UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN M. PAYDEN-TRAVERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 13-1735 CKK
	)	
PAMELA TALKIN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs allege that 40 U.S.C. § 6135 and Supreme Court Regulation 7 violate the Religious Freedom Restoration Act ("RFRA"), but plaintiffs fail to make a prima facie showing that the government has substantially burdened their exercise of religion. Plaintiffs allege that they wish to pray and hold vigils on the Supreme Court plaza in order to speak out against war and the death penalty as an exercise of their faith. But they do not allege that their religion compels them to pray on the plaza as opposed to praying in a multitude of other locations, including the adjacent fifty-foot-wide sidewalk directly in front of the plaza. Rather, plaintiffs concede that their choice of the plaza is primarily motivated by a desire to direct their message at the Supreme Court. Hence, theirs is a case of speech on an issue of public interest rather than a religious exercise at all, and plaintiffs fail to meet their burden.

Furthermore, the provisions in question are the least restrictive means of advancing the government's compelling interests. The plaza in front of the United States Supreme Court "encourage[s] contemplation of the Court's central purpose, the administration of justice to all who seek it." Hodge v. Talkin, 799 F.3d 1145, 1163 (D.C. Cir. 2015) (citing Statement Concerning the Supreme Court's Front Entrance, 2009 J. Sup. Ct. U.S. 831, 831 (2010)

(Breyer, J.)), cert. denied, 136 S. Ct. 2009 (2016). To maintain order and decorum on the plaza, and thereby advance the government's compelling interest in preserving public confidence in the integrity of the judiciary, the challenged laws prohibit demonstrations on the plaza that might attract public attention. But the plaza otherwise grants access to all comers, and the restrictions on expressive assemblages are confined to the plaza itself, and not the adjacent sidewalks, where demonstrations are allowed. Moreover, a prohibition on demonstrations is necessary because any demonstration could fuel the impression of a Court swayed by outside influence. Hence, the limitations are the least restrictive means of advancing the government's compelling interests. For these reasons, as set forth more fully below, the Complaint should be dismissed for failure to state a claim upon which relief can be granted.[1]

BACKGROUND

Statutory and Regulatory Background

Plaintiffs in this case allege a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4, which provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in [42 U.S.C. § 2000bb-1(b)]." 42 U.S.C. § 2000bb-1(a). Section 2000bb-1(b) provides that government may substantially burden a person's exercise of religion "only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling

[1] The original complaint challenged Regulation 7 under the First and Fifth Amendments as well as RFRA. See Complaint for Declaratory and Injunctive Relief (ECF No. 1) ¶¶ 5-11, 70-76. After the D.C. Circuit upheld 40 U.S.C. § 6135 against a First and Fifth Amendment challenge in Hodge, plaintiffs amended their complaint to remove their First and Fifth Amendment claims and to add a RFRA claim against 40 U.S.C. § 6135. Plaintiffs who did not make RFRA allegations in the original complaint were excluded from the amended complaint. See First Amended Complaint for Declaratory and Injunctive Relief ("Complaint") (ECF No. 13).

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

The statute at issue in this case, 40 U.S.C. § 6135, imposes restrictions on demonstrations in the Supreme Court buildings or grounds, stating as follows:

> It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

40 U.S.C. § 6135. Another provision defines "the Supreme Court grounds" to extend to the curbs of the four streets fixing the boundary of the city block in which the Court is situated. 40 U.S.C. § 6101(b); Hodge, 799 F.3d at 1150-51 (upholding 40 U.S.C. § 6135 against First Amendment challenge in the context of activities on the Supreme Court plaza). The statute thus encompasses not only the building, but also "the plaza and surrounding promenade, lawn area, and steps," United States v. Grace, 461 U.S. 171, 179 (1983); see also Hodge, 799 F.3d at 1151, but it has been held unconstitutional under the First Amendment as applied to the sidewalks comprising the outer boundaries of the Court grounds, Grace, 461 U.S. at 183. Hence, Section 6135 is not enforced with respect to the perimeter sidewalks including the sidewalk on First Street N.E. in front of the Supreme Court plaza, which is fifty feet wide. Hodge, 799 F.3d at 1153-54, 1169. The Supreme Court plaza is "an oval terrace that is 252 feet long (at the largest part of the oval) and 98 feet wide (inclusive of the front eight steps)," Hodge, 799 F.3d at 1151.

