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GUN CONTROL AFTER HELLER

THE SCOPE OF THE SECOND AMENDMENT AND STANDARDS OF SCRUTINY

presented by

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PART I

INTRODUCTION

The Second Amendment to the United States Constitution states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The past three years have seen an explosion of litigation challenging a broad array of federal, state, and local firearms regulations under the Second Amendment. This explosion was spawned by the Supreme Court's 2008 decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008). Heller was the Court's first in-depth treatment of the Second Amendment. It held for the first time that the Second Amendment protects an individual right to possess a firearm, regardless of any connection to militia service. The Court also held that this right encompasses a right to possess an operable handgun in the home for self-defense. The Court arrived at these holdings in the course of striking down a District of Columbia ban on the possession of handguns in the home. Heller also addressed a District of Columbia requirement that firearms kept in the home be unloaded and dissassembled or bound by a trigger lock or similar device. The Court concluded that this requirement violated the Second Amendment because it "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense." Id., at 2818.

Because the District of Columbia is a federal enclave, the Court did not have occasion in Heller to address whether the Second Amendment restricts state and local governments. Long-established precedent held that the Bill of Rights' protections do not automatically apply to state and local governments, but do so only if they are "incorporated" into the Fourteenth Amendment. Two years later, in McDonald v. Chicago, 130 S.Ct. 3020 (2010), the Court addressed this question in the course of reviewing Chicago's handgun ban and held that the Second Amendment is incorporated.

Myriad challenges to firearms regulations followed these decisions. These challenges have been raised as defenses in criminal prosecutions for unlawful arms possession, as well as in civil lawsuits affirmatively challenging firearms regulations. Regulations challenged in civil lawsuits include: a county ban on gun shows on county property (Nordyke v. King, 644 F.3d 776 (9th Cir. 2011)); a city requirement that firearms be registered (Heller v. District of Columbia, 698 F. Supp.2d 179 (D.D.C. 2010)) ("Heller II")); a city ban on the possession of assault weapons and large capacity ammunition magazines (id.); a city ban on the operation of shooting ranges (Ezell v. Chicago, __ F.3d __, 2011 WL 2623511 (7th Cir. 2011)); a city ban on the sale of firearms (Pacholski v. Chicago, No. 10

C 4184 (N.D. Ill.)); a city ban on carrying firearms outside the home (id.); a city requirement that owners of more than one firearm must keep the additional firearms safely secured (id.); and a county's implementation of a state law requiring a showing of good cause before a concealed carry permit will be issued (Peruta v. County of San Diego, 758 F. Supp.2d 1106 (S.D. Cal. 2010)).

Courts addressing these challenges generally face two main questions. The first is the "scope" question: Does the Second Amendment right to keep and bear arms encompass and protect the activity or weapon at issue? The second is the "standard of scrutiny" question: If the Second Amendment does encompass the activity or weapon, what standard of scrutiny (e.g., strict scrutiny, intermediate scrutiny) should be used to evaluate the regulation at issue? This presentation will survey how some courts have attempted to answer these questions.

PART II

THE SCOPE OF THE SECOND AMENDMENT - THE ROLE OF HISTORY

As to scope, Heller established that the Second Amendment protects a right to possess an operable handgun in the home for self-defense. But the Court cautioned that "since this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." Heller, 128 S. Ct. at 2821. And, indeed, Heller did not address many questions now arising in Second Amendment litigation. Nonetheless, two particular features of the Heller decision have been seized upon by lower courts attempting to resolve the scope questions before them.

First, Heller placed great weight on history. In answering the main issue before it – whether the Second Amendment protects an individual right unconnected to a militia – Heller started from the premise that "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Heller, 128 S. Ct. at 2788. The Court also explained that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." Id. at 2821. Thus, the Court's stated task was to determine the "original understanding" of the Second Amendment at the time of its adoption in 1791. Id. at 2816. That is, what did the public in 1791 understand the right to keep and bear arms to mean and protect?

