Appendix

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL D. OMONDI, Defendant-Appellant.	No. 19-50119 D.C. No. 2:17-cr-00315-FMO-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Submitted April 1, 2020**
Pasadena, California

Before: BEA and BADE, Circuit Judges, and Y. GONZALEZ ROGERS,*** District Judge.

Defendant-Appellant Michael D. Omondi appeals his misdemeanor conviction for unlawful entry onto Vandenberg Air Force Base ("Vandenberg"), in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Yvonne Gonzalez Rogers, United States District Judge for the Northern District of California, sitting by designation.

violation of 18 U.S.C. § 1382. A magistrate judge found Omondi guilty of the offense following a bench trial, and the district court upheld that conviction after Omondi's initial appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the conviction.

1. Omondi first argues that the government failed to introduce evidence sufficient to find him guilty of violating § 1382. "We review challenges to the sufficiency of evidence, including questions of statutory interpretation, de novo." *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017) (citation omitted).[1] "There is sufficient evidence to support a conviction if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Section 1382 provides in relevant part that: "[w]hoever . . . goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . [s]hall be fined under this title or imprisoned not more than six months." 18 U.S.C. § 1382.

[1] Although Omondi did not file a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29, his plea of not guilty placed the issue before the magistrate judge for purposes of his bench trial. *See United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993). Thus, we need not review for plain error. *See id.*

The government need not prove that a defendant acted with a specific intent. *See United States v. Mowat*, 582 F.2d 1194, 1203 (9th Cir. 1978). Rather, "[w]here entry alone is the basis of the violation," the government must prove only that the defendant knew that "the entry [was] unauthorized." *United States v. Cottier*, 759 F.2d 760, 762 (9th Cir. 1985); *see also United States v. Patz*, 584 F.2d 927, 929 (9th Cir. 1978) ("The usual situation in which 18 U.S.C. § 1382 is applicable is that in which the entry is with knowledge that the facility has been closed to the public by properly promulgated regulations of the military commander. Such an entry is for a 'purpose prohibited by regulation.'").

That is precisely what happened here. As with many military sites, Vandenberg is a "closed" installation by order of its Base Commander (the "Commander") issued pursuant to 50 U.S.C. § 797 and 32 C.F.R. § 809a. The order provides for two exceptions: (1) a limited right-of-way easement for local highways; and (2) a designated protest area on the base. Relevant here, a painted green line and a highway demarcate the protest area. Thus, although the Commander permits members of the public—in certain instances and subject to restrictions—to access this designated portion of the base, the rest of the base remains closed at all times.

On the date of Omondi's offense, a crowd permissibly gathered in the protest area. But, as testimony, photographs, and video presented by the

government established, Omondi left that designated area by himself and crossed over the painted green line. As Omondi left that area, he passed a large sign indicating he was entering a restricted portion of the base, and after walking nearly 100 yards, he approached a line of officers standing shoulder-to-shoulder blocking any further entry into the base. Lastly, the government introduced evidence that Omondi was arrested on three previous occasions for illegally entering Vandenberg. Viewed in the light most favorable to the government, the evidence as a whole was sufficient to find Omondi guilty of the offense beyond a reasonable doubt.[2]

Omondi's arguments to the contrary fail to persuade us otherwise. Omondi argues that the government cannot prove that he knowingly entered Vandenberg without authorization because he *was in fact* authorized to enter the protest area. Put differently, Omondi asks this court to hold that § 1382 loses all applicability once a defendant steps onto a military installation with authorization. If Omondi is correct, § 1382 would afford him free reign to access the most sensitive portions of Vandenberg because the Commander permitted him to protest in a designated portion of the base. We disagree. Omondi's proposed reading of the statute lacks support in its plain language and "would frustrate its more general purpose of

[2] Because we conclude that the government introduced evidence sufficient to convict Omondi for a violation of § 1382, we also reject his argument that the magistrate judge misstated the elements of the offense.

protecting the property of the Government so far as it relates to the national defense." *United States v. Albertini*, 472 U.S. 675, 681–82 (1985) (internal quotation and brackets omitted); *see also United States v. Apel*, 571 U.S. 359, 364 (2014) (describing the defendant's prior conviction under § 1382 as "trespass[ing] beyond the designated protest area" at Vandenberg). Accordingly, the government introduced evidence sufficient to convict Omondi of the offense beyond a reasonable doubt.

