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2008 SEP 26 PM 3:29

U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.  
SOUTHWEST DIVISION

7 Attorneys for Defendant  
MICHAEL WISNIEWSKI

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

13 UNITED STATES OF AMERICA,  
14 Plaintiff,  
15 v.  
16 MICHAEL WISNIEWSKI,  
17 Defendant.

NO. X0510142-RCF

**NOTICE OF MOTION AND  
MOTION TO DISMISS FOR  
SELECTIVE PROSECUTION;  
MEMORANDUM OF POINTS  
AND AUTHORITIES; EXHIBITS**


Date: October 16, 2008  
Time: 1:30 pm

19  
20 TO THE HONORABLE RITA COYNE FEDERMAN AND ASSISTANT UNITED  
21 STATES ATTORNEY SHARON McCASLIN:

22 Defendant Michael Wisniewski, by and through his attorney Deputy Federal  
23 Public Defender John Littrell, hereby moves to dismiss the citation against him in  
24 the above-captioned case on the ground of selective prosecution.  
25

26 Respectfully submitted,  
27 SEAN K. KENNEDY  
28 Federal Public Defender

DATED: September 26, 2008

By   
JOHN LITRELL  
Deputy Federal Public Defender

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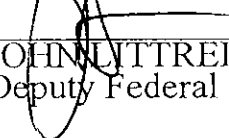
MOTION

Defendant Michael Wisniewski, by and through his attorney of record, Deputy Federal Public Defender John Littrell, hereby moves this Honorable Court for an order dismissing the indictment in this case on the ground that Mr. Wisniewski was targeted for prosecution on account of his expressive speech and affiliation with the participants in the May 19, 2007 Armed Forces Day Vigil at Vandenberg Air Force Base, in violation of the Free Speech and Equal Protection Guarantees of the United States Constitution.

This motion is premised upon the Constitution, the attached Memorandum of Points and Authorities, all files and records in this case, and any further evidence as may be adduced at the hearing on this motion.

Respectfully submitted,  
SEAN K. KENNEDY  
Federal Public Defender

DATED: September 26, 2008

By  \_\_\_\_\_  
JOHN LITRELL  
Deputy Federal Public Defender

1 I.

2 INTRODUCTION

3 On Saturday, May 19, 2007, Mr. Wisniewski was photographing a gathering of  
4 approximately thirty people conducting a non-violent vigil at the Vandenberg Air Force  
5 Base. Mr. Wisniewski was not there to protest. Mr. Wisniewski was there to  
6 photograph the vigil for the Catholic Agitator, a bi-monthly publication of the Los  
7 Angeles Catholic Worker community. There were several other photographers and  
8 videographers present. Some were military personnel. But at least one of the  
9 videographers represented a civilian media organization, like Mr. Wisniewski did.

10 Both Mr. Wisniewski and the civilian photographer had sophisticated camera  
11 equipment. Both shot photographs on behalf of their civilian employers. Both shot  
12 photographs from the designated "speech" area as well as the area that was as off-limits  
13 to the vigil participants. The only relevant difference between the two was that Mr.  
14 Wisniewski wore a t-shirt that read "No War" and identified the "Los Angeles Catholic  
15 Worker" organization, whereas the civilian videographer did not wear clothing that  
16 expressed a point of view, and did not appear to sympathize with the vigil participants.

17 Mr. Wisniewski was arrested for trespassing based on the fact that he strayed from  
18 the designated vigil area to shoot photographs of the vigil. The civilian photographer,  
19 who likewise strayed from the designated area to shoot video footage, was not arrested  
20 or prosecuted. The government's decision to arrest and prosecute Mr. Wisniewski  
21 violates the Equal Protection guarantee of the Due Process Clause of the Fifth  
22 Amendment to the United States Constitution, because it was based on Mr. Wisniewski's  
23 expressive speech and his affiliation with the participants in the vigil. Accordingly, the  
24 trespassing charge against Mr. Wisniewski should be dismissed.

1 II.

2 **FACTS**

3 Mr. Wisniewski is a professional photographer. He is also a member of the Los  
4 Angeles Catholic Worker organization. The Catholic Worker is part of an international  
5 movement that began in 1933 that provides food, services, and hospitality to the poor  
6 and homeless. Mr. Wisniewski takes photographs which are published in the Catholic  
7 Worker's bi-monthly newspaper, the Catholic Agitator. See www.lacatholicworker.org.  
8 He also shoots photographs and video for other groups and non-profit organizations,  
9 both as a volunteer and for pay. See Exhibit A (Declaration of Michael Wisniewski).

