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## Guns: Ordinance Regulating Large-Capacity Magazines Is Analyzed Under Intermediate Scrutiny, Survives Preliminary Injunction

### *Fyock v. City of Sunnyvale*, No. 14-15408 (9th Cir. Mar. 4, 2015).

In the most recent post-*Heller* application of intermediate scrutiny to a gun regulation, the Ninth Circuit has upheld the denial of an injunction against a Sunnyvale ordinance prohibiting the possession of a "large-capacity" (more than ten rounds) magazine. The Circuit Court found that although the ordinance burdened a core Second Amendment right, that burden was not severe, and the heart of the Second Amendment right envisioned by *Heller*—the personal possession and use of a handgun—was not severely compromised.

The Violent Crime Control and Law Enforcement Act proscribed the possession of "large-capacity ammunition feeding devices" – e.g. those capable of accepting more than ten rounds of ammunition. California relied on this federal law for years. In 2004 the federal law lapsed, leaving a loophole in the state's gun laws. Sunnyvale, California moved to eliminate the gap by enacting a municipal ordinance regulating the possession of large-capacity magazines as the federal law had done.

The ordinance provided that "[n]o person may possess a large-capacity magazine in the city of Sunnyvale whether assembled or disassembled. It defined "large-capacity magazine" as "any detachable ammunition feeding device with the capacity to accept more than ten (10) rounds, but shall not include any of the following: (1) A feeding device that has been permanently altered so that it cannot accommodate more than ten (10) rounds; or (2) A .22 caliber tubular ammunition feeding device; or (3) A tubular magazine that is contained in a lever action firearm."

The law went into effect on March 6, 2013 and gave residents until March 6, 2014 to comply – e.g. if a resident possessed these magazines, they had to be removed them from city limits, surrendered to the city, or transferred to a gun smith.

Leonard Fyock filed suit, arguing that the law violated his Second Amendment rights and moving for a preliminary injunction to enjoin the ordinance and forestall its compliance date. The District Court denied the preliminary injunction.

**HELD**: On appeal the Ninth Circuit affirmed the District Court, holding it did not abuse its discretion in denying the injunction.

**DISCUSSION**: To win a preliminary injunction Fyock had to show "(1) he is likely to succeed on the merits of his claim, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of hardships tips in his favor, and (4) a preliminary injunction is in the public interest."

The only element of this test focused on by the Circuit Court was the likelihood of success. The court applied the two-pronged post-*Heller* framework asking "(1) whether the challenged law burdens conduct protected by the Second Amendment; and (2) if so, what level of scrutiny should be applied."

The Ninth Circuit upheld the lower court's holding that the city ordinance burdened conduct protected by the Second Amendment. In order to avoid this holding the city had to show that large-capacity magazines were both dangerous and uncommon; however, the record showed they are hardly unusual, having been sold for decades for commercial and personal use.

The Circuit Court also found the lower court did not abuse its discretion in applying intermediate scrutiny. The appropriate level of scrutiny depends on "(1) how closely the law comes to the core of the Second Amendment right; and (2) how severely, if at all, the law burdens that right." The D.C. Circuit is the only court thus far to have answered these questions with regard to large-capacity magazines. That court noted that restricting access to large-capacity magazines does not disarm individuals or prevent them from defending themselves.

Thus, the Ninth Circuit approved the district court reasoning that, though this ordinance impacts the core of the Second Amendment, it does not burden the right severely: it does not restrict access to the "quintessential self-defense weapon" – the handgun, does not restrict possession of magazines in general, and includes an exception such that to the extent a gun only functions with large-capacity magazines, they may be possessed by that gun-owner in Sunnyvale.

Applying intermediate scrutiny, the court found that Sunnyvale's stated interest in reducing harm of intentional and accidental gun use, reducing violent crime, and decreasing crimes against law enforcement were obviously substantial and important

government interests. The Ninth Circuit also found the second element of intermediate scrutiny – a reasonable fit between the stated purpose and the ordinance. Sunnyvale provided evidence that large-capacity magazines result in more shots fired, more gunshots per victim, and more deaths from gunshot injuries. It also showed that these magazines are disproportionately used in mass shootings, as well as in crimes against law enforcement. Finally, it presented studies showing that a reduction in these magazines may decrease the use of them in gun crimes generally.

