the compelling interest of

protecting the property, assets, personnel on Kings Bay submarine naval base” (Lepine: 286:21–287:2). In reaching this conclusion, Captain Lepine considered the religious motivations of the defendants to be an irrelevant factor. (Lepine: 257:20–258:19, discussing the charge of conspiracy) Because the issue of whether one means is less effective than another necessarily involves considering the religious motivations of the defendants, the Court should assign no probative value to Captain Lepine’s generalization.

Moreover, this opinion is unsupported by Captain Lepine’s experience, because he has never tried to impose civil injunction or community service as a base commander at Kings Bay. (Lepine: 248:1–13) Indeed, Captain Lepine’s speculation is inconsistent with his experience. He has personally signed about 20 bar and ban (debarment) letters, and “that act has been successful at preventing [the] return of individuals” to the base – indeed, none of those individuals has re-entered the base and needed to be prosecuted. (Lepine: 248:16–249:2; 265:18–266:19) Left unexplained is why such debarment letters, which are within the base commander’s discretion and authority, and which have been so effective in Captain Lepine’s experience, would not be equally effective at achieving the Government’s interests against these religious defendants.

As another example of a less restrictive means, Captain Lepine (and even Scott Bassett) has the authority to permit tours to the static missile display within the base perimeter fence, where some of the defendants exercised their religious beliefs, and members of the general public are routinely and often authorized access to “tour” the display. (Bassett: 189:22–190:15, 198:1–3; Lepine: 244:14–245:1) Yet Captain Lepine testified that “members of the general public are not authorized access inside the fence line in any capacity to exercise their religious rights.” (Lepine: 270:11–13) Because the Government has refused to consider permitting religious exercises to

occur at the static missile display, it has no basis for arguing that such an accommodation would be ineffective at furthering its interests.

Captain Lepine's opinion is also speculative with respect to what means may or may not be effective with respect to these particular defendants. At the hearing, this Court ruled that Captain Lepine "is unable to testify or offer any speculation about what would or would not have deterred these defendants" in the past. (Nov. 7 transcript, 235:1-3; 231:20-232:1) In order to give a non-speculative opinion about any specific defendant, Captain Lepine would have had to undertake an analysis based on "knowledge about each individual defendant." (See Nov. 7 transcript, 237:9-15) There is no evidence that Captain Lepine has undertaken such a defendant-specific analysis. Indeed, the evidence shows that Captain Lepine has not even "considered" [any] less restrictive means short of prosecuting" these defendants. (Lepine: 229:8-10, emphasis added)

The most that Captain Lepine could offer at the hearing were generalizations about hypothetical categories of individuals (e.g., about individuals with prior records of formal charges or convictions for trespass), but such hypothetical opinions are insufficient to satisfy RFRA's "exceptionally demanding" least-restrictive-means standard (using the wording of Hobby Lobby, 134 S.Ct. at 2780). As the Government has acknowledged, in responding to each of the defendants' proposed alternative means, the Government must assess "the probability of those alternatives in achieving ... those compelling interests" (Nov. 7 transcript, 236:11-15). That assessment surely requires taking into account the specific beliefs, motivations, intentions and circumstances of each individual defendant. Otherwise, RFRA's "exceptionally demanding" standard would be routinely defeated by generalized hypotheticals.

It is not helpful to the Government if the evidence shows that Captain Lepine himself, as base commander, has “no authority to implement” fines, injunctions, pretrial diversion, or community service. (Lepine: 229:6-16, emphasis added; also 264:10–265:10) Nor is it helpful that Captain Lepine’s “responsibility to deal with trespassers, terrorists, or any ... other unknown individuals ... would be to turn them over to the Camden County sheriff for, essentially, arrest and use ... this process to file charges against them” (Lepine: 229:16-21). RFRA places its obligations on the federal government as a whole, not on any specific official. The Government has presented no evidence that any government decision maker has even considered any of the defendants’ proposed alternatives to criminal prosecution.

It is an inescapable conclusion from the evidence, as a matter of law, that the Government has failed to investigate alternative means of furthering its compelling interests, and that it has failed to demonstrate to the Court, on the basis of evidence, that it has complied with its responsibilities under RFRA.

II. PATRICK O’NEILL’S EVIDENCE AND EXPLANATIONS IN SUPPORT OF HIS RFRA DEFENSE.

A. Patrick O’Neill Has Met His Prima Facie Burden Under RFRA.

1. Patrick O’Neill’s Religious Beliefs Are Sincerely Held And Each of Patrick O’Neill’s Actions On April 4-5, 2018 For Which He Is Prosecuted Were Religiously Motivated.