10 On May 19, 2007, Mr. Wisniewski was covering a non-violent vigil that took  
11 place outside of the Vandenberg Air Force Base. Among the participants in the vigil  
12 were his co-defendants, Jeff Dietrich, Dennis Apel, Father Louis Vitale, and Father  
13 Steve Kelly. Mr. Wisniewski knew his co-defendants, and sympathized with their  
14 reasons for conducting the vigil. He wore a black t-shirt with white lettering that read  
15 "Los Angeles Catholic Worker" and "No War." See Exhibit B (Video footage of the  
16 May 19, 2007 vigil produced by the government). But his reasons for being there were  
17 not to participate in the vigil, but rather to take photographs for the Catholic Agitator.

18 A wide green painted stripe in the roadway purported to identify the area where  
19 vigil participants were allowed to conduct the vigil from the area where they were not  
20 allowed. During the course of the vigil, Mr. Apel and others stepped over the green line  
21 a number of times to communicate with military personnel and ask them to join the vigil.

22 Several other photographers and videographers were present to record the vigil.  
23 See Exhibit C (Photographs taken by Michael Wisniewski on May 19, 2007). A number  
24 of them were either military personnel or military contractors. At least one, however,  
25 was not apparently affiliated with the military. He, like Mr. Wisniewski, was a civilian.  
26 He carried a video camera and displayed visible press identification. See Exhibit A.

27 As vigil participants crossed the green painted line, both Mr. Wisniewski and the  
28 man with the visible press identification crossed the line in order to photograph them.

1 Mr. Wisniewski was arrested and prosecuted. The civilian videographer was not.  
2

3 **III.**

4 **ARGUMENT**

5 “Though the law itself be fair on its face and impartial in appearance, yet, if it is  
6 applied and administered by public authority with an evil eye and an unequal hand, so  
7 as practically to make unjust and illegal discriminations between persons in similar  
8 circumstances, material to their rights, the denial of equal justice is still within the  
9 prohibition of the Constitution.” Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

10 Since Yick Wo, the United States Supreme Court has repeatedly affirmed that the  
11 selective application of local law based on purposeful discrimination among similarly  
12 situated offenders violates the Equal Protection guarantee of the United States  
13 Constitution and can warrant dismissal of criminal charges.<sup>1</sup> Wayte v. United States,  
14 470 U.S. 598, 608-09 (1985); United States v. Armstrong, 517 U.S. 456, 464-65 (1996).

15 In order to prevail on a motion to dismiss for selective prosecution, the defendant  
16 bears the burden of showing, by clear and convincing evidence, that (1) other persons  
17 similarly situated to the defendant are not being prosecuted, and (2) the prosecution in  
18 the instant case is based on an impermissible motive, such as discrimination on account  
19 of the exercise of a constitutionally protected right. Armstrong, 517 U.S. at 464-65;  
20 United States v. Steele, 461 F.2d 1148, 1151 (9<sup>th</sup> Cir. 1972) (reversal of conviction  
21 where defendant targeted because of his exercise of First Amendment rights).  
22

23 **A. The Civilian Videographer Was Similarly Situated, But Not Prosecuted**

24 Both Mr. Wisniewski and the other civilian photographer were professionals  
25 covering the Armed Forces Day vigil for their respective employers. Both carried  
26 professional-grade media equipment. Neither directly participated in the vigil. But both  
27

28 <sup>1</sup> The Due Process Clause of the Fifth Amendment prohibits the federal government from denying any person the equal protection of the laws. Johnson v. Robinson, 415 U.S. 361, 364 n.4, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974).

1 crossed the green painted line during the vigil in order to photograph the participants.

2  
3 **B. Mr. Wisniewski Was Targeted For Prosecution On Account of His**  
4 **Expressive Speech And His Affiliation With Vigil Participants**

5 There is no apparent explanation for the government's choice to prosecute Mr.  
6 Wisniewski, rather than the civilian videographer, other than that Mr. Wisniewski was  
7 singled out for prosecution because of his ideological affiliation with the vigil  
8 participants. Mr. Wisniewski was affiliated with the Catholic Worker organization, a  
9 group that opposes the war against, and illegal occupation of, Iraq. See Exhibit A. His  
10 sympathy for the vigil participants was apparent from his t-shirt, which identified the  
11 "Los Angeles Catholic Worker" and read "No War" in large white letters.

