

Second Amendment, Second Time Around

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The national debate over the contours of gun regulation continues to reverberate in courtrooms across America. While the Supreme Court determined, in *Heller* and *McDonald*, that there is an unquestionable constitutional right to possess firearms for self-defense within one's own residence, it did not analyze every nuance of that right and left open many other Second Amendment questions.

Gun Possession in the Home: For some, *Heller* and *McDonald* laid to rest any argument that a state or municipality can limit the possession of handguns, by competent adults, for personal self-defense within the home.

But not so fast. The issue is far from settled, judging by the dimensions of a California case just denied certiorari by the Supreme Court. In *Jackson v. City and County of San Francisco*, No. 12-17803 (9th Cir. Mar 25, 2014), the Ninth Circuit upheld two of San Francisco's firearm and ammunition regulations, which "limit but do not destroy Second Amendment rights."

The first regulation relates to handgun possession within a residence. San Francisco Police Code section 4512 provides that "[n]o person shall keep a handgun within a residence owned or controlled by that person unless" (1) "the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice," or (2) "[t]he handgun is carried on the person of an individual over the age of 18." S.F. Police Code art. 45, § 4512(a), (c)(1). Violations of section 4512 are punishable by a fine of up to $1,000 and up to six months in prison. Id. § 4512(e).

The second challenged provision prohibits the sale of ammunition, including the so-called "hollow-point" bullet, that (1) has "no sporting purpose," (2) is "designed to expand upon impact and utilize the jacket, shot or materials embedded within the jacket or shot to project or disperse barbs or other objects that are intended to increase the damage to a human body or other target," or (3) is "designed to fragment upon impact ." S.F. Cal., Police Code art. 9, § 613.10(g).

Plaintiffs are citizens of San Francisco "who presently intend to keep their handguns within the home in a manner ready for immediate use to protect themselves and their families." They and other gun-rights organizations brought suit, challenging the regulations on Second Amendment grounds and moving for a preliminary injunction. The district court denied that motion.

The Ninth Circuit affirmed. It acknowledged that *Heller* confers "an individual right to keep and bear arms" and that the District of Columbia's requirement that "firearms in the home be rendered and kept inoperable at all times" made it " impossible for citizens to use [firearms] for the core lawful purpose of self-defense." But it cited *Heller's* often quoted caveat that the Second Amendment does not preclude certain "longstanding prohibitions" and "presumptively lawful regulatory measures," such as "prohibitions on carrying concealed weapons," "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," "laws imposing conditions and qualifications on the commercial sale of arms," and prohibitions on "the carrying of 'dangerous and unusual weapons."

The *Jackson* court also referenced *Heller's* teaching that mere rational basis review was insufficient for Second Amendment analysis: "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant . . . and would have no effect." Here, core Second Amendment rights were undeniably at stake, requiring an analysis of the degree to which the San Francisco Code provisions burdened those rights:

> As Jackson argues, there are times when carrying a weapon on the person is extremely impractical, such as when sleeping or bathing. Therefore, as a practical matter, section 4512 sometimes requires that handguns be kept in locked storage or disabled with a trigger lock. Having to retrieve handguns from locked containers or removing trigger locks makes it more difficult "for citizens to use them for the core lawful purpose of self-defense" in the home. Heller, 554 U.S. at 630. Section 4512 therefore burdens the core of the Second Amendment right.
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> This is not the end of our inquiry, however. . . . Unlike the challenged regulation in Heller, id. at 629, section 4512 does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home. Rather, section 4512 regulates how San Franciscans must store their handguns when not carrying them on their persons. This indirectly burdens the ability to use a handgun, because it requires retrieving a weapon from a locked safe or removing a trigger lock. But because it burdens only the "manner in which persons may exercise their Second Amendment rights," Chovan 735 F.3d at 1138, the regulation more closely resembles a content-neutral speech restriction that regulates only the time, place, or manner of speech. The record indicates that a modern gun safe may be opened quickly. Thus, even when a handgun is secured, it may be readily accessed in case of an emergency. Further, section 4512 leaves open alternative channels for self-defense in the home, because San Franciscans are not required to secure their handguns while carrying them on their person.

Applying intermediate scrutiny, the *Jackson* court found that San Francisco had shown that section 4512's requirement that persons store handguns in a locked storage container or with a trigger lock when not carried on the person "is substantially related to the important government interest of reducing firearm-related deaths and injuries."

The hollow bullet ban also survived Jackson's motion for injunction. The Ninth Circuit found that the limitation was "substantially related to San Francisco's important interest of reducing the lethality of ammunition." Even if a less-restrictive alternative was available (such as prohibiting hollow-point bullets in public only), "intermediate scrutiny does not require the least restrictive

Continued on page 30

Supreme Court Continued from page 27

means of furthering a given end." (citing *Ward v Rock Against Racism*, 491 U.S. 781, 798 (1989)).

