08-4112

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois, 60604

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, ILLINOIS STATE RIFLE ASSOCIATION, and SECOND AMENDMENT FOUNDATION, INC.,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Appellants,	Case No. 08-CV-3645
v.	Milton I. Shadur, Judge
CITY OF CHICAGO,	
Appellee.	

APPELLANTS' MEMORANDUM OF POINTS AND AUTHORITIES REGARDING JURISDICTION

COME NOW APPELLANTS Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association, by and through undersigned counsel, and in submitting their Memorandum of Points and Authorities Regarding Jurisdiction in Response to the Court's Order of December 10, 2008, states as follows:

PRELIMINARY STATEMENT

This Court has jurisdiction over the initial appeal in this case pursuant to 28 U.S.C. § 1292(a)(1). Although Section 1292(a)(1) is narrow, the unique circumstances of the initial appeal fall squarely within the established parameters of an appealable interlocutory order. In any event, this Court now also has jurisdiction over the appeal pursuant to Section 1291, as the District Court entered a final judgment for Appellee on its motion for a judgment on the pleadings on December 18, 2008, conclusively resolving the case, and Appellants have noticed

their appeal from that Order as well (*See* Docket Entry, Order, and Order granting Judgment in a Civil Case, all dated December 18, 2008, attached hereto and incorporated herein as Group Exhibit "A").

The correct course of action is to merge the two appeals, and renew the briefing schedule.

STATEMENT OF FACTS

On June 26, 2008, Appellants filed this action in the United States District Court for the Northern District of Illinois, challenging the constitutionality of various Chicago ordinances banning and otherwise regulating firearms. N.D.IL Civil Action No. 08-3645. The following day, other parties filed five related cases in the same court. One case, No. 08-3697, also challenged some – but not all – of the same Chicago ordinances, invoking some – but not all – of the legal theories raised here, and making other arguments not advanced by Appellants here. Of the other four related cases, three were settled and dismissed, leaving only No. 08-3696, which challenges certain ordinances of the Village of Oak Park.

The three cases were related, but not consolidated, before the Hon. Milton Shadur, to whom this earliest-filed case was assigned. They therefore proceeded on more or less the same track. In all three cases, the defendants answered, but did not file any dispositive motions.

The facts not being in dispute, and the case raising purely questions of law, Appellants moved for summary judgment on July 31, 2008. Upon presenting the motion, the District Court announced that the motion would not be considered as it was allegedly premature. *But see* Fed. R. Civ. Proc. 56 (plaintiffs may file motion for summary judgment within 20 days of filing the complaint).[1]

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[1] Counsel for Appellants was also counsel for the plaintiffs in *Heller* v. *District of Columbia*, 128 S. Ct. 2783 (2008), which was resolved on plaintiffs' motion for summary

However, as the cases progressed, the District Court came to accept Appellants' position that the cases would largely if not completely be controlled by one legal question: whether the Second Amendment is incorporated as against the states by the Fourteenth Amendment. The District Court therefore suggested that Plaintiffs in the three cases could obtain a resolution of this question by filing a motion to narrow the issues in the cases pursuant to Fed. R. Civ. Proc. 16.

On October 21, 2008, Appellants followed the District Court's advice and filed just such a motion. The following day, the plaintiffs in the remaining related cases filed similar motions, to be presented the same day as Appellants' motion, albeit theirs were styled as motions for leave to brief the issue under Rule 16. The District Court allowed the plaintiffs in the related cases to brief the issue as well, which they did.

On December 4, 2008, the District Court issued an opinion and order in the two related cases, denying their Rule 16 motions. The District Court held, unequivocally, that it believed itself bound by Seventh Circuit precedent to reject incorporation of the Second Amendment:

> This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs' argument--it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament. But as later-to-be-Justice Oliver Wendell Holmes famously observed in 1881 in The Common Law:
>
> The life of the law has not been logic: it has been experience.
>
> In sum, this Court--duty bound as it is to adhere to the holding in *Quilici* [v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)] rather than accepting plaintiffs' invitation to "overrule" it (!)--declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances.

