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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA,
20
21 Plaintiff,
22 v.
23 ROBERT L. ROSEBROCK,
24 Defendant.

CVB Nos. 4920201, 4920202,
6593951, 6593729 / CC11

NOTICE OF MOTION AND MOTION TO
DISMISS ALL PHOTOGRAPHY /
RECORDING CHARGES;
MEMORANDUM OF POINTS AND
AUTHORITIES

Hearing Date: March 7, 2017
Hearing Time: 8:30 a.m.
Courtroom 341 (Roybal)
Hon. Steve Kim

25 TO ALL INTERESTED PARTIES:

26 PLEASE TAKE NOTICE that on Tuesday, March 7, 2017, at 8:30 a.m., or as soon thereafter as
27 counsel may be heard, before Honorable Steve Kim, United States Magistrate Judge, in courtroom 341
28 of the Roybal Federal Building and U.S. Courthouse, located at 255 E. Temple St., Los Angeles, CA,
defendant ROBERT L. ROSEBROCK, by his attorneys, Robert Patrick Sticht and Sterling E. Norris,
will move, and does hereby move, under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, and

FILED
2017 FEB 24 PM 2:09
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY: _____

1 pursuant to, *inter alia*, the First Amendment of the United States Constitution, for an Order dismissing
2 all photography / recording charges against him.

3 This motion is based upon the accompanying memorandum of points and authorities, the files
4 and records in this case, and any oral argument and evidence that the Court may allow.

5 Dated: February 24, 2017

Respectfully submitted,

6 JUDICIAL WATCH, INC.
7 LAW OFFICES OF ROBERT PATRICK STICHT

8
9 By: 
10 ROBERT PATRICK STICHT

11 Attorneys for Defendant
12 Robert L. Rosebrock

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Rosebrock has been charged with taking photographs on Memorial Day, May 30, 2016, within the Veterans Administration Facility located at 11301 Wilshire Boulevard in Los Angeles, California ("VA Facility") in violation of 38 C.F.R. § 1.218(a)(10), and on the same day "displaying placards or posting materials" by affixing two small (4" x 6") American Flags to the exterior fence of the VA Facility without authorization in violation of 38 C.F.R. § 1.218(a)(9). *See* Exhibit A (United States District Court Violation Notice, Number 4920201 and Number 4920202); *see also* Government Trial Memorandum ("Gov Trial Memo"), filed November 30, 2016 at 2. Mr. Rosebrock has been further charged with recording video on June 12, 2016, with a Sony camcorder within the VA Facility in violation of 38 C.F.R. § 1.218(a)(10). *See* Exhibit B (United States District Court Violation Notice Number 6593951); Government Trial Memo at 3.

II. BACKGROUND

The "Statement of Probable Cause" for the May 30, 2016 citation, issued by Veterans Affairs ("VA") Police Officer Ralph Garcia, states in pertinent part:

While checking the great lawn gate, I observed Robert Rosebrock on the great lawn taking photographs . . . Rosebrock was taking photographs of flags which he later admitted to posting on the fence as well as the grounds of the property . . . Rosebrock was advised that the taking of photographs on VA property without authorization for media use is not authorized. Based on past articles, I know the photos would be used for media purposes (see attached article). Understanding this, I asked Rosebrock what he was going to do with the photographs. Rosebrock states, "Put them on a website and plaster you guys all over the net with news stories on you. It's called freedom of the press!" I advised Rosebrock if he continued to take photographs he would be cited as he did not have authorization. Rosebrock began stating he intends to take photos for his media blog once again and stated its freedom of the press a second time. He further explained that he will continue to take photos and videos to destroy VA Officers and the VA on his media website. I explained to Rosebrock he would be cited if the photographs continue. Rosebrock put his camera away and was told to sit on the wall of the fence while I continued to investigate.