The Marshal of the Supreme Court is authorized to prescribe regulations that are necessary for "(1) the adequate protection of the Supreme Court Building and grounds and of individuals and property in the Building and grounds; and (2) the maintenance of suitable order and decorum within the Building and grounds." 40 U.S.C. § 6102(a). The regulation at issue in

this case, Supreme Court Regulation 7, was promulgated pursuant to this authority and provides in relevant part:

> This regulation is issued under the authority of 40 U.S.C. § 6102 to protect the Supreme Court building and grounds, and persons and property thereon, and to maintain suitable order and decorum within the Supreme Court building and grounds. . . . This regulation does not apply on the perimeter sidewalks on the Supreme Court grounds. . . .
>
> No person shall engage in a demonstration within the Supreme Court building and grounds. The term "demonstration" includes demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to draw a crowd or onlookers. The term does not include casual use by visitors or tourists that is not reasonably likely to attract a crowd or onlookers.

S. Ct. Reg. 7.[2]

The Allegations of the Complaint

Plaintiffs John Payden-Travers and Midgelle Potts assert that 40 U.S.C. § 6135 (Section 6135) and Supreme Court Regulation 7, as applied to their proposed activities, violate RFRA. See Complaint ¶¶ 1, 49. Plaintiff Payden-Travers alleges that he is a post-denominational Christian 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." Id. ¶¶ 22, 34. He states that he wishes to hold "candlelight vigil[s]" on the Supreme Court plaza and to "verbally express[] his view that the practice of executing individuals should be halted and that capital punishment should be abolished." Id. ¶ 35. According to plaintiff Payden-Travers, "[a] candlelight vigil on the sidewalk adjacent to the

[2] Supreme Court Regulation 7 closely resembles the National Park Service regulation at issue in Oberwetter v. Hilliard, 639 F.3d 545 (D.C. Cir. 2011), which prohibited "demonstrations" as applied to silent expressive dancing in the Jefferson Memorial and which was upheld against a First Amendment challenge.

Supreme Court would not be sufficient to demonstrate to passersby that Mr. Payden-Travers is acting a conscientious objector to the Supreme Court's allowance of the immoral death penalty to continue." Id. ¶ 36.

Plaintiff Potts alleges that she is a Unity Christian whose "faith compels her to pray for an end to torture, war, and the death penalty" and to "speak[] out against torture, war, and the death penalty." Id. ¶¶ 37, 39. Ms. Potts seeks to hold "prayer vigils" with other individuals on the plaza of the Supreme Court as an exercise of her religion which "would include prayer that is both aloud and silent." Id. ¶ 46. According to plaintiff Potts, "[a] prayer vigil on the sidewalk adjacent to the Supreme Court building would not be a sufficient exercise of Ms. Potts' religious teachings because the Supreme Court Plaza is a distinct enclave, and the public would not sufficiently identify her actions with the Court if the prayer were conducted on the sidewalk." Id. ¶ 47.

Plaintiffs seek a declaration that Section 6135 and Supreme Court Regulation 7, as applied to their proposed activities, violate the RFRA, and they seek an injunction barring defendants from arresting or prosecuting plaintiffs for engaging in their proposed activities. Id., Prayer for Relief.

LEGAL STANDARD

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The complaint must be dismissed if plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Kowai v. MCI Commc'ns Corp., 16 F.3d 1271, 1266 (D.C. Cir. 1994). When considering a Rule

12(b)(6) motion to dismiss, the court must construe the complaint liberally in the plaintiffs' favor and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. Id. However, the court "need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Id. In resolving a motion to dismiss, a court "may consider . . . matters of which [the court] may take judicial notice." E.E.O.C. v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). The court may take judicial notice of the physical location and characteristics of the Supreme Court plaza. See Hodge, 799 F.3d at 1151; Fed. R. Evid. 201.

