Gordon D. Schaber Competition

2021-22

Moot Court

Spencer Hicks v.

Placerado Unified School Distirct

10/12/21

FACT

Situation

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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SPENCER HICKS, a Minor, by and through his parents, Robert and Andrea Hicks, Plaintiff & Appellant, vs. PLACERADO UNIFIED SCHOOL DISTRICT, Defendant & Appellee.	Case No.: 2021-501 FACTS

The parties agree the following facts are undisputed:

During the 2020-21 school year, 18-year-old Spencer Hicks was a senior at Placerado High School in the Placerado Unified School District (School District). Because of the Covid-19 pandemic, all of Placerado High School's classes were conducted virtually. The School District required all students to keep their cameras on during class sessions and that all class sessions be recorded when two or more participants joined. Spencer attended class while sitting in his bedroom, at his desk. Directly behind him was his closet.

Throughout the school year, Spencer competed to become valedictorian of his graduating class against several other smart and involved seniors. One such senior, Abby Chu, was in several of Spencer's classes, including Advanced Placement Literature. The two were highly competitive and did not get along. Abby was involved in Future Farmers of America, played several sports and the violin. Spencer wrote for the newspaper, played basketball, volunteered, and participated in Placerado High School's Junior Reserve Officer Training Corps (Junior ROTC) program. Both students had over a 4.0 grade point average.

During several audio and video recorded Literature classes, Spencer and Abby disagreed and argued with one another while discussing class assigned literature. Twice the argument strayed from classwork and the two hurled personal insults at each other. Spencer argued the only reason Abby would get valedictorian over him was because Placerado High School wanted an Asian woman in the position. Abby argued Spencer was a "product of privilege," who would likely become valedictorian and get everything he wanted in life because his parents were rich. The Literature teacher, Ms. Herman, did not know how to use the digital classroom platform and struggled to control Spencer and Abby's arguments.

At the end of April 2021, the Placerado High School faculty selected Abby to be valedictorian. In the Literature class that followed, Spencer was obviously upset and quiet the entire class session. At the end of the class session, Ms. Herman congratulated Abby on being

named valedictorian. Abby thanked Ms. Herman and then said she was "grateful the school could take this opportunity to teach rich kids like Spencer they can't get everything they want." Spencer immediately yelled at Abby to "shut up. You're such a b----. Just get out of my life." Spencer then left the virtual classroom.

After class, Ms. Herman sent Spencer an email requesting to speak with him 15 minutes before class the next day, to which he agreed. At the next class session, Spencer and Ms. Herman signed onto the virtual platform 15 minutes before class started and Ms. Herman began recording the session. Before Ms. Herman could speak to Spencer, Spencer apologized for his behavior the day before. He explained that he was upset about not being named valedictorian and had handled the situation poorly and offensively. He was truly sorry for his behavior and offered to apologize to the class and Abby personally. Ms. Herman accepted Spencer's apology and agreed to his terms. Because there was still over 10 minutes before the class session was to begin, Ms. Herman said she was going to do dishes in her kitchen and left the room. Her camera remained on.

Spencer also left his camera on. He further turned on music and tidied up his room before opening his closet. In the closet, and viewable on the recording, were clothes, shoes, and what appeared to be a gun safe. Spencer took his Junior ROTC uniform out of the closet, which he needed that night to present the colors during the National Anthem at Placerado High School's Divisional Championship baseball game. Spencer hung the uniform on a hook near the closet and then spent

several minutes lint rolling his jacket and then ironing his pants. Spencer then opened the gun safe in his closet and removed the rifle he used as part of the Junior ROTC program. Also visible in the gun safe was a shotgun Spencer used when bird hunting with his family. Spencer then sat down in a chair near his closet and started cleaning the rifle.

At this point, several students joined the Literature class session and saw Spencer cleaning his rifle in front of the shotgun in the gun safe. The students attempted to get Spencer's attention by yelling his name and messaging him in the chat. The messages read: "SPENCER!!! You have guns?!?!?"; "OMG! Put your guns away!!"; "This is school man. NOT cool!" Abby messaged, "This is taking it too far, Spencer! If you want valedictorian that bad, fine...you don't have to shoot me." On the video recording, Abby looked scared and angry.

At the start of the class hour, Ms. Herman reappeared in her home office and on video. She also attempted to get Spencer's attention, to no avail, and could not figure out how to turn off Spencer's camera. Two minutes after the class session officially began, Spencer hastily looked up and ran over to his computer claiming to not have realized class had started. Several students yelled at Spencer for an explanation regarding his firearms, to which he responded that he forgot his camera was on and did not realize everyone could see into his room. Spencer apologized and Ms. Herman ended the class session early.

A Placerado Sheriff Deputy soon arrived at Spencer's house and said he was there to address an issue reported from Spencer's school.

Spencer's father allowed the deputy to enter the home and showed the deputy where the family stored their weapons, including those in Spencer's room. Finding all the guns were legally owned and safely secured, the deputy closed the investigation, left, and reported his findings to the school.

Later in the afternoon, Spencer and his parents were notified that Spencer was immediately suspended for three days for violating the School District's Gun-Free School Policy. The policy had always prohibited the possession of firearms on school property or at school functions, unless the firearm was approved as part of a school event or program and was possessed at the time of participation in that event or program. With the move to a virtual format, the School District updated the policy.

The School District's gun policy now states: "Student's are prohibited from using firearms at school or during school related events. This includes firearms brought onto school property, a school bus, or any location where any activity sponsored by the school is presently being conducted, except when the firearm is approved by the principal as part of a school-sanctioned event or program and is possessed at the time of participation in that event or program. *While class sessions are conducted virtually, students may not have any firearm visible on camera.* Disciplinary action includes immediate suspension and potential expulsion."

After Spencer's parents unsuccessfully pleaded with Placerado High School and the School District to lift the suspension, Spencer's

father contacted a journalist friend and told him what happened. The *Placerado Gazette* ran a story the next morning with the headline "School Suspends Stellar Student For Possessing School Approved Rifle." The School District released the following statement, which was included in the article: "We take the safety of all our students and staff very seriously. Safety is our number one priority, and we will continue to ensure a safe and bully-free school environment whether in-person or distance learning is taking place. Parents send their children to school with the understanding that we will keep them safe. The last thing we can tolerate is inflicting students with the pain and trauma of seeing a gun in a classroom."

By the end of the week, the story had gone viral. National news organizations ran their own versions of the story and interviewed Spencer's father, although Spencer declined to be interviewed. Spencer did provide this comment: "This has been a very stressful time in my life, made worse by a misunderstanding that led to my suspension and damaged my prospects as a candidate to elite academic institutions. I would prefer not to add to this stress by further commenting, and instead wish to move on with my life."

Spencer, however, maintained a presence on social media, especially Instagram, an online photo sharing platform. Instagram, users can "like" an image by tapping on a heart-shaped icon under the post or tapping on the image itself. The person who posted the photo will receive a notification that someone has "liked" his or her post. The

"like" is visible to anyone who can see the image. Through a similar process, users can also "like" comments left by other users on a post.

On Instagram, Spencer was a member of a public group called "Student Warriors for the Second Amendment." Following his suspension, Spencer "liked" a photo series shared to the group's Instaram page. The first photo featured a screenshot of the *Placerado Gazette* article. The second photo included a screenshot of contact information listed on Placerado High School's website. The caption to the second photo read: "The people running this school are idiots! Call, email, or do whatever you have to do to blast this school for ignoring the Second Amendment!!" The photo received 900 likes and 53 comments. Some of the comments were racially motivated insults directed at Abby. To some of those comments, Spencer replied, "Leave her out of this." Spencer "liked" a different comment in this series, where the user wrote "F--- this school."

In a later post on Student Warriors for the Second Amendment's Instagram page, a user posted a screenshot of comments appearing on Placerado High School's Instagram page. The comments from the school's page were both critical and approving of Placerado High School's action of suspending Spencer. The caption to this screenshot read: "Great work! Let's keep at it so the only comments this school sees or hears are from Student Warriors for the Second Amendment." Spencer liked this screenshot and a comment posted on Student Warriors for the Second Amendment's Instagram page that read: "If

students and teachers could be f---ing armed, we wouldn't have school shootings. #armtheschools."

A Placerado High School student took a screenshot of the photos and comments Spencer liked and sent the screenshot to the School District. Within days, news of Spencer's Instagram "likes" had spread, and parents and students voiced concern about Spencer's behavior. Amid these concerns, the Placerado High School principal and other administrators continued to field dozens of daily emails and online comments from Student Warriors of the Second Amendment. Because of this, Placerado High School and the School District asked Spencer to remove the "likes" from the photos and comments on Student Warriors of the Second Amendment's Instagram page. Spencer refused and the School District expelled Spencer for violating its media policy. The School District concedes Spencer liked the photos and comments while off school property and at times when no school events were in progress.

Spencer, through his parents as guardians ad litem, filed a civil complaint in the United States District Court for the Eastern District of California, against the School District. Spencer's complaint alleges the School District violated Spencer's rights under the Second Amendment by disciplining him for unintentionally displaying firearms during a virtual class session. Spencer's complaint further alleges the School District violated Spencer's rights under the First Amendment by expelling him for liking photos and comments on Student Warriors for the Second Amendment's Instagram account.

After an expedited summary judgment proceeding, the district court granted summary judgment in favor the School District. Spencer, through his parents, has appealed to the United States Court of Appeals for the Ninth Circuit. Three issues are now pending before the Ninth Circuit:

1. Did the district court err in concluding the School District's gun policy did not burden activity protected by the Second Amendment and thus presume the gun policy valid, or was a heightened level of review required?
2. If the district court was required to apply intermediate scrutiny to determine whether the School District violated Spencer's right under the Second Amendment by suspending him, do the facts establish a reasonable fit between the School District's substantial interests and application of its gun policy?
3. Did the district court err in concluding the School District did not violate Spencer's right under the First Amendment by expelling him for his social media behavior related to posts concerning his suspension?

LIBRARY

128 S.Ct. 2783
Supreme Court of the United States

DISTRICT OF COLUMBIA et al., Petitioners,
v.
Dick Anthony HELLER.

No. 07–290.
|
Argued March 18, 2008.
|
Decided June 26, 2008.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, pp. 2822 – 2847. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, pp. 2847 – 2870.

OPINION

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D.C. Code §§ 7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001). Wholly apart from that prohibition, District of Columbia law also requires residents to keep their lawfully owned firearms "unloaded and dissembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. See § 7–2507.02.

Respondent Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns and the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home." App. 59a. The District Court dismissed respondent's complaint. The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense,[2] reversed, see *Parker v. District of Columbia,* 478 F.3d 370, 401 (2007). It held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. See *id.,* at 395, 399–401. The Court of Appeals directed the District Court to enter summary judgment for respondent.

We granted certiorari. 552 U.S. 1035, 128 S.Ct. 645, 169 L.Ed.2d 417 (2007).

II

We turn first to the meaning of the Second Amendment.

A

The Second Amendment provides: "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." In interpreting this text, we are guided by the principle that "[t]he 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." *United States v. Sprague,* 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11–12. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2–4.

B

We start with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else.*

At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States,* 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ... indicate[s]: 'wear, bear, or carry ... upon the person ... for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.' " *Id.,* at 143, 118 S.Ct. 1911 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed.1990)). We think that Justice GINSBURG accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

It is therefore entirely sensible that the Second Amendment announces the purpose for which the right was codified: to prevent elimination of the militia. It does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. But, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.

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 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.