2. For similar reasons, we reject Omondi's argument that we must set aside his conviction because it violates the Due Process Clause. Specifically, Omondi argues that § 1382, when read in combination with the Commander's order, was unconstitutionally vague as applied to him. We review de novo whether a criminal statute violates the Due Process Clause. *See United States v. Lee*, 183 F.3d 1029, 1031 (9th Cir. 1999).

The Due Process Clause prohibits the enforcement of vague laws, which fail to provide fair notice of what conduct is prohibited. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). When a defendant challenges the statute as applied to his own conduct, whether the statute is vague "turns on whether the statute provided adequate notice to him that his particular conduct was proscribed." *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013). If the defendant had actual notice that his conduct was prohibited, we will not set aside a conviction for

vagueness because "there is no due process problem." *United States v. Backlund*, 689 F.3d 986, 997 (9th Cir. 2012).

As detailed previously, the government presented ample evidence demonstrating that Omondi knew that he was not permitted to enter the restricted portions of Vandenberg. Omondi, however, contends that he was entitled to a warning to leave the restricted area prior to his arrest in accordance with the Commander's order. The right to a warning is not an element of the offense. *See* 18 U.S.C. § 1382. The statute, in combination with the Commander's order, established a line that Omondi was not permitted to cross. As the evidence at trial demonstrated, Omondi crossed that line, knowing very well that he was not permitted to do so. Because Omondi had actual notice that his conduct was prohibited, his conviction does not run afoul of the Due Process Clause. *See Backlund*, 689 F.3d at 997.

AFFIRMED.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL D. OMONDI, Defendant-Appellant.	No. 19-50119 D.C. No. 2:17-cr-00315-FMO-1 Central District of California, Los Angeles ORDER

Before: BEA and BADE, Circuit Judges, and Y. GONZALEZ ROGERS,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Bade has voted to deny the petition for rehearing en banc, and Judges Bea and Gonzalez Rogers have so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is therefore

DENIED.

* The Honorable Yvonne Gonzalez Rogers, United States District Judge for the Northern District of California, sitting by designation.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL OMONDI, Defendant.	Case No. CR 17-0315 (FMO) **ORDER RE: APPEAL**

Having considered the briefing filed with respect to defendant's appeal of his conviction for violating 18 U.S.C. § 1382 ("§ 1382"), unlawful entry onto military, naval, or coast guard property, the court finds that oral argument is not necessary to resolve the instant appeal, and concludes as follows.

BACKGROUND

On August 6, 2016, Michael David Omondi ("Omondi" or "defendant") participated in a protest at Vandenberg Air Force Base ("Vandenberg" or "Base"). (See Dkt. 20, Appellant's Opening Brief ("AOB") at 2). The designated protest area was along Highway One. (See id.). California Boulevard, which led into Vandenberg, intersected Highway One.[1] (See id.). During

[1] "Highway 1 runs northwest several miles inside Vandenberg until it turns northeast at a 90 degree angle. There Highway 1 intersects with Lompoc Casmalia Road, which continues running northwest, and with California Boulevard, which runs southwest. In the east corner of this intersection there is a middle school. In the west corner there is a visitors' center and a public bus stop. A short way down California Boulevard is the main entrance to the operational areas of [Vandenberg Air Force] Base where military personnel live and work. . . . In the south corner of the intersection is an area that has been designated by the Federal Government for peaceful

the protest, a military patrol officer and marked government vehicle were stationed at this intersection to block vehicular, but not pedestrian access, onto California Boulevard. (See id.; Dkt. 22, Government's Answering Brief ("RB") at 3).

On the Base, there is a green line on the pavement marking the boundary between public areas and restricted areas. (See Dkt. 20, AOB at 2). A visitor control center and a bus stop, which are both generally open to persons with official business, are past the green line within the restricted areas. (See id. at 2 & 4; Dkt. 22, RB at 3). A sign near the visitor's center warns that it is unlawful to enter the area without permission of the commander. (See id.). Past the visitor center lies the main entry into the Base, the Santa Maria gate, as well as a guard shack. (See id.).

