United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 2010 Decided October 4, 2011

No. 10-7036

DICK ANTHONY HELLER, ET AL.,
APPELLANTS

v.

DISTRICT OF COLUMBIA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01289)

Stephen P. Halbrook argued the cause for appellants. With him on the briefs was *Richard E. Gardiner*.

William J. Olson, *Herbert W. Titus*, and *John S. Miles* were on the brief for *amici curiae* Conservative Legal Defense and Education Fund, et al. in support of appellants.

Todd S. Kim, Solicitor General, Office of the Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were *Peter J. Nickles*, Attorney General, *Donna M. Murasky*, Deputy Solicitor General, and *Holly M. Johnson*, Assistant Attorney General.

Matthew M. Shors was on the brief for *amici curiae* Professional Historians and Law Professors, et al. in support of appellees.

Paul R.Q. Wolfson, *A. Stephen Hut, Jr.*, *Joshua M. Salzman*, and *Jonathan E. Lowy* were on the brief for *amici curiae* The Brady Center to Prevent Gun Violence, et al. in support of appellees.

Before: GINSBURG, HENDERSON and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

III. Conclusion

For the reasons stated above, we affirm the judgment of the district court with respect, first, to the requirement of mere registration as applied to handguns and expressed in D.C. Code §§ 7-2502.01(a) and 7-2502.03(b), and second, to the ban on "assault weapons" and large-capacity magazines, as they are defined in §§ 7-2502.02(a)(6), 7-2501.01(3A)(A)(i)(I), (IV), and 7-2506.01(b). With respect to the registration requirements in §§ 7-2502.03(a)(10), 7-2502.03(a)(11), 7-2502.03(a)(13)(A), 7-2502.03(d), 7-2502.03(e), 7-2502.04, and 7-2502.07a, and all the registration requirements (including §§ 7-2502.01(a) and 7-2502.03(b)) as applied to long guns, *see* Part II.B.3.c, the judgment is vacated and this matter is remanded to the district court for further proceedings consistent with this opinion.

So ordered.

Appendix: Regarding the Dissent

Our colleague has issued a lengthy dissenting opinion explaining why he would strike down both the District's registration requirements and its ban on semi-automatic rifles. We respond to his main arguments below.

A. Interpreting *Heller* and *McDonald*

A substantial portion of the dissent is devoted to arguing *Heller* and *McDonald* preclude the application of heightened (intermediate, or for that matter, strict) scrutiny in all Second Amendment cases. The dissent reasons that *Heller* rejected balancing tests and that heightened scrutiny is a type of

balancing test. As we read *Heller*, the Court rejected only Justice Breyer's proposed "interest-balancing" inquiry, which would have had the Court ask whether the challenged statute "burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." 554 U.S. at 689–90 (Breyer J., dissenting). That is, Justice Breyer, rather than ask merely whether the Government is promoting an important interest by way of a narrowly tailored means, as we do here, would have had courts in Second Amendment cases decide whether the challenged statute "imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate." *Id.* at 693. Thus, although Justice Breyer would have had us assess whether the District's handgun ban "further[s] the sort of life-preserving and public-safety interests that the Court has called 'compelling,'" *id.* at 705 (citation omitted), the key to his "interest-balancing" approach was "proportionality"; that is, he would have had us weigh this governmental interest against "the extent to which the District's law burdens the interests that the Second Amendment seeks to protect," *id.* at 706.

Our dissenting colleague asserts (at 25) heightened scrutiny is also "a form of interest balancing" and maintains that strict and intermediate scrutiny "always involve at least some assessment of whether the law in question is sufficiently important to justify infringement on an individual constitutional right." Although, as he points out, the Supreme Court has in a few opinions applying heightened scrutiny — out of scores if not hundreds of such opinions — used the word "balance," heightened scrutiny is clearly not the "interest-balancing inquiry" proposed by Justice Breyer and rejected by the Court in *Heller*. The Court there said, Justice Breyer's proposal did not correspond to any of "the traditionally expressed levels (strict scrutiny, intermediate

scrutiny, rational basis)," 554 U.S. at 634, but was rather "a judge-empowering 'interest-balancing inquiry'" that would have a court weigh the asserted governmental interests against the burden the Government would place upon exercise of the Second Amendment right, a balancing that is not part of either strict or intermediate scrutiny.

The dissent further contends *McDonald* confirms the Supreme Court's rejection of heightened scrutiny in Second Amendment cases because a plurality of the Court there said "Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." 130 S. Ct. at 3050. That observation was clearly and specifically directed to Justice Breyer's interest-balancing inquiry, as the very next sentence shows: "As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion." *Id.* Moreover, strict and intermediate scrutiny do not, as the dissent asserts (at 19), "obviously require assessment of the 'costs and benefits' of government regulations." Rather, they require an assessment of whether a particular law will serve an important or compelling governmental interest; that is not a comparative judgment.

