IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, *ET AL.*, *Appellants*,	)	
v.	)	No. 04-7041
DISTRICT OF COLUMBIA, *ET AL.*, *Appellees.*	)	

OPPOSITION TO MOTION TO LIFT STAY OF MANDATE

On May 24 and July 26, 2007, with the agreement of counsel for Dick Anthony Heller, the only appellant in this case held to have standing, this Court properly exercised its discretion to enter orders staying issuance of the mandate pending the filing of a petition for a writ of certiorari by the District of Columbia and its Mayor, Adrian M. Fenty. On September 4, the District appellees filed a timely petition in the Supreme Court (No. 07-290).[1] On the same day, they filed a letter with this Court informing it of the petition pursuant to F.R.A.P. 41(d)(2)(B). Given that this rule provides that a timely petition and letter result in the continuation of a previously granted stay "until the Supreme Court's final disposition," a reasonable expectation arose that the status quo would remain in effect until the Supreme Court finally disposes of this case.

Contrary to that expectation and without citing a single case in which any court has altered a stay of the mandate in a case pending before the Supreme Court, Heller now urges this Court to lift its stay in part and issue a partial mandate because, he contends, the District has conceded the unconstitutionality of one particular provision of its gun-control regulatory

[1] A copy of the petition, without the appendix, is attached.

scheme. His reasons for seeking such relief are unsound and his motion should therefore be denied.

1. The question presented in the petition for certiorari is: "Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns." Pet. i. The petition urges that the decision of this Court invalidating the District's handgun ban is wrong for three independent reasons: (1) "the text and history of the Second Amendment establish that it protects weapons possession and use only in connection with service in state-regulated militias"; (2) "even if there is a right to possess and use weapons unrelated to militia service, the Second Amendment restricts only federal interference with state-regulated militias and state-recognized gun rights"; and (3) "in any event," the District's handgun ban "does not infringe whatever right the Second Amendment could be read to protect, because it is eminently reasonable to permit private ownership of other types of weapons, including shotguns and rifles, but ban the easily concealed and uniquely dangerous modern handgun." Pet. 2. Thus, contrary to Heller's contention, the question presented in the petition substantially encompasses the arguments the District and Mayor Fenty stated they "'potentially would present'" in seeking a stay of the mandate in this Court. Motion to Lift Stay of Mandate 3 (quoting Appellees' Unopposed Motion for Stay of Mandate 2); *see* Pet. 2, 11-30.

The petition states that D.C. Code § 7-2507.02, which requires firearms kept at home to be "unloaded and disassembled or bound by a trigger lock or similar device," does "not

require extensive discussion." Pet. 7 n.2. The petition relates that this Court "read this provision to forbid loading, assembling, and unlocking even a lawfully possessed firearm for use in self-defense" and held the provision unconstitutional on that reading, but that "[t]he District does not . . . construe this provision to prevent the use of a lawful firearm in self-defense." *Id.*; *see Parker v. District of Columbia*, 478 F.3d 370, 400-01 (D.C. Cir. 2007).

2. Heller's motion rests on the incorrect premise that "it appears the city has conceded the unconstitutionality of" D.C. Code § 7-2507.02 — what he calls "the functional firearms ban" but is more fairly characterized as a safe-storage provision.[2] Motion 4. There has been no such concession. To the contrary, if the District and its Mayor should prevail on either of their first two arguments, the Supreme Court's disposition would necessarily invalidate this Court's ruling on the constitutionality of D.C. Code § 7-2507.02 (whether or not this Court's reading of that local law is correct). If, for example, the Supreme Court should conclude that any right protected by the Second Amendment is limited to weapons possession and use in connection with service in state-regulated militias, this Court's constitutional ruling would fall. A similar result would obtain if the Supreme Court should rule that laws limited in

