[J-29-2023] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JONATHAN BARRIS,	:	No. 68 MAP 2022
	:	
Appellee	:	Appeal from the Commonwealth Court Order dated May 28, 2021 at No. 671 CD 2020 Reversing the
v.	:	Order of the Court of Common Pleas of Monroe County, Civil Division, at No. 6773 Civil 2015 dated May 26,
STROUD TOWNSHIP,	:	2020
	:	
Appellant	:	ARGUED: May 24, 2023

CONCURRING AND DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: February 21, 2024**

I concur in the result reached by the Majority. However, in my view, its application of the two-part inquiry set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022), is at odds with the High Court's guidance. Further, the analysis conducted by the Majority is internally inconsistent. Accordingly, while I agree with its conclusion, I do not join the Majority's application of *Bruen*.

As the Majority observes, *Bruen* has effectuated a "dramatic sea change in Second Amendment law[.]" Majority Op. at 19. Rejecting the means-end framework that had been utilized by various federal courts of appeal,[1] the High Court adopted the following test:

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[1] As *Bruen* explains, following the High Court's decisions in *Heller* and *McDonald*, federal courts of appeal developed a two-step test to address Second Amendment claims. *Bruen*, 597 U.S. at 18. First, the government would have to justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." *Id.* (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. (continued…)

> [W]hen 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. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 597 U.S. at 17. The first inquiry is whether the plain text of the Second Amendment covers the individual's proposed conduct. *Id.* at 24. If the individual's proposed conduct is covered by the plain text, we then move on to the second inquiry, which requires us to determine whether the challenged regulation is consistent with the "historical tradition" of firearm regulation. *Id.* Regardless of any concerns I share with the Majority regarding the application of the *Bruen* test, *see* Majority Op. at 63, this analysis is what the High Court has articulated, and we must remain as faithful to that test as is possible. It is my position that the Majority has failed to correctly conduct the first inquiry under *Bruen*.

2019)). If the government's historical evidence was "inconclusive or suggest[ed] that the regulated activity is not categorically unprotected," the courts would move to step two. *Id.* (quoting *Kanter*, 919 F.3d at 441)). Under the second step, courts would determine how close the law came to core of the Second Amendment and the severity of its burden on that right. *Id.* If a "core" right was burdened, courts would apply "strict scrutiny," but for any lesser interest, the federal courts of appeal would apply "intermediate scrutiny." *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012) (applying intermediate scrutiny to New York's requirement that "proper cause" must be demonstrated for applicants to obtain a license to carry a concealed handgun).

The threshold inquiry requires this Court to examine the challenger's proposed conduct to determine if it is protected by the Second Amendment.[2] *See, e.g.*, *Bruen*, 597 U.S. at 32 (examining whether the challengers' proposed course of conduct —"carrying handguns publicly for self-defense"— implicated the plain text of the Second Amendment); *Range v. U.S. Att'y Gen.*, 69 F.4th 96, 103 (3d Cir. 2023) (examining the challenger's request "to possess a rifle to hunt and a shotgun to defend himself at home" and finding that "'the Second Amendment's plain text covers [the challenger's] conduct'") (citing *Bruen*, 597 U.S. at 17)); *United States v. Sitladeen*, 64 F.4th 978, 987 (8th Cir. 2023) ("*Bruen* tells us to begin with a threshold question: whether the person's conduct is 'covered by' the Second Amendment's 'plain text.'"); *Teter v. Lopez*, 76 F.4th 938, 948 (9th Cir. 2023) (examining whether the challenger's "possession of butterfly knives is conduct covered by the plain text of the Second Amendment"); *Nat'l Rifle Ass'n*, 61 F.4th 1317, 1324 (11th Cir. 2023) (determining whether the challenger's proposed conduct — "buying firearms"— is implicated by the Second Amendment), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir. July 14, 2023); *United States v. Kays*, 624 F.Supp.3d 1262, 1265 n.4 (W.D. Okla. 2022) (reading *Bruen* to stand for the proposition that "an individual's Second Amendment rights are [] predicated on their … conduct").

