Written by **Bob Adelmann** on November 4, 2024

Three-judge Panel Upholds DC Ban on High-capacity Magazines, Defying Supreme Court Rulings

The ruling by a three-judge panel of the U. S. District Court of Appeals for the District of Columbia last week continued its long defiance of recent rulings by the Supreme Court. At issue in *Hanson v. District of Columbia* is D.C.'s insistence that magazines that carry more than 10 rounds of ammunition fall outside the Supreme Court's rulings in *Heller, McDonald*, *Bruen*, and *Rahimi*. Two of the three judges on the panel agreed that D.C.'s ban on "extra-large capacity magazines," or ELCMs, is constitutional.

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Mental Gymnastics

The mental gymnastics needed to reach this conclusion were remarkable.

The panel agreed unanimously that ELCMs are "arms" under the Second Amendment: "We therefore agree with [Plaintiff] Hanson that ELCMs very likely are 'arms' within the meaning of the plain text of the Second Amendment."

The panel further agreed unanimously that they are "in common use":

> Because ELCMs are in sufficiently wide circulation and given the disputed facts in the record about the role of ELCMs for self-defense, we will presume for present purposes that ELCMs can be used for self-defense.
>
> Accordingly, because Hanson has shown it is likely that ELCMs are "arms" and are in common use for self-defense today, it appears on this record that "the Second Amendment's plain text covers" and therefore presumptively protects the possession of ELCMs.

There the decision should have ended: an injunction against enforcement of the ban should be granted.

But no. There had to be a way to justify the ban. And the two judges (one appointed by President Obama, the other by President Reagan) found it — societal concerns over mass shootings:

> Large capacity magazines have given rise to an unprecedented societal concern: mass shootings. As the First Circuit has observed, there is "no direct precedent for the contemporary and growing societal concern that [ELCMs] have become the preferred tool for murderous individuals intent on killing as many people as possible, as quickly as possible."

It added that the laws represent D.C.'s justification of the cap: to counter the growing use of ECLMs "to facilitate crime and, specifically, to perpetuate mass shootings."

Then, to add to the insanity, the two-judge majority claimed that past limitations on Bowie knives and pocket pistols from the 19th century (long after the Second Amendment was added to the Constitution) were relevant and were "identified [as] a relevant historical analogue" that the Supreme Court now requires as justification for such bans.

In his dissent, Judge Justin Walker, nominated to his present position by then-President Donald Trump in 2019, was blunt:

> In *District of Columbia v. Heller*, the Supreme Court held that the government cannot categorically ban an arm in common use for lawful purposes.
>
> Magazines holding more than ten rounds of ammunition are arms in common use for lawful purposes.
>
> Therefore, the government cannot ban them.

Walker expanded on his unhappiness with the decision rendered by his colleagues:

> D.C. has offered no reason to doubt that throughout all of this history, no federal or state legislature enacted a blanket ban on a gun in common use for lawful purposes.
>
> Yes, there could be limits on *who* possesses a gun. Yes, there could be limits on *where* and *how* you carry a gun.
>
> And yes, there could be limits on owning and carrying *unusual* guns.
>
> But D.C. has failed to identify any categorical ban on a gun in common use for lawful purposes in the first century of our nation's history.

He then excoriated his colleagues for siding with the District, in plain defiance of Supreme Court rulings:

> With *Heller* and *McDonald*, the Supreme Court left little doubt about the validity of severe gun-control regimes.
>
> But revanchist [i.e., those seeking vengeance] legislatures responded with "defiance."
>
> D.C. led the way. After its ban on keeping handguns was held unconstitutional, it followed "with a ban on carrying."
>
> "And when *that* was struck down," D.C. confined "carrying a handgun in public to those with a special need for self-defense."
>
> D.C. then lost in court *again*, this time after arguing that the Second Amendment's "core does not cover public carrying at all."

D.C. Not Alone

Unfortunately, D.C. is not alone in its defiance of the high court. Wrote Walker:

> D.C.'s unveiled contempt for *Heller* and *McDonald* was not unique. For example, the Massachusetts Supreme Judicial Court held that the Second Amendment does not protect

> stun guns — a decision that the unanimous Supreme Court summarily reversed in *Caetano v. Massachusetts*.
>
> With a terse, two-page opinion, the Court dispensed with the state court's thin reasoning as patently "inconsistent" with the "clear" holdings of *Heller* and *McDonald*.
>
> *Caetano* put lower courts on notice: Exceptions to gun rights under the Second Amendment depend on a historical tradition of analogous regulations, and there is no historical tradition of banning arms in common use for lawful purposes.
>
> Many state courts did not get the memo. Nor did some federal circuit courts.

That would include, of course, the D.C. District Court of Appeals, on which Walker sits.

SCOTUS Not Happy With Lower Courts' Defiant Rulings

The defiance by lower courts has been noted repeatedly by Supreme Court justices, who have expressed unhappiness with it. Walker noted:

> Justice Thomas (joined by Justice Scalia) lamented that "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts . . . have failed to protect it."
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> Justice Thomas (again joined by Justice Scalia) criticized lower courts' "crabbed reading of *Heller*" and "noncompliance with our Second Amendment precedents."
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> Justice Thomas said that "lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights."
>
> Justice Alito (joined by Justice Thomas) criticized lower court "reasoning" that "defies our decision in *Heller*."
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> Justice Alito (joined by Justice Gorsuch) expressed "concern" about "the way *Heller* has been treated in the lower courts."
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> Justice Kavanaugh shared a similar "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."
>
> Justice Thomas (joined by Justice Kavanaugh) again accused the lower courts of "blatant defiance," explaining that means-end scrutiny was "entirely inconsistent with *Heller*" and "appear[ed] to be entirely made up."

The case may revert to the lower court for further consideration. Or Hanson and his attorneys may appeal to the Supreme Court for proper remedy.