During the protest, a confrontation management team, consisting of law enforcement and base personnel, formed a confrontation line across California Boulevard, in front of the guard shack. (See Dkt. 20, AOB at 3). Master Sergeant Roberto Ruelas was the team leader for the confrontation management team. (See id.).

On the day of the protest, Chris Knudson and Jedidiah Poole walked down California Boulevard, past the green line and towards the confrontation line. (See Dkt. 20, AOB at 3). Neither man saw the warning sign. (See id.). Master Sergeant Manuel Cervantez[2] read a proclamation, over an amplified PA system, informing anyone approaching the confrontation line that they were trespassing and had two minutes to leave. (See id.; Dkt. 20-1, Appellant's Excerpts of Record ("ER") at 159). The warning stated as follows:

> The base commander has given permission for non-partisan, peaceful demonstrations to occur in a designated area today that is within the installation commander's area of responsibility and authority. You are

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protests. A painted green line on the pavement, a temporary fence, Highway 1, and Lompoc Casmalia Road mark the boundaries of the protest area." United States v. Apel, 571 U.S. 359, 362-63, 134 S.Ct. 1144, 1147-48 (2014) (describing the location relevant to this case).

[2] Master Sergeant Cervantez's name appears both as "Cervantez[,]" (see Dkt. 20-1, ER at 159), and "Cervantes[.]" (See Dkt. 20, AOB at 3).

> outside that designated area without approval of the base commander and are now in an area the commander has not authorized for such activity. You have 2 minutes to return to the designated are[a] which is marked by the green line on the road. You must remain on the Highway 1 side of that marker. If you do not do so, you will be cited for trespassing[.]

(Dkt. 20-1, ER at 159). When they did not leave after two minutes, Knudsen and Poole were arrested. (See Dkt. 20, AOB at 3).

At some point later, Omondi, who had previously been arrested for trespassing at Vandenberg, (see Dkt. 20, AOB at 3; Dkt. 20-1, ER at 160-63), walked past the green line and stopped short of the confrontation line. (See Dkt. 20, AOB at 3). He was handcuffed and detained for trespassing. (See id.). Omondi asked if he would have a chance to leave, but he was not given an opportunity or time to leave. (See id.).

There is a document entitled "Peaceful Protest Activity Policy Letter" ("Letter") posted on Vandenberg's website. (See Dkt. 20-1, ER at 156-58). The Letter states that "[f]ailure to adhere to the rules outlined here and failure to vacate United States (VAFB) property at the request of Security Forces . . . may result in . . . the issuance of a citation for violating trespass laws or other applicable criminal violations[,]" and "[a]nyone failing to vacate installation property upon advisement from Security Forces . . . may be removed from United States (VAFB) property and may be cited for applicable criminal violations which may include a violation of 18 U.S.C. Section 1382." (Id. at 156-57). It also states that "[t]he painted green line and Highway 1/Lompoc-Casmalia Road mark the boundaries for peaceful protest activity." (Id. at 157).

The Magistrate Judge found Omondi guilty of unlawful entry in violation of 18 U.S.C. § 1382. (See Dkt. 20-1, ER 145-48). The Magistrate Judge rejected defendant's pre-trial motion to dismiss brought on the basis that Vandenberg failed to provide him with adequate notice of his trespass prior to his arrest and violated his due process. (See id. at ER 33-35 & 145).

The Magistrate Judge sentenced Omondi to imprisonment for six months, a special assessment of $10, and a processing fee of $30, but stayed Omondi's sentence pending appeal. (See Dkt. 20-1, ER at 168).