The court found this evidence legitimate and relevant to the city's interests, meaning Sunnyvale was entitled to rely on it and the lower court entitled to weigh it in the city's favor. It determined Fyock's argument on this issue was an attempt to have it re-evaluate the evidence, in essence substituting its discretion for that of the lower court. It refused to do so.

http://cdn.ca9.uscourts.gov/datastore/opinions/2015/03/04/14-15408.pdf (last accessed Mar. 11, 2015).

## Jurisdiction: Challenge to Reduction of Chicago's Medical Benefits is not Governed by Constitution's Contract Clause and Cannot Be Tried in Federal Court

## *Underwood v. City of Chicago*, No. 13-3790 (7th Cir. Feb. 25, 2015).

The Seventh Circuit has remanded to state courts a case brought by City of Chicago retirees challenging a reduction in health benefits, finding that the US Constitution's Contracts Clause did not apply and looking to the application of a recent Illinois Supreme Court decision on pensions.

From 1982 to 2013 Chicago provided free or subsidized healthcare to its retirees who receive pension benefits through the police, fire, and a few other job classifications. This was done through a series of ordinances, and in June of 2013 the last ordinance expired and was not renewed. Retirees were told they would have to pay more for medical coverage starting in 2014 and a class of them filed suit against the city. They alleged a reduction in their benefits violated Art. XIII §5 of the Illinois Constitution, which states that "membership in any pension or retirement system of . . . any unit of local government . . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." The retirees also asserted a claim under the Contracts Clause of the United States Constitution, thus giving the District Court supplemental jurisdiction over the state claim.

The District Court dismissed the case on the pleadings, ruling the Pensions Clause of the Illinois Constitution did not apply to healthcare. It also dismissed the Contract Clause argument, holding the clause inapplicable under the facts. After the District Court ruled the Supreme Court of Illinois held in another case that the Pensions Clause applies to health benefits. As a result, both sides filed briefs asking the Seventh Circuit to decide the case on the merits.

**HELD**: The Seventh Circuit refused to decide the case on the merits, given the state supreme court had another Pensions Clause case under review that could shed light on the issues before it. Since it faced a question of first impression in the state it vacated the lower court holding with instruction to remand the state claim to state court.

**DISCUSSION**: The parties presented the Seventh Circuit with conflicting perspectives on the Pensions Clause. The retirees argued that if a city promises health coverage for any period of time – whether a year, or until a sunset provision expires, etc. – then that retiree is entitled to healthcare coverage for life in accordance with the state constitution Pensions Clause. Chicago argued that the Pensions Clause instead be understood to say that "membership" is contractual and does not imply that a benefit term cannot be overridden. However, the Circuit Court was "reluctant to resolve [this] novel issue of state constitutional law." For one, the state supreme court had not had the chance to resolve it directly and, perhaps important to the Court, each argument had some support in state decisions that were related but not quite on-point. Second, while the

case was pending in the Seventh Circuit the state's highest court granted review in *Matthews v. Chicago Transit Authority*, 2014 IL App. (1st) 123348 (Apr. 25, 2014), which could shed light on the very questions at issue in the case. And last, the Court noted that the parties had not even briefed a question it found "potentially important" to the case. The Court wondered what "benefits" the Pensions Clause protects. The plaintiffs assumed that it covers the kind of health benefits at issue, but the court noted that there are various approaches to health care benefits – defined-benefit plans and defined-contribution plans for example – and which ones the Pensions Clause covered could be a significant issue in the case.

Given that the case came to federal court because of supplemental jurisdiction, the Court found itself free to resolve the federal claims and return the state claims to state court. The court did so. It agreed the lower court properly dismissed the Contracts Clause claim, holding that the plaintiffs sued the wrong party. The Contacts Clause prevents states from enacting laws that impair the obligation of contracts. The retirees attempted to meet this standard by arguing that state statutes had impaired their rights to health benefits. But in doing so they pled themselves out of court because "Chicago is not responsible for the content of state law."

The city's ordinance had a sunset clause – June 2013 – and the plaintiffs did not argue that was a breach of contract. The court noted the plaintiffs did posit that the Pensions Clause of the Illinois Constitution gave the city's promise greater force than ordinary common law of contracts would, but the court found that to be an issue of state law, not federal Constitutional law. The lower court was thus upheld on this issue, but the Pensions Clause holding was vacated with instructions to remand it to state court.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D02-25/C:13-3790:J:Easterbrook:aut:T:fnOp:N:1507410:S:0
(last accessed Mar. 11, 2015).