ARGUMENT

I. PLAINTIFFS FAIL TO MAKE OUT A PRIMA FACIE CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

A plaintiff in a RFRA action must establish that the government has substantially burdened the plaintiff's sincere exercise of religion. Specifically, to state a prima facie RFRA claim, plaintiffs must show that the application of federal law: (1) substantially burdened; (2) a sincere[3]; (3) religious exercise. 42 U.S.C. § 2000bb–1(a); see Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006); Sample v. Lappin, 479 F. Supp. 2d 120, 122 (D.D.C. 2007). Only if plaintiffs make a prima facie showing of a substantial burden on their sincere exercise of religion does the burden of persuasion shift to the government to prove that the challenged action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." 42 U.S.C. § 2000bb–1(b); see Sample, 479 F.

[3] For purposes of this motion, it will be assumed that plaintiffs are sincere in their religious

Supp. 2d at 122.[4] "Whether application of a federal law violates RFRA is a question of statutory construction for the court, not a question of fact." United States v. Vasquez-Ramos, 531 F.3d 987, 990 (9th Cir. 2008) (per curiam); see Mahoney v. Dist. of Columbia, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that a judicial inquiry into whether a burden is substantial "prevent[s] RFRA claims from being reduced into questions of fact"); Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008) ("accepting as true the factual allegations that [plaintiff's] beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

A. The Complaint Fails To Plausibly Allege that Government Action Substantially Burdened the Plaintiffs' Exercise of Religion

Under RFRA, plaintiffs bear the burden of establishing that the government has substantially burdened their exercise of religion. See Gonzales, 546 U.S. at 428; Kaemmerling, 553 F.3d at 677, 679. A "substantial burden" exists only "when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." Kaemmerling, 553 F.3d at 678. "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." Id.; see also Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, 246 (D.C. Cir. 2014), vacated on other grounds, Zubik v. Burwell, 136 S. Ct. 1557 (2016).

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observances.

[4] Congress enacted RFRA in response to Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), where, in upholding a generally applicable law that criminalized the sacramental use of peyote, the Supreme Court held that the First Amendment's Free Exercise Clause did not require the government to justify burdens on religious exercise imposed by laws neutral towards religion. City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

"The Court of Appeals has found that a neutral regulation that places a limit on where someone may engage in religiously motivated expression does not violate RFRA." Wilson v. James, 139 F. Supp. 3d 410, 425 (D.D.C. 2015) (citing Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001), and Mahoney v. U.S. Marshals Serv., 454 F. Supp. 2d 21 (D.D.C. 2006)). In Henderson, the Court of Appeals held that a ban on selling t-shirts on the National Mall that expressed a religious message did not constitute a "substantial burden" on religious exercise. See 253 F.3d at 17 ("Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means, it is not a substantial burden on their vocation."). Similarly, in Mahoney, the court held that security limitations on where the plaintiffs could protest outside the Red Mass, an annual ceremony at St. Matthew's Cathedral that marks the beginning of the judicial year, did not violate RFRA. See 454 F. Supp. 2d at 38 (finding that there was no RFRA violation where the plaintiffs did not "allege that their religion compels them to demonstrate in favor of the public display of the Ten Commandments at all times and in all places").[5]

[5] Numerous other courts have likewise held that impinging upon a claimant's practice of religion at only a specific location does not constitute a substantial burden. See, e.g., Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (finding no substantial burden in government's decision to allow use of recycled wastewater to make artificial snow on a mountain that the plaintiff Indian tribes considered sacred, because the plaintiffs were free to access "the rest of the Peaks for religious purposes."); La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. U.S. Dep't of the Interior, No. 11-00400, 2013 WL 4500572, *10 (C.D. Cal. Aug. 16, 2013), aff'd, 603 F. App'x 651 (9th Cir. 2015) (finding no substantial burden in limited loss of access to allegedly sacred sites resulting from construction of a federal power plant, because "denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim, regardless of how that denial of access is accomplished"); United States v. Forchion, No. 04-949, 2005 WL 2989604, at *5 (E.D.Pa. July 22, 2005) (rejecting RFRA claim that federal regulations prohibiting the smoking of marijuana on federal property imposed substantial burden); United States v. Acevedo-Delgado, 167 F.Supp.2d 477, 480-81 (D.P.R. 2001) (finding that prohibition on entry upon a

