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The Comfort of Home: Why *Peruta v. County of San Diego's* Extension of Second Amendment Rights Goes Beyond the Scope Envisioned by the Supreme Court

Reed Harasimowicz
Boston College Law School, reed.harasimowicz@bc.edu

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THE COMFORT OF HOME: WHY *PERUTA v. COUNTY OF SAN DIEGO*'S EXTENSION OF SECOND AMENDMENT RIGHTS GOES BEYOND THE SCOPE ENVISIONED BY THE SUPREME COURT

Abstract: On February 13, 2014, in *Peruta v. County of San Diego*, the U.S. Court of Appeals for the Ninth Circuit extended the scope of the Second Amendment to cover the public carry of handguns. Extending the scope of the Second Amendment caused the Ninth Circuit to apply the incorrect standard of scrutiny in analyzing the challenged gun regulation. This Comment argues that the Ninth Circuit's overzealous extension of the scope of the Second Amendment is inconsistent with the U.S. Supreme Court's decision in *District of Columbia v. Heller*, its own precedent in *United States v. Chovan*, and the approach taken by its sister circuits.

INTRODUCTION

The Second Amendment of the U.S. Constitution provides that the right to keep and bear Arms shall not be infringed.¹ Since the ratification of the Bill of Rights, there has been much debate about the scope of the Second Amendment.² Recently, however, the U.S. Supreme Court in *District of Columbia v. Heller* ruled that the Second Amendment codified a preexisting, individual right to keep and bear arms for self-defense.³ In so holding, the Court noted that the right to bear arms is not an absolute right, and it is well-settled that firearms may be reasonably regulated, especially outside the home.⁴

¹ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

² See, e.g., *Dist. of Columbia v. Heller*, 554 U.S. 570, 577 (2008). The major competing viewpoints regarding the scope of the Second Amendment are based on the language of the amendment's prefatory clause and the operative clause. See *id.* (addressing the two competing readings of the Second Amendment). The predominant view throughout the nineteenth and twentieth centuries was that the Second Amendment protected the collective rights of states to organize militias and of individuals to possess and carry firearms in connection with militia service. See, e.g., *Parker v. Dist. of Columbia*, 478 F.3d 370, 380 & n.6 (D.C. Cir. 2007) *aff'd sub nom. Heller*, 554 U.S. 570. The opposing view, recently adopted by the Supreme Court in *Heller*, is that the Second Amendment protects an individual right to possess a firearm unconnected with militia service for presumptively lawful purposes (self-defense). *Heller*, 554 U.S. at 595; *Parker*, 478 F.3d at 370, 380 & n.6.

³ *Heller*, 554 U.S. at 595. (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

⁴ *Id.* The *Heller* majority compared the exercise of the Second Amendment to the exercise of the First Amendment. *Id.* (“Thus, we do not read the Second Amendment to protect the right of citizens to

In early 2014, in *Peruta v. County of San Diego*, the U.S. Court of Appeals for the Ninth Circuit analyzed the constitutionality of a gun regulation that appellant claimed infringed on his Second Amendment right to carry a handgun in public for self-defense.⁵ California generally prohibits the open or concealed carry of a firearm in public, unless an individual is granted a permit to carry a concealed weapon (“CCW”), which requires the applicant to show “good cause.”⁶ After extensively analyzing the textual and historical scope of the Second Amendment, the Ninth Circuit held that the good cause requirement constituted a complete destruction of the right to bear arms and therefore did not pass constitutional muster under any level of scrutiny.⁷

This Comment examines why the Ninth Circuit’s assertion that the core of the Second Amendment right extends beyond the home to cover the right to carry arms in public for self-defense is flawed and contravenes Supreme Court precedent.⁸ Part I of this Comment discusses the Supreme Court’s framework for analyzing Second Amendment claims and discusses the *Peruta* case within the context of California’s handgun regulatory scheme.⁹ Part II compares the Ninth Circuit’s approach to defining and analyzing the scope of the right to the approaches applied by other courts, including the Ninth Circuit’s prior approach in *United States v. Chovan*.¹⁰ Finally, Part III argues that in a rehearing en banc the Ninth Circuit should follow the Supreme Court’s guidance in *Heller*, its own precedent set in *Chovan*, and the trend of its sister circuits by exercise judicial discretion in defining the scope of the Second Amendment and applying intermediate scrutiny to determine the constitutionality of the CCW regulation.¹¹

carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”). Outside the home, the Second Amendment right to gun possession comes into conflict with the state’s police powers to protect the public safety. See Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1161 (2011).

⁵ *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1149 (9th Cir. 2014).

⁶ CAL. PENAL CODE §§ 25400, 25605, 25850, 26150, 26155, 26350 (2012). California law delegates to each county the power to define the policy for obtaining a CCW. *Peruta*, 742 F.3d at 1148. San Diego County’s policy interpreted good cause as “a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm’s way.” *Id.*

⁷ *Peruta*, 742 F.3d at 1170–72; see *infra* note 37 (discussing the three levels of scrutiny to constitutional challenges).

⁸ See *infra* notes 12–89 and accompanying text.

⁹ See *infra* notes 12–31 and accompanying text.