## Jurisdiction: Federal Court Jurisdiction Survives *Rooker-Feldman* Dismissal Where No State Court Decision is Being Challenged

## *Holland v. County of Los Angeles*, No. 12-57145 (9th Cir. Mar. 5, 2015).

Where a federal suit challenges the actions of a county and an agency of the county, dismissal on Rooker-Feldman grounds—that the action is a de facto appeal of a state court decision—is inappropriate, according to the Ninth Circuit.

Michael Holland filed suit in the federal court alleging that the County of Los Angeles, and its Department of Children and Family Services ("DCFS"), as well as a few individual employees retaliated against him in violation of the First Amendment. He claimed that, after he wrote a book about DCFS and his experiences in a juvenile dependency case, the agency falsely accused him of child abuse and listed him on the Child Abuse Central Index, all of which resulted in his loss of employment. The District Court dismissed the case for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. Mr. Holland appealed.

**HELD**: The Ninth Circuit reversed the lower court, holding the claim should not have been dismissed under *Rooker-Feldman* since it did not present a de facto appeal of a state court decision.

**DISCUSSION**: The *Rooker-Feldman* doctrine denies a federal court jurisdiction if the action before it "(1) contains a forbidden de facto appeal of a state court decision and (2) seek[s] to litigate an issue that is inextricably intertwined with the state court judicial decision from which the forbidden de facto appeal is brought." In order to find a de facto appeal, the court must determine that "(1) a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court and (2) the plaintiff seeks relief from a state court judgment based on that decision."

The Ninth Circuit reversed the lower court in this case because Holland did not claim the state court committed an error, rather he asserted that the parties committing the unconstitutional retaliation were the County and the DCFS. Moreover, Holland was not appealing a state court judgment because, as the record showed, the original juvenile dependency case involving Holland and his ex-wife was dismissed without prejudice; he did not lose in the state court and was not appealing a loss.

http://law.justia.com/cases/federal/appellate-courts/ca9/12-57145/12-57145-2015-03-06.html (last accessed Mar. 11, 2015).

## Procedure: Identifications Based on Low Quality Video Footage Sufficient for Probable Cause

## *Bailey v. City of Chicago*, No. 13-3670 (7th Cir. Mar. 6, 2015)

Low quality video footage provides probable cause sufficient to overcome a § 1983 claim of malicious prosecution where the arrestee is subsequently released, according to the Seventh Circuit.

In September 2009, a fight broke out at a high school in Chicago. After reviewing low quality video footage, several individuals identified Eugene Bailey as one of assailants. Based on these identifications, the investigating officers placed a "detective hold" on Bailey to ensure that he was not released in error before charges could be filed against him. The next day, first-degree murder charges were filed and a judge entered a probable cause finding against him. Over the next three weeks, the investigators received information that seriously called into question Bailey's involvement with the death of the student. Most notably, individuals that initially identified Bailey as the assailant recanted those statements and other individuals, including witnesses to the fight, later identified another person as the suspect. The charges were dropped and Bailey subsequently brought suit. The district court granted summary judgment for the defendants on each claim.

**HELD:** The Seventh Circuit court affirmed, finding that the investigation of Bailey was properly conducted.

**DISCUSSION:** Bailey's complaint included a claim under § 1983, where he asserts that the content and the image quality of the video footage was insufficient to provide a proper basis for his identification and as such, it was unreasonable for the officers to believe that a person could make a credible identification based on the video. As a general rule, probable cause is an absolute defense to any claim under § 1983 for wrongful arrest or false imprisonment. The court rejected this argument, noting that the standard for finding probable cause requires a showing that the facts were sufficient to warrant a reasonable person to believe that the suspect had committed the offense. The court found that the six individuals that had identified Bailey as the attacker were sufficiently credible at the time and it was reasonable for the officers to rely on them. The court stressed that fact that each individual knew Bailey in some capacity and that the familiarity between the witnesses and Bailey made the identifications credible and countered the concerns about the quality of the video.

The court also determined that Bailey's detention was not unreasonable or excessive, because he was held for less than 48 hours before prior to his probable cause hearing. The plaintiff argued that the presumption of reasonableness for detentions within 48 period should be reconsidered, on account of developments in technology making the 48 period unreasonable. The court rejected this argument, noting that the investigators spent most of their time interviewing suspects, an activity that could not be made more

efficient by technological advancements. Moreover, the principal cause of the delay was the city's policy that required all violent felonies to be reviewed by the state attorney's office before charges are approved. Finding no evidence of improper conduct, the court held that Bailey's detention was reasonable.

