Office of the Attorney General

Washington, D.C. 20530

March 3, 2010

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Re: Boardley v. U.S. Dep't of the Interior (D.D.C.)

Dear Mr: Leader:

In accordance with 28 U.S.C. 530D, I write to inform you that the Department of Justice has decided not to pursue a cross-appeal of the one portion of the district court's decision in this case that was adverse to the government. In that portion, the district court concluded that one phrase in a Park Service regulation was susceptible of a broader reading than the Park Service gave it, and that if read in that broad manner the phrase violates the First Amendment. Because the Park Service has no interest in applying the regulation in the way the court held would be unconstitutional – and because the Park Service intends to revise the regulation to clarify this matter – an appeal is not warranted.

Under 36 C.F.R. 2.51(a), a park superintendent may designate locations within a national park for "[p]ublic assemblies, meetings, gatherings, demonstrations, parades, and other public expressions of views." Under 36 C.F.R. 2.52(a), a park superintendent may designate locations for "[t]he sale or distribution of printed matter." Permits are required for these activities.

In 2007, plaintiff Boardley sought to distribute religious literature at Mt. Rushmore National Memorial. A ranger told him that he could not do so without a permit, but that he could obtain a permit within two days. Mr. Boardley returned home to Minnesota without seeking a permit or distributing more leaflets. He then contacted the Park Service's Mt. Rushmore office about obtaining a permit to distribute literature the following summer. He encountered some difficulties in receiving a permit or permit application. Slip op. 1-2.

Mr. Boardley then filed this suit, raising both facial and as-applied challenges to the regulations. The district court rejected Mr. Boardley's claim that the regulations were applied to him in a discriminatory manner when the park ranger told him in 2007 that he needed a permit to distribute literature, and held that his challenge to the Park Service's failure to issue him a permit for 2008 became moot when it issued a permit shortly after this suit was filed. Slip op. 5-6. The court similarly rejected Mr. Boardley's as-applied challenge under the Religious Freedom Restoration Act, finding that the regulations did not substantially burden his exercise of religion. Slip op. 6-7

The district court then addressed Mr. Boardley's facial challenges. The court noted that the First Amendment permits time, place, and manner restrictions on speech in a public forum if they are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open alternative channels for communication. The court also noted that if such measures are part of a permitting scheme, they must be narrowly drawn, reasonable, and definite, so that the government officials who apply them do not have limitless discretion. Slip op. 8. The court concluded that, with the exception of one phrase in 36 C.F.R. 2.51(a), the regulations met those standards. Specifically, although the court did not question the validity of the permit requirement for conducting "[p]ublic assemblies, meetings, gatherings, demonstrations, [and] parades" in national parks, it held that the permitting requirement was invalid under the First Amendment as applied to "other public expressions of views." See slip op. 8-12, 18-19.

The court acknowledged that in 36 C.F.R. 2.51(a), "[t]he phrase 'other public expressions of views' was probably intended to cover events like those in the list that precede it" – i.e., public assemblies, meetings, etc. Slip op. 8. The court further acknowledged that this reading is supported by the rule of ejusdem generis, which courts apply when interpreting ambiguous statutory or regulatory language. Slip op. 9 n.3. But the court nevertheless found that the phrase "other public expressions of views" in 36 C.F.R. 2.51(a) is not so limited, observing that a "visitor who sports the cap of her local baseball team, wears a T-shirt supporting a political candidate, or displays a tattoo of her favorite band" – or who offers her opinion on any issue to a group of any size -- could be regarded as publicly expressing a view. The court reasoned that those activities would not threaten the objectives the permitting regulation was intended to promote: preserving the scenic beauty and historical value of national parks, maintaining their cleanliness and tranquility, and ensuring the security and safety of park visitors. Slip op. 9-10.

In addition, given the breadth of activities the court believed were covered by the literal terms of 36 C.F.R. 2.51(a), the court concluded that the regulation invited park officials to exercise nearly unfettered discretion in enforcing it. The court acknowledged, however, that there was no evidence that such selective enforcement had occurred at Mt. Rushmore or elsewhere, and it did not point to any evidence that the regulation had actually ever been applied to the sort of informal conduct it described. Slip op. 10-11.

The district court rejected Mr. Boardley's remaining challenges to the regulations. Thus, the court held that provision for denying a permit if the activity would present a clear and present danger to the public health or safety was not impermissibly vague, slip op. 12-14; that the regulatory requirement that the Park Service act on a permit application "without unreasonable delay" sufficiently assured prompt action, slip op. 14; that the substantial interest in preserving the experience of park visitors justified application of the permit requirement to individuals and small groups, slip op. 14-16; and that the regulations did not impermissibly burden spontaneous or anonymous speech, slip op. 16-18.

Mr. Boardley has appealed the district court's judgment insofar as it sustained the regulations, and the Department of Justice will defend the regulations against his renewed challenges on appeal. The Department of Justice has decided, however, not to pursue a cross-appeal of the district court's decision insofar as it held that the phrase "other public expressions of views" in 36 C.F.R. 2.51(a) does not satisfy the First Amendment's narrow-tailoring requirement.

As the district court recognized, the purpose of that phrase was to include within the permitting requirement activities that closely resemble the "[p]ublic assemblies, meetings, gatherings, demonstrations, [and] parades" that precede the phrase in the regulation. When read in that manner, the regulation raises no substantial First Amendment concerns. By contrast, the Interior Department does not seek to subject to a permitting requirement informal expressions of the sort that concerned the district court, and it has not interpreted 36 C.F.R. 2.51(a) to do so. The Interior Department has also concluded that the activities it seeks to subject to a permitting requirement are adequately covered by the preceding terms in the regulation. Accordingly, the district court's decision – which reads the final phrase in Section 2.51(a) to apply to a broad range of additional conduct and then invalidates it under the First Amendment – has no substantial practical impact on the Park Service's operations or on the experience of visitors to national parks. Finally, the Department of the Interior intends to revise the regulations, and in the meantime it has issued a clarifying memorandum, dated August 3, 2009. For these reasons, the Department of Justice has concluded that an appeal is not warranted.

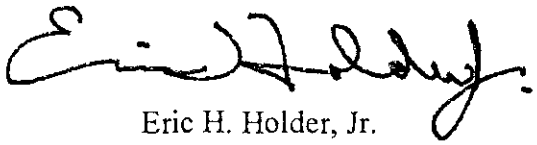
Mr. Boardley and the government both filed notices of appeal from the district court's decision. Further briefing was then stayed pending disposition of the government's motion for partial summary affirmance of the district court's judgment insofar as it dismissed as moot Mr. Boardley's as-applied challenges to the regulations and his Bivens claims against several Department of Interior officials, and held that Mr. Boardley's claims under the Religious Freedom Restoration Act failed as a matter of law. That motion was granted, and the Court set a briefing schedule for the remainder of the appeal.

Mr. Boardley filed his opening brief on January 5, 2010. The government's brief was filed on February 19, 2010. In that brief, the government defends the district court's judgment rejecting Mr. Boardley's remaining challenges to the regulations. But for the reasons given above, the government does not challenge the portion of the district court's decision that is

premised on its unduly broad reading of the phrase "other public expressions of views" in 36 C.F.R. 2.51(a).

Thank you for your attention to this matter.

Sincerely,



Eric H. Holder, Jr.
Attorney General