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Federal Circuit Second Amendment Developments 2018

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FEDERAL CIRCUIT SECOND AMENDMENT DEVELOPMENTS 2018

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INTRODUCTION

This Article analyzes federal circuit court Second Amendment cases decided in 2018. We proceed through the U.S. Circuit Courts of Appeals in numerical order, which is the order in which the circuits were created.

In 2018, the federal circuits delivered mixed decisions on magazine bans, extended their split on whether bearing arms in public places is a viable constitutional right, upheld California's ban on new model handguns, upheld New York City's prohibition on taking handguns out of the city, and upheld the federal ban on purchasing handguns outside one's state of residence. As in previous years, all challenges to the various categories of persons statutorily prohibited from exercising Second Amendment rights were rejected. The Fifth Circuit turned aside the claim that licensed carry at public colleges violates the Second Amendment, while the Ninth Circuit oversaw the demise of a handgun and self-defense ban in the Commonwealth of the Northern Mariana Islands.

By the end of 2018, every circuit except for the Eighth had adopted a Two-Part Test for Second Amendment cases. This article begins by describing the First Circuit's 2018 abandonment its previous test, which was based on text, history, and tradition.

Under the Two-Part Test, the court first 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 usually apply intermediate scrutiny, but strict scrutiny and categorical invalidation are also available.[3]

I. FIRST CIRCUIT. UPHOLDING "MAY ISSUE" CARRY SCHEME. *GOULD V. MORGAN*

Until 2018, the First Circuit analyzed Second Amendment cases based on text, history, and tradition. Now the Eighth Circuit is the only one remaining that has *not* adopted the Two-Part Test.[4]

The court switched tests in *Gould v. Morgan*, which challenged prohibitions on the right to bear arms in two Massachusetts cities. The First Circuit's switch was probably necessary in order

[3] The Two-Part Test is detailed in our article, *The Federal Circuits' Second Amendment Doctrines*. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017) (reviewing every federal circuit Second Amendment case after *District of Columbia v. Heller*, up to August 2016) (cited in *Pena v. Lindley*, No. 15-15449, 2018 WL 3673149, at *29 n.17 (9th Cir. Aug. 3, 2018)) (Bybee, J., dissenting).

[4] 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).

to uphold the prohibitions. Based on text, history, and tradition, it would be difficult to contend that the individual right to "bear arms" does not include carrying a firearm for lawful protection, or that policies preventing most of the population from exercising the right are constitutional.

In Massachusetts, possession of firearms requires a permit that is issued by local law enforcement. The statute allows the issuer to impose restrictions on the permit.[5] In most of Massachusetts, handgun possession permits allow the lawful possessor to carry the handgun in public places for lawful self-defense.

However, both Boston and Brookline require applicants who wish to bear arms for self-defense to demonstrate that they have a greater need for self-defense than does the general public. If the local police decide that the applicant does not have a special need, then the permit will prohibit defensive carry, while authorizing carrying for target practice, hunting, and so on.[6]

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 bear arms generally for self-defense.

The First Circuit asked: "Does the Second Amendment protect the right to carry a firearm outside the home for self-defense?" And if so, "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?"[7]

Adopting the Two-Part Test for the first time, the 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.[8]

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

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[5] Licensees may "purchase, rent, lease, borrow, possess and carry: (i) firearms, including large capacity firearms, 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." Mass. Gen. Laws Ann. ch. 140, § 131(a). The licensee may be authorized to carry 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." *Id.* § 131(d).

[6] "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." Gould v. Morgan, 907 F.3d 659, 664 (1st Cir. 2018).

[7] *Id.* at 666.

[8] *Gould*, 907 F.3d at 670.

> the Second Amendment's 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.[9]

Because "[p]ublic carriage of firearms for self-defense falls outside the perimeter of this core right," the court reviewed the licensing prohibitions under intermediate scrutiny rather than strict scrutiny.[10]

"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.[11]

> Outside the home, the regime arguably does burden a citizen's non-core Second Amendment right….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

[9] *Id.* at 671–72.
[10] *Id.* at 672.
[11] *Id.* at 673.

