

Court Rules in Second Amendment Case

by Sophia M. Stadnyk, Senior Associate Counsel

On June 28, 2010, the Court ruled in *McDonald v. City of Chicago*, 2010 WL 2555188 (U.S. June 28, 2010). Consistent with its decision two years ago in *District of Columbia v. Heller*, 554 U. S. ___ (2008), in a 5-4 split the Court again, in the context of a local gun ban, affirmed the right to keep and bear arms for the purpose of self-defense in the home as a "fundamental" constitutional right, and found the Second Amendment was incorporated against state and local governments. However, there was no decisive agreement on how it was incorporated: only four justices (Justice Alito, joined by the Chief Justice, Justice Scalia, and Justice Kennedy) concluded that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment right recognized in *Heller*, but a majority rejected incorporation via the Privileges or Immunities Clause of the Fourteenth Amendment.

The 214-page ruling concerned handgun bans enacted by the City of Chicago and the Village of Oak Park, Illinois. Residents, including the elderly Otis McDonald, challenged the bans on the basis that it left them vulnerable to attack by criminals, and that in Chicago, the handgun murder rate had actually increased since the ban was enacted. The district court rejected the plaintiffs' argument that the Chicago and Oak Park laws were unconstitutional, and the Seventh Circuit, relying on three 19th-century Supreme Court cases that held the Second Amendment applied only to the Federal government, affirmed. Describing these cases as "defunct," the appellate court nonetheless declared that it was obligated to follow Supreme Court precedents that had "direct application."

The Supreme Court reversed and remanded. Justice Alito wrote the opinion and Justice Scalia filed a concurring opinion. Justice Thomas filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed a dissenting opinion, as did Justice Breyer, joined by Justices Ginsburg and Sotomayor.

"In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. ... We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." This right was fully binding on the States and limited ("but by no means eliminate[d]") their ability to "devise solutions to social problems that suit local needs and values." Referring again to *Heller*, Justice Alito's opinion reiterated that a right to keep and bear arms was not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," and that reasonable restrictions and regulations were permissible.

In *McDonald*, the Court painted with a very broad brush indeed—it did not even strike the local ordinances in issue—but two upcoming cases, at least, will further define the scope of the Second Amendment and local restrictions that fall short of a near-total ban. Dick Heller, the plaintiff in the 2008 decision, and others are now challenging the District of Columbia gun registration ordinance adopted after the D.C. ban had been struck down by the Supreme Court. In the Ninth Circuit, the decision in *Nordyke v. King*, argued before the en banc court, is pending and will likely build on the Supreme Court's decision. *Nordyke* concerns a county ordinance that prohibited the possession of firearms and ammunition on county property. Because this included a fairground owned by the county that had been rented for gun shows in the past, gun show promoters and patrons brought suit, arguing that the restriction was unconstitutional. The Ninth Circuit had previously, in a decision reported at 563 F.3d 439 (9th Cir. 2009), ruled that the Due Process Clause incorporated the Second Amendment so as to apply it against the states and local governments, but found that the particular ordinance did not violate the Second Amendment. And to come full circle, earlier this month, the City of Chicago adopted a new ordinance, the Responsible Gun Ownership Ordinance, that, among other things, requires a Chicago Firearms Permit before a person can possesses a firearm; bans gun shops in the City; prohibits gun owners from carrying or possessing a handgun anywhere except within the owner's home (presumably making it unlawful to step anywhere outside a home with a handgun); and makes it unlawful to possess long guns.

Commenting on the new Chicago ordinance, a lobbyist with the National Rifle Association in Illinois suggested another lawsuit was possible: "The city wants to put as many hurdles and as much red tape in the way of someone who just wants to exercise their constitutional right to have a gun," said Todd Vandermyde. In brief, it looks like the Supreme Court's decision marks just the opening salvo of a new round of gun rights litigation. **M**