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[2]The provision refers to how citizens are to "keep" firearms and can fairly be interpreted to prescribe how citizens are to keep them under normal circumstances, not emergencies that require self-defense. Thus, the District and the Mayor argued before this Court that the provision should not be read to prohibit use of properly registered firearms in self-defense: "The Council appears to have recognized that on rare occasions, in the event of a true emergency when necessary for self-defense, a gun could be unlocked. Otherwise there would have been no point to [a passage in the legislative history indicating] that locked guns can be ready for use in under a minute." Appellees' Brief at 17. The District appellees do not respond to the numerous other mischaracterizations of the petition for certiorari in Heller's motion because they should not affect the disposition of the motion.

scope to the District of Columbia do not implicate the Second Amendment. Thus, the stay of the mandate to which Heller has previously consented and which he apparently agrees should continue as to the handgun ban (Motion 2-4, 8-9) should also continue as to D.C. Code § 7-2507.02.

The third argument presented in the petition is that the handgun ban is reasonable, and hence constitutional under any reading of the Second Amendment. It bears emphasis that the District appellees do not contend that a ban on the use of all firearms for self-defense (as Heller and this Court interpret D.C. Code § 7-2507.02) would be reasonable. To the contrary, the question presented is based on the premise that rifles and shotguns are available to District residents for use in self-defense.[3] In its decision, this Court reached that result by ruling that the Second Amendment requires it.

The fact that the District and the Mayor ultimately agree with Heller and this Court that rifles and shotguns lawfully possessed at home may be used in self-defense does not imply, however, that an injunction should issue. The question whether an injunction should issue depends on whether the provision in question is unconstitutional. Because the District and the Mayor have presented arguments that would result in a ruling of constitutionality if

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[3]Furthermore, if the Supreme Court questions this premise, it has broad authority to add to or reframe the question presented. *See* Stern, Gressman, Shapiro & Geller, Supreme Court Practice 313-14 & 416-17 (8th ed. 2002) (discussing dozens of Supreme Court decisions adding to and reformulating questions presented). Notably, Heller admits elsewhere in his motion that the Supreme Court is free to take up the so-called "functional firearms ban" question; he states that the question the District and its Mayor have presented only "significantly reduce[s] the likelihood that the Supreme Court would grant certiorari on that question." Motion 7-8.

the Supreme Court agrees with them, there is no reason to revisit this Court's decisions to stay issuance of the mandate.

3. Furthermore, Heller's motion is inconsistent with F.R.A.P. 41(d)(2)(B), which states: "The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition." Under a straightforward application of the rule, the stay in this case should continue until the Supreme Court has disposed of this case. Heller does not explain how lifting the stay in part would be consistent with this rule.

The motion is also inconsistent with the interests this rule protects. This matter is now pending with the Supreme Court for its review. Due regard for that Court indicates that this Court should not take measures that may interfere with that review. Issuance of a partial mandate would split the case; the district court would be directed to take action even though the Supreme Court may at a later date issue a holding that would require that action to be vacated. F.R.A.P. 41(d)(2)(B) serves to prevent such inefficient and undesirable proceedings.

4. Finally, as this Court observed, "Heller does not appear to challenge the requirement that a gun ordinarily be kept unloaded or even that a trigger lock be attached under some circumstances." *Parker*, 478 F.3d at 401. Accordingly, Heller's interest during the pendency of this case in the Supreme Court is that he might (1) have to use a registered

firearm in self-defense and (2) be prosecuted for it. The likelihood of the first contingency occurring is distinctly remote, especially given that Heller keeps his firearms outside the District, unlike another plaintiff (held to lack standing) who registered a shotgun for lawful possession in the District. Complaint at 3. Furthermore, given the District's and its Mayor's construction of its law — as permitting homeowners to use lawful weapons in self-defense — the likelihood that Heller will be prosecuted while the case is pending before the Supreme Court is nonexistent. Indeed, Heller adduced no evidence that he (or any other individual) has ever been prosecuted for this activity.

CONCLUSION

This Court should deny the motion. Heller earlier agreed to wait the outcome of proceedings in the Supreme Court and this Court properly stayed its decision. The material circumstances have not changed. As a consequence, neither should the status quo.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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