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Wasatch Equality v. Alta Ski Lifts Co.: Will Alta be Allowed to Continue Harshin' Snowboarders' Mellow?

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WASATCH EQUALITY V. ALTA SKI LIFTS CO.: WILL ALTA BE ALLOWED TO CONTINUE HARSHIN' SNOWBOARDERS' MELLOW?

INTRODUCTION

An avalanche of controversy has recently appeared on the 10th Circuit Court of Appeals' docket, centering on the appeal of *Wasatch Equality v. Alta Ski Lifts Co*[1]., a Utah case that upheld a ski resort's right to exclude snowboarders from its ski area. Alta, a 2,200-acre ski resort in Utah, is one of three ski resorts in the country that is exclusive to skiers.[2] It has had this policy since the mid-eighties when snowboarding began to gain popularity and a negative backlash quickly emerged in response to snowboarding counterculture.[3] Tellingly, when snowboarders were banned from the resort, Alta's general manager even said, "anyone who uses the words rip, tear, or shred . . . will never be welcome at Alta."[4] Recently, however, snowboarders (Equality) have challenged this ban, claiming that excluding them from the resort, which is located on national forest land, is unconstitutional. Alta has defended its decision on the basis that it is a private resort and that there is no constitutional right to snowboard.

BACKGROUND

Alta is a Utah ski resort that first opened in 1938 and has exclusively catered to skiers since its inception, although it did not issue a formal rule on the types of winter sports allowed at the resort until the mid-1980s.[5] Alta claims that it allows only skiers on its mountain because many of their customers prefer to ski on a "skier's only" mountain, and therefore they are making a savvy business decision.[6] Alternatively, it

1. Wasatch Equality v. Alta Ski Lifts Co., 55 F. Supp. 3d 1351 (D. Utah 2014).
2. Kristen Wyatt & Brady McCombs, *Snowboarders Take Fight Against Ban at Utah Resort to Appeals Court*, THE DENVER POST (Nov. 18, 2015), http://www.denverpost.com/weathernews/ci_29131746/snowboarders-take-fight-against-ban-at-utah-resort.
3. Paul J. MacArthur, *The Top Ten Important Moments in Snowboarding History*, SMITHSONIAN.COM, (Feb. 5, 2010), http://www.smithsonianmag.com/history/the-top-ten-important-moments-in-snowboarding-history-6851590/?no-ist=&page=2; Response Brief for Appellee at 11–12, Wasatch Equality v. Alta Ski Lifts Co., 2015 WL 3946470 (C.A. 10) (2015), No. 14-4152.
4. Appellant's Opening Brief Brief at 8, Wasatch Equality v. Alta Ski Lifts Co., 2015 WL 1887096 (C.A.10) (2015), No. 14-4152.
5. ALTA, http://www.alta.com/the-mountain/about-alta (last visited Feb. 28, 2015); Response Brief for Appellee at 11–12, Wasatch Equality v. Alta Ski Lifts Co., 2015 WL 3946470 (C.A. 10) (2015), No. 14-4152.
6. ALTA, http://www.alta.com/the-mountain/about-alta (last visited Feb. 28, 2015).

argues that snowboarders have a blind spot that skiers do not have, and therefore it is also safer for everyone to only allow skiers at the resort.[7]

Wasatch Equality, on the other hand, is a Utah non-profit corporation founded by Utah residents who ski and snowboard.[8] Apparently formed in order to contest Alta's skier-only policies, Wasatch's mission statement is to "promote equality among skiers and snowboarders [by] working to establish equal access and fair use of public lands by everyone."[9] They, along with four Utah snowboarders, filed this lawsuit in order to force one of the only remaining ski-only resorts (Alta) to open its slopes to both skiers and snowboarders.[10]

The case at hand revolves around the claim that the Federal government is discriminating against snowboarders because Alta is located on federal land, yet it treats two groups of people disparately.[11] When the courts encounter a disparate treatment claim such as this, three potential levels of scrutiny may apply: rational basis, intermediate scrutiny, and strict scrutiny. Strict scrutiny applies only to protected classes such as race, while intermediate scrutiny applies to classes like gender. Since snowboarders are not considered a protected class of people, they are subject to rational basis review instead of a higher standard. Rational basis merely asks whether the government had any sort of reason for promulgating the rule at issue and therefore discriminating against a group of people. Before the courts may even determine whether there is a rational basis for excluding snowboarders from Alta, however, Wasatch must prove that the discrimination can be attributable to the federal government. If it cannot, then Wasatch does not have a valid constitutional claim against Alta and the federal government.