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g., Reno v. American Civil Liberties Union,* 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g., Kyllo v. United States,* 533 U.S. 27, 35–36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under 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," *Parker v. District of Columbia*, 478 F.3d 370, 400 (2008), would fail constitutional muster.

638 F.3d 458
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Sean MASCIANDARO, Defendant–Appellant.

No. 09–4839.
|
Argued: Dec. 8, 2010.
|
Decided: March 24, 2011.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion for the court, in which Judge WILKINSON and Senior Judge DUFFY joined.

OPINION

NIEMEYER, Circuit Judge, writing for the court:

Sean Masciandaro was convicted of carrying or possessing a loaded handgun in a motor vehicle within a national park area, in violation of 36 C.F.R. § 2.4(b). He challenges his conviction arguing section 2.4(b) violates the Second Amendment as applied to him and facially.

We conclude that Masciandaro's Second Amendment claim to a right to carry or possess a loaded handgun for self-defense is assessed under the intermediate scrutiny standard, and, even if his claim implicates the Second Amendment, a question we do not resolve here, it is defeated by applying that standard. We conclude that the government has amply shown that the regulation reasonably served its substantial interest in public safety in the national park area where Masciandaro was arrested. Thus, we hold that 36 C.F.R. § 2.4(b) is constitutional as applied to Masciandaro's conduct.

Accordingly, we affirm.

I

On June 5, 2008, at about 10:00 a.m., United States Park Police Sergeant Ken Fornshill, who was conducting a routine patrol of Daingerfield Island, near Alexandria, Virginia, observed a Toyota hatchback parked illegally. Following a search of Masciandaro's car, Fornshill uncovered a loaded 9mm Kahr semiautomatic pistol, and at the police station, Masciandaro produced an expired Virginia concealed weapon carry permit.

Daingerfield Island, where Masciandaro was arrested, is not an island but an outcropping of land extending into the Potomac River near Alexandria. The area, which is managed by the National Park Service, is used for recreational purposes and includes a restaurant, marina, biking trail, wooded areas, and other public facilities.

Masciandaro was charged with "carrying or possessing a loaded weapon in a motor vehicle" within national park areas, in violation of 36 C.F.R. § 2.4(b)..

At trial, Masciandaro explained that he carried the handgun for self-defense, as he frequently slept in his car while traveling on business, and that while traveling, he often kept cash, a laptop computer, and other valuables on hand. The place where Masciandaro was arrested on June 5, 2008, was 20 miles from his residence in Woodbridge, Virginia.

II

We now turn to Masciandaro's constitutional challenge to 36 C.F.R. § 2.4(b). Masciandaro contends that the Second Amendment, as construed by the Supreme Court in its "watershed" decision in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), guaranteed to him the right to possess and carry weapons in case of confrontation and thus protected him from prosecution under § 2.4(b) for exercising that right in a national park area. Masciandaro points out that his handgun is the "quintessential self-defense weapon" and that he is exactly the type of "law-abiding citizen" who is the primary intended beneficiary of the Second Amendment's protections.

In reaching its holding, the Supreme Court in *Heller* did not define the outer limits of the Second Amendment right to keep and bear arms. It did point out, however, that the right was "not unlimited, just as the First Amendment's right of free speech was not." *Id.* at *2799; see also id.* at 2816. Illustrating this point, the Court related that a majority of the 19th-century courts that considered prohibitions on carrying concealed weapons held them to be lawful under the Second Amendment. *Id.* at 2816. It summarized:

> 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 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. The Court explained in a footnote that it was identifying these "presumptively lawful regulatory measures only as examples." *Id*. at 2817 n. 26.

In *Heller,* the Supreme Court expressly avoided deciding what level of scrutiny should be applied when reviewing a law burdening the right to keep and bear arms, *see Heller*, 128 S.Ct. at 2817, 2821, because it concluded that the District of Columbia's handgun ban under consideration before it "would fail constitutional muster" "[u]nder *any* of the standards of scrutiny [traditionally] applied to enumerated constitutional rights," *id*. at 2817–18 (emphasis added). The Court did, however, rule out a rational basis review, because that level of review "would be redundant with the separate constitutional prohibitions on irrational laws." *Id*. at 2817 n. 27. Moreover, by listing several "presumptively lawful regulatory measures," *id*. at 2816–17 & n. 26, the Court provided a hint as to the types of governmental interests that might be sufficient to withstand Second Amendment challenges, as well as the contexts in which those interests could be successfully invoked.

II

Perhaps to avoid being required to carry any burden to justify its firearms regulations in national parks, which are properties owned and managed by the government, the government contends that 36 C.F.R. § 2.4(b) is a law regulating firearms in "sensitive places," as identified in *Heller*, 128 S.Ct. at 2816–17, and therefore is *presumptively* constitutional, *see id*. at 2817 n. 26. Arguing that Daingerfield Island is a sensitive place, the government states that "a large number of people, including children, congregate in National Parks for recreational, educational and expressive activities. Park land is not akin to a gun owner's home and is far more analogous to other public spaces, such as schools, municipal parks, governmental buildings, and appurtenant parking lots, where courts have found firearms restrictions to be presumptively reasonable. Furthermore, as the district court noted, the locations within the National Parks where motor vehicles travel are even more sensitive, given that they are extensively regulated thoroughfares frequented by large numbers of strangers, including children."

Masciandaro contends that the parking lot at Daingerfield Island was not a "sensitive place" like a school or governmental building, as referenced to in *Heller*. He argues, "The George Washington Memorial Parkway, where [he] was charged with violation of the superseded [National Park Service] weapons regulation, is a public road and a major traffic thoroughfare in the Washington metropolitan area and is not a sensitive place....

"There is a patchwork of regulations that allow people to use and possess weapons on NPS land, including parkways and remote forests and parks across the United States. Those regulations reflect the [Department of Interior's] determination that NPS land is not sensitive, as a general matter. Indeed, the very same NPS regulation [36 C.F.R. § 2.4] that prohibits possession of loaded weapons in motor vehicles indicates that it is lawful to hunt with weapons, use them for target practice, have them in residential dwellings, use them for research activities, and carry them for protection in "pack trains" or on trail rides, all on NPS land." (*Citing* 73 Fed. Reg. 74,966, 74,971 (Dec. 10, 2008)).

These arguments raise the question whether the "sensitive places" doctrine limits the scope of the Second Amendment or, instead, alters the analysis for its application to such places.

The Supreme Court in *Heller* did state twice that the Second Amendment's right to bear arms was "not unlimited." *See* 128 S.Ct. at 2799, 2816. For example, it stated, "Like most rights, *the right* secured by the Second Amendment *is not unlimited*.... Although we do not take an exhaustive historical analysis today of the *full scope* of the Second Amendment, nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id*. at 2816–17 (emphasis added).

Because of the relation between the first statement and the examples, one might conclude that a law prohibiting firearms in a sensitive place would fall *beyond the scope* of the Second Amendment and therefore would be subject to no further analysis. But the Court added a footnote to its language, calling these regulatory measures "*presumptively* lawful." *Id*. at 2817 n. 26 (emphasis added). The Court's use of the word "presumptively" suggests that the articulation of sensitive places may not be a limitation *on the scope* of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right.

The arguments of counsel about the meaning of the "sensitive places" language raise difficult questions about the scope of the Second Amendment and the scrutiny to be given to government regulations in sensitive places. In *Chester,* we explained the ambiguity inherent in these questions:

> Having acknowledged that the scope of the Second Amendment is subject to historical limitations, the Court cautioned that *Heller* should not be read "to cast doubt on longstanding prohibitions" such as ... "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." [*Heller*, 128 S.Ct.] at 2816–17. *Heller* described its exemplary list of "longstanding prohibitions" as "presumptively lawful regulatory measures," *id*. at 2817 n. 26, without alluding to any historical evidence that the right to keep and bear arms did not extend to ... the conduct prohibited by any of the listed gun regulations. It is unclear to us whether *Heller* was suggesting that "longstanding prohibitions" such as these were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason.

U.S. v. *Chester,* 628 F.3d 973, 679 (4th Cir. 2010). In *Marzzarella,* the Third Circuit labored over the same ambiguity, "We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny." U.S. v. *Marzzarella,* 614 F.3d 85, 91 (3rd Cir. 2010).

We need not, however, resolve the ambiguity in the "sensitive places" language in this case, because even if Daingerfield Island is not a sensitive place, as Masciandaro argues, 36 C.F.R. § 2.4(b) still passes constitutional muster under the intermediate scrutiny standard.

III

In reaching this result, we conclude first that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks, including Daingerfield Island. Although the government's interest need not be "compelling" under intermediate scrutiny, cases have sometimes described the government's interest in public safety in that fashion. *See Schenck v. Pro–Choice Network,* 519 U.S. 357, 376, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (referring to the "significant governmental interest in public safety"); *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (commenting on the "Federal Government's compelling interests in public safety"). The government, after all, is invested with "plenary power" to protect the public from danger on federal lands under the Property Clause. *See* U.S. Const. art. IV, § 3, cl. 2 (giving Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *Utah Div. of State Lands v. United States,* 482 U.S. 193, 201, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987); *Camfield v. United States,* 167 U.S. 518, 525, 17 S.Ct. 864, 42 L.Ed. 260 (1897); *see also United States v. Dorosan,* 350 Fed.Appx. 874, 875 (5th Cir.2009) (per curiam) (noting that U.S. Postal Service is authorized under the Property Clause to exclude firearms from its property); Volokh, *Implementing the Right for Self–Defense,* 56 U.C.L.A. L. Rev. at 1529–33. As the district court noted, Daingerfield Island is a national park area where large numbers of people, including children, congregate for recreation. *See Masciandaro,* 648 F.Supp.2d at 790. Such circumstances justify reasonable measures to secure public safety.

We also conclude that § 2.4(b)'s narrow prohibition is reasonably adapted to that substantial governmental interest. Under § 2.4(b), national parks patrons are prohibited from possessing *loaded* firearms, and only then within their motor vehicles. 36 C.F.R. § 2.4(b) We have no occasion in this case to address a regulation of unloaded firearms. Loaded firearms are surely more dangerous than unloaded firearms, as they could fire accidentally or be fired before a potential victim has the opportunity to flee. The Secretary could have reasonably concluded that, when concealed within a motor vehicle, a loaded weapon becomes even more dangerous. In this respect, § 2.4(b) is analogous to the litany of state concealed carry prohibitions specifically identified as valid in *Heller*. See 128 S.Ct. at 2816–17.

By permitting park patrons to carry unloaded firearms within their vehicles, § 2.4(b) leaves largely intact the right to "possess and carry weapons in case of confrontation." *Heller*, 128 S.Ct. at 2797. While it is true that the need to load a firearm impinges on the need for armed self-defense, *see* Volokh, *Implementing the Right for Self–Defense,* 56 U.C.L.A. L. Rev. at 1518–19, intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question. *See United States v. Baker,* 45 F.3d 837, 847 (4th Cir.1995). Moreover, because the United States Park Police patrol Daingerfield Island, the Secretary could conclude that the need for armed self-defense is less acute there than in the context of one's home.

Accordingly, we hold that, on Masciandaro's as-applied challenge under the Second Amendment, § 2.4(b) satisfies the intermediate scrutiny standard.

AFFIRMED

United States District Court, N.D. Florida, Tallahassee Division.

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al., Plaintiffs,
v.
Rick SWEARINGEN, in his official capacity as Commissioner of the Florida Department of Law Enforcement, Defendant.