For the threshold inquiry, instead of focusing on the conduct in which Barris proposed to engage, the Majority looked to the unchallenged penalty imposed for violation of the challenged statute — disarming violators — and concluded that the penalty

[2] I agree with the Majority that while some courts addressing the first step have grappled with the question of whether a challenger is part of "the people" contemplated by the Second Amendment, there is no need to engage in such an inquiry in this matter. Majority Op. at 45.

implicated the plain text of the Second Amendment — to keep and bear arms. Majority Op. at 49. From my review, unlike the Majority's analytical choice, none of the post-*Bruen* cases focus on the penalties that could result from engaging in the challenger's proposed conduct. Rather, *Bruen* requires courts to first address the purportedly protected conduct in which the challenger intends to engage to determine if **that conduct** is protected by the plain text of the Second Amendment.

Barris initiated this litigation to protect his ability to gain firearm proficiency on his own property outside of the confines of a commercial shooting range. Barris contends that the zoning aspect of the Ordinance[3] prohibits him from discharging firearms on his property with scant discussion of and no reliance on the penalties that would result from violating the Ordinance.[4] In his amended complaint, Barris explains that he constructed and maintained a "home shooting range[,]" and that the Ordinance "limits the discharge of lawfully owned firearms within the Township, … outlaw[ing] firearm practice and safe shooting ranges on residential property[.]" Amended Complaint, 1/8/2018, ¶¶ 8 & 11. This, he argues, "unlawfully impedes and has a chilling effect on bearing arms by limiting experience inherently necessary to the exercise of Second Amendment rights and limits and impedes the ability to remain secure in their homes by limiting firearm proficiency,"

[3] Specifically, the Ordinance provides that "[i]t shall be unlawful to fire or discharge any firearm within the Township of Stroud except[,]" for, in relevant part, that "[t]he discharging of firearms shall be allowed on indoor or outdoor shooting ranges pursuant to applicable provisions of the Stroud Township Zoning Ordinance[.]" Ordinance, §§ 3 & 4(D).

[4] Even when recognizing the possible penalties for violating the Ordinance, Barris only references that discharging his firearms on his property could result in civil fines or incarceration if a violator fails to pay those fines. Amended Complaint, 1/8/2018, ¶ 12 (referencing Section 5 of the Ordinance describing civil fines and enforcement proceedings).

to those willing to travel and incur additional cost. *Id.* ¶ 18. At no point has Barris sought to invoke his possession of firearms as the basis for his Second Amendment challenge.[5] In fact, Barris never even references the seizure of his firearms. While he has since seemingly abandoned the position that his proposed conduct even implicates the text of

[5] The Majority maintains that Barris' claim was only partially based on his ability to gain firearm proficiency, and that the breadth of his challenge included possession of firearms insofar as Barris stated that the Ordinance "deprive[s] him of his Constitutional right to bear … firearms." Majority Op. at 50 n.38 (quoting Amended Complaint, 1/8/2018, ¶ 19). Thus, according to the Majority's rationale, *Bruen*'s first step can be satisfied by examining the Ordinance's unchallenged penalty provision that permits the seizure of a violator's firearms. *Id.* Respectfully, I disagree that Barris' claim is so broad. Although the Majority is correct that Barris' amended complaint asserts that the Ordinance "deprive[s] him of his Constitutional right to bear, gain proficiency and learn firearms[,]" Amended Complaint, 1/8/2018, ¶ 19, the immediately preceding paragraph in his amended complaint lays out precisely the extent to which Barris views his right to bear arms as being violated. Therein, Barris explains that the Ordinance

> has a chilling effect on bearing arms by limiting experience inherently necessary to the exercise of Second Amendment rights and limits and impedes the ability of persons to remain secure in their homes by limiting firearm proficiency to those willing and able to travel, incur cost and expense, obtain memberships and other obligations imposed by commercial or private shooting ranges.

Id. ¶ 18. Barris explains his concern about his right to "bear arms," and it, as set forth in his challenge, has nothing to do with the possession of firearms. The entirety of his amended complaint discusses his home shooting range, the benefits of firearms proficiency, and that the harm to his Second Amendment rights will stem from having to travel and incur costs to gain firearms proficiency as a result of the Ordinance. He does not discuss the penalty provision relied upon by the Majority, nor does he discuss any harm that would result from the seizure of his firearms. Thus, in my view, Barris' proposed conduct underlying his challenge relates only to training on his home shooting range.