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judgment filed 32 days after initiation of that action.

Order, N.D. Ill. Nos. 08-3696/3697, 12/4/2008 at 5.

Also on December 4, 2008, the District Court entered an order denying Appellants' Rule 16 motion, as well as their outstanding Rule 56 motion for summary judgment, on the same grounds. The District Court made it quite plain its belief that Appellants' prayer for injunctive relief was barred as a matter of law by Seventh Circuit precedent. Referencing the above-noted December 4 order in the related cases, the District Court explained:

> *Quilici* is an on-all-fours decision by our Court of Appeals that takes the opposite position from that now pressed by plaintiffs in all three cases before this Court. There is no need to repeat what is said in that opinion, for it might well have been written for this case too.

Order, No. 08-3645, 12/4/2008.

On December 5, 2008, Appellants noticed their appeal of this order, which had conclusively denied them injunctive relief that would vindicate their constitutional rights. Although the District Court had foreclosed Appellants all relief, it did not dismiss the case, and there was no motion pending before the District Court to have the case dismissed.

The District Court set all three matters for a status conference December 9, 2008. At the December 9, 2008 status conference, Defendants orally moved for an F.R.Civ.P. 12(c) judgment on the pleadings in all three cases, on the basis of the District Court's December 4, 2008 Orders. The parties were instructed to submit proposed orders.

On December 18, 2008, at the next scheduled status conference, the District Court announced it was granting the motions for judgment on the pleadings, and signing and entering all three proposed orders conclusively disposing of the cases. Notices of appeal were promptly filed in all three cases, including this one – No. 08-4244. On December 22, 2008, the District

Court Clerk entered the final judgment in this action dated December 18, 2008.

ARGUMENT

I. THE DECEMBER 4, 2008 ORDER DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT IS APPEALABLE UNDER SECTION 1292(a)(1).

"A definitive denial of permanent injunctive relief is automatically appealable under section 1292(a)(1)." *Elliott* v. *Hinds*, 786 F.2d 298, 300 (7th Cir. 1986) (*citing Donovan* v. *Robbins*, 752 F.2d 1170, 1173 (7th Cir. 1985)). The District Court's December 4, 2008 Order, denying summary judgment, qualifies on all grounds.

The motion for summary judgment sought permanent injunctive relief. The language of the District Court's Order denying permanent injunctive relief was also quite definitive. The District Court believed itself controlled by Seventh Circuit precedent in a manner precluding relief as a matter of law. "[T]he district court's ruling does preclude any reconsideration of injunctive relief." *Elliott*, 786 F.2d at 300. There was no question whatsoever that the December 4, 2008 Order ended Appellants' prospects for obtaining injunctive relief in the District Court. Appellants "suffered total defeat on [their] request for an injunction, and § 1292(a)(1) allows [them] an immediate appeal." *Holmes* v. *Fisher*, 854 F.2d 229, 231 (7th Cir. 1988).

The Supreme Court's decision in *Goldstein* v. *Cox*, 396 U.S. 471 (1970), referenced by this Court's briefing order, is inapposite. *Goldstein* determined the Supreme Court's appellate jurisdiction under Section 1253 of interlocutory orders issued by three-judge courts. The Supreme Court observed that under Section 1292(a)(1), which is analogous, "a denial of summary judgment is not an appealable order denying an injunction, *at least where the denial is based upon the existence of a triable issue of fact*." *Goldberg*, 396 U.S. at 475 (*citing Switzerland Assn.* v. *Horne's Market*, 385 U.S. 23 (1966)) (emphasis added). Indeed, footnoting

this language, the Supreme Court noted: "In *Switzerland Assn.*, *supra*, this Court left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the existence of a triable issue of fact." *Id.*, n.2.

