

No. 13-17132 [Dist Ct. No.: 3:12-CV-03288-WHO]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JOHN TEIXEIRA; et al.,
Plaintiffs - Appellants,

vs.

COUNTY OF ALAMEDA; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERRATA MEMORANDUM

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ERRATA MEMORANDUM

Appellants hereby submit this errata memorandum to update the citations to the Excerpt of Record in the Appellants' Opening Brief (AOB) made necessary by the filing of a revised Excerpt of Record (ER). The revised ER was authorized by order of the Court. (DktEntry: 29).

No changes have been made to these sections of the AOB except for the updated citations to the ER.

Respectfully Submitted on Date: May 7, 2014,

/s/ Donald Kilmer

Attorney for the Appellants

STATEMENT OF THE CASE

Based on a prior iteration of the Complaint in this matter, Defendants brought a motion to dismiss under Fed.R.Civ.Pro. 12(b) and Plaintiffs sought injunctive relief under Fed.R.Civ.Pro. 65. The trial court denied Plaintiffs request for injunctive relief and granted Defendants motion to dismiss with leave to amend. [ER-190, Tab 8, Docket Entry 37.]

Plaintiffs filed a First Amended Complaint. [ER-190, Tab 8, Docket Entry 40] Defendants filed a Motion to Dismiss pursuant to Fed.R.Civ.Pro. 12 (b). [ER-191, Tab 8, Docket Entry 44] The trial court granted the motion without leave to amend. [ER-192, Tab 8, Docket Entry 56 and 58] Plaintiffs filed this appeal. [ER-192, Tab 8, Docket Entry 59]

STATEMENT OF FACTS

Because this appeal arises out of a trial court's order granting a motion to dismiss without leave to amend under Fed.R.Civ.Pro. 12(b), this Court must accept as true the factual allegations of the operative complaint, and construe those facts in the light most favorable to the

non-moving party – Plaintiff-Appellants. *Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1127 (9th Cir. 2012); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 526 (9th Cir. 2008).

The substantive facts from the First Amended Complaint are that the individual plaintiffs (Teixeira, Nobriga and Gamaza) wanted to open a gun store in the unincorporated area of Alameda County. [ER-37 to 52, Tab 4, First Amended Complaint] They applied for and were initially granted a variance to an Alameda Ordinance that prohibits a gun store from operating within 500 feet of certain other structures. The only relevant structures that came close to disqualifying the gun store's location were residentially zoned. (i.e., The proposed site of the gun store was NOT within 500 feet of any school, liquor store or other firearm store.) Only three private residences came anywhere near meeting the definition under the "500-Foot Rule." One was across a major thoroughfare and other two were located across 12 lanes of Interstate 880. Plaintiffs contend that private residences cannot, as a matter of law, be classified as sensitive places. [ER-37 to 52, Tab 4, First Amended Complaint: ¶¶ 26 to 67]

Furthermore there exists and remains a controversy over how this 500 feet is to be measured and this forms part of the basis of plaintiffs' equal protection claim in that the rules for taking the measurement appear to depend on the kind of business looking for the variance. Politically unpopular gun stores being are subject to different rules for where the measurement is to be taken. Should the measurement be taken from the front door of the usual business or the closest wall to the disqualifying structure of the potential gun store? [ER-41 to 42, Tab 4, First Amended Complaint: ¶¶ 44 & 45]

Plaintiffs brought suit challenging the "500-foot rule" on its face and as applied to them, based on the constitutional status of the products they intended to sell. Specifically, they contend that once public safety considerations are accounted for through federal and state laws regulating the sale of firearms, then guns are analogous to books. That means this case is subject to the legal precedence of the line of cases that grew out of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) and *Renton v. Playtime Theatres Inc.*, 475 U.S. 41 (1986), and *Ezell v. City of Chicago*.

Therefore, not only must the government bear the burden to

justify their regulations, but that concrete evidence must be produced by them to show: (1) there is a public safety hazard and/or negative secondary effect of a new gun store and (2) that the regulation promoted will address those public safety concerns.

Furthermore, the First Amended Complaint alleged that the 500 Foot Rule acts as a *de facto* ban on any new gun stores opening in the unincorporated areas of Alameda County. [ER-49 to 52, Tab 4, First Amended Complaint: ¶¶ 56, 59 to 61, 63 to 67] The trial court erred when it brushed away this allegation by considering the existence of current gun stores that: (1) were not required to comply with the 500 Foot Rule (especially when they were not in unincorporated Alameda County), and (2) there was no data that these existing gun stores are subject to the same rules that were going to be imposed on plaintiffs herein. [ER-10 to 28, Tab 3, Order Granting Motion to Dismiss]

A second theory of constitutional liability was advanced against the County on the grounds that plaintiffs and their customers are engaged in the exercise of a necessary subsidiary of a fundamental right and are being treated differently without an important/significant justification based on the exercise of that right. [ER-52 to 53, Tab 4,

First Amended Complaint: ¶¶ 68 to 75] The first Dismissal Order imposed a “class-of-one” rule, found that the plaintiffs had not sufficiently plead their Equal Protection claim and dismissed with leave to amend. [ER-190, Tab 8, Docket Entry 37.] The second Dismissal Order reasoned it was constrained by the “law of the case” doctrine and made the same finding, but dismissed without leave to amend. [ER-10 to 28, Tab 3, Order Granting Motion to Dismiss] Of course, the Ninth Circuit panel assigned to this case is not bound by the “law of the case” doctrine as review by this Court is *de novo*.

****END OF ERRATA MEMORANDUM****

CERTIFICATE OF SERVICE

On May 7, 2014, I served this ERRATA MEMORANDUM by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 7, 2014,

/s/ Donald Kilmer

Attorney of Record for Appellants