¹⁰ See *infra* notes 32–65 and accompanying text.

¹¹ *Heller*, 554 U.S. at 635; see *infra* notes 66–89 and accompanying text.

I. BACKGROUND

The Supreme Court set the stage for this constitutional challenge in *District of Columbia v. Heller*.¹² Section A of this Part discusses how the Supreme Court defined the scope of the Second Amendment in *Heller*.¹³ Section B traces Peruta's case from his application for a CCW permit to his appeal to the Ninth Circuit Court of Appeals.¹⁴

A. Supreme Court Defines Scope of Right in the Home, Leaves Ambiguity for Interpretation of Right to Bear Arms in Public

In 2008, in *United States v. Heller*, the U.S. Supreme Court held that the District of Columbia's total ban on handgun possession in the home violated the Second Amendment right to keep and bear arms in the home.¹⁵ In so concluding, the Court used a two-part analysis: (1) whether having operable handguns in the home amounted to "keep[ing] and bear[ing] arms" within the meaning of the Second Amendment; and (2) whether the challenged law infringed the right.¹⁶ The Court held that the Second Amendment protects the right to have operable handguns in the home and that D.C.'s total ban on handgun possession in the home amounted to a complete destruction of that Second Amendment right.¹⁷ A few years after *Heller*, in *McDonald v. City of Chicago, Illinois*, the Supreme Court clarified that the Second Amendment right to keep and bear arms extends to the states by virtue of the Fourteenth Amendment.¹⁸

¹² See *infra* notes 15–31 and accompanying text.

¹³ See *infra* notes 15–20 and accompanying text.

¹⁴ See *infra* notes 21–31 and accompanying text.

¹⁵ *Heller*, 554 U.S. at 635 (“[W]hatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”). The *Heller* Court narrowly held that the core right of the Second Amendment was the right to keep and bear arms in the home where the need for “defense of self, family, and property is most acute.” *Id.* at 628 (noting that the holding is confined to complete handgun prohibition in the home).

¹⁶ *Id.* at 576, 628. This analysis in *Heller* provided a framework for lower courts to follow in subsequent Second Amendment challenges. See *Ezell v. City of Chicago*, 651 F.3d 684, 700–01 (7th Cir. 2011) (noting that *Heller* “points in a general direction” and does not leave us “without a framework for how to proceed”); see also *Peruta*, 742 F.3d at 1150 (“We apply [the approach in *Heller*] here, as we have done in the past, and as many of our sister circuits have done in similar cases.” (citing *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013))).

¹⁷ See *Heller*, 554 U.S. at 628–29. The Court did not define the scope of the right to bear arms outside the home. *Id.* at 635 (“[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than . . . our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.” (citing *Reynolds v. United States*, 98 U.S. 145 (1879))).

¹⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010) (“A provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States . . . therefore . . . the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”). The Court refused to treat the Second Amendment right to keep and bear arms as a “second-class right, subject to an entirely differ-

Neither case explicitly defined the scope of the Second Amendment right outside the home, or established a standard of review to determine what it would take to infringe that right.¹⁹ Nonetheless, both *Heller* and *McDonald* were clear that the scope of the Second Amendment right to have and bear arms within the home is not subject to judicial interest balancing.²⁰

B. Peruta's Application for a Concealed Weapons License and Subsequent Second Amendment Challenge

California generally prohibits the open or concealed carry of a handgun in public locations.²¹ Citizens may, however, apply for a license to carry a concealed weapon in the city or county in which one works or resides.²² To obtain a CCW, a citizen must meet several requirements and establish good cause for the permit.²³ In San Diego County, the power to grant CCWs is vested in the

ent body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.” *Id.* at 780; *see Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (holding that the Bill of Rights protections must “all . . . be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment”); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1025 (2009) (noting the rationale behind the incorporation doctrine, that the Bill of Rights’ provisions, the nation’s fundamental law, ought to place comparable restrictions on state and federal officials with respect to certain individual rights). *McDonald* also reaffirmed *Heller*’s assurances that many longstanding handgun regulations are presumptively lawful. *McDonald*, 561 U.S. at 791; *Heller*, 554 U.S. at 627.

¹⁹ *See Peruta*, 742 F.3d at 1150 (“[N]either *Heller* nor *McDonald* speaks explicitly or precisely to the scope of the Second Amendment right outside the home or to what it takes to ‘infringe’ it.”); *see also Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) *cert denied*, 133 S. Ct. 1806 (2013) (noting that this “vast ‘terra incognita’ has troubled courts since *Heller* was decided”).