Case No.: 4:18cv137-MW/MAF
|
Signed 06/24/2021

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Mark E. Walker, Chief United States District Judge

This case asks whether Florida can constitutionally ban the sale of firearms to those between the ages of eighteen and twenty-one. The Second Amendment secures an individual right to bear arms for self-defense. But that right—like all others—has limits. And the Supreme Court has sketched those limits only in passing, leaving the Second Amendment's reach largely undefined. As a result, this case falls squarely in the middle of a constitutional no man's land.

Both parties agree that the threshold issue here is whether the Second Amendment protects 18-to-20-year-olds' right to purchase firearms at all. Arguing that the Second Amendment guarantees 18-to-20-year-olds the right to purchase firearms, Plaintiffs look to Founding-Era militia laws, which they argue show that 18-to-20-year-olds have always had the right to buy firearms. By contrast, emphasizing the Supreme Court's approval of other gun control laws traceable to the early twentieth century, Defendant points to laws from roughly the same period restricting the transfer of firearms to minors—historically, those under twenty-one. These laws, he claims, show that restrictions on the purchase of firearms by those under twenty-one fall outside the Second Amendment.

Because it is bound by Eleventh Circuit precedent to do so, this Court agrees with Defendant that the Second Amendment does not protect the sale of firearms to 18-to-20-year-olds. Accordingly, Defendant's motion for summary judgment, ECF No. 107, is **GRANTED**.

Plaintiffs' Second Amendment Claims

Almost every circuit has adopted a two-step test for evaluating Second Amendment claims. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis U. L.J. 193, 212 (2017). The Eleventh Circuit is no exception. Under the two-step test, this Court must first "ask if the restricted activity is protected by the Second Amendment in the first place." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012). If the answer to that question is no, the law is constitutional, and the inquiry ends. But if the answer is yes, this Court must "apply an appropriate form of means-end scrutiny." *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). Though the two-step test sounds simple in theory, it can become muddled in practice. Love it or hate it,[7] however, this Court must apply the two-step test, and it begins with step one.

Step One: Does the Law Burden Activity Protected by the Second Amendment?

Is the purchase of firearms by 18-to-20-year-olds protected by the Second Amendment? A simple question, but difficult to answer. *Heller* did not delineate the Second Amendment's scope. 554 U.S. at 626, 128 S.Ct. 2783 (declining to "undertake an exhaustive historical analysis ... of the full scope of the Second Amendment"). But the Court did say that its decision should not "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 626–27, 128 S.Ct. 2783. These longstanding restrictions, *Heller* explained, are "presumptively lawful." *Id*. at 672 n.26, 128 S.Ct. 2783. The Court further stated that the Second Amendment does not protect "the carrying of dangerous and unusual weapons." *Id*. at 627, 128 S.Ct. 2783 (quotations omitted). Finally, *Heller* suggested restrictions on the concealed carry of firearms also passed constitutional muster. *Id*. at 626, 128 S.Ct. 2783.

Some activities, then, obviously fall outside the Second Amendment's scope. Take, for example, dangerous and unusual weapons. *Heller* forecloses the argument that the Second Amendment guarantees the right to possess weapons of war, such as bazookas or landmines. *See United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009) (holding that the Second Amendment does not protect pipe bombs). But most scope questions are more complicated. In addressing those questions, "*Heller* commands that ... courts must read the challenged statute in light of the historical background of the Second

Amendment." *GeorgiaCarry*, 687 F.3d at 1261. Put another way, this Court must look to the Second Amendment's history to discern its scope.[8]

And while "[t]he Two-Part Test is conceptually straightforward in most applications," Kopel & Greenlee, *Doctrines, supra*, at 215, *Heller*'s list of "longstanding, presumptively lawful regulatory measures" presents an additional wrinkle that is "difficult to map" onto the two-step framework, *NRA, Inc. v. ATF*, 700 F.3d 185, 196 (2012).

The Supreme Court has not created a test for determining whether a regulation is longstanding and presumptively lawful. Indeed, *Heller* did "not elaborate on why [the laws it listed] were presumptively lawful, instead promising to provide a historical justification" at a later time. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 250 (2020). For this reason, "few lines from [*Heller*] have been more controversial or consequential" than its passage discussing presumptively lawful regulations. *Id.* at 252. Still, controversial or otherwise, this Court must do its best to follow *Heller.*

Gleaning what we can from *Heller*, a "presumptively lawful" prohibition could be either (1) a law specifically listed in *Heller*, (2) a law that is analogous to the laws listed in *Heller*, or (3) a law that is longstanding in time. Kopel & Greenlee, *Doctrines, supra*, at 215. *Heller* says nothing about prohibitions on the sale of firearms to 18-to-20-year-olds, and thus such restrictions do not fall into the first category.

In short, *Heller*'s listed regulations are similar to restrictions on the purchase of firearms by 18-to-20-year-olds; all target specific groups that are thought to be especially dangerous with firearms. *See U.S. v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (finding restrictions on drug users longstanding because the court saw "the same amount of danger in allowing habitual drug users to traffic in firearms as ... in allowing felons and mentally ill people to do so."). Given the close match, this Court finds restrictions on the purchase of firearms by 18-to-20-year-olds analogous to the restrictions on *Heller*'s list.

Moreover, "the established consensus of federal [and state] appellate and district courts from around the country is that age-based restrictions limiting the rights of 18-[to-]20-year-old adults to keep and bear arms fall under the 'longstanding' and 'presumptively lawful' measures recognized by the Supreme Court in *Heller* as evading Second Amendment scrutiny." *Lara v. Evanchick*, __ F.Supp.3d __, __, 2021 WL 1432802, at *10 (2021) (addressing 18-to-20-year-olds' right to carry arms in public). A presumption of validity therefore applies to the Act. But the question remains, how does the presumption apply?

How Does the Presumption Apply?

Having determined that restrictions such as Florida's are analogous to the restrictions on *Heller's* list, this Court must now determine how that affects its analysis. The circuits vary wildly on how to address a regulation falling into a longstanding category. But as discussed above, the Eleventh Circuit has held that longstanding prohibitions fall outside the Second Amendment.

That said, some courts that consider longstanding restrictions outside the Second Amendment's scope nonetheless allow as-applied challenges to longstanding regulations. *See, e.g.*, *Folajtar v. Attorney General*, 980 F.3d 987, 901 (3rd Cir. 2020) ("We do, however, permit Second Amendment challenges to § 922(g)(1) as applied to individuals ...."). Others allow a plaintiff to rebut the presumption of legality by showing that the law in question does in fact burden a Second Amendment right. *See Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253 (D.C. Cir. 2011) (explaining that longstanding regulations "are presumed not to burden conduct within the scope of the Second Amendment," but that "[a] plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right"); *see also U.S. Booker*, 644 F.3d 12, 25 (1st Cit. 2011) ("While the categorical regulation of gun possession by domestic violence misdemeanants thus appears consistent with *Heller*'s reference to certain presumptively lawful regulatory measures, ... some sort of showing must be made to support the adoption of a new categorical limit on the Second Amendment right."). Intuitively, this seems like the right approach. *See Presumption*, Black's Law Dictionary (11th ed. 2019) ("[a] presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.").

But for better or worse, the Eleventh Circuit has treated the presumption as insurmountable. As the Fourth Circuit observed, *White* treats longstanding status "for all practical purposes, as a kind of 'safe harbor' for unlisted regulatory measures ... which [the Eleventh Circuit] deem[s] to be analogous to those measures specifically listed in *Heller.*" *U.S. v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (discussing *U.S. v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010). In short, in the Eleventh Circuit, a longstanding regulation is a constitutional one—end of story. *See United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (holding that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the

Second Amendment"); *U.S. v. Focia*, 869 F.3d 1269, 1286-87 (11th Cir. 2017) (finding restriction on licensed firearms dealers selling to persons residing in another state longstanding and ending inquiry); *Flick v. Att'y Gen.*, 812 F. App'x 974, 975 (11th Cir. 2020) (rejecting as-applied challenge to felon-in-possession prohibition).

Accordingly, having decided restrictions such as the one at issue here are longstanding, this Court can only reject Plaintiffs' challenge at step one. And because any potential factual disputes in this case implicate the Act's "fit" at step two, there are no material facts in dispute for the purpose of the parties' motions. Defendant's motion for summary judgment is therefore **GRANTED** as to Count I of Plaintiffs' Second Amended Complaint.

IT IS ORDERED:

Defendant's motion for summary judgment is **GRANTED**.

657 F.3d 998
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Kevin V. DUGAN, Defendant–Appellant.

No. 08–10579.
|
Argued and Submitted Aug. 8, 2011.
|
Filed Sept. 20, 2011.

Before: DIARMUID F. O'SCANNLAIN, SUSAN P. GRABER, and CARLOS T. BEA, Circuit Judges.

OPINION

GRABER, Circuit Judge:

We consider the constitutionality of 18 U.S.C. § 922(g)(3), which makes it illegal for "any person ... who is an unlawful user of or addicted to any controlled substance ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Reviewing de novo, *United States v. Vongxay,* 594 F.3d 1111, 1114 (9th Cir.), we uphold the statute against this Second Amendment challenge.[1]

Defendant Kevin Dugan illegally grew and sold marijuana. He also smoked marijuana regularly. When police officers responded to a report of domestic violence at his home one afternoon, they discovered his marijuana operation and arrested Defendant. Because Defendant also had a business of dealing in firearms, a jury convicted him of, among other things, shipping and receiving firearms through interstate commerce while using a controlled substance, in violation of § 922(g)(3).

Defendant argues that § 922(g)(3) runs afoul of the Second Amendment because it deprives him of his constitutional right "to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). But, in *Heller*, the Supreme Court instructed that the Second Amendment right "is not unlimited." *Id.* at 626, 128 S.Ct. 2783. In particular, the Court told us that "nothing in [its Heller] 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 626–27, 128 S.Ct. 2783. Two of our sister circuits have taken that statement to mean that § 922(g)(3), which embodies a long-standing prohibition of conduct similar to the examples mentioned in *Heller*, permissibly limits the individual right to possess weapons provided by the Second Amendment. *United States v. Yancey,* 621 F.3d 681, 687 (7th Cir.2010) (per curiam); *United States v. Seay,* 620 F.3d 919, 925 (8th Cir.2010). We agree.

Like our sister circuits, we see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so. Habitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances. Moreover, unlike people who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse. The restriction in § 922(g)(3) is far less onerous than those affecting felons and the mentally ill. *Yancey,* 621 F.3d at 686–87. Because Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, we conclude that Congress may also prohibit illegal drug users from possessing firearms.

AFFIRMED.

843 F.3d 816
United States Court of Appeals, Ninth Circuit.

Jeff SILVESTER; Brandon Combs; The Calguns Foundation, Inc., a non-profit organization; The Second Amendment Foundation, Inc., a non-profit organization, Plaintiffs-Appellees,
v.
Kamala D. HARRIS, Attorney General of the State of California, in her official capacity, Defendant-Appellant.

No. 14-16840
|
Argued and Submitted February 9, 2016 San Francisco, California
|
Filed December 14, 2016

OPINION

Opinion by Judge Schroeder

INTRODUCTION

California has extensive laws regulating the sale and purchase of firearms. The State now appeals the district court's judgment in favor of Plaintiffs in their Second Amendment challenge to the State's law establishing a 10-day waiting period for all lawful purchases of guns.

This case is a challenge to the application of the full 10-day waiting period to those purchasers who have previously purchased a firearm or have a permit to carry a concealed weapon, and who clear a background check in less than ten days. It is not a blanket challenge to the waiting period itself. It is not a challenge to the requirement that the California Bureau of Firearms ("BOF") approve of the purchase of any firearm. It is not a claim that persons have been denied firearms who should have been permitted to purchase them. Plaintiffs do not seek instant gratification of their desire to purchase a weapon, but they do seek gratification as soon as they have passed the BOF background check.