To answer whether the 1791 public understood the right to keep and bear arms as protecting an individual right, the Court delved extensively into history. The bulk of the majority opinion examined various historical sources, such as the

English Bill of Rights and pre-Founding English history and treatises, Founding-era American statutes and state constitutions, the Second Amendment's drafting history, and 18th and 19th century American dictionaries, treatises, statutes, and caselaw. The Court continued to emphasize history in McDonald, where it addressed whether the right to keep and bear arms is incorporated under the Fourteenth Amendment. McDonald not only discussed the historical analysis and sources canvassed in Heller, but also the understanding of the right to keep and bear arms held by those living during the period of the Fourteenth Amendment's ratification in 1868. See McDonald, 130 S.Ct. at 3036-3044 (plurality opinion).

Second, Heller discussed certain activities and weapons that enjoy little or no Second Amendment protection. Citing a tradition spanning from Blackstone through the 19th century, the Court explained that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited;" it is not a right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Heller, 128 S. Ct. at 2816. As one example of the limits of the right, the Court noted that the majority of 19th century courts upheld prohibitions on the carrying of concealed weapons. Id. Another "important limitation" is that the Second Amendment protects only weapons that are in "common use" (such as handguns), and not weapons that are "dangerous and unusual," such as machine guns. Id. at 2817. The Court went on to list examples of other, "presumptively lawful," restrictions: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. at 2816-17 & 2817 n.26. However, as to this last set of restrictions, the Court did not discuss their historical basis, much less a clear 1791 understanding that they are permissible. Indeed, as at least one court has remarked, Heller did not "allud[e] to any historical evidence that the right to keep and bear arms did not extend to felons, the mentally ill or the conduct prohibited by any of the listed gun regulations. United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010). But see United States v. Marzzarella, 614 F.3d 85, 91-92 (3rd Cir. 2010) (concluding that Heller establishes that these categories are outside the scope of the Second Amendment as historically understood).

These two features of Heller have led lower courts to emphasize history to varying degrees when addressing Second Amendment scope questions.

A. Cases emphasizing history

Some courts state that the historical inquiry is required and critical. For instance, in addressing the federal ban on firearm possession by persons convicted of domestic violence misdemeanors (18 USC § 922(g)(9)), the Fourth Circuit concluded that, based on Heller, "determining the limits of the scope of the right

is necessarily a matter of historical inquiry . . . into whether the conduct at issue was understood to be within the scope of the right at the time of ratification." Chester, 628 F.3d at 678, 680. In so doing, the court rejected an approach that merely asks whether the challenged law is analogous to one of the "presumptively lawful" restrictions listed in Heller. Id. at 679 (discussing United States v. White, 593 F.3d 1199 (5th Cir. 2011)). At the same time, the court acknowledged the problems attendant with a historical inquiry. The court noted the "lack of historical evidence in the record" as to whether domestic violence misdemeanants were understood in 1791 as surrendering their firearms rights, and further opined that such evidence was likely to be inconclusive. Id. at 681. Indeed, the historical evidence was inconclusive even as to the more-deeply studied issue of whether felons enjoyed the right to keep and bear arms. Id. at 680-81. The lack of historical evidence effectively resulted in the court resolving the scope issue in favor of the plaintiff, as the court went on to "assum[e]" that the Second Amendment's scope did extend to domestic violence misdemeanants. Id. at 681.

The Seventh Circuit took a similar approach in Ezell v. Chicago, which addressed the validity of Chicago's ban on shooting ranges. The court framed the scope question as "whether range training is categorically unprotected by the Second Amendment," and ultimately concluded that range training is within the Second Amendment's scope of protection. Ezell, 2011 WL 2623511, at *14. In doing so, the court relied in part on logic, concluding that firearms training is an implicit corollary to the right to possess a firearm in the home for self-defense. But the court also concluded that "a textual and historical inquiry into original meaning" was necessary. Id. at *12.

Two aspects of Ezell's historical inquiry are particularly noteworthy. First, while Heller focused on what the public understood the right to mean in the period surrounding the Second Amendment's ratification in 1791, Ezell concluded that, based on McDonald, the most relevant historical period for a challenge to a state or local regulation was that surrounding the ratification of the Fourteenth Amendment in 1868. Id. at *12, *14. Second, the historical lens used by the court essentially required the city to establish a long tradition of regulations that precisely mirrored the city's current law. The city had cited numerous 18th and 19th century statutes prohibiting the discharge of firearms in cities. This was proffered to show that there was not a widespread understanding among prior generations that shooting firearms, including in a shooting range, was protected conduct; if such an understanding existed, citizens would not have enacted laws prohibiting it. However, the court concluded that this historical evidence was insufficient because the statutes, by and large, did not specifically address controlled target practice, or because they were not total prohibitions (some contained exceptions that allowed discharge under certain circumstances, such as obtaining a permit from the governor or city council). Id. at *14-15. This extremely high hurdle resulted in the scope issue being resolved against the city.