In sum, these limits on gun possession within the home are not prohibited, at least for the Ninth Circuit:

> We recognize the significance of the Second Amendment right to keep and bear arms. "[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." McDonald, 130 S.Ct. at 3042. But we also recognize that the Second Amendment right, like the First Amendment right to freedom of speech, may be subjected to governmental restrictions which survive the appropriate level of scrutiny.

Jackson and gun-rights proponents filed for certiorari before the Supreme Court. They did not succeed.

On Monday, June 8, the Court denied cert in *Jackson*, over the dissent of Justices Thomas and Scalia. Justice Thomas voiced his concern over the direction being taken by the Ninth Circuit:

> Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition.

The bottom line is that considerable work remains to be done in clarifying the metes and bounds of gun possession within the home.

Public Carry: If there is continued ambiguity about guns in the home, the picture is even less clear on the issue of public carry, where an obvious schism is developing among the federal judiciary.

The Nation's Capital: Washington DC is the most recent jurisdiction to be rebuffed in its efforts to control public gun carry. Last month, the US District Court for the District of Columbia granted a preliminary injunction to three plaintiffs--supported by the Bellevue, Washington-based Second Amendment Foundation--who challenged the District's "good reason" requirement for the issuance of a concealed carry gun permit. In *Wrenn v. District of Columbia*, no. 1:15-cv-162 (D. D.C. May 18, 2015) US District Court Judge Frederick Scullin found that the plaintiffs had shown a sufficient likelihood of winning on the merits such that the law should be held in abeyance pending judicial resolution.

Applying intermediate scrutiny, Scullin determined that the District's law inhibited the public carry of handguns, undermining the Second Amendment:

> The District of Columbia's arbitrary "good reason"/"proper reason" requirement, however, goes far beyond establishing such reasonable restrictions. Rather, for all intents and purposes, this requirement makes it impossible for the overwhelming majority of law-abiding citizens to obtain licenses to carry handguns in public for self-defense, thereby depriving them of their Second Amendment right to bear arms. (citation omitted).

Washington D.C. has hardly been timid about attempting to limit gun possession and usage, even after its indoor use restrictions were resoundingly stricken in *Heller* in 2008. Last year, *Palmer v. District of Columbia,* no. 1:09-cv-14082 (July 26, 2014), invalidated the District's predecessor regulations restricting concealed carry. At issue in *Palmer* was D.C. Code § 7- 2502.01(a) which provided that "no persons or organization in the District shall possess or control any firearm, unless the persons or organization holds a valid registration certificate for the firearm" and D.C. Code § 7-2502.02(a)(4) which stated that individuals who are not retired police officers may only register a handgun "for use in self-defense within that person's home."

Under these predecessor laws, applicants were required to "give a brief statement of your intended use of the firearm and where the firearm will be kept." Empirical evidence was that virtually no public carry permits were issued.

The *Palmer* plaintiffs challenged the DC Code provisions on Second Amendment grounds—as well as under Equal Protection and Right to Interstate Travel principles because only District residents could apply for the public carry permits.

The same Judge Scullin had presided over *Palmer*. He applied *Heller's* dictate, extended to the states via *McDonald*, that the Second Amendment right to keep and bear arms is held by the individual and is not limited to a communal, militia-based context. And he advanced the logic that "bearing" a firearm cannot be confined to self-defense within a residence. The predecessor D.C. Code provisions were deemed unconstitutional and their enforcement was permanently enjoined.

Within weeks after *Palmer*, the DC Council promulgated new regulatory language. While acknowledging the right of the public to carry firearms in public, the new legal framework added a "good reason" requirement—the applicant had to articulate that he or she had a "good reason to fear injury to his or her person or property or ha[s] any other proper reason for carrying a pistol." D.C Code §22-4506(a). The Code provided various elements which might support a "good reason" applicant, including "evidence of specific threats or previous attacks," employment requiring the carrying of large amounts of cash or valuables, or the need to protect vulnerable family members with mental or physical disabilities.

The "good reason" hurdle proved to be mountainous. Once again, the empirical evidence was damning--the new framework did not result in increased issuance of DC public carry permits by Chief Cathy Lanier's police department. Some accounts cited the number at fewer than ten permits issued for this city of over 600,000 residents. Last month, *Wrenn* enjoined the DC "good reason" law.

The Ninth Circuit: Judge Scullin's legal analysis in *Wrenn* relied in large measure on precedent from the Ninth Circuit. In 2014, that court had considered San Diego's "good cause" scheme in *Peruta v. City and County of San Diego*, no. 10-56961 (Feb. 13, 2014). *Peruta* arose under the rubric of California's broad prohibitions against concealed carry of a firearm and public carry of a loaded firearm generally (Cal. Penal Code § 25400 et seq.). The California scheme allowed for licensing of concealed carry upon an applicant's showing of "good moral character," completion of a specified training course, and establishing "good cause." Id. §§ 26150, 26155. The state delegated to each California municipality the power to issue a written policy setting forth the procedures for obtaining a concealed-carry license. Id. § 26160.