We agree with the State that the 10-day waiting period is a reasonable safety precaution for all purchasers of firearms and need not be suspended once a purchaser has been approved. We do not need to decide whether the regulation is sufficiently longstanding to be presumed lawful. Applying intermediate scrutiny analysis, we hold that the law does not violate the Second Amendment rights of these Plaintiffs, because the ten day wait is a reasonable precaution for the purchase of a second or third weapon, as well as for a first purchase.

We begin our Second Amendment analysis with the legal background. It reflects that, beginning with the Supreme Court's watershed decision in *Heller*, federal courts have had to scrutinize a variety of state and local regulations of firearms, and that our court, along with others, has developed a body of law applying intermediate scrutiny to regulations falling within the scope of the Second Amendment's protections.

I

The Second Amendment provides: "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." U.S. Const. amend. II. The seminal case interpreting the Second Amendment in this century is *Heller*, where the Supreme Court confronted statutes effectively prohibiting operable firearms in the home. 554 U.S. 570, 628, 128 S.Ct. 2783 (2008).

In *Heller*, the plaintiff challenged District of Columbia statutes that banned the possession of all handguns, and required that any lawful firearm stored in the home, such as a hunting rifle, be "disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* After conducting a lengthy historical inquiry into the original meaning of the Second Amendment, the Court announced for the first time that the Second Amendment secured an "individual right to keep and bear arms." *Id.* at 595, 128 S.Ct. 2783. The Court determined that the right of self defense in the home is central to the purpose of the Second Amendment, while cautioning that the right preserved by the Second Amendment "is not unlimited." *Id.* at 626–28, 128 S.Ct. 2783.

The core of the *Heller* analysis is its conclusion that the Second Amendment protects the right to self defense in the home. The Court said that the home is "where the need for defense of self, family, and property is most acute," and thus, the Second Amendment must protect private firearms ownership. *Id.* at 628, 128 S.Ct. 2783. The *Heller* Court held that, under any level of scrutiny applicable to enumerated constitutional rights, the ban on handgun possession "would fail constitutional muster." *Id.* at 629, 128 S.Ct. 2783. Notably, in so doing, the Court expressly

left for future evaluation the precise level of scrutiny to be applied to laws relating to Second Amendment rights. *Id.* at 626–27, 634–35, 128 S.Ct. 2783. The Court did, however, reject a rational basis standard of review, thus signaling that courts must at least apply intermediate scrutiny. *Id.* at 628 n.27, 128 S.Ct. 2783.

We therefore turn to our circuit law that has developed during the eight years since *Heller*.

II

Our court, along with the majority of our sister circuits, has adopted a two-step inquiry in deciding Second Amendment cases: first, the court asks whether the challenged law burdens conduct protected by the Second Amendment; and if so, the court must then apply the appropriate level of scrutiny. Our two leading cases in this circuit are *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), and *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). In *Chovan*, we collected cases from other circuits utilizing a similar two-step inquiry. 735 F.3d at 1134–37.

Under our case law, the court in the first step asks if the challenged law burdens conduct protected by the Second Amendment, based on a "historical understanding of the scope of the right." *Heller*, 554 U.S. at 625, 128 S.Ct. 2783. Whether the challenged law falls outside the scope of the Amendment involves examining whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood. *Id.* Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis. *See Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). A challenged law may also fall within the limited category of "presumptively lawful regulatory measures" identified in *Heller*. *Jackson*, 746 F.3d at 960; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 996–97 (9th Cir. 2015).

If the regulation is subject to Second Amendment protection (*i.e.*, the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful), the court then proceeds to the second step of the inquiry to determine the appropriate level of scrutiny to apply. *Jackson*, 746 F.3d at 960. In ascertaining the proper level of scrutiny, the court must consider: (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right. *Id.* at 960–61.

The result is a sliding scale. A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. *Id.* at 961. That is what was involved in *Heller*. 554 U.S. at 628–29, 128 S.Ct. 2783. A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. *See Chovan*, 735 F.3d at 1138. Otherwise, intermediate scrutiny is appropriate. "[I]f a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right," the court may apply intermediate scrutiny. *Jackson*, 746 F.3d at 961.

We have imported the test for intermediate scrutiny from First Amendment cases. *See id.* at 965; *Chovan*, 735 F.3d at 1138–39. To uphold a regulation under intermediate scrutiny, we have identified two requirements: (1) the government's stated objective must be significant, substantial, or important; and (2) there must be a "reasonable fit" between the challenged regulation and the asserted objective. *Chovan*, 735 F.3d at 1139.

III

This court has applied intermediate scrutiny in a series of cases since *Heller* to uphold various firearms regulations. *See Fyock*, 779 F.3d at 1000–01; *Jackson*, 746 F.3d at 966, 970; *Chovan*, 735 F.3d at 1139. The first was *Chovan* where we considered a regulation prohibiting domestic violence misdemeanants from possessing firearms. We held that the law did not violate the Second Amendment because the prohibition was substantially related to the important government interest of preventing domestic gun violence. 735 F.3d at 1141.

Then in *Jackson*, we affirmed the district court's denial of a preliminary injunction in which plaintiffs sought to enjoin a San Francisco ordinance requiring handguns inside the home to be stored in locked containers or disabled with a trigger lock when not being carried on the person. 746 F.3d at 958. We held that this was appropriately tailored to fit the city's interest of reducing the risk of firearm injury and death in the home, and thus, survived intermediate scrutiny. *Id.* at 966. We concluded that the regulation did not prevent citizens from using firearms to defend themselves in the home, but rather indirectly burdened handgun use by requiring an individual to retrieve a weapon from a locked safe or removing a trigger lock. *Id.* We distinguished that regulation from the total ban in *Heller* because it only burdened the "manner in which persons may exercise their Second Amendment

rights." *Id.* at 964 (quoting *Chovan*, 735 F.3d at 1138).

Jackson also involved a challenge to a law prohibiting the sale of hollow-point ammunition. *Id.* at 967. We applied intermediate scrutiny and found that the regulation was a reasonable fit with the objective of reducing the "lethality" of bullets because it targeted only the sale of a class of bullets that exacerbates the harmful effect of gun-related injuries. *Id.* at 970.

In *Fyock*, we affirmed the district court's denial of a preliminary injunction to enjoin a city ordinance restricting possession of large-capacity magazines. 779 F.3d at 994. We denied the injunction on the ground that the challenge to the regulation was not likely to succeed on the merits. We concluded that the ordinance would likely survive intermediate scrutiny because the city presented sufficient evidence to show that the ordinance was substantially related to the compelling government interest of public safety. *Id*. at 1000–01.

While these cases all upheld regulations within the scope of the Amendment because they did not severely burden the exercise of rights, this court, very recently, sitting en banc, looked to whether a regulation was outside the scope of the Second Amendment. In *Peruta*, we considered California's statutory scheme regulating conceal carry permits. 824 F.3d at 924. We held that the Second Amendment does not protect the right to carry a concealed weapon in public. *Id.* at 939. Applying an exhaustive historical analysis, we concluded that the carrying of concealed weapons outside the home had never been acceptable and was therefore beyond the scope of the Second Amendment's protections. *Id.* We stressed that *Heller* put limits on the scope of the Amendment and had expressly observed that the Second Amendment has not generally been understood to protect the right to carry concealed weapons. *Id.* at 928 (citing *Heller*, 554 U.S. at 626–27, 128 S.Ct. 2783).

A concurrence by three judges agreed, but additionally came to an alternative conclusion that if the regulation was within the scope of the Second Amendment, the regulation would survive intermediate scrutiny. *Id*. at 942 (Graber, J., concurring). (The majority agreed with this analysis, though found it unnecessary to reach the issue. *Id.*)

Our intermediate scrutiny analysis is in line with that of other circuits. They have applied similar intermediate scrutiny to uphold firearms regulations within the scope of the Second Amendment. *See Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (holding that a regulation requiring individuals seeking a permit to carry a handgun in public was longstanding and presumptively lawful, and that it withstands intermediate scrutiny); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (applying intermediate scrutiny, upholding a Maryland statute that required an applicant for a permit to carry a handgun outside the home to provide a substantial reason for doing so); *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013) (upholding, under intermediate scrutiny, Texas's statutory scheme barring 18-to-20-year-olds from carrying handguns in public); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (applying intermediate scrutiny in upholding New York legislation that prevented individuals from obtaining a concealed carry license, except individuals who demonstrated a special need for self protection); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (finding a prohibition on assault weapons passed muster under intermediate scrutiny review); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (applying intermediate scrutiny to uphold a statute prohibiting drug users from firearm possession).

There is accordingly near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate. Most circuits also appear to apply a two-step test similar to ours. The case law in our circuit and our sister circuits thus clearly favors the application of intermediate scrutiny in evaluating the constitutionality of firearms regulations, so long as the regulation burdens to some extent conduct protected by the Second Amendment. Critical to that analysis is identifying an important legislative objective and determining whether the regulation reasonably fits with the objective. We therefore turn to the history and operation of the California law at issue in this case.

IV

We assume, without deciding, that the regulation is within the scope of the Amendment and is not the type of regulation that must be considered presumptively valid. The issue in this case is narrow, however, because it concerns whether California's 10-day wait to take possession of a firearm violates Second Amendment rights when applied to subsequent purchasers who pass the background check in less than ten days.

The burden of the 10-day waiting period here, requiring an applicant to wait ten days before taking possession of the firearm, is less than the burden imposed by contested regulations in other Ninth Circuit cases applying intermediate scrutiny. *See, e.g.*, *Fyock*, 779 F.3d 991; *Jackson*, 746 F.3d 953; *Chovan*, 735 F.3d 1127. This court has explained that laws which regulate only the "*manner* in

which persons may exercise their Second Amendment rights" are less burdensome than those which bar firearm possession completely. *Chovan*, 735 F.3d at 1138.

The actual effect of the waiting period on Plaintiffs is very small. The contested application of the regulation to Plaintiffs simply requires them to wait the incremental portion of the waiting period that extends beyond completion of the background check. The regulation does not prevent, restrict, or place any conditions on how guns are stored or used after a purchaser takes possession. The waiting period does not approach the impact of the regulation in *Jackson* that required firearms to be stored in locked containers or disabled with a trigger lock. 746 F.3d at 963. The waiting period does not prevent any individuals from owning a firearm, as did the regulation in *Chovan*. 735 F.3d at 1139.

There is, moreover, nothing new in having to wait for the delivery of a weapon. Before the age of superstores and superhighways, most folks could not expect to take possession of a firearm immediately upon deciding to purchase one. As a purely practical matter, delivery took time. Our 18th and 19th century forebears knew nothing about electronic transmissions. Delays of a week or more were not the product of governmental regulations, but such delays had to be routinely accepted as part of doing business.

It therefore cannot be said that the regulation places a substantial burden on a Second Amendment right. Intermediate scrutiny is appropriate. Accordingly, we proceed to apply the two-step analysis of intermediate scrutiny that looks first to the government's objectives in enacting the regulation and second to whether it is reasonably suited to achieve those objectives. *Jackson*, 746 F.3d at 965.

From the beginning, the waiting period in California has had the objective of promoting safety and reducing gun violence. The parties agree that these objectives are important. The first step is undisputedly satisfied.