With regard to his state law claims for emotional distress and malicious prosecution, Bailey argued that the federal district court lacked supplemental jurisdiction over those claims. Specifically, Bailey asserted that his claims involved novel questions of law which required the court to relinquish jurisdiction. However, the court was not persuaded by these arguments, noting that Bailey's state law claims arose from the same set of facts as his federal claims and that the exercise of supplemental jurisdiction by the district court was completely discretionary. Consequently, the court found that jurisdiction was proper.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D03-06/C:13-3670:J:Manion:aut:T:fnOp:N:1512501:S:0 (last accessed Mar 12, 2015).

## Sex Offenders: Blanket Enforcement of Residency Ban Within 2,000 Feet of Schools and Parks Fails Rational Basis Test

## *In re Taylor*, No. S206143 (Ca. Mar. 2, 2015).

California's laws prohibiting parolee registered sex offenders from living within 2000 feet of any school or park are unconstitutional when applied across the board by San Diego County, the California Supreme Court held last week. This decision is but the most recent in a broad spectrum of cases balancing the eforts of municipalities to protect their children from sexual predators against the rights of registered sex offenders to live, work and travel within a community.

The case arises under "Jessica's Law," passed by California voters in November 2006 as Proposition 83, the Sexual Predator Punishment and Control Act. Among its objectives, Jessica's Law sought to "prevent sex offenders from living near where our children learn and play" by creating "predator free zones around schools and parks."

This was accomplished by adding mandatory residency restrictions to California Penal Code section 3003.5, which already restricted where and with whom certain paroled registered sex offenders could live. Jessica's Law added a new provision, making it "unlawful for any person for whom registration is required . . . to reside within 2000 feet of any public or private school, or park where children regularly gather."

The California Department of Corrections and Rehabilitation (CDCR) began enforcing the residency restrictions against all registered sex offenders on parole in San Diego County.

Petitioners were registered sex offenders on active parole in San Diego County against whom section 3003.5(b) was enforced. They brought various habeas corpus proceedings, alleging that the residency restrictions virtually eliminated all reasonable housing options in the County, unconstitutionally depriving them of due process and denying their rights to free association and interstate travel. The California Court of Appeals found for petitioners.

The California Supreme Court initially remanded the cases to trial courts for evidentiary hearings, requiring that the inquiry derive "a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders" and "an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in each particular jurisdiction."

**HELD:** Section 3003.5(b)'s residency restrictions are unconstitutional as applied across the board to petitioners and similarly situated registered sex offenders on parole in San Diego County.

**DISCUSSION:** The data requested by the California Supreme Court provided ample evidence that the law, when applied across the board, was disproportionately harming petitioners without achieving enhanced safety for children. The record reflected that blanket enforcement of section 3003.5(b) had led to "greatly increased homelessness" among San Diego's registered sex offenders:

> According to CDCR's own uncontradicted parole database reports, of the 482 sex offender parolees on active parole at the time of the hearing, 165 of them (34 percent or a full one-third) were registered as transient, i.e., homeless. Between September 2007 and August 2010, the number of registered sex offenders on active parole in the City of San Diego who registered as transient with the San Diego Police Department increased four- to fivefold.

Increased homelessness hindered petitioners' access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services. More significantly, it was "further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety."

The infirmities with San Diego's application of the law made it unnecessary to determine if strict scrutiny analysis should apply. "[W]e are persuaded that blanket enforcement of the mandatory residency restrictions of Jessica's Law, as applied to registered sex offenders on parole in San Diego County, cannot survive even the more deferential rational basis standard of constitutional review." The increase in homelessness among registered sex offenders and the concomitant difficulty imposed on law enforcement in tracking those parolees "bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators."
The court found that the mandatory restrictions against registered sex offenders in San Diego County directly contravened the original legislative intent behind California's parole laws.

> The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family, and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.

It is important to note that this decision was based on an as-applied challenge. The California Supreme Court had already dismissed a facial challenge to Jessica's law. It explicitly stated that the CDCR retains the statutory authority to impose special parole conditions on registered sex offenders "including residency restrictions that may be more or less restrictive than those found in section 3003.5(b), as long as they are based on, and supported by, the particularized circumstances of each individual parolee."