Here, the Court need not accept the Complaint's conclusory assertions that defendants have substantially burdened the exercise of plaintiffs' religion. See Priests for Life, 772 F.3d at 247 ("Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact."). The Complaint does not contain any factual allegations to establish that being prevented from praying or holding vigils on the Supreme Court plaza constitutes a substantial burden. Although plaintiffs assert that their faith compels them to speak out against the death penalty, torture, and war, see Complaint ¶¶ 34, 39, 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. See Henderson, 253 F.3d at 17; Mahoney, 454 F. Supp. 2d at 38 n.8. Similarly, they do not allege that praying on the plaza is an important component of their religious scheme. Kaemmerling, 553 F.3d at 678.

And like the Henderson plaintiffs who had "a multitude of means" to preach their religious message besides selling t-shirts on the National Mall, Henderson, 253 F.3d at 17, plaintiffs here have countless alternative locations at which to pray and hold vigils, including the adjacent sidewalks a few feet away.[6] Indeed, the Complaint makes clear 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, Complaint ¶¶ 36, 47. Hence, like the Mahoney plaintiffs who wished to direct their "political message" regarding the Ten Commandments to "prominent

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military installation did not substantially burden a minister's exercise of religion, because he remained able to fulfill his duties as a minister and to advocate for changes in certain laws).

[6] Cf. Mahoney v. Lewis, No. 1:00-cv-01325, at *13 (D.D.C. June 23, 2000) (ECF No. 16) (holding that Supreme Court regulation restricting signs on public sidewalks near Supreme Court did not substantially burden plaintiffs' religious beliefs because plaintiffs were "still able to conduct prayer vigils and protests on the sidewalk of the Supreme Court.")

government officials," Mahoney, 454 F. Supp. 2d at 38, plaintiffs' is a "classic case of speech on an issue of public interest, not of religious exercise." Id. Because plaintiffs have not come close to pleading facts that could plausibly establish a substantial burden, the Court should dismiss the Complaint.

II. DEFENDANTS HAVE EMPLOYED THE LEAST RESTRICTIVE MEANS TO ADVANCE A COMPELLING INTEREST

Under RFRA, only if plaintiffs make a threshold showing that their exercise of religion has been substantially burdened must the government then demonstrate a compelling interest in the enforcement of the regulations at issue through the least restrictive means available. 42 U.S.C. § 2000bb-1(b). Because as explained above, the Complaint lacks the requisite allegations to satisfy plaintiffs' initial burden, the Court need not reach the second prong of the inquiry. But even if the Court were to reach the issue, dismissal of the Complaint is nonetheless warranted because defendants have employed the least restrictive means of advancing a compelling government interest.

A. Defendants' Prohibition of Plaintiffs' Activities on the Plaza Advances the Compelling Government Interest in Maintaining Suitable Order and Decorum and Preserving the Appearance of a Judiciary Immune to Public Pressure

Section 6135 and Regulation 7 serve the government's interest in the "maintenance of suitable order and decorum" within the Supreme Court grounds. See 40 U.S.C. § 6102(a)(2). By preserving decorum in the area of the Courthouse, the government also furthers its interest "in assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure." Hodge, 799 F.3d at 1150; id. at 1165 (noting that Section 6135 "also promotes the understanding that the Court resolves the matters before it without regard to political pressure or public opinion"). The Supreme Court has recognized the government's "compelling interest in

judicial integrity," Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1668 (2015), and its "compelling interest in preserving public confidence in their judiciaries," id. at 1673. In Williams-Yulee, the Court found that a state canon of judicial conduct banning all personal solicitations by judicial candidates "advance[d] the State's compelling interest in preserving public confidence in the integrity of the judiciary." Id. at 1666.

"[A]s the public's staging ground to enter the Supreme Court building and engage with the business conducted within it, the plaza . . . is an area in which the government may legitimately attempt to maintain suitable decorum for a courthouse." Hodge, 799 F.3d at 1163. The Court in Hodge observed that the Supreme Court "did not doubt the importance and legitimacy" of the government's interests in "maintaining 'proper order and decorum' in the Supreme Court building and grounds . . . and . . . in avoiding the '*appear[ance]* to the public that the Supreme Court is subject to outside influence . . . .'" Hodge, 799 F.3d at 1153 (quoting Grace, 461 U.S. at 182-83) (emphasis in original); id. at 1163 (noting that the Supreme Court "did 'not denigrate the necessity . . . to maintain proper order and decorum within the Supreme Court grounds'") (quoting Grace, 461 U.S. at 182). Section 6135 and Regulation 7 serve these purposes, and in doing so, advances a compelling government interest.