The parties dispute, however, whether the waiting period reasonably fits with the stated objectives. The test is not a strict one. We have said that "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Id.* at 969. Instead, it requires only that the law be "substantially related to the important government interest of reducing firearm-related deaths and injuries." *Id.* at 966. The district court recognized that some waiting period was necessary for background checks, but held that the full waiting period served no further legislative purpose as applied to subsequent purchasers. We cannot agree. In enacting the present statute, the Legislature said that the waiting period "provide[d] a 'cooling-off' period, especially for handgun sales." The legislation coincided historically with increased national concern over the prevalence of inexpensive handguns leading to crime and violence. In fact, the following year, the Legislature introduced the Handgun Safety Standard Act of 1997 in response to the proliferation of cheap handguns, which the California DOJ said, at the time, were "three times more likely to be associated with criminal activity than any other type of weapon." Assemb. B. 488, 1997–98 Reg. Sess. (Cal. 1997).

The State, in the district court, relied on studies showing that a cooling-off period may prevent or reduce impulsive acts of gun violence or self harm. One study confirmed that firearm purchasers face the greatest risk of suicide immediately after purchase, but the risk declines after one week. Another found that waiting periods correlate to reductions in suicides among the elderly. The district court discounted these studies, saying that the studies did not focus on subsequent purchasers. But the studies related to all purchasers. They confirm the common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down. This is no less true for a purchaser who already owns a weapon and wants another, than it is for a first time purchaser.

The district court reasoned that a cooling-off period would not have any deterrent effect on crimes committed by subsequent purchasers, because if they wanted to commit an impulsive act of violence, they already had the means to do so. This assumes that all subsequent purchasers who wish to purchase a weapon for criminal purposes already have an operable weapon suitable to do the job.

The district court's assumption is not warranted. An individual who already owns a hunting rifle, for example, may want to purchase a larger capacity weapon that will do more damage when fired into a crowd. A 10-day cooling-off period would serve to discourage such conduct and would impose no serious burden on the core Second Amendment right of defense of the home identified in *Heller*. 554 U.S. at 628, 128 S.Ct. 2783.

The thrust of the Plaintiffs' argument on appeal is similar. They contend that once a subsequent purchaser has passed the background check, and it is determined that there is no reason why the purchase should be prohibited, then there is no reason to delay the purchase any further. They therefore contend that the waiting period is overinclusive and applies to more people than it should.

Their position in this regard is very similar to the argument we rejected in *Jackson*. We there upheld a regulation requiring handguns to be stored in locked containers or disabled with a trigger lock when not carried on the person. *Jackson*, 746 F.3d at 969. Plaintiffs had argued that because a principal purpose of the law was to prevent access to weapons by children and other unintended users, the law was too broad and should not apply when there was little risk of unauthorized access, as, for example, when the gun owner lived alone. *Id.* at 966.

We upheld the regulation because the safety interests that the government sought to protect were broader than preventing unauthorized access. The interests extended to reducing suicides and deterring domestic violence on the part of authorized users. *Id.* We said, "San Francisco has asserted important interests that are broader than preventing children or unauthorized users from using the firearms, including an interest in preventing firearms from being stolen and in reducing the number of handgun-related suicides and deadly domestic violence incidents." *Id.*

The State's reasons for the waiting period here, like the reasons for the storage protections in *Jackson*, are broader than Plaintiffs are willing to recognize. The waiting period provides time not only for background checks, but for the purchaser to reflect on what he or she is doing, and, perhaps, for second thoughts that might prevent gun violence.

Thus the waiting period, as applied to these Plaintiffs, and the safety storage precautions, as applied to the plaintiffs in *Jackson*, have a similar effect. Their purpose is to promote public safety. Their effect is to require individuals to stop and think before being able to use a firearm.

The State is required to show only that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 1000 (citation and quotation marks omitted). The State has established that there is a reasonable fit between important safety objectives and the application of the waiting period to Plaintiffs in this case. The waiting period provides time not only for a background check, but also for a cooling-off period to deter violence resulting from impulsive purchases of firearms. The State has met its burden.

CONCLUSION

The judgment of the district court is reversed and the matter is remanded for the entry of judgment in favor of the State. Costs are awarded to the State.

REVERSED and **REMANDED**.

883 F.3d 45
United States Court of Appeals, Second Circuit.

The NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry,* Plaintiffs–Appellants,
v.
The CITY OF NEW YORK and The New York City Police Department—License Division, Defendants–Appellees.

Docket No. 15-638-cv
|
August Term, 2016
|
Argued: August 17, 2016
|
Decided: February 23, 2018

Opinion

Gerard E. Lynch, Circuit Judge:

New York State Penal Law establishes two primary types of handgun licenses: "carry" licenses and "premises" licenses. N.Y. Penal Law §§ 400.00(2)(a), (f). A carry license allows an individual to "have and carry [a] concealed" handgun "without regard to employment or place of possession ... when proper cause exists" for the license to be issued. *Id.* § 400.00(2)(f).

Generally, a carry license is valid throughout the state except that it is not valid within New York City "unless a special permit granting validity is issued by the police commissioner" of New York City. N.Y. Penal Law § 400.00(6).

A premises license is specific to the premises for which it is issued, and "[t]he handguns listed on th[e] license may not be removed from the address specified on the license except" in limited circumstances, including the following:

> (3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately.
>
> (4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separatel.

38 RCNY § 5-23(a).

Plaintiffs hold premises licenses that allow them to possess handguns in their residences in New York City. They seek to transport their handguns outside the premises for purposes other than the ones authorized by Rule 5-23. All three Plaintiffs seek to transport their handguns to shooting ranges and competitions outside New York City. In addition, Colantone, who owns a second home in Hancock, New York, seeks to transport his handgun between the premises for which it is licensed in New York City and his Hancock house.

The Plaintiffs argue on appeal, as they did below, that by restricting their ability to transport firearms outside the City, Rule 5-23 violates the Second Amendment. For the reasons explained below, we reject each of the Plaintiffs' arguments.

DISCUSSION

I. Rule 5-23 Does Not Violate the Second Amendment.

In *District of Columbia v. Heller*, the Supreme Court announced that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). In *McDonald v. City of Chicago*, the Court held that this right is incorporated within the Due Process Clause of the Fourteenth Amendment, and therefore binds the States as well as the Federal Government. 561 U.S. 742, 791, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). However, the Court remarked that its holding should not "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." *Heller*, 554 U.S. at 626–27, 128 S.Ct. 2783. "Neither *Heller* nor *McDonald* ... delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015).

A. Analytical Framework

Following *Heller*, this Circuit adopted a "two-step inquiry" for "determining the constitutionality of firearm restrictions." *Id.* First, we "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment," and second, if we "conclude[ ] that the statute[ ] impinge[s] upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny." *Id.* at 254, 257.

In determining whether some form of heightened scrutiny applies, we consider two factors: "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.' Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." *N.Y. State Rifle*, 804 F.3d at 258, quoting *Ezell v. City of Chicago ("Ezell I")*, 651 F.3d 684, 703 (7th Cir. 2011).

As to the second factor, we have held that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *U.S. v. Decastro*, 682 F.3d 160, 166 (2nd Cir. 2012). "The scope of the legislative restriction and the availability of alternatives factor into our analysis of the degree to which the challenged law burdens the right." *N.Y. State Rifle*, 804 F.3d at 259 (internal quotation marks omitted).

For example, since *Heller*, we have found New York's and Connecticut's prohibitions of semiautomatic assault weapons to be distinguishable from the ban struck down in *Heller*, because under those statutes, "citizens may continue to arm themselves with non-semiautomatic weapons *or* with any semiautomatic gun that does not contain any of the enumerated military-style features." *Id.* at 260. Even where heightened scrutiny is triggered by a substantial burden, however, strict scrutiny may not be required if that burden "does not constrain the Amendment's 'core' area of protection." *Id.* Thus, the two factors interact to dictate the proper level of scrutiny.

The Plaintiffs argue that the Rule violates the Second Amendment in two ways: first, by preventing Plaintiff Colantone from taking the handgun licensed to his New York City residence and transporting it to his second home in Hancock, New York, and second, by preventing the Plaintiffs from taking their handguns to firing ranges and shooting competitions outside the City. We address these arguments in turn.

In *Kachalsky v. County of Westchester*, we applied intermediate scrutiny and affirmed New York's "proper cause" requirement for the issuance of a carry license, despite finding that such a requirement "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public." 701 F.3d 81, 93 (2nd Cir. 2012). In comparison to the regulation considered in *Kachalsky*, the restrictions complained of by the Plaintiffs here impose at most trivial limitations on the ability of law-abiding citizens to possess and use firearms for self-defense. New York has licensed the ownership and possession of firearms in their residences, where "Second Amendment guarantees are at their zenith," *id*. at 89, and does not limit their lawful use of those weapons "in defense of hearth and home"—the "core" protection of the Second Amendment, *Heller*, 554 U.S. at 634-35, 128 S.Ct. 2783.

Strict scrutiny does not attach to Rule 5-23 as a result of Colantone's desire to transport the handgun licensed to his New York City residence to his second home in Hancock, New York. Even if the Rule relates to "core" rights under the Second Amendment by prohibiting Colantone from taking his licensed firearm to his second home, the Rule does not substantially burden his ability to obtain a firearm for that home, because an "adequate alternative[ ] remain[s] for [Colantone] to acquire a firearm for self-defense." *Decastro*, 682 F.3d at 168; *see also New York State Rifle,* 804 F.3d at 259 Here, New York City imposes no limit on Colantone's ability to obtain a license to have a handgun at his second residence in Hancock.

Next, the Plaintiffs argue that the Rule imposes a substantial burden on their core Second Amendment rights by prohibiting them from taking their licensed handguns to firing ranges and shooting competitions outside the City. The Plaintiffs' primary argument is that the right to possess and use guns in self-defense suggests a corresponding right to engage in training and target shooting, and thus restrictions on the latter right must themselves be subject to heightened scrutiny. *Ezell I*, 651 F.3d at 704.

Possession of firearms without adequate training and skill does nothing to protect, and much to endanger, the gun owner, his or her family, and the general public. Accordingly, we may assume that the ability to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns that regulations that sharply restrict that ability to obtain such training could impose substantial burdens on core Second Amendment rights. Some form of heightened scrutiny would be warranted in such cases, however, not because live-fire target shooting is *itself* a core Second Amendment right, but rather because, and only to the extent that, regulations amounting to a ban (either explicit or

functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home.

In this case, by contrast, the Plaintiffs present no evidence demonstrating that the Rule serves to functionally bar their use of firing ranges or their attendance at shooting competitions. In fact, the Plaintiffs concede that seven authorized ranges are available to them, including at least one in each of the City's five boroughs. What the Plaintiffs seek is the inverse of what the *Ezell I* plaintiffs sought: they do not complain that they are required to undertake burdensome journeys away from the city in which they live in order to maintain their skills, but rather they demand the right to take their handguns to ranges and competitions *outside* their city of residence.

However, some form of heightened scrutiny may still be required. We have applied intermediate scrutiny when analyzing regulations that substantially burdened Second Amendment rights or that encroached on the core of Second Amendment rights by extending into the home. *See, e.g.*, *N.Y. State Rifle*, 804 F.3d at 258-59 (applying intermediate scrutiny to statutes that were "both broad and burdensome" and that "implicate the core of the Second Amendment's protections"); *Kachalsky*, 701 F.3d at 93 (applying intermediate scrutiny to requirement that "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public").

Because we assume, that the Rule approaches the Second Amendment's core area of protection as applied to Colantone's second home, though it does not impose a substantial burden, we find that intermediate scrutiny is appropriate to assess the Rule in that instance. As to the Plaintiffs' access to firing ranges and shooting competitions, the Rule does not approach the core area of protection, and we find it difficult to say that the Rule substantially burdens any protected rights.

