

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,	)	Case No. 04-7041
	)	
Appellants,	)	
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Appellees.	)	
_____	)	

**MOTION TO LIFT STAY OF MANDATE**

Appellant Dick Heller, by and through undersigned counsel, hereby moves the Court to lift its stay of the mandate and issue the mandate forthwith enjoining enforcement of D.C. Code § 7-2502.07.

This motion is made on the following grounds:

1. On March 9, 2007, this Court issued a judgment holding D.C. Code § 7-2502.07, which bans the possession of all functional firearms within the home, unconstitutional;
2. On May 8, 2007, this Court denied Appellees' motion for rehearing en banc;
3. On May 24, 2007, this Court stayed the mandate for ninety days, pending Appellees' petition for writ of certiorari;
4. On July 16, Appellees petitioned Chief Justice Roberts for an extension of time of thirty additional days in which to file their petition for certiorari; the extension was granted on July 18;
5. On July 26, this Court stayed the mandate for an additional thirty days;

6. On September 4, Appellees filed their petition for certiorari; and
7. Appellees' petition for certiorari fails to cite the functional firearms ban as relevant to their petition for certiorari, Sup. Ct. R. 14.1(f); presents a question that omits reference to the functional firearms ban, and suggests it is not at issue in the case, Sup. Ct. R. 14.1(a); and otherwise fails to dispute the correctness of this Court's judgment that the functional firearms ban is unconstitutional.

Wherefore, Appellant respectfully requests that the motion be granted and the Court's mandate issue forthwith with respect to the functional firearms ban, D.C. Code § 7-2502.07.<sup>1</sup>

Appellees have indicated that they will oppose this motion.

#### **INTRODUCTION**

Over six months ago, this Court held that D.C. Code § 7-2502.07, which bans the home possession of *all* functional firearms – handguns, rifles, and shotguns – by law-abiding adults, violates the Second Amendment rights of District of Columbia residents.

Because Appellants support the Appellees' efforts to have the case heard in the Supreme Court, and because Appellants fully expected the Appellees to petition the Supreme Court for a writ of certiorari in this case, Appellants agreed to the first ninety-day stay of this Court's mandate, entered on May 24.

As Judge Silberman noted in granting that motion, if the city had not actually intended to petition the Supreme Court for certiorari, "it would [have] be[en] inappropriate for it to have

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<sup>1</sup>D.C. Code § 7-2502.07 is referred to herein as the "functional firearms ban." This Court has determined that it renders inoperable all firearms -- including rifles, shotguns, and pre-1976 handguns -- that are not banned outright by other provisions of the D.C. Code, which are not at issue in this motion.

sought the stay.” Parker v. District of Columbia, 2007 U.S. App. LEXIS 12467 \*1 (D.C. Cir. May 24, 2007) (Silberman, J.) (citing Boim v. Quranic Literacy Institute, 297 F.3d 542, 543-44 (7th Cir. 2002) (Rovner, J.)).

Appellants agreed to the second motion for a stay of this Court’s mandate, but only because Chief Justice Roberts granted Appellees an additional thirty days to file their certiorari petition.<sup>2</sup>

At no time did Appellees suggest that they would accept any portion of this Court’s judgment, nor did it occur to Appellants that the petition for certiorari would be anything short of comprehensive. In moving for a stay, Appellees represented to this Court that

The substantial questions that a petition for certiorari potentially would present include (1) whether the panel majority’s decision conflicts with the Supreme Court’s decision in *United States v. Miller*, 307 U.S. 174 (1939) . . . ; (2) whether the Second Amendment protects firearms possession or use that is not associated with service in a State militia; (3) whether the Amendment applied differently to the District because of its constitutional status . . . ; and (4) whether the challenged laws represent reasonable regulation of whatever right the Amendment protects.

Appellees’ Motion, May 15, 2007, at 2.

But when the long-awaited petition for certiorari finally arrived on September 4, Appellees presented only the following question pursuant to Sup. Ct. R. 14.1(a):

Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.

Exh. A (certiorari petition at i).

