Docket No. 14-36049

The United States
Court of Appeals
For
The Ninth Circuit

Elizabeth E. Nesbitt, *et.al.*, Plaintiffs-Appellees
v.
U.S. Army Corps of Engineers, *et.al.*, Defendants-Appellants

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Appeal from the United States District Court
For
The District of Idaho
The Hon. B. Lynn Winmill, District Judge

Brief of *Amicus Curiae* GeorgiaCarry.Org, Inc. In Support of Plaintiffs-Appellees And In Favor of Affirmance

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Corporate Disclosure Statement

GeorgiaCarry.Org, Inc. has no parents or subsidiaries and is not publicly traded.

Identity and Interest of *Amicus Curiae*

GeorgiaCarry.Org, Inc. ("GCO") is a non-profit corporation organized under the laws of the State of Georgia. Its mission is to foster the rights of its members to keep and bear arms. GCO has approximately 8,000 members. While most members are residents of Georgia, GCO also has members from several other states and foreign countries.

GCO's interest in this case is twofold. First, GCO has members that recreate in Idaho, including on lands managed by the Corps. Such members are directly impacted by this case because they desire to keep and carry arms on lands managed by the Corps in case of confrontation. Second, GCO and its members have brought similar litigation against two separate Corps commanders regarding the challenged regulation and its application to Corps lands within the State of Georgia. One of those cases is presently pending before the U.S. Court of Appeals for the Eleventh Circuit. GCO therefore has an interest in the outcome of the present case before a sister circuit.

Statement on Authority, Funding, and Authoring of this Brief

GCO is authorized to file this Brief by Fed.R.App.Proc. 29-1(a). GCO obtained consent from all parties to file this Brief.

No party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this Brief. No person, other than GCO, its members, its counsel, contributed money that was intended to fund preparing or submitting this Brief.

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1. The Corps Is Not Acting In A Proprietary Capacity

The Corps argues that the Second Amendment does not apply to its managed lands because it is acting in a proprietary and not a governmental capacity. GCO will show the several fallacies of this argument.

First, this position is contradictory to other arguments the Corps makes. For example, the Corps also argues that its lands are "sensitive" because such lands are owned by the Department of Army. The Corps can hardly argue that that U.S. Army is a proprietary (i.e., non-governmental) organization. Proprietary armies were a relic of the now-defunct English feudal system. At least in the United States and democratized countries, private armies do not exist. Common defense on a collective basis is a uniquely governmental function.

Second, the Corps has failed to cite any information in the record indicating that it is a mere "market participant." *See Reeves v. Stake*, 447 U.S. 429 (1980) (Holding that a state is a "market participant" and not a "market regulator" when it goes into the business of manufacturing cement). Indeed, the record indicates that the Corps manages vast areas of recreational lands, lands that were acquired by the federal government largely through eminent domain. The Corps is more than a mere player in the recreational lands market. The Corps dominates the market as a

governmental monopolist, taking control of water resources in ways impossible for a private market participant to do.

Finally, the Corps' enforcement of the regulation at issue completely undermines its claim of proprietary capacity. Consider how a private campground owner would be able to enforce a ban on carrying firearms. A camper discovered to have firearm in his possession would be asked to leave, under penalty of trespass. Not so for the Corps. Violators of the Corps' regulation are subject to criminal penalties directly for the violation. 36 C.F.R. § 327.25. It is difficult to take the Corps' proprietary claim seriously when it enforces its "private rules" with fines and imprisonment. Proprietary actors who enforce their rules with fines and imprisonment are called extorters and kidnappers. Only governments, acting in a governmental capacity, may lawfully impose such punishments.

2. The Ban Would Not Pass Muster Under Even Rational Basis Review

Plaintiffs-Appellees ably cited the range of conceivable scrutinies/analyses that could be applied to this case. They also correctly noted that binding precedent establishes that rational basis cannot be applied in Second Amendment cases. GCO nevertheless will show that the challenged ban would not even pass muster under rational basis.

