Office of the Attorney General

Washington, D.C. 20530

November 5, 2010

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Boardley v. U.S. Department of the Interior, No. 09-5176 (D.C. Cir.)

Dear Madam Speaker:

In accordance with 28 U.S.C. 530D, I write to inform you that the Department of Justice has decided not to petition the Supreme Court for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case. The appellate panel unanimously held that two regulations promulgated by the Department of the Interior to regulate certain expressive activities in national parks, 36 C.F.R. 2.51(a) and 2.52(a), are facially invalid under the First Amendment. As explained below, the Department of Justice determined that further review is not warranted because, inter alia, the court left the Interior Department free to amend its regulations to address the court's concerns, which the Interior Department did on October 19 by issuing interim regulations.

Section 2.51(a) allows "[p]ublic assemblies, meetings, gatherings, demonstrations, parades, and other public expressions of views" to take place in a national park only if the park superintendent has issued a permit for the activity. Section 2.52(a) contains an identical permit requirement for "[t]he sale or distribution of printed matter" within national parks. Under Sections 2.51(e) and 2.52(e), the park superintendent is required to designate specific areas that will be available for these types of expressive activities, and permits will be issued only for activity that takes place in those areas.

In 2007, plaintiff Michael Boardley sought to distribute religious literature at Mt. Rushmore National Memorial. A Park Service ranger told him that he needed a permit to do so. After Boardley encountered problems obtaining a permit application or a permit, he challenged the regulations under the First Amendment in the District Court for the District of Columbia. The district court rejected all but one of his claims. It held that the regulations were constitutional except to the extent that Section 2.51(a) required a permit for "other public expressions of views," a requirement that the district court deemed vague and overbroad. As explained in my letter to you dated March 3, 2010, the Department of Justice decided not to appeal that single adverse aspect of the district court's order.

Boardley appealed the judgment sustaining the remainder of the regulations. After briefing and oral argument, the court of appeals held that the permit requirements are invalid under the First Amendment and reversed the district court's judgment denying relief. The government conceded for purposes of the case that park areas made available for expressive activity are designated public forums for purposes of First Amendment analysis (slip op. 10), and the court of appeals therefore analyzed the permit requirements under the standard generally applicable to content-neutral licensing schemes. Though it acknowledged that the regulations adequately constrain park administrators' discretion to deny permits (slip op. 12-16), the court of appeals held that the regulations are unconstitutional because they are overbroad (slip op. 16-28).

The court of appeals recognized the Park Service's interests in protecting park resources, protecting park facilities from damage, avoiding overcrowding of park locations, minimizing interference with park activities, and preserving peace and tranquility in the parks. Slip op. 17-18. And it recognized that the regulations' fit between means and ends is sufficient in the case of large groups, because the permit requirement gives park officials advance notice of the logistical and other problems that such groups may cause. Slip op. 23. But the court of appeals concluded that the regulations impose unnecessary and unjustified burdens on expressive activity by small groups and individuals. Slip op. 24-27. It also concluded that the regulations do not leave open sufficient alternative means of communication. Slip. op. 28-29. The court stressed, however, that it is the prerogative of the agency "to decide whether to rewrite the regulations to apply only to large groups, and to decide where to draw the line." Slip. op. 29.

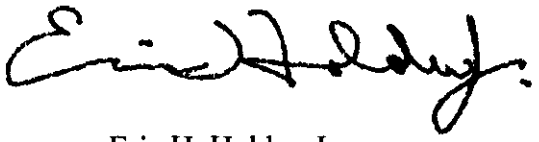
The court of appeals' decision does not squarely conflict with the decisions of other courts of appeals. And although the court of appeals reversed the district court's denial of relief, it did not direct the particular form of relief that the district court should enter on remand. Because this was an action brought by a single individual, any injunctive relief should be limited accordingly—assuming that any such relief would now be appropriate at all.

In response to the court of appeals' decision, the Department of the Interior has decided to issue interim regulations. The Interior Department published those regulations in the Federal Register on October 19, 2010, with an immediate effective date, and requested public comments. The regulations adopt a general exception to the permit requirement for groups of fewer than 25 people. That limitation parallels a similar exception in regulations applicable to parks in the National Capital Region. See 36 C.F.R. 7.96(g)(2)(i). Under the interim regulations, however, the limitation can be lowered for particular parks to accommodate special concerns. The interim regulations also request small groups to notify Park Service personnel of planned demonstrations for security purposes, and clarify the meaning of the term "demonstration" and require action on permits for larger groups within ten days. In addition, the Interior Department explained in promulgating the regulations that the identification of areas available for activities covered by the regulations is not intended to designate them as full public forums for purposes of First Amendment analysis.

In these circumstances, and in light of the issuance of the October 19 regulations, the Department of Justice has determined not to seek further review of the court of appeals' decision. I am enclosing copies of the court of appeals' opinion and the interim regulations issued by the Department of the Interior on October 19, 2010.

The time within which to file a petition for certiorari currently expires on December 6, 2010. Please do not hesitate to contact us if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General

Enclosures