B. Cases de-emphasizing history

In contrast to these cases, other courts take greater heed of Heller's list of presumptively lawful restrictions and, in light of the tension between that list and a strict historical analysis into original understanding, view Heller as calling for a much more relaxed historical inquiry. For instance, in an en banc decision upholding the federal ban on firearm possession by domestic violence misdemeanors, the Seventh Circuit concluded that Heller should not be read as requiring a long and exact historical pedigree. United States v. Skoien, 614 F.3d 638 (7th Cir. 2010). The court noted that one of the presumptively lawful restrictions listed by Heller was the prohibition of firearms by felons. But, as the court explained, such a restriction is not necessarily "longstanding" – the first federal ban on possession by felons was not enacted until 1938, and it was not extended to non-violent felons until 1961. Id. at 641. From this, the court concluded that modern-day restrictions "need not mirror limits that were on the books in 1791" in order to be valid. Id. The First Circuit took a similar tack in United States v. Booker, 644 F.3d 12 (1st Cir. 2011). Citing Skoien, the court noted that the federal ban on possession by felons (18 USC § 922(g)(1)) "is firmly rooted in the twentieth century and likely bears little resemblance to laws in effect at the time the Second Amendment was ratified." Id. at 24. The court further rejected the idea that "the relative age of a regulation is the key to its constitutionality." Id. See also Marzzarella, 614 F.3d at 94 ("it is not clear that pre-ratification presence is the only avenue to a categorical exception").

C. Cases omitting history

Perhaps because of the difficulties attendant to a focus on history, some courts analyze the scope question without historical analysis. For instance, in evaluating the District of Columbia's firearm registration requirements, the district court in Heller II did not examine whether there was a historical tradition of registration regulations or whether unregistered firearms have historically been thought to be within the scope of the right to keep and bear arms. Rather, it concluded that the registration requirements fell within the Second Amendment's scope because of how they operated: Since one could not lawfully possess a firearm without registering it, the registration requirements implicated the right to have a firearm in the home for self-defense. Heller II, 698 F. Supp.2d at 190. Other courts go even further, and essentially avoid the scope question altogether. They simply assume that the Second Amendment does encompass the conduct in question, and then proceed to evaluate the claim under the appropriate standard of scrutiny. See, e.g., Nordyke, 644 F.3d at 786-88; United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011) (upholding, under intermediate scrutiny, federal restriction on loaded firearms in motor vehicles on national parkland); Peruta, 758 F. Supp.2d 1106 (upholding, under intermediate scrutiny, policy prohibiting carrying of loaded handguns in public without showing of good cause). It is to

that question that we now turn.

PART III

WHAT IS THE "LEVEL OF SCRUTINY" COURTS HAVE APPLIED SINCE HELLER

INTRODUCTION

The Supreme Court's decision in Heller did not define the full contours of the Second Amendment, and it left for lower courts to decide how laws impacting the Second Amendment should be analyzed. The Supreme Court invalidated the District of Columbia's handgun ban, but it did not identify a particular standard of review. Instead the Court held that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights [the D.C. handgun ban] would fail constitutional muster." Heller 128 S.Ct. at 2817-18.

The Supreme Court did, however, provide some guidance to lower courts by signaling that the "rational basis test" is not the correct level of scrutiny. The Heller Court made clear:

> [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 with the separate constitutional prohibitions on irrational laws and would have no effect.

Heller, 128 S.Ct. at 2818 n.27.

There is one other section of the Heller opinion discussed earlier which is worth mentioning again. It ostensibly talks about the scope of the Second Amendment, but I think it also bears on what level of scrutiny may be applicable to certain criminal statutes or state and local regulations. This language is quoted or discussed in most lower court opinions since Heller. In dicta, the Supreme Court said:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to case doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17. The Court went on to say that this list of "presumptively lawful

regulatory measures" was exemplary and not exhaustive. Id. at 2817 n.26.