If the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at least something to that effect. *Cf. Heller*, 554 U.S. at 628 n.27 (expressly rejecting rational basis review). The Court did not say anything of the sort; the plaintiffs in this case do not suggest it did; and the idea that *Heller* precludes heightened scrutiny has eluded every circuit to have addressed that question since *Heller* was issued. *See* First Circuit: *United States v. Booker*, 644 F.3d 12, 25 (2011)

(requiring "a substantial relationship between the restriction and an important governmental objective"); Third Circuit: *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny); Fourth Circuit: *United States v. Masciandaro*, 638 F.3d 458, 471 (2011) (same); *Chester*, 628 F.3d at 683 (same); *id.* at 690 (Davis, J., concurring) (same); Seventh Circuit: *Ezell*, 2011 WL 2623511, at *17 (applying "more rigorous showing" than intermediate scrutiny, "if not quite 'strict scrutiny'"); *id.* at *21–22 (Rovner J., concurring) (endorsing intermediate scrutiny); *Williams*, 616 F.3d at 692–93 (applying intermediate scrutiny); *United States v. Skoien*, 614 F.3d 638, 641–42 (2010) (en banc) (upholding law upon assumption intermediate scrutiny applies); Ninth Circuit: *Nordyke*, 644 F.3d at 786 n.9 (reserving "precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights"); *id.* at 795 (Gould J., concurring in part, "would subject to heightened scrutiny only arms regulations falling within the core purposes of the Second Amendment" and "would subject incidental burdens on the Second Amendment right ... to reasonableness review"); Tenth Circuit: *Reese*, 627 F.3d at 802 (applying intermediate scrutiny).

The dissent (at 30–31) takes us to task for suggesting a restriction on a core enumerated constitutional right can be subjected to intermediate scrutiny. This assertion, true or false, is simply misplaced; we apply intermediate scrutiny precisely because the District's laws do not affect the core right protected by the Second Amendment. *See supra* at 22–24, 31–32.

Unlike our dissenting colleague, we read *Heller* straightforwardly: The Supreme Court there left open and untouched even by implication the issue presented in this case. The Court held the ban on handguns unconstitutional

without at the same time adopting any particular level of scrutiny for Second Amendment cases because it concluded that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster." *Id.* at 628–29 (internal quotation marks and citation omitted); *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 628–30). Nothing in *Heller* suggests a case involving a restriction significantly less severe than the total prohibition of handguns at issue there could or should be resolved without reference to one or another of the familiar constitutional "standards of scrutiny." On the contrary, the Supreme Court was explicit in cautioning that because *Heller* was its "first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." *Heller*, 554 U.S. at 635; *see also, e.g.*, *Ezell*, 2011 WL 2623511, at *13 (with the exception of "broadly prohibitory laws restricting the core Second Amendment right," courts are "left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe enumerated constitutional rights"); *Chester*, 628 F.3d at 682 ("*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context"); Volokh, *supra*, at 1456 ("The Court [in *Heller*] did not discuss what analysis would be proper for less 'severe' restrictions, likely because it had no occasion to").

Having rejected the possibility of heightened scrutiny, the dissent (at 31) goes on to find in *Heller* this proposition: "Gun bans and gun regulations that are not longstanding or sufficiently rooted in text, history, and tradition are not

consistent with the Second Amendment individual right." We do not see this purportedly "up-front" test "announced" anywhere in the Court's opinion. The Court in *Heller* said certain "longstanding" regulations are "presumptively lawful," 554 U.S. at 626–27 & n.26, but it nowhere suggested, nor does it follow logically, that a regulation must be longstanding or "rooted in text, history, and tradition" in order to be constitutional. As we have said, the Court struck down the handgun ban because it so severely restricted the core Second Amendment right of self-defense in the home that it "would fail constitutional muster" under any standard of scrutiny. Likewise, the Court invalidated the District's requirement that handguns "in the home be rendered and kept inoperable" because that requirement "makes it impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 630. The Court in *Heller* did consider whether there were historical analogues to the handgun ban, but only to note, primarily in response to Justice Breyer's dissent, that because earlier laws were far less restrictive, they did not support the constitutionality of a ban on handguns. *See id.* at 632 ("Nothing about [the] fire-safety laws" cited by Justice Breyer "undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns"); *id.* ("other founding-era laws" cited by Justice Breyer "provide no support for the severe restriction in the present case"). In any event, we think it clear *Heller* did not announce the "up-front" test applicable to all Second Amendment cases that our dissenting colleague goes to great lengths to "divine" from that opinion.

In sum, *Heller* explicitly leaves many questions unresolved and says nothing to cast doubt upon the propriety of the lower courts applying some level of heightened scrutiny in a Second Amendment challenge to a law significantly less restrictive than the outright ban on all

handguns invalidated in that case. Although *Heller* renders longstanding regulations presumptively constitutional, it nowhere suggests a law must be longstanding or rooted in text, history, and tradition to be constitutional.

B. Registration Requirements

Our dissenting colleague contends (at 47) the historical registration laws we cite do not support the District's basic registration requirement because to rely upon those laws as historical precedents "is to conduct the *Heller* analysis at an inappropriately high level of generality." In fact, however, the historical regulations and the District's basic registration requirement are not just generally alike, they are practically identical: They all require gun owners to give an agent of the Government basic information about themselves and their firearm.

