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## FEDERAL CIRCUIT SECOND AMENDMENT DEVELOPMENTS 2018

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### INTRODUCTION

This Article provides a summary of federal circuit court cases decided in 2018. By the end of 2018, every circuit except for the Eighth has adopted a Two-Part Test for Second Amendment cases. In Part One, the court determines whether the challenged law burdens the Second Amendment right. If so, the court applies heightened scrutiny in Part Two. Courts in Second Amendment cases almost always apply intermediate scrutiny, but strict scrutiny and categorical invalidation are also available.

The Two-Part Test is detailed in our article, *The Federal Circuits' Second Amendment Doctrines*.<sup>1</sup> That article reviews every federal circuit Second Amendment case after *District of Columbia v. Heller* (2008), up to approximately August 2016.

### I. FIRST CIRCUIT

#### A. UPHOLDING "MAY ISSUE" CARRY SCHEME, *GOULD V. MORGAN*

Under Massachusetts law, licensees may:

purchase, rent, lease, borrow, possess and carry:  
(i) firearms, including large capacity firearms,

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<sup>1</sup> David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017) (cited in *Pena v. Lindley*, 898 F.3d 969, 1004 (9th Cir. 2018) (Bybee, J., dissenting)).

and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper.<sup>2</sup>

A license may be issued if the applicant “has good reason to fear injury . . . or for any other reason, including the carrying of firearms for use in sport or target practice only.”<sup>3</sup>

For a general carry license, both Boston and Brookline require applicants to demonstrate that they have a greater need for self-defense than that of the general public. If an applicant fails to do so, he might still receive a license, but typically under specified restrictions. “Boston offers licenses restricted to employment, hunting and target practice, or sport. For its part, Brookline offers licenses subject to restrictions for employment, hunting, target practice, sport, transport, domestic (use only in and around one's home), or collecting.”<sup>4</sup>

The plaintiffs challenged the Boston and Brookline policies after each received a license that restricted the purpose for which he could carry. For instance, one license was restricted to employment and sporting purposes. Another was restricted to hunting and target-practice. The plaintiffs argued that they had a right to carry firearms generally for self-defense.

The First Circuit phrased the issues as such:

Does the Second Amendment protect the right to carry a firearm outside the home for self-defense? And if they prevail on that question, may the government condition the exercise of the right to bear arms on a showing that a citizen has a “good reason” (beyond a generalized desire for self-defense) for carrying a firearm outside the home?<sup>5</sup>

To analyze these questions, the First Circuit adopted the Two-Part Test for the first time. This development was notable

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<sup>2</sup> Mass. Gen. Laws Ann. ch. 140, § 131(a).

<sup>3</sup> *Id.* § 131(d).

<sup>4</sup> *Gould v. Morgan*, 907 F.3d 659, 664 (1st Cir. 2018).

<sup>5</sup> *Id.* at 666.

because previously, the First Circuit relied on the competing test of text, history, and tradition more than any other circuit. Now, the Eighth Circuit is the only remaining circuit that has *not* adopted the Two-Part Test.<sup>6</sup>

In Part One, the court determined that the right to bear arms applies beyond the home to some extent:

The Supreme Court's seminal decision in Heller guides our voyage. The Heller Court left no doubt that the right to bear arms "for defense of self, family, and property" was "most acute" inside the home. 554 U.S. at 628, 128 S.Ct. 2783. If the right existed solely within the home, the Court's choice of phrase would have been peculiar. See Moore v. Madigan, 702 F.3d 933, 935-36 (7th Cir. 2012). So, too, the Heller Court stated that prohibitions on carrying firearms in "sensitive places" are "presumptively lawful," 554 U.S. at 626-27 & n.26, 128 S.Ct. 2783—a pronouncement that would have been completely unnecessary if the Second Amendment right did not extend beyond the home at all. Reading these tea leaves, we view Heller as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home.<sup>7</sup>

In Part Two, however, the court determined that the application beyond the home is very limited, and that the core of the right is in the home:

We make explicit today what was implicit in Hightower: that the core Second Amendment right is limited to self-defense in the home. . . . this configuration of the Second Amendment's

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<sup>6</sup> This does not necessarily mean that the Supreme Court will approve the Two-Part Test. As Judge Bibas recently pointed out, "Heller overruled nine" circuit courts. Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey, 910 F.3d 106, 134 (3d Cir. 2018) (Bibas, J., dissenting).

<sup>7</sup> Gould, 907 F.3d at 670.

core interest is consistent with Heller, in which the Court declared that the home is where “the need for defense of self, family, and property is most acute,” such that the Second Amendment “elevates above all other interests the ... defense of hearth and home.” 554 U.S. at 628, 635, 128 S.Ct. 2783; see GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1259 (11th Cir. 2012) (explaining that the Heller Court “went to great lengths to emphasize the special place that the home—an individual’s private property—occupies in our society”).

Societal considerations also suggest that the public carriage of firearms, even for the purpose of self-defense, should be regarded as falling outside the core of the Second Amendment right. The home is where families reside, where people keep their most valuable possessions, and where they are at their most vulnerable (especially while sleeping at night). Outside the home, society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats. This same panoply of protections is much less effective inside the home. Police may not be able to respond to calls for help quickly, so an individual within the four walls of his own house may need to provide for the protection of himself and his family in case of emergency. Last—but surely not least—the availability of firearms inside the home implicates the safety only of those who live or visit there, not the general public.

Viewed against this backdrop, the right to self-defense—upon which the plaintiffs rely—is at its zenith inside the home. This right is plainly more circumscribed outside the home. “[O]utside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-

defense.” United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011). These truths are especially evident in densely populated urban areas like Boston and Brookline.<sup>8</sup>

Because “[p]ublic carriage of firearms for self-defense falls outside the perimeter of this core right,” the court found intermediate scrutiny appropriate.<sup>9</sup> “It cannot be gainsaid that Massachusetts has compelling governmental interests in both public safety and crime prevention,” so the question was whether the licensing scheme was substantially related to those interests.<sup>10</sup>

Here, the fit between the asserted governmental interests and the means chosen to advance them is close enough to pass intermediate scrutiny. The challenged regime does not infringe at all on the core Second Amendment right of a citizen to keep arms in his home for the purpose of self-defense. Outside the home, the regime arguably does burden a citizen's non-core Second Amendment right. See supra Sections III.B, III.C. But in allocating this burden, the Massachusetts legislature was cognizant that firearms can present a threat to public safety. Striving to strike a balance, the legislature took note that some individuals might have a heightened need to carry firearms for self-defense and allowed local licensing authorities to take a case-by-case approach in deciding whether a particular “applicant has good reason to fear injury.” Mass. Gen. Laws ch. 140, § 131(d). In addition, the legislature made appropriate provisions for restricted licenses, thus ensuring that individuals may carry firearms while engaging in hunting, target-shooting, and a host of other pursuits. Those same protections extend

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<sup>8</sup> *Id.* at 671-72.

<sup>9</sup> *Id.* at 672.

<sup>10</sup> *Id.* at 673.

to individuals who need to carry firearms for work-related reasons.<sup>11</sup>

Like some other circuits, the First Circuit applied the intermediate scrutiny rule that the law must not be substantially more burdensome than necessary:

the fit between the asserted governmental interests and the means chosen by the legislature to advance them need only be substantial in order to withstand intermediate scrutiny. . . . Courts have described this requirement in various ways. A typical formulation—with which we agree—describes it as “a reasonable fit . . . such that the law does not burden more conduct than is reasonably necessary.”<sup>12</sup>

The court determined that the may-issue carry law did not burden more conduct than reasonably necessary and upheld it.

## II. SECOND CIRCUIT

It is no secret that the Second Amendment is often treated as a second-class right in the Second, Fourth, and Ninth Circuits.<sup>13</sup> Within this trifecta of circuits, the Second Circuit is the most hostile. Second Amendment plaintiffs have been known to win cases in federal district courts in the Fourth and Ninth Circuits. In the Ninth, they sometimes even win before three-judge panels—although so far, such wins have later been overturned *en banc*. In the Second Circuit, hostility to the Second Amendment is more hegemonic.<sup>14</sup>

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<sup>11</sup> *Id.* at 674.

<sup>12</sup> *Id.* (quoting *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013)).

<sup>13</sup> See, e.g., David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018).

<sup>14</sup> Thus, in a case challenging New York’s vague statute on gravity knives (which New York City police used against common folding knives), the plaintiffs wisely did not frame the case as a Second Amendment issue, even though knives are Second Amendment arms. See *Copeland v. Vance*, 893 F.3d 101 (2d Cir. 2018); see generally David B. Kopel, Clayton Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 175 (2013) (cited with

In the last year, the Second Circuit's most important decision upheld a ban on licensed handgun owners taking their registered handguns out of New York City. A somewhat better-reasoned decision upheld the federal Gun Control Act's prohibition on firearms possession by persons who were dishonorably discharged from the military.

A. CITY MAY PROHIBIT LICENSED HANDGUN OWNERS FROM TAKING THEIR HANDGUNS OUT OF THE CITY. *NEW YORK STATE RIFLE & PISTOL ASS'N, INC. v. CITY OF NEW YORK*

In New York, one must obtain a license to own a handgun. There are two types of licenses: "carry" licenses and "premises" licenses.<sup>15</sup> "A carry license allows an individual to 'have and carry [a] concealed' handgun 'without regard to employment or place of possession.'" But it is only granted "when proper cause exists" for the issuance of the license.<sup>16</sup>

"Proper cause" is not defined by the Penal Law, but New York State courts have defined the term to include carrying a handgun for target practice, hunting, or self-defense. When an applicant demonstrates proper cause to carry a handgun for target practice or hunting, the licensing officer may restrict a carry license "to the purposes that justified the issuance."<sup>17</sup>

In New York City, carry permits are issued to retired law enforcement, celebrities, and other favored persons. In contrast, the city's police department does (reluctantly and slowly) issue to ordinary citizens licenses to keep handguns in their homes. A "premises" license is limited to the premise specified on the license. The firearm can be removed from that

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approval in *Seattle v. Evans*, 366 P.3d 906 (Wash. 2015) (by both majority and dissent)); *State v. Herrmann*, 873 N.W.2d 257 (Wisc. Ct. App. 2015); *State v. DeCiccio*, 105 A.3d 165 (Conn. 2014); *People v. Trowells*, No. 3015/2013 (N.Y. Sup. Ct. July 11, 2014).

<sup>15</sup> N.Y. PENAL LAW §§ 400.00(2)(a), (f).

<sup>16</sup> *Id.* § 400.00(2)(f).

<sup>17</sup> *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 53 (2d Cir. 2018) ("*NYSRPA*").

premise for only very limited reasons, such as to “transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately.”<sup>18</sup> Administratively, the city’s police department has declared that an “authorized” shooting range is only a range located in New York City.

The plaintiffs alleged that the limitations of their premises licenses violated the Second Amendment, since they wanted to transport their firearms beyond their premises for various reasons not included in the statute or in the New York City regulations.

Specifically, one plaintiff wanted to take his handgun licensed for his residence in New York City to his second home in Hancock, New York. Other plaintiffs wanted to take their handguns licensed to premises in New York City to out-of-city firing ranges and shooting competitions.

The court skipped immediately to Part Two of the Two-Part Test: “At the first step, the Plaintiffs argue that Rule 5-23 impinges on conduct protected by the Second Amendment. We need not decide whether that is so, because, as explained below, the Rule passes constitutional muster under intermediate scrutiny.”<sup>19</sup>

The law that prohibited one plaintiff from taking his firearm to his second home warranted mere intermediate scrutiny because he could possibly acquire a separate firearm for that second home.

The prohibition on taking firearms outside the city for range training and shooting competitions similarly warranted merely intermediate scrutiny. The court recognized the importance of training, but only to the extent that it was necessary to acquire and maintain the skill necessary to protect oneself and family, and the general public:

restrictions that limit the ability of firearms owners to acquire and maintain proficiency in the use of their weapons can rise to a level that significantly burdens core Second Amendment protections. Possession of firearms without adequate training and skill does nothing to

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<sup>18</sup> 38 R.C.N.Y. § 5-23(a) (2019).

<sup>19</sup> *NYSRPA*, 883 F.3d at 55 (quotations and citations omitted).

protect, and much to endanger, the gun owner, his or her family, and the general public. Accordingly, we may assume that the ability to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns that regulations that sharply restrict that ability to obtain such training could impose substantial burdens on core Second Amendment rights. Some form of heightened scrutiny would be warranted in such cases, however, not because live-fire target shooting is *itself* a core Second Amendment right, but rather because, and only to the extent that, regulations amounting to a ban (either explicit or functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home. Indeed, if the Plaintiffs' broader argument were accepted, every regulation that applied to businesses that provide firearms training or firing-range use would itself require heightened scrutiny, a result far from anything the Supreme Court has required.<sup>20</sup>

The court noted that the city's "Rule 5-23 allows a holder of a premises license to take the handgun licensed for his or her New York City premises to an authorized firing range in the City to engage in practice, training exercises, and shooting competitions"<sup>21</sup> and that "[t]he record evidence demonstrates that seven firing ranges in New York City are available to any premises license-holder."<sup>22</sup>

The court upheld the ban under intermediate scrutiny based on an apparent distrust of licensed armed citizens in general:

In a detailed affidavit, the former Commander of the License Division, Andrew Lunetta,

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<sup>20</sup> *Id.* at 58–59.

