

2020 WL 6555054

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United States District Court, D. Oregon,
Portland Division.

WESTERN STATES CENTER, INC., an Oregon public benefit corporation; The First Unitarian Church of Portland, Oregon, an Oregon religious nonprofit corporation; Sara D. Eddie, an individual; Oregon State Representative Karin A. Power, an elected official; and Oregon State Representative Janelle S. Bynum, an elected official, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; **United States Customs and Border Protection**; Federal Protective Service; and United States Marshals Service, Defendants.

No. 3:20-cv-01175-JR

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Signed 11/02/2020

Attorneys and Law Firms

Clifford S. Davidson, Snell & Wilmer LLP, Lake Oswego, OR, Andrew M. Jacobs, Pro Hac Vice, Snell & Wilmer L.L.P., Phoenix, AZ, for Plaintiffs.

Jeffrey Aaron Hall, Jordan Von Bokern, DOJ-Civ, Washington, DC, for Defendants.

ORDER FOR PRELIMINARY INJUNCTION

MOSMAN, United States District Judge

*1 Plaintiffs seek an injunction to protect their First Amendment rights to Freedom of Speech and Freedom of Worship, and a more general right to limited federal policing powers under the Tenth Amendment. I have rejected Plaintiffs' Tenth Amendment argument, primarily because it is not likely to succeed on the merits. I have also found Plaintiffs' Free Exercise claim, while doctrinally distinct from Free Speech, to be almost indistinguishable as to remedy and redressability.

Plaintiffs' claims center on protests outside the Mark O. Hatfield U.S. Courthouse ("U.S. Courthouse") in downtown Portland. Plaintiffs assert the right to come to the U.S. Courthouse area and peacefully protest. They also claim some federal agents have chilled their exercise of that right by engaging in retaliatory conduct towards other peaceful protesters, by the unwarranted use of force. The showing that the federal agents have any retaliatory motive is non-existent. Unfortunately for the federal agents, they operate under the burden of statements from the President (and for Border Patrol agents, Acting Secretary Wolf) expressing precisely such a motivation. For these and other reasons discussed at oral argument, I have found Plaintiffs are entitled to some form of injunctive relief.

Injunctions are supposed to be grounded in redressability. They typically should prevent action so that the threatened harm does not occur, without infringing on a defendant's legitimate interests or actions. What they must not do is paper over a problem with endless lawyer talk. This is particularly true here, where Plaintiffs seek finely-drawn limitations on law enforcement conduct in a situation that can involve hundreds or even thousands of protesters in a small area in front of the U.S. Courthouse, some of whom are engaged in violent conduct, in the middle of the night, all obscured by the smoke from commercial grade fireworks.

Plaintiffs have candidly acknowledged that nonviolent protesters found in the midst of such a melee cannot readily be distinguished from violent protesters. They have suggested an injunction that covers them when they are a certain number of feet away from any violent protesters. This seems unworkable to me, not the least because it presupposes a static situation, one in which they can know where the crowd is going to move or what the stranger next to them will do next.

Instead of an injunction grounded in the behavior of individuals in a crowd, I have focused on the primary relief sought by Plaintiffs: a geographical solution that focuses on where certain federal law enforcement activity can occur. Plaintiffs assert, and I agree, that this will provide them with a zone of safety where they can peacefully protest without fear of retaliation. As will be set out more precisely below, I have limited Defendants' crowd control activities to an extended city block around the U.S. Courthouse. Within that sphere, called the "Excluded Area," federal law enforcement can engage in crowd control activities subject to all the pre-existing limits, constitutional or otherwise, on their conduct, but not covered by this injunction. Beyond that line federal agents must cease crowd control activities, including

clearing people away from the U.S. Courthouse.

*2 While focusing on a geographic area where crowd control is, or is not, permitted, this injunction in no way limits pre-existing protections or authorities. It remains the case, for example, that federal agents cannot individually target protesters in retaliation for their speech, anywhere or anytime. It also remains the case, for example, that within or beyond the Excluded Area, federal agents can make arrests or engage in “hot pursuits” according to longstanding rules governing such activities.

The Court ORDERS as follows:

1. Plaintiffs’ Motion for Preliminary Injunction [ECF 16] is GRANTED in part;
2. The Court hereby ENJOINS Defendants United States Department of Homeland Security, United States Customs and Border Protection, Federal Protective Service, and United States Marshals Service, and all persons working at their direction within the physical boundaries of the Portland Division of the United States District Court for the District of Oregon (the “Enjoined Parties”), as follows:
3. The Enjoined Parties may not employ general crowd control measures—as distinguished from lawful activity directed at individual protesters—farther than one extended block in all directions from the U.S. Courthouse. One extended block is defined as the most distant side of the far sidewalk from the U.S. Courthouse. For example, one extended block to the west is the west side of the west sidewalk on SW Fourth Avenue. The corners are defined by where the extended blocks intersect. For example, where the west side of the west sidewalk on SW Fourth Avenue meets the north side of the north sidewalk of SW Taylor Street is one corner. This is the Excluded Area. The Enjoined Parties may employ general crowd control measures while they are physically located in the Excluded

Area, even if those activities have consequences beyond the Excluded Area.¹

4. “Lawful activity directed at individual protesters” includes, for example, the following:
 - a. lawfully making arrests without a warrant for any offense against the United States committed in the presence of an officer or agent, or for any felony cognizable under the laws of the United States if the officer or agent has reasonable grounds to believe that the person to be arrested has committed or is committing a felony (*see* 40 U.S.C. § 1315(b)(2)(C));
 - b. conducting investigations, on and off the property in question, of offenses that may have been committed against property owned or occupied by the Federal Government or persons on the property (*see* 40 U.S.C. § 1315(b)(2)(E));
 - c. engaging in hot pursuit of a suspect believed to have violated federal law (*United States v. Jackson*, 139 F. App’x 83, 85–86 (10th Cir. 2005)).
5. This Order does not cover federal law enforcement activity at any other location than the U.S. Courthouse.
6. This Order shall be in effect until further order from this Court. The Court will set a hearing for the week of November 9, 2020, to evaluate the injunction, including whether or not warnings are needed prior to the use of crowd control measures.

IT IS SO ORDERED.

All Citations

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Footnotes

¹ Plaintiffs have also raised the issue of warnings prior to the use of crowd control measures. Before instituting warning requirements, I want to have a more developed record on the need for warnings. I will reconsider this issue if Plaintiffs demonstrate how an injunction could effectively contain warning requirements to redress their injuries.