The statement then describes how Officer Garcia issued a citation to Mr. Rosebrock for posting two American Flags on the fence at or near the "Great Lawn Gate." It continues:

Rosebrock took out his camera and stated, "I am taking a picture of this!" I again instructed Rosebrock if he took a photograph he would be cited for the offense. Rosebrock stated, "Go ahead. They will drop it because they don't have time to deal with

1 me!" Rosebrock began taking photographs. I advised Rosebrock he would now be
2 receiving a citation for unauthorized photography and if he continued, his camera would
3 be confiscated for use as evidence in court.

4 *See Exhibit A.*

5 Mr. Rosebrock was not provided, and there does not appear to be, a "Statement of Probable
6 Cause" for the June 12, 2016 citation, issued by VA Police Sergeant Michael Perez, but the citation
7 itself states: "While in full police uniform on VA property I observed Robert Rosebrock video
8 recording VA property and VA police officers while on VA property without permission or authority."

9 *See Exhibit B.*

10 The Investigative Report prepared by Sgt. Perez for June 12, 2016, states in pertinent part:

11 On June 12, 2016 while on patrol at the West Los Angeles Veteran Affairs I (Sergeant
12 Michael Perez) received a radio call from Officer Davis advising that he was going to
13 make an arrest at Veterans Parkway. I arrived at Veterans Parkway and observed Officer
14 Davis ordering a male black adult to take down a United States flag that was placed on
15 the Veterans Affairs fence line. The male black adult was wearing a red white and blue
16 shirt, pants, and hat (same color and design as the United States flag). I also observed
17 Robert Rosebrock video recording VA property and police officers on VA Federal
18 property without authority or permission.

19 ***

20 I then made contact with a different subject (frequent Sunday protestor), Robert
21 Rosebrock who was recording VA property and Federal Officers on Federal Veterans
22 Affairs property without permission (violation of Code of Federal Regulation (CFR)
23 1.218 a (10)-Taking photographs without permission). I then advised the subject that he
24 is taking video recording on Federal property without permission and confiscated his
25 camera (Black In color Sony, Handycam, HDR-CX220, Serial number 3310433) after
26 advising Rosebrock that he was not allowed to record and he continued to video record
27 (video camera was placed into evidence locker #3). I advised Rosebrock that he was
28 being detained and that I will be issuing him a citation. Rosebrock began to walk away
and I again advised him that he is being detained and that he [is] not free to leave because
I will be issuing him a citation.

See Exhibit C.

23 **III. ARGUMENT**

24 The regulation in question, 38 C.F. R. § 1.218(a)(10), states:

25 "Photographs for advertising or commercial purposes may be taken only with the written consent
26 of the head of the facility or designee. Photographs for news purposes may be taken at entrances,
27 lobbies, foyers, or in other places designated by the head of the facility or designee."

28 There is no claim that Mr. Rosebrock took photographs or made video recordings for advertising

1 or commercial purposes and no facts supporting any such claim. Accordingly, our focus is on the
2 second sentence of the regulation.

3 A.

4 The first question is whether section 1.218(a)(10)'s provision on photographs taken for "news
5 purposes" applies to Mr. Rosebrock. There is no doubt that Mr. Rosebrock is a long-standing, vigorous
6 advocate for at least two causes: the protection of veterans, especially homeless veterans, and respect
7 for the American Flag. *See generally* Docket No. 61 (Order on Summary Judgment), Robert Rosebrock
8 v. Donna Beiter et al., Case No. 10-cv-01878-SJO, Central District of California. In this regard, he
9 occasionally writes articles published in Veterans Today, Canada Free Press, and The Front Page
10 Online, where he is a "contributor." However, it is also undeniable that Mr. Rosebrock does not write
11 about "the news," but instead focuses his writing on his advocacy for the veterans' and American Flag
12 issues of particular concern to him. He is not a news reporter or news organization engaged in gathering
13 and reporting on the news; he is an advocate expressing his First Amendment rights. Section
14 1.218(a)(10) does not apply to him. The "news purposes" aspect of the regulation is an essential
15 element of the alleged offense. *See* Gov Trial Memo at 4. It cannot be proven. Therefore, the
16 photography/recording charges should be dismissed.