The Corps manages vast areas of unpopulated[1] lands and waterways. The Corps concedes that its rangers are not law enforcement officers and are not authorized to carry side arms. The Corps asserts that its recreational programs involve strangers in close proximity to one another, drinking alcohol and playing loud music, sometimes to the annoyance of one another. The Corps implies it lacks the ability to address such situations if they turn violent. The Corps obviously also lacks the ability to address armed robberies, assaults, rapes, and murders, as well as attacks by wild animals. In other words, the Corps provides essentially no on-site security for the vast acreage it controls. Visitors to Corps property are therefore responsible for their own security, even more so than the average person is when not on Corps property.

The foregoing would not be particularly remarkable if it were not for the challenged regulation. In the name of public safety, the Corps prohibits visitors from providing their own security, too. In this fantastic approach to security, the Corps apparently believes that if it bans ammunition, then violent crimes (and animal attacks) will not happen. The Corps could just as

[1] Generally, residing on Corps-managed lands is prohibited. 36 C.F.R. § 327.22.

readily prevent forest fires by banning fire extinguishers. This "hope and pray" approach to security at a supposedly "sensitive area" is irrational.

3. The Ban Would Cannot Pass Means-End or Categorical Scrutiny

Of course, ***some*** level of scrutiny higher than rational basis must be applied to this case (as noted in Plaintiffs-Appellants' Brief, either categorical, strict scrutiny, or intermediate scrutiny). In that event, the Corps would bear the burden of proving that its regulation is appropriate, either as a close fit (intermediate scrutiny) or narrowly tailored (strict scrutiny) (presumably the categorical approach would preclude any showing by the Corps that would save the regulation). The problem for the Corps is that it made no showing whatsoever.

The challenged regulation, like all schemes challenged under the Second Amendment, is claimed to advance the objective of public safety. Government actors see this as a safe harbor virtually immune from attack. Perhaps it is, as no one can say that public safety is not an important government objective. Where the argument fails is in the relationship between the objective and the measure. The Corps fails to offer anything more than conjecture that ammunition in the hands of Plaintiffs-Appellees would harm public safety. Not only is there not a close fit, there is no fit at all.

In order to justify the regulation as applied to Petitioners-Appellees, the Corps would have to introduce ***some*** proof that the public is at risk if Petitioners-Appellees are armed on Corps property. Petitioners-Appellees' law-abiding history makes producing such proof virtually impossible (and the Corps failed to attempt to do so, in any event). Failing the requisite proof, it cannot be said that there is any fit at all between the regulation and the objective of public safety.

The Corps does not dispute that Plaintiffs-Appellees are law-abiding citizens. Yet the Corps' ban against carrying ammunition or loaded firearms for self-defense applies against all such law-abiding citizens in every corner of every one of the 12 million acres managed by the Corps.[2] The Supreme Court has twice rejected total bans on possession of loaded firearms in the home. *District of Columbia v. Heller,* 554 U.S. 570 (2008) and *McDonald v. City of Chicago,* 561 U.S. 742 (2010), respectively. The 7th Circuit has rejected a total ban on possession of loaded firearms outside the home. *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012). All three of the aforementioned cases were decided on a categorical basis (i.e., they did not apply any stated level of scrutiny, but instead rejected out of hand the total

[2] This is in contrast to Chicago's 150,000 acres and the District of Columbia's 44,000 acres.

bans before them). The Supreme Court just last month applied a categorical approach to bans involving fundamental (though unenumerated) constitutional rights. *Obergefell v. Hodges,* ___ U.S. ___ (June 26, 2015) (Rejecting state prohibitions on same-sex marriage without applying any form of means-end scrutiny).

It is clear that total bans on the exercise of fundamental constitutional rights cannot pass constitutional muster. This is especially true where, as here, the ban applies ubiquitously throughout the jurisdiction of a national entity, with no exceptions. This is in contrast to a meaningful attempt to impose "time, place, and manner" regulations that still afford an ample opportunity to exercise the right.

Conclusion

The District Court correctly determined that the ban at issue in this case is unconstitutional, and the judgment of the District Court should be affirmed.

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Certificate of Compliance

I certify that this Brief of *Amicus Curiae* complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of *Amicus Curiae* contains 2,043 words as determined by the word processing system used to create it.

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