I appreciate the Majority's reluctance to engage in an inquiry that may involve an area of the law that the High Court has left uncertain, Majority Op. at 50-51 n.38 ("[U]nder the circumstances, we think a dose of restraint is more than warranted."). Respectfully, I do not see how "restraint" justifies recasting a challenger's proposed conduct as something that it is not.

the Second Amendment,[6] the general conduct Barris is seeking to protect remains the same: "firearm training" on "home target ranges." Barris' Brief at 10 & 12.

The Majority supplants the focus of Barris' argument with its own observation in order to avoid a tougher question: "whether ancillary rights, including training with arms (either at home or elsewhere), are protected by the Second Amendment." Majority Op. at 49. However, my reading of the High Court's test in *Bruen* leads me to the understanding that it is not up to this Court to determine what "proposed course of conduct" is implicated by the plain text of the Second Amendment divorced from the constitutional challenged asserted. Rather, Barris, as the challenger, must invoke the asserted constitutional right he is seeking to protect in terms of the specific conduct in which he intends to engage. As Barris never based his challenge on the provision permitting Township authorities to seize his firearms, nor argued in any other way that the Ordinance deprived him of possession of his firearms, we must address the question in the context in which it has been brought to us. In other words, we must address whether the conduct that Barris seeks to engage in is implicated by the plain text of the Second Amendment. I am of the position that it does not.

Barris' challenge to the Ordinance is that it prevents him from engaging in "firearm training" on his "home target range." Barris' Brief at 10 & 12. In his amended complaint, Barris makes clear that he views the Ordinance as "outlaw[ing] firearm practice and safe shooting ranges on residential property[,]" despite recognizing that individuals may still discharge firearms at "large-scale commercial and/or private" shooting ranges. Amended

[6] Barris now asserts that "[n]o Second Amendment 'text' references firearm training." Barris' Brief at 10.

Complaint, 1/8/2018, ¶ 11. This limitation, he argues, "limits firearm proficiency to those willing and able to travel, incur cost and expense, obtain memberships and other obligations imposed by commercial or private shooting ranges." *Id.* ¶ 18. Thus, while Barris discusses the importance of firearms proficiency that comes from training, his primary contention is that the Ordinance limits where he can do it. Thus, we need not address whether firearms training is a corollary or ancillary right under the Second Amendment that would satisfy *Bruen*'s first step. Instead, we must determine whether Barris' proposed conduct, i.e., training on his home shooting range, falls within the ambit of the Second Amendment.

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. As the Majority acknowledges, Majority Op. at 47-49, the High Court has discussed that firearms training may very well be implicit in the Second Amendment:

> the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121–122; cf. Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

District of Columbia v. Heller, 554 U.S. 570, 597 (2008). There is an inherent difference between the ability to train with firearms in general and the ability to train with firearms anywhere without limitation. These distinct concepts illustrate why Barris' proposed conduct falls outside the protection of the Second Amendment. The *Bruen* Court discussed the Second Amendment's plain text and its "unqualified command." *Bruen*, 597 U.S. at 17 (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n. 10)). As the

High Court has explained, the core "command" of the Second Amendment is the "right to keep and bear arms for self-defense." *Id.* (citing *Heller*, 554 U.S. 570; *McDonald v. City of Chicago*, 561 U.S. 742 (2010)). However, as *Heller* recognized, "[l]ike most rights, the right secured by the Second Amendment is not unlimited[,]" as "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

If we assume, as the High Court has suggested, that the Second Amendment necessarily incorporates the idea that firearm owners must be able to maintain proficiency to effectuate the purpose of the Second Amendment,[7] that right, "[l]ike most rights," is not unlimited. *See Heller*, 554 U.S. at 626. As there is nothing in the "unqualified command" of the Second Amendment that entitles individuals to any weapon in any circumstance whatsoever, *see id.*, the logical conclusion is that the text similarly does not command that an individual is free to train under any circumstance or in any location. *See, e.g.*, *Oakdale Tactical Supply, LLC v. Howell Twp.*, 2023 WL 2074298, at *3-*4 (E.D. Mich., Feb. 17, 2023) (acknowledging the distinction between "training with firearms" in general and "the construction and use of an outdoor, open-air 1,000-yard shooting range").

