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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT C. WARDEN,) No: 2:09-cv-01686-MJP
Plaintiff,)
) PLAINTIFF'S MOTION FOR
vs.) PRELIMINARY INJUNCTION
)
GREGORY J. NICKELS and)
CITY OF SEATTLE,)
Defendants.) NOTE ON MOTION CALENDAR:
) **Friday, January 22, 2010**

INTRODUCTION

Plaintiff hereby moves for a preliminary injunction enjoining defendants from enforcing Executive Order 07-08 entitled "Gun Safety at City Facilities," Seattle Parks Department Rule/Policy Number P 060-8.14, and all other restrictions of any kind regarding firearm possession and/or any other aspect of firearms. Plaintiff further requests that such preliminary injunction remain in effect until ultimate disposition of the above-captioned civil action.

1 merits are raised and the balance of hardships tips sharply in
2 favor of the moving party. Immigrant Assistance Project of the
3 L.A. County of Fed'n of Labor v. INS, 306 F.3d 842, 873 (9th
4 Cir. 2002); Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d
5 1115, 1119 (9th Cir. 1999); Roe v. Anderson, 134 F.3d 1400, 1402
6 (9th Cir. 1998). "'These two formulations represent two points
7 on a sliding scale in which the required degree of irreparable
8 harm increases as the probability of success decreases.'" Roe,
9 134 F.3d at 1402 (quoting United States v. Nutri-cology, Inc.,
10 982 F.2d 394, 397 (9th Cir. 1992)); accord Sun Microsystems, 188
11 F.3d at 1119. "Thus, 'the greater the relative hardship to the
12 moving party, the less probability of success must be shown.'" Sun
13 Microsystems, 188 F.3d at 1119 (quoting Nat'l Ctr. for
14 Immigrants Rights v. INS, 743 F.2d 1365, 1369 (9th Cir. 1984)).

15 IRREPARABLE INJURY

16 The Second Amendment to the Constitution of the United
17 States reads, in relevant part, "[T]he right of the people to
18 keep and bear arms, shall not be infringed." (In DC v. Heller,
19 No. 07-290, June 26, 2008, the U. S. Supreme Court ruled that
20 the Second Amendment guarantees an individual right,
21 notwithstanding the beguiling prefatory clause referencing
22 militia.) Article I, section 24 of the Washington State

1 Constitution reads, in relevant part, "The right of the
2 individual citizen to bear arms in defense of himself, or the
3 state, shall not be impaired..." Thus, both constitutions, in
4 plain, direct, and unambiguous language, guarantee an individual
5 right to carry (bear) firearms.

6 Defendants have promulgated a rule that intentionally
7 and facially infringes and impairs the right to bear arms. The
8 rule was enforced against Plaintiff on November 14, and is still
9 being enforced. If Plaintiff went to the Southwest Community
10 Center with his pistol tomorrow, there is no reason to suspect
11 that the rule would not be enforced. Defendants have and intend
12 to continue to deny fundamental civil rights to individuals in
13 violation of both federal and state constitutions.

14 That is the very essence of irreparable injury – harm
15 that cannot subsequently be undone or compensated; injury for
16 which damages cannot be compensable in money. The
17 constitutional civil right to bear arms is a matter of personal
18 liberty, and does not lend itself to monetary damages. Further,
19 once a civil liberty has been denied in a discrete instance,
20 with regard to that discrete instance, the right is gone
21 forever. Such injury is inherently irreparable.

22

1 LIKELIHOOD OF SUCCESS ON THE MERITS

2 Both federal and state constitutions guarantee an
3 individual right to bear arms. Further, the right is specifically
4 enumerated in both constitutions in separate, dedicated sections
5 that deal only with the right. In footnote number 27 of DC v.
6 Heller, No. 07-290, June 26, 2008, page 56, the U. S. Supreme
7 Court stated that rational basis review "could not be used to
8 evaluate the extent to which a legislature may regulate a
9 specific, enumerated right, be it the freedom of speech, the
10 guarantee against double jeopardy, the right to counsel, or the
11 right to keep and bear arms." The Heller Court thus includes
12 the right to bear arms in the very select group of enumerated
13 liberties considered fundamental to a free people, and to what
14 it means to be an American.