> host of other pursuits. Those same protections extend to individuals who need to carry firearms for work-related reasons.[12]

As the First Circuit acknowledged, intermediate scrutiny requires consideration of substantially less burdensome alternatives.[13] The court determined that the may-issue carry law did not burden more conduct than reasonably necessary and upheld it.

The First Circuit followed the forms of intermediate scrutiny, but not the substance. As the experience of the other cities in Massachusetts demonstrates, citizens who pass Massachusetts' rigorous system for handgun licensing are no danger to public safety. So the First Circuit had to resort to speculation to find a justification for the notion that the residents of Brookline or Boston who pass Massachusetts' rigorous licensing system for handgun possession are somehow inherently more dangerous than other Massachusetts residents. The First Circuit upheld the prohibitory licensing policies of the Boston and Brookline police merely by making vague statements about the special issues affecting dense cities.

In fact, Brookline is not different from many other leafy and wealthy Massachusetts suburbs. Parts of Boston are dense urban areas, and some parts are denser than the urban cores of cities such as Springfield or Worcester. However, residents of cities all over Massachusetts lawfully carry handguns when working in or visiting Boston and Brookline, and the record was devoid of problems caused by already-existing lawful carry in Boston and Brookline.

The First Circuit's *Gould* decision was an example of the problem, also seen in some other Circuits, of an unusually lax version of intermediate scrutiny being used for Second Amendment review.

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.[14] 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.[15]

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.

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[12] *Id.* at 674.

[13] "[T]he 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.'" *Id.* (quoting *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013)).

[14] *See, e.g.*, David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018).

[15] Thus, in a case challenging New York's vague statute on gravity knives (which New York City police apply to 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 approval in *Seattle v. Evans*, 184 Wash.2d 856 (Wash. 2015) (by both majority and dissent)); *State v. Herrmann*, 366 Wis.2d 312 (Wisc. App. 2015); State v. DeCiccio, 315 Conn. 79; 105 A.3d 165 (2014); People of the State of New York v. Anthony Trowells, No. 3015/2013 (Aug. 4, 2014; Supreme Court, Bronx County, Part 92) (Justice Troy Webber).

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.[16] "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.[17]

> "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."[18]

In New York City, unrestricted carry permits are issued to retired law enforcement, to celebrities, and to other favored persons. In contrast, the city's police department reluctantly and slowly issues premises permits 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 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."[19] 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 violate the Second Amendment, because they wanted to transport their firearms beyond their premises for various reasons forbidden by 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."[20]

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

The prohibition on taking the firearms outside the city for range training and shooting competitions similarly was given only 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.[21]

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[16] N.Y. PENAL LAW §§ 400.00(2)(a), (f).

[17] § 400.00(2)(f).

[18] New York State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45, 52–53 (2d Cir. 2018) ("*NYSRPA*").

[19] 38 REV. CODE N.Y. § 5-23(a)(3).

[20] *NYSRPA*, 883 F.3d at 55 (quotations and citations omitted).

[21]

> [R]estrictions 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 protect, and much to endanger, the gun owner, his or her family, and the general

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."[22] And that "[t]he record evidence demonstrates that seven firing ranges in New York City are available to any premises license-holder."[23]

Was there any public safety benefit in preventing a licensed New York City handgun owner in Staten Island from practicing with her gun at a nearby target range in New Jersey? Preventing a licensed resident in the Bronx from taking his handgun to a target-shooting competition in Connecticut?

"Yes," was the answer, according to the Second Circuit. The answer was based entirely on an affidavit from the former Commander of the City's License Division. He opined that license holders "are just as susceptible as anyone else to stressful situations," including road rage, "crowd situations, demonstrations, [and] family disputes." He also said that sometimes premises permit holders had been discovered to be transporting their guns in circumstances in which their claim to be on the way to or from a target range was implausible.[24] Notably, the affidavit contained no data, and not one actual example of any of the above problems.