<sup>21</sup> *Id.* at 59.

<sup>22</sup> *Id.* at 60.

discussed why taking a licensed handgun to a second home or a shooting competition outside the City, even under the restrictions imposed by the Rule for permitted transportation, constitutes a potential threat to public safety. He explained that premises license holders “are just as susceptible as anyone else to stressful situations,” including driving situations that can lead to road rage, “crowd situations, demonstrations, family disputes,” and other situations “where it would be better to not have the presence of a firearm.” Accordingly, he stated, the City has a legitimate need to control the presence of firearms in public, especially those held by individuals who have only a premises license, and not a carry license. He went on to discuss how “public safety will be compromised” unless the regulations concerning when and where premises licensees can transport their firearms “can be effectively monitored and enforced, and are not easily ignored or susceptible to being violated.”<sup>23</sup>

Lunetta added examples of “abuses” that occurred when citizens were allowed to transport their handguns to out-of-city shooting ranges: licensees traveling “with loaded firearms, licensees found with firearms nowhere near the vicinity of an authorized range, licensees taking their firearms on airplanes, and licensees . . . with their firearms during hours where no authorized range was open.”<sup>24</sup> Based largely on Lunetta’s affidavit, the regulation was upheld.

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<sup>23</sup> *Id.* at 63 (citations omitted).

<sup>24</sup> *Id.* (brackets in original). In 2019, the Supreme Court granted certiorari in the case. Attempting to moot the case, New York City repealed the regulation. At oral argument on Dec. 2, 2019, the City admitted that ending the regulation had not harmed public safety in the slightest. *New York State Rifle & Pistol Assoc. v. City of New York*, No. 18-280, Transcript at 52 (Dec. 2, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-280\\_j4ek.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-280_j4ek.pdf).

B. UPHOLDING PROHIBITED PERSONS LAW FOR PERSONS  
DISHONORABLY DISCHARGED FROM THE MILITARY.  
*UNITED STATES V. JIMENEZ*

Oscar Sanchez paid Jose Jimenez \$40 to drive him to a parking lot where Sanchez had arranged to sell 20 handguns to someone who turned out to be an undercover NYPD detective. Sanchez transferred a black bag to the detective's car, but no guns were inside—only a box of Capri Sun and a carjack. No exchange of firearms occurred.

As part of the operation, after Jimenez and Sanchez drove away, two ATF agents pulled them over. During this stop, Sanchez took the round chambered in the handgun he carried and handed it to Jimenez. Soon after, the agents discovered the round and further discovered that Jimenez had previously been dishonorably discharged from the Marines.<sup>25</sup>

Jimenez was subsequently convicted for violating 18 U.S.C. § 922(g)(6), which prohibits anyone who “has been discharged from the Armed Forces under dishonorable conditions” from possessing firearms or ammunition “in or affecting commerce.” Jimenez appealed, arguing that § 922(g)(6) violates the Second Amendment.

In this case, the Second Circuit became the first Circuit Court to consider the constitutionality of the ban since *Heller*.

Applying the Two-Part Test, the court quickly jumped to Part Two:

Proceeding with our usual caution, we find that it is unnecessary to determine whether Jimenez can claim any Second Amendment protections because even if we assume (without deciding) that he can, we conclude that those protections

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<sup>25</sup> Jimenez had served “18 months in a military prison for conspiracy to sell military property, wrongful disposition of military property, use and possession of a controlled substance, and conduct of a nature to bring discredit upon the armed forces, in violation of 10 U.S.C. §§ 881, 908, 912a, 934. He had been convicted of these offenses after confessing to using and dealing ecstasy and to possessing and selling firearms and night vision goggles that had been stolen from the military.” *United States v. Jimenez*, 895 F.3d 228, 231 (2d Cir. 2018).

do not preclude his conviction under Section 922(g)(6).<sup>26</sup>

The court decided intermediate scrutiny was appropriate, because “those who, like Jimenez, have been found guilty of felony-equivalent conduct by a military tribunal are not among those ‘law-abiding and responsible’ persons whose interests in possessing firearms are at the Amendment’s core.”<sup>27</sup>

Intermediate scrutiny requires the government to prove that the law is substantially related to an important governmental interest. The court held that the government did so, even though “the government presents no studies, no empirical data, no expert testimony, no legislative findings...to substantiate the belief that no dishonorably discharged veteran may be trusted with a bullet.”<sup>28</sup>

The government met its burden of proof because “the government relie[d] on the fact that those convicted of felonies have been widely found to be more dangerous with deadly weapons [and] Jimenez was discharged for felony-equivalent conduct.”<sup>29</sup>

Section 922(g)(6) became law as part of the Gun Control Act of 1968, which creates similar bans for other “special risk groups”: felons, fugitives, illegal drug users and addicts, the mentally incompetent, those who have “been committed to a mental institution,” undocumented immigrants, individuals with nonimmigrant visas, those who have renounced United States citizenship, those subject to a domestic violence order of protection, and those convicted of a misdemeanor crime of domestic violence. When the military discharge provision of the Gun Control Act was introduced, it was treated as of a piece with all of these special risk groups and specifically with the felon ban. That portion of

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<sup>26</sup> *Id.* at 234.

<sup>27</sup> *Id.* at 235.

<sup>28</sup> *Id.* at 236 (internal quotations omitted).

<sup>29</sup> *Id.*

the Gun Control Act was meant to deprive those who had demonstrated an inability or unwillingness to take others' safety into account, or otherwise might be especially dangerous with a gun, from possessing deadly weapons.<sup>30</sup>

Does the court's reasoning allow a class of persons to be prohibited from exercising a constitutional right simply because Congress listed them among other classes that could justifiably be prohibited? Perhaps not, for the court elaborated:

There is no reason to think that Jimenez is more likely to handle a gun responsibly just because his conviction for dealing drugs and stolen military equipment (including firearms) occurred in a military tribunal rather than in state or federal court.<sup>31</sup>

Thus, the prohibition for persons with dishonorable discharges was, in the case of Jimenez, the equivalent of prohibitive felony convictions. The court's reasoning should not be extended to dishonorable discharges for other reasons, such as to persons who received a dishonorable discharge for having a homosexual orientation.

Lastly, Jimenez attempted to distinguish ammunition from firearms, arguing that "[a] bullet is categorically less dangerous than a gun' since 'even an unloaded gun can be used to menace, threaten, or strike a victim.'" But the court was unpersuaded. As the court pointed out, "[g]uns are not regulated because they can be used as blunt objects: tire irons and baseball bats remain legal. Guns are regulated because of their capacity to launch bullets at speeds sufficient to cleave flesh and shatter bone. Without bullets, guns do not have that capacity."<sup>32</sup>

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<sup>30</sup> *Id.* at 337 (internal citations omitted).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 238.

### III. THIRD CIRCUIT

#### A. UPHOLDING A BAN ON MAGAZINES WITH A GREATER THAN 10-ROUND CAPACITY, *ASS'N OF NEW JERSEY RIFLE & PISTOL CLUBS, INC. V. ATTORNEY GEN. NEW JERSEY*

In June 2018, New Jersey reduced its 15-round magazine limit established in 1990<sup>33</sup> to 10 rounds.<sup>34</sup> Owners of the newly-outlawed magazines had until December 10, 2018 to “[t]ransfer the semi-automatic rifle or magazine to any person or firm lawfully entitled to own or possess that firearm or magazine,” “[r]ender the semi-automatic rifle or magazine inoperable or permanently modify a large capacity ammunition magazine to accept 10 rounds or less,” or “[v]oluntarily surrender the semi-automatic rifle or magazine.”<sup>35</sup>

Before beginning its two-part analysis, the court had to determine whether magazines are “arms” under the Second Amendment. It decided that “[b]ecause magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are ‘arms’ within the meaning of the Second Amendment.”<sup>36</sup>

In Part One of the Two-Part Test, the court considers whether the challenged regulation burdens the Second Amendment. For an arms ban, the court must “consider whether the type of arm at issue is commonly owned”<sup>37</sup> and “typically possessed by law-abiding citizens for lawful purposes.”<sup>38</sup> The court acknowledged that “millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense, and there is no longstanding history of LCM [large-capacity

<sup>33</sup> N.J. Stat. Ann. § 2C:39-1(y), -3(j) (2014).

<sup>34</sup> *Id.* § 2C:39-19.

<sup>35</sup> *Id.*

<sup>36</sup> *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) (“*ANJRPC*”).

<sup>37</sup> *Id.* The court stated that “[c]ommon use’ is not dispositive since weapons illegal at the time of a lawsuit would not be (or at least should not be) in common use and yet still may be entitled to protection.” *Id.* at 117 n.15 (citing *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir.2015)).

<sup>38</sup> *Id.* at 116.

magazine] regulation.”<sup>39</sup> Nonetheless, the court proceeded to Part Two merely “assum[ing] without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection.”<sup>40</sup>

In determining the level of scrutiny in Part Two, the court found that the law “does not severely burden the core Second Amendment right to self-defense in the home for five reasons.”<sup>41</sup>

“First, the Act, which prohibits possession of magazines with capacities over ten rounds, does not categorically ban a class of firearms. The ban applies only to magazines capable of holding more than ten rounds and thus restricts possession of only a subset of magazines that are over a certain capacity.”<sup>42</sup>

“Second, unlike the ban in Heller, the Act is not ‘a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [self-defense in the home].’ . . . The record here demonstrates that LCMs are not well-suited for self-defense.”<sup>43</sup>

“Third, also unlike the handgun ban in Heller, a prohibition on large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves. Put simply, the Act here does not take firearms out of the hands of law-abiding citizens, which was the result of the law at issue in Heller. The Act allows law-abiding citizens to retain magazines, and it has no impact on the many other firearm options that individuals have to defend themselves in their home.”<sup>44</sup>

“Fourth, the Act does not render the arm at issue here incapable of operating as intended. New Jersey citizens may still possess and utilize magazines, simply with five fewer rounds per magazine.”<sup>45</sup>

“Fifth, ‘it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances. By this rationale, any type of firearm

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<sup>39</sup> *Id.* at 116–17 (citations omitted).

<sup>40</sup> *Id.* at 117.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quotation omitted).

<sup>43</sup> *Id.* at 118 (quoting *Heller*, 554 U.S. at 628).

<sup>44</sup> *Id.* (quotations and citations omitted).

<sup>45</sup> *Id.*

possessed in the home would be protected merely because it could be used for self-defense.”<sup>46</sup>

Since “it does not severely burden, and in fact respects, the core of the Second Amendment right,” the court applied intermediate scrutiny.<sup>47</sup>

The Third Circuit determined the ban “reasonably fits the State’s interest in promoting public safety”<sup>48</sup> because “[n]ot only will the LCM ban reduce the number of shots fired and the resulting harm, it will present opportunities for victims to flee and bystanders to intervene.”<sup>49</sup>

Recognizing its need to consider less burdensome alternatives in intermediate scrutiny, the court found that “the Act does not burden more conduct than reasonably necessary” because it “does not disarm an individual” and it “imposes no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess.”<sup>50</sup>

Judge Bibas dissented. He first wrote that strict scrutiny was more appropriate than intermediate scrutiny. Since the magazines are commonly owned for self-defense in the home, the ban burdened the core of the Second Amendment right—and when the core of other constitutional rights are burdened, the law is either categorically unconstitutional<sup>51</sup> or strict scrutiny applies.<sup>52</sup>

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<sup>46</sup> *Id.* (quoting *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 119.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 122.

<sup>51</sup> *Id.* at 127 (Bibas, J., dissenting). Judge Bibas cited *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial) and *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause).

<sup>52</sup> *Id.* at 127 (Bibas, J., dissenting) (“The ‘bedrock principle’ of the Free Speech Clause forbids limiting speech just because it is ‘offensive or disagreeable.’ *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). So content-based speech restrictions get strict scrutiny. *Id.* at 412, 109 S.Ct. 2533. The Free Exercise Clause was designed as a bulwark against ‘religious persecution and intolerance.’ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (internal quotation marks omitted). So laws that target religion or religious conduct get strict scrutiny. *Id.* at 533, 113 S.Ct. 2217. And the Equal Protection Clause targets classifications that historically were used to

Judge Bibas argued that the majority committed several errors in determining the appropriate level of scrutiny:

First and most fundamentally, the majority weighs the merits of the right to possess large magazines.<sup>53</sup> . . . The majority observes that the record is unclear on how many people fire more than ten rounds in self-defense . . . But the Second Amendment provides a right to “keep and bear Arms.” It protects possessing arms, not just firing them. So the majority misses a key part of the Second Amendment. The analysis cannot turn on how many bullets are fired.<sup>54</sup>

Moreover, it is contrary to the way courts apply heightened scrutiny to select the tier of scrutiny *after* considering the severity of the burden. “Polling defensive gun uses and alternatives to set a level of scrutiny, as the majority does, boils down to forbidden interest-balancing. Any gun regulation limits gun use for both crime and self-defense. And any gun restriction other than a flat ban on guns will leave alternative weapons. So the majority’s test amounts to weighing benefits against burdens.”<sup>55</sup>

Additionally,

though it denies it, the majority effectively cabins *Heller’s* core to bans on handguns. . . . People commonly possess large magazines to defend themselves and their families in their homes. That is *exactly why* banning them burdens the core Second Amendment right. For any other right, that would be the end of our analysis; for the Second Amendment, the

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discriminate. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). So laws that classify based on race get strict scrutiny. *Id.* at 235, 115 S.Ct. 2097.”).