In any event, we do not decide, but rather remand to the district court, the question whether the District's novel registration requirements and all its registration requirements as applied to long guns withstand intermediate scrutiny. *See supra* at 28. Accordingly, those registration requirements will be deemed constitutional only if the District shows they serve its undoubtedly important governmental interests in preventing crimes and protecting police officers.

C. Assault Weapons

In arguing *Heller* requires holding unconstitutional the District's ban on certain semi-automatic rifles, the dissent relies heavily upon the idea that *Heller* held possession of semi-automatic handguns is "constitutionally protected." The Court's holding in *Heller* was in fact narrower, condemning as unconstitutional a prohibition of all handguns, that is, a ban

on the "entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. 554 U.S. at 628. A narrower prohibition, such as a ban on certain semi-automatic pistols, may also "fail constitutional muster," *id.*, but that question has not yet been decided by the Supreme Court.[*] Therefore, the dissent (at 32–33) mischaracterizes the question before us as whether "the Second Amendment protects semi-automatic *handguns* but not semi-automatic *rifles*." The dissent at (38 n.16) insists it is "implausible" to read *Heller* as "protect[ing] handguns that are revolvers but not handguns that are semi-automatic." We do not, however, hold possession of semi-automatic handguns is outside the protection of the Second Amendment. We simply do not read *Heller* as foreclosing every ban on every possible sub-class of handguns or, for that matter, a ban on a sub-class of rifles. *See Marzzarella*, 614 F.3d at 101 (upholding prohibition on possession of handguns with serial numbers obliterated); *cf.* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 422 (2009) (*Heller* "avoided—perhaps in part because it had little cause to consider—categorization at the level of classification: that is, the creation of subcategories that may warrant only intermediate protection").[**]

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[*] Indeed, as we noted in Part I, the present plaintiffs, whilst in the district court, separately and specifically challenged the ban on certain semi-automatic pistols.

[**] Moreover, despite the dissent's contrary assertion (at 36), a number of states and municipalities, representing over one fourth of the Nation's population, ban semi-automatic rifles or assault weapons, and these bans are by no means "significantly narrower" than the District's ban. *See* N.Y. Penal Law §§ 265.00(22), 265.02(7), 265.10 (prohibiting possession, manufacture, disposal, and transport of assault weapons, including AR-15); Conn. Gen. Stat. §§ 53-202a, 53-202c (prohibiting possession of semiautomatic firearms, including AR-15); Cal. Penal Code §§ 12276–12282

The dissent, indulging us by assuming some level of heightened scrutiny applies, maintains (at 37) "D.C. cannot show a compelling interest in banning semi-automatic rifles." Why not? "[B]ecause the necessary implication of the decision in *Heller* is that D.C. could not show a sufficiently compelling interest to justify its banning semi-automatic handguns." That conclusion, however, is neither to be found in nor inferred from *Heller*. As we explain above, the Court in *Heller* held the District's ban on all handguns would fail constitutional muster under any standard of scrutiny because the handgun is the "quintessential" self-defense weapon. *See* 554 U.S. at 629 ("There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift

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(same); Haw. Rev. Stat. §§ 134-1, 134-4, 134-8 (banning assault pistols); Mass. Gen. Laws ch. 140, §§ 121–123 (banning assault weapons as defined in expired federal law); Md. Code, Criminal Law, §§ 4-301–4-306 (prohibiting assault pistols); N.J. Stat. Ann. §§ 2C:39-1(w), 2C:39-5 (prohibiting assault firearms, including AR-15); Legal Cmty. Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State, and Selected Local Guns Laws*, 25–26 (Feb. 2008), http://www.lcav.org/publications-briefs/reports_analyses/RegGuns.entire.report.pdf (Boston, Cleveland, Columbus, and New York City prohibit assault weapons, including semi-automatic rifles); Aurora, Ill., Code of Ordinances § 29-49 (prohibiting assault weapons, including AR-15); City Code of Buffalo N.Y. § 180-1 (prohibiting assault weapons, including assault rifles); Denver Colo. Mun. Code § 38-130 (same); City of Rochester Code § 47-5 (same). In fact, the District's prohibition is very similar to the nationwide ban on assault weapons that was in effect from 1994 to 2004. *See* 18 U.S.C. §§ 921(a)(30), 922(v)(1) (prohibiting possession of semi-automatic rifles and pistols, including AR-15).

and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police"). The same cannot be said of semi-automatic rifles.

Finally, in criticizing our application of intermediate scrutiny to the ban on assault weapons, our dissenting colleague says (at 33, 40) "it is difficult to make the case that semi-automatic rifles are significantly more dangerous than semi-automatic handguns" "because handguns can be concealed." It is not our place, however, to determine in the first instance whether banning semi-automatic rifles in particular would promote important law-enforcement objectives. Our role is narrower, *viz.*, to determine whether the District has presented evidence sufficient to "establish the reasonable fit we require" between the law at issue and an important or substantial governmental interest. *Fox*, 492 U.S. at 480.