15 The level of scrutiny applied to regulation of
16 fundamental enumerated Constitutional rights is strict. The
17 Heller Court did not rule what the level of scrutiny should be
18 for Second Amendment cases, but they did specifically rule out
19 rational review, and they did characterize the right to bear
20 arms as fundamental. The Heller Court, on page 33, went so far
21 as to favorably quote the following reference to the Second
22 Amendment from Blackstone's Commentaries: "This may be

1 considered as the true palladium of liberty The right to
2 self-defence is the first law of nature."

3 On a side note, there is no question that Article I,
4 section 24 of the Washington State Constitution applies to
5 Defendants, who are state actors. The application of the Second
6 Amendment of the U. S. Constitution to the states is a question
7 that will be definitively answered by the U. S. Supreme Court
8 this term in McDonald v. City of Chicago, Docket No. 08-1521.
9 Given the ruling and reasoning of the majority in Heller, it is
10 almost certain that the same majority will rule in McDonald to
11 apply the Second Amendment to the states. Otherwise, they will
12 have to coherently explain just how and why the 600 thousand
13 residents of the District of Columbia enjoy the fundamental
14 "true palladium of liberty" to which the remaining 300 million
15 of us are not entitled.

16 Strict Scrutiny

17 The Seattle Parks Department gun ban at issue in this
18 case could not possibly withstand strict scrutiny. First,
19 Defendants have not articulated a compelling government interest
20 to justify the ban. The purported interest, to protect children
21 from gun violence, has no substance and no objective facts
22 behind it. For example, how many children have been hurt or

1 threatened by firearms in Seattle Parks Department facilities in
2 the last year, ten years, or ever? The rate of actual or
3 threatened gun violence against children in Seattle Parks
4 Department facilities would have to be substantial to
5 demonstrate a compelling government interest. But Defendants
6 have not cited even a single instance of actual or threatened
7 violence in their justification contained within the written
8 ban. Defendants do nothing more than baselessly throw out the
9 mere idea of child safety, and then leave it there to fend for
10 itself without the slightest bit of objective fact or credible
11 evidence behind it.

12 Defendants' gun ban is not narrowly tailored to achieve
13 their interest. If the goal is to protect the safety of
14 children (or anyone, for that matter), then banning trained,
15 law-abiding, concealed pistol licensed citizens does not advance
16 that goal. In fact, banning armed good guys likely makes a
17 place less safe from bad guys (who will carry guns regardless of
18 any signage out front), not more safe.

19 Defendants do cite in their written ban a study by
20 University of Pennsylvania researchers that found that "people
21 with a gun were 4.5 times more likely to be shot in an assault
22 than those not possessing a gun." However, their sample of

1 persons shot by a gun while carrying a gun was composed mostly
2 of drug dealers, others with criminal records, cab drivers, and
3 women being stalked. In other words, the sample was of
4 individuals who were already in danger of violence before they
5 strapped on their pistols. Is anyone enlightened by the
6 stunningly obvious claim that armed drug dealers are more likely
7 to be shot by guns than your average person?

8 Below is a short article debunking the above study cut
9 and pasted in its entirety from [reason.com/blog/2009/10/05/why-
10 skydivers-would-be-better/print](http://reason.com/blog/2009/10/05/why-skydivers-would-be-better/print). It was written by Jacob
11 Sullum, senior editor of Reason Magazine, whose weekly column is
12 carried by newspapers across the U.S., including the *New York
13 Post*, *The Washington Times*, and the *Chicago Sun-Times*. His work
14 also has appeared in *The Wall Street Journal*, *USA Today*, *The New
15 York Times*, the *Los Angeles Times*, the *San Francisco Chronicle*,
16 *Cigar Aficionado*, *National Review*, and many other publications.
17 Plaintiff hereby adopts and incorporates into this Motion Mr.