17 Even if we assume that section 1.218(a)(10)'s provision on photographs taken for "news
18 purposes" applies to Mr. Rosebrock, a violation cannot be proven. Officer Garcia made it clear that he
19 was on bicycle patrol checking the "Great Lawn Gate" when he observed Mr. Rosebrock taking
20 photographs of "flags" posted on the fence. Officer Garcia also made clear that he was detaining and
21 issuing Mr. Rosebrock a citation at or near the "Great Lawn Gate" when he observed Mr. Rosebrock
22 begin taking photographs of his official activities: "Rosebrock . . . was told to sit on the wall of the
23 fence while I continued to investigate." Sgt. Perez likewise clearly indicated he was at "Veterans
24 Parkway," i.e., the same location when he observed Mr. Rosebrock video recording VA police arresting
25 the male black adult and VA property at Veterans Parkway. The "Great Lawn Gate" is adjacent to a
26 public plaza and abuts a public sidewalk. Beyond the "Great Lawn Gate" is a park – Los Angeles
27 National Veteran's Park – that has been open to the public since 2015. The "Great Lawn Gate" serves
28 as an entrance to the park. Section 1.218(a)(10) expressly permits photographs for news purposes at

1 “entrances.” For this reason as well, the photography charge on May 30, 2016 should be dismissed.

2 B.

3 The next question is whether the second sentence of section 1.218(a)(10) even prohibits
4 anything. On its face, the sentence authorizes photography “for news purposes” at “entrances.” The
5 “designated by the head of the facility or designee” language modifies “other places,” not “entrances,”
6 “lobbies,” or “foyers,” as is indicated by the comma after “foyers.” As a result, the regulation should be
7 read as list of the following places where photographs may be taken for news purposes: (1) entrances;
8 (2) lobbies; (3) foyers; or (4) other places designated by the head of the facility or designee. The
9 sentence does not say these are the only locations news photographs may be taken or that taking news
10 photographs anywhere else is prohibited. By contrast, the first sentence plainly says that photographs
11 may be taken for advertising or commercial purposes “only with the written consent of the head of the
12 facility or designee.” The first sentence is a prohibition. The second sentence is not. Because nothing
13 is prohibited by the second sentence, Mr. Rosebrock cannot have violated it as a matter of law.

14 C.

15 “[G]overnment may impose reasonable restrictions on the time, place, or manner of engaging in
16 protected speech provided that they are adequately justified without reference to the content of the
17 regulated speech.” *Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993). It cannot be reasonably
18 challenged that photography is expressive speech protected by the First Amendment. Section
19 1.218(a)(10) treats different types of photography differently. These different types of expression are:
20 (1) photography for advertising or commercial purposes; (2) photography for “news purposes;” and (3)
21 all other types of photography, apparently including artistic, educational, informational, and scientific
22 purposes. Section 1.218(a)(10) is not a “content neutral” regulation. In *Cincinnati*, the Court held that
23 the government’s ban on newsracks on city sidewalks that dispense commercial advertisements, but not
24 newspapers, was not a content neutral regulation of speech. The Court noted that it previously had
25 “expressly rejected the argument that ‘discriminatory . . . treatment is suspect under the First
26 Amendment only when the legislature intends to suppress certain ideas.’” *Id.* at 429. “Under the city’s
27 newsrack policy, whether any particular newsrack falls within the ban is determined by the content of
28 the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the

1 ban is this case is ‘content based.’” *Id.* Likewise here, whether any photograph is subject to the VA’s
2 regulation is dependent on whether it is taken for an advertising or commercial purpose, news purpose,
3 or any other purpose. The regulation is content-based.