B. Application of Intermediate Scrutiny

When applying intermediate scrutiny under the Second Amendment, "the key question is whether the statute[ ] at issue [is] substantially related to the achievement of an important governmental interest." *N.Y. State Rifle*, 804 F.3d at 261.

"To survive intermediate scrutiny, the fit between the challenged regulation [and the government interest] need only be substantial, not perfect. Unlike strict scrutiny analysis, we need not ensure that the statute is narrowly tailored or the least restrictive available means to serve the stated governmental interest. Moreover, we have observed that state regulation of the right to bear arms has always been more robust than analogous regulation of other constitutional rights. So long as the defendants produce evidence that fairly supports their rationale, the laws will pass constitutional muster." *Id.*

The Rule seeks to protect public safety and prevent crime, and "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." *Kachalsky*, 701 F.3d at 97. "[W]hile the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public." *Id.* at 96. "There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Id.* at 94-95; *see also U.S. v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("[O]utside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.").

Premises license holders "are just as susceptible as anyone else to stressful situations," including driving situations that can lead to road rage, "crowd situations, demonstrations, family disputes," and other situations "where it would be better to not have the presence of a firearm." App. 68. Accordingly, the City has a legitimate need to control the presence of firearms in public, especially those held by individuals who have only a premises license, and not a carry license. In the past, the City has had difficulty monitoring and enforcing the limits of the premises license. "Abuses" that occurred when, prior to adoption of the current Rule, the City *did* allow licensees to carry their handguns to shooting ranges out of the City. Based on these abuses, the New York Police Department was concerned that allowing premises licensees to transport their firearms anywhere outside of the City for target practice or shooting competitions made it "too easy for them to possess a licensed firearm while traveling in public, and then if discovered create an explanation about traveling for target practice or shooting competition." *Id.* at 70.

In contrast, the Plaintiffs have not demonstrated any burden placed on their protected rights. The Plaintiffs express the desire to travel to additional locations with their handguns and participate in certain shooting competitions outside of the City. But, as we have stated, the Plaintiffs are still free to participate in those shooting competitions with a rented firearm, and to obtain licenses for handguns in their second homes, and the Plaintiffs have presented no evidence indicating that this understanding is mistaken. Additionally, the Plaintiffs present no evidence that the firing ranges that they wish to access outside the City are

significantly less expensive or more accessible than those in the City. Even if the Plaintiffs did provide this evidence, they would still need to demonstrate that practicing with one's own handgun provides better training than practicing with a rented gun of like model, and the Plaintiffs fail to even assert this fact.

In light of the City's evidence that the Rule was specifically created to protect public safety and to limit the presence of firearms, licensed only to specific premises, on City streets, and the dearth of evidence presented by the Plaintiffs in support of their arguments that the Rule imposes substantial burdens on their protected rights, we find that the City has met its burden of showing a substantial fit between the Rule and the City's interest in promoting public safety.

Constitutional review of state and local gun control will often involve difficult balancing of the individual's constitutional right to keep and bear arms against the states' obligation to "prevent armed mayhem in public places." *Kachalsky*, 701 F.3d at 96, quoting *Masciandaro*, 638 F.3d at 471. This is not such a case. The City has a clear interest in protecting public safety through regulating the possession of firearms in public, and has adduced "evidence that fairly supports [the] rationale" behind the Rule. *N.Y. State Rifle*, 804 F.3d at 261 The burdens imposed by the Rule do not substantially affect the exercise of core Second Amendment rights, and the Rule makes a contribution to an important state interest in public safety substantial enough to easily justify the insignificant and indirect costs it imposes on Second Amendment interests. Accordingly, Rule 5-23 survives intermediate scrutiny.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

United States District Court, E.D. North Carolina, Western Division.

Kelly STAFFORD; Grass Roots North Carolina; Second Amendment Foundation; and Firearms Policy Coalition, Inc., Plaintiffs,
v.
Gerald BAKER in his official capacity as Sheriff of Wake County, Defendant.

NO. 5:20-CV-123-FL
|
Signed 02/18/2021

ORDER

LOUISE W. FLANAGAN, United States District Judge

This matter is before the court on defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (DE 16).

Plaintiffs commenced this action asserting claims against defendant, sheriff of Wake County, North Carolina, arising out of defendant's announcement of a suspension in acceptance of new applications for pistol purchase permits (PPP) and concealed handgun permits (CHP), from March 24, 2020, through April 30, 2020. Plaintiffs assert claims for 1) violation of their rights under the Second and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983 ("first claim")

Defendant argues that plaintiffs fail to state a claim for violation of the Second Amendment, because the alleged temporary delay in accepting permits survives an intermediate scrutiny level of review.[2] Plaintiffs contend a heightened level of scrutiny applies, and that they have alleged in any event a violation of the Second Amendment at the level of intermediate scrutiny.

The United States Court of Appeals for the Fourth Circuit applies a "two-part approach to Second Amendment claims ... under Heller." Kolbe v. Hogan, 849 F.3d 114, 132 (4th Cir. 2017) (en banc). "Pursuant to that two-part approach, we first ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." Id. at 133. If so, "we next apply an appropriate form of means-end scrutiny," "between strict scrutiny and intermediate scrutiny." Id. (quotations omitted).

"[T]he level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." Kolbe, 849 F.3d at 133. Regarding the determination of level of scrutiny, the Fourth Circuit has recognized: "The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right." United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) (quotations omitted). "Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms." Id.

The level of scrutiny guides the court's analysis of a Second Amendment claim. "To satisfy strict scrutiny, the government must prove that the challenged law is narrowly tailored to achieve a compelling governmental interest." Kolbe, 849 F.3d at 133. "Strict scrutiny is thereby the most demanding test known to constitutional law." Id. "The less onerous standard of intermediate scrutiny requires the government to show that the challenged law is reasonably adapted to a substantial governmental interest." Id. (quotations omitted). "The government must demonstrate under the intermediate scrutiny standard that there is a reasonable fit between the challenged regulation and a substantial governmental objective." Id. (quotations omitted). "Intermediate scrutiny does not demand that the challenged law be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." Id. (quotations omitted). "In other words, there must be a fit that is reasonable, not perfect." Id. (quotations omitted). By contrast, the lowest "rational-basis" standard of scrutiny requires only a "rational relationship" to a "legitimate governmental purpose." Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

Here, while the instant suspension plainly burdens plaintiffs' Second Amendment rights, the "degree to which the challenged [action] burdens the right," Kolbe, 849 F.3d at 133, is not a high degree of burden but rather a low degree of burden, because it is temporary and arises in the context of a statutory scheme that already requires an applicant to wait up to 14 days before receiving an application approval. See N.C. Gen. Stat. § 14-404(f); cf. Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 207 (5th Cir. 2012) (applying intermediate scrutiny to laws that "regulate commercial sales through an age qualification with temporary effect," preventing law-abiding adults aged

18 to 20 from purchasing handguns from federally licensed dealers); Silvester v. Harris, 843 F.3d 816, 818-819 (9th Cir. 2016) (applying intermediate scrutiny to "law establishing a 10-day waiting period for all lawful purchases of guns"). Therefore, while there is not Fourth Circuit case law directly on point, it appears that an intermediate level of scrutiny is appropriate.

As alleged, there is not a "reasonable fit between the challenged regulation and a substantial governmental objective." Kolbe, 849 F.3d at 133. Here, a complete suspension in accepting PPP applications does not reasonably fit with the government objective to ameliorate "concerns over social distancing" and "concerns related to the COVID-19 pandemic." (Compl. ¶ 22). Nor does a complete suspension in accepting PPP applications reasonably fit a problem of high volumes of permit applications. (Compl. Ex 1. (DE 8-2 at 2)).[3] Rather, the corrective measure chosen under the facts alleged is at best a blunt, or tangentially related, measure for addressing the concerns noted. Indeed, based on the allegations in the complaint, it is plausible to infer that defendant suspended acceptance of applications due to inability to process a high volume of applicants at a time of acute public need, under the guise of generally articulated "public health concerns." (Id. ¶ 22; see Compl. Ex 2. (DE 8-3 at 2)). While the court recognizes that the challenged action need not "be the least intrusive" means of achieving the government objective, Kolbe, 849 F.3d at 133, here there are numerous less intrusive alternatives, plausibly inferred, that reasonably could have fit the stated public health objectives without suspending acceptance of all applications.

CONCLUSION

Based on the foregoing, defendant's motion to dismiss is DENIED.

141 S.Ct. 2038
Supreme Court of the United States.

MAHANOY AREA SCHOOL DISTRICT, Petitioner
v.
B. L., a Minor, BY AND THROUGH Her Father, Lawrence LEVY and Her Mother, Betty Lou Levy

No. 20-255
|
Argued April 28, 2021
|
Decided June 23, 2021

Opinion

Justice BREYER delivered the opinion of the Court.

A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment

I

B. L. (who, together with her parents, is a respondent in this case) was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B. L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team.

That weekend, B. L. and a friend visited the Cocoa Hut, a local convenience store. There, B. L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B. L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B. L. had about 250 "friends") to view the images for a 24 hour period.

The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." App. 20. The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji. *Id.*, at 21.

B. L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B. L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B. L.'s posts. *Id.*, at 83–84. Questions about the posts persisted during an Algebra class taught by one of the two coaches. *Id.*, at 83.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team. In response, B. L., together with her parents, filed this lawsuit in Federal District Court.

II

We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); see also *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 794, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) ("[M]inors are entitled to a significant measure of First Amendment protection" (alteration in original; internal quotation marks omitted)). But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (internal quotation mark omitted). One such characteristic, which we have stressed, is the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of

parents. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986).

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see *id.*, at 685, 106 S.Ct. 3159; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse v. Frederick*, 551 U.S. 393, 409, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007); and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, see *Kuhlmeier*, 484 U.S., at 271, 108 S.Ct. 562.

Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S., at 513, 89 S.Ct. 733. These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule. Given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case

can, however, provide one example.

III

Consider B. L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B. L.'s posts, while crude, did not amount to fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). And while B. L. used vulgarity, her speech was not obscene as this Court has understood that term. See *Cohen v. California*, 403 U.S. 15, 19–20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. See *id.*, at 24, 91 S.Ct. 1780; cf. *Snyder v. Phelps*, 562 U.S. 443, 461, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate"); *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) ("The inappropriate ... character of a statement is irrelevant to the question whether it deals with a matter of public concern").

Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained, *supra*, at 2046 – 2047) diminish the school's interest in punishing B. L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. See App. 35 (indicating that coaches removed B. L. from the cheer team because "there was profanity in [her] Snap and it was directed towards cheerleading"); see also *id.*, at 27, 47, and n. 9, 78, 82. The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time. See *Morse*, 551 U.S., at 405, 127 S.Ct. 2618 (clarifying that although a school can regulate a student's use of sexual innuendo in a speech given within the school, if the student "delivered the same speech in a public forum outside the school context, it would have been protected"); see also *Fraser*, 478 U.S., at 688, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) (noting that if the student in *Fraser* "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate").

B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*, 393 U.S., at 514, 89 S.Ct. 733. Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. App. 82–83. But when one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking ... about it," she responded simply, "No." *Id.*, at 84. As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S., at 509, 89 S.Ct. 733. The alleged disturbance here does not meet *Tinker*'s demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. One of the coaches testified that the school decided to suspend B. L., not because of any specific negative impact upon a particular member of the school community, but "based on

the fact that there was negativity put out there that could impact students in the school." App. 81. There is little else, however, that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have previously said, simple "undifferentiated fear or apprehension ... is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S., at 508, 89 S.Ct. 733.