However, it seems evident that this decision will invite greater scrutiny of the enforcement of Jessica's law in California. It will also serve as an additional impetus for those challenging similar "child safety zone" laws in other states and municipalities, particularly where the laws cover all sex offenders and allow indiscriminate enforcement.

http://www.courts.ca.gov/opinions/documents/S206143.PDF (last accessed Mar. 11, 2015).

## Speech: Protections for Public Speech by Elected Officials is Not Clearly Established; Qualified Immunity Applies in Retaliation Case

## *Werkheiser v. Pocono Township*, No. 13-3646 (3d Cir. Mar. 6, 2015).

*Garcetti* clearly established that public employees speaking in their official capacity are not protected against retaliation, but did not specifically discuss whether *elected officials* have such protection. Without specifically answering that question, the Third Circuit has found that elected officials do not have a clearly established First Amendment right regarding their official statements sufficient to defeat qualified immunity asserted by a town or its officers.

In 2007 Harold Werkheiser was elected to the three-member Board of Supervisors for Pocono Township, Pennsylvania. Pocono Supervisors are permitted to hold additional positions, and in 2008 Werkheiser was appointed by the Board to serve as "Roadmaster," analogous to a Director of Public Works.

In 2012 the other two Supervisors authorized the hiring of a Town Administrator at a salary of $70,000—despite the fact that one of them had taken disability leave but was still drawing his full $36,000 Supervisor's salary. The two also hired a grant writer, which was a job that they were supposed to be doing. Werkheiser openly challenged this questionable expense of public funds.

In January 2013 the other two Supervisors denied Werkheiser's re-appointment as Roadmaster. He filed suit alleging that the Township and the two Supervisors as individuals had unconstitutionally retaliated against him in violation of the First Amendment. Specifically he argued he was denied his Roadmaster job in retaliation for the views he expressed in his capacity as an elected official about the Board's overpayment for administrative services.

The defendants argued they were entitled to qualified immunity—because Werkheiser's comments were made in his official capacity, *Garcetti* controlled. Since his speech was not protected by the First Amendment, he could not prove a violation of his constitutional rights. Werkheiser countered that *Garcetti* did not control because "elected officials" are different from "public employees," and that as an elected official his speech was protected under the First Amendment. The District Court agreed with Werkheiser, holding that the Supreme Court had previously determined that elected officials are entitled to express their views without risk of retaliation, in *Bond v. Floyd*, 386 U.S. 116 (1966).

**HELD:** On appeal, the Third Circuit vacated the lower court, holding that it is not clearly established that the type of retaliation suffered by Werkheiser violated the First Amendment.

**DISCUSSION**: The Circuit Court found, unlike the lower court, that the case law on First Amendment protections for elected officials is "unsettled." It cited cases from various circuit and district courts disagreeing over the issue and, where agreeing that protections should be afforded, disagreeing over the extent of those protections. It therefore could not hold that the right was clearly established.

The court was careful to clarify that it did not decide whether *Garcetti* applied to elected officials' speech. It explained the rationales supporting *Garcetti* – public employers' heightened interests in controlling their employees' official statements, and their need to ensure accuracy and sound judgment--and noted that elected officials, unlike public employees, are there to represent different constituencies. The Court of Appeals also noted that, unlike cases where courts upheld elected officials' retaliation claims, in this case Werkheiser did not suffer loss of his elected seat. Werkheiser lost his *appointed position* in public works, not his Supervisor job. He fulfilled the term of the latter. Thus, the Circuit Court vacated the lower court on the issue of whether the law was clearly established--and left the larger *Garcetti* issue for another day.

http://www2.ca3.uscourts.gov/opinarch/133646p.pdf (last accessed Mar. 11, 2015).

## THIS JUST IN: Private Nuisance? DC Court Prohibits Man from Smoking (Tobacco) in His Own Home

The Washington DC Superior Court has issued a temporary injunction prohibiting Edwin Gray, whose family has owned a residence in the city for 50 years, from smoking in his own home. The court acted after a couple who recently moved in next door to Gray complained that smoke was filtering into their home through a hole in the basement.

In addition to the injunction, the suit seeks $500,000 in damages.

If this precedent survives (even without the damages claim), stay tuned for more fireworks across the city.

http://www.wjla.com/articles/2015/03/temporary-precedent-setting-court-order-means-d-c-man-can-t-smoke-in-own-home-112130.html#ixzz3UCBgPwFa