FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

DISCLAIMER:

THE VIEWS EXPRESSED IN THIS PRESENTATION ARE NOT OUR OWN BUT ARE AN ANALYSIS OF THE COLLECTIVE VIEWS OF NINE PEOPLE WHO LIVE AND WORK IN WASHINGTON DC.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

BUT FIRST…

Constitution of the State of New Mexico

Article II: Bill of Rights

Section 6: Right To Bear Arms.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

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A law which prohibits one from carrying a firearm into a liquor establishment is a reasonable regulation and not an infringement upon the right to bear arms, under either the federal or the state constitution. *State v. Dees*, 1983-NMCA-105, 100 N.M. 252, 669 P.2d 261

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Section 30-7-3 NMSA 1978, prohibiting unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, is not an unconstitutional infringement upon the right to bear arms under the New Mexico constitution; regulation of the right to bear arms is not a deprivation of that right. *State v. Lake*, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380, *cert. denied*, 121 N.M. 676, 916 P.2d 1343.

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Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. Therefore, the defendant's conviction for negligent use of a deadly weapon did not violate his right to bear arms under the state constitution. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, *cert. denied*, 115 N.M. 228, 849 P.2d 371

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The State Constitution neither forbids nor grants the right to bear arms in a concealed manner. *State ex rel. N.M. Voices for Children, Inc. v. Denko*, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458

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The language used in the last sentence of this section takes from municipalities and counties authority they otherwise would have under their police powers to regulate matters which are incidents of right to bear arms. The practical result of the prohibition is to allow firearm regulation only by the state and state agencies with the requisite statutory authority. 1990 Op. Att'y Gen. No. 90-07.

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N.M. Const., Art. II, § 6 removed local governments' ability to regulate firearms, therefore Bernalillo county lacks the authority to prohibit firearms at the Bernalillo county government center. New Mexico's courts have statutory authority to promulgate rules to prohibit weapons, including firearms, at courts and court facilities. Given the public's ability to access the probate court on the second floor of the Bernalillo county government center, it is reasonable to infer that the probate court would have authority to prohibit firearms onto those portions of the government center that are specifically used for court-related functions. *Prohibition of Weapons in Multi-Use County-Owned Building* (12/1/2022), Att'y Gen. Adv. Ltr. 2022-16

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

AND NOW TO FEDERAL LAW, BEGINNING WITH THE US CONSTITUTION:

The Constitution of the United States of America

Amendments To The Constitution

Amendment II: Right to Keep and Bear Arms

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

Three Primary Federal Laws Restricting Firearms:

National Firearms Act of 1934

Gun Control Act of 1968

Violence Against Women Act of 1994

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

US Constitution, Amendment II: Right to Keep and Bear Arms

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.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

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FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

US Constitution, Amendment II: Right to Keep and Bear Arms

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.

This is known as the prefatory clause

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US Constitution, Amendment II: Right to Keep and Bear Arms

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.

This is known as the operative clause

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

District of Columbia v. Heller, 554 U.S. 570 (2008)

Decided 5-4

Opinion: Antonin Scalia (Author), joined by John Roberts, Anthony Kennedy, Clarence Thomas, Samuel Alito

Dissent: John Paul Stevens (Author), joined by David Souter, Ruth Bader Ginsburg, Stephen G. Breyer

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District of Columbia law banned handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provided separately that no person may carry an unlicensed handgun, but authorized the police chief to issue 1-year licenses; and required residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device.

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Held:

The Second Amendment 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.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

At issue in this case was:

(1) the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and

(2) the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home."

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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 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824). 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.

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The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

Logic demands that there be a link between the stated purpose and the command. But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

The first salient feature of the operative clause is that it codifies a "right of the people." The Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. These instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

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The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." *Dictionary of the English Language* 107 (4th ed.). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *A New and Complete Law Dictionary* (1771).

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The term [arms] was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.

The most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

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, and the Fourth Amendment applies to modern forms of search, 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.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

The most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

At the time of the founding, as now, to "bear" meant to "carry." And "bear arms" was not limited to the carrying of arms in a militia.

The Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed."

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McDonald v. City of Chicago, 561 U.S. 742 (2010)

Decided 5-4

Opinion: Samuel Alito (Author), joined by John Roberts, Anthony Kennedy, Clarence Thomas, Antonin Scalia

Dissent: John Paul Stevens (Author), joined by Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor

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Chicago enacted a handgun ban to protect its residents "from the loss of property and injury or death from firearms." The Supreme Court had previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in case law, the Supreme Court held that the Second Amendment right is fully applicable to the States.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

The Bill of Rights, including the 2nd Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." In McDonald, the Supreme Court held that the Due Process Clause of the 14th Amendment incorporates the 2nd Amendment right recognized in Heller.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. ___ (2022)

Decided 6-3

Opinion: Clarence Thomas (Author), joined by John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett,

Dissent: Stephen Breyer (Author), joined by Sonia Sotomayor, Elena Kagan

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

Primary Holding:

New York required that an applicant for an unrestricted license to "have and carry" a concealed pistol or revolver must prove "a special need for self-protection distinguishable from that of the general community. "We hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Despite the popularity of this two-step approach, it is one step too many. Today, we decline to adopt that two-part approach.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

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We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

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This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms. In that context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)

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If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.

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The Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply only to those arms in existence in the 18th century. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, 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.

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When confronting present-day firearm regulations, the historical inquiry that courts must conduct will often involve reasoning by analogy. To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. Whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry.

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Confining the right to "bear" arms to the home would make little sense given that self-defense is "the central component of the [Second Amendment] right itself." *Heller*, 554 U. S., at 599; see also *McDonald*, 561 U. S., at 767. After all, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," *Heller*, 554 U. S., at 592, and confrontation can surely take place outside the home.

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A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. See, e.g., *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251 (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.

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Regarding New York's law, we know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

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New York's proper-cause requirement to receive a permit violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

New York State Rifle & Pistol Association, Inc. v. Bruen

Decided 6-3

Concurrence: Brett Kavanaugh (Author), joined by John Roberts

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

United States v. Rahimi

Docket Number: 22-915

On Certiorari from the 5th Circuit

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

QUESTION PRESENTED:

Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

QUESTION PRESENTED:

Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

FACTS IN BRIEF:

Zackey Rahimi was issued a civil restraining order by a Texas state court on February 5, 2020, after his ex-girlfriend accused him of assaulting her; the order barred him from engaging in certain harassment-related behaviors towards his ex-girlfriend or her child, as well as owning firearms. Suspecting Rahimi of an unrelated crime, officers executed a search warrant at his home, discovering a rifle and a pistol he admitted to possessing.

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FIFTH CIRCUIT REVISED OPINION:

The Fifth circuit rejected the government's argument that Second Amendment applies only to "law abiding, respectable citizens", citing to Justice Amy Coney when she served as a judge on the United States Court of Appeals for the Seventh Circuit. Justice Barrett then argued, "Founding era legislatures did not strip felons of the right to bear arms simply because of their status as felons", or impose any "virtue-based restrictions" on that right.

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FIFTH CIRCUIT CONCURRENCES:

Concurrence argued that "civil protective orders are too often misused as a tactical device in divorce proceedings – and issued without any actual threat of danger". Then went further and argued that Section 922(g)(8) could even put victims of domestic violence "in greater danger than before", because they would be unable to defend themselves against their abusers with guns, if a judge had issued a "mutual" protective order.

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WILL BE DECIDED BY JUNE 2024

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OTHER PERCOLATING DECISIONS

FEDERAL COURTS' JURISPRUDENCE ON SECOND AMENDMENT IN 2023

DISCUSSION