<sup>53</sup> *Id.* at 128 (Bibas, J., dissenting).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (citations omitted).

majority demands something much more severe.<sup>56</sup>

Judge Bibas argued that the majority not only chose the wrong standard of review, it misapplied the standard. Specifically, the government had not been required to (and did not) prove that the law was effective;<sup>57</sup> the government was not required to prove that substantially less burdensome alternatives were unavailable;<sup>58</sup> and the majority considered how often the banned magazines are actually used in self-defense, which was inconclusive and irrelevant.<sup>59</sup> Consequently, “[t]he majority’s watered-down ‘intermediate scrutiny’ is really rational-basis review,” far different from the intermediate scrutiny applied when other rights are at issue.<sup>60</sup>

#### IV. FOURTH CIRCUIT

##### E. UPHOLDING BAN ON FELONS AND USERS OF ILLEGAL DRUGS. *U.S. v. YATES*

A jury convicted Meredith Yates and Kevin Vanover of several firearms offenses, including possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2); possession of a firearm by an illegal drug user in violation of § 922(g)(3), 924(a)(2); and possession of an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), 5871 (2012).<sup>61</sup>

On appeal, Yates and Vanover argued “that the Second Amendment does not allow the government to limit gun ownership based on prior convictions or marijuana use.”<sup>62</sup> But *Heller* stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. . . .”<sup>63</sup> And the Fourth Circuit previously held in *U.S. v. Carter* that the ban on illegal drug users “proportionally advances the government’s legitimate goal of

<sup>56</sup> *Id.* at 129–30 (Bibas, J., dissenting).

<sup>57</sup> *Id.* at 130–131 (Bibas, J., dissenting).

<sup>58</sup> *Id.* at 130–133 (Bibas, J., dissenting).

<sup>59</sup> *Id.* at 133 (Bibas, J., dissenting).

<sup>60</sup> *Id.* (Bibas, J., dissenting).

<sup>61</sup> *United States v. Yates*, 746 Fed. Appx. 162, 163 (4th Cir. 2018).

<sup>62</sup> *Id.* at 164.

<sup>63</sup> *Heller*, 554 U.S. at 626.

preventing gun violence and is therefore constitutional under the Second Amendment.”<sup>64</sup> So the conviction was quickly affirmed.

Yates and Vanover petitioned for certiorari on October 31, 2018. The petition was denied on December 3, 2018.

## V. FIFTH CIRCUIT

### A. UPHOLDING BAN ON HANDGUN SALES TO RESIDENTS OF OTHER STATES. *MANCE V. SESSIONS*

District of Columbia residents Andrew and Tracy Hanson traveled to Texas to purchase handguns from Fredric Mance, a federally licensed firearms dealer (“FFL”). They did so because D.C. has only one FFL, who has no inventory and charges \$125 for each firearms transfer.

The Hansons could legally purchase firearms under the laws of both Texas and the District of Columbia. The District’s laws allow a resident to buy handguns outside the District. However, federal law prohibits an FFL from selling handguns to out-of-state residents.<sup>65</sup> Federal law would permit Mance to

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<sup>64</sup> United States v. Carter, 750 F.3d 462, 470 (4th Cir. 2014).

<sup>65</sup> 18 U.S.C. § 922(a)(3) and (b)(3) provide that:

(a) It shall be unlawful—

...

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any

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firearm acquired in any State prior to the effective date of this chapter....

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver — ...

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes....

27 C.F.R. § 478.99(a), provides:

Interstate sales or deliveries. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: *Provided*, That the foregoing provisions of this paragraph (1) shall not apply to the sale or delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any

transfer the firearms to the FFL in the District of Columbia, but the Hansons objected to the fee. Instead, they challenged the constitutionality of the federal scheme.<sup>66</sup>

The Fifth Circuit applied strict scrutiny to the law, assuming without deciding that it was the correct standard. After explaining why Congress passed the interstate sales ban in 1968,<sup>67</sup> the court had to determine whether the law was

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person for temporary use for lawful sporting purposes (see § 478.97).

<sup>66</sup> See *Mance v. Sessions*, 896 F.3d 699 (5th Cir. 2018).

<sup>67</sup>

The district court accepted that when Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 (Crime Control Act) and the Gun Control Act of 1968 there was an actual problem in need of solving. The findings and declarations set forth in the Crime Control Act reflect that Congress was of the view that “the existing Federal controls over [widespread traffic in firearms] do not adequately enable the States to control this traffic within their own borders through the exercise of their police power.” Congress had concluded that there was a “serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State,” and these interstate purchases were accomplished “without the knowledge of ... local authorities.” Congress found that individuals circumventing the laws of the state in which they resided included “large numbers of criminals and juveniles.” Congress had additionally concluded “that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances ....” Similarly, Congress found:

that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees’ places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms. . . .

narrowly tailored to the government's interest in the present day:

The overarching question in a strict-scrutiny analysis of the laws and regulations at issue, it seems to us, is whether an in-state sales requirement remains justified by a compelling government interest and is narrowly tailored to serve that interest after the Gun Control Act was amended by the Brady Act and in light of federal regulations promulgated after the in-state sales requirement was enacted.<sup>68</sup>

The Fifth Circuit concluded that the ban passed strict scrutiny. "All parties to this suit concede that there is a compelling government interest in preventing circumvention of the handgun laws of various states."<sup>69</sup> And the law was narrowly tailored because the alternative of requiring every FFL to master the laws of all 50 states and the District of Columbia was unreasonable:

There are more than 123,000 FFLs nationwide. It is unrealistic to expect that each of them can become, and remain, knowledgeable about the handgun laws of the 50 states and the District of Columbia, and the local laws within the 50 states and the District. The district court relied on 27 C.F.R. § 478.24 to support the conclusion that FFLs can "ensure that their firearms transactions comport with state and local law." But the compilation of state gun laws by the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives is more than 500 pages long, and it provides the full text of those laws. FFLs are not engaged in the practice of law, and we do not expect even an attorney in one state to master the laws of 49 other states in a particular area.

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*Id.* at 705–06 (citations omitted).

<sup>68</sup> *Id.* at 706.

<sup>69</sup> *Id.* at 707.

Additionally, the compilation on which the district court relied is only updated annually.

The laws of the various states differ as to who may lawfully possess a firearm. All but one state (Vermont) prohibits possession of a firearm by a felon, but the definitions of “felony” differ. Restrictions based on mental illness vary among the states. Some states prohibit the purchase of a firearm by drug abusers, and some restrict purchases by those who have abused alcohol.

It is reasonable, however, for the federal government to expect that an FFL located in a state, and subject to state and local laws, can master and remain current on the firearm laws of that state. The in-state sales requirement is narrowly tailored to assure that an FFL who actually delivers a handgun to a buyer can reasonably be expected to know and comply with the laws of the state in which the delivery occurs.<sup>70</sup>

According to the Fifth Circuit, it did not matter that federal laws allow interstate long gun sales (with the consent of both states). Obviously, FFLs are expected to be competent at complying with the long gun sales laws of every state. But the court explained that “at least some states have regulated the sale of handguns more extensively than they have regulated the sale of long guns.”<sup>71</sup> Moreover, handguns were used more commonly in the crimes that inspired the Gun Control Act.

In fact, compliance with foreign state handgun laws is not particularly more difficult than compliance with such laws for handguns. As the Fifth Circuit admitted, a federal statute requires the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) to annually publish a book of the relevant gun laws of every state and of every locality therein. The book is supposed to be made available to FFLs so that they can examine and obey the laws of other states. Thanks to the

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<sup>70</sup> *Id.* at 707–08 (citations omitted).

<sup>71</sup> *Id.* at 708.

worldwide web, that book is now readily available and can be updated as often at ATF wishes.

On July 20, 2018, the Fifth Circuit denied a petition for rehearing en banc by an 8-7 vote. The dissenting judges issued three separate dissents. Judge Elrod, joined by judges Smith, Jones, Willett, Ho, Duncan, and Engelhardt argued that the Two-Part Test that the Fifth Circuit applied, which most Circuit Courts have adopted, is inappropriate under *Heller*. Rather, Judge Jones believes an analysis based on text, history, and tradition is most consistent with *Heller*.<sup>72</sup> This is the test the First Circuit had used prior to *Gould*,<sup>73</sup> and notably, it is the test advocated by then-Judge Kavanaugh in the D.C. Circuit.<sup>74</sup>

Judge Willett, joined by the other six dissenting judges, argued that the court should rehear the case *en banc* to determine the appropriate test: “How should judges evaluate laws that burden Americans’ Second Amendment rights – tiers of scrutiny vs. ‘text, history, and tradition?’”<sup>75</sup>

Judge Ho—joined by the six other dissenters—wrote that the law fails strict scrutiny. He pointed out that the law was not the least restrictive means available because a law could serve the same purpose while allowing an FFL to deal with residents of two states:

The Government does not contend (nor could it) that a dealer is fully capable of complying with the laws of one state, but incapable of complying with the laws of two. This alone demonstrates that a categorical ban on all interstate handgun sales is over-inclusive—it prohibits a significant number of transactions that fully comply with state law.<sup>76</sup>

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<sup>72</sup> *Mance v. Sessions*, 896 F.3d 390, 394–95 (5th Cir. 2018). Judge Elrod made a similar argument in a 2012 dissent. *Houston v. City of New Orleans*, 675 F.3d 441, 448–452 (5th Cir. 2012) (Elrod, J., dissenting).

<sup>73</sup> See, e.g., *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).

<sup>74</sup> See *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>75</sup> *Mance*, 896 F.3d at 398 (Willett, J., dissenting).

<sup>76</sup> *Id.* at 402 (Ho, J., dissenting). Indeed, the original 1968 Gun Control Act had also banned interstate long gun sales, but had allowed interstate long gun sales between contiguous states as long as both states enacted authorizing legislation. The interstate long gun sales

Judge Ho additionally pointed out that even theoretically FFLs would not actually have to learn the laws of all 50 states because most states rely on the same National Instant Criminal Background Check System (NICS):

36 states think that relying on NICS adequately vindicates their interests. According to an FBI report cited by the Government, 36 states – including every state in this circuit, as well as the District of Columbia – rely solely on NICS to run background checks. See FBI Criminal Justice Information Services, National Instant Criminal Background Check System (NICS) Operations 3 (2014), available at <https://www.fbi.gov/aboutus/cjis/nics/reports/2014-operations-report>.

What's more, the fact that nearly three-quarters of states rely entirely on NICS, and not on their own databases, further demonstrates why the interstate sales ban serves little purpose: If a D.C. resident wishes to buy a handgun, the dealer will run the same NICS background check, regardless of whether the dealer is based in D.C., Texas, or most other states. And in any event, even assuming the panel is correct that better information sharing would make the system more effective, that only furthers the point here: There are less restrictive alternatives to ensure compliance with state handgun laws.<sup>77</sup>

Judge Ho concluded by pointing out the irony of justifying additional restrictions on the basis that the existing restrictions are too complex to be understood on their own:

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ban was repealed by the Firearms Owners' Protection Act of 1986; today, a FFL in one state can sell to a resident of any other state, as long as both states consent.

<sup>77</sup> *Id.* at 403 (Ho, J., dissenting).

The Government's defense of the federal ban — that state handgun laws are too complex to obey — is not just wrong under established precedent, it is troubling for a more fundamental reason. If handgun laws are too complex for law-abiding citizens to follow, the answer is not to impose even more restrictive rules on the American people. The answer is to make the laws easier for all to understand and follow. The Government's proposed prophylaxis — to protect against the violations of the few, we must burden the constitutional rights of the many — turns the Second Amendment on its head. Our Founders crafted a Constitution to promote the liberty of the individual, not the convenience of the Government.<sup>78</sup>

Notably, states that believe their handgun laws are too complex for nonresident sellers to comprehend remain free to prohibit residents from buying out-of-state. The practical effect of the federal ban is only to prohibit handgun sales that are permitted by the seller's state *and* the buyer's state.

The plaintiffs petitioned for certiorari in what became *Mance v. Whitaker* on November 19, 2018. The petition is still pending.