²⁰ *Compare McDonald*, 561 U.S. at 791 (noting that the Court has expressly rejected the argument that the scope of the Second Amendment right should be determined by “judicial interest balancing”), *with Heller*, 554 U.S. at 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”). The *Heller* dissent proposed adopting an interest-balancing approach where the judiciary would weigh the individual interest protected by the Second Amendment against the government interest in public-safety. *Heller*, 554 U.S. at 689 (Stevens, J., dissenting). The dissent viewed *Heller* as a case that dealt with whether administrative proceedings violated the due process clause of the constitution, as an example of the Supreme Court applying an interest-balancing approach. *Id.*

²¹ CAL. PENAL CODE § 25400 (2012) (banning the unlawful concealed carry of a firearm); *id.* § 25605 (exempting from Section 25400 a citizen who carries a firearm in the citizen’s residence, place of business, or private property owned by the citizen); *id.* § 25850 (listing the punishment for carrying a loaded firearm in public); *id.* § 26150 (covering the application process for obtaining a license to carry a concealed weapon); *id.* § 26155 (outlining the responsibilities of a county sheriff’s department for issuing a CCW); *id.* § 26350 (banning the open carry of a handgun in public); *Peruta*, 742 F.3d at 1147. California’s policy favors concealed carry of a firearm over open carry, and only provides licensing procedures for concealed carry. *Peruta*, 742 F.3d at 1172. Open carry of a firearm, loaded or unloaded, is completely prohibited. CAL. PENAL CODE § 26350; *Peruta*, 742 F.3d at 1172.

²² CAL. PENAL CODE §§ 26150, 26155; *Peruta*, 742 F.3d at 1148.

²³ CAL. PENAL CODE §§ 26150, 26155; *Peruta*, 742 F.3d at 1148. One must also demonstrate “good moral character,” be a resident of or spend substantial time in the county in which he or she apply, and complete a specified training course. CAL. PENAL CODE §§ 26150, 26155.

county sheriff's department, which requires supporting documentation in order to satisfy the good cause requirement.²⁴ If the applicant cannot demonstrate "circumstances that distinguish [him or her] from the mainstream," then he or she will not be issued a CCW.²⁵ Concern for personal safety alone is not considered good cause.²⁶

Edward Peruta, a resident of San Diego County, applied for a CCW for self-defense but was denied by the sheriff's department of San Diego County because his documentation did not satisfy the good cause requirement.²⁷ Subsequent to filing a complaint in the U.S. District Court for the Southern District of California against the sheriff and San Diego County, Peruta filed an amended complaint to add similarly situated plaintiffs who had applied for but were denied CCWs in San Diego County.²⁸ After surviving a motion to dismiss, Plaintiffs filed a motion for partial summary judgment.²⁹ The district court, applying intermediate scrutiny, denied Plaintiffs' motion holding that the county's CCW policy was reasonably related to the important governmental interest of public safety and reducing the rate of gun use in crime.³⁰ Plaintiffs appealed to the U.S. District Court of Appeals for the Ninth Circuit.³¹

²⁴ CAL. PENAL CODE §§ 26150, 26155; *Peruta*, 742 F.3d at 1148. Applicants submit supporting documents, which may include restraining orders, or letters from law enforcement agencies or district attorneys familiar with the case. *Peruta*, 742 F.3d at 1148. The County Sheriff discusses the documentation with each applicant to determine whether he or she can show a pressing need for self-protection. *Id.*; see *supra* note 6 and accompanying text (defining "good cause").

²⁵ *Peruta*, 742 F.3d at 1148.

²⁶ *Id.*

²⁷ *Id.* Peruta, otherwise eligible to possess a firearm, owned a news and information company that gathered and provided raw, breaking news videos, photographs, and tips to media outlets. First Amended Complaint at 3, *Peruta v. Cnty. of San Diego*, No. 3:09-cv-02371-IEG-BGS, 2010 WL 10663415 (S.D. Cal. 2010). As part of his duties, he entered high crime areas. *Id.*

²⁸ *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010) *rev'd and remanded*, 742 F.3d 1144 (9th Cir. 2014). Plaintiffs included a hairdresser who carried large amounts of cash through high-crime neighborhoods, a retired Navy officer who was instructed by the Sheriff's Department that applying for a CCW would be a waste of time because he would not satisfy "good cause," a medical physician who performed legal abortions and was the target of threats from anti-abortion protestors, and a registered nurse who worked with legally insane populations and received death threats from patients. First Amended Complaint, *supra* note 27, at 4–9.

²⁹ *Peruta*, 758 F. Supp. 2d at 1110 (S.D. Cal. 2010); Defendant William D. Gore's Points & Auths. in Support of Motion to Dismiss Complaint, *Peruta v. Cnty. of San Diego*, No. 3:09-cv-02371-IEG-BGS (S.D. Cal. Nov. 12, 2009) (arguing that the complaint should be dismissed because there is no constitutional right to carry concealed weapons in public); see also Memorandum of Points & Auths. in Support of Plaintiffs' Motion for Partial Summary Judgment, at 1–3, *Peruta v. Cnty. of San Diego*, No. 3:09-cv-02371-IEG-BGS (S.D. Cal. Nov. 1, 2010).

³⁰ *Peruta*, 758 F. Supp. 2d at 1117–18 ("Intermediate scrutiny requires the asserted governmental end to be more than just legitimate; it must be either 'significant,' 'substantial,' or 'important,' and it requires the 'fit between the challenged regulation and the asserted objective be reasonable, not perfect.'" (quoting *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010))).

³¹ *Peruta*, 742 F.3d at 1149.