4 Determining what standard applies to content-based regulation is not entirely clear, but the
5 government nonetheless must make some type of showing if its regulation is to survive scrutiny. The
6 outcome appears to depend on the type of forum at issue – a public forum, limited public forum, nor
7 non-public forum. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985).
8 Section 1.218(a)(10) purports to cover the entire VA campus, but the campus itself is subject to a wide
9 variety of uses. The forum analysis for the charges against Mr. Rosebrock should be determined by
10 where on the campus he is alleged to have violated the regulation – here, either on the plaza at the Great
11 Lawn Gate or the grounds of the park adjacent to the Great Lawn Gate. It would make no logical sense
12 to apply the same forum analyses to the public plaza and public park, on the one hand, and other
13 locations on the VA campus that have entirely different purposes, such as the inside of the Veterans’
14 home, on the other.

15 Sidewalks and parks have traditionally been considered public fora for First Amendment
16 purposes. *United States v. Grace*, 416 U.S. 171, 177-80 (1983) (treating public sidewalks forming the
17 perimeter of the Supreme Court grounds to be a public forum). For a public forum, “the government’s
18 ability to permissibly restrict expressive conduct is very limited: the government may enforce
19 reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are
20 narrowly tailored to serve a significant government interest, and leave open ample alternative channels
21 of communication.” *Id.* at 177 (internal quotations omitted). “Additional restrictions such as an
22 absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to
23 accomplish a compelling governmental interest.” *Id.*

24 Section 1.218(a)(10) is not content neutral, and, as a result, the government must show that its
25 regulation is more than “narrowly tailored to serve a significant government interest and leave[s] open
26 ample channels of communication.” Plainly, the government is never going to be able to demonstrate
27 that its interest in regulating photographs taken on the plaza or in the adjacent park are all that
28 significant or that Section 1.218(a)(10) is narrowly tailored to serve that interest and leaves open ample

1 channels of expressive speech. Therefore, the regulation cannot be applied constitutionally to Mr.
2 Rosebrock's photography / recording as a matter of law.

3 D.

4 A law or regulation may be unconstitutionally vague if it "fail[s] to provide the kind of notice
5 that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*,
6 527 U.S. 41, 56 (1999). Further, a law or regulation may be unconstitutionally vague if it authorizes or
7 encourages "arbitrary and discriminatory enforcement." *Id*; see also *Kolender v. Lawson*, 461 U.S. 352,
8 355 (1983) ("the void-for-vagueness doctrine requires that a penal statute define the criminal offense
9 with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a
10 manner that does not encourage arbitrary and discriminatory enforcement.") (citations omitted).

11 Section 1.218(a)(10) is unconstitutionally vague for both reasons insofar as it does not
12 sufficiently identify what conduct is prohibited with respect to the taking of photographs for "news
13 purposes." It is ambiguous whether the term applies to traditional news media only – newspapers, news
14 magazines, and televisions stations that cover the news generally for distribution to a wide audience – or
15 has a broader application. The regulation dates from at least as early as 1985. Does it apply to bloggers
16 or persons with websites or twitter accounts? If so, how many persons do their blogs and tweets have to
17 reach to qualify as having a "news purpose?" Does it apply to activists who engaged in public advocacy
18 or whistleblowers who make disclosures to the media? Is anyone with a smartphone and a Facebook
19 page potentially subject to prosecution if they take a photograph on VA property? Ordinary people are
20 unlikely to know whether Section 1.218(a)(10) applies to them or only to traditional news media like
21 KTLA or the Los Angeles Times. Because the term "news purposes" is hopelessly vague and has not
22 been defined, Section 1.218(a)(10) also authorizes and encourages arbitrary and discriminatory
23 enforcement, such as occurred here. The regulation is unconstitutionally vague.