While, as noted, there is certainly support from the High Court that firearms training would by itself satisfy *Bruen*'s threshold inquiry, *Heller*, 554 U.S. at 597, for the reasons discussed above, we need not probe that implication any further because the conduct

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[7] As the Majority acknowledges, at least one Justice is firmly of the belief that firearms proficiency is necessary to effectuate the right to bear arms. Majority Op. at 48-49 (*See Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring) ("Constitutional rights [] implicitly protect those closely related acts necessary to their exercise … . The right to keep and bear arms, for example, implies a corresponding right to obtain the bullets necessary to use them, and to acquire and maintain proficiency in their use[.]") (internal quotation marks and citations omitted)).

Barris seeks to protect is more specific. Barris seeks to protect his ability to train with firearms in his own backyard despite the availability of firearms training facilities within the Township. The Ordinance does not prohibit firearms training. It merely establishes where it may take place. It is this limitation as to **where** Barris can engage in such training that has been brought before this Court, as he is in no way foreclosed from engaging in firearms training in general. In fact, Barris specifically highlights that there are "large-scale commercial and/or private" shooting ranges where he may still engage in such conduct. Amended Complaint, 1/8/2018, ¶ 11. However, it is his position that by limiting firearms training to such facilities, the Ordinance negatively impacts his rights under the Second Amendment because it requires him to travel and pay the attendant costs to enjoy these facilities. *Id.* ¶ 18. There is nothing in the plain text of the Second Amendment that guarantees a specific location for where one may train with their firearms; there exists merely the implication, as suggested by the High Court, that one cannot be prohibited from training in general. Moreover, Barris has not developed an argument to support the existence of such an implicit discrete right; let alone an "unqualified command" under the Second Amendment. *Bruen*, 597 U.S. at 17.

Barris' claim is based upon a violation of the Second Amendment, but his "proposed conduct" is not implicated by the plain language of the Second Amendment. Thus, he cannot satisfy *Bruen*'s threshold inquiry that engaging in firearms training on his private residential property is covered by the plain text of the Second Amendment. Given that Barris' proposed conduct does not pass this initial hurdle, this Court does not need to address the second question of whether the historical evidence supports a finding that

the Ordinance is consistent with the Nation's historical tradition of firearm regulation, and Barris' challenge to the Ordinance must fail.

In the alternative, if, contrary to the foregoing analysis, the High Court's construction of the Second Amendment encompasses the right to firearms proficiency training at one's home, my ultimate conclusion would not change. As to the breadth of a right to maintain firearms proficiency, the High Court may utilize precepts similar to those used in interpreting the right to keep and bear arms. To give the language its full effect, the High Court interpreted the right to keep and bear arms without any "home/public distinction[,]" *Bruen*, 597 U.S. at 32, "guarantee[ing] the individual right to possess and carry weapons in case of confrontation[,]" *Heller*, 554 U.S. at 592. Despite the fact that the text does not clearly establish this right so broadly, the High Court has determined that such a notion is embedded in an understanding of the Second Amendment. *Bruen*, 597 U.S. at 32-33. Following this logic, the High Court may similarly consider that firearms proficiency training at one's home fits broadly within the implicit right to train and maintain proficiency with one's firearms. If so, then I would find the historical evidence discussed by the Majority to be appropriate to satisfy *Bruen*'s second step, insofar as it compares the Ordinance to historical laws that similarly regulated the circumstances under which individuals may discharge their firearms. Majority Op. at 52-62.

While not all of the examples cited by the Majority are directly on point with the geographic regulation currently before this Court, *see* Majority Op. at 53-54 (discussing historical examples that regulated **when** firearms may be discharged), most of the regulations it cites to similarly address **where** individuals may discharge their firearms. *See* Majority Op. at 54-58 (discussing historical examples of laws that limited the

discharge of firearms in certain locations and others that regulated where firearms training may take place). Given that the historical examples need not be "a historical twin," but rather "a well-established and representative historical analogue," I am of the position that the proffered historical examples are sufficiently analogous to demonstrate that the Ordinance is consistent with this Nation's historical tradition of firearm regulation. Thus, I would agree that if the threshold inquiry results in the conclusion that the text of the Second Amendment is directly implicated by Barris' proposed conduct to engage in firearms proficiency training at his home, then the historical examples cited by the Majority satisfy *Bruen*'s second step. Majority Op. at 52 (citing *Bruen* 597 U.S. at 24).