II. DETERMINING THE APPROPRIATE SCOPE AND STANDARD OF REVIEW FOR SECOND AMENDMENT CHALLENGES

To analyze the constitutionality of the “good cause” permitting regulation, the U.S. Court of Appeals for the Ninth Circuit first had to define the scope of the Second Amendment right to keep and bear arms and then scrutinize the challenged gun regulation.³² Section A of this Part summarizes the scope and standards of review applied to Second Amendment challenges by other circuits.³³ Section B explores the approach taken by the Ninth Circuit when faced with a previous Second Amendment challenge.³⁴ Lastly, Section C discusses the Ninth Circuit’s latest approach in *Peruta v. County of San Diego*.³⁵

A. The Circuit Court Split: Standard of Scrutiny Contingent on Court’s Analysis of Scope of Second Amendment Right

In the wake of the U.S. Supreme Court decision in *District of Columbia v. Heller*, lower courts have inconsistently grappled with whether state gun regulations infringe on the Second Amendment right to bear arms outside the home.³⁶ Courts have traditionally applied one of three standards of review to constitutional challenges: rational basis, strict scrutiny, or intermediate scrutiny.³⁷ The Supreme Court in *Heller* was explicit, however, that rational basis

³² See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014).

³³ See *infra* notes 36–48 and accompanying text.

³⁴ See *infra* notes 49–54 and accompanying text.

³⁵ See *infra* notes 55–65 and accompanying text.

³⁶ See *supra* notes 12–31 and accompanying text (discussing the Supreme Court’s analysis and holding in *Heller* that a complete ban on handguns in the home violated the Second Amendment right to keep and bear arms); see also *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (prohibiting the carrying of guns in public by statute violated the Second Amendment in Illinois); cf. *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) *cert. denied*, 134 S. Ct. 2134 (2014) (requiring applicant to demonstrate “justifiable need” for permit to carry a handgun in public did not violate the Second Amendment in New Jersey); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013) (requiring showing of “good and substantial reason” for permit to carry handgun outside the home did not violate the Second Amendment in Maryland); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97–98 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (requiring showing of “proper cause” to obtain a permit to carry a concealed weapon in public did not violate the Second Amendment in New York).

³⁷ *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008). See generally Andrew Peace, Comment, *A Snowball’s Chance in Heller: Why DeCastro’s Substantial Burden Standard is Unlikely to Survive*, 54 B.C. L. REV. E. SUPP. 175, 178 (2013), <http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/14>, archived at <http://perma.cc/2L4S-AV6K> (discussing the differences among the three standards of review). Rational basis is the most deferential standard and requires only that a government action be rationally related to a legitimate government interest. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985) (applying rational basis scrutiny to constitutionality of zoning ordinance adversely affecting the mentally challenged under the Equal Protection clause). Conversely, strict scrutiny requires that a regulation is narrowly tailored to achieve a compelling government interest. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (applying strict scrutiny to race-based criteria in college admissions under the Equal Protection clause). Intermediate scrutiny lies some-

review does not apply to Second Amendment challenges.³⁸ In the Second Amendment context, the level of scrutiny applied to gun control regulations depends on the regulation's burden on the core of the Second Amendment right.³⁹ Thus, whether to apply strict or intermediate scrutiny turns on how a court defines the scope of the Second Amendment right outside the home.⁴⁰

Most courts have been hesitant to extend the core right of the Second Amendment expounded in *Heller* outside the home.⁴¹ These courts have acknowledged that in light of the *Heller* decision, there may logically be some application of the Second Amendment right to bear arms in public for self-defense.⁴² Without further Supreme Court guidance, however, the courts have not thought it prudent to assert it as a core protection of the Second Amendment.⁴³ Indeed, in 2011, in *United States v. Masciandaro*, the U.S. Court of

where in between rational basis and strict scrutiny and requires the government to demonstrate 1) that the objective of the action is important, and 2) that the relationship between the challenged action and the objective is reasonable. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to gender classifications at a Virginia military college under the equal protection clause).

³⁸ *Heller*, 554 U.S. at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

³⁹ *See Peruta*, 742 F.3d at 1167–68.

⁴⁰ *See id.* at 1167; *United States v. Chovan*, 735 F.3d 1127, 1136, 1138 (9th Cir. 2013) (“[T]he 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.’” (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011))).

⁴¹ *See, e.g., Drake*, 724 F.3d at 431 (“We reject Appellants’ contention that a historical analysis leads inevitably to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense We do, however, recognize that the Second Amendment’s individual right to bear arms *may* have some application beyond the home.”); *Woollard*, 712 F.3d at 875–76 (“Accordingly, a considerable degree of uncertainty remains as to the scope of [the *Heller*] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.” (internal quotations omitted)); *Kachalsky*, 701 F.3d at 91 (“History and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms”).