18 Sullum's criticism of the Penn study:

19

1 **Why Skydivers Would Be Better Off Without Parachutes**

2 [Jacob Sullum](#) | October 5, 2009

3 In Philadelphia, researchers at the University of Pennsylvania find, possessing a gun is strongly
4 associated with getting shot. Since "guns did not protect those who possessed them," they
5 [conclude](#), "people should rethink their possession of guns." This is like noting that possessing a
6 parachute is strongly associated with being injured while jumping from a plane, then concluding
7 that skydivers would be better off unencumbered by safety equipment designed to slow their
8 descent. "Can this study possibly be as stupid as it sounds?" [asks](#) Stewart Baker at *Skating on*
9 *Stilts*. Having shelled out \$30 for the privilege of reading the entire [article](#), which appears in the
10 November *American Journal of Public Health*, I can confirm that the answer is yes.

11 The authors, led by epidemiologist Charles C. Branas, paired 677 randomly chosen gun assault
12 cases with "population-based control participants" who were contacted by phone shortly after the
13 attacks and matched for age group, gender, and race. They found that "people with a gun were
14 4.5 times more likely to be shot in an assault than those not possessing a gun." Branas et al.
15 suggest several possible explanations for this association:

16 A gun may falsely empower its possessor to overreact, instigating and losing
17 otherwise tractable conflicts with similarly armed persons. Along the same lines,
18 individuals who are in possession of a gun may increase their risk of gun assault by
19 entering dangerous environments that they would have normally avoided.
20 Alternatively, an individual may bring a gun to an otherwise gun-free conflict only to
21 have that gun wrested away and turned on them.

22 The one explanation the researchers don't mention is the one that will occur first to defenders of
23 the right to armed self-defense: Maybe people who anticipate violent confrontations—such as
24 drug dealers, frequently robbed bodega owners, and women with angry ex-boyfriends—
25 are especially likely to possess guns, just as people who jump out of airplanes are especially
26 likely to possess parachutes. The closest Branas et al. come to acknowledging that tendency is
27 their admission, toward the end of the article, that they "did not account for the potential of
28 reverse causation between gun possession and gun assault"—that is, the possibility that a high
29 risk of being shot "causes" gun ownership, as opposed to the other way around. While
30 the researchers took into account a few confounding variables related to this tendency (including
31 having an arrest record, living in a rough neighborhood, and having a high-risk
32 occupation), they cannot possibly have considered all the factors that might make people
33 more prone to violent attack and therefore more likely to have a gun as a defense against that
34 hazard. To take just one example, not every criminal has an arrest record. Yet it seems fair to
35 assume that criminals in Philadelphia are a) more likely than noncriminals to be armed and b)
36 more likely than noncriminals to be shot. That does not mean having a gun increases their chance
37 of being shot. Certainly they believe (as police officers do) that having a gun makes them safer
38 than they otherwise would be. Nothing in this study contradicts that belief.

1 Finally, Defendants' gun ban is not the least
2 restrictive means for achieving their purported interest. Just
3 one obvious example of a less restrictive alternative to a
4 blanket ban would be to include an exception for concealed
5 pistol license holders. RCW 9.41.300 provides that "Cities,
6 towns, counties, and other municipalities may enact laws and
7 ordinances ... Restricting the possession of firearms in any
8 stadium or convention center, operated by a city, town, county,
9 or other municipality, except that such restrictions shall not
10 apply to ... Any pistol in the possession of a person licensed
11 [to carry a concealed pistol] under RCW 9.41.070" The state
12 legislature, who has preempted the entire field of firearm
13 regulation, therefore specifically protects the right of
14 concealed pistol licensed citizens to carry firearms in local
15 stadiums and convention centers.

16 For the reasons detailed above, Defendants' gun ban rule
17 would not withstand any of the three required prongs of strict
18 scrutiny.

19 Intermediate Scrutiny

20 The Seattle gun ban would fare no better under an
21 intermediate level of scrutiny. As noted above, Defendants have
22 not articulated a compelling government interest to justify the

1 ban. Under intermediate scrutiny, the government interest must
2 still be "important." However, the purported interest, to
3 protect children from gun violence, has no substance and no
4 objective facts behind it. For example, how many children have
5 been hurt or threatened by firearms in Seattle Parks Department
6 facilities in the last year, ten years, or ever? The rate of
7 gun violence against children in Seattle Parks Department
8 facilities would have to be significant (at the very least
9 quantified) to demonstrate an important government interest.
10 But Defendants have not cited a single instance of such violence
11 in their justification contained within the written ban. Again,
12 Defendants do nothing more than baselessly throw out the mere
13 idea of child safety, and then leave it there to fend for itself
14 without the slightest bit of objective fact or credible evidence
15 behind it.