B. Defendants Have Employed the Least Restrictive Means for Advancing a Compelling Government Interest

The restrictions that 40 U.S.C. § 6135 and Regulation 7 place on expressive assemblages on the Supreme Court plaza are the least restrictive means for the government to advance its compelling interest. The government does not "restrict use of the plaza to those who participate in the [Court's] official business," but rather, "grants access to all comers." Hodge, 799 F.3d at 1165 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983)).

Moreover, Section 6135 and Regulation 7 do not apply on the perimeter sidewalks including the sidewalk in front of the Supreme Court plaza, which is fifty feet wide, Hodge, 799 F.3d at 1153-54, 1169; S. Ct. Reg. 7 ("This regulation does not apply on the perimeter sidewalks on the Supreme Court grounds,"), and which therefore affords ample space in the vicinity of the Supreme Court for plaintiffs and others to pray and hold vigils. Indeed, plaintiffs allege no facts plausibly to suggest "that the sidewalk in front of the Court is a physically inadequate or less effective forum" for communicating their message. See id. at 1169. They simply allege that it would not be "sufficient" to identify their actions and objections with the Supreme Court. See Complaint ¶¶ 36, 47.

In addition to the fact that 40 U.S.C. § 6135's restrictions are geographically limited, the ban on demonstrations on the plaza is necessary, because the government cannot otherwise accomplish its objectives.[7] As the D.C. Circuit has observed, "all demonstrations on the Court's front porch . . . could fuel the impression of a Court responsive to public opinion or outside influence, and could compromise the decorum and order suitable in the entryway to a courthouse, the nation's highest." Hodge, 799 F.3d at 1170 (emphasis in original); cf. Oberwetter v. Hilliard, 639 F.3d 545 (D.C. Cir. 2011) (rejecting First Amendment challenge to Park Service regulation that prohibited "demonstrations" as applied to silent expressive dancing in the Jefferson Memorial). And even if plaintiffs were to argue that their solitary demonstration would not disrupt the order and decorum of the plaza, "[a]ny judicial attempt to carve out a

[7] Cf. Williams-Yulee, 135 S. Ct. at 1671 ("The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary."); Hodge, 799 F.3d at 1167 ("[T]he alternative interest in maintaining decorum and order likewise forms a 'subtle, intangible and nonquantifiable' baseline

religious exemption in this situation would lead to significant administrative problems…and open the door to a weed-like proliferation of claims for religious exemptions." U.S. v. Israel, 317 F.3d 768, 772 (7th Cir. 2003) (upholding against a RFRA challenge a demand that a convicted felon on parole abstain from *all* marijuana use); cf. Olsen v. DEA, 878 F.2d 1458, 1462 (D.C. Cir. 1989) (finding that government is not required to accommodate a practice that would require "burdensome and constant official supervision and management").

"Restricting expressive assemblages and displays [on the Supreme Court plaza] promotes a setting of decorum and order at the Supreme Court." Hodge, 799 F.3d at 1165. On the other hand, "[a]llowing demonstrations directed at the Court, on the Court's own front terrace, would tend to yield the opposite impression: that of a Court engaged with – and potentially vulnerable to – outside entreaties by the public." Hodge, 799 F.3d at 1165. Thus, because any demonstration on the Supreme Court plaza would defeat the government's compelling objectives; the restrictions are confined to the plaza itself; and plaintiffs have ample opportunity to engage in their alleged religious practices on the sidewalk adjacent to the Supreme Court plaza and elsewhere, the government has employed the least restrictive means for advancing its compelling interest.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed for failure to state a claim upon which relief can be granted.

Dated: Sept. 1, 2016

Respectfully submitted,

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against which to apply any rigorous tailoring inquiry.") (quoting Henderson, 964 F.2d at 1184).

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