⁴² *Moore*, 702 F.3d at 936 (holding that the core of the Second Amendment right applies equally outside the home because “a right to bear arms thus implies a right to carry a loaded gun outside the home”); *cf. Drake*, 724 F.3d at 431 (refusing to extend the core of the Second Amendment right outside the home, but recognizing that the Second Amendment right “*may* have some application beyond the home”); *Kachalsky*, 701 F.3d at 89 (“[T]he [Supreme] Court’s analysis suggests . . . that the [Second] Amendment must have *some* application in the very different context of the public possession of firearms.”). The core Second Amendment right expounded in *Heller* was the right to keep and bear arms “in defense of hearth and home.” 554 U.S. at 635; *see also Chovan*, 735 F.3d at 1138 (“*Heller* tells us that the core of the Second Amendment is “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”)

⁴³ *See, e.g., Drake*, 724 F.3d at 431 (“For these reasons, we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the “core of the right as identified by *Heller*.”); *Kachalsky*, 701 F.3d at 96 (refusing to extend the Second Amendment guarantees which are at their “zenith” in the home to public carry because state regulation of firearms in public was also enshrined within the scope of the Second Amendment when it was adopted); Unit-

Appeals for the Fourth Circuit acknowledged the serious dangers inherent in extending the scope of the right to bear arms too broadly.⁴⁴ Therefore, the Second, Third, and Fourth Circuits have decided to exercise judicial restraint in their decisions, and absent further Supreme Court guidance, have limited the core Second Amendment protection to the right to keep and bear arms within the home.⁴⁵

This reluctance to extend the core right espoused in *Heller* outside the home has caused many courts to apply intermediate scrutiny, rather than strict scrutiny, to state gun regulations.⁴⁶ Intermediate scrutiny allows courts to deal with the fine line between the specific, enumerated right to keep and bear arms and the presumptively lawful regulations listed in *Heller*.⁴⁷ In applying intermediate scrutiny, the Second, Third, and Fourth Circuits have upheld gun regulations as constitutional.⁴⁸

B. Ninth Circuit Precedent: Approach in *Chovan*

The Ninth Circuit previously faced a Second Amendment challenge to a gun regulation in 2013 in *U.S. v. Chovan*.⁴⁹ The gun regulation challenged in *Chovan* was a federal statute that prohibited people convicted of domestic vio-

ed States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (“[W]e think it prudent to await direction from the [Supreme] Court itself.”). In this case, the Fourth Circuit affirmed the District Court’s judgment that “*Heller*’s dicta makes pellucidly clear that the Supreme Court’s holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations.” United States v. Masciandaro, 648 F. Supp. 2d 779, 788 (E.D. Va. 2009), *aff’d*, 638 F.3d 458 (4th Cir. 2011).

⁴⁴ *Masciandaro*, 638 F.3d at 476 (noting the risk that [tragic acts of mayhem] “would rise exponentially as one moved the right from the home to the public square”).

⁴⁵ *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 882; *Kachalsky*, 701 F.3d at 97–98.

⁴⁶ See *Drake*, 724 F.3d at 436; *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 96; Kiehl, *supra* note 4, at 1145–46 (highlighting the struggle of lower courts to adopt a standard of review post-*Heller*); Peace, *supra* note 37, at 181 (discussing the trend among lower courts to apply intermediate scrutiny to Second Amendment cases); see also *supra* note 37 (for differences among standards of review).

⁴⁷ See *Heller*, 554 U.S. at 626–27. The non-exhaustive, presumptively lawful list of gun regulations includes: possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places, including schools and government buildings, and conditions and qualifications on the commercial sale of arms. *Id.* As opposed to strict scrutiny, which requires that a regulation be narrowly tailored to achieve a compelling government interest, intermediate scrutiny requires only that a regulation be reasonable to achieve an important government interest. See *supra* note 36. Courts have generally chosen intermediate scrutiny because 1) strict scrutiny is inconsistent with *Heller*’s presumptively lawful regulations, and 2) it is appropriate in cases where the challenged regulation falls outside of the core right identified in *Heller*. Kiehl, *supra* note 4, at 1145–46; Peace, *supra* note 37, at 187 (arguing that intermediate scrutiny is the preferred standard because it is “restrictive enough to strike down a complete ban on handguns, but also permissive enough to justify upholding the presumptively lawful restrictions listed in *Heller*”).

⁴⁸ See, e.g., *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 882; *Kachalsky*, 701 F.3d at 97–98.

⁴⁹ 735 F.3d 1127, 1129–30 (9th Cir. 2013).

lence misdemeanors from possessing firearms for life.⁵⁰ In *Chovan*, the Ninth Circuit explicitly adopted the two-step Second Amendment analysis undertaken by its sister circuits following *Heller*.⁵¹ Furthermore, the Ninth Circuit agreed that the appropriate level of scrutiny to be applied also depends on a separate two-part analysis: (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.”⁵² The court applied intermediate scrutiny, reasoning that the gun regulation substantially burdened the right to bear arms, despite not implicating the core Second Amendment right as defined in *Heller*.⁵³ The Ninth Circuit upheld the gun regulation, finding that the government’s objective to prevent domestic gun violence was important and the fit between the challenged regulation and the asserted objective was reasonable.⁵⁴

*C. Ninth Circuit Holds “Good Cause” Regulation Unconstitutional:
Approach in Peruta*

In *Peruta*, the Ninth Circuit held that San Diego County’s CCW permitting policy was unconstitutional because it denied responsible, law-abiding citizens the right to bear arms outside the home for self-defense.⁵⁵ Following the *Heller* two-part test, the Ninth Circuit held first, that the scope of the right to bear arms includes the right to carry a firearm outside the home for purposes of lawful self-defense.⁵⁶ Next, the Ninth Circuit held that the CCW regulation

⁵⁰ *Id.* at 1130; 18 U.S.C. § 922(g)(9) (2012) (“It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

⁵¹ *Chovan*, 735 F.3d at 1136; *see Drake*, 724 F.3d at 440 (applying the *Heller* two-prong approach to Second Amendment challenge); *Woollard*, 712 F.3d at 882 (same); Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011) (same); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (same). *Chovan* adopted the two-step inquiry that (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny. *See* 735 F.3d at 1136 (“We believe this two-step inquiry reflects the Supreme Court’s holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited.”).