But the *Goldberg* Court then declined to "decide whether the same treatment should be given to denials of summary judgment under § 1253, for we conclude that the only interlocutory orders that we have power to review under that provision are orders granting or denying preliminary injunctions." *Id.*

Accordingly, per *Goldberg*'s language, this appeal based on Section 1292(a)(1) remains controlled by the *Switzerland Assn.* standard. This standard is easily satisfied by the instant appeal of the December 4, 2008 Order. The case saw no material factual dispute. The manner in which the ordinances operate is uncontested, and it is also beyond dispute that Appellants have had the challenged ordinances applied against them by Defendant.[2]

The Supreme Court had occasion to revisit *Switzerland Assn.* in *Carson* v. *Am. Brands*, 450 U.S. 79 (1981), in the context of a district court's refusal to enter a proposed consent decree including injunctive relief. In *Carson*, the Supreme Court suggested that an interlocutory order could be appealed under Section 1292(a)(1) only if appellant could show the order had "'serious,

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[2] The Complaint laid out the specific history of Appellants' denied permit applications, adverse administrative action, and relevant current and lapsed gun registrations. When Appellee's initial answer disclaimed sufficient knowledge of these events, Appellants moved to strike the answer, pointing to copies of Appellee's own records. Appellee amended its answer to admit the basic facts of the case. The parties never disputed the plain, well-known operation of the challenged ordinances.

perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal." *Carson*, 450 U.S. at 84 (citation omitted).

But the Seventh Circuit reads *Carson* very narrowly. "Asking whether an order plainly denying an injunction *also* caused irreparable injury would add a gratuitously complicating factor to the simple statutory rule." *Holmes*, 854 F.2d at 232. *Carson*, per the Seventh Circuit, merely sought to determine whether a class of orders was appealable, and did not require a factual analysis of each appeal. "[I]rreparable injury is not relevant only where the district court's order is unquestionably the denial of an injunction." *Simon Prop. Group, L.P.* v. *Mysimon, Inc.*, 282 F.3d 986, 990 n.1 (7th Cir. 2002).

"[O]ur jurisdiction under § 1292(a)(1) is secure because the district court's order entirely negated the equitable component in the case." *Albert* v. *Trans Union Corp.*, 346 F.3d 734, 739 (7th Cir. 2003); *see also Graff* v. *City of Chicago*, 9 F.3d 1309, 1313 (7th Cir.1993) (en banc) (Section 1292(a)(1) jurisdiction on appeal of order dismissing claims for injunctive relief).

> Section 1292(a)(1) is decently plain: all interlocutory orders denying injunctions are appealable. There may be difficult questions, as in *Carson*, whether a given decision *is* an interlocutory order denying an injunction, and it makes sense in characterizing an ambiguous order to determine whether it has the attributes that usually accompany the grant or denial of injunctions . . . The process of characterization cannot be allowed to feed back into the propriety of an appeal from an order that is unquestionably an injunction.

Holmes, 854 F.2d at 231.

In any event, the December 4, 2008 Order plainly passes the *Carson* standard even if it were a standard per which the character of the appeal must be scrutinized. There was simply no way to challenge the order other than by immediate appeal, because there was nothing left of Appellants' case once the District Court explained that they could not win as a matter of law, yet

no final judgment, or even pending motion that might lead to a final judgment, was entered at that time.

And the Order had serious, perhaps irreparable consequences – the denial of constitutional rights. The Supreme Court has already established that a municipal handgun ban of the kind challenged here violates the Second Amendment. *Heller*, 128 S. Ct. 2783. There is no question that Appellants' Second Amendment rights are being violated, only whether the Appellee is bound to respect those rights. *Cf. National People's Action* v. *Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990) (citations omitted) ("[e]ven a temporary deprivation of first amendment freedom of expression rights is generally sufficient to prove irreparable harm"). "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary" to obtain injunctive relief. *Mitchell* v. *Cuomo*, 748 F.2d 804 (2d Cir. 1984) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973)).

