

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE TOWNSHIP OF ADDISON,

Plaintiff/Appellee,

v

JERRY CLINE BARNHART

Defendant/Appellant.

_____ /

Supreme Court
Docket No. 145144

Court of Appeals
Docket No. 301294 and 272942

Oakland County Circuit Court
Case No. 2009-DA8918-AV
Hon. Leo Bowman

52-3 Judicial District Court
Case No. 05-010900-OM
Hon. Julie A. Nicholson

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

145144 (48)

8/21

40427

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FILED

AUG - 9 2012

Amicus Curiae, The Michigan Coalition for Responsible Gun Owners (MCRGO), by and through its attorney, Steven W. Dulan (P54914), hereby respectfully requests leave to file an amicus curiae brief, and states the following in support thereof:

1. The MCRGO is a non-profit organization that was founded in 1996, whose mission is to promote safe use and ownership of firearms through education, litigation and legislation. The organization is actively involved in lobbying activities on behalf of gun owners, assisting the legislators in drafting firearms laws, and promoting the safe and legal use and possession of firearms.
2. MCRGO is a single-issue, non-partisan group focused on firearms rights and training.
3. MCRGO has over 3000 dues-paying members statewide and 73 affiliated clubs with membership totaling several thousand more.
4. MCRGO's Board of Directors is made up primarily of elected officials including Representatives, Senators, and Sheriffs, belonging to both major political parties.
5. Many of the members and affiliated clubs of the MCRGO own and use firearms ranges. All of their rights will be potentially impacted by the final decision in this case, as will the majority of the millions of law-abiding gun owners in Michigan.
6. The Court of Appeals' decisions effectively remove the protection of the Michigan Sport Shooting Ranges Act ("SSRA"), MCL 691.1541, et seq., to sport shooting ranges. Consequently, range owners will be prevented from maintaining, promoting, and using their own sport shooting ranges.

7. If the Court of Appeals' definition of a "sport" was to stand, this would render null and void MCRGO member's ability to create a sport shooting range on his or her own property, in order to promote the legal purpose of sport shooting.
8. The MCRGO has a substantial interest in the outcome of this case, in order to ensure that its members' rights to maintain, operate, and use their sport shooting ranges are protected. If the Court of Appeals' decisions remain in effect, other municipalities will likely follow the Plaintiffs/Appellees in this case, in enacting ordinances that would be tantamount to a ban on sport shooting ranges in their respective jurisdictions.
9. The ordinance as applied in this case, and any similar ordinances that may be enacted in the wake of this case, run counter to the spirit of Article 1, Section 6 of the Michigan Constitution, and the Second Amendment to the United States Constitution.

WHEREFORE, amicus curiae respectfully requests leave to file the attached Amicus Curiae Brief In Support of Defendant/Appellant's Application for Leave to Appeal.

Respectfully submitted:

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Statement of Questions Involved

I) ARE SPORT SHOOTING RANGES PROTECTED UNDER THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I §6 OF THE MICHIGAN CONSTITUTION?

Amicus Curiae Answers: Yes
Defendant/Appellant Answers : Yes
Plaintiff/Appellee Answers: No

II) DOES THE COURT OF APPEALS' NARROW INTERPRETATION OF THE TERM "SPORT" VIOLATE THE SECOND AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I §6 OF THE MICHIGAN CONSTITUTION?

Amicus Curiae Answers: Yes
Defendant/Appellant Answers : Yes
Plaintiff/Appellee Answers: No

Statement of Interest

The Michigan Coalition for Responsible Gun Owners represents thousands of members, many of whom own and operate shooting ranges. These members have expended significant amounts of time and personal resources developing and maintaining their ranges so as to comply with local, State and Federal laws. The purposes of these ranges are to educate and to promote the practice of firearms in order to assist in the exercise of the Constitutional right to keep and bear arms in defense of self and state. If the Court of Appeals' decisions in this matter are left unreviewed, the MCRGO's members' ranges will no longer be protected under the SSRA and the members may no longer be able to maintain and use their sport shooting ranges. Not only would this nullify the members' substantial investment, but it would also have the effect of seriously eroding the individual Constitutional right to bear arms – the right to bear arms would potentially be severely curtailed absent the right to practice or train with firearms at a safe and secure location such as these sport shooting ranges.