In the Second Amendment context, a speculative affidavit devoid of evidence was sufficient to uphold a bizarre restriction that exists nowhere else in the United States. The plaintiffs filed a petition for certiorari.

Today's policies in New York City continue the long-standing pattern of abusive enforcement of New York's statewide handgun licensing law, the 1911 Sullivan Act. The abuses in New York City began as soon as the legislature passed the Act and have continued in various forms ever since.[25]

B. UPHOLDING PROHIBITED PERSONS LAW FOR PERSONS DISHONORABLY DISCHARGED FROM THE MILITARY. *U.S. 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 NY Police Department 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

> 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.

Id. at 58–59.

[22] *Id.* at 59.

[23] *Id.* at 60.

[24] *Id.* at 63.

[25] *See, e.g.*, David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGISL. 303, 347 (2016) (describing early abuses).

handed it to Jimenez. Soon after, the agents discovered the round, and further discovered that Jimenez had previously been dishonorably discharged from the Marines.[26]

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 post-*Heller* Circuit Court to consider the constitutionality of the ban on persons who have been dishonorably discharged. 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 do not preclude his conviction under Section 922(g)(6).[27]

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."[28]

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."[29]

The government met its burden of proof because "the government relies 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:"[30]

> 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 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.

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[26] 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, No. 17-287-CR, 2018 WL 3352599, at *1 (2d Cir. July 10, 2018).

[27] *Id.* at *3.

[28] *Id.* at *4.

[29] *Id.* at *5 (internal quotations omitted).

[30] *Id.*

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.[31]

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."[32]

III. THIRD CIRCUIT. UPHOLDING CONFISCATION OF MAGAZINES OVER 10 ROUNDS. *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[33] to 10 rounds.[34] 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."[35] The New Jersey legislature dubbed these magazines "large capacity magazines" (LCMs). By the end of 2018, not one resident of New Jersey had surrendered magazines to the government.[36]

Before beginning the 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."[37]

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"[38] and "typically possessed by law-abiding citizens for lawful

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[31] *Id.* at *6.
[32] *Id.* at *7.
[33] N.J. Stat. Ann. § 2C:39-1(y), -3(j) (West 2014).
[34] N.J. Stat. Ann. § 2C:39-19.
[35] *Id.*
[36] *See* Jacob Sullum, *Gun Owners Don't Seem Eager to Comply With New Jersey's New Magazine Ban*, Reason, Dec. 20, 2018, https://reason.com/blog/2018/12/20/new-jerseys-gun-owners-do-not-seem-eager.
[37] Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey, 910 F.3d 106, 116 (3d Cir. 2018) ("*ANJRPC*").
[38] *Id.* at 116. 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)).

purposes."[39] 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 regulation."[40] 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."[41]

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."[42]

"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."[43]

"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."[44]

"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."[45]

"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."[46]

"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 possessed in the home would be protected merely because it could be used for self-defense.'"[47]

Since the confiscation "does not severely burden, and in fact respects, the core of the Second Amendment right," the court applied intermediate scrutiny.[48]

The Third Circuit determined the ban "reasonably fits the State's interest in promoting public safety"[49] 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."[50]

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 "imposes no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess."[51]

Judge Bibas dissented. He wrote that strict scrutiny was more appropriate than intermediate scrutiny. Because the magazines are commonly owned for self-defense in the home,

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[39] *Id.* at 116.
[40] *Id.*at 116–17 (citations omitted).
[41] *Id.* at 117.
[42] *Id.*
[43] *Id.* (quotation omitted).
[44] *Id.* at 118 (quoting *Heller*, 554 U.S. at 628).
[45] *Id.* (quotations and citations omitted).
[46] *Id.*
[47] *Id.* (quoting *Marzzarella*, 614 F.3d at 94).
[48] *Id.*
[49] *Id.* at 119.
[50] *Id.*
[51] *Id.* at 122.

