

In Gun Control Case, Orrick Associate Scores En Banc Win

In a win for gun control advocates, the U.S. Court of Appeals for the Ninth Circuit on Tuesday ruled en banc that a Bay Area county ordinance restricting where firearms can be sold does not violate the Second Amendment.

By Ben Hancock

SAN FRANCISCO — In a win for gun control advocates, the U.S. Court of Appeals for the Ninth Circuit on Tuesday ruled en banc that a Bay Area county ordinance restricting where firearms can be sold does not violate the Second Amendment.

The decision overturns a divisive May 2016 ruling by an appeals court panel, which held that the Alameda County ordinance should have been more closely scrutinized to determine its impact on residents' right to bear arms. The full en banc opinion, including two concurrences and one dissent, spans 61 pages. Judge Marsha Berzon wrote for the majority.

Representing the would-be gun store operators in *Teixeira v. County of Alameda* was San Jose-based attorney Donald Kilmer.



Brian P. Goldman, Senior Associate at Orrick, Herrington & Sutcliffe

“It’s disappointing that the Ninth Circuit seems to go out of its way to denigrate and diminish the Second Amendment in this circuit,” he said by telephone.

Arguing in defense of the county’s gun ordinance was Brian Goldman, a senior associate with Orrick, Herrington & Sutcliffe. It was his first time arguing en banc. The Recorder caught up

with Goldman to ask him about the significance of the ruling, and how he prepared to argue a complicated and controversial issue in front of 11 judges.

The Recorder: First things first, tell me what this decision means.

Brian Goldman: This decision holds that local governments and state governments can regulate

the sale of firearms without triggering scrutiny under the Second Amendment, so long as individuals are still able to buy guns in the city or county or state. What the plaintiffs here had alleged was that they had a freestanding right to sell guns, and that they should therefore be allowed to open a gun store of their own in the location of their choosing without regard to local zoning laws.

The Recorder: You were arguing in front of an en banc panel of 11 judges. What was one thing that you did to prepare yourself that you felt was particularly effective?

Goldman: Lots of practice answering questions that we thought the court was likely to ask. Within the law firm and along with some partner organizations, we held several moot court exercises where other attorneys played the role of judges. They had read the briefs in the case, they had read the record and the relevant precedent, and tried to ask the most difficult questions about the case that they could imagine judges would ask. Some of those questions were then actually asked by members of the en banc court during the oral argument. So it meant that when I was standing up there delivering argument to the court, there were

no questions that I had to answer that I was answering for the very first time.

The Recorder: You clerked for Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit and U.S. Supreme Court Justice Sonia Sotomayor. How much did that familiarity with the appellate courts help you in this process?

Goldman: I think that familiarity with the argument process was hugely beneficial to being able to decipher what individual judges were trying to get at with their questions, [and] what the real concerns were that were animating some of the particular questions that I got. And also understanding the dynamics of the court when it's sitting as a panel with multiple decision-makers all working together, and knowing that an answer to a question—even if it's not the answer that's necessarily going to be most satisfactory to the judge who's asking it—needs to be an answer that is likely to be persuasive to a majority of the judges.

The Recorder: In the wake of the Las Vegas shootings, do you see added symbolic or other significance to this decision?

Goldman: I think it's important that this decision affirms the

power of communities to regulate the sale of deadly weapons in the way that is most appropriate for those communities and allowing that degree of local control. The decision recognizes that individuals absolutely have a constitutionally protected right to keep and bear arms, but it recognizes that that isn't without limitations in terms of how and when guns are sold.