Let's see how the lower courts have wrestled with this language in particular and how Heller has been interpreted in general. I will focus on what standards of review courts have used when evaluating restrictions that impact the Second Amendment. I first want to examine how criminal defendants have fared when seeking to invalidate various federal firearm laws because they allegedly violate the Second Amendment.

I will end the presentation highlighting three civil cases – Heller II, which challenged the District of Columbia's comprehensive gun laws; Nordyke out of the 9th Circuit; and Ezell, which invalidated the City of Chicago's ban on gun ranges which was enacted in 2010 as part of Chicago's comprehensive regulatory scheme.

CRIMINAL CASES

Instead of identifying all of the cases in the federal courts where criminal defendants have invoked their Second Amendment rights, I want to highlight criminal cases from three different circuits, the 3rd, the 10th and the 7th.

None of these courts have treated Heller and the Second Amendment in an identical fashion, but two of the three circuits seem to have settled on a form of intermediate scrutiny – the 3rd and the 10th. The 7th Circuit applied its own version of intermediate scrutiny in the criminal case I will be discussing but chose not to decide what the appropriate level of scrutiny might be in future Second Amendment cases.

1. United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010)

In Marzzarella, the 3rd Circuit upheld a criminal conviction under 18 USC § 922(k) which prohibits the possession of a handgun with obliterated serial numbers. The decision is important for several reasons, but I want to focus on two aspects of the case.

First, the court set forth a two-part test:

> [W]e ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, the [court's] inquiry is complete. If it does, [the court must] evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

Id. at 89.

Second, the court held that intermediate scrutiny and not strict scrutiny should be the proper test. It reached this conclusion after analogizing the Second Amendment to the First Amendment. The court saw a parallel in First Amendment jurisprudence between lawful limitations on the exercise of First Amendment rights (such as time, place, and manner restrictions) and improper regulations based on content. Id. at 89 n.4. Noting that strict scrutiny is not always triggered in First Amendment challenges, it held that "[s]trict scrutiny does not apply automatically any time an enumerated right is involved." Id. at 96.[1]

Instead of using language associated with "strict scrutiny," namely "compelling" or "narrowly tailored," the court concluded that the government's objective must be "significant," "substantial" or "important," and the fit between the law and the objective can be less than perfect.

The court applied intermediate scrutiny and held that § 922(k) served an important law enforcement purpose by enabling the tracing of weapons by tracking serial numbers. "The goal of § 922(k), in particular, is to assist law enforcement by making it possible to use the serial number of a firearm recovered in a crime to trace and identify its owner and source." Id. at 98. The court also found a "reasonable fit" because the statute only reached conduct which rendered a firearm untraceable. Id.

2. United States v. Reese, 627 F.3d 792 (10th Cir. 2010)

The second case worth mentioning is out of the 10th Circuit, United States v. Reese, 627 F.3d 792 (10th Cir. 2010). The decision does not set forth any new legal principles, but it gives credence to the 3rd Circuit's analysis by adopting the two-part test used in Marzzarella.

In this case, the defendant, James Reese, had been charged with three counts of possessing firearms in violation of 18 USC § 922(g)(8). The statute prohibits the possession of firearms by a person subject to a domestic protective order.[2] The protective order had been entered in 2005 and had a 50-year duration

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[1] "Strict scrutiny" requires a party seeking to withstand a challenge to establish a compelling governmental interest and the law must be "narrowly tailored." See, e.g., FEC v. Wisconsin Right to Life, Inc. 551 U.S. 449, 465 (2007).

[2] Reese was subject to a protective order issued by the Hawaii Family Court, which restricted Reese from threatening or physically abusing his ex-wife and children. The order

period; it was in place to protect his former wife who had filed for divorce. In 2009, after Reese had moved to New Mexico from Hawaii, Reese was charged by New Mexico authorities with having over 50 guns in his home and place of business.

Reese challenged the charges and argued that § 922(g)(8) was unconstitutional on its face and as applied. The district court agreed with Reese, finding that "'the 50-year Order of Protection' was not 'narrowly tailored to serve the governmental interest of reducing domestic violence.'" Id. at 799. The Government appealed to the 10th Circuit.

The 10th Circuit reversed and held that § 922(g)(8) was in fact constitutional after applying intermediate scrutiny. The Court primarily relied on the framework developed in Marzzarella. The Reese court found that § 922(g)(8) imposed a burden on Reese's Second Amendment rights because he was barred from possessing any weapons for the duration of the 50-year protection order.

