

No Longer a Vast *Terra Incognita*

The United States Court of Appeals for the Third Circuit in *Drummond vs. Robinson Twp.*, 2021 U.S. App. LEXIS 24511*, 2021 WL 3627106 (August 17, 2021) (Krause, C.J.), is the latest federal appellate court to weigh in on the question concerning the right to bear arms, currently implicated in the context of local zoning rules. The decision written by Circuit Judge Krause naturally cites the boundary line established in *District of Columbia vs. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008). Pertinent to the discourse was Judge Krause's observation that the right to bear arms no longer presents a "vast *terra incognita*." 2021 U.S. App. LEXIS 24511*, *1 (quoting *United States vs. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)).

The question presented in *Drummond vs. Robinson Twp.* is whether local zoning restrictions on where citizens can purchase or practice with firearms implicates the right to bear arms under *Heller*. "As neither rule finds deep roots in history or tradition, we conclude that both carry constitutional consequences." 2021 U.S. App. LEXIS 24511, *2.

The court noted that the Second Amendment right to bear arms "is not unlimited." *Id.* at *9. The court in Judge Krause's typically unambiguous language states that as the two-step framework outlining the *United States vs. Marzzarella*, makes abundantly clear, different laws trigger differing tests. *Id.* at *2 (citing *Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010)).

The Court noted that in examining rules which conflict with the Second Amendment, the court will hunt for what it calls historical outliers which are laws that lack traditional counterparts. These rules are subjected to heightened scrutiny. The Court, in its evaluation as to whether a rule violates the Constitution, will also examine "modern outliers." Those are laws "with few parallels in contemporary practice." *Id.* The Court goes on to explain that "the more 'exceptional' a rule, the more likely the government has overlooked less burdensome 'options' that could serve as interest just as well." *id.*, relying upon *McCullen vs. Coakley*, 573 U.S. 464, 490, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

While that language is a bit arcane to comprehend fully, the Court explains that the zoning rules challenged in *Drummond* constitute outliers and because the pleading-stage materials failed to justify their "anomalous features" the Court vacated the District Court's dismissal order and remanded the case for discovery. This thoughtful sidestepping of the issue necessarily prompted a ruling on the pending Motion for Preliminary Injunction.

The blackletter ruling of the Court was that the zoning rules dealing with rifle practice and nonprofit organizations both can and should be tested in the courts.

At issue was a 265-acre track in Robinson Township, Pennsylvania with a gun range now designated the Greater Pittsburgh Gun Club. The Club at one point had over 800 dues-paying members. It also served as a practice location for nearby National Guard units. Without recounting the history of the Club and actions against it in detail, suffice it to say this was an organization which faced many challenges.

William Drummond leased the land in 2017. Drummond determined to engage in the retail sale of firearms and to operate a shooting range in an attempt to rejuvenate the Club. He also planned to permit customers to shoot firearms such as pistols, shotguns, and center-fire rifles up to .50 caliber.

At the time Drummond finalized the lease, the Township permitted gun ranges in three types of districts. When the Township residents saw that Drummond had leased the club, they asked for rezoning to limit activities on the property. The residents believed that the range would constitute a “nuisance” and a “danger.” The Board voted to amend the rules governing Sportsmen’s Clubs in categories governing the land that Drummond leased. The new rules limited clubs to pistol range, skeet shoot, trap and skeet and rib-fire rifle practice.

After a thorough evaluation, the Court in *Drummond* decided that the Township’s new ordinance deviated from the historical paradigm. Following *Heller*, the Court in *Drummond* decided that the “presence of ordinary restrictions in some places cannot excuse extraordinary restrictions on others.” 2021 U.S. App. LEXIS 24511, *15 (footnote omitted).

Perhaps even more importantly, the Court in *Drummond*, reviewed whether to apply strict or intermediate scrutiny. Intermediate scrutiny was said to govern. If a zoning ordinance has the effect of depriving would-be gun owners of the guns and skills commonly used for lawful purposes then strict scrutiny may be warranted. *Id.* at *17, The Appellant took no position on that issue. In this instance, “[t]he challenged ordinance steers clear of the *Second Amendment’s* core and thus implicates intermediate scrutiny.” *Id.* at *19.

Judge Krause wrote that the ordinance “plausibly fails intermediate scrutiny.” *Id.* The Court noted that if non-profit status moderates commercial intensity, as argued by the Township, why permit for-profit shooting ranges? *Id.* at *25. The Court did not, of course, determine that the zoning regulation failed intermediate scrutiny but rather identified reasons why the ordinance “plausibly” fails intermediate scrutiny.

In terms of the burden of proof, the Court noted:

As the Township argues and as we accept above, the challenge rules stop short of an absolute ban on firearms purchase and practice. It does not follow, though, that the burden they produce is not significant. The non-profit ownership rule, in particular, has already forced the Greater Pittsburgh Gun Club out of business, and may have the same effect on other Sportsman’s Clubs. It is plausible that those closures impair residents’ access to the weapons and skills commonly used to lawfully defend their homes.

Id. at *27.

A rigorous analysis of the rules that interfere with the right to bear arms must be and should be undertaken, according to the Court. The Appellant’s Preliminary

Injunction Motion did not receive a substantive ruling by the district court and therefore the case was remanded for that purpose.

Although appellees sought to have the case assigned to another district judge, the circuit court denied that request.

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.