#### F. CAMPUS CARRY LAW UPHELD, *GLASS V. PAXTON*

Texas enacted a Campus Carry Law in 2015, allowing certain permitholders to carry concealed handguns on college campuses.<sup>79</sup> The law allows public colleges to impose reasonable regulations, but prevents them from prohibiting the carrying of handguns.<sup>80</sup> "For example, the law permits public colleges to establish regulations concerning the storage of handguns in residence halls."<sup>81</sup>

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<sup>78</sup> *Id.* at 405 (Ho, J., dissenting).

<sup>79</sup> Codified as Tex. Gov't Code § 411.2031.

<sup>80</sup> § 411.2031(d-1).

<sup>81</sup> *Glass v. Paxton*, 900 F.3d 233, 236 (5th Cir. 2018) (citing Tex. Gov't Code § 411.2031(d)).

“To become a license holder (with some exceptions), the applicant must be a Texas resident who is at least 21 years old, has not been convicted of a felony or certain misdemeanors, is not chemically dependent, has participated in handgun training, and has passed a proficiency examination.”<sup>82</sup>

Three University professors, including Dr. Jennifer Glass, challenged the Campus Carry Law. For simplicity’s sake, the Fifth Circuit referred only to Glass; we will do the same. Glass raised three claims: (1) “that the law and policy violate her First Amendment right to academic freedom by chilling her speech inside the classroom;” (2) “that the law and policy violate her rights under the Second Amendment because firearm usage in her presence is not sufficiently ‘well-regulated;’” and (3) “that the law and policy violate her right to equal protection because the University lacks a rational basis for determining where students can or cannot concealed-carry handguns on campus.”<sup>83</sup>

In support of her First Amendment claim, Glass argued that “her classroom speech would be ‘dampened to some degree by the fear’ it could initiate gun violence in the class by students who have ‘one or more handguns hidden but at the ready if the gun owner is moved to anger and impulsive action.’ In an affidavit she expressed particular concern for ‘religiously conservative students [who] have extreme views,’ as well as ‘openly libertarian students,’ whom she ‘suspect[s] are more likely to own guns given their distaste for government.’”<sup>84</sup>

The Fifth Circuit held that Glass lacked standing to bring her First Amendment claim because she failed to prove that the alleged harm was “certainly impending.” The court explained that “Glass cannot manufacture standing by self-censoring her speech based on what she alleges to be a reasonable probability that concealed-carry license holders will intimidate professors and students in the classroom.”<sup>85</sup>

In support of her Second Amendment claim, Glass argued that “the Campus Carry Law and University policy violate the Second Amendment because firearm usage in her

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<sup>82</sup> *Glass*, 900 F. 3d at 236 (citing Tex. Gov’t Code §§ 411.172, 411.174, 411.188).

<sup>83</sup> *Id.* at 237.

<sup>84</sup> *Id.* at 238 (brackets in original).

<sup>85</sup> *Id.* at 242.

presence is not sufficiently ‘well regulated.’”<sup>86</sup> “Glass contends that to the extent the Second Amendment recognizes an individual right to carry firearms, persons not carrying arms have a right to the practice being well-regulated.”<sup>87</sup> “‘Like it or not,’ Glass argues, ‘there is specific constitutional language that premises the right, whatever its extent, on the use of guns [as] ‘well-regulated.’” She argues that the prefatory clause places a ‘condition’ on the individual right.”<sup>88</sup>

To the contrary, the Fifth Circuit found that *Heller* precludes such an interpretation:

Glass’s argument is foreclosed by *Heller*. In two separate locations in the majority opinion, the Court held that the Second Amendment’s prefatory clause does not limit its operative clause: “The [prefatory clause] does not limit the [operative clause] grammatically, but rather announces a purpose.” 554 U.S. at 577, 128 S.Ct. 2783.

Indeed, the “prefatory clause does not limit or expand the scope of the operative clause.” *Id.* at 578, 128 S.Ct. 2783. The Amendment’s first clause “is prefatory and not a limitation on the amendment itself.” *Hollis v. Lynch*, 827 F.3d 436, 444 (5th Cir. 2016). Because the operative clause provides the codification of the individual right, the prefatory clause cannot “limit or expand the scope” of the individual right. *Heller*, 554 U.S. at 578, 128 S.Ct. 2783.<sup>89</sup>

“The prefatory clause does not limit the scope of the individual right codified in the operative clause” so Glass “failed to state a claim under the Second Amendment.”<sup>90</sup>

In support of her Equal Protection claim, Glass argued that “the Campus Carry Law and University policy violate her

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<sup>86</sup> *Id.* at 243.

<sup>87</sup> *Id.* at 244.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

right to equal protection under the Fourteenth Amendment because the University lacks a rational basis for determining where students can or cannot concealed-carry handguns on campus.”<sup>91</sup>

In her amended complaint, Glass alleges that “[t]here is no rational basis for the division in the state’s policies between where concealed carry of handguns is permitted and where it may be prohibited.” She does not challenge Texas’s purported government interest: public safety and self-defense. Instead, she argues that there is no rational basis for Texas to allow private universities to ban concealed carry but not public universities. In addition, she argues that there is no rational basis for the University to allow concealed carry in classrooms while simultaneously prohibiting the practice in other campus locations such as faculty offices, research laboratories, and residence halls.<sup>92</sup>

Texas provided a rational response to each allegation. “First, the Campus Carry Law distinguishes between public and private universities in order to respect the property rights of private universities. Second, public safety and self-defense cannot be achieved if concealed carry is banned in classrooms because attending class is a core reason for students to travel to campus.”<sup>93</sup> And third, “public safety and self-defense can still be achieved if concealed carry is banned in less-frequented areas such as faculty offices and research laboratories.”<sup>94</sup>

Since “Texas’s rationales are arguable at the very least,” Glass’s Equal Protection claim failed.<sup>95</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 245.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 246.

## VI. SIXTH CIRCUIT

A. UPHOLDING GUN BAN FOR DOMESTIC VIOLENCE  
MISDEMEANOR IN DISTANT PAST. *STIMMEL V. SESSIONS*

Terry Lee Stimmel pleaded no contest in 1997 to “knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member,” a misdemeanor crime of domestic violence.<sup>96</sup> In 2002, he tried to purchase a firearm from Walmart but was denied as a domestic violence misdemeanant. After unsuccessfully appealing to the FBI, he challenged the constitutionality of the federal ban on domestic violence misdemeanants codified in 18 U.S.C. § 922(g)(9). The Sixth Circuit, like every other Circuit Court to consider a Second Amendment challenge to the ban so far, upheld the law.<sup>97</sup>

The court applied the Two-Part Test. In determining whether the law burdened the scope of the right, the court sought evidence of historical or longstanding regulations on domestic violence misdemeanants. After failing to find such evidence, the court assumed without deciding “that a domestic violence misdemeanant’s Second Amendment rights remain intact to some degree” and continued to Part Two.<sup>98</sup>

The court applied intermediate scrutiny in Part Two primarily because “Stimmel, as a domestic violence misdemeanant, is at least somewhat removed from the Amendment’s core protected class as defined in *Heller*.”<sup>99</sup> And because “Congress lightened the burden on the right by providing domestic violence misdemeanants with four mechanisms of relief from their firearm disability. They can (1) petition to set aside their conviction; (2) seek a pardon; (3) have their conviction expunged; or (4) have their civil rights fully restored.”<sup>100</sup> “In sum, § 922(g)(9) places a substantial burden on

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<sup>96</sup> Ohio Rev. Code § 2919.25(A).

<sup>97</sup> *Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2018); See Kopel & Greenlee, *supra* note 1, at 242–44, 278–81, 305–06 (discussing cases from other circuits).

<sup>98</sup> *Stimmel*, 879 F.3d at 205.

<sup>99</sup> *Id.* at 206.

<sup>100</sup> *Id.* at 207.

the right, but does not touch the Second Amendment's core – intermediate scrutiny is appropriate here.”<sup>101</sup>

The court emphasized that “[t]he burden of justifying § 922(g)(9) under heightened scrutiny is demanding and remains with the government.”<sup>102</sup> The government satisfied this burden by proving that a “reasonable fit” exists between disarming domestic violence misdemeanants and its compelling objective of preventing gun violence:

On the government's evidence, which Stimmel fails to rebut, it is reasonable to conclude that domestic abusers have high recidivism rates, pose a continued risk to their families, as well as law enforcement, are more likely to kill their victims when armed, and should therefore be disarmed. In accord with the unanimous view of those circuits that have addressed the question, we conclude the fit here is, at least, reasonable. Section § 922(g)(9) survives intermediate scrutiny.<sup>103</sup>

The evidence that domestic violence offenders in general are much more likely than the general population to perpetrate criminal homicides or other major violent crimes is overwhelming. However, the evidence that one-time offenders remain dangerous even after decades of good behavior is thin. Accordingly, Judge Danny Boggs dissented. As he summarized:

Because the government has offered, at best, minimal evidence that a non-recidivist domestic violence misdemeanor presents a heightened risk of reoffending decades after his or her conviction, it has yet to justify what is, effectively, a lifetime ban on a fundamental constitutional right.<sup>104</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 211.

<sup>104</sup> *Id.* at 213 (Boggs, J., dissenting).

In a 2016 statutory interpretation case on the federal domestic violence statute, Justice Thomas’s dissent also raised concerns about the prohibition, which is the only federal statute that uses a misdemeanor conviction to impose a lifetime ban on the exercise of a constitutional right. He criticized the majority for treating the Second Amendment as a second-class right.<sup>105</sup>

B. NO RIGHT TO SELL GUNS TO FELONS. *UNITED STATES V. BACON*

Donte Bacon admitted that he “purchased the firearm” and “sold it ... with reasonable cause to know that [the purchaser was] a felon” in August of 2014.<sup>106</sup> Later that month, “Bacon confirmed that he sold a different firearm, a semiautomatic pistol with an obliterated serial number, to a prohibited person.”<sup>107</sup> Bacon was convicted of violating 18 U.S.C. § 922(d)(1) and (k) for selling a firearm to a prohibited person and possessing a firearm with an obliterated serial number. He appealed to the Sixth Circuit.

The Sixth Circuit seemingly placed the burden on Bacon to prove that the Second Amendment protects the right to sell arms to felons: “Bacon has not provided and we are unable to find any historical indication that the Second Amendment encompasses such sales.”<sup>108</sup> This was erroneous. Under the precedent of the Sixth Circuit, and of other circuits, the government bears the Part One burden of proof to show that a particular activity is outside the scope of the Second Amendment right as traditionally understood.<sup>109</sup>

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<sup>105</sup> *Voisine v. United States*, 136 S.Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (disagreeing with majority’s reading that the statute encompasses reckless conduct); See David Kopel, *Voisine v. United States - Post-Decision SCOTUScast*, FEDERALIST SOCIETY (Aug. 8, 2016) (audio), <https://fedsoc.org/commentary/podcasts/voisine-v-united-states-post-decision-scotuscast>.

<sup>106</sup> *United States v. Bacon*, 884 F.3d 605, 608 (6th Cir. 2018) (brackets in original).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 611.

<sup>109</sup> See *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011)); see also *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir.

However, since there was Supreme Court precedent nearly on point, the court's error was mostly a matter of semantics. *Heller* had stated: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."<sup>110</sup> The prohibition on selling firearms to felons is thus easy to infer.

The Sixth Circuit determined that Bacon asserted a Second Amendment challenge only to the ban on selling firearms to felons. As for the separate ban on selling firearms with obliterated serial numbers, the court explained in a footnote that "[e]ven if he had raised Second Amendment arguments regarding § 922(k), we are persuaded by the Third Circuit's analysis in *United States v. Marzzarella*, 614 F.3d 85, 100 (3d Cir. 2010) (rejecting a defendant's Second Amendment challenge and finding that '§ 922(k) would pass muster under either intermediate scrutiny or strict scrutiny')."<sup>111</sup>

## VII. EIGHTH CIRCUIT

### A. SUPPRESSORS AND SHORT-BARRELED RIFLES ARE NOT INDISPUTABLY PART OF SECOND AMENDMENT RIGHT. *UNITED STATES V. STEPP-ZAFFT*

After a search of Stepp-Zafft's apartment produced "numerous firearms [including five unregistered short-barreled rifles], grenade bodies, fuses, black powder, empty carbon dioxide pellet gun cylinders, and what appeared to be two homemade silencers fashioned out of oil and fuel filters,"<sup>112</sup>

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2014); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013); *United States v. Chester*, 628 F.3d 673, 681–82 (4th Cir. 2010).

<sup>110</sup> *Bacon*, 884 F.3d at 611–12 (quoting *Heller*, 554 U.S. at 626–27).

<sup>111</sup> *Id.* at 612 n.3; See Kopel & Greenlee, *supra* note 1, at 204–05, 212–14, 216, 236–37 (discussing the persuasive and well-reasoned *Marzzarella* opinion, which is a foundation of circuit jurisprudence on the Second Amendment).