In their listing of constitutional and statutory provisions at issue, required by Sup. Ct. R. 14.1(f), Appellees referenced their Appendix, which does not contain the functional firearms ban

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<sup>2</sup>Appellants filed their opposition to that request for extension two days after it was made, but unfortunately, the application had already been granted.

of D.C. Code § 7-2502.07. Exh. A at 1, 91a-98a. The only reference to the functional firearms ban in Appellees’ petition for certiorari is buried in a footnote. After four years of unsuccessfully defending their ban on *all* functional firearms, here is the sum total of what the Appellees had to tell the Supreme Court about this provision:

The majority read this provision to forbid loading, assembling, and unlocking even a lawfully possessed firearm for use in self-defense. App. 55a. On that reading, it held the provision unconstitutional. The District does not, however, construe this provision to prevent the use of a lawful firearm in self-defense.

Exh. A at 7 n.2.

Moreover, Appellees’ statement begins by describing this Court’s opinion as holding “that the District of Columbia’s longstanding law banning handguns but authorizing private possession of rifles and shotguns violates the Second Amendment.” Exh. A at 1.

Thus, it appears the city has conceded the unconstitutionality of the functional firearms ban. If so, there is no reason for the stay of the mandate to remain in effect with respect to that provision.

### **SUMMARY OF ARGUMENT**

The certiorari petition’s description of this Court’s holding is, *at best*, inaccurate. The city has no law “allowing possession of rifles and shotguns,” any more than it has laws allowing possession of cars and toaster ovens. Contrary to the suggestion in Appellees’ Question Presented, the city does have laws requiring the registration of rifles and shotguns, which laws were not at issue in this case, and it has a law requiring that rifles or shotguns be kept in a non-functional condition, D.C. Code § 7-2502.07, which was struck down for infringing on Second Amendment rights. Parker v. District of Columbia, 478 F.3d 370, 400-01 (D.C. Cir. 2007).

Although Appellees continue to assert that the Second Amendment does not guarantee any individual rights, Appellees' petition does not contest this Court's judgment that the functional firearms ban violated the Second Amendment.

Appellees are not entitled to a stay of the mandate as of right simply because they petitioned the Supreme Court for certiorari. The question whether a mandate should be stayed is an equitable one, and the equities in this case are largely defined by the content of Appellees' petition for certiorari. The petition contains no argument or other basis for staying injunction of the functional firearms ban.

## **ARGUMENT**

### **I. APPELLEES ARE NOT ENTITLED TO A STAY AS OF RIGHT.**

Appellees are entitled to seek a stay of this Court's mandate pending the filing of a petition for certiorari in the Supreme Court. Fed. R. App. P. 41(b) & (d)(2). "Relief is not, however, a matter of right but of sound judicial discretion." United States v. Holland, 1 F.3d 454, 456 (7<sup>th</sup> Cir. 1993) (Ripple, J., in chambers). In moving for a stay, parties "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). In this circuit, parties must demonstrate "facts showing good cause for the relief sought." D.C. Cir. R. 41(a)(2). That a motion to stay the mandate would be granted "is far from a foregone conclusion." 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987.1 (3d ed. 1999).

In determining such a motion, we consider whether there is a reasonable probability that the Supreme Court will grant certiorari, whether there is a fair prospect that the movants will prevail on the merits, whether the movants are likely to suffer irreparable harm in the absence of a stay, and the balance of the equities, including the public interest.

Doe v. Miller, 418 F.3d 950, 951 (8<sup>th</sup> Cir. 2005) (citing Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) and Holland, 1 F.3d at 456).

**II. THERE ARE NO GROUNDS TO STAY INJUNCTION OF THE FUNCTIONAL FIREARMS BAN.**

Had Appellees stated that they would not seek review of this Court’s decision striking down the functional firearms ban, Appellants would never have consented to staying the mandate with respect to that provision. Nor would this Court have likely agreed, in the first instance, to such an overbroad stay. Just as it would have been improper for Appellees to seek a stay without intending to petition for certiorari, Parker, 2007 U.S. App. LEXIS 12467 (Silberman, J.); Boim, 297 F.3d at 543-44, so was it improper for Appellees to seek a stay of the mandate as it related to the entire judgment, where Appellees do not contest that the functional firearms ban is unconstitutional.

No conclusion can be reached other than that Appellees concede the functional firearms ban, D.C. Code § 7-2502.07, can and should be enjoined, since they do not mention the provision as being relevant to their petition for certiorari. See Sup. Ct. R. 14.1(f). To mention in a passing footnote that Appellees do not read the functional firearms ban the same way that this Court does falls far short of asking the Supreme Court to overturn this Court’s judgment striking down that particular ban. To the contrary, implicit in Appellees’ statement that “[t]he District does not . . . construe this provision to prevent the use of a lawful firearm in self-defense,” Exh. A at 7 n.2, is the suggestion that if the provision does in fact prevent the use of firearms in self-defense, as this Court concluded, it is unconstitutional.

