UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN M. PAYDEN-TRAVERS, *et al.*, PLAINTIFFS vs. PAMELA TALKIN, *et al.*, DEFENDANTS	)	Civil Action No. 1:13-cv-1735 (CKK)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. Plaintiffs have made out a *prima facie* case for violation of RFRA.

When the location of a religious exercise it itself of religious significance, courts have held that a location-based restriction can violate RFRA. *See e.g., Comanche Nation v. United States*, No. CIV-08-849-D, 2008 U.S. Dist. LEXIS 73283, at *49 (W.D. Okla. Sep. 23, 2008). In contrast, where the location is itself of no religious significance, courts have found that there is no substantial burden on religious exercise. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 274 (3d Cir. 2007) ("Indeed, several sister circuits have held that, when the plaintiff does not show that locating its premises in a particular location is important in some way to its religion and the area from which plaintiff's building is excluded is not large, there is no constitutionally cognizable burden on free exercise.")

Thus, in rejecting a RFRA challenge in *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), the D.C. Circuit found it significant that "Plaintiffs do not . . . allege that selling t-shirts in that particular area of the District of Columbia is central to the exercise

of their religion." Similarly, in *Mahoney v. United States Marshals Serv.*, 454 F. Supp. 2d 21, 38 n.8 (D.D.C. 2006) this Court held that there was no substantial burden on religion because the plaintiffs "have not alleged that their religion compels them to pray once a year at specific points on the 1700 block of Rhode Island Avenue." Defendants seem to recognize the importance of this distinction as well, arguing that "plaintiffs do not allege that their religion directs them to conduct their desired activities *on the plaza* or to express their views to the Supreme Court." (Def. Mot. at 9) (emphasis in original).

Here, Plaintiffs have adequately pled how the location of their intended religious exercise is itself of religious significance. Plaintiff Payden-Travers is a "conscientious objector" whose "faith compels him to speak out against war and the death penalty in order to publicly distance himself from the commission of these acts by the government in the name of the American public." (First Am. Compl. ¶¶ 28, 34). The exercise of his religious activity on the Supreme Court plaza is necessary because the same activity somewhere else would "not be sufficient to demonstrate to passersby that Mr. Payden-Travers is acting [as] a conscientious objector to the Supreme Court's allowance of the immoral death penalty to continue." (First Am. Compl. ¶ 36.)

Ms. Potts' faith not only "compels her to live her beliefs by speaking out against torture, war, and the death penalty," it also requires her to "engage in the religious practice of bearing nonviolent 'public witness.'" (First Am. Compl. ¶¶ 39-40.) To bear public witness means that she must "make clear that she does not endorse the use of her tax dollars to fund torture, war, and executions." (First Am. Compl. ¶ 42.) The exercise of her religious activity on the Supreme Court plaza is necessary because if she were to bear

public witness somewhere else, such as the adjacent sidewalk, the "public would not sufficiently identify her actions with the Court[.]" (First Am. Compl. ¶ 47.)

Defendants argue that "plaintiffs here have countless alternative locations at which to pray and hold vigils, including the adjacent sidewalks a few feet away." (Def. Mot. at 9.) However, it is essential to both Mr. Payden-Travers' and Ms. Potts' religious exercise that it take place in a location which passersby and the public will sufficiently associate them with the Court. Exercising their religious activity on the adjacent sidewalk to the Supreme Court is no different than exercising their religious activity on any other sidewalk in the city because "[t]here is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city." *United States v. Grace*, 461 U.S. 171, 183 (1983). In contrast, "[t]he plaza's appearance and design vividly manifest its architectural integration with the Supreme Court building, as well as its separation from the perimeter sidewalks and surrounding area." *Hodge v. Talkin*, 799 F.3d 1145, 1158 (D.C. Cir. 2015). Thus, "[f]rom the perspective of a Court visitor (and also the public), the physical and symbolic pathway to the Supreme Court chamber begins on the plaza." *Id.* at 1159 (internal quotation marks and brackets omitted). The prohibition on religious exercises at this unique, symbolic pathway therefore substantially burdens Plaintiffs' rights.

II. Defendants have not employed the least restrictive means to achieve the government's interests.

The statute (as interpreted by the D.C. Circuit in *Hodge*) and regulation at issue are not the least restrictive means to achieve the government's interests. Rather than a

blanket ban on expressive activity and demonstrations, a more narrowly tailored approach is possible. In light of the government's asserted interests in maintaining the appearance of an impartial judiciary and maintaining the dignity and decorum of the Court, the prohibition could be limited to activities directed at the Court which compromise the dignity and decorum of the Court. Indeed, that is precisely the narrowing interpretation of 28 U.S.C. § 6135 employed by the D.C. Court of Appeals. *Pearson v. United States*, 581 A.2d 347, 358 (D.C. 1990) (statute is constitutional if "limited to group demonstrations directed at the Court which compromise the dignity and decorum of the Court[.]")

To the extent that the statute and regulation seek to "counter[] the sense that it is appropriate to appeal to the Court through means other than briefs and oral argument," *Hodge*, 799 F.3d at 1165, the inclusion of a prohibition on activities which are not even directed at the Court is not narrowly tailored. Similarly, as to the goal of maintaining the dignity and decorum of the Court, the prohibition is not narrowly tailored if it extends to activities which do not compromise the dignity and decorum of the Court. Indeed, the D.C. Circuit conceded that "the prohibitions of the Assemblages and Display Clauses may reach beyond what is strictly necessary to vindicate those interests[.]" *Id.* at 1165.

Defendants contend that "plaintiffs' choice of the Supreme Court plaza was primarily animated by a wish to direct their objections to the Supreme Court and the public[.]" (Def. Mot. at 9.) However, although Plaintiffs' religious exercise is intended to convey a message to the public, it is not directed to the Court or intended to influence public opinion. The goal of their religious exercises is to convey to the public that *Plaintiffs* are not complicit with what they consider to be the immoral actions of the Supreme Court. As explained in the Amended Complaint, Mr. Payden-Travers' faith "compels him to

speak out against war and the death penalty *in order to publicly distance himself* from the commission of these acts[.]" (First Am. Compl. ¶ 34) (emphasis added). Similarly, "Ms. Potts engages in the practice of bearing public witness in order to make clear that *she* does not endorse the use of her tax dollars to fund torture, war, and executions.") (First Am. Compl. ¶ 42) (emphasis added). These *religious* activities, which are a public disavowal of the Supreme Court's acts, are not the same as, and should not be confused with the *political* activities of attempting to influence the Supreme Court or the public's opinion. *Cf. Mahoney*, 454 F. Supp. 2d at 38, ("plaintiffs wish to demonstrate at the Red Mass because it provides a target-rich audience of prominent government officials, at whom plaintiffs wish to direct their political message.")

III. Conclusion

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' motion to dismiss.

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