12 Targeting Mr. Wisniewski for prosecution based on his expressive speech violates  
13 the Equal Protection Guarantee of the Due Process Clause. In Steele, a man was  
14 prosecuted for refusing to participate in the United States Census in Hawaii. 461 F.2d  
15 at 1151. Although there were at least six other Hawaiians, of whom the government was  
16 aware, who refused to participate in the Census, only the defendant and four others were  
17 prosecuted. Id. The evidence showed that the four who were prosecuted were identified  
18 by census-takers as "hard core protesters." The defendant, in particular, had organized  
19 a press conference, held a march, and distributed pamphlets opposing the census. The  
20 Ninth Circuit found that the defendant had established that the prosecution was based  
21 on invidious discrimination in violation based on the defendant's First Amendment  
22 protected speech. The Court reversed the defendant's conviction, explaining that "[t]he  
23 government offered no explanation for its selection of defendants, other than  
24 prosecutorial discretion. That answer simply will not suffice in the circumstances of this  
25 case. Since Steele had presented evidence which created a strong inference of  
26 discriminatory prosecution, the government was required to explain it away, if possible,  
27 by showing the selection process actually rested upon some valid ground."

28 Similarly, because the evidence establishes that there were two men engaged in

1 precisely the same conduct, and only Mr. Wisniewski was selected for arrest and  
2 prosecution, the government must be required to explain why Mr. Wisniewski was  
3 prosecuted. In Steele, the defendant established that of ten offenders of which the  
4 government was aware, prosecutions were initiated against only the offenders that  
5 exercised their First Amendment rights by explicitly condemning the law that the  
6 government sought to apply. Id. In this case, Mr. Wisniewski's expressive speech – his  
7 t-shirt – was not directed at the trespassing law, but rather against war generally.  
8 Nonetheless, it was his speech that distinguished him from the civilian videographer  
9 who was not prosecuted, despite having committed the same conduct. In the absence of  
10 some other explanation for the government's choice to prosecute Mr. Wisniewski, and  
11 not the civilian videographer, the only reasonable inference is that Mr. Wisniewski was  
12 selected on the basis of his expressive speech and association. See id. at 1152.

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**IV.**  
**CONCLUSION**

Mr. Wisniewski respectfully requests that the court hold an evidentiary hearing in which the Government is required to explain its decision to target Mr. Wisniewski for prosecution, and its decision not to arrest or prosecute the other civilian videographer. Should the government fail to establish a constitutionally adequate explanation for targeting Mr. Wisniewski, the Court should dismiss the charge, under either the selective enforcement doctrine, see id., or its own supervisory powers. See United States v. Doe, 125 F.3d 1249, 1256-57 (9th Cir. 1997) (citing United States v. Carrasco, 786 F.2d 1452,1455 (9<sup>th</sup> Cir. 1986)) (“Dismissal is appropriate when the investigatory or prosecutorial process has resulted in a violation of a federal constitutional or statutory right and no lesser remedial action is available.”) (citation omitted).

Respectfully submitted,  
SEAN K. KENNEDY  
Federal Public Defender

DATED: September 26, 2008

By   
JOHN PITRELL  
Deputy Federal Public Defender

EXHIBIT A



1 walked back toward the group and approached his wife. After a brief moment Mr.  
2 Apel then turned and again crossed the “property line” and again began pleading with  
3 the military personnel present to join him. Mr. Apel at this point was very emotional,  
4 and stated to Sgt. Ahrens how much he cared for him and his family as well as all  
5 other military personnel and their families and the Iraqi people.

6 During this short time two other members of the group, both of whom are  
7 Roman Catholic priests, Louis Vitale and Steven Kelly, crossed the “property line”  
8 and joined Mr. Apel in the invitation to the military personnel present to join them.  
9 Soon afterward, Robert Jefferson Dietrich, crossed the “property line” and joined the  
10 personal invitation to the military personnel. All three were escorted a short distance  
11 from the gathered group and arrested.