San Diego County's policy interpreted the "good cause" requirement to mean "[A] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way." Good cause

was "evaluated on an individual basis" and might arise in "situations related to personal protection as well as those related to individual businesses or occupations." But concern for "one's personal safety alone is not considered good cause."

The *Peruta* court, in a 2-1 split, found the San Diego "good cause" policy to be so restrictive as to eviscerate the Second Amendment's grant of individual rights to carry handguns in public for self-defense. In so doing, the Ninth Circuit spotlighted the growing judicial fissure on public-carry rights:

> By evading an in-depth analysis of history and tradition, the Second, Third and Fourth Circuits missed a crucial piece of the Second Amendment analysis. They failed to comprehend that carrying weapons in public for the lawful purpose of self defense is a central component of the right to bear arms.... And further, they failed to comprehend that regulations on the right, although permissible to an extent, could not go so far as to enjoin completely a responsible, law-abiding citizen's right to carry in public for self-defense. Such regulations affecting a destruction of the right to bear arms, just like the regulations that affect a destruction of the right to bear arms, cannot be sustained under any standard of scrutiny. (citation omitted).

Indicative of the dynamic and fiercely-contested tenor of the Second Amendment debate, San Diego's "good cause" battle may not be over, and Judge Scullin's well-intentioned reliance on *Peruta* may prove to be premature. The Ninth Circuit agreed to rehear *Peruta* on June 16, 2015, en banc. And at least one well-placed NRA observer predicted that, based on the likely staffing of the en banc proceeding, a reversal of *Peruta* may be in the offing.

The Seventh Circuit: The Seventh Circuit has spoken authoritatively on the public carry issue. In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), Judge Posner struck down Illinois' blanket prohibition on carrying ready-to-use firearms outside the home:

> A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment, though there is no proof it would. In contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need. .... Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.

In Seventh Circuit, however, the right to public carry is not unlimited. That court recently upheld a ban on public carry of certain types of firepower--assault weapons and large-capacity magazines. In *Friedman v. City of Highland Park*, No. 14-3091 (7th Cir. Apr. 27, 2015), the Court of Appeals catalogued the types of firearms which would have only been available for use by a militia—and held that accordingly, military-grade assault weapons could not be possessed by the general public today. It also found a sufficient legal basis to sustain intermediate scrutiny:

> Unlike the District of Columbia's ban on handguns, Highland Park's ordinance leaves residents with many self-defense options. True enough, assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers. Householders too frightened or infirm to aim carefully may be able to wield them more effectively than the pistols James Bond preferred. But assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in aggregate. Why else are they the weapons of choice in mass shootings? A ban on assault weapons and large-capacity magazines might not prevent shootings in Highland Park (where they are already rare), but it may reduce the carnage if a mass shooting occurs. That laws similar to Highland Park's reduce the share of gun crimes involving assault weapons is established by data.

The Contrary View—"Terra Incognita": While the Seventh Circuit found adequate guidance in *Heller* and *McDonald* to define a right of self-defense in public, the Fourth Circuit discerned no such talisman. Judge Wilkinson expressed his concerns in *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011):

> [T]here may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that 'self-defense has to take place wherever [a] person happens to be,' appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. The whole matter strikes us as a vast terra incognita that courts should enter only upon necessity and only then by small degree.

The Second Circuit: Foremost among the jurisdictions upholding limits on public carry is the Second Circuit and its decision in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). There, the court considered a New York regulatory scheme similar to those in Maryland, Massachusetts, Hawaii and New Jersey—which would likely face stiff challenge in other circuits. New York law generally prohibits possession of a firearm absent a license. (N.Y. Penal Law § 265.01 et seq.). Licenses are limited to those over 21 years of age, of good moral character, without a history of crime or mental illness, and "concerning whom no good cause exists for the denial of the license." (N.Y. Penal Law § 400.00(1)(a)-(d), (g)). While certain occupations (bank messengers, jail employees, judges), pursuits (hunting and target practice) and certain locations (residences, places of business) will elicit a license, permission for concealed carry will only be granted "when proper cause exists for the issuance thereof." (N.Y. Penal Law § 400.00(2)(f). "Proper cause" is not defined in the statute, but New York State courts have opined that applicants must demonstrate "a special need for self-protection distinguishable from that of the general community." "Good moral character plus a simple desire to carry a weapon" is insufficient, nor is living or being employed in a "high crime area."