<sup>112</sup> *United States v. Stepp-Zafft*, 733 F. App'x 327, 328 (8th Cir. 2018) (brackets added). "At trial, agents described the items seized from Stepp-Zafft's apartment. All five of the unregistered short-barreled rifles had been modified from their original design. Two had been modified with barrels shorter than sixteen inches. The other three were originally designed and sold as pistols, but they had been

Stepp-Zafft was convicted of possessing unregistered firearms—specifically, five short-barreled rifles, nine destructive devices, and two suppressors—in violation of 26 U.S.C. §§ 5861(d) and 5871. Those statutes, part of the National Firearms Act of 1934 (“NFA”), as amended, require possessors or manufacturers of such items to register those items and pay a tax. Stepp-Zafft had done neither.

“On appeal, Stepp-Zafft contends that the registration requirement unconstitutionally infringes on a Second Amendment right to possess the short-barreled rifles and homemade silencers found in his apartment.” However, because Stepp-Zafft raised these issues for the first time on appeal, the court reviewed only for plain error.<sup>113</sup>

Regarding the defendant’s untimely argument that short-barreled rifles (SBRs) are protected arms: “*Heller* said that there is no Second Amendment right to possess a short-barreled *shotgun* . . . and a plurality of the Court previously observed in a different context that a short-barreled rifle is a ‘concealable weapon’ that is ‘likely to be used for criminal purposes.’”<sup>114</sup> Moreover, “[o]ther courts have seen no

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converted into short-barreled rifles with the addition of a shoulder stock.” *Id.*

<sup>113</sup> Typically, a party must show “good cause” to raise a defect in an indictment for the first time at the appellate stage, but the government failed to present that argument so such a showing was not required in this case. *Id.*

<sup>114</sup> *Id.* at 328 (quoting *Heller*, 554 U.S. at 624; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992)). *Thompson/Center Arms* had held that ATF may not impose the \$200 National Firearms Act (NFA) tax for the sale of kits that could be assembled into any of the following: 1. Legal single-shot rifle (long barrel plus stock), 2. Legal single-shot handgun (short barrel, no stock), or 3. NFA-covered short-barreled rifle (stock, short barrel). *Thompson/Center* was a split decision. Justice Souter announced the judgment of the Court, joined by Chief Justice Rehnquist and Justice O’Connor. Interpreting the NFA statute, they stated that by selling items that could be combined in various ways (one of which would require NFA registration), *Thompson/Center* had not “made” a NFA item. Justice Scalia, joined by Justice Thomas, concurred in the judgment. They reasoned that, under the statutory provisions at issue, the making of a firearm could not be completed until the firearm is assembled. Justice White dissented, joined by Justices Blackmun, Stevens, and Kennedy. They relied on legislative history and rejected

constitutional distinction between short-barreled shotguns and rifles in the wake of *Heller*.”<sup>115</sup> Therefore “*Stepp-Zafft*’s constitutional claim is at least subject to reasonable dispute [so the] district court did not make an obvious error by failing to dismiss the charge *sua sponte*.”<sup>116</sup>

As for whether suppressors are protected arms, the Eighth Circuit noted that “some courts after *Heller* have rejected his position on the ground that silencers are not typically possessed by law-abiding citizens for lawful purposes.”<sup>117</sup> And “because he did not raise this challenge in the district court, the parties did not present evidence on the purposes and common uses of silencers.” Therefore, “the claim is at least subject to reasonable dispute in light of existing authorities and the undeveloped record in this case,” so the “district court did not commit a plain error by declining to dismiss the charge on its own motion.”<sup>118</sup>

The *Stepp-Zafft* decision is correct as far as it goes, since the district court was not on notice that registration requirements for SBRs and suppressors are plainly unconstitutional. However, it would be sloppy reasoning to assume that everything in the NFA is outside of the Second Amendment simply because *Heller* suggested that short-barreled shotguns and machine guns are outside.

For example, a student note in the *Harvard Journal of Law & Public Policy* argues that there is no good reason for regulating SBRs more stringently than other firearms. The note also casts doubt on ATF’s administrative interpretations expending the

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application of the rule of lenity in a civil case. *Thompson/Center* was selling all the parts necessary to make a short-barreled rifle; the fact that other parts were included in the sale was irrelevant. Justice Stevens also dissented separately, emphasizing the danger of concealable firearms.

<sup>115</sup> *Id.* at 328 (citing *United States v. Gilbert*, 286 Fed. App’x 383, 386 (9th Cir. 2008); *United States v. Cox*, 235 F. Supp. 3d 1221, 1227 (D. Kan. 2017); *United States v. Gonzales*, No. 2:10-cr-00967, 2011 WL 5288727, at \*6 (D. Utah Nov. 2, 2011)).

<sup>116</sup> *Stepp-Zafft*, 733 Fed. App’x at 328.

<sup>117</sup> *Id.* (citing *United States v. McCartney*, 357 Fed. App’x 73, 76 (9th Cir. 2009); *Cox*, 235 F.Supp.3d at 1227; *United States v. Perkins*, No. 4:08CR3064, 2008 WL 4372821, at \*4 (D. Neb. Sept. 23, 2008)).

<sup>118</sup> *Stepp-Zafft*, *supra* note 112, at \*2.

scope of the SBR statute, such as by attempting to control arm braces or forward grips for pistols.<sup>119</sup>

Notably, a SBR is *less* lethal than a rifle with a longer barrel, due to reduced velocity and hence reduced kinetic energy. In contrast, short-barreled shotguns can be *more* lethal at close range, in the sense that the shorter barrel produces a wider shot spread. Whatever the reason, short-barreled shotguns have always been disproportionately used in crime, whereas SBRs are not.

An article by Stephen Halbrook examined the legislative history of the NFA and found no support for treating “silencers” as NFA items. As Halbrook pointed out, sound moderators are standard equipment for hunting rifles in several European nations; there, the permit or license for rifle possession generally presumes that the user will (or must) use a sound moderator.<sup>120</sup>

## VIII. NINTH CIRCUIT

### A. AFFIRMING INJUNCTION AGAINST CALIFORNIA MAGAZINE CONFISCATION. *DUNCAN V. BECERRA*

In *Duncan v. Becerra*,<sup>121</sup> the Ninth Circuit issued an unpublished opinion upholding a preliminary injunction enjoining California from enforcing a statute that required persons who lawfully possess “large-capacity magazines” (supposedly, magazines capable of holding more than 10 rounds) to dispossess them. Citizens were provided three options for dispossession: they could (1) “remove the large-capacity magazine from the State;” (2) “sell the large-capacity magazine to a licensed firearm dealer;” or (3) “surrender the

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<sup>119</sup> See James A. D’Cruz, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 HARV. J. L. & PUB. POL’Y 493 (2017).

<sup>120</sup> Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMBERLAND L. REV. 33 (2015-2016). See generally, Allen Halbrook, *The NFA Creates Some Particular Dangers for Non-Licensees Making or Modifying AR-Type Rifles and for Those Making Silencers*, State Bar of Texas, 6th Annual 2017 TXCLE Firearms Law symposium 7.VII.

<sup>121</sup> *Duncan v. Becerra*, 742 F. App’x 218 (9th Cir. 2018).

large-capacity magazine to a law enforcement agency for destruction.”<sup>122</sup>

The district court held that the ban violates the Second Amendment—both under intermediate scrutiny and under what it called “the *Heller* test,”<sup>123</sup> which simply “asks whether the law bans types of firearms commonly used for a lawful purpose.”<sup>124</sup>

As the district court found, the magazines are commonly owned by law-abiding citizens for self-defense. The court noted that some of the nation’s most popular handguns—which *Heller* deemed the “quintessential self-defense weapon”—come with standard magazines larger than 10 rounds. The court also found that such magazines would very likely be utilized by a present-day militia and would contribute to the common defense. Thus, the court found that the magazines are protected by the Second Amendment.

The district court held that the ban failed intermediate scrutiny as well. The court deemed the magazine ban “a haphazard solution likely to have no effect on an exceedingly rare problem, while at the same time burdening the constitutional rights of other California law-abiding responsible citizen[s].”<sup>125</sup> Although California had offered evidence from Michael Bloomberg organizations and similar groups claiming that “large” magazines make mass shootings worse, the district court carefully reviewed the evidence and found it shoddy and unpersuasive.

Further, “it would be reasonable to infer, based on the State’s evidence, that a right to possess magazines that hold more than 10 rounds may *promote* self-defense,” meaning that the evidence showed public safety might actually be better served by *increasing* the availability of the banned magazines.<sup>126</sup> Thus, the “reasonable fit” between the challenged regulation and an important state interest did not exist, so the ban failed intermediate scrutiny.

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<sup>122</sup> Cal. Penal Code § 32310(d)(1)-(3).

<sup>123</sup> *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117–18 (S.D. Cal. 2017).

<sup>124</sup> *Id.* at 1117 (quoting *Friedman v. City of Highland Park*, 136 S.Ct. 447, 449 (2015) (Thomas, J., and Scalia, J., dissenting from denial of certiorari)).

<sup>125</sup> *Id.* at 1124.

<sup>126</sup> *Id.* at 1121.

Federal appellate courts review district court preliminary injunctions only for abuse of discretion. By a 2-1 vote, the panel found there had been no abuse of discretion. First, the district court was correct that “magazines for a weapon likely fall within the scope of the Second Amendment.”<sup>127</sup> Second, “[a]lthough the district court applied two different tests, there is no reversible error if one of those tests follows the applicable legal principles and the district court ultimately reaches the same conclusion in both analyses.”<sup>128</sup> The appropriate test under circuit precedent was intermediate scrutiny.

Finally, “[t]he district court did not abuse its discretion by concluding that [the law] did not pass intermediate scrutiny. The district court’s review of the evidence included numerous judgment calls regarding the quality, type, and reliability of the evidence, as well as repeated credibility determinations.”<sup>129</sup> On appeal, “California articulates no actual error made by the district court, but, rather, multiple instances where it disagrees with the district court’s conclusion or analysis regarding certain pieces of evidence. This is insufficient to establish that the district court’s findings of fact and its application of the legal standard to those facts were ‘illogical, implausible, or without support in inferences that may be drawn from facts in the record.’”<sup>130</sup>

In a 2015 case, a different three-judge panel of the Ninth Circuit had upheld a district court’s decision *not* to grant a preliminary injunction against a similar confiscation law enacted by a Bay Area town, Sunnyvale.<sup>131</sup> Although the evidence in the *Fyock v. Sunnyvale* and *Duncan* cases differed, the key point was that neither decision by the district judges in those cases was an abuse of discretion. Rather, the decision to grant or not grant the preliminary injunction was based on the district judges’ reasonable discretion in weighing the evidence before them. When a preliminary injunction is being appealed, the only job for the appellate judges is to see if there is an abuse

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<sup>127</sup> *Duncan*, 742 F. App’x at 220.

<sup>128</sup> *Id.* at 220.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 222. (quoting *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc)).

<sup>131</sup> *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015).

of discretion; the appellate judges are not supposed to reweigh the evidence. The fact that two district court judges saw similar evidence and came to different conclusions does not mean that either judge is guilty of abuse of discretion.

The majority wrote that Judge Wallace's dissent was improperly reweighing the evidence. For example, Judge Wallace wrote that the confiscation law could be upheld based on some statistics supplied by one of Michael Bloomberg's organizations. Yet the district court had specifically explained why those statistics lacked reliability and credibility: they were "incomplete studies from unreliable sources upon which experts base speculative explanation and predictions."<sup>132</sup>

Like the Second Circuit in another magazine ban case,<sup>133</sup> Judge Wallace seemed to favor a very weak standard of intermediate scrutiny review for Second Amendment cases: as long as the government could provide some evidence, that was sufficient—notwithstanding the other side's evidence showing that the government evidence is flawed or unpersuasive.

B. FOR COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, DISTRICT COURT DECISION AGAINST HANDGUN BAN MAY NOT BE APPEALED BY WOULD-BE INTERVENOR. *RADICH V. GUERRERO*

The Commonwealth of the Northern Mariana Islands (CNMI) is a United States Territory in the northern Pacific Ocean. The southernmost island in the Mariana Archipelago is Guam, although Guam is a separate territory.<sup>134</sup> Most

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<sup>132</sup> *Duncan*, 265 F. Supp. 3d at 1120.

<sup>133</sup> *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Kopel & Greenlee*, at 288–97 (discussing Second Circuit's uniquely weak standard of review).

<sup>134</sup> Guam became part of the United States when it was seized from Spain in 1898 in the Spanish-American War. In 1899, Spain sold the rest of the Mariana Archipelago to Germany. Japan seized the archipelago from Germany in World War I. After World War II, the United Nations declared the archipelago (not including Guam) to be a United Nations Trust Territory to be administered by the United States. Pursuant to a vote of Congress and of the Mariana people, the territory became an associated commonwealth of the United States, with a constitution adopted in 1978.

inhabitants of the CNMI live on the islands of Saipan, Tinian, and Rota.

