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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
AMMON BUNDY, et al.,	**GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS COUNT 2 (#482)**
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendants' Motion to Dismiss Count 2 (ECF No. 482) and its supporting Memorandum (ECF No. 483), filed by defendant Stanek on behalf of all defendants named in Count 2.

Defendants argue that the charging statute, Title 18, United States Code, Section 930(b) is unconstitutionally vague and overbroad. Defendants' vagueness challenge is premised on grounds that the statute is facially invalid because its terms are so broad that a person of ordinary

intelligence is deprived of notice as to the conduct prohibited by the statute. Defendants also raise an as-applied vagueness claim arguing that they were not on notice that their behavior violated the law. Finally, they claim that the statute is constitutionally overbroad in violation of the First and Second Amendments. Defendants' Motion should be denied. The terms of the statute are neither esoteric nor difficult to understand and they proscribe conduct that is readily understood by a reasonable person. Defendants knew or had reason to know that their conduct was unlawful. Finally, the statute does not proscribe speech and does not unreasonably infringe on the right to bear arms.

I. Section 930(b) Does Not Reach Constitutionally Protected Conduct

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982), the Court provided guidance for analyzing facial challenges to the overbreadth and vagueness of a law:

> [A] court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

The statute in this case does not reach a substantial amount of constitutionally protected conduct. Accordingly, defendants' overbreadth challenge must fail.

Title 18, United States Code, Section 930(b) provides:

> (b) Whoever, with intent that a firearm or other dangerous weapon be used in the commission of a crime, knowingly possesses or causes to be present such firearm

> or dangerous weapon in a Federal facility, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

Defendants claim that the statute is facially invalid because it chills constitutionally protected speech by prohibiting "the possession of a firearm in a federal facility even when possession of that firearm is inseparable from the protected speech of a political protest." (Defs.' Mem. 8). Defendants argument is based on a gross misreading of the First Amendment.

The First Amendment protects the expression of ideas through printed or spoken words as well as nonverbal "activity . . . sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974) (statute unconstitutional as applied to defendant who displayed flag with peace sign to protest military action). However, the Supreme Court has "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation and internal quotation marks omitted).

Facial overbreadth challenges are limited to statutes "which, by their terms, seek to regulate 'only spoken words'" or "purport to regulate the time, place, and manner of expressive or communicative conduct." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973); *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).").

Section 930(b) does not regulate spoken words and does not regulate expressive or communicative conduct. The statute prohibits knowingly possessing a firearm in a federal facility with the intent to use the firearm in the commission of a crime. As such it does not

impact "forms of conduct integral to, or commonly associated with, expression" and is not facially overbroad. *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996).

Defendants' reliance on *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003) is misplaced. While defendants accurately quote from the case, they ignore the facts and analysis set forth therein. Nordyke was engaged in promoting gun shows at the Alameda County Fairgrounds. Alameda County subsequently passed an ordinance making it illegal to possess firearms on county property, including the county-owned fairgrounds. Nordyke alleged, under the First Amendment, that the ordinance impermissibly infringed upon constitutionally protected speech. As defendants note, the court found that "[g]un possession can be speech where there is 'an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it.'" *Nordyke*, 319 F.3d at 1190 (quoting *Spence*, 418 U.S. at 410-11). The court explained, "a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally. Flag waving and flag burning are both protected expressive conduct." *Id.* Nevertheless, the Alameda County ordinance banning firearms on county property did not violate the First Amendment:

> Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it. The law itself applies broadly to ban the possession of all guns for whatever reason on County property. The law includes exceptions, primarily for those otherwise allowed to carry guns under state law, but these exceptions do not narrow the law so that it 'has the inevitable effect of singling out those engaged in expressive activity.'

Id. (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986)). Because the ordinance was not "'directed narrowly and specifically at expression or conduct commonly associated with expression'" it did not unconstitutionally infringe expressive conduct. *Id.* at 1190 (quoting

Roulette, 97 F.3d at 305). *CPR for Skid Row v. City of Los Angeles*, 779 F.3d. 1098 (9th Cir. 2015) (state law making it unlawful to disrupt political meetings by "threats, intimidations, or unlawful violence" was not a content-based restriction and was not facially vague). Section 930(b) is not directed at expression or conduct commonly associated with expression. The statute is not facially overbroad.

The overbreadth doctrine is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. "[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 610-11. A statute is not unconstitutionally overbroad unless "the overbreadth of [the] statute is not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. In *Roulette*, the court observed:

> This reasoning is eminently sensible. One might murder certain physicians to show disapproval of abortion; spike trees in a logging forest to demonstrate support for stricter environmental laws; steal from the rich to protest perceived inequities in the distribution of wealth; or bomb military research centers in a call for peace. Fringe acts like these, however, provide no basis upon which to ground facial freedom-of-speech attacks on our laws against murder, vandalism, theft or destruction of property.

Roulette, 97 F.3d at 305. Defendants' armed takeover and occupation of a federal facility, even if motivated by a desire to draw attention to a cause, does not render Section 930(b) overbroad.

