UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	**No. 8:22-cr-00259-WFJ-AEP**
Plaintiff,	)	
	)	
vs.	)	
	)	
PENNY HESS,	)	
	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS INDICTMENT

Defendant, PENNY HESS, by her attorneys, respectfully submits the following reply memorandum in support of her Motion to Dismiss the Superseding Indictment.

The first section of the government's response, spanning about nine pages, focuses on the statute, 18 U.S.C. § 951, which "is content neutral" and "plainly does not abridge free speech on its face." Gov't Resp., at 12. The government argues, incredibly, that because the statute it is using to prosecute the APSP defendants[1] is neutral on its face, there can be targeting of protected speech. This argument should be rejected.

The government has arrested prominent critics of its policies and charged them

[1] This Reply Memorandum, like the Motion to Dismiss, is filed on behalf of defendant Hess; its arguments apply only to the three APSP Defendants – Hess, Yeshitela and Nevel – who are all similarly situated with respect to these constitutional challenges. Defendant Romain has adopted the arguments in the Motion to Dismiss and the government has chosen to respond as if all four defendants had joined together in their challenge to the indictment. This is unfair. The factual allegations against Romain are distinct and do not overlap with the allegations against the APSP defendants. The indictment includes overt acts alleged to have been committed by Romain and others who are unaffiliated with the APSP. Because the allegations are distinct, the government should respond separately to Romain and to the APSP defendants, rather than combine the facts of the two cases, as it has done in its response.

in an indictment in which every Overt Act refers to their political speeches and activism,[2] much of it in opposition to the war in Ukraine. And now, when challenged, it argues that because the statute it is using to prosecute these defendants is content-neutral, this case should be evaluated under the lenient "intermediate scrutiny" standard, as set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), used to review regulations "that only incidentally restrict speech." Gov't Resp., at pp. 9-18.

Section 951 is content-neutral because it was never intended to be used to target speech. Its plain language applies to a person who "*acts* in the United States as an agent of a foreign government ...." 18 U.S. C. § 951 (a) (emphasis added). As the District Court stated in *United States v. Al Malik Alshahhi*, (a case cited by the Government), "Section 951 regulates *conduct*, that is, *acting* as a foreign agent. Therefore, its 'effect on speech would be only incidental to its primary effect on conduct.'" 2022 U.S. Dist. LEXIS 110730, at *4 (E.D.N.Y. 2022) (emphasis added).

Thus the government here is using Section 951 in a way never intended, to prosecute political activists who allegedly partnered with Russians on issues of mutual concern. In fact, this prosecution appears to be the first ever in which the government

[2] In a desperate attempt to show that the APSP defendants are charged with "acting" as well as speaking, the government asserts that the defendants are charged with "conspiring to help lobby to free Russian detainees." Gov't Resp., at 24. The indictment contains no such allegation. In support of this newly invented charge, the government cites Overt Act 43, which describes an electronic message sent to defendant Hess in November 2018, asking the APSP to provide "expert" assistance to Ionov before a human rights committee relating to the detention of Russian nationals. But there is no response by Hess to this message, and no allegation that the APSP ever acted as experts or conspired to lobby for Russia on any issue.

has attempted to use Section 951 to target speech. Every other Section 951 prosecution that we have found targets conduct such as espionage, fraud, bribery, extortion or illegal lobbying on behalf of foreign governments. See Motion to Dismiss, at pp. 9-10.

Accordingly, while Section 951 may be content-neutral on its face, the government is using the statute to target protected speech. Thus, this prosecution is not content neutral. The government here is using the federal criminal law to silence critics of its foreign policy.

The Supreme Court decision in *Cohen v. California*, 403 U.S. 15 (1971), is instructive. There the defendant was convicted of breach of the peace for wearing a jacket displaying an offensive word to protest the Vietnam War and the draft. Although the breach of peace statute was directed at conduct and not speech, and was content-neutral, the Court recognized that Cohen was being prosecuted under the statute because of what his speech communicated. Accordingly, the State was required to show a "compelling reason" to prevent Cohen from delivering his message, and his conviction was reversed. *Id.*, at 18-19.

The government's argument that this prosecution has "no relation to [defendants'] exercise of free expression," but relates only to their alleged partnership with Russia, is plainly untrue. If these defendants had partnered with Russia to promote Russian literature or cuisine, this prosecution would never have been brought. The APSP defendants are being prosecuted because of political speech, which includes their vocal criticisms of U.S. involvement in the war in Ukraine. This prosecution is not

content neutral.

The Government attempts to distinguish the cases relied upon by the defendants – *De Jonge v. Oregon*, 299 U.S. 353 (1937), *Thomas v. Collins*, 323 U.S. 516 (1945), *NAACP v. Button*, 371 U.S. 415 (1963), and *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) – all on the basis that they "involved laws that directly regulated speech based on its content." Gov't Resp., at pp. 16-17. But as previously shown, while Section 951 might not abridge free speech on its face, the government is using it here to target protected speech. The cases cited by the defendant are directly on point as they set forth the proper standard of review for a criminal prosecution that abridges protected speech.