12 As a photojournalist, my participation in this entire vigil was as a photographer  
13 for the Los Angeles Catholic Worker (LACW), of which I am a part-time community  
14 member. The photos I take at various LACW functions appear on our website  
15 (<http://lacatholicworker.org>) and in our bi-monthly newspaper, the *Catholic Agitator*. I  
16 also do photographic work for other groups and nonprofit organizations, most of  
17 which is without charge. My photographic equipment is on the high-end price range.  
18 I use both, a Digital Canon Rebel XTi camera body with four different lenses, and an  
19 analog Canon AE1 Program body with five lenses in my work. Total cost of my new  
20 digital equipment was in excess of \$3,000., which includes flash lighting, a monopod  
21 and 2 tripods for stability and background lighting, and two CF Cards, one 2 GB and  
22 one 4 GB, that hold the digital photos. Other miscellaneous equipment needed to  
23 store my equipment and perform my work also is included in this amount.

24 The Los Angeles Catholic Worker is part of an international movement that  
25 began in 1933 that provides food, services, and hospitality to the poor and homeless  
26 in any given area. There are approximately 200 Catholic Worker communities  
27 worldwide, but most are located in the U.S. We are an intentional Christian  
28 Community that lives in a common house with shared responsibility for serving and

1 caring for the poor and homeless of Skid Row and victims of domestic violence. We  
2 operate a soup kitchen where we serve hot meals three days each week along with a  
3 hot breakfast two other days each week. We also provide long and short-term  
4 hospitality in our community house to our infirmed homeless friends and domestic  
5 violence victims. Periodically we also provide hospice care and spiritual support to  
6 homeless friends dying of either cancer or AIDS. We also have a clinic where a  
7 volunteer dentist provides dental work for our friends each Friday, and eye care by  
8 volunteer optometrists once each quarter. All of our funding is provided by private  
9 donations from individuals. All full-time community members do not hold outside  
10 jobs, but receive a ten-dollar per week stipend. Part-time live-in community members  
11 can hold a part-time job, but do not receive a stipend. I am an outside part-time  
12 community member with a minimum three day per week commitment with the  
13 LACW community. Along with our care for and support of society's marginalized,  
14 Catholic Workers are pacifists who hold tight to gospel principles and thus stand  
15 against all violence and all weapons of war. We also stand against unjust structures,  
16 both secular and religious, that cause and perpetuate poverty and injustice thus  
17 creating victims of oppression by the ruling class.

18       Upon our arrival at Vandenberg on said date and time, I noticed five other  
19 people (four males and one female) in civilian clothes also photographing and video  
20 taping the event. None of these five had identification that would indicate they were  
21 military personnel or from the press. I then assumed that they, like myself, were there  
22 to photograph the event either as press or as private citizens. At one point I also  
23 noticed a male in civilian clothes with visible Press identification carrying a video-  
24 cam and tri-pod. All six were crossing the "property line" at will taking photographs  
25 and videos from all angles and from various locations, including spots adjacent to  
26 where our group was holding our vigil. As I observed their free movement without  
27 military intervention, I too began photographing from various points on both sides of  
28 the "property line". My intent was not to commit civil disobedience and risk arrest,

1 but merely to take photographs. I cannot recall the exact time, but approximately forty  
2 minutes after our arrival, as I was photographing on the military side of the "property  
3 line," Sgt. Ahrens asked me to please step back to the other side, which I did. As the  
4 vigil progressed, however, while it was clear that the other photographers present  
5 continued to cross back and forth uninhibited, I remained on the public side of the  
6 "property line." Only when the members of our group began being arrested did I  
7 follow the other photographers as they crossed the line to photograph the arrests.  
8 Nothing was said to me until Fr. Steve Kelly was being arrested, by which time 10 to  
9 15 minutes had passed, Sgt. Ahrens then ordered my arrest as well.

10

11 I provide this statement and attest that it is full and truthful to the best of my  
12 knowledge.

13 I declare under penalty of perjury that the foregoing is true and correct to the  
14 best of my knowledge.

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*Michael Wisniewski*  
MICHAEL WISNIEWSKI

# EXHIBIT B

EXHIBIT C



















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PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and at whose direction I served the **NOTICE OF MOTION AND MOTION TO DISMISS FOR SELECTIVE PROSECUTION.**

On September 11, 2008, following ordinary business practice, service was:

<input checked="" type="checkbox"/> Placed in a closed envelope, for collection and hand-delivery by our internal staff, addressed as follows:	<input type="checkbox"/> By hand-delivery addressed as follows:	<input checked="" type="checkbox"/> Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:
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PLEASE SEE ATTACHED SERVICE LIST

This proof of service is executed at Los Angeles, California, on September 26, 2008.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

  
 \_\_\_\_\_  
 TERESA LOPEZ

SERVICE LIST

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