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[52] or strict scrutiny applies.[53]

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.[54] 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."[55]

Moreover, it is backwards—and contrary to normal adjudication in heightened scrutiny cases—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."[56]

Additionally, "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 majority demands something much more severe."[57]

Further, the majority incorrectly applied intermediate scrutiny. Specifically, the government was not required to (and did not) prove that the law was effective.[58] The government did not prove that substantially less burdensome alternatives were unavailable.[59] And the majority considered how often the banned magazines are actually used in self-defense, which was inconclusive and irrelevant.[60] Consequently, "[t]he majority's watered-down 'intermediate

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[52] *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).

[53] *ANJPRC* 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 discriminate. *See Adarand Constructors, Inc. v. Pena*, 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.

[54] *AJNRPC* at 128 (Bibas, J., dissenting).

[55] *Id.*

[56] *Id.* (citations omitted).

[57] *Id.* at 129–30 (Bibas, J., dissenting).

[58] *Id.* at 130–131 (Bibas, J., dissenting).

[59] *Id.* at 130–31, 132–133 (Bibas, J., dissenting).

[60] *Id.* at 133 (Bibas, J., dissenting).

scrutiny' is really rational-basis review," far different from the intermediate scrutiny applied when other rights are at issue.[61]

IV. FOURTH CIRCUIT. 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 convicted felon in violation,[62] and possession of a firearm by an illegal drug user.[63]

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."[64] But *Heller* had stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[65] 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 preventing gun violence and is therefore constitutional under the Second Amendment."[66] So the convictions were quickly affirmed.

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

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.[67] Federal law would

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[61] *Id.* at 133 (Bibas, J., dissenting).

[62] United States v. Yates, 2018 WL 3694912, at *1 (4th Cir. 2018); 18 U.S.C. §§ 922(g)(1), 924(a)(2).

[63] 18 U.S.C. §§ 922(g)(3), 924(a)(2). Also failure to register certain firearms as required by the National Firearms Act of 1934. 26 U.S.C. §§ 5841, 5861(d), 5871.

[64] Yates at *1.

[65] *Heller*, 554 U.S. at 626.

[66] 750 F.3d 462, 470 (4th Cir. 2014).

[67] 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 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—...

permit the Texas FFL to transfer the handguns to the FFL in the District of Columbia, but the Hansons objected to the D.C. FFL fee they would have to pay. Instead, they challenged the constitutionality of the federal scheme.[68]

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,[69] the

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

[68] Mance v. Sessions, 896 F.3d 699 (5th Cir. 2018).

[69]

> 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:
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> 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 ....

Id. at 705–06 (citations omitted).

court had to determine whether the law was 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.[70]

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."[71] The law was narrowly tailored because 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. 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.[72]

According to the Fifth Circuit, it did not matter that federal laws allows interstate long gun sales as long as both states consent. 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."[73] Moreover, handguns were used more commonly in the crimes that inspired the Gun Control Act.

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[70] *Id.* at 706.
[71] *Id.* at 707.
[72] *Id.* at 708 (citations omitted).
[73] *Id.*

Actually, 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 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 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 dissentals. Judge Elrod, joined by judges Smith, Jones, Willett, Ho, Duncan, and Engelhardt argued that the Two-Part Test that the Fifth Circuit applied and that 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*.[74] This is the test the First Circuit had used until 2018,[75] and notably, it is the test advocated for by then-Judge Kavanaugh.[76]

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'?"[77]

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.[78]

Judge Ho additionally pointed out that 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

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[74] 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).

[75] *See* United States v. Rene E., 583 F.3d 8 (1st Cir. 2009).

[76] *See* Heller v. District of Columbia ("*Heller II*"), 670 F.3d 1244 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[77] *Mance*, 896 F.3d at 398 (Willett, J., dissenting).

[78] *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 consented. The interstate long gun sales 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 if both states so permit.

> 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.[79]

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

> 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.[80]

Notably, states, such as New York, that *do* believe their handgun laws are too complex for people in other states to comprehend remain free to prohibit state residents from buying out-of-state. The practical effect of the federal ban is only to prohibit handgun sales which 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 pending.