16 Next, the means to the important government interest
17 would have to be substantially related to that interest. As
18 noted above, there is absolutely no credible evidence to suggest
19 that Defendants' draconian gun ban positively relates to a safer
20 environment. If the goal is to protect the safety of children
21 (or anyone, for that matter), then banning trained, law-abiding,
22 concealed pistol licensed citizens does not advance that goal.

1 In fact, banning armed good guys likely makes a place less safe
2 from bad guys (who will carry guns regardless of any signage out
3 front), not more safe. Defendants' gun ban rule would thus not
4 withstand either prong of intermediate scrutiny.

5 BALANCE OF HARDSHIPS

7 Defendants have promulgated a rule that significantly
8 impacts a fundamental civil right without articulating any
9 objective rationale for doing so. Defendants claim to want to
10 protect children without providing the slightest evidence to
11 suggest that any children were in any danger, or are in any less
12 danger with the rule in place. To achieve this dubious
13 interest, Defendants have proclaimed that hundreds of Parks
14 Department properties are now "gun free zones," thus creating
15 target rich environments for violent criminals who choose to
16 ignore the gun ban. Put bluntly, the gun ban is a fatally
17 flawed solution to a problem that simply does not exist.

18 So if this motion is granted, the hardship suffered by
19 Defendants will be the temporary inability to enforce an
20 irrational rule that arguably makes people less rather than more
21 safe from gun violence; a rule for which Defendants have failed
22 to objectively articulate any actual government interest that
23 would be advanced. They would have to either remove or cover

1 their signs, and refrain from enforcing the rule. That is all.

2 On the other hand, the hardship for Plaintiff (and for
3 thousands of similarly-situated persons) if this motion is not
4 granted is nothing less than the continued abrogation of a
5 fundamental civil right in hundreds of areas that are generally
6 open to the public. Plaintiff and other law-abiding citizens
7 who choose to exercise their right to bear arms will continue to
8 be barred from these public areas because, and only because,
9 they are unwilling to allow their enjoyment of the parks or
10 recreation centers to be conditioned on forfeiting a fundamental
11 constitutional liberty.

12 The balance of hardships tips completely in favor of
13 Plaintiff. The continued loss of the "true palladium of
14 liberty" clearly outweighs Defendants interest in enforcing an
15 irrational solution to an imagined problem.

16 ADVANCMENT OF PUBLIC INTEREST

17 See above discussion regarding the balance of hardships.
18 There is no public interest advanced by intentionally denying a
19 fundamental constitutional civil right, especially when that
20 denial serves no demonstrated purpose. However, the public
21 interest clearly is served by insisting that state actors not
22 infringe civil liberties in the absence of a compelling reason

1 to do so.

2 CONCLUSION

3 As detailed above, Plaintiff's motion for a preliminary
4 injunction easily meets every prong of both the "traditional"
5 and the "alternative sliding scale" tests.

6 FRCP 65(c) requires the posting of security by
7 Plaintiffs "in such sum as the court deems proper, for the
8 payment of such costs and damages as may be incurred or suffered
9 by any party who is found to have been wrongfully enjoined or
10 restrained." Plaintiff requests the Court to set a nominal bond
11 of one dollar in this case. Simply, Defendants will not suffer
12 any conceivable harm if the injunction is granted.

13 For the reasons detailed above, Plaintiff requests that
14 the court grant this motion for a preliminary injunction
15 enjoining defendants from enforcing Executive Order 07-08
16 entitled "Gun Safety at City Facilities," Seattle Parks
17 Department Rule/Policy Number P 060-8.14, and any and all other
18 restrictions of any kind regarding firearm possession and/or any
19 other aspect of firearms. Plaintiff further requests that such
20 preliminary injunction remain in effect until ultimate
21 disposition of the above-captioned civil action.

22

1 DATED this 18th day of December, 2009.
2

3 Respectfully submitted,
4

5 s/ Robert C. Warden

6 Robert C. Warden, WSBA No. 21189

7 10224 SE 225th PL

8 Kent WA 98031

9 (206) 601-9541