Patrick O’Neill is a father of eight children and grandfather to two. (Tr. 145: 22,25) Mr. O’Neill was raised by his mother, who was a “big influence on my religious faith.” (Tr. 146: 6) He works as a chaplain at Wake Med Hospital in Raleigh, NC, where he visits and brings Eucharist to the sick. (See Tr. 148: 4-8) Mr. O’Neill’s faith teaches him that Jesus was a “nonviolent Savior,

the Prince of Peace.” (Tr. 150: 2-3) In that spirit, Mr. O’Neill has dedicated his life to nonviolence, a direct extension of his sincere religious beliefs.

So too, Mr. O’Neill “came to Kings Bay to express our religious belief that it’s a place where a secret is being kept...the base commander mentioned the Trident II D5 missile.” (Tr. 151: 11-17) Mr. O’Neill came to Kings Bay specifically “to recognize the sin of Trident, specifically the sin of the D5 missile. It is the most insidious, deadliest, horrific weapon ever built.” (Tr. 151: 20-22) He was religiously motivated to come to Kings Bay, “and, yes, we had to go there, because that’s the place where the sin is being committed.” (Tr. 152: 2-4) “Our Catholic faith compels us to come here to speak about something so dangerous and so horrific, something that represents such a threat to our families, to our children, to our grandchildren...” (Tr. 155: 25; 156: 1-3) There at King’s Bay, Mr. O’Neill’s symbolic and dramatic actions were undertaken in an attempt to awaken his sisters and brothers to the impending horrors the world will experience if we do not -- as a human family -- work to eliminate nuclear weapons of mass destruction. In a world where living on the brink of nuclear war has become normal, Mr. O’Neill intended to images and actions based in his religious faith to send a strong message based on his “Catholic faith[s] call to preserve life and be stewards of God’s creation.” (Tr. 159: 10-11)

B. The Government Has Failed To Meet Its Burden As To This Particular Defendant

1. The Government’s Prosecution of Patrick O’Neill Substantially Burdens His Religious Expression And Is Not The Least Restrictive Means Of Furthering The Governments Interest.

Mr. O’Neill came to Kings Bay to expose Trident as sinful, improper to life, and the opposite of God, who is Love. (See Tr. 151:23-25; 152: 1-4) Despite the nonviolent and largely symbolic nature of the events of April 4-5, 2018, coupled with the clear religious overtones

expressed by words and symbols, Mr. O'Neill has been charged with felony crimes, the most restrictive means of punishment for these religious actions designed to save God's Creation from destruction. In seven weeks of incarceration and now in release under restrictions, Mr. O'Neill's practice of his religious faith has been and is significantly constrained. "The time that we spend in jail is the time away from the Eucharist, a time away from our religious practice." (Tr. 158: 17-18) This would only be exacerbated by any additional period of incarceration.

The Government seems to claim a compelling interest in protecting the weapons of mass destruction hidden at Kings Bay, while the real compelling interest underlying this case is "our shared compelling interest...to hope that we can have a world without war and a world without nuclear weapons. That's our prayer, and that's something we can all say we agree on." (Tr. 158: 3-6) Even if we, as a society, are not yet at the point where we can recognize "that we all have the same compelling interest, that we're really here today because we share a compelling interest in preserving life. Nobody wants war. Nobody wants to see nuclear weapons used," it is unreasonable to think that the Government has *no* other option but the *most restrictive* to address the religiously motivated actions of Mr. O'Neill. (Tr. 148: 17-20)

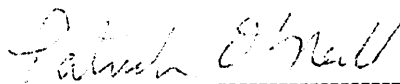
III. CONCLUSION

The Trident is a system predicated on the end of the world. (Tr. 155: 21) But Mr. O'Neill, motivated by his faith, tells us that this eventuality is not unchangeable. In referring to Jesus miraculously restoring sight to the blind, Mr. O'Neill says "I always see that healing of the sightless person as also endowing the sightless person with truth, spiritual truth that can no longer be denied." (Tr. 153: 12-14) And with the restoration of sight comes responsibility, "once we can

see, then we have the responsibility of sight. We can't say that we're blind to the truth." (Tr. 153: 9-11)

Mr. O'Neill acted at Kings Bay in this spirit – that his actions may open our eyes to the truth that weapons of mass destruction are sinful and must be abolished. Now he is being criminally prosecuted for exercising his Catholic faith and calling out the government's stockpiling and use of nuclear weapons, which the Catholic Church says is immoral and must be abolished. Mr. O'Neill has met his prima facie burden under RFRA and the government has failed to meet theirs. Therefore, the Court must dismiss the government's indictment. Alternatively, Mr. O'Neill should be entitled to submit this evidence in his defense to a jury of his peers at trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January 2019, I served upon all parties a copy of the foregoing **RESPONSE TO THE COURT'S NOVEMBER 28, 2018, ORDER DIRECTING SUPPLEMENTAL BRIEFING** by having said brief delivered to the Clerk of the Court and once stamped and accepted, scanned by the Clerk after which a notice of electronic filing (NEF), will be was generated and sent to all parties.

Dated this 16th day of January 2019.

A handwritten signature in black ink, reading "Patrick O'Neill", written over a horizontal line.

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