It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. See *Tyson & Brother v. Banton*, 273 U.S. 418, 447, 47 S.Ct. 426, 71 L.Ed. 718 (1927) (Holmes, J., dissenting). "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." *Cohen*, 403 U.S., at 25, 91 S.Ct. 1780.

* * *

For the reasons expressed above, we nonetheless agree that the school violated B. L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

It is so ordered.

Justice ALITO, with whom Justice GORSUCH joins, concurring.

I join the opinion of the Court but write separately to explain my understanding of the Court's decision and the framework within which I think cases like this should be analyzed. This is the first case in which we have considered the constitutionality of a public school's attempt to regulate true off-premises student speech, and therefore it is important that our opinion not be misunderstood.

I

The Court holds—and I agree—that: the First Amendment permits public schools to regulate *some* student speech that does not occur on school premises during the regular school day; this authority is more limited than the authority that schools exercise with respect to on-premises speech; courts should be "skeptical" about the constitutionality of the regulation of off-premises speech; the doctrine of *in loco parentis* "rarely" applies to off-premises speech; public school students, like all other Americans, have the right to express "unpopular" ideas on public issues, even when those ideas are expressed in language that some find " ' inappropriate ' " or " ' hurtful ' "; public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government; the Mahanoy Area High School violated B. L.'s First Amendment rights when it punished her for the messages she posted on her own time while away from school premises; and the judgment of the Third Circuit must therefore be affirmed.

II

The degree to which enrollment in a public school can be regarded as a delegation of authority over off-campus speech depends on the nature of the speech and the circumstances under which it occurs. I will not attempt to provide a complete taxonomy of off-premises speech, but relevant lower court cases tend to fall into a few basic groups. And with respect to speech in each of these groups, the question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question.

One category of off-premises student speech falls easily within the scope of the authority that parents implicitly or explicitly provide. This category includes speech that takes place during or as part of what amounts to a temporal or spatial extension of the regular school program, *e.g.,* online instruction at home, assigned essays or other homework, and transportation to and from school. Also included are statements made during other school activities in which students participate with their parents' consent, such as school trips, school sports and other extracurricular activities that may take place after regular school hours or off school premises, and after-school programs for students who would otherwise be without adult supervision during that time. Abusive speech that occurs while students are walking to and from school may also fall into this category on the theory that it is school attendance that puts students on that route and in the company of the fellow students who engage in the abuse. The imperatives that justify the regulation of student speech while in school—the need for orderly and effective instruction and student protection—apply more or less equally to these off-premises activities.

Most of the specific examples of off-premises speech that the Court mentions fall into this category. See *ante,* at 2045 (speech taking place during "remote learning," "participation in other online school activities," "activities taken for school credit," "travel en route to and from the school," "[the time during which] the school is responsible for the student," and "extracurricular activities," as well as speech taking place on "the school's immediate

surroundings" or in the context of "writing ... papers"). The Court's broad statements about off-premises speech must be understood with this in mind.

At the other end of the spectrum, there is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection, see *Lane v. Franks*, 573 U.S. 228, 235, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment"); *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) ("[A] free-speech clause without religion would be Hamlet without the prince"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) ("[A]dvocacy of a politically controversial viewpoint ... is the essence of First Amendment expression"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"); *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" (internal quotation marks omitted)), and the connection between student speech in this category and the ability of a public school to carry out its instructional program is tenuous.

If a school tried to regulate such speech, the most that it could claim is that offensive off-premises speech on important matters may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises. But it is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas that are "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); see also *Matal* v. *Tam*, 582 U.S. ——, —— – ——, 137 S.Ct. 1744, 1751, 198 L.Ed.2d 366 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (opinion of Stevens, J.) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63–64, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) ("Nor may speech be curtailed because it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger"); *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"). It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right.

To her credit, petitioner's attorney acknowledged this during oral argument. As she explained, even if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto." Tr. of Oral Arg. 15–16. The school may suppress the disruption, but it may not punish the off-campus speech that prompted other students to engage in misconduct. See *id.,* at 5–6 ("[I]f listeners riot because they find speech offensive, schools should punish the rioters, not the speaker. In other words, the hecklers don't get the veto"); see also *id.,* at 27–28.

This is true even if the student's off-premises speech on a matter of public concern is intemperate and crude. When a student engages in oral or written communication of this nature, the student is subject to whatever restraints the student's parents impose, but the student enjoys the same First Amendment protection against government regulation as all other members of the public. And the Court has held that these rights extend to speech that is couched in vulgar and offensive terms. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U.S. ——, 139 S.Ct. 2294, 204 L.Ed.2d 714 (2019); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

Between these two extremes (*i.e.*, off-premises speech that is tantamount to on-campus speech and general statements made off premises on matters of public concern) lie the categories of off-premises student speech that appear to have given rise to the most litigation. A survey of lower court cases reveals several prominent categories. I will mention some of those categories, but like the Court, I do not attempt to set out the test to be used in judging the constitutionality of a public school's efforts to regulate such speech.

One group of cases involves perceived threats to school

administrators, teachers, other staff members, or students. Laws that apply to everyone prohibit defined categories of threats, see, *e.g.*, 18 Pa. Cons. Stat. § 2706(a); Tex. Penal Code Ann. § 22.07(a) (West 2020), but schools have claimed that their duties demand broader authority.

Another common category involves speech that criticizes or derides school administrators, teachers, or other staff members. Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence. See Brief for College Athlete Advocates as *Amicus Curiae* 12–21; Brief for Student Press Law Center et al. as *Amici Curiae* 10–11, 17–20, 30.

Perhaps the most difficult category involves criticism or hurtful remarks about other students. Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech. See, *e.g.*, *Saxe v. State College Area School Dist.*, 240 F.3d 200, 206–207 (C.A.3 2001).

III

The present case does not fall into any of these categories. Instead, it simply involves criticism (albeit in a crude manner) of the school and an extracurricular activity. Unflattering speech about a school or one of its programs is different from speech that criticizes or derides particular individuals, and for the reasons detailed by the Court and by Judge Ambro in his separate opinion below, the school's justifications for punishing B. L.'s speech were weak. She sent the messages and image in question on her own time while at a local convenience store. They were transmitted via a medium that preserved the communication for only 24 hours, and she sent them to a select group of "friends." She did not send the messages to the school or to any administrator, teacher, or coach, and no member of the school staff would have even known about the messages if some of B. L.'s "friends" had not taken it upon themselves to spread the word.

The school did not claim that the messages caused any significant disruption of classes. The most it asserted along these lines was that they "upset" some students (including members of the cheerleading squad), caused students to ask some questions about the matter during an algebra class taught by a cheerleading coach, and put out "negativity ... that could impact students in the school." The freedom of students to speak off-campus would not be worth much if it gave way in the face of such relatively minor complaints. Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting, and the algebra teacher had the authority to quell in-class discussion of B. L.'s messages and demand that the students concentrate on the work of the class.

As for the messages' effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but it is self-evident that this authority has limits. (To take an obvious example, a coach could not discriminate against a student for blowing the whistle on serious misconduct.) And here, the school did not simply take B. L.'s messages into account in deciding whether her attitude would make her effective in doing what cheerleaders are primarily expected to do: encouraging vocal fan support at the events where they appear. Instead, the school imposed punishment: suspension for a year from the cheerleading squad despite B. L.'s apologies.

There is, finally, the matter of B. L.'s language. There are parents who would not have been pleased with B. L.'s language and gesture, but whatever B. L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity. And B. L.'s school does not claim that it possesses or makes any effort to exercise the authority to regulate the vocabulary and gestures of all its students 24 hours a day and 365 days a year.

There are more than 90,000 public school principals in this country[27] and more than 13,000 separate school districts.[28] The overwhelming majority of school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand. If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

89 S.Ct. 733
Supreme Court of the United States

John F. TINKER and Mary Beth Tinker, Minors, etc., et al., Petitioners,
v.
DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT et al.

No. 21.
|
Argued Nov. 12, 1968.
|
Decided Feb. 24, 1969.

Opinion

Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Cf. *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. *Cox v. Louisiana*, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. Cf. *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is ***509** the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

In the present case, our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' *Burnside v. Byars*, *supra*, 363 F.2d at 749.

In *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 S.Ct. 625, 627 (1923), Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to 'foster a homogeneous people.' He said:

> 'In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a ***512** state without doing violence to both letter and spirit of the Constitution.'

This principle has been repeated by this Court of numerous occasions during the intervening years. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629, Mr. Justice Brennan, speaking for the Court, said:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker*, (364 U.S. 479), at 487 (81 S.Ct. 247, 5 L.Ed.2d 231). The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.[6] This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars, supra, 363 F.2d at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. *Hammond v. South Carolina State College*, 272 F.Supp. 947 (D.C.S.C.1967) (orderly protest meeting on state college campus); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (D.C.M.D.Ala.1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

767 F.3d 764
United States Court of Appeals,
Ninth Circuit.

John DARIANO; Dianna Dariano, on behalf of their minor child, M.D.; Kurt Fagerstrom; Julie Ann Fagerstrom, on behalf of their minor child, D.M.; Kendall Jones; Joy Jones, on behalf of their minor child, D.G., Plaintiffs–Appellants,
v.
MORGAN HILL UNIFIED SCHOOL DISTRICT; Nick Boden, in his official capacity as Principal, Live Oak High School; Miguel Rodriguez, in his individual and official capacity as Assistant Principal, Live Oak High School, Defendants–Appellees.

No. 11–17858.
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Argued and Submitted Oct. 17, 2013.
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Filed Feb. 27, 2014.
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Amended Sept. 17, 2014

OPINION

McKEOWN, Circuit Judge:

We are asked again to consider the delicate relationship between students' First Amendment rights and the operational and safety needs of schools. As we noted in *Wynar v. Douglas County School District,* 728 F.3d 1062, 1064 (9th Cir.2013), "school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights." In this case, after school officials learned of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo, the school asked a group of students to remove clothing bearing images of the American flag.

The students brought a civil rights suit against the school district, alleging violations of their federal and state constitutional rights to freedom of expression. We affirm the district court's denial of the students' motion for summary judgment on all claims. School officials anticipated violence or substantial disruption of or material interference with school activities, and their response was tailored to the circumstances. As a consequence, we conclude that school officials did not violate the students' rights to freedom of expression.

BACKGROUND

This case arose out of the events of May 5, 2010, Cinco de Mayo, at Live Oak High School ("Live Oak" or "the School"), part of the Morgan Hill Unified School District The Cinco de Mayo celebration was presented in the "spirit of cultural appreciation." It was described as honoring "the pride and community strength of the Mexican people who settled this valley and who continue to work here." The school likened it to St. Patrick's Day or Oktoberfest. The material facts are not in dispute.

Live Oak had a history of violence among students, some gang-related and some drawn along racial lines. In the six years that Nick Boden served as principal, he observed at least thirty fights on campus, both between gangs and between Caucasian and Hispanic students. A police officer is stationed on campus every day to ensure safety on school grounds.

On Cinco de Mayo in 2009, a year before the events relevant to this appeal, there was an altercation on campus between a group of predominantly Caucasian students and a group of Mexican students. The groups exchanged profanities and threats. Some students hung a makeshift American flag on one of the trees on campus, and as they did, the group of Caucasian students began clapping and chanting "USA." A group of Mexican students had been walking around with the Mexican flag, and in response to the white students' flag-raising, one Mexican student shouted "f* * * them white boys, f* * * them white boys." When Assistant Principal Miguel Rodriguez told the student to stop using profane language, the student said, "But Rodriguez, they are racist. They are being racist. F* * * them white boys. Let's f* * * them up." Rodriguez removed the student from the area.