STANDARD OF REVIEW

"In all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed." 18 U.S.C. § 3402; see also Fed. R. Crim. P. 58(g)(2)(B). "The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge." Fed. R. Crim. P. 58(g)(2)(D). Accordingly, in determining the sufficiency of the evidence, the court evaluates whether the record evidence could reasonably support a conviction, viewing the evidence in the light most favorable to the government. See Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92 (1979) (establishing sufficiency of evidence as the controlling standard of review in criminal proceedings); see also United States v. Madrigal-Valadez, 561 F.3d 370, 374 (4th Cir. 2009) (evidence is sufficient to support a conviction where a review of the record, from a light favorable to the government, reflects the existence of substantial evidence). A reviewing court is not permitted to intrude on the factfinder's role "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Musacchio v. United States, 136 S.Ct. 709, 715 (2016) (internal quotation marks omitted). A court will reverse only if any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. See Jackson, 443 U.S. at 319, 99 S.Ct. at 2789; United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).

A court reviews de novo a Magistrate Judge's legal conclusions and reviews underlying factual findings for clear error. See Quinn v. Robinson, 783 F.2d 776, 791-92 (9th Cir. 1986); see also United States v. McDermott, 589 F.Appx. 394, 395 (9th Cir. 2015). The court reviews de novo whether a statute is void for vagueness. See United States v. Shetler, 665 F.3d 1150, 1164 (9th Cir. 2011).

DISCUSSION

Section 1382 provides in relevant part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or

> installation, for any purpose prohibited by law or lawful regulation; . . . [s]hall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 1382.[3] The unlawful purpose may be the unauthorized entry itself. See United States v. Hall, 742 F.2d 1153, 1154 (9th Cir. 1984) (per curiam) ("[G]oing upon a military base with knowledge that such entry is unauthorized violates the statute."). However, "[w]here entry alone is the basis of the violation, knowledge that the entry is unauthorized is an essential element of a section 1382 offense." United States v. Cottier, 759 F.2d 760, 762 (9th Cir. 1985).

I. SUFFICIENCY OF THE EVIDENCE.

Omondi asserts that "[n]othing obstructed entry into the base on California Boulevard until one reached the Santa Maria gate and guard shack at the gate." (Dkt. 20, AOB at 4). According to Omondi, this, along with the location of the bus stop and visitor's center beyond the green line, created "the reasonable inference" that the confrontation line and gate marked the point of unauthorized entry. (See id.). Omondi also asserts that because the other two protestors were given an opportunity to leave, he believed that "momentary entry" was permitted. (See id.). Finally, Omondi states that his prior experience and knowledge regarding passing the green line and the risk it created of arrest is different from knowing that his conduct (in passing the green line) was a prohibited entry. (See id.). Omondi's assertions are unpersuasive.

Other courts, in the reentry context, have found analogous factors sufficient to constitute notice of the boundaries of a prohibited area. See, e.g., United States v. Douglass, 579 F.2d 545, 547 (9th Cir. 1978) (entry into a telephone booth on the other side of a "clearly marked white boundary line" but before the fence outside the base constituted reentry); United States v. Vasarajs, 908 F.2d 443, 445 & 447 (9th Cir. 1990) (rejecting the defendant's contention that she believed the boundary of the fort was a guard shack, where she passed two signs, including one saying "Welcome to Fort Richardson" and affirming her conviction even though defendant changed her mind and requested to leave upon reaching the gate); see also United States v. Reid, 389 F.Appx. 711, 712 (9th Cir. 2010) (finding sufficient probable cause for arrest under

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[3] Section 1382 also prohibits reentry "after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof[.]" 18 U.S.C. § 1382.

Section 1382 where defendant was in a wooded, training area of a fort, traveling in reverse on a dirt road that connected two public highways, a short distance from a sign showing he was in an unauthorized area, and when asked if he had any military or authorized purpose to be at the fort, responded: "I don't have any military affiliation or Fort Lewis training area access pass.").