Turning to the second part of the test as defined by the 3rd Circuit, the Reese court adopted the same definition of intermediate scrutiny – whether the challenged law serves a "significant," "substantial" or "important" governmental interest and then whether there is a "fit" between the governmental interest and the law in question.[3] The court accepted the government's contention that § 922(g)(8) was designed to keep firearms away from those who pose a threat to the physical safety of family members and that this governmental interest was furthered by the statute. Id. at 803-04. The Reese court noted that § 922(g)(8) affects a narrow class of persons whose prior behavior suggests that they are more likely to engage in domestic violence. The court also quoted the Heller language that "longstanding prohibitions" are not unconstitutional.

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expressly revoked "all permits/licenses" that Reese had for firearms and required Reese to "immediately turn over all firearms, [and] ammunition." 627 F.3d at 795.

[3] The Reese court held that the government satisfied the intermediate scrutiny test, but just like the 3rd Circuit did in Marzarella, it says in dicta that the statute in question also would satisfy strict scrutiny. The court states: "Even if we were to apply a strict scrutiny test requiring the government to prove that § 922(g)(8) is narrowly tailored to further a compelling interest, **. . .** we are persuaded, for essentially the reasons outlined above, that the government could satisfy these requirements. In particular, the government's interest in preventing armed domestic violence is compelling and the specific requirements outlined in § 922(g)(8) are narrowly tailored to ensure that only persons subject to specific types of domestic protection orders are subject to restrictions on their Second Amendment rights." 627 F.3d at 804 n.4

3. United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)

United States v. Skoien is one of several cases[4] that addresses crimes of domestic violence and whether individuals convicted of these misdemeanor crimes can be deprived of possessing firearms in light of Heller. The 2010 decision is by the 7th Circuit sitting en banc on a petition for rehearing. Ten of the 11 judges on the panel held that 18 USC § 922(g)(9), which prohibits the possession of firearms by those convicted of misdemeanor crimes of domestic violence, is constitutional.

Skoien, who had two such convictions, failed to convince the court that his Second Amendment rights invalidated the possession ban. One of the reasons that this case is so interesting is that the sole dissenting judge, Judge Sykes, had written the original Skoien opinion for a three-judge panel. In her opinion, Judge Sykes had vacated Skoien's conviction and remanded the case to the district court for further proceedings. The panel held that intermediate scrutiny applied and that the government "has the burden of establishing a reasonable fit between its important interest in reducing domestic gun violence and the means chosen to advance that interest – § 922(g)(9)'s total disarmament of domestic violence misdemeanants." United States v. Skoien, 587 F.3d 803, 816 (7th Cir. 2009), vacated 614 F.3d 638 (7th Cir. 2010).

The en banc opinion, written by Chief Judge Easterbrook, upheld § 922(g)(9) and looked at Heller differently from the original panel opinion. I think that Judge Easterbrook's opinion is noteworthy for at least three reasons: First, as discussed above in Part II, the 7th Circuit appears less bound by the language used by the Heller court and its focus on history and 1791. Unlike some courts which have carefully scrutinized the language in Heller that certain "longstanding prohibitions" (discussed above) are constitutional, Judge Easterbrook says:

> We do not think it profitable to parse the passages of Heller as if they contained an answer to the question whether § 922 (g)(9) is valid.. . . . Although the passages we have quoted are not dispositive, they are informative. They tell us that statutory prohibitions on the possession of weapons by some persons are proper – and, importantly for current purposes, that the legislative role did not end in 1791.

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[4] See, e.g., United States v. Booker, 644 F.3d 12 (1st Cir. May 2, 2011); United States v. Chester, 628 F.3d 673 (4th Cir. 2010); United States v. White, 593 F.3d 1199 (11th Cir. 2010).

United States v. Skoien, 614 F.3d at 640 (emphasis added). I think this passage is important because it rejects an approach by some courts that relies almost exclusively on the status of gun laws as they were in 1791.