At least one party to this appeal, student M.D., wore American flag clothing to school on Cinco de Mayo 2009. M.D. was approached by a male student who, in the words of the district court, "shoved a Mexican flag at him and said something in Spanish expressing anger at [M.D.'s] clothing."

A year later, on Cinco de Mayo 2010, a group of Caucasian students, including the students bringing this appeal, wore American flag shirts to school. A female student approached M.D. that morning, motioned to his shirt, and

asked, "Why are you wearing that? Do you not like Mexicans[?]" D.G. and D.M. were also confronted about their clothing before "brunch break."

As Rodriguez was leaving his office before brunch break, a Caucasian student approached him, and said, "You may want to go out to the quad area. There might be some—there might be some issues." During the break, another student called Rodriguez over to a group of Mexican students, said that she was concerned about a group of students wearing the American flag, and said that "there might be problems." Rodriguez understood her to mean that there might be a physical altercation. A group of Mexican students asked Rodriguez why the Caucasian students "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"

Boden directed Rodriguez to have the students either turn their shirts inside out or take them off. The students refused to do so.

Rodriguez met with the students and explained that he was concerned for their safety. The students did not dispute that their attire put them at risk of violence. Plaintiff D.M. said that he was "willing to take on that responsibility" in order to continue wearing his shirt. Two of the students, M.D. and D.G., said they would have worn the flag clothing even if they had known violence would be directed toward them.

School officials permitted M.D. and another student not a party to this action to return to class, because Boden considered their shirts, whose imagery was less "prominent," to be "less likely [to get them] singled out, targeted for any possible recrimination," and "significant[ly] differen[t] in [terms of] what [he] saw as being potential for targeting."

The officials offered the remaining students the choice either to turn their shirts inside out or to go home for the day with excused absences that would not count against their attendance records. Students D.M. and D.G. chose to go home. Neither was disciplined.

In the aftermath of the students' departure from school, they received numerous threats from other students. D.G. was threatened by text message on May 6, and the same afternoon, received a threatening phone call from a caller saying he was outside of D.G.'s home. D.M. and M.D. were likewise threatened with violence, and a student at Live Oak overheard a group of classmates saying that some gang members would come down from San Jose to "take care of" the students. Because of these threats, the students did not go to school on May 7.

The students and their parents, acting as guardians, brought suit under 42 U.S.C. § 1983 and the California Constitution against Morgan Hill Unified School District ("the District"); and Boden and Rodriguez, in their official and individual capacities, alleging violations of their federal and California constitutional rights to freedom of expression.

ANALYSIS

We analyze the students' claims under the well-recognized framework of *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Under *Tinker,* students may "express [their] opinions, even on controversial subjects ... if [they] do[ ] so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 513, 89 S.Ct. 733 (final alteration in original) (internal quotation marks omitted). To "justify prohibition of a particular expression of opinion," school officials "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509, 89 S.Ct. 733.

That said, "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513, 89 S.Ct. 733. Under *Tinker,* schools may prohibit speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities," or that constitutes an "actual or nascent [interference] with the schools' work or ... collision with the rights of other students to be secure and to be let alone." *Id.* at 508, 514, 89 S.Ct. 733; *see also Wynar,* 728 F.3d at 1067 (quoting *Tinker,* 393 U.S. at 508, 514, 89 S.Ct. 733.). As we have explained, "the First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances." *Karp v. Becken,* 477 F.2d 171, 175 (9th Cir.1973) (footnote omitted). Indeed, in the school context, "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." *Id.* As the Seventh Circuit explained, "[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission." *Zamecnik v. Indian Prairie Sch. Dist. # 204,* 636 F.3d 874,

877–78 (7th Cir.2011).

Although *Tinker* guides our analysis, the facts of this case distinguish it sharply from *Tinker,* in which students' "pure speech" was held to be constitutionally protected. 393 U.S. at 508, 89 S.Ct. 733. In contrast to *Tinker,* in which there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone," *id.,* there was evidence of nascent and escalating violence at Live Oak. On the morning of May 5, 2010, each of the three students was confronted about their clothing by other students, one of whom approached student M.D. and asked, "Why are you wearing that? Do you not like Mexicans[?]" Before the brunch break, Rodriguez learned of the threat of a physical altercation. During the break, Rodriguez was warned about impending violence by a second student. The warnings of violence came, as the district court noted, "in [the] context of ongoing racial tension and gang violence within the school, and after a near-violent altercation had erupted during the prior Cinco de Mayo over the display of an American flag." Threats issued in the aftermath of the incident were so real that the parents of the students involved in this suit kept them home from school two days later.

The minimal restrictions on the students were not conceived of as an "urgent wish to avoid the controversy," as in *Tinker, id.* at 510, 89 S.Ct. 733, or as a trumped-up excuse to tamp down student expression. The controversy and tension remained, but the school's actions presciently avoided an altercation. Unlike in *Tinker,* where "[e]ven an official memorandum prepared after the [students'] suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption," *id.* at 509, 89 S.Ct. 733, school officials here explicitly referenced anticipated disruption, violence, and concerns about student safety in conversations with students at the time of the events, in conversations the same day with the students and their parents, and in a memorandum and press release circulated the next day.

In keeping with our precedent, school officials' actions were tailored to avert violence and focused on student safety, in at least two ways. For one, officials restricted the wearing of certain clothing, but did not punish the students. School officials have greater constitutional latitude to suppress student speech than to punish it. In *Karp,* we held that school officials could "curtail the exercise of First Amendment rights when they c[ould] reasonably forecast material interference or substantial disruption," but could not discipline the student without "show[ing] justification for their action." 477 F.2d at 176; *cf. Wynar,* 728 F.3d at 1072 (upholding expulsion, despite its "more punitive character," as a justified response to threats); *LaVine v. Blaine Sch. Dist.,* 257 F.3d 981, 992 (9th Cir.2001).

For another, officials did not enforce a blanket ban on American flag apparel, but instead allowed two students to return to class when it became clear that their shirts were unlikely to make them targets of violence. The school distinguished among the students based on the perceived threat level, and did not embargo all flag-related clothing. *See* Background, *supra.*

Finally, whereas the conduct in *Tinker* expressly did "not concern aggressive, disruptive action or even group demonstrations," 393 U.S. at 508, 89 S.Ct. 733, school officials at Live Oak reasonably could have understood the students' actions as falling into any of those three categories, particularly in the context of the 2009 altercation. The events of 2010 took place in the shadow of similar disruptions a year earlier, and pitted racial or ethnic groups against each other. Moreover, students warned officials that there might be physical fighting at the break.[6]

We recognize that, in certain contexts, limiting speech because of reactions to the speech may give rise to concerns about a "heckler's veto."[7] But the language of *Tinker* and the school setting guides us here. Where speech "for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others," school officials may limit the speech. *Tinker,* 393 U.S. at 513, 89 S.Ct. 733. To require school officials to precisely identify the source of a violent threat before taking readily-available steps to quell the threat would burden officials' ability to protect the students in their charge-a particularly salient concern in an era of rampant school violence, much of it involving guns, other weapons, or threats on the internet—and run counter to the longstanding directive that there is a distinction between "threats or acts of violence on school premises" and speech that engenders no "substantial disruption of or material interference with school activities." *Id.* at 508, 514, 89 S.Ct. 733; *see also id.* at 509, 513, 89 S.Ct. 733.

In the school context, the crucial distinction is the nature of the speech, not the source of it. The cases do not distinguish between "substantial disruption" caused by the speaker and "substantial disruption" caused by the reactions of onlookers or a combination of circumstances. *See, e.g., Taylor v. Roswell Indep. Sch. Dist.,* 713 F.3d 25, 38, 38 n. 11 (10th Cir.2013) (observing that "Plaintiffs note that most disruptions occurred only because of wrongful behavior of third parties and that no Plaintiffs participated in these activities.... This argument might be effective outside the school context, but it ignores the 'special characteristics of the school environment,' " and that the

court "ha[d] not found[ ] case law holding that school officials' ability to limit disruptive expression depends on the blameworthiness of the speaker. To the contrary, the *Tinker* rule is guided by a school's need to protect its learning environment and its students, and courts generally inquire only whether the potential for substantial disruption is genuine." (quoting *Tinker,* 393 U.S. at 506, 89 S.Ct. 733)); *Zamecnik,* 636 F.3d at 879–80 (looking to the reactions of onlookers to determine whether the speech could be regulated); *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1272 (11th Cir.2004) (looking to the reactions of onlookers to determine whether a student's expression "cause[d] (or [was] likely to cause) a material and substantial disruption") (alterations and internal quotation marks omitted).

Perhaps no cases illustrate this principle more clearly than those involving displays of the Confederate flag in the school context. We respect the American flag, and know that its meaning and its history differ greatly from that of the Confederate flag. Nevertheless, the legal principle that emerges from the Confederate flag cases is that what matters is substantial disruption or a reasonable forecast of substantial disruption, taking into account either the behavior of a speaker—*e.g.,* causing substantial disruption alongside the silent or passive wearing of an emblem—or the reactions of onlookers. Not surprisingly, these cases also arose from efforts to stem racial tension that was disruptive. Like *Dariano,* the reasoning in these cases is founded on *Tinker. See, e.g., Hardwick v. Heyward,* 711 F.3d 426, 437 (4th Cir. 2013) (upholding school officials' ban on shirts with labels like "Southern Chicks," "Dixie Angels," and "Daddy's Little Redneck," and the Confederate flag icon, even though the bearer contended that hers was a "silent, peaceable display" that "even drew positive remarks from some students" and "never caused a disruption" because "school officials could reasonably forecast a disruption because of her shirts" (internal quotation marks omitted)); *A.M. ex rel. McAllum v. Cash,* 585 F.3d 214, 223 (5th Cir.2009) (noting that "[o]ther circuits, applying *Tinker,* have held that administrators may prohibit the display of the Confederate flag in light of racial hostility and tension at their schools"); *Barr v. Lafon,* 538 F.3d 554, 567–68 (6th Cir.2008) (noting the "disruptive potential of the flag in a school where racial tension is high," and that "[o]ur holding that the school in the circumstances of this case reasonably forecast the disruptive effect of the Confederate flag accords with precedent in our circuit as well as our sister circuits").[8]

Our role is not to second-guess the decision to have a Cinco de Mayo celebration or the precautions put in place to avoid violence where the school reasonably forecast substantial disruption or violence. "We review ... with deference[ ] schools' decisions in connection with the safety of their students even when freedom of expression is involved," keeping in mind that "deference does not mean abdication." *LaVine,* 257 F.3d at 988, 992. As in *Wynar,* the question here is not whether the threat of violence was real, but only whether it was "reasonable for [the school] to proceed as though [it were]." 728 F.3d at 1071; *Karp,* 477 F.2d at 175 (noting that "*Tinker* does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption"). Here, both the specific events of May 5, 2010, and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real. We hold that school officials, namely Rodriguez, did not act unconstitutionally, under either the First Amendment in asking students to turn their shirts inside out, remove them, or leave school for the day with an excused absence in order to prevent substantial disruption or violence at school.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, joined by TALLMAN and BEA, Circuit Judges, dissenting from the denial of rehearing en banc:

The freedom of speech guaranteed by our Constitution is in greatest peril when the government may suppress speech simply because it is unpopular. For that reason, it is a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech. It is this bedrock principle—known as the heckler's veto doctrine—that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently.

In doing so, the panel creates a split with the Seventh and Eleventh Circuits and permits the will of the mob to rule our schools. For these reasons, I must respectfully dissent from our refusal to hear this case en banc.