The government's argument that this prosecution is analogous to a time, place, and manner restriction that only incidentally abridges speech, such as a town ordinance that prohibits excessive noise after dark in a residential neighborhood, is ludicrous. The APSP defendants are being criminally prosecuted for making political speeches against U.S. policy, and they are facing up to ten years in prison. This prosecution bears no resemblance to enforcement of a reasonable time, place and manner regulation. The government's attempt to criminalize political speech and dissent must be evaluated under strict scrutiny, meaning the government must show a compelling interest to justify this prosecution. See *NAACP v. Button*, 371 U.S. at 438.

Next, the Government argues that even if strict scrutiny were applied, that standard is satisfied because Section 951 is "narrowly tailored to serve compelling state interests." Gov't Resp., at 18 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163

(2015)) (Arizona town's ordinance regulating signs violated First Amendment).

But here, it is not the statute that is limiting protected speech; it is the government's mis-use of the statute. Thus, whether or not Section 951 is "narrowly tailored to serve compelling state interests" is immaterial. Compare *Cohen v. California*, *supra* (whether the breach of peace statute was narrowly tailored to serve compelling state interests was immaterial where the statute was used improperly to criminalize offensive speech).

The Government also cites *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), in support of an argument that "national security and foreign policy concerns constituted valid and compelling government interests." Gov't Resp., at 19, n.5. There, the Court found that the statute that prohibited "material support or resources" to designated terrorist organizations could be applied to a person who supports lawful, nonviolent purposes of those groups. In rejecting a First Amendment challenge, the Court relied on a Congressional finding that "all contributions to foreign terrorist organizations further their terrorism." *Id.*, at 30.

In contrast to *Holder*, there are no Congressional findings here that the APSP defendants' political speech and activism furthers terrorism or threatens national security. Quite to the contrary, as the Supreme Court has held, "free expression [is] of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Next, the government argues that the defendants' speech is being targeted, not for

its message, but for some other purpose consistent with the First Amendment. Gov't Resp., at pp. 22-24. The government cites *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), a decision that involves cross burning and discusses "proscribable speech" such as obscenity and espionage. However, the indictment here does not allege that any part of the defendants' political speeches were obscene or communicated the Nation's defense secrets or were proscribable for any reason.

Next, the government argues that the accusation in the indictment that defendants are spreading "Russian propaganda and disinformation" has been misinterpreted by the defendants. According to the government,

> the term "disinformation" does not refer to information that is necessarily false. Rather, it refers to Russian intelligence's longstanding employment of "active measures," which are "influence operations" utilized by the Russian government .... Gov't Resp., at 5, n.2.

The Merriam-Webster Dictionary defines "disinformation" as "false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth."[3] The government's attempt to re-define the meaning of words is right out of Alice in Wonderland and should be rejected.[4]

The government's discussion of *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005), a case cited by defendants, is misleading. The government states that in *Dumeisi*,

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[3] https://www.merriam-webster.com/dictionary/disinformation.

[4] See Lewis Carroll, *Through the Looking Glass*: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

"the Court clearly determined that publishing articles at the direction of Iraqi intelligence was a legitimate basis for Dumeisi's conviction." Gov't Resp., at 27. This is incorrect. Rather, in finding the evidence sufficient to support the conviction, the Seventh Circuit found there was evidence that Dumeisi, a newspaper publisher, submitted reports to Iraqi intelligence on Iraqi Opposition living in the U.S., "printed provocative articles in his paper in order to learn more about the Opposition; and that he produced false press passes for IMUN (Iraqi Mission to the United Nations) employees." *Id.*, at 581.

The *Dumeisi* Court also found that the jury was properly instructed on the First Amendment when it was told:

> The speech that Mr. Dumeisi gave at the Iraqi Mission and newspaper articles he authored or published are protected by the First Amendment. The speech and newspaper articles, as well as Mr. Dumeisi's opinion and political views, are to be considered only insofar as they may pertain to issues of motive and intent.

Id., at 579. Thus, "publishing articles at the direction of Iraqi intelligence" was protected by the First Amendment and was not a legitimate basis for Dumeisi's conviction, except to the extent that Dumeisi used those articles to expose Iraqi opposition members.

In the final section of its Response, the government argues that "Section 951 is not substantially overbroad." Gov't Resp., at 29. A substantially overbroad statute will be invalidated on its face. *New York v. Ferber*, 458 U.S. 747, 769 (1982). But a "law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Id.*, at 771.

We have not argued that Section 951 is substantially overbroad or that it should be invalidated. We do argue that this indictment must be dismissed because it targets protected speech without any compelling government interest. In dismissing this indictment, this Court should make clear, as the Seventh Circuit did in *Dumeisi*, that speech protected by the First Amendment cannot be considered as substantive evidence of guilt under Section 951. In this way, this Court would limit the reach of 951 to conduct and not speech, as Congress intended, without invalidating the statute.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For all of these reasons, dismissal of the superseding indictment is required as to the APSP Defendants. Because of the importance, complexity and uniqueness of these issues, defendant Hess requests an opportunity to appear before the Court and present oral arguments in support this Motion.

WHEREFORE, based on the foregoing, Defendant Penny Hess respectfully moves this Honorable Court to enter an order dismissing the superseding indictment in the above-captioned case with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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