II. Section 930(b) Provides Fair Notice and Does Not Encourage Arbitrary Enforcement

Defendants' vagueness challenge also fails. In a facial challenge, a statute is unconstitutionally vague if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *United States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009) (quoting *United*

States v. Williams, 553 U.S. 285, 304 (2008)). In an as-applied challenge, a statute is unconstitutionally vague if it "fail[s] to put a defendant on notice that his conduct was criminal." *Id.*

Where, as here, the statute does not implicate First Amendment rights, a defendant alleging facial vagueness must show that "the enactment is impermissibly vague in all its applications." *Hoffman Estates*, 455 U.S. at 495. If a statute is constitutional as applied to the individual asserting the challenge, the statute is facially valid. *United States v. Dang*, 488 F.3d 1135, 1141 (9th Cir. 2007). Even when a statute "clearly implicates free speech rights," it will survive a facial challenge so long as "it is clear what the statute proscribes 'in the vast majority of its intended applications.'" *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001) (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, (1989); *see also Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

Defendants' efforts to paint the clear terms of the statute as vague strain credulity. They contend that the terms "Federal Facility," and "Firearm" are vague and that the "vagueness problem" is exacerbated by the scienter requirement that a defendant intend that the firearm be used in the commission of a crime. (Defs.' Mem. 3-4).

Section 930(g)(1) expressly defines the term "Federal Facility" as "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." Defendants question what

constitutes "regular" presence of federal employees. (Defs.' Mem. 3). The dictionary defines "regular" as "recurring, attending, or functioning at fixed or uniform intervals." *Merriam-Webster's Collegiate Dictionary* (10th ed. 1997). Defendants also question what constitutes "official" duties. (Defs.' Mem. 3). Here, *Webster's* provides, "of or relating to an office, position, or trust <*official* duties>." *Merriam-Webster's Collegiate Dictionary* (10th ed. 1997). Notwithstanding defendants' claim to the contrary, a reasonable person of ordinary intelligence would understand which buildings are covered by the statute in the vast majority of intended applications.

Title 18, United States Code, Section 921(a)(3) defines "Firearm" as used in Chapter 44 as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

Despite the fact that this statute is among the most frequently used federal criminal laws, defendants have cited no cases challenging the statutory definition of firearm on vagueness grounds. The only published cases the government has identified have found the statute constitutional. *See United States v. Quiroz*, 449 F.2d 583, 585 (9th Cir. 1971) ("We hold that the statutes [18 U.S.C. §§ 921(a)(3) and 922(g)] give fair warning and thus are not unconstitutionally vague."); *United States v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463, 466 (2d Cir. 1971) ("We hold that 18 U.S.C. § 921(a)(3) is constitutional as applied to the facts of this case.").

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Far from exacerbating the "vagueness problem" of Section 930(b), the scienter requirement mitigates any vagueness in the statute. *See Hoffman Estates*, 455 U.S. at 499 ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."); *United States v. Jae Gab Kim*, 449 F.3d 933, 943 (2006). By its terms, the Section 930(b) applies only to one who "knowingly possess or causes to be present" in federal facility a firearm "with intent that a firearm . . . be used in the commission of a crime." As such, it provides ample notice of what is prohibited.

The fact that defendants have concocted fanciful hypotheticals in an effort to undermine the clear terms of the statute does not render the statute impermissibly vague. *See Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications'. . . .") (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960).

Defendants allege that Section 930(b) "raises troubling equal protection problems" because of the disparate treatment of offenders under Sections 930(a) and 930(b). (Defs.' Mem. 4-5). The Supreme Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Defendants have made no effort to identify any suspect classification or fundamental rights at issue. There is clearly a rational basis to distinguish between those who merely possess a firearm and those who possess a firearm with the intent to use the firearm in the commission of a crime.

Because the terms of the statute clearly define the offense, it does not raise concerns regarding arbitrary enforcement. In *Kolender v. Lawson*, 461 U.S. 352, 353 (1983), the Court reviewed a facial challenge to a California statute that required "persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*, 392 U. S. 1 (1968)." The Court focused on what was required to meet the "credible and reliable" identification requirement and found that the statute "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender*, 461 U.S. at 361. Section 930(b) suffers from no such vagueness. It gives ordinary people ample notice on how to comply with the law and establishes clear guidelines to government enforcement of the law.

Defendants claim that Section 930(b) is subject to arbitrary enforcement and that they were "singled out for punishment despite the involvement of dozens of others in the protest against the government's treatment of the Hammond family." (Defs.' Mem. 7). They claim that they were prosecuted based on political pressures and the content of their speech. To the contrary, defendants' were prosecuted because they entered and occupied buildings at the Malheur National Wildlife Refuge (MNWR) *because* they were federal facilities. They did so while armed with fully operational firearms intending that their weapons be used in the commission of a crime, namely a conspiracy to impede officers of the United States, in violation of Title 18, United States Code, Sections 371 and 2. They were prosecuted for their conduct, not their speech.

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III. Section 930(b) Does Not Infringe on the Second Amendment

Section 930(b) does not violate the Second Amendment. The Second Amendment declares that "[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court held that a complete ban on handgun possession in the home violated the Second Amendment. The Court noted that "the right secured by the Second Amendment is not unlimited" and that it "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. In reaching its decision, the Court emphasized that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27. The Court called such restrictions "presumptively lawful." *Id.* at 627 n.26. The Court was clearly referring to the prohibition set forth in Section 930. The federal facilities at the MNWR are "sensitive places" and the prohibition on possessing firearms in such places with intent to commit a crime does not violate the Second Amendment.

Dated this 11th day of May 2016.

Respectfully submitted,

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