II. THIS COURT HAS JURISDICTION OVER THE MATTER PER SECTION 1291.

The above discussion may in fact be moot given the fact that in the intervening time since the appeal was first noticed, and specifically on December 18, 2008, the District Court entered final judgment on all Counts of Appellants' Complaint in Appellee's favor and against Appellants on the same grounds as the December 4, 2008 Order denying Appellants summary judgment. Appellants have appealed this order as well. Appellants' two appeals should be merged, and the case set for briefing and argument forthwith.

CONCLUSION

Appellants respectfully submit that this Court has jurisdiction to hear their appeal of the District Court's December 4, 2008 definitive order denying them permanent injunctive relief,

and the District Court's final judgment in Appellee's favor of December 18, 2008. Appellants request that their appeal be allowed, and that Appeal No. 08-4244, filed December 18, 2008, be merged into this appeal.

Dated: December 23, 2008

Respectfully submitted,

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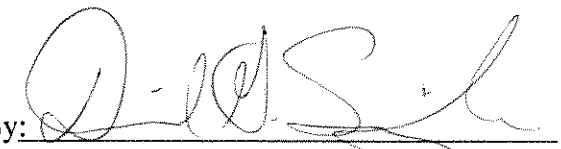
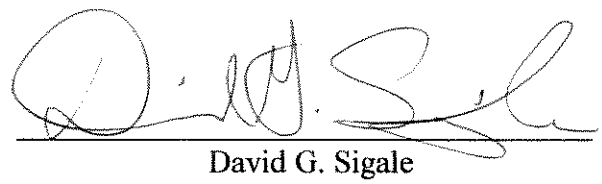
By: 
David G. Sigale
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, David G. Sigale, Esq., pursuant to F.R.App.P. 25(d)(1)(B), certify that I mailed a copy of this Memorandum of Points and Authorities Regarding Jurisdiction to Suzanne M. Loose, Esq., counsel for the Defendant-Appellee City of Chicago, at the following address:

City of Chicago Department of Law
Appeals Division
30 North LaSalle Street, Suite 800
Chicago, IL 60602

on December 23, 2008, by U.S. Mail, postage prepaid, from Naperville, Illinois.



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AO 450(Rev. 5/85)Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

McDonald

v.

City of Chicago

JUDGMENT IN A CIVIL CASE

Case Number: 08 C 3645

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of the City of Chicago and against Plaintiffs on all counts of the Complaint.

Michael W. Dobbins, Clerk of Court

Date: 12/18/2008

/s/ Sandy Newland, Deputy Clerk

GROUP EXH. "A"

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, ILLINOIS STATE RIFLE ASSOCIATION, and SECOND AMENDMENT FOUNDATION, INC.,	)	
Plaintiffs,	)	Case No. 08-CV-3645
v.	)	
CITY OF CHICAGO,	)	
Defendant.	)	

ORDER

On December 4, 2008, the Court ruled it is bound by Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) to reject incorporation of the Second Amendment *via* the Fourteenth Amendment as against Defendant City of Chicago. Accordingly, the Court denied Plaintiffs' Rule 56 motion for summary judgment, holding Plaintiffs cannot prevail absent incorporation of the Second Amendment. On the same grounds as announced earlier by the Court, and over Plaintiffs' objection for the reasons stated in their Rule 56 and Rule 16 Motions and in open court, the Court hereby grants the contested December 9, 2008 oral motion of the Defendant City of Chicago, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings on Counts I-V of the Complaint. Judgment is hereby entered in favor of the City of Chicago and against Plaintiffs on all counts of the Complaint.

Dated: December 18, 2008

ENTERED:

The Honorable Milton I. Shadur
United States District Court Judge

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Milton I. Shadur	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 C 3645	DATE	12/18/2008
CASE TITLE	McDonald vs. City of Chicago		

DOCKET ENTRY TEXT

Status hearing held. Enter Order. This Court hereby grants the contested December 9, 2008 oral motion of the City of Chicago, pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on Counts I-V of the Complaint. Judgment is hereby entered in favor of the City of Chicgao and against Plaintiffs on all counts of the Complaint.

■ [For further detail see separate order(s).] Docketing to mail notices.

00:15

Courtroom Deputy Initials:	SN