⁵² *Chovan*, 735 F.3d at 1138 (quoting *Ezell*, 651 F.3d at 703).

⁵³ *Id.*

⁵⁴ *Id.* at 1139–41.

⁵⁵ *See* 742 F.3d at 1170–71 (framing the issue as whether “San Diego County policy in light of the California licensing scheme as a whole violates the Second Amendment”).

⁵⁶ *Id.* at 1166 (concluding that the weight of textual and historical authority suggested that the right to bear arms included the right to carry weapons outside the home for self-defense); *see supra* Part I (discussing the Supreme Court’s two-part analysis in *Heller*).

infringed on that right.⁵⁷ The Ninth Circuit did not, however, choose to apply a particular standard of scrutiny to the regulation, but rather held that the regulation was unconstitutional under any level of scrutiny.⁵⁸ Just as the Supreme Court in *Heller* held that the regulation effected a complete destruction of the right to keep and bear arms in the home, the Ninth Circuit held that San Diego County's regulation, within the state-wide regulatory scheme, effected a complete destruction of the right of a law-abiding citizen to bear arms outside the home for self-defense.⁵⁹

The dissenting opinion criticized the majority's broad framing of the Second Amendment right at issue.⁶⁰ For the dissent, the issue was more narrow: whether the Second Amendment protects the concealed carrying of handguns in public, not whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.⁶¹ The dissent concluded that carrying a concealed weapon in public was not understood to be protected by the Second Amendment at the time of ratification.⁶² Therefore, the dissent found the right asserted by plaintiffs fell outside the scope of the Second Amendment, and that the gun regulation was constitutional.⁶³ Even if the good cause requirement implicated the Second Amendment, the dissent argued it would pass constitutional muster under intermediate scrutiny.⁶⁴ A petition for rehearing en banc is currently pending.⁶⁵

III. THE NINTH CIRCUIT'S ANALYSIS IS INCONSISTENT WITH ITS OWN PRECEDENT AND SUPREME COURT GUIDANCE

The appropriate approach for a court to take is twofold: 1) exercise judicial restraint by recognizing that, without further guidance from the Supreme

⁵⁷ See *Peruta*, 742 F.3d at 1169. The Ninth Circuit concluded that the "good cause" CCW regulation limited the exercise of the core Second Amendment right to public carry to "a few people, in a few places, at a few times," and denied the *typical* law-abiding citizen from bearing arms in public for self-defense. See *id.* at 1168–70.

⁵⁸ *Id.* at 1175–76 ("Because our analysis paralleled the analysis in *Heller* itself, we did not apply a particular standard of heightened scrutiny . . ."); see *supra* note 37 (discussing the standards of review for constitutional challenges).

⁵⁹ *Peruta*, 742 F.3d at 1175–76 ("Such regulations affecting a destruction of the right . . . cannot be sustained under any standard of scrutiny.").

⁶⁰ *Id.* at 1179 (Thomas, J. dissenting). In Judge Thomas's dissent, he criticizes the majority for its "sweeping decision that unnecessarily decides questions not presented." *Id.*

⁶¹ *Id.* at 1179–80 ("In this changing landscape, with many questions unanswered, our role as a lower court is 'narrow and constrained by precedent,' and our task 'is simply to apply the test announced by *Heller* to the challenged provisions.'" (quoting *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2011))).

⁶² *Id.* at 1191.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Petition for Rehearing En Banc by Amici Curiae California Police Chiefs' Association and California Peace Officers' Association at 2, *Peruta*, 742 F.3d 1144 (No. 10-56971).

Court, the core of the Second Amendment right is limited to the home, and 2) apply intermediate scrutiny to determine the extent to which the gun regulation burdens the right to bear arms in public.⁶⁶ The U.S. Court of Appeals for the Ninth Circuit's broad extension of Second Amendment protections outside the home in *Peruta v. County of San Diego* is a zealous leap of faith from the U.S. Supreme Court's narrow holding in *District of Columbia v. Heller*.⁶⁷ The Ninth Circuit's conclusion that San Diego's CCW regulatory scheme is analogous to a complete ban on handguns in the home, and therefore constitutes a complete destruction of the right to bear arms in public for self-defense, may be overstated and does not align with the Supreme Court's reasoning in *Heller*.⁶⁸

The Supreme Court's holding in *Heller*, that the core of the Second Amendment right is the right to keep and bear arms in defense of hearth and home, was deliberately narrow and it is not the role of a lower court to expand that right.⁶⁹ After engaging in a skewed textual and historical analysis, the Second Circuit concluded that carrying a handgun in public for self-defense is a central, core component of the Second Amendment.⁷⁰ In doing so, the Ninth Circuit expanded the scope of Second Amendment protections and dramatically reduced California's ability to regulate guns in public.⁷¹ Criticizing decisions from the U.S. Court of Appeals for the Second, Third, and Fourth Circuits, the Ninth Circuit claimed that its sister circuits failed to comprehend that gun regulations could not enjoin a law-abiding citizen from carrying a handgun

⁶⁶ See *infra* notes 65–87 and accompanying text.