In 2016, a decision of the federal district court for the District of the Northern Mariana Islands held certain gun controls in the CNMI to be contrary to the Second Amendment.<sup>135</sup> The district court began by pointing out that the Covenant establishing the Commonwealth expressly made the Second and Fourteenth Amendments applicable to the CNMI.<sup>136</sup>

The district court found the following unconstitutional:

- A law prohibiting lawful permanent CNMI residents who were not of native blood from being issued gun permits.
- A ban on issuing gun permits for home defense.
- A handgun possession ban.
- A handgun import ban.<sup>137</sup>

The Commonwealth's legislature promptly enacted a new gun control statute that complied with the district court's decision. The Commonwealth elected not to appeal the district court decision to the Ninth Circuit.<sup>138</sup> During the period for filing an appeal, the Tanapag Middle School Parent Teacher Student Association (PTSA) attempted to intervene in the case and file an appeal to the Ninth Circuit. The district court rejected the motion to intervene.<sup>139</sup>

In July 2018, the Ninth Circuit affirmed the district court's denial of the motion to intervene because the PTSA lacked standing.<sup>140</sup> Even if the PTSA were correct that the *Radich* decision would lead to metal detectors being installed in schools, PTSA is a voluntary organization, and the *Radich*

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<sup>135</sup> See generally *Radich v. Guerrero*, No. 1:14-CV-00020, 2016 WL 1212437 (D.N. Mar. I. Mar. 28, 2016).

<sup>136</sup> *Id.* at 2.

<sup>137</sup> *Id.* at 9.

<sup>138</sup> The Ninth Circuit's jurisdiction includes Guam and the CNMI. The CNMI legislature later enacted a handgun ban that would go into effect only if the district court decision were overturned.

<sup>139</sup> *Radich v. Guerrero*, 1:14-CV-00020, 2016 WL 3034159 (D.N. Mar. I. May 27, 2016).

<sup>140</sup> *Radich v. Guerrero*, 729 Fed. App'x 623 (9th Cir. 2018).

decision did not require PTSA “to do or refrain from doing anything.”<sup>141</sup>

PTSA also claimed organizational standing because some members are teachers and teachers have a duty to protect students. However, organizational standing must be “germane to the organization’s purpose.” Article III standing is not conferred merely by “a desire to vindicate value interests.”

C. OPEN CARRY IS AN INDIVIDUAL RIGHT AND MAY NOT BE LIMITED ONLY TO SECURITY GUARDS. *YOUNG V. HAWAII*

In *Peruta v. San Diego*, the en banc Ninth Circuit held that the Second Amendment does not protect the *concealed* carrying of handguns; addressing the issue that *Peruta* had carefully avoided, in July 2018, a 2-1 panel in *Young v. Hawaii* held that Hawaii’s near-total prohibition on the open carrying of handguns for lawful self-defense violates the right to bear arms.<sup>142</sup>

Hawaii’s restrictions on firearms carry are the most extreme of any state. Carrying or transporting a loaded firearm outside of one’s property is generally forbidden. Unloaded and cased firearms may be transported while going to or from a gunsmith, a hunting ground, and a few other places. Carrying a loaded handgun in public, either openly or concealed, requires a permit. Concealed carry permits are close to nil (4 permits have been issued in the last 18 years). Only a few dozen open carry permits exist in the State, and they are only for security guards while on the job.

After being denied a permit, George K. Young, Jr. brought a lawsuit in the federal district court for the district of Hawaii.<sup>143</sup> The district court granted the defendants’ motion to dismiss, and Young appealed. For procedural reasons, the State of Hawaii was out of the case by the appellate stage, but the County of Hawaii (the Big Island) remained as a defendant. The State nevertheless filed an amicus brief.

The Ninth Circuit panel examined *Heller* and *McDonald v. City of Chicago*, which had explicated that the textual right to

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<sup>141</sup> *Id.* at 624 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)).

<sup>142</sup> *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018).

<sup>143</sup> *Young v. Hawaii*, 911 F. Supp. 2d 972 (D. Haw. 2012).

“keep” arms is distinct from the right to “bear” arms. The latter includes the right to bear arms for self-defense outside the home, but (as *Heller* said and *McDonald* reaffirmed), the exercise of the right may be excluded from “sensitive places, such as schools and government buildings.”<sup>144</sup> In *Young*, “The State’s amicus brief asks us to stretch this list of presumptively lawful measures to allow all laws ‘preserving public safety.’ This argument borders on the absurd. Surely not all areas of the public are as sensitive as schools or government buildings, nor is it, as the State suggests, a ‘very small and reasonable step to view virtually the entire public sphere as a sensitive place.’”<sup>145</sup>

Expressly following the methodology of *Heller* and *McDonald*, the *Young* court carefully examined history and tradition. Early sources, such as Blackstone, considered the right to bear arms for self-defense to be a natural right; so did the first American treatise on constitutional law, St. George Tucker’s 1803 annotated American edition of Blackstone. Like *Heller*, the Ninth Circuit relied heavily on Tucker:

And in advocating for the prerogative of the Judiciary to strike down unconstitutional statutes, Tucker wrote: “If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, . . . would be able to pronounce decidedly upon the constitutionality of these means.” *see also* Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 637–38 (2012).<sup>146</sup>

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<sup>144</sup> *Heller*, 554 U.S. at 626; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

<sup>145</sup> *Young*, 896 F.3d at 1053 n.6.

<sup>146</sup> *Id.* at 1054. Also included in the natural rights discussion were Leonard W. Levy’s *Origins of the Bill of Rights* (quoting a prominent colonial newspaper on the right to arms as “a natural right”) and David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008).

Following the *Heller* methodology, the Ninth Circuit studied nineteenth-century cases on the right to arms, especially cases from before the Civil War. The majority of the cases—including the cases that *Heller* said were correct explications of the right—upheld prohibitions on concealed carry, but rejected similar restrictions on open carry.

During the nineteenth century, the South was the region most enthusiastic about gun control, and some Southern controls were based on racial animus.

The dissent faults our reliance on decisions from the South, implying that the thorough analysis found in such opinions must have been the product of a “culture where slavery, honor, violence, and the public carrying of weapons were intertwined.”... To say the least, we are puzzled. The dissent overlooks the fact that the Southern cases on which we rely only arose because the legislatures in those states had enacted restrictions on the public carry of firearms. Indeed, were it the case that the Southern culture of slavery animated concerns to protect the right to open carry, why would the Georgia legislature have sought to ban open carry in the first place?

As a more fundamental matter, too, we cannot agree with the dissent’s choice to cast aside Southern cases. *Heller* placed great emphasis on cases from the South, and *Nunn* in particular. We are an inferior court. Can we really, while keeping a straight face, now say that such cases have little persuasive effect in analyzing the contours of the Second Amendment? We think not.<sup>147</sup>

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<sup>147</sup> *Young*, 896 F.3d at 1057 n.9. *Nunn* was an 1846 Georgia case striking a ban on most handguns, striking a ban on open carry, and upholding a ban on concealed carry. *Nunn v. State*, 1 Ga. 243 (1846). *Heller* quotes and lauds *Nunn* more than any other case. The article that the *Young* dissent relied on is Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125

As the *Young* majority acknowledged, a minority of the nineteenth-century cases denied that there is right to defensive carry; these cases start with Arkansas's 1842 *State v. Buzzard*.<sup>148</sup> These cases are explicitly based on the assumption that the right to keep and bear arms is solely to foster the militia.

Yet, with *Heller* on the books, cases in *Buzzard's* flock furnish us with little instructive value. That's because *Heller* made clear that the Second Amendment is, and always has been, an individual right centered on self-defense; it has never been a right only to be exercised in connection with a militia....And bound as the inferior court that we are, we may only assess whether the right to bear arms extends outside the home on the understanding that the right is an individual one centered on self-defense. Thus, *Heller* knocks out the load-bearing bricks in the foundation of cases like *Buzzard*, for those courts only approved broad limitations on the public carry of weapons because such limitations in no way detracted from the common defense of the state.<sup>149</sup>

An 1830s Massachusetts statute provided a model adopted by several other states. According to the statute, if Person A provided well-founded evidence to a court that Person B threatened "injury or a breach of the peace," then the court could issue an order presenting Person B with two choices: (1) Stop carrying arms in public or (2) If you want to continue carrying arms, then you must post a bond for good behavior ("surety of the peace"). Despite the court order, Person B could continue carrying arms, without need for posting a bond, under two circumstances: (1) militia service or (2) if Person B had "good cause" to fear for his safety.

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YALE L.J. FORUM 121 (2015). Cornell is a prolific and sometimes unreliable historian. See David T. Hardy, *Lawyers, Historians and 'Law Office History'*, 46 CUMBERLAND L. REV. 1 (2015).

<sup>148</sup> *State v. Buzzard*, 4 Ark. 18 (1842).

<sup>149</sup> *Young*, 896 F.3d at 1057-58.

Professor Saul Cornell and the *Young* dissent characterize these statutes as broad bans on public carrying. This is contrary to the text. The statutes applied only to persons who were identified in court by specific evidence as being particularly dangerous. Even then, they could still carry if they posted a bond.

In 1328, English King Edward II created the Statute of Northampton, which forbade subjects “to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.” There was an exception for the king’s servants. It is possible to read the statute as a comprehensive ban on carry. The dissent relied on the argument of scholar Patrick J. Charles, who contends that the Statute of Northampton was part of the common law and was adopted in America, and therefore, there is no right to carry arms.<sup>150</sup>

However, the Statute of Northampton was not interpreted in England as a carry ban—at least not by the time the American colonies were on the scene. William Hawkins’s 1716 treatise explained that “no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People.”<sup>151</sup>

Hawkins’s view is consistent with the result of a famous trial from 1686, *Sir John Knight’s Case*. The Chief Justice of the King’s Bench explained that the Statute of Northampton applies only to “people who go armed to terrify the King’s subjects.”<sup>152</sup>

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<sup>150</sup> Patrick J. Charles, *The Faces of the Second Amendment outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEVELAND STATE L. REV. 373 (2016).

<sup>151</sup> 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 489 (8th ed., 1824). Hawkins is the main source for *Heller*’s statement that “dangerous and unusual” weapons are not within the protection of the right to arms. Although Hawkins was writing about *carrying* “dangerous and unusual” arms, the *Heller* majority expanded Hawkins’s point to cover the *possession* of “dangerous and unusual” arms.

<sup>152</sup> Knight, who was a political opponent of King James II, had carried a blunderbuss to church because some Irish Catholics had made credible threats to assassinate him. King James II was pro-Catholic, while Knight was an enthusiast for persecution of Catholics. As one observer of the trial recounted, the jury acquitted Knight “not thinking he did it with any ill design.” For more on the Statute of Northampton

“More fundamentally,” wrote the *Young* majority, “we respectfully decline the County’s and the State’s invitation to import English law wholesale into our Second Amendment jurisprudence....Indeed, there is a scholarly consensus that the 1689 English right to have arms was *less protective* than its American counterpart.”<sup>153</sup>

Early American commentators interpreted common law limits on arms carrying as applying only to persons who carried “offensively” or in a “terrifying” manner or who carried “dangerous and unusual” weapons. The 1843 North Carolina *State v. Huntly* explained “the carrying of a gun per se constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime.”<sup>154</sup>

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and *Knight's Case* see NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O’SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT* 91–101 (2d ed. 2017).

<sup>153</sup> *Young*, 896 F.3d at 1065. For example, as St. George Tucker noted, English law defined as “treason” any gathering of a certain number of armed men without prior government approval, but such gatherings were a protected right under the American Constitution. See *id.* (quoting St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States*, vol. 5, app., n.B, at 19).

<sup>154</sup> 25 N.C. 418, 422–23 (1843). The phrase “business or amusement” was a legal term of art, to encompass all peaceable activity. See, e.g., *The Schooner Exchange v. Mcfaddon & Others*, 11 U.S. 116 (1812) (Marshall, C.J.) (“[T]he ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement. . . .”); *Johnson v. Tompkins*, 13 F. Cas. 840, No. 741 (Cir. Ct. E.D. Penn. 1833) (Supreme Court Justice Baldwin, acting as Circuit Judge) (“[A]ny traveller who comes into Pennsylvania upon a temporary excursion for business or amusement”); *Baxter v. Taber*, 4 Mass. 361, 367 (1808) (“[H]e may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water. . . .”); *Republica v. Richards*, 2 U.S. (2 Dall.) 224 (Penn. 1795) (same language as *Johnson v. Tompkins*).

According to Cornell, Charles, and the *Young* dissent, all carrying (except when mandated by the government) was considered inherently “terrifying.” The majority answers:

In all, “whatever Northampton banned on the shores of England,” the American right to carry common weapons openly for self-defense “was not hemmed in by longstanding bans on carrying.”<sup>155</sup>

Because text, history, and tradition show that peaceful carrying of common arms is part of the Second Amendment, the next question was the standard of judicial review. Bearing arms is part of the core of the Second Amendment. “While the Amendment’s guarantee of a right to ‘keep’ arms effectuates the core purpose of self-defense within the home, the separate right to ‘bear’ arms protects that core purpose outside the home.”<sup>156</sup>

Under Ninth Circuit precedent, “We next ask whether section 134-9 [Hawaii statute that specifies open carry permits

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What an odd way it would be to write a criminal statute!...For instance, Maine’s 1821 Northampton analogue authorized the arrest of “all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State, or such others as may utter any menaces or threatening speeches.” 1821 Me. Laws 285. If riding armed were itself unlawful because it terrorized the good citizens of Maine, it strains credulity to suggest that Maine drafters would have felt the need to clarify such reasoning right in the middle of the statute’s operative provisions. Indeed, why only clarify the consequences of riding armed, and no other prohibited conduct?

*Young*, 896 F.3d at 1067. The “odd” Cornell-Charles reading of early American state statutes would conflict with “neighboring criminal provisions.” For example, Delaware allowed a slave to “go armed with any dangerous weapon” if the master gave permission. Yet by the Cornell et al. theory, *nobody* in Delaware could carry any weapon, except when mandated by government. *Id.*

Likewise, Tennessee authorized sheriffs to arrest anyone “armed with the intention of committing a riot or affray.” But according to Cornell, carrying an arm at all was a serious crime. So why limit arrest powers only to “riot and affray”? “Why on earth would Tennessee have so limited a sheriff’s authorization to arrest if going armed was itself unlawful?” *Id.*

<sup>155</sup> *Id.* at 1067–68 (quoting *Wrenn v. D.C.*, 864 F.3d 650, 660–61 (D.C. Cir. 2017)).

<sup>156</sup> *Id.* at 1069.

may be issued only to security professionals] ‘amounts to a destruction’ of the core Second Amendment right to carry a firearm openly for self-defense....If so, the law is ‘unconstitutional under any level of scrutiny.’”<sup>157</sup>

As counsel for Hawaii County had admitted at oral argument, “no one other than a security guard—or someone similarly employed—had ever been issued an open carry license.” Thus:

Restrictions challenged under the Second Amendment must be analyzed with regard to their effect on the typical, law-abiding citizen....An individual right that does not apply to the ordinary citizen would be a contradiction in terms....Just as the Second Amendment does not protect a right to bear arms only in connection with a militia, it surely does not protect a right to bear arms only as a security guard. The typical, law-abiding citizen in the State of Hawaii is therefore entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense. It follows that section 134-9 “amounts to a destruction” of a core right, and as such, it is infirm “[u]nder any of the standards of scrutiny.”<sup>158</sup>

The Hawaii portion of the statute limiting open carry to security professionals was held unconstitutional. The decision below was reversed and remanded. Notably, the plaintiffs did *not* challenge a separate requirement in Hawaii: that carry permits be issued only “Where the urgency or the need has been sufficiently indicated.” With no information in the record “showing the stringency of the requirement,” the court did not address “whether such requirement violates the Second Amendment.”<sup>159</sup>

In 2019, the Ninth Circuit granted Hawaii County’s petition of *en banc* rehearing. As this Article goes to press, oral argument has not yet been held.

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<sup>157</sup> *Id.* at 1070.

<sup>158</sup> *Id.* at 1071.

<sup>159</sup> *Id.* at 1050 n.2.

D. STATE MAY EXEMPT RETIRED PEACE OFFICERS FROM CARRY BAN NEAR SCHOOLS WITHOUT EXEMPTING CONCEALED-CARRY PERMITHOLDERS, *GALLINGER V. BECERRA*

California passed the Gun-Free School Zone Act in 1994, which banned firearms from school grounds and within school zones (defined as a 1,000-foot radius around school grounds). The statute provided two exceptions: concealed-carry permitholders and retired peace officers.

Reacting against the trend in other states towards armed defense of schools, California amended its Gun-Free School Zone Act in 2015. The amendment as introduced would have eliminated the exceptions for both permitholders and retired law enforcement, but as passed, the amendment retained the exception for retired law enforcement.

A group of permitholders and firearms organizations challenged the amendment, arguing that it violated the Fourteenth Amendment's Equal Protection Clause by irrationally treating permitholders and retired law enforcement differently.

Notably, the Ninth Circuit had held in *Silveira v. Lockyer* that an exemption for retired officers from an "assault weapons" ban violated the Equal Protection Clause.<sup>160</sup> The *Gallinger* court determined that *Silveira* was distinguishable "for the commonsense reason that assault weapons are more dangerous than other kinds of firearms."<sup>161</sup> The court explained that "while the inherent risks that accompany carrying assault weapons for self-defense or public-safety purposes may outweigh any increased benefits to a retired officer's or the public's safety, the same need not be true for other kinds of firearms."<sup>162</sup>

After evading *Silveira's* precedent, the *Gallinger* court upheld the law based on the legislature's determination that "(1) retired peace officers are at a heightened risk of danger based on their previous exposure to crime, and (2) allowing

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<sup>160</sup> *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

<sup>161</sup> *Gallinger v. Becerra*, 898 F.3d 1012, 1018 (9th Cir. 2018).

<sup>162</sup> *Id.* at 1019.

them to carry firearms other than assault weapons on school grounds mitigates that risk and increases officer safety.”<sup>163</sup>

The Ninth Circuit was also persuaded that retired officers carrying firearms enhanced public safety “due to the extensive training in the safe storage and operation of firearms that law enforcement personnel receive.”<sup>164</sup> It is unclear how training in the safe storage of firearms improves one’s ability to *carry* a firearm responsibly. And it is not necessarily true that a retired officer is better trained than a permitholder; licensing authorities in California may require permitholders to complete a 24-hour course certified by the Commission on Peace Officer Standards and Training in addition to 16 hours of standard training.<sup>165</sup>

E. UPHOLDING CHAMBER LOAD INDICATOR, MAGAZINE DETACHMENT MECHANISM, AND MICROSTAMPING REQUIREMENTS FOR NEW SEMIAUTOMATIC HANDGUNS: *PENA V. LINDLEY*

A handgun must be included on the California Department of Justice’s (“CDOJ”) handgun roster to be sold commercially in the state. California often adds new requirements for inclusion on the roster. The plaintiffs challenged three requirements of semiautomatic handguns: (1) that new models contain a chamber load indicator<sup>166</sup> (“CLI,” defined as a “device that plainly indicates that a cartridge is in the firing chamber”);<sup>167</sup> that each new model contain a magazine detachment mechanism<sup>168</sup> (“MDM,” defined as “a mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol.”);<sup>169</sup> and that each be equipped with microstamping features (meaning that “each

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<sup>163</sup> *Id.* at 1020.

<sup>164</sup> *Id.*

<sup>165</sup> Cal. Penal Code § 26165.

<sup>166</sup> *Id.* § 31910(b)(5).

<sup>167</sup> *Id.* § 16380.

<sup>168</sup> *Id.* § 31910(b)(5).

<sup>169</sup> *Id.* § 16900.

such pistol must imprint two sets of microscopic arrays of characters that identify the make, model, and serial number of the pistol onto the cartridge or shell casing of each fired round").<sup>170</sup> These requirements do not apply to handguns already on the roster, which are grandfathered as long as the manufacturer continuously pays a fee and the firearm does not fail a retest for other requirements.<sup>171</sup>

Applying the Two-Part Test, the court assumed without deciding that the laws burden the right to keep and bear arms, and quickly proceeded to Part Two.

The court continued to move quickly in Part Two. The court did not determine whether the laws implicate the core of the Second Amendment right—even though under circuit precedent the determination is a necessary inquiry in determining the appropriate level of heightened scrutiny.<sup>172</sup> Instead, the *Pena* court decided that intermediate scrutiny was appropriate “[b]ecause the restrictions do not substantially burden any such right.”<sup>173</sup> The burden was unsubstantial because the grandfathered firearms remained available<sup>174</sup> and because the laws “place almost no burden on the physical exercise of Second Amendment rights.”<sup>175</sup>

For the mandatory magazine disconnect mechanism (MDM), the court was unconcerned about semiautomatic handguns being rendered useless without a magazine inserted: “Although MDMs might prevent a gun from firing at will, it is likely a rare occurrence when someone has time to put a round from outside a magazine in the chamber without inserting the magazine itself.”<sup>176</sup> Therefore, “[t]he legislative judgment that preventing cases of accidental discharge outweighs the need for discharging a gun without the magazine in place is reasonable.”<sup>177</sup> This was pure speculation without evidence;

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<sup>170</sup> *Id.* § 31910(b)(7).

<sup>171</sup> *Pena v. Lindley*, 898 F.3d 969, 983 (9th Cir. 2018).

<sup>172</sup> *See U.S. v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (“the level of scrutiny should depend on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right.”) (quotations omitted).

<sup>173</sup> *Pena*, 898 F.3d at 977.

<sup>174</sup> *Id.* at 978–79.

<sup>175</sup> *Id.* at 978.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 980.

under standard rules of intermediate scrutiny, the government cannot carry its burden of proof by speculating.<sup>178</sup>

The Ninth Circuit's application of intermediate scrutiny for the second Amendment, was typically undemanding. Because a chamber lock indicator (CLI) "lets someone know that a gun is loaded without even having to pick it up to check" and because a "MDM prevents a firearm from shooting unless a magazine is inserted," "[t]he CLI and MDM requirements [r]easonably fit with California's interest in public safety."<sup>179</sup>

Whatever the merits of mandatory magazine disconnects and chamber lock indicators, all parties agreed that they could be added to a firearm for a few extra dollars in manufacturing costs. The double-microstamping mandate was different. According to the plaintiffs, it was impossible at any price. However, the Ninth Circuit upheld it; because double-microstamping requirement would theoretically "address the substantial problem of untraceable bullets at crime scenes and the value of a reasonable means of identification," the court held that the mandate reasonably fits with California's interests in public safety and crime prevention.<sup>180</sup>

The court was undeterred by "evidence that gun manufacturers have not produced a functioning, commercially available semiautomatic pistol equipped with the microstamping technology and they have no plans to attempt to do so."<sup>181</sup> The Ninth Circuit quickly dismissed the concern: "[s]imply because no gun manufacturer is 'even considering trying' to implement the technology, it does not follow that microstamping is technologically infeasible."<sup>182</sup> "We need not accept wholesale that manufacturers will decline to implement

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<sup>178</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (The government's "burden is not satisfied by mere speculation or conjecture." Instead, it "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them.").

*Heller*, 554 U.S. at 634-35 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. . . . The Second Amendment . . . is the very *product* of an interest balancing by the people.").

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 986.

<sup>181</sup> *Id.* at 983 (quotations omitted).

<sup>182</sup> *Id.*

this new public safety technology in the face of California's evidence that the technology is available and that compliance is feasible."<sup>183</sup>

California provided no evidence to contradict the plaintiff's claim that "no new handguns being sold in the United States can satisfy CDOJ's testing protocol and, therefore, no new handguns qualify for California's approved-as-safe roster."<sup>184</sup> Significantly, as the dissent pointed out, "[s]o far as we can tell from the meager record before us, no one—including CDOJ—has ever tested any weapon against California's protocol to see whether it is technologically feasible."<sup>185</sup> Therefore, the court upheld a safety requirement that may be entirely impossible to comply with. There was no evidence in the record that compliance with the California mandate is possible. The effect of this law is extreme; it freezes firearms technology in time.

*Heller* made clear that constitutional rights cannot be technologically fossilized at some particular moment in history:

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, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35–36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), 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.<sup>186</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *Pena*, 898 F.3d at 988 (Bybee, J., concurring in part and dissenting in part).

<sup>185</sup> *Id.*

<sup>186</sup> *Heller*, 554 U.S. at 582.

The reasoning applies the same to the sixteenth century, the eighteenth century and the twenty-first. Just as the government cannot prohibit the freedom of speech through iPhones or the internet, the government cannot prohibit the development of the right to keep and bear arms through modern or future technologies.

Judge Bybee concurred in part and dissented in part. He joined in the portions of the majority opinion upholding the CLI and MDM requirements. But he dissented regarding the microstamping requirement due to his concern “that the testing protocol adopted by the California Department of Justice [ ] in its regulations is so demanding that no gun manufacturer can meet it.”<sup>187</sup> Judge Bybee noted that the infeasibility of the microstamping requirement was preventing the MDM and CLI requirements from being implemented:

Under the appropriate Second Amendment analysis, I cannot conclude that there is a reasonable fit between CDOJ’s microstamping requirement and the legislature’s object in solving handgun crimes. The result of CDOJ’s restrictive testing protocol is undisputed: since at least 2013, no new handguns have been sold commercially in California, and that means that no guns were sold with the microstamping feature. That fact has an important secondary effect – it means that no new handguns are being sold commercially with the MDM and CLI safety features either.

The consequence is obvious. Today, no one in California can purchase handguns that have the safety features the legislature thought critical for saving lives, nor can any Californian purchase guns with the microstamping feature the legislature thought important to assist police. The only guns commercially sold in California are grandfathered from these provisions. This is a totally perverse result. If the legislature (or

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<sup>187</sup> *Pena*, 898 F.3d at 988 (Bybee, J., concurring in part and dissenting in part).

CDOJ, seeking to implement the legislature's instructions) has adopted safety requirements that no gun manufacturer can satisfy, then the legislature has effectively banned the sale of new handguns in California. The effect of this result on our intermediate-scrutiny analysis is clear: the fit between California's interest in solving handgun crimes and the microstamping requirement would not only fail to be reasonable, it would be non-existent. The requirement would severely restrict what handguns Californians can purchase without advancing the State's interest in solving handgun crimes—or any government interest—one iota.<sup>188</sup>

Judge Bybee conducted his own Two-Part analysis; he did not make the assumptions the majority had made to fast-track the analysis. He found that the microstamping requirement does burden conduct protected by the Second Amendment; in Part Two, he would have reversed and remanded based on the lack of evidence in the record that firearms manufacturers are capable of implementing the microstamping requirement successfully.

## IX. TENTH CIRCUIT

### A. QUALIFIED IMMUNITY FOR ARREST FOR LAWFUL OPEN CARRY: *SANDBERG V. ENGLEWOOD, COLORADO*

On March 14, 2014, Westin Sandberg was running errands in Englewood, Colorado, while open-carrying a 9mm handgun on his hip. While in an auto shop—where he was granted permission by the owner to continue carrying his firearm—two officers confronted the Iraq War veteran with their firearms drawn and seized his handgun and 21 rounds of ammunition. After being detained for four hours, Sandberg was charged with disorderly conduct, and his firearm, holster, ammunition, and magazine were confiscated. Within months,

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<sup>188</sup> *Id.* at 988–89 (Bybee, J., concurring in part and dissenting in part).

the charge was dropped, and Sandberg's property was returned to him.

Sandberg later filed a 42 U.S.C. 1983 action alleging that, among other things, the officers violated his Second Amendment rights "by detaining him, searching him, and issuing him a citation, solely because he was openly carrying a firearm."<sup>189</sup>

The Tenth Circuit concluded that the claim was properly dismissed by the district court because "when the events at issue in this case occurred it was not clearly established that the Second Amendment guaranteed a citizen the right to openly carry a firearm in public without risk of facing police action."<sup>190</sup> This was because "[t]here is no case from the Tenth Circuit or the Supreme Court holding that *Heller's* articulation of a right to keep and bear arms inside the home must necessarily extend to a right to keep and bear arms outside the home."<sup>191</sup>

The Tenth Circuit had previously held that the Second Amendment does not guarantee the right to concealed carry.<sup>192</sup> In another case, involving a prohibition against arms carrying on United States Postal Service property, a 2-1 panel had declined to determine whether a right to bear arms exists but had hypothesized such a right *arguendo*.<sup>193</sup>

The *Sandberg* court acknowledged a Seventh Circuit case that definitively held that the right to bear arms applies beyond the home,<sup>194</sup> three circuit court cases that assumed the right applies beyond the home,<sup>195</sup> and a dissent from the denial of certiorari in which Justice Thomas, joined by Justice Gorsuch, argued that "[t]he most natural reading of [the Second Amendment] encompasses public carry."<sup>196</sup> But this was not

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<sup>189</sup> Sandberg v. Englewood, Colorado, 727 F. App'x 950, 961 (10th Cir. 2018).

<sup>190</sup> *Id.* at 962.

<sup>191</sup> *Id.* at 961.

<sup>192</sup> Peterson v. Martinez, 707 F.3d 1197 (10th Cir. 2013).

<sup>193</sup> Bonidy v. United States Postal Serv., 790 F.3d 1121 (10th Cir. 2015).

<sup>194</sup> Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

<sup>195</sup> Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012).

<sup>196</sup> Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting).

enough to “clearly establish” the right, as Sandberg needed to do.

B. SHORT-BARRELED RIFLES AND SUPPRESSORS NOT PROTECTED ARMS: *U.S. v. COX*

In 2013, Kansas passed the Second Amendment Protection Act (SAPA).<sup>197</sup> SAPA provides, in part:

A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in the state of Kansas.<sup>198</sup>

Relying on SAPA, Shane Cox began selling homemade suppressors at his army-surplus store in Chanute, Kansas, with a copy of SAPA posted next to the display case. Jeremy Kettler purchased one; both parties believed the transaction was legal under SAPA as long as the suppressor never left Kansas. In fact, Kettler boasted about his new suppressor on Facebook.

Soon after, Cox and Kettler were charged with several crimes:

[F]ederal prosecutors secured a grand jury indictment against Cox and Kettler . . . Counts 2, 3, and 4 each charged Cox with possessing an unregistered firearm—a destructive device, a short-barreled rifle, and another destructive device, respectively—in violation of 26 U.S.C. §

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<sup>197</sup> Codified at Kan. Stat. Ann. §§ 50-1201, -1211(2014).

<sup>198</sup> Kan. Stat. Ann. § 50-1204(a).

5861(d). Count 5 accused both Cox and Kettler of conspiring, under 18 U.S.C. § 371, to violate the NFA by building and selling an unregistered silencer. Counts 6, 7, 8, 9, and 11 charged Cox with five violations of 26 U.S.C. § 5861(e) for transferring five silencers—four to recipients identified by their initials plus a fifth to “an undercover law enforcement officer.” Cox R. vol. 1 at 34. Count 10 accused Cox of making a silencer in violation of 26 U.S.C. § 5861(f). Count 12 alleged that between June 20, 2014, and February 4, 2015, Cox had “engaged in the business of manufacturing and dealing in” silencers in violation of 26 U.S.C. § 5861(a). Cox R. vol. 1 at 34. And count 13 charged Kettler with possessing a silencer in violation of 26 U.S.C. § 5861(d).<sup>199</sup>

Cox and Kettler admitted that they violated the NFA but appealed their convictions, arguing that the NFA is unconstitutional and that SAPA provides them a valid defense.

First, the court held that “the NFA is a valid exercise of Congress’s taxing power, as well as its authority to enact any laws ‘necessary and proper’ to carry out that power.”<sup>200</sup>

Second, the court considered whether the NFA comports with the Second Amendment. Here, Cox and Kettler presented different arguments, but they both maintained that the Second Amendment protected their right to possess short-barreled rifles and to make, sell, and possess suppressors.

Cox argued that the NFA was unconstitutional under *Heller*. Therefore, the Tenth Circuit applied the Two-Part Test, but none of the challenges made it past Part One. The Tenth Circuit held that short-barreled shotguns fall outside the right’s guarantee based on “*Heller*’s conclusion that short-barreled shotguns—close analogues to short-barreled rifles—belong in that category of weapons not typically possessed by law-abiding citizens for lawful purposes.”<sup>201</sup>

Turning to suppressors, the parties argued:

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<sup>199</sup> *United States v. Cox*, 906 F.3d 1170, 1175–76 (10th Cir. 2018).

<sup>200</sup> *Id.* at 1179.

<sup>201</sup> *Id.* at 1185.

{S}ilencers are in common use (more common, says Kettler, than handguns were in the District of Columbia when the Court decided *Heller*) and that they're very rarely used to commit crimes – "except on television and in the movies." Kettler's Opening Br. at 34. Further, they claim that silencers protect the shooter's (and bystanders') hearing and, "by reducing muzzle flinch and the disorientation that can follow a loud shot," can improve accuracy. Cox's Opening Br. at 45. And because the alternative – donning earmuffs – takes up precious time and suppresses surrounding sounds, they argue that these hearing-protection and accuracy benefits make silencers particularly valuable for "the core lawful purpose of home defense."<sup>202</sup>

This was irrelevant, however, because the court determined that suppressors are not arms at all:

According to *Heller*, "the Second Amendment extends, *prima facie*, to all instruments that constitute *bearable arms*." 554 U.S. at 582, 128 S.Ct. 2783 (emphasis added). An instrument need not have existed at the time of the founding to fall within the amendment's ambit, but it must fit the founding-era definition of an "Arm[ ]." *Id.* at 581, 128 S.Ct. 2783 (citing two dictionaries from the eighteenth, and one from the nineteenth, century). Then and now, that means, the Second Amendment covers "[w]eapons of offence, or armour of defence," or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Id.* at 581, 128 S.Ct. 2783 (alteration in original) (citations omitted). A silencer is a firearm accessory; it's not a weapon

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<sup>202</sup> *Id.* at 1186. Earmuffs are not an "alternative" to sound suppressors; each type of hearing protection supplements the other to further reduce pressure on the ear drum.

in itself (nor is it “armour of defence”). Accordingly, it can’t be a “bearable arm” protected by the Second Amendment.<sup>203</sup>

Judge Hartz filed a short concurrence to emphasize that, “In determining that silencers are not protected by the Second Amendment, we explain that they are not ‘bearable arms.’ We had no occasion to consider whether items that are not themselves bearable arms but are necessary to the operation of a firearm (think ammunition) are also protected.”<sup>204</sup>

The Tenth Circuit also upheld the NFA’s restrictions on making and selling suppressors. The court explained that “[t]he NFA’s requirements that firearms dealers and manufacturers register and pay taxes annually fit neatly into that category of ‘presumptively lawful regulatory measures’”<sup>205</sup> identified by *Heller*, including “laws imposing conditions and qualifications on the commercial sale of arms.”<sup>206</sup> More importantly, the court had already held that suppressors are not protected arms. “Even if the Second Amendment covers the right to buy and sell arms in the abstract, it can’t in practice protect the right to buy and sell instruments, such as silencers, that fall outside its ambit.”<sup>207</sup>

Next, the court considered whether the NFA taxes violate the Second Amendment by “imposing a charge for the enjoyment of a right granted by the federal constitution.”<sup>208</sup> “Under *Murdock* and *Cox* [*v. State of New Hampshire*, 312 U.S. 569 (1941)], seminal cases in the Court’s ‘fee jurisprudence,’ the government may collect a fee to defray administrative and maintenance costs associated with the exercise of a constitutional (usually First Amendment) right, but it can’t impose a general revenue tax on the exercise of such a right.”<sup>209</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1196.

<sup>205</sup> *Id.* at 1187 (quoting *Heller*, 554 U.S. at 627 n.26).

<sup>206</sup> *Heller*, 554 U.S. at 626–27.

<sup>207</sup> *Cox*, 906 F.3d at 1187.

<sup>208</sup> *Id.* (quoting *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943)). It is worth noting that the right to keep and bear arms is not granted by the Constitution. Rather, “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” *Heller*, 554 U.S. at 592.

<sup>209</sup> *Cox*, 906 F.3d at 1187.

The rule did not matter here, however, since the court had already decided that short-barreled rifles and suppressors are not protected by the right to arms.

Lastly, the Tenth Circuit considered whether the defendants' reliance on SAPA was a valid defense. It was not. "That general mistake-of-law rule forecloses Cox and Kettler's proposed defense—that they wrongly believed, in reliance on the SAPA, that federal firearms regulations didn't reach their Kansas-centric activities. To be criminally liable, Cox and Kettler didn't need to know that their acts were 'illegal, wrong, or blameworthy.'"<sup>210</sup> But as the court noted, "Cox's and Kettler's reliance on the SAPA did, in the end, mitigate their sentences, if not their guilt. . . . That benefit turned out to be two years' probation for Kettler and one year's for Cox. (The NFA allows for a penalty of up to ten years in prison, a fine of up to \$10,000, or both for violating any of its provisions. 26 U.S.C. § 5871.)."<sup>211</sup>

## CONCLUSION

The decisions of 2018 continue the post-*Heller* approach of upholding all provisions of the Gun Control Act of 1968 and of the National Firearms Act of 1934. As usual, the prohibited persons cases were easy under *Heller* and post-*Heller* circuit doctrine.

Restrictions on firearms commerce were easy as applied to unlicensed persons willfully selling arms to sketchy characters. But the Fifth Circuit's decision upholding the ban on handgun sales by federally licensed firearms dealers to residents of consenting other states had questionable reasoning.

Nullification of the right to bear arms remains a continuing problem in some states. In the Second Circuit, treating the Second Amendment as a second-class right would actually be an improvement from the current jurisprudence. There, New York City was allowed to continue its mean-spirited policy of preventing handgun owners in Staten Island from practicing gun safety in New Jersey, prohibiting residents of the Bronx from participating in target competitions in

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<sup>210</sup> *Id.* at 1190 (quoting *U.S. v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring)).

<sup>211</sup> *Id.* at 1195.

Connecticut, and forbidding New York City residents to take their registered handguns from one home to another.

There were a number of victories for the Second Amendment in 2018. The Fifth Circuit protected the ability of States to extend the right of self-defense to college campuses. The Ninth Circuit recognized the right to bear arms (openly) and the right to keep standard-capacity magazines. Based on recent history, however, there is reason to expect that the en banc court will reverse these well-reasoned decisions.

Although residents of the fifty States may not pay much attention to U.S. Territories, the citizens of the Territories are American citizens, and their rights are just as important as the rights of other citizens. Accordingly, the final demise of the racial ban, handgun ban, and self-defense ban in the Commonwealth of the Northern Mariana Islands is good news for ordered liberty.