Moreover, this Court accepted Appellants' arguments that the provision at issue, D.C. Code § 7-2502.07, is tantamount to a gun ban, in that "it would reduce a pistol to a useless hunk of 'metal and springs.'" Parker, 478 F.3d at 401. The functional firearms ban applies not only to handguns, but to rifles and shotguns as well. In light of this Court's holding that D.C. Code § 7-2502.07 is, as Appellants have maintained throughout this litigation, an unconstitutional ban on functional firearms, Appellees' repeated representations to the Supreme Court that their law "allows" possession of rifles and shotguns are misleading unless they are read as describing an environment in which D.C. Code § 7-2502.07 is no longer operative. "Allowing" possession of rifles and shotguns is not the same as "allowing" possession of a useless hunk of metal and springs. So long as D.C. Code § 7-2502.07 remains in effect, the city is not allowing its citizens to have *any* type of firearm.

Surely, in representing to the Supreme Court that Heller "may lawfully possess a rifle or shotgun to protect himself," Exh. A at 28, Appellees did not mean to suggest that Heller would be limited to operating such a rifle or shotgun as a club or as a thrown object. Considering that it is the judgment of this Court that D.C. Code § 7-2502.07 forbids Heller from possessing any functional firearm to protect himself, Appellees' failure to cite this aspect of the Court's decision and the provision at issue in their certiorari petition, while suggesting to the Supreme Court that the exact opposite is true, is quite troubling.

In seeking the stay, Appellees claimed that "[t]he failure to grant a stay . . . could needlessly require the executive and legislative branches of the District's government to act to implement a judgment that may receive further review from the Supreme Court." Appellees' Motion, May 15, 2007 at 2. But by failing to petition the Supreme Court to review the functional

firearms ban, Appellees significantly reduce the likelihood that the Supreme Court would grant certiorari on that question. The stay thus fails the first and most important prong of the Rule 41 test – whether there is a reasonable probability that certiorari would be granted on the portion of the judgment to be stayed. Sup. Ct. R. 14.1(a); *see also* Yee v. City of Escondido, 503 U.S. 519, 535-36 (1992). Appellees cannot hide from the Supreme Court the fact that the functional firearms ban was struck down. In light of the petition, the Supreme Court may view the unconstitutionality of this provision as conceded.<sup>3</sup>

The other Rule 41 factors require little discussion. Since Appellees suggest that D.C. Code § 7-2502.07 is unimportant, it is difficult to imagine that the Supreme Court would reverse this Court’s judgment with respect to that provision, regardless of its decision as to the portions of the judgment that are being appealed. And considering this Court’s judgment that the functional firearms ban violates individual rights, the public interest factors weigh decisively against continued enforcement of that provision.

### CONCLUSION

The question before this Court is whether any reason exists to continue depriving District residents of their constitutional rights under a law that the city refuses to defend any further. The city has abandoned its defense of the functional firearms ban. It has suggested that if the Court’s understanding of the provision is accurate, then the law is indeed unconstitutional.

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<sup>3</sup>But nothing prevents Appellants from defending this aspect of the judgment in the Supreme Court. *Cf. Northwest Airlines v. County of Kent*, 510 U.S. 355, 364 (1994) (“[a] prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment”) (citations omitted); *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (“[o]ur practice permits review of an issue not pressed so long as it has been passed upon”) (citations omitted).

And most critically, the city has represented to the Supreme Court that a legal environment exists in the District of Columbia in which rifles and shotguns are “allowed” – an environment in which the functional firearms ban no longer exists. If that representation is accurate, then the mandate to enjoin enforcement of the city’s ban on functional firearms, D.C. Code § 7-2502.07, should issue forthwith.

Dated: September 12, 2007

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

On this, the 12<sup>th</sup> day of September, 2007, I caused a true and correct copy of the foregoing Motion to Lift Stay to be served on the following by **personal, hand delivery** :

Todd Kim  
Office of the Attorney General, Appellate Division  
441 Fourth Street, N.W.  
Sixth Floor  
Washington, D.C. 20001-2714

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 12<sup>th</sup> day of September, 2007.

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Alan Gura