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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	CASE NO: 2:09 cr 183 DB
Plaintiff,	:	
vs.	:	REPLY TO DEFENDANT'S MEMORANDUM OPPOSING MOTION *IN LIMINE* IN RE: NECESSITY DEFENSE
TIM DeCHRISTOPHER,	:	
Defendant.	:	Honorable DEE BENSON

The United States, by and through the undersigned Assistant United States Attorneys, respectfully submits this reply to the defendant's memorandum in opposition. The defendant has failed to present any authority to support his position that he should be allowed to present a necessity defense. At the same time, he apparently continues to claim the intention to:

> see a trial with a jury of my peers where we can really expose the deeper injustices in the system that consistently chooses the short-term profits of a few over the lives and well-being of many. We can use the trial to really address our moral imperative to defend a livable future.

John Hollenhorst, *Environmental activists pleads not guilty to disrupting auction*, KSL-TV, April 28 2009, http://www.ksl.com/?nid=148&sid=6302709.

The defendant asserts that the United States' motion is untimely, claiming that the necessity defense "has not been articulated or raised . . . and the [g]overnment's concern [is] premature and not justiciable." (D. Mem. at 8). Meanwhile, while the defendant argues that the United States is invading privileged territory, (D. Mem. at 9), he and counsel are also apparently advertising their intended defense before the masses. According to printed media, the defendant and counsel are broadcasting the very intentions that they purport to be privileged in their memorandum:

> "What I faced when I was there in the auction," DeChristopher says, "was this choice . . . of taking the action that I did and disrupting the auction, or being complicit … in this destruction of our land, destruction of our democracy, and the destruction of our climate. And that is something we want to show in the trial, that climate change presents such a serious threat to our future that it creates a moral imperative that is higher than just following the law as it exists." Pat Shea has elaborated on this strategy, noting that it is called the "necessity" or "lesser-evil" defense and that it has a long history in American jurisprudence. "A crucial question will be: Was the danger presented imminent? Most courts have defined 'imminent' as in the next second, or immediately life-threatening," Shea says. "But, when you are talking geological time [as is the case with climate change], a month, six months, a year is imminent."

Louis Godfrey, Salt Lake CITY WEEKLY, July 8, 2009, *"Crunch Time: Facing trial for disrupting a BLM lease auction, Tim DeChristopher thinks time is running out ... for everyone"* (ellipses in original);

http://www.cityweekly.net/utah/article-8444-crunch-time.html?current_page=5.

The United States maintains that a necessity defense is improper, whether revealed or not,[1] in this matter. Moreover, regardless of whether the defendant's actions are viewed as *indirect* or *direct* civil disobedience, he should be barred from presenting the extenuating evidence to support a necessity defense because he cannot meet its strict requirements. Those requirements were not established by the prosecution, as the defendant would have the Court believe. (D. Mem. at 8). Rather, it was the Supreme Court that set the necessity defense's parameters, requirements and hurdles, as well as every other circuit court of appeals (including the Tenth Circuit) that has addressed the issue. There is no case opinion to which the defendant has cited, or can cite, that supports his intention to turn the trial in this matter into a contest of perspectives on "climate justice."

Trials in federal court have always been subject to the limitations of the rules that govern them, including the federal rules of evidence and precedent. Therefore, it is not unreasonable or unconstitutional for the Court to ensure that the trial conforms to those rules, despite the defendant's contentions to the contrary. By granting the motion in

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[1]As discussed, the defendant and counsel have openly shared the intended defense throughout the media. *See also, Deseret News*, May 15, 2009, "Feds seek to block activist's global warming defense," (quote attributed to attorney Pat Shea: "[the defense is] going to be an effort to, one, prove in a judicial setting the nature of global warming, and the necessity for direct action . . . ."); *Salt Lake Tribune*, May 16, 2009, "Bogus BLM bid case: Feds worry jury might buy 'monkey-wrencher' theme," (quote attributed to attorney Pat Shea: "We want to demonstrate global warming is a reality that creates certain necessities, including civil disobedience. . . . Part of it is convincing the judge that [climate change] is an imminent threat.") (brackets in original). Nevertheless, the defendant has made a request to submit an *ex parte* proffer, under seal. (D. Mem. at 8). Such a request should not be granted, especially in light of the prior defendant-generated exposure of their necessity defense framework. Rather, the touted defense should bear the scrutiny and adversarial critique that an open courtroom provides.

limine, the Court limits the defendant only in raising a defense that the rules, and controlling and persuasive authority, clearly forbids. The Court's ruling would certainly not foreclose the defendant from presenting valid and lawful defenses against the charges in the indictment, noting, of course, that the defendant carries no burden to present any defense at trial.

CONCLUSION

The Court should bar the defendant from presenting the necessity defense as it is inapplicable on its face. Alternatively, in the event that the defendant opts to provide a written offer of proof on the four elements of a necessity defense, the Court should find that the defendant cannot meet those stringent requirements. Moreover, the court should order that the defendant is precluded from presenting evidence and argument that creates an undue risk of jury nullification.

For the foregoing reasons, the United States asks the Court to grant its motion in limine.

SUBMITTED this 15th day of September, 2009.

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/s/ John W. Huber
/s/ Scott B. Romney
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