B. CAMPUS CARRY LAW UPHELD. *GLASS V. PAXTON*

Texas enacted a Campus Carry Law in 2015, allowing certain concealed carry permit holders to carry concealed handguns on public college campuses.[81] The law allows colleges to impose reasonable regulations, but prevents them from prohibiting the carrying of handguns.[82] "For example, the law permits public colleges to establish regulations concerning the storage of handguns in residence halls."[83]

"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."[84]

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

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[79] *Id.* at 403 (Ho, J., dissenting).
[80] *Id.* at 405 (Ho, J., dissenting).
[81] Codified as Tex. Gov't Code § 411.2031.
[82] § 411.2031(d-1).
[83] Glass v. Paxton, 900 F.3d 233, 236 (5th Cir. 2018) (citing Tex. Gov't Code § 411.2031(d)).
[84] *Glass*, 900 F. 3d at 236 (citing Tex. Gov't Code §§ 411.172, 411.174, 411.188).

the University lacks a rational basis for determining where students can or cannot concealed-carry handguns on campus."[85]

For the 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.'"[86]

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."[87]

Even if Prof. Glass had standing on the First Amendment merits, her hypothetical about intimidation would have lacked factual support. Besides Texas, nine other states have laws allowing licensed students over 21 to carry on campus.[88] Examples of intimidation by religious or libertarian students, or by other lawfully-carrying students, anywhere, were notably absent from the record.

On the Second Amendment, Glass argued that "the Campus Carry Law and University policy violate the Second Amendment because firearm usage in her presence is not sufficiently 'well regulated.'"[89] "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."[90] "'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."[91]

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.[92]

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[85] *Id*. at 237.
[86] *Id*. at 238 (brackets in original).
[87] *Id*. at 242.
[88] National Conference of State Legislatures, *Gun Campus: An Overview*, Aug. 14, 2018, http://www.ncsl.org/research/education/guns-on-campus-overview.aspx (listing Arkansas, Colorado, Georgia, Idaho, Kansas, Mississippi, Oregon, Texas, Utah and Wisconsin). Also Tennessee allows carry by faculty and staff, but not students. *Id.* In Wisconsin, universities may forbid carry in buildings by posting signs at all entrances, but not more prohibit carry on the grounds. *Id.* Mississippi require that licensees who wish to carry on campus obtain extra training. *Id.*
[89] *Id*. at 243.
[90] *Id*. at 244.
[91] *Id*.
[92] *Id*.

"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."[93]

In support of the Equal Protection claim, Glass argued that "the Campus Carry Law and University policy violate her 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."[94]

> 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.[95]

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."[96] 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."[97]

Since "Texas's rationales are arguable at the very least," Glass's Equal Protection claim failed.[98]

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.[99] 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.[100]

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

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[93] *Id.*
[94] *Id.*
[95] *Id.* at 245.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 246.
[99] Ohio Revised Code § 2919.25(A).
[100] Stimmel v. Sessions, 879 F.3d 198 (6th Cir. 2018). For cases from other circuits, see Kopel & Greenlee, 61 ST. LOUIS U. L.J. at 242–44, 278–81, 305–06.

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.[101]

The court applied intermediate scrutiny in Part Two. *Heller* had often referred to "law abiding citizens," so "Stimmel, as a domestic violence misdemeanant, is at least somewhat removed from the Amendment's core protected class as defined in *Heller*."[102] Importantly, "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."[103] "In sum, § 922(g)(9) places a substantial burden on the right, but does not touch the Second Amendment's core—intermediate scrutiny is appropriate here."[104]

The court emphasized that "[t]he burden of justifying § 922(g)(9) under heightened scrutiny is demanding and remains with the government."[105] The government satisfied this burden by proving that a "reasonable fit" exists between disarming domestic violence misdemeanants and the 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.[106]

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, at most. Accordingly, Judge Danny Boggs dissented. As he summarized:

> Because the government has offered, at best, minimal evidence that a non-recidivist domestic violence misdemeanant 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.[107]

In a 2016 statutory interpretation case on the federal domestic violence statute, Justice Thomas in dissent also raised concerns about the prohibition, which is the only federal statute using a misdemeanor 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.[108]

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[101] *Stimmel*, 879 F.3d at 205.
[102] *Id.* at 206.
[103] *Id.* at 207.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 211.
[107] *Id.* at 213 (Boggs, J., dissenting).
[108] Voisine v. United States, 136 S.Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (disagreeing with majority's reading that the statute encompasses reckless conduct). For more on *Voisine*, 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.