The second reason that the en banc opinion is important is that it refused to decide what the proper test should be in all future Second Amendment cases. Instead of deciding that strict scrutiny or some form of intermediate scrutiny is the correct test, it accepted the Government's concession that § 922(g)(9) is valid only if it is substantially related to an important governmental interest. The court adopted this version of intermediate scrutiny in this case but said that "we need not get more deeply into the 'levels of scrutiny' quagmire." Id. at 641-42.[5]

Finally, Skoien is important because it set out a road map of how intermediate scrutiny can be satisfied by the Government. The categorical disqualification prohibiting domestic violence misdemeanants from possessing guns did not have to be proven by evidence presented in a court of law. "Heller did not suggest that disqualifications would be effective only if the statute's benefits are first established by admissible evidence." Id. at 641. The court concluded that "logic and data" established the substantial relationships between § 922(g)(9) and the objective of "preventing armed mayhem." Id. at 642.

CIVIL CASES

According to some estimates, state and local governments are facing over 40 lawsuits challenging firearm regulations under the Second Amendment. There are six suits alone brought against the City of Chicago.

Not surprisingly, I am not going to try to discuss all of these cases in the limited time we have; instead I want to focus on the decisions of three courts which have considered some of the regulatory schemes that have been challenged

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[5] In two criminal cases subsequent to Skoien, the court again avoided deciding the standard of review. See United States v. Williams, 616 F.3d 685 (7th Cir. 2010); United States v. Yancey, 621 F.3d 681 (7th Cir. 2010). At issue in both Williams and Yancey was whether federal statutes, which prohibited certain classes of persons (felons and unlawful users or addicts of controlled substances, respectively) from possessing firearms, violated the Second Amendment. In both cases, the 7th Circuit concluded that the Government had satisfied the framework set forth in Skoien. There was "a strong showing that the challenged subsection [of the statute] was substantially related to an important governmental objective." Yancey, 621 F.3d at 683; see also Williams, 616 F.3d at 692-93; Skoien, 614 F.3d at 641-42. The court reiterated that it was reserving "the question whether a different kind of firearm regulation might require a different approach." Yancey, 621 F.3d at 683.

since the Supreme Court's decision in Heller and examine the level of scrutiny that has been applied. These cases should be of interest to local governments who want to regulate the possession or use of firearms.

1. Heller v. District of Columbia, 698 F.Supp.2d 179 (D.D.C 2010) ("Heller II")

The first case is from the District of Columbia. In Heller v. District of Columbia, the district court upheld a comprehensive gun law that was enacted after D.C.'s handgun ban had been struck down by the Supreme Court. In Heller II, the plaintiffs challenged three parts of the newly enacted ordinance: (1) the firearms registration procedures; (2) the law's prohibition on assault weapons; and (3) the prohibition on large capacity ammunition feeding devices. The parties filed cross motions for summary judgment and in a 30-page opinion the court granted the District's motion and upheld the D.C. ordinance.

The opinion is important for three reasons:

First, it held that intermediate scrutiny is the appropriate standard of review. Id. at 186. Intermediate scrutiny is defined by the court as "whether the measure is substantially related to an important government interest." Id. at 188.

Second, the court held that this level of scrutiny "will come into play, of course, only in cases in which the law implicates the core Second Amendment right, namely, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" Id. (quoting Heller, 128 S.Ct. at 2821) (emphasis added)

Third, if a restriction does not implicate "the core Second Amendment right," intermediate scrutiny is not applied and the court will likely uphold the restriction and give deference to legislative findings. Id. at 193-94.

Applying these principles, the district court subjected the registration requirements to intermediate scrutiny. "Because no individual may possess an unregistered firearm in the District, the registration requirements plainly implicate the core Second Amendment right." Id. at 190. After citing extensively from the legislative history of the law, the court held that the registration requirements satisfied intermediate scrutiny:

> Because the [City] Council provided ample evidence of the ways in which the registration requirements will effectuate the goal of promoting public safety, and because public safety is a quintessential matter of public regulation, the court concludes that there is at least a substantial nexus between the registration

requirements and the important governmental interest underlying those requirements.

Id. at 192-93.

The court also ruled in favor of D.C. on the assault weapons ban and the ban on large capacity ammunition, noting that they "fall outside the scope of the core Second Amendment right, and the plaintiffs' constitutional claims with respect to the bans on these weapons must therefore fail." Id. at 195. The court reached this conclusion after reviewing the legislative history which found that assault weapons do not "have any 'legitimate use as self-defense weapons." Id.[6]

The district court issued its decision in March of 2010, and the case is on appeal. The case is fully briefed, and we are all eagerly awaiting a decision by the D.C. Circuit which was expected in August.

