

Guns And More Guns

by IMLA Editorial Staff

In yet another chapter in the ongoing battle between gun rights and efforts to limit them, Chicago's ordinance restricting sales and transfers of firearms has been found unconstitutional. In 2010 the Supreme Court invalidated Chicago's handgun ban in *McDonald v. City of Chicago,* 561 U.S. 3025 (2010). The City thereafter enacted a new set of ordinances regulating firearms, including a ban on the sale and transfer of firearms within City limits. Municipal Code § 8-20-100 states, in relevant part, that "no firearm may be sold, acquired or otherwise transferred within the city, except through inheritance of the firearm." MCC § 8-20-100(a) (Ordinance). Several Chicago residents and an association of firearms dealers brought suit, contending that the Ordinance impermissibly infringed on their constitutional rights to keep and bear arms.

HELD: The Ordinance violates the Second Amendment.

DISCUSSION: Although the demise of the Ordinance was fairly predictable, the Federal District Court for the Northern District of Illinois provided an extensive analysis, some of which purports to fill in various gaps left in the Supreme Court's Second Amendment decisions. As the district court noted, in 2008 the Supreme Court had found a preexisting "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller,* 554 U.S. 570, 592 (2008). But the *Heller* opinion "did leave open many questions, which was not surprising given that it was the first detailed attempt at interpreting the Second Amendment." Among these was the question as to what level of scrutiny should apply to firearms regulations. Two years later in *McDonald,* the Court held that the Fourteenth Amendment extended individual gun possession rights to the states—but *McDonald* also declined to set out the precise standard for analyzing Second Amendment challenges.

The district court found some guidance in *Ezell v. City of Chicago,* 651 F.3d 684 (7th Cir. 2011). Under *Ezell,* the first step is to conduct a historical inquiry into the scope of the Second Amendment right as it was understood either in 1791 (when the Bill of Rights was ratified) for federal law or in 1868 (when the Fourteenth Amendment was ratified) for state and local law. If the regulated activity falls outside the Second Amendment right as it was understood at the relevant historical moment, it is "categorically unprotected." But if the regulated activity is not categorically unprotected, then the court must examine the strength of the City's justifications for regulating that activity. *Ezell* teaches, after analyzing First Amendment jurisprudence (which *Heller* and *McDonald* both suggest is appropriate) that a sliding scale means-end inquiry should apply:

> First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right. (citation omitted).

The district court reiterated one foundational point from *Heller*: "no matter where on the sliding scale the challenged statute is located, one thing is sure: the standard of judicial review is always stricter than rational basis review." And, based on *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012), the district court also concluded that the correct year for determining the scope of the Second Amendment was 1791, not 1868.

Applying the Moore/Ezell two-step analysis, the district court found little evidence that sales or transfers of guns had been prohibited in 1791. It also found that a heightened level of scrutiny was appropriate, because the proposed law burdened *everyone* living in Chicago (as opposed to other statutes that only limited gun rights of specific groups such as those convicted of domestic violence). Here, "intermediate scrutiny" was inadequate. The appropriate standard was "not quite strict scrutiny," which meant that the City must demonstrate that legitimate gun sales and transfers create such genuine and serious risks to public safety that prohibiting them within Chicago is justified.

The City's stated justifications were: (1) to restrict criminals' access to licensed dealers; (2) to restrict gun acquisition in the illegal market; and (3) to eliminate gun stores from Chicago, which are dangerous in themselves and cannot be safely regulated. The district court found that none of these sufficed. It was not acceptable to burden *all* Chicago gun buyers in an effort to deter criminal gun purchasers, and there was no evidence that prohibiting all sales in the City actually would impede illegal sales. As a corollary, eliminating all gun stores in the City could not be shown to reduce the danger of guns in criminal hands.

The district court granted plaintiffs' motion for summary judgment, declaring the Ordinance unconstitutional under the Second Amendment. But it stayed the judgment's effect for one week, until January 13, to allow the City "to consider and enact other sales-and-transfer restrictions short of a complete ban" and make a formal motion for stay pending appeal.

Illinois Association of Firearms Retailers v. City of Chicago, No. 10-C04184 (N.D. Ill. Jan. 6, 2014)