B. NO RIGHT TO SELL GUNS TO FELONS. *U.S. V. BACON*

Donte Bacon admitted that in August of 2014 he "purchased the firearm" and "sold it ... with reasonable cause to know that [the purchaser was] a felon."[109] Later that month, "Bacon confirmed that he sold a different firearm, a semiautomatic pistol with an obliterated serial number, to a prohibited person."[110] 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."[111] 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.[112]

However, the court's error was harmless, since there was Supreme Court precedent nearly on-point. *Heller* had stated: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[113] 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')."[114]

VII. EIGHTH CIRCUIT. SUPPRESSORS AND SHORT-BARRELED RIFLES ARE NOT INDISPUTABLY PART OF SECOND AMENDMENT RIGHT. *U.S. 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,"[115] 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, as amended, require

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[109] United States v. Bacon, 884 F.3d 605, 608 (6th Cir. 2018) (brackets in original).
[110] *Id.*
[111] *Id.* at 611.
[112] *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. 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).
[113] *Bacon*, 884 F.3d at 611–12 (quoting *Heller*, 554 U.S. at 626–27).
[114] *Id.* at 612 n.3. For more on the persuasive and well-reasoned *Marzzarella* opinion, which is a foundation of circuit jurisprudence on the Second Amendment, see Kopel & Greenlee, at 204–05, 212–14, 216, 236–37.
[115] United States v. Stepp-Zafft, No. 17-1558, 2018 WL 2171216, at *1 (8th Cir. May 11, 2018). "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 converted into short-barreled rifles with the addition of a shoulder stock." *Id.*

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." But since Stepp-Zafft raised these issues for the first time on appeal, the court reviewed only for plain error.[116]

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.'"[117] Moreover, "[o]ther courts have seen no constitutional distinction between short-barreled shotguns and rifles in the wake of *Heller*."[118] 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*."[119]

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."[120] 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."[121]

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 encompassed in the NFA is beyond the scope of the Second Amendment, simply because *Heller* suggested that short-barreled shotguns and machine guns are beyond the scope.

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[116] Typically, a party defendant must show "good cause" to raise a defect in an indictment for the first time at the appellate stage, but the government failed to raise a "good cause" argument, so the "good cause" showing was not required in this case. *Id.*

[117] *Id.* at *2 (quoting *Heller*, 554 U.S. at 624; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992)). The *Thompson/Center* case had held that ATF may not impose the 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. *Id.* at 506. 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. *Id.* at 519 (Scalia, J., concurring). Justice White dissented, joined by Justices Blackmun, Stevens, and Kennedy. They relied on legislative history and rejected 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. *Id.* at 523 (White, J., dissenting). Justice Stevens also dissented separately, emphasizing the danger of concealable firearms. *Id.* at 525 (Stevens, J., dissenting).

[118] *Id.* at *2 (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)).

[119] *Stepp-Zafft*, at *2.

[120] *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)).

[121] *Stepp-Zafft*, No. 17-1558 at *2.

For example, a student note in the *Harvard Journal of Law & Public Policy* argues that there is no good reason for regulating short-barreled rifles more stringently than other firearms. The note also casts doubt on ATF's administrative interpretations expending the scope of the SBR statute, such as by attempting to control arm braces or forward grips for pistols.[122]

Notably, a short-barreled rifle is *less* lethal than a rifle with a longer barrel, due to reduced velocity and hence reduced kinetic energy. Short-barreled shotguns, however, 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 short-barreled rifles are not.