⁶⁷ See *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1175 (9th Cir. 2014) (majority opinion).

⁶⁸ See *Heller*, 554 U.S. at 635; *Peruta*, 742 F.3d at 1175. In *Heller*, the Supreme Court deliberately chose not to define the scope of the Second Amendment right beyond the home. See 554 U.S. at 635; Megan Ruebsamen, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 60 (2013) (noting that instead of defining the constitutional scope of gun control legislation, “*Heller* deliberately set a controlled pace of defining Second Amendment rights”). Therefore, the implied message from *Heller* for lower courts is to practice judicial restraint when defining the scope of a right that has such serious ramifications on public safety. See *Heller*, 554 U.S. at 635; Ruebsamen, *supra*, at 60.

⁶⁹ See *infra* notes 70–74 and accompanying text.

⁷⁰ See *Peruta*, 742 F.3d at 1175. In its historical analysis of the scope of the Second Amendment, the Ninth Circuit divided interpretations of the Second Amendment into three categories: 1) authorities that recognized bearing arms for self-defense to be an individual right; 2) authorities that recognized bearing arms for a purpose other than self-defense to be an individual right; and 3) authorities that did not recognize the right to bear arms as an individual right (collective rights theory). *Id.* at 1155–56. Based on its reading of *Heller*, the Ninth Circuit expressly afforded weight only to authorities that recognized bearing arms for self-defense to be an individual right. *Id.* at 1166. By doing so, the Ninth Circuit skewed its historical analysis and its resulting conclusion regarding the scope of the Second Amendment. See *id.*

⁷¹ See *id.* The Ninth Circuit's eager approach to extend the scope of the Second Amendment directly conflicts with the Fourth Circuit's prudent approach, which stated in dicta: “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.” *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

in public for self-defense.⁷² The Ninth Circuit's misstep was analogizing the complete ban on handguns in the home in *Heller* with the good cause CCW regulation at issue in *Peruta*—they have drastically different implications on the exercise of Second Amendment rights.⁷³ Had the Ninth Circuit followed the implied guidance of the Supreme Court in *Heller* and exercised judicial restraint when extending the scope of the Second Amendment beyond the home, it would come to a different conclusion regarding the burden of the CCW regulations on that right.⁷⁴

Further, expanding the core of the Second Amendment right outside the home would bring the scope of the right in direct conflict with the presumptively lawful gun regulations espoused in *Heller*.⁷⁵ The Ninth Circuit failed to follow its own precedent in *United States v. Chovan* by expanding the scope of the Second Amendment right.⁷⁶ In *Chovan*, the Ninth Circuit adopted the view that the core Second Amendment right as defined in *Heller* was the right to keep and bear arms in defense of the home.⁷⁷ The court declined to extend the scope of that right to bearing arms in public.⁷⁸ Additionally, the *Chovan* court applied intermediate scrutiny to a gun regulation that affected an individual's right to bear arms in public because it did not implicate the core of the Second Amendment right but rather only substantially burdened the right to bear arms.⁷⁹ The *Peruta* majority does not address why it declined to follow its own

⁷² *Peruta*, 742 F.3d at 1175; see *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) *cert. denied*, 134 S. Ct. 2134 (2014); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir.) *cert. denied*, 134 S. Ct. 422 (2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97–98 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1806 (2013).

⁷³ See *Peruta*, 742 F.3d at 1170. Even within the California regulatory scheme that completely bans the open carry of a firearm, the “good cause” CCW regulation cannot be characterized as a “complete ban” on carrying a firearm in public. See *id.* Whereas the D.C. ban on firearms in the home at issue in *Heller* may accurately be characterized as a “complete destruction” of the Second Amendment right because it enjoined every law-abiding citizen from keeping and bearing a gun in the home, the “good cause” CCW regulation cannot be characterized as a complete destruction of the right because law-abiding citizens could still apply for and obtain a permit to carry a concealed gun in public. See *Heller*, 554 U.S. at 629; *Peruta*, 742 F.3d at 1170; cf. *Palmer v. District of Columbia*, No. 1:09-CV-1482 (FJS), 2014 WL 3702854, at *7 (D.D.C. July 24, 2014) (holding that the District of Columbia’s “blanket prohibition” on the public carry of loaded handguns outside the home was clearly unconstitutional).

⁷⁴ See *Heller*, 554 U.S. at 635; *Peruta*, 742 F.3d at 1175; see also *supra* note 68 and accompanying text (noting the implied guidance from the *Heller* Court for lower courts to practice judicial restraint when defining the scope of the Second Amendment).

⁷⁵ See *infra* notes 76–82 and accompanying text.

⁷⁶ See *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *supra* Part III.B (for discussion of the Ninth Circuit’s decision in *Chovan*).