Here, viewed in the light most favorable to the government, a reasonable trier of fact could find that defendant had reasonable and actual knowledge that Omondi entered the Vandenberg Base without the authorization of the base commander when he left the designated protest area crossed the green demarcation line, and approached the confrontation team. During the bench trial, the Magistrate Judge heard testimony from four government witnesses who were present at the Base on the day in question, (see Dkt. 20-1, ER at 40-111) (trial testimony of Tech Sergeant Kurtis Villavicencio, Master Sergeant Roberto Carlos Ruelas, Master Sergeant Manuel Cervantez, and Airman First-Class Nicholas Ignazio), as well as one defense witness.[4] (See id. at 122-29) (testimony of John Dennis Apel). Photographic exhibits depicting the protest site and a video exhibit depicting the subject protest were also introduced into evidence. (See id., ER at 30-32). Omondi's history of similar prior citations was also taken into account. (See id. at ER 161-63). Lastly, there was Omandi's statement during the bench trial suggesting that he knew the green line marked a boundary over which entry – even if only momentarily – was restricted. (See Dkt. 20-1, ER at 128) (". . . I've crossed the green line and been told that I would be arrested if I didn't go back and gone back and not gotten arrested."). In short, the record reflects sufficient evidence for a rational trier of fact to find Omondi guilty beyond a reasonable doubt of a violation under 18 U.S.C. § 1382. See Jackson, 443 U.S. at 319, 99 S.Ct. at 2789 ("This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be

[4] The Magistrate Judge accepted the parties' stipulations as to the testimonies of several defense witnesses, including Hortencia Hernandez, Chris Knudson, Jedediah Poole, Sam Yergler, and Allison McGillivray. (See Dkt. 20-1, ER at 116-21) (discussing the stipulations with the magistrate judge). These stipulations, however, were not included in the Excerpts of Record.

considered in the light most favorable to the prosecution."); Musacchio, 136 S.Ct. at 715 (explaining limited nature of sufficiency of evidence review).

II. DUE PROCESS.

Omondi argues that the trespass statute as applied to him "violates due process because it is void for vagueness." (See Dkt. 20, AOB at 6). He contends that his immediate arrest was in contravention to Vandenberg's policy giving protesters two minutes to leave. (See id.). According to Omondi, he had no notice that his approach to the confrontation line would be considered a violation, absent a warning and refusal to leave.[5] (See id. at 7). Omondi's as-applied challenge is based on Vandenberg's "specific implementation of [§ 1382] with respect to authorized entries for protests and the line between the authorized and unauthorized activities." (See Dkt. 25, Appellant's Reply Brief ("ARB") at 3).

"The void-for-vagueness doctrine . . . effectively holds that the very words of statutes must be sufficiently precise to provide comprehensible notice to average citizens of the substance of the rules that bind them." Vasarajs, 908 F.2d at 448 (internal citation omitted). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99 (1972). The void-for-vagueness doctrine prevents "arbitrary and discriminatory enforcement" by establishing clear and definite standards for enforcement. See id., 92 S.Ct. 2299. A stricter standard of statutory vagueness must be applied to a statute that potentially may inhibit the exercise of a constitutionally protected right, such as freedom of speech. See Smith v. California, 361 U.S. 147, 151, 80 S.Ct. 215, 217-18 (1959). To survive a vagueness challenge, a statute must give "relatively clear guidelines as to prohibited conduct." Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525, 114 S.Ct. 1747, 1754 (1994). Such "objective criteria" will "minimize the possibility of arbitrary enforcement

[5] Omondi also contends that the failure to warn and give an opportunity to leave implicates First Amendment concerns, requiring special attention to vagueness problems. (See Dkt. 20, AOB at 7).

and assist in defining the sphere of prohibited conduct under the statute." Id. at 526, 114 S.Ct. 1754.