As the representative organization for these members, the MCRGO has a direct interest in advocating on behalf of the Defendant/Appellant as well as its members-at-large, and affiliated clubs. A final determination on the Court of Appeal's interpretation of the SSRA will have a direct impact on MCRGO members' and clubs' rights.

Statement of Facts

The MCRGO, as amicus curiae, hereby incorporates the Statement of Material Facts and Proceedings contained in the Defendant/Appellant's Application for Leave to Appeal, submitted by and through his attorney K. Scott Hamilton.

Argument

I) SPORT SHOOTING RANGES ARE PROTECTED BY THE SECOND AMENDMENT AND MICHIGAN'S ARTICLE I §6.

While incorporation of the Second Amendment to states and local governments is a fairly recent event, the Seventh Circuit Court of Appeals has held that the Second Amendment protects ranges from restrictions made by local entities. *Ezell v City of Chicago*, 651 F3d 684, 704-705 (CA 7, 2011). Quoting Justice Thomas Cooley, the Court said, “[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them.” *Id.* at 704. Courts in Michigan have not yet applied Article 1 §6 to the operation of shooting ranges in the state due to other protections they receive under state law.

In approaching the issue of whether localities may place restrictions on the operation of ranges, the Seventh Circuit used an intermediate level of scrutiny, requiring “a fit between the legislature's ends and the means chosen to accomplish those ends, ... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.” *Id.* at 708 (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480; 109 S Ct 3028, 3035 (1989)). The Seventh Circuit used a type of scrutiny borrowed from First Amendment Free Speech cases. They held that the reasoning for creating a statute that impinges upon Second Amendment rights must be a sufficiently important government interest that such interest would balance with the importance of the right to bear arms. *Id.* at 703.

Applying the rule of *Ezell* to the present case, we see a parallel with the goals of the SSRA. Both aim to protect the right of law-abiding citizens to receive training with their lawfully-obtained firearms in order to be better able to defend themselves and others – a right recognized as fundamental by the United States Supreme Court in *McDonald v City of Chicago*, ___ US ___; 130 S Ct 3020; 177 L Ed 2d 894 (2010). Justice Alito stated in the Court's opinion that "Heller explored the right's origins in English law and noted the esteem with which the right was regarded during the colonial era and at the time of the ratification of the Bill of Rights. This is powerful evidence that the right was regarded as fundamental in the sense relevant here." *Id.* at 3023 (citing *District of Columbia v Heller*, 554 US 570, 584-585; 128 S Ct 2783, 2793 (2008)).

While the Seventh Circuit did not assert that no regulation of ranges may be made, it did restrict the regulation to those regulations which were in proportion to the interest being served. *Ezell, supra* at 708. In the present case, the Township claimed that the range violated an ordinance that prohibited a business without a license. In order to bring this goal about, they have attempted to zone shooting ranges out of the township, regardless of use of noise abatement tools. This infringement upon rights is wildly out of proportion with the Township's goals; noise abatement is already required by the State's Generally Accepted Operating Practices, with which the District Court determined, as a matter of fact, Barnhart's range was in compliance.

The additional requirement by the Court of Appeals in *Barnhart* that ranges must not take part in commercial activities means that the vast majority of ranges in Michigan are not protected by the Sport Shooting Range Act (SSRA). *People v Barnhart*, unpublished opinion per curiam to the Court of Appeals, issued March 13, 2008 (Docket No. 272942). Looking at the events leading to the passage of the SSRA by the legislature, the Court of Appeals has opened the door

to Townships using zoning and noise legislation to effectively ban ranges within their borders. The Court in *Ezell* spoke of the irreparable harm by such bans stating that "the City Council [of Chicago] violated the Second Amendment when it made its law; its very existence stands as a fixed harm to every Chicagoan's Second Amendment right to maintain proficiency in firearm use by training at a range." *Ezell, supra* at 699. The Seventh Circuit made it clear that the right of an individual to have ranges available for training is protected by the Second Amendment.