The problem with the Majority's analysis is that the right it selected for the threshold inquiry – the right to keep and bear arms – is totally disconnected from the right it examines in conducting its historical analysis – firearm regulations limiting the place where firearms may be discharged.[8] The Majority skirts the issue of whether Barris'

[8] The Majority asserts that there is "no disconnect" between its first and second step because many of the historical analogues it cites to implicate the "right to keep and bear arms," and that, in fact, many of the cited historical regulations involve "disarming those who discharged firearms in prohibited areas." Majority Op. at 58 n.57. I fully acknowledge that among the historical examples, there are some that include penalties that involve the seizure of a violator's firearms. I have made no factual assertions to the contrary. Rather, my concern is that the Majority in its application of the *Bruen* test is not examining the proposed conduct it asserts (i.e., possession of firearms) as the conduct being regulated under the historical analogues. The Majority finds harmony between the Ordinance and the historical regulations by concluding that both operated by "banning the discharging of firearms in certain areas[.]" *Id.* at 61. Thus, its first step focuses on "possession of firearms" as the conduct while its second step focuses on a separate conduct being regulated (i.e., where firearms may be discharged). Despite the Majority's contention that I would "rewrite *Bruen*'s second step[,]" *id.* at 58-59 n.57, I disagree, as I believe its application of the test is contrary to the High Court's own example.

In *Bruen*, the challenger's "proposed course of conduct[,]" as explained by the High Court, was "carrying handguns publicly for self-defense." *Bruen*, 597 U.S. at 32. This satisfied (continued…)

conduct is protected by the Second Amendment by analyzing the penalty provisions of the challenged Ordinance. It concludes that the penalty of disarming violators of the Ordinance implicates Barris' right to keep and bear arms, which is explicitly protected by the Second Amendment. Once the Majority decided, contrary to Barris' challenge, that the conduct at issue was his right to keep and bear arms and that right was directly implicated by the text of the Second Amendment, logically and pursuant to *Bruen*, the remaining question for the Majority's determination could only be whether disarming an individual for violating the Ordinance, is consistent with the Nation's historical tradition of firearm regulation.

Instead, the Majority disconnects its historical analysis justifying the Ordinance from the conduct it identified as giving Barris' proposed conduct presumptive Second Amendment protection. Without ever deciding that Barris' proposed conduct of engaging in firearms training on his private residential property fell within the "unqualified command" of the Second Amendment, the Majority embarks on an expansive exposition of historical regulations limiting the location of the discharge of firearms. If the Majority had concluded, in keeping with my proposed alternative analysis, that the proposed protected conduct was firearms proficiency training at Barris' home, and that such conduct was covered by the plain text of the Second Amendment, then the Majority's analysis of this Nation's historical tradition of firearm regulation would be apt. However, pursuant to *Bruen*, what

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Bruen's first step. In examining *Bruen*'s second step, it found the government's historical record did not demonstrate "a tradition of broadly prohibiting public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." *Id.* at 38. Accordingly, the *Bruen* Court demonstrated by example that in the second step, examining the historical analogues, we must look to how those laws regulated the proposed conduct.

it could not do is what it did here — identify unchallenged but textually protected conduct (i.e., the right to keep and bear arms) — to trigger the analysis of the historical tradition of firearm regulations limiting the location of the discharge of firearms. The incongruity strips the opinion of meaning.

Because I conclude that Barris' proposed conduct of engaging in firearms proficiency training on his private residential property is not covered by the plain text of the Second Amendment, his challenge to the Ordinance fails. In the alternative, even if the right to firearms proficiency training is broad enough to include training at one's home, then the historical examples discussed by the Majority adequately demonstrate that the Ordinance is consistent with this Nation's historical tradition of firearm regulation. For the reasons stated, I concur only in the result reached by the Majority.