Here, the statute and the written policy clearly demarcate the unlawful conduct, see 18 U.S.C. § 1382 ("goes upon any military . . . installation, for any purpose prohibited by law"), and the restricted areas. (See Dkt. 20-1, ER at 157) ("The painted green line and Highway 1/Lompoc-Casmalia Road mark the boundaries for peaceful protest activity."). Though due process requires notice of unlawful conduct, it does not require an opportunity to take back one's unlawful conduct. See Vasarajs, 908 F.2d at 449 ("[W]e agree that due process requires that there have been some way for Vasarajs to learn the boundary of the Fort. But this probably does not mean that the government had to provide actual notice to Vasarajs. The possibility that an official description of the Fort's geographical boundaries was available to Vasarajs had she made inquiry of the government would likely satisfy the dictates of due process."); see, e.g., id. at 445 (affirming conviction under § 1382 where defendant entered fort property, but then "changed her mind about entering the Fort[,]" indicating at the gate that she did not want to enter). The Letter states that the green line marks the boundary for peaceful protest activity and that "anyone failing to vacate installation property upon advisement from Security Forces" or otherwise "adhere to the rules outlined" in the Letter may be subject to citation. (See Dkt. 20-1, ER at 156). Thus, the Security Forces' failure to give Omondi a warning and opportunity to return to the authorized area does not negate the notice and knowledge Omondi had with respect to his prohibited conduct in crossing the green line. Omondi had notice of the restricted area (past the green line), see supra at § I.; (Dkt. 20-1, ER 156), and he had notice that he was risking arrest by entering that area, perhaps most notably because of his prior arrests for trespassing or entering onto military property. See supra at § I.; (Dkt. 20-1, ER at 160-63); see also United States v. Walli, 2013 WL 1773617, *3, report and recommendation adopted, 2013 WL 1838159 (E.D. Tenn. 2013) (rejecting the defendants' argument that "knowledge that one's conduct places one at risk for criminal sanction or knowledge that something is 'illegal' is not sufficient to place one on notice that he or she has violated a specific statute, particularly one carrying a potential twenty-year prison term."); United States v. Douglass, 579 F.2d 545, 547 ("[T]he boundary of the reservation is well marked by the

white line, the location and meaning of which was well known to the appellant"). That Omondi believed he would be given an opportunity to leave, without being cited, does not transform his unlawful act into a lawful one, nor does it result in a violation of due process.

In any event, Omondi's knowledge of his unauthorized entry precludes a violation of his due process rights. See supra at § I.; Walli, 2013 WL 1773617, at *3 ("As an initial matter, the Court questions whether the Defendant[] may bring a vagueness challenge to [§ 1382] because the Defendant[] knew [his] conduct was prohibited[.]"); see also Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 1857-58 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."). Omondi argues that he had "no notice or warning that approaching the confrontation line would be considered a violation, absent a warning and opportunity to leave" and that "[t]he failure to accord Omondi the warning and notice violated his right to Due Process." (Dkt. 20, AOB at 7). However, Vandenberg's written policy on its website does not guarantee a warning or two-minute opportunity to leave. (See Dkt. 20-1, ER at 156) ("Failure to adhere to the rules outlined here and failure to vacate United States (VAFB) property at the request of Security Forces . . . may result in . . . the issuance of a citation for violating trespass laws or other applicable criminal violations.").[6] Even if Vandenberg did have "established policies and protocols" of giving protestors a warning before arrest, (see Dkt. 20, AOB at 6-7), the substantial "interest of the base commander in maintaining control over the entry of persons" to Vandenberg, see United States v. Albertini, 783 F.2d 1484, 1487 (9th Cir. 1986), does not "justif[y] engrafting onto § 1382 a judicially defined" warning and time requirement. See, e.g., United States v. Albertini, 472 U.S. 675, 682, 105 S.Ct. 2897, 2903 (1985) (rejecting the defendant's argument that § 1382 applies only to reentry that occurs within some "reasonable" time period because "most prosecutions for violating the second paragraph of § 1382 have involved reentry within a year after issuance of a bar order, and . . . recent bar letters . . . have

[6] The Magistrate Judge did not make a clear finding on whether Omondi heard the warning given to the prior two protestors. (See Dkt. 20-1, ER at 146) ("It may very well have been that . . . you didn't hear [the loudspeaker warning]."). Thus, for purposes of the appeal, the court will assume that Omondi did not hear the warning.

been limited to a 1- or 2- year period"). In short, § 1382, as applied to Omondi, is not unconstitutionally vague. See Douglass, 579 F.2d at 548 (holding that re-entry portion of § 1382 satisfies the void-for-vagueness test, reasoning that it "is neither long nor complex; it incorporates no imprecise common law phrases."). Omondi had sufficient notice that his conduct violation § 1382, and neither the due process clause nor Vandenberg's purported policy required that Omondi be provided with an individualized warning.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT the Magistrate Judge's decision is **affirmed**. Judgment shall be entered accordingly.

Dated this 8th day of April, 2018.