The *Kachalsky* court referenced Judge Wilkerson's "terra incognita" description of the Supreme Court's input on a right

Continued on page 32

Inside Canada Continued from page 25

not it would continue to use Donovan or rely on and use its internal legal employees as city prosecutors. In 2010 Donovan was advised in writing that Montreal was going to use its full time lawyers to act as Municipal prosecutors, and his services would no longer be needed. Donovan alleged that Montreal had no right to terminate his services since it had to respect the resolution adopted on June 2, 1992 by Westmount, confirming that the latter retained his services as a Westmount Municipal Court prosecutor. Donovan also argued that if he was to be terminated, Montreal had to give him appropriate notice before terminating his service.

HELD: Motion Dismissed.

DISCUSSION: The Court held that Montreal was able to terminate the services of Donovan. At the time Montreal terminated Donovan's services, the Westmount resolution was obsolete. The Court relied on the *Act Respecting the Exercise of Certain Municipal Powers In Certain Urban Agglomerations,* which delegated to Montreal the competence concerning municipal court affairs. Furthermore, the agreement relating to the delegation of activates of penal proceedings before Montreal Municipal Court signed by Westmount in 2006 permitted Westmount to use the services of prosecutors other than those used by Montreal-but Westmount had never subsequently retained the services of Donovan. It was Montreal that continued to retain Donovan, and therefore Montreal was able to put an end to Donovan's services.

With regards to notice, the Court indicated that Donovan was terminated because Montreal decided to use its own employees to act as Municipal Court prosecutors. Therefore it is clear that Donovan was not Montreal's employee. The Court agreed with the position put forward by Montreal that Donovan was bound by a service contract and was subject, as any lawyer, to the *Code of Ethics of Advocates*. The Code of Ethics provides that a lawyer may not, at any time, limit the right of the client to consult another lawyer. Montreal argued that requiring a client to give his lawyer prior notice of termination of service would be in violation of the client's right to choose his lawyer. ML

Supreme Court Continued from page 31

to self-defense outside the home. The Second Circuit grudgingly "assumed" that such a right may exist—but proceeded to uphold a restrictive "proper cause" permitting scheme by applying intermediate scrutiny in the form of an "interest-balancing test:"

> Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest."

Freed of the requirement to find narrow tailoring, the Second Circuit determined that maintaining public safety was an important governmental interest and the New York "proper cause" process served that interest– in stark contrast to the recent DC Circuit analysis in *Wrenn*.

High Court Reprise? *Heller* and *McDonald* resolved narrow questions about gun possession—and left many other questions unanswered. Subsequent interpretations of those decisions and their implications for limits on firearms, whether in the home or in public, have diverged widely, as evidenced in *Wrenn, Peruta, Moore, Kachalsky, Jackson* and other Circuit Court holdings. While the general momentum is shifting unmistakably towards less restriction on the right "to keep and bear arms," the real meaning of the Second Amendment will clearly require continuing explication by the Supreme Court. ML

Amicus Corner Cont'd from page 28

issue of the reasonableness of the accommodations proposed after this incident by Sheehan's litigation expert (i.e., that the officers should have allowed Sheehan to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

The Supreme Court granted certiorari on two issues: (1) whether the ADA requires police officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of an arrest; and (2) whether it was clearly established for the purposes of the Fourth Amendment that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable due to the anticipated resistance of an armed and violent suspect within the residence.

IMLA's brief argued, among other things, that individual police officers should not be required to perform an analysis regarding what accommodations are necessary under the ADA, but rather, police should be afforded broad discretion in these circumstances.

In a 6-2 opinion, the Court dismissed the first issue regarding the ADA as improvidently granted, declining to rule on an important issue for local governments.

Regarding the Fourth Amendment issue, the Court noted that the "real question" was "whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability." Despite having reframed the question presented on the Fourth Amendment issue, the Court declined to rule on this constitutional question. The Court instead rested its holding on the fact that the law was not clearly established at the time of the events, thereby entitling the officers to qualified immunity. In so holding, the Court reversed the decision of the Ninth Circuit, admonishing that it has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established at a high level of generality... Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." The Court explained that under the circumstances, a reasonable officer could have concluded that the second entry into Sheehan's home was justified both under the continuous search rationale and the exigent circumstances rationale.

The second case decided by the Court on May 18, 2015 in which IMLA had participated as an amicus was *Comptroller of the Treasury of Maryland v. Wynne.* In *Wynne,* local governments were dealt a loss by the Court when it held that Maryland's tax scheme was unconstitutional under the dormant Commerce Clause.

The Maryland tax scheme at issue had two components: a state tax and a county tax. The county tax is based on where the individual is domiciled and maintains a principal residence. Maryland provides residents who pay income tax to another jurisdiction for income earned in that other jurisdiction a credit against Maryland state taxes, but Maryland does not provide a credit against its county taxes. Nonresidents