2. Nordyke v. King, 644 F.3d 776 (9th Cir. 2011)

In May 2011, the 9th Circuit issued yet another opinion involving the Nordykes, two gun show promoters who challenged Alameda County's ban on gun shows at outdoor public fairgrounds. In Nordyke v. King, 644 F.3d 776 (9th Cir. 2011), the court held that "heightened scrutiny," but not strict scrutiny, should apply to regulations which substantially burden the right to keep and bear arms for self defense. Id. at 786. The corollary of this standard also means that regulations which are not a substantial burden on the right are subject to a "non-heightened" level of scrutiny, i.e., rational basis. The 9th Circuit justified its standard by noting that "in a variety of contexts, the court applies mere rational basis scrutiny to laws that regulate, but do not significantly burden, fundamental rights." Id. at 785. As part of the analysis the court said the appropriate inquiry is "whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes." Id. at 787.

In the end, however, the 9th Circuit did not apply this new test to the facts of the case; instead it ruled that the Nordykes should be permitted to file a second amended complaint which will be considered by the district court. However, it is worth noting how the court frames the issue for remand:

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[6] In ruling in favor of D.C., the court stated: "The Council held extensive hearings and heard from numerous witnesses on both sides of the gun control divide before determining that assault weapons and large capacity ammunition feeding devices constitute weapons that are not in common use, are not typically possessed by law-abiding citizens for lawful purposes and are "dangerous and unusual" within the meaning of Heller. The court does not see fit to override that decision." Id. at 194.

> The Nordykes only challenge the ordinance as an effective prohibition on gun shows on county fairgrounds. That is, they complain they cannot display and sell guns on county property. **. . .** Thus, the proper inquiry is whether a ban on gun shows at the county fairgrounds substantially burdens the right to keep and bear arms; not whether a county can ban all people from carrying firearms on all of its property for any purpose.

Id. at 786-787.

We will continue to see how this multi-year saga plays out in the 9th Circuit on remand, but I think the 9th Circuit's decision is important because that court may have developed the most lenient version of intermediate scrutiny we have seen to date.

3. Ezell v. City of Chicago, __ F.3d __, 2011 WL 2623511 (7th Cir. 2011)

The final case we will discuss is also the most recent. On July 6, 2011, a three-judge panel of the 7th Circuit ruled in Ezell v. City of Chicago, 2011 WL 2623511 (7th Cir. 2011). In this case, the court, in a opinion by Judge Sykes, reversed a district court decision and granted plaintiffs' request for a preliminary injunction which enjoined Chicago's ban on gun ranges within the city limits. The court created a new framework, one that has its roots in the original panel decision in Skoien authored by Judge Sykes, which was later rejected by the en banc panel.

The court stated that unless it is clear that the activity is "categorically unprotected," the inquiry examines the strength of the government's justification for the restriction. Id. at 13. This then requires a court to decide what level of heightened scrutiny applies. According to Judge Sykes, this depends how closely the core of the Second Amendment right is implicated. The court noted that in Skoien it was appropriate to apply intermediate scrutiny "because the claim was not made by a 'law-abiding responsible citizen' as in Heller." However, in Ezell the court held that a more rigorous standard should apply because the City's restriction "is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self defense." Ezell, 2011 WL 2623511, at *17.

Although the court said the level of review is "not quite 'strict scrutiny,'" plaintiffs may argue that it is closer to that standard of scrutiny than any standard set by other courts of appeal. The court concluded that the City had not met its burden, so the gun range ban was enjoined. The court set forth the burden the City had to meet on remand:

> To be appropriately respectful of the individual rights at issue in this case, the City bears the burden of establishing a strong public-interest justification for its ban on range training: The City must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights. Stated differently, the City must demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.

Id.

CONCLUSION

It may be too early to say what standard of review will ultimately be agreed upon for assessing the constitutionality of restrictions that implicate the Second Amendment, and the standard could very well differ based on the type of claim. At this time, however, it appears that a growing number of courts are applying some form of intermediate scrutiny. What remains to be seen is how and when intermediate scrutiny is applied, and perhaps, equally importantly, how a governmental entity can satisfy its burden under that test.