/s/
Fernando M. Olguin
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, V. MICHAEL D. OMONDI, DEFENDANT.	CR 17-00315-FMO CC 21 6425453 SANTA BARBARA, CALIFORNIA FEBRUARY 16, 2017 (9:12 A.M. TO 11:40 A.M.) (11:58 A.M. TO 12:50 P.M.)

CVB TRIAL

BEFORE THE HONORABLE LOUISE A. LA MOTHE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:	SEE NEXT PAGE
COURT REPORTER:	RECORDED; COURT SMART
COURTROOM DEPUTY:	DEBBIE FISCHER
TRANSCRIBER:	DOROTHY BABYKIN COURTHOUSE SERVICES 1218 VALEBROOK PLACE GLENDORA, CALIFORNIA 91740 (626) 963-0566

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

THINKING AND PERMIT THE BASE COMMANDER TO DETAIN THE INDIVIDUAL AFTER THEY HAVE BEEN -- AFTER THEY HAVE ENTERED INTO A PROHIBITED AREA EVEN IF THE BASE COMMANDER CHOOSES NOT TO GRANT THAT DEFENDANT AN OPPORTUNITY TO LEAVE.

THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

DEFENDANT OMONDI: YOUR HONOR -- OH --

THE COURT: THE GOVERNMENT HAS THE BURDEN. SO, THEY GET TO CLOSE.

ALL RIGHT.

SO -- ALL RIGHT. THANK YOU FOR THOSE PRESENTATIONS.

AND THIS IS MY RULING:

ON THE MOTION TO DISMISS, I DENY IT.

I DON'T BELIEVE THAT -- THAT YOU HAD A LACK OF NOTICE. I THINK THAT -- THAT THE DEFENDANT HAD NOTICE THAT HE WAS IN A PROHIBITED AREA. AND THAT UNDER COTTIER ALL OF THE CIRCUMSTANCES HAVE TO BE TAKEN INTO ACCOUNT -- THE CONTEXT IN WHICH ALL OF THIS HAPPENED.

FOR THAT REASON, THE VIDEO IS VERY, VERY USEFUL TO US I THINK IN SEEING AT LEAST FROM THE VIDEOGRAPHER'S VIEWPOINT WHAT THE SCENE LOOKED LIKE.

AND JUST LET ME SAY IN GENERAL. THE REASON THAT I FIND YOU GUILTY, MR. OMONDI, OF THE VIOLATION OF SECTION 1382 IS IN LARGE PART I RELY UPON THE ARREST OF THE TWO EARLIER PROTESTORS. AND HERE'S WHY.

WHEN YOU LOOK AT THE VIDEO YOU CAN SEE THE WAY IN WHICH THEY MARCHED DOWN THE CENTER OF THE STREET AT A VERY MODERATE PACE ALMOST AS IF THEY WERE IN PROCESSION. AND THEY WALK RIGHT UP TO THE AREA WHERE THEY SEE THE LINE OF SECURITY FORCES.

AFTER THEIR ARREST AND A FEW MINUTES LATER -- I AM NOT SAYING IT WAS NECESSARILY 5 OR 6 OR 10 OR 15 -- YOU COME DOWN IN THE VERY SAME MANNER IN THE VERY SAME CENTER OF THE ROAD AT A VERY SIMILAR PACE.

ALL OF THIS SAYS TO ME THAT HAVING SEEN THE COMPLETE SURROUNDINGS WITH THE VEHICLE BLOCKING THE ROAD AND THE FACT THAT THERE IS A LINE OF SECURITY FORCES STANDING THERE, EVERYBODY KNOWS WHAT'S GOING ON.

AND IT MAY VERY WELL HAVE BEEN THAT YOU STANDING WHERE YOU WERE IN THE PROTEST AREA AT THE ORIGINAL TIME THAT THE LOUDSPEAKER WARNING WAS GIVEN, THAT BECAUSE OF THE SURROUNDINGS AND THE TRAFFIC OR WHATEVER ELSE, YOU DIDN'T HEAR IT.