24 The regulation also is facially overbroad because its substantial sweep – which encompasses
25 whatever the VA deems a "new purpose" -- penalizes or at least inhibits a substantial amount of
26 protected, expressive activity. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As a result, it is
27 unconstitutional. Section 1.218(10) also is unconstitutionally overbroad as applied to Mr. Rosebrock's
28 constitutionally-protected photographing and recording. See *Bigelow v. Virginia*, 421 U.S. 809, 829

1 (1975) (reversing conviction because statute as applied to defendant was unconstitutional).

2 E.

3 It is now clear that individuals have a First Amendment right to record police activity carried out
4 in public. *See, e.g., Gericke v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014); *Smith v. Cumming*, 212 F.3d 1332,
5 1333 (11th Cir. 2000); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 349 (9th Cir. 1995) (recognizing
6 the “First Amendment right to film matters of public interest”). “Gathering information about
7 government officials in a form that can be readily disseminated serves a cardinal First Amendment
8 interest in protecting and promoting the free discussion of governmental affairs.” *Gericke*, 753 F.3d at 7
9 (internal citations and quotations omitted). The U.S. Department of Justice recognized this right
10 expressly in a May 14, 2012 guidance letter encouraging the Baltimore City Police Department to
11 develop policies that “affirmatively set forth the First Amendment right to record police activity.” *See*
12 *Exhibit D* at 2.

13 Mr. Rosebrock is charged with violating Section 1.218(a)(10) on two occasions: recording his
14 own interaction with Officer Garcia on Memorial Day, May 30, 2016, when Officer Garcia cited Mr.
15 Rosebrock for posting two, 4 by 6 inch American Flags on the fence on each side of the “Great Lawn
16 Gate;” and recording the VA police’s interaction with Ted Hayes on June 12, 2016, when Mr. Hayes
17 was handcuffed after he posted a full-sized American Flag on the same fence. Again, importantly, the
18 “Great Lawn Gate” is adjacent to a public plaza and abuts a public sidewalk. Beyond the “Great Lawn
19 Gate” is a park – Los Angeles National Veteran’s Park – that has been open to the public since 2015.
20 The “Great Lawn Gate” serves as an entrance to the park. No claim is made that Mr. Rosebrock did not
21 have every right to be on the plaza, at the gate, or in the park. On both occasions, the police activity in
22 question was carried out in public at or near the “Great Lawn Gate” entrance. Rosebrock’s recording of
23 police activity was protected by the First Amendment.

24 III. CONCLUSION

25 For the foregoing reasons, the Court should dismiss the photography / recording charges on
26 Memorial Day May 30, 2016, and on June 12, 2016.

1 **CERTIFICATE OF SERVICE**

2 I, Robert Patrick Sticht, declare:

3 I am a citizen of the United States and resident or employed in the County of Los Angeles,
4 California. My business address is Law Offices of Robert Patrick Sticht, P.O. Box 49457, Los Angeles,
5 CA 90049. I am over the age of eighteen years. I am not a party to the above-entitled action.

6 I manually filed (or caused to be manually filed) the foregoing NOTICE OF MOTION AND
7 MOTION TO DISMISS ALL PHOTOGRAPHY / RECORDING CHARGES; MEMORANDUM OF
8 POINTS AND AUTHORITIES with the Clerk of the Court for the United States District Court for the
9 Central District of California. I caused a copy of the same document to be placed in a sealed envelope
10 and served by U.S. Mail, postage prepaid, in the ordinary course of business, and/or hand-delivered,
11 upon the following persons:

12 Robert L. Rosebrock, 575 S. Barrington Ave., #410, Los Angeles, CA 90049;

13 Sharon McCaslin and Adam Schleifer, Assistant United States Attorneys, 1300 U.S. Courthouse,
14 312 North Spring Street, Los Angeles, CA 90012.

15 Executed on February 24, 2017 at Los Angeles, California.

16 I declare under penalty of perjury that the foregoing is true and correct.

17 
18 ROBERT PATRICK STICHT