The protections of Article I § 6 of the Michigan Constitution protect the rights of individual's to keep arms for self-defense to an even higher degree than the Federal Constitution. While the text of the Federal Constitution refers to a "well-regulated militia", Michigan's Constitution openly endorses the right to self-defense through the ownership of firearms. 1963 Const, art 1, §6; US Const, Am II. Following *Ezell*, it is clear that since ranges are inextricably linked with the rights granted under the Federal Constitution, they must be even more closely linked with the provision in Michigan's Constitution. As such, to allow the Township to restrict the ability of Mr. Barnhart to provide training and the use of his range to persons who visit would fly in the face of the language and intent of the Second Amendment and Article I § 6 of the Michigan State Constitution.

**II) THE COURT OF APPEALS' NARROW INTERPRETATION OF THE
TERM "SPORT" VIOLATES THE CORE OF THE SECOND
AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I §6
OF THE MICHIGAN CONSTITUTION.**

The right to practice with firearms is an integral part of a person's right to bear arms. As such sport shooting ranges are a necessary component to practicing with firearms. If the Court of Appeals' unreasonably narrow interpretation of the term "Sport" were to remain, the ultimate

effect would be to remove the protections provided by the SSRA, resulting in the shutdown of a significant number of Michigan's sport shooting ranges and a violation of a person's right to bear arms. The Court of Appeals' restrictive interpretation of the term "Sport" would essentially force shooting range facility owners, who sought the protections of the SSRA to ensure that no money or any commercial activity was conducted on their ranges. There could be no compensation for instructors, no funds to assist in maintaining or upgrading range facilities, nor could range owners be able to recover the cost of building the ranges in the first place. The entire purpose of the SSRA would be eviscerated, since none of the shooting ranges it was meant to protect would continue operations absent the means with which to maintain their facilities or hire certified instructors to teach students.

The Second Amendment to the U.S. Constitution states that "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." US Const, Am II. Per the recent landmark case of *McDonald*, the Supreme Court made clear that the provisions of the Second Amendment were applicable to the States, by way of the Fourteenth Amendment: "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald, supra* at 3042. The consequences of this decision further incorporate the interpretations of the Second Amendment, and its litany of case law, into the jurisprudence of each state. Given the U.S. Supreme Court's ruling, Article I §6 of Michigan's Constitution is, therefore, subject to the same interpretation and case law. Michigan's Constitution specifically provides that "Every person has a right to keep and bear arms for the defense of himself and the state." 1963 Const, art 1, §6. Based on the ruling in

McDonald, the case law surrounding the U.S. Constitution's Second Amendment, can be used to interpret this provision of Michigan's Constitution.

To that extent, another recent U.S. Supreme Court decision illustrates that shooting ranges are part of the right to bear arms. In the *Heller* case, Justice Scalia specifically found that part of the Second Amendment was the "the imposition of proper discipline and training." *Heller, supra* at 597 (2008). Justice Scalia continues his discussion by way of a survey of noted commentators to the Second Amendment. In it, Justice Scalia cites Justice Thomas Cooley's words: "The alternative to a standing army is a 'well-regulated militia', but this cannot exist unless the people are trained to bearing arms." *Heller, supra* at 618, citing Justice Thomas M. Cooley, *A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union*, 350 (Little, Brown and Company)(1868). Both Justices understood the Second Amendment to refer to a person's need to practice with firearms. As a practical matter, the training referred to by the Justices must take place in a safe and secure environment – at a shooting range facility. Absent shooting ranges, the lack of facilities in which to practice, will infringe upon a person's right to bear arms. In other words, there could be no practical purpose to bearing arms without adequate training on how to use such arms.