WASATCH EQUALITY'S ARGUMENTS

When the case was first introduced in Utah's District Court, Equality asserted that snowboarders' rights were violated under the 14th Amendment because Alta is situated on federal forest service land.[12] This tenuous connection formed the basis for Equality's belief that a state action existed; therefore Equality attributed Alta's decision to ban snowboarders to the federal government. The Utah court disagreed, however, and dismissed the case due to a lack of any evidence supporting that there was state involvement in the decision to make the ban.[13] A major factor in the court's decision was that the profits the U.S. Forest Service

7. Megan Barber, *Lawsuit Continues Over Snowboarding Ban at Alta Ski Area*, ALTA (Nov. 18, 2015), http://ski.curbed.com/2015/11/18/9898706/alta-snowboarding-ban-court-case.
8. WASATCH EQUALITY, http://wasatchequality.org/ (last visited Feb. 28, 2015).
9. *Id.*
10. *Id.*
11. Wasatch Equality v. Alta Ski Lifts Co., 55 F. Supp. 3d 1351, 1356–57 (D. Utah 2014).
12. *Id.*
13. *Id.* at 1357.

received from Alta amounted to less than 0.1%of the U.S. Forest Service's annual budget.[14]

In its current appeal before the 10th Circuit, Equality argues that the Utah District Court improperly dismissed the case because it did not make presumptions in favor of the Plaintiffs, and if it had done so, the court would have found that there was a state action.[15] Additionally, Equality argues that the court improperly concluded that a rational basis justifies the ban, especially because animus is present here and can never support governmental discrimination.[16] For example, Equality claims that "the former Mayor of Alta and owner of the Alta Lodge, Bill Leavitt, confirmed that the Ban is economically harmful but motivated by animus" when he admitted that he knew the resort would lose money without revenue from snowboarders, but that he would keep the ban in place because regular patrons preferred a snowboard-free environment.[17] In sum, Equality asserts that as the Plaintiff it was only required to allege plausible facts stating a cause of action, and thus because its Complaint sufficiently alleged a claim of state action that discriminated against Plaintiffs without rationally furthering any governmental interest, the Utah District Court should have denied Alta's motion to dismiss.[18]

ALTA'S ARGUMENTS

Alta, on the other hand, argued that not only is there no state action upon which to base a Constitutional claim, snowboarding is also not within "the zone of interests protected by the Fourteenth Amendment."[19] The Utah District Court found that Alta was mistaken on the latter point because although being a snowboarder is not a special class deserving heightened scrutiny, the Equal Protection Clause[20] still applies equally to all persons when the discrimination can be attributed to a government actor.[21] Moreover, Alta claimed that under the Property Clause,[22] because the federal government was acting as a proprietor rather than as a regulator, an equal protection challenge is not acceptable even if a state action was present.[23] Here, the Utah District Court agreed with Alta, and cited *Engquist v. Oregon Dep't of Agriculture*[24] for its reasoning. It stated, "Given the need for discretion when acting as a proprietor, the rule that people should be treated alike, under like circumstances and condi-

14. *Id*. at 1358.
15. Appellant's Opening Brief at 15–16, Wasatch Equality v. Alta Ski Lifts Co., 2015 WL 1887096 (C.A.10) (2015), No. 14-4152.
16. *Id*. at 17.
17. *Id*. at 12.
18. *Id*. at 18.
19. Wasatch Equality v. Alta Ski Lifts Co., 55 F. Supp. 3d 1351, 1361 (D. Utah 2014).
20. U.S. CONST. amend. XIV.
21. Wasatch Equality, 55 F. Supp. 3d 1351 at 1362.
22. U.S. CONST. art. IV, § 3, cl. 2.
23. Wasatch Equality, 55 F. Supp. 3d 1351 at 1362.
24. Engquist v. Oregon Dep't of Agric., 553 U.S. 591, 603 (2008).

tions is not violated when one person is treated differently from other because treating like individuals differently is an accepted consequence of the discretion granted."[25] Effectively, the Utah District Court acknowledged that because the U.S. Forest Service is a proprietor of public lands and can enter into contracts with entities such as ski resorts in order to use those lands, it has the ability to treat individuals differently even if it could not do so if it was acting in its normal function as a lawmaker or regulator.

On appeal to the 10th Circuit, in addition to its arguments in the lower court, Alta also argues that Equality's complaint fails to plead plausible facts that could show that it treated snowboarders differently than others who are similarly situated, or that the difference in treatment was irrational or abusive.[26] The former argument relies on the fact that Alta allows all people to use its facilities whether they are skiers or snowboarders, but both classes are subject to the restriction against snowboards.[27] The latter argument rests on the U.S. Forest Service's mandate to provide a *reasonable* range of recreational opportunities.[28] In effect, the U.S. Forest Service is not required to allow all recreational activities on its land, meaning that it is well within its discretion to allow only certain activities on federal land, and thus this discretion serves as adequate rational basis for the exclusion.[29]

WHERE THE LAW STANDS TODAY

At the time of writing, the 10th Circuit has yet to release its decision on this case. Given that snowboarders are not a protected class and that the federal government didn't act other than to allow Alta to place a ski resort on federal land, Wasatch's chances for prevailing in this lawsuit seem thin at best. This may be compounded by the fact that Alta is far from being the only resort in Utah; there are many others that welcome both skiers and snowboarders. While Alta's decision to ban snowboards from its slopes may not be popular, as a private resort it should have the right to limit its winter sport activities at its discretion, and I believe that the courts would be reluctant to take away that freedom. Time will tell, but until then snowboarders will have to shread their gnarr at another resort.

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25. Wasatch Equality, 55 F. Supp. 3d 1351 at 1362–63.
26. Brief for the Federal Defendants at 12, Wasatch Equality v. Alta Ski Lifts Co., 2015 WL 3989040 (C.A.10) (2015), No. 14-4152.
27. *Id.* at 40.
28. *Id.* at 41.
29. *Id.* at 42.