An article by Stephen Halbrook examined the legislative history of the NFA and found no support at all for treating "silencers" as NFA items. As Halbrook points 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.[123]

VIII. NINTH CIRCUIT

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

In *Duncan v. Becerra*,[124] 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" (defined as 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 large-capacity magazine to a law enforcement agency for destruction."[125]

The district court held that the ban violates the Second Amendment—both under intermediate scrutiny and under what it called "the *Heller* test,"[126] which simply "asks whether the law bans types of firearms commonly used for a lawful purpose."[127]

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]."[128] Although California had offered evidence from Michael Bloomberg

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[122] James A. D'Cruz, Note, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 HARV. J. L. & PUB. POL'Y 493 (2017).

[123] 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.

[124] No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018) (unpublished).

[125] Cal. Penal Code § 32310(d)(1)-(3).

[126] Duncan v. Becerra, 265 F. Supp. 3d 1106, 1117–18 (S.D. Cal. 2017).

[127] *Id.* at 1117 (quoting *Friedman v. City of Highland Park*, 136 S.Ct. 447, 449 (2015) (Justices Thomas and Scalia dissenting from denial of certiorari)).

[128] *Id.* at 1124.

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.[129] Thus, the "reasonable fit" between the challenged regulation and an important state interest did not exist, so the ban failed intermediate scrutiny.

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."[130] 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."[131] 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."[132] 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.'"[133]

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.[134] Although the evidence in the *Fyock v. Sunnyvale* and *Duncan* cases has some differences, 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 of discretion; the appellate judges are not supposed to re-weigh 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 Ninth Circuit 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."[135]

Like the Second Circuit in another magazine ban case,[136] dissenting Judge Wallace seemed to favor a very weak standard of intermediate scrutiny review for Second Amendment cases: as

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[129] *Id.* at 1121.
[130] *Duncan*, No. 17-56081 at *1.
[131] *Id.* at *2.
[132] *Id.*
[133] *Id.* (quoting *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc)).
[134] Fyock v. Sunnyvale, 779 F.3d 991 (9th Cir. 2015).
[135] *Duncan*, 265 F. Supp. 3d at 1120.
[136] 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 unusually weak standard of review).

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.[137] Most 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.[138] The district court began by pointing out that the Covenant establishing the Commonwealth expressly made the Second and Fourteenth Amendments applicable to the CNMI.[139]

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.[140]

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.[141] 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.[142]

In July 2018, the Ninth Circuit affirmed the district court's denial of the motion to intervene, because the PTSA lacked standing.[143] 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* decision did not require PTSA "to do or refrain from doing anything."[144]

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."

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[137] 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.

[138] Radich v. Guerrero, 2016 WL 1212437 (D.N. Mar. I. Mar. 28, 2016).

[139] *Id.* at 2.

[140] *Id.* at 9.

[141] 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.

[142] Radich v. Guerrero, 2016 WL 3034159 (D.N. Mar. I. May 27, 2016).

[143] Radich v. Guerrero, 729 Fed. App'x 623 (9th Cir. 2018).

[144] *Id.* at 624 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)).

The United States extends from the Virgin Islands and Puerto Rico, in the Atlantic Time Zone, to Guam and the CNMI in the Chamorro Time Zone—a span of twelve time zones. Thus, it may be accurate to say that the sun never sets on the Second Amendment.

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

Addressing the issue that had been carefully avoided by an earlier *en banc* opinion on concealed carry licenses,[145] 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.[146] The author of the majority opinion was Judge Diarmuid O'Scannlain, who had also written the *Peruta* panel opinion on concealed carry, which was later overturned *en banc.*

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 issued in the last 18 years), and only a few dozen open carry permits exist, 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.[147] The district court granted the defendants' motion to dismiss, and Young appealed. For procedural reasons, defendant 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 filed an amicus brief.