In the related case of *Ezell*, the Seventh Circuit Court of Appeals found that the City of Chicago's ordinance banning shooting ranges was unsupported and not justified in light of the *Heller* and *McDonald* cases. The Court specifically stated that the ban against shooting ranges was a "serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell, supra* at 708. The Court eloquently summarized the premises underlying both *Heller* and

McDonald: “The right to possess firearms for protection implies a corresponding right to acquire and to maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective .” *Id.* at 704. In discussing the City’s justification for the ordinance, the Court, in referring again to *Heller* and *McDonald*, found that the City faced a significant burden: “The City must establish...that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.” *Id.* at 708-709.

Although persuasive, the *Ezell* case is closely related to the case at hand. While in *Ezell*, the City of Chicago enacted a complete ban on shooting ranges within the City, the Appellee’s ordinance (as interpreted by the Court of Appeals) has precisely the same effect. If the immunity provided by the SSRA were to be eviscerated as they would be under the Appellee’s ordinance, the core of the Second Amendment, as well as that of Michigan’s Constitutional Article I §6 rights would be consequently rendered inert. As was discussed by the U.S. Supreme Court and the Seventh Circuit Court of Appeals, individuals would lack the ability to practice with their firearms given that a significant number of Michigan’s sport shooting ranges would cease to exist, thus violating the “core” of the Second Amendment and Michigan’s Constitution

Conclusion

The right to bear arms is not only a fundamental constitutional right, but it also includes the right to practice with those firearms. Michigan’s own Constitution affords as much, if not greater protection of a person’s right to bear arms. As the case law, particularly from the Seventh Circuit, indicates, this protection is extended to those of sport shooting ranges, such as Mr. Barnhart’s range in this case. Through its narrow interpretation, the Court of Appeals has violated Mr. Barnhart’s Second Amendment rights, and, by extension, the rights of Michigan gun

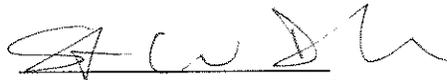
owners who operate sport shooting ranges. If the holding that “sport” shooting ranges are only those ranges where no commercial activity occurred, per the Court of Appeal’s interpretation, shooting ranges around Michigan, would likely close, leaving few other facilities where gun owners could legally practice with firearms. This would have the direct result of negating the very heart of the Second Amendment as well as Michigan’s Article 1 §6.

Relief Requested

WHEREFORE, the MCRGO respectfully requests that it be permitted to file its amicus brief in support of Defendant Barnhart's Application for Leave to Appeal.

Respectfully submitted:

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PROOF OF SERVICE

I, Steven W. Dulan, do hereby certify and affirm that on August 8, 2012, I filed the Motion for Leave to File Amicus Curiae Brief in Support of Defendant/Appellant's Application for Leave to Appeal and the Proposed Amicus Curiae Brief for The Michigan Coalition of Responsible Gun Owners, seven (7) copies of the same, and the filing fee, by first class mail, with copies sent to the parties at the addresses listed in the pleadings in this matter.

Signed:



STEVEN W. DULAN (P54914)
Attorney for Amicus Curiae
*The Michigan Coalition of Responsible
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August 8, 2012

**Michigan Supreme Court
Clerk of the Court
Michigan Hall of Justice
925 Ottawa Street
Lansing, MI 48913**

Dear Clerk of the Court:

Re.: People of the Township of Addison v Jerry Cline Barnhart; Supreme Court Docket No. 145144;

Enclosed, please find the original Motion for Leave to File Amicus Curiae Brief in Support of Defendant/Appellant's Application for Leave to Appeal and the Proposed Amicus Curiae Brief for The Michigan Coalition of Responsible Gun Owners, along with seven (7) copies of the same, the Proof of Service, and the \$75.00 filing fee.

Sincerely,



Steven W. Dulan

cc.: Robert C. Davis
K. Scott Hamilton