BUT I FIND THAT THERE IS NOT A REQUIREMENT ON THE BASE COMMANDER THAT EVERY SINGLE PROTESTOR WALKING DOWN THAT STREET HAS TO GET HIS OWN WARNING AND 2 MINUTES TO LEAVE. I THINK THAT THAT'S TOO MUCH OF A RESTRICTION TO PUT ON THE BASE COMMANDER.

THERE WAS A LOUDSPEAKER WARNING GIVEN. WAS IT PERFECT? MAYBE NOT. BUT I THINK THAT YOU WERE ON NOTICE,

PARTICULARLY YOU, BECAUSE IT WAS NOT YOUR FIRST PROTEST. YOU DID HAVE NOTICE OF THE WAY THINGS HAD GONE IN THE PAST. AND YOU KNEW THAT GOING OVER THE GREEN LINE AT LEAST MADE YOU RUN THE RISK THAT YOU WOULD BE ARRESTED. ISN'T THAT THE WHOLE POINT.

SO, TAKING INTO ACCOUNT THE VEHICLE THAT WAS BLOCKING THE ROAD, TAKING INTO ACCOUNT THE PAINTED GREEN LINE, IT SEEMS TO ME THAT WE CANNOT PUT MORE BURDENS ON A BASE COMMANDER THAN WHAT SECTION 1382 DOES. IT'S A CLOSED MILITARY INSTALLATION. THE BASE COMMANDER HAS THE RESPONSIBILITY TO PROTECT THE BASE AND ALL OF ITS OCCUPANTS AND EVERYTHING ELSE THAT IT HAS IN IT.

AND, SO, I NEED TO DEFER TO THE BASE COMMANDER IN THIS PARTICULAR WAY -- NOT IN ALL WAYS, BUT WITH RESPECT TO THE WAY IN WHICH THIS PARTICULAR PROTEST WAS HANDLED.

I FIND THAT THERE WAS ADEQUATE SIGNAGE. EVERYBODY WALKED PAST THAT SIGN. NOW, THE FOLKS WALKING PAST IT MAY HAVE BEEN CONCENTRATING ON THE SECURITY FORCES IN FRONT OF THEM AND NOT NECESSARILY ON THE SIGN THEY WERE WALKING PAST. BUT THAT DOES NOT MAKE THE SIGNAGE INADEQUATE.

I FIND THAT A FENCE IS NOT REQUIRED. EVERYBODY KNEW WHAT THE GREEN LINE MEANT. AND AS I'VE SAID BEFORE, YOU KNEW THE RISK THAT YOU WERE RUNNING. I -- I AGREE THAT OVER THE YEARS DEPENDING ON THE BASE COMMANDER, THOSE RULES AND PROCEDURES MAY CHANGE FROM TIME TO TIME. BUT IT IS NOT THE ROLE OF THE COURTS FOR US TO PUT AN ADDITIONAL RESTRICTION ON

THE BASE COMMANDER UNDER THE CIRCUMSTANCES.

SO, I FIND YOU GUILTY OF TRESPASS.

SO, WHERE DO WE STAND AS FAR AS SENTENCING IS CONCERNED?

(GOVERNMENT COUNSEL CONFERRING.)

MS. AHN: WE'RE READY TO MAKE AN ARGUMENT WITH RESPECT TO SENTENCING, YOUR HONOR.

THE COURT: WELL, I WANT A PRESENTENCE REPORT. SO, I'M NOT GOING TO DO IT TODAY.

MS. AHN: YES, YOUR HONOR.

THE COURT: AND ESPECIALLY GIVEN THE TIME.

BUT I THINK IT'S APPROPRIATE UNDER THE CIRCUMSTANCES TO HAVE A PRESENTENCE INVESTIGATION REPORT.

SO, WHAT I WANT TO DO IS PUT IT OVER FOR SHOULD WE SAY 90 DAYS.

MS. AHN: THAT'S FINE WITH THE GOVERNMENT, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. OMONDI, WOULD THAT WORK FOR YOU?

DEFENDANT OMONDI: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

THE CLERK: MAY 18.

THE COURT: WHAT WILL IT BE?

THE CLERK: MAY 18.

THE COURT: MAY 18. REALLY? ALREADY.