The Ninth Circuit panel examined *Heller* and *McDonald v. City of Chicago*, which had explicated that the textual right to "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."[148] In *Young*, the state's "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.'"[149]

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 major American treatise on constitutional law, St. George Tucker's 1803 annotated American edition of Blackstone. The *Heller* Court relied heavily on Tucker, and so did the Ninth Circuit:

> 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*

[145] Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).
[146] Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018).
[147] Young v. Hawaii, 911 F. Supp. 2d 972 (D. Haw. 2012).
[148] *Heller*, 554 U.S. at 626; McDonald v. City of Chicago, 561 U.S. 742, 786 (2010).
[149] *Young*, 896 F.3d at 1053 n.6.

> *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).[150]

Like *Heller*, the Ninth Circuit studied nineteenth century cases on the right to arms, especially cases from before the Civil War. The large majority of the cases—including the cases that *Heller* said were correct explications of the right—held that there is *not* a right to carry concealed, and there *is* a right to 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?
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> 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.[151]

As the *Young* majority acknowledged, a minority of nineteenth century cases did deny that there is right to defensive carry; these cases start with Arkansas's 1842 *State v. Buzzard*.[152] 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

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[150] *Id.* at 1054. Also included in the natural rights discussion is LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (2001) (quoting a prominent colonial newspaper on the right to arms as "a natural right") and David B. Kopel, T*he Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008).

[151] *Young*, 896 F.3d at 1057 n.9. The article had argued against Southern cases was Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 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).

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. *See* David B. Kopel, *The First Century of Right to Arms Litigation*. 14 Georgetown J.L. & Pub. Pol'y 127, 151–52 (2016).

[152] State v. Buzzard, 4 Ark. 18 (1842).

> on the public carry of weapons because such limitations in no way detracted from the common defense of the state.[153]

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 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 B had "good cause" to fear for his safety.

The *Young* dissent characterized these statutes as broad bans on public carrying. This is contrary to the text. The statutes only applied 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.

Another legal history issue in *Young* stretched back to 1328, when English King Edward II created the Statute of Northampton. It 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 *Young* dissent adopted 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.[154]

However, 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' 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."[155]

Hawkins' 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 only applies to "people who go armed to terrify the King's subjects."[156]

"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."[157]

Early American commentators interpreted common law limits on arms carrying as only applying to persons who carried "offensively" or in a "terrifying" manner or who carried

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[153] *Young*, 896 F.3d at 1057–58.

[154] Patrick J. Charles, *The Faces of the Second Amendment outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEVELAND ST. L. REV. 373 (2016).

[155] 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 489 (8th ed., 1824). Hawkins, by the way, 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' point to cover the *possession* of "dangerous and unusual" arms.

[156] 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 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) (law school textbook).

[157] *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).

"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."[158]

In sum, the Northampton analogues found in U.S. states confirm that, "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."[159]

Because text, history, and tradition show that peaceable 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."[160]

Under Ninth Circuit precedent, the next question was whether the Hawaii statute and its regulation allowing only carry permits only for 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.'"[161]

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:

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[158] 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. . . ."); Respublica v. Richards, 2 U.S. (2 Dall.) 224 (Penn. 1795) (same language as *Johnson v. Tompkins*).

According to Saul Cornell, Patrick Charles, and the *Young* dissent, all carrying (except when mandated by the government) was considered inherently "terrifying." The majority answered:

> 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" 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.*

[159] *Id.* at 1067–68 (quoting *Wrenn v. D.C.*, 864 F.3d 650, 660–61 (D.C. Cir. 2017)).

[160] *Id.* at 1069.

[161] *Id.* at 1070.

> 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."[162]

The 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."[163]

Hawaii County has informed Mr. Young's attorneys that it intends to file for *en banc* review.

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 (the 1,000-foot radius around school grounds). It provided exceptions for concealed-carry permit holders and retired peace officers.

In 2015 California amended its Gun-Free School Zone Act in 2015 to prohibit carry permit holders for carrying on school property. A group of permitholders and firearms organizations sued, arguing that the ban violated the Fourteenth Amendment's Equal Protection Clause by irrationally treating permitholders and retired law enforcement differently.

Notably, the Ninth