⁷⁷ *Chovan*, 735 F.3d at 1138 (“*Heller* tells us that the core of the Second Amendment is the ‘right of the law-abiding, responsible citizen to use arms in defense of hearth and home.’”).

⁷⁸ *Id.* The *Chovan* court held that the gun regulation preventing possession by criminals did not implicate this core Second Amendment right to use guns in defense of hearth and home. *Id.*

⁷⁹ *Id.* at 1139; see *supra* note 37 and accompanying text (discussing the standards of review for constitutional challenges).

precedent in *Chovan*.⁸⁰ Indeed, by extending the core right of the Second Amendment to public carry, the right directly conflicts with the presumptively lawful regulations espoused in *Heller*.⁸¹ That is not to say that the right to bear arms in public for self-defense is not protected by the Second Amendment, it is just not the core of the right as envisioned by the *Heller* Court.⁸²

Moreover, the appropriate standard to apply is intermediate scrutiny because it allows a Court to strike a balance between the individual right to bear arms and lawful gun regulation for public safety.⁸³ By failing to apply a particular standard of heightened scrutiny, the Ninth Circuit in *Peruta* conflates the requirements to satisfy intermediate scrutiny with strict scrutiny in its critique of its sister circuits.⁸⁴ The Ninth Circuit claims that had the Second, Third, and Fourth Circuits applied intermediate scrutiny correctly, the gun regulations would have been held unconstitutional.⁸⁵ The Ninth Circuit's reasoning was that the state in each of these cases failed to "demonstrate sufficient narrow tailoring" of the gun regulation to the government's aim of public safety.⁸⁶ Under intermediate scrutiny, however, the regulation only need be reasonably related to the government objective.⁸⁷ Although the Ninth Circuit claimed that the good cause CCW regulation failed to pass any standard of scrutiny, the standard it actually applied was strict scrutiny.⁸⁸ Strict scrutiny has been rejected by the Second, Third, and Fourth Circuits when dealing with Second Amendment challenges and should be rejected by the Ninth Circuit if a rehearing *en banc* is granted and in subsequent cases.⁸⁹

⁸⁰ *Peruta*, 742 F.3d at 1194 (Thomas, J. dissenting) ("Rather than employing the straightforward methodology prescribed by *Chovan*, the majority wanders off in a different labyrinthian path, both in its analysis of the Second Amendment right at issue and its analysis of the government regulation in question.").

⁸¹ See *Heller*, 554 U.S. at 626–27. For instance, a core constitutional right to carry a handgun in public would directly conflict with a law forbidding guns in a school zone. See *id.* As the Fourth Circuit noted, the extension of the core right to public carry "portend[s] all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities." *Masciandaro*, 638 F.3d at 475 (4th Cir. 2011). The presumptively lawful gun regulation would have to be struck down as an unconstitutional infringement on the right to bear arms in public, and federal and state governments would be hard-pressed to pass *any* gun regulation that would not burden that right. See *id.* at 475 (4th Cir. 2011).

⁸² See *Heller*, 554 U.S. at 626–27.

⁸³ See *infra* notes 84–89 and accompanying text.

⁸⁴ See *Peruta*, 742 F.3d at 1176–78 (majority opinion); *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 882; *Kachalsky*, 701 F.3d at 97–98.

⁸⁵ *Peruta*, 742 F.3d at 1178.

⁸⁶ *Id.*

⁸⁷ See *supra* note 37 and accompanying text.

⁸⁸ See *Peruta*, 742 F.3d at 1178.

⁸⁹ See, e.g., *Drake*, 724 F.3d at 436; *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 96–97; *United States v. Marzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) *aff'd*, 614 F.3d 85 (3d Cir. 2010) (stating that the *Heller* Court's willingness to presume the validity of several types of gun regulations is inconsistent with the adoption of a strict scrutiny standard of review); see also Lawrence

CONCLUSION

In *Peruta v. County of San Diego*, the U.S. Court of Appeals for the Ninth Circuit greatly expanded the scope of the Second Amendment in their analysis of a constitutional challenge to a good cause CCW regulation. In *District of Columbia v. Heller*, the U.S. Supreme Court deliberately defined the core of the Second Amendment narrowly as the right to keep and bear arms in the home for self-defense. By failing to exercise judicial restraint, the Ninth Circuit extended that core right to cover bearing arms in public for self-defense, and failed to apply the appropriate means-ends scrutiny in holding the CCW regulation unconstitutional. In a rehearing *en banc*, the Ninth Circuit panel should exercise restraint and not extend the core of the Second Amendment right outside the home. Going forward, the Ninth Circuit should follow the precedent it set in *U.S. v. Chovan*, and the trend of its sister circuits, and correctly apply intermediate scrutiny to determine whether the good cause CCW regulation unconstitutionally infringes that right.

REED HARASIMOWICZ

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Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago: *Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 438–39 (2011) (“[A] rigorous form of strict scrutiny, requiring the government to demonstrate that a challenged regulation is the essential means for achieving a compelling government interest, would likely be the death knell for most gun control laws.” (citing Eugene Volokh, Symposium, *Implementing the Right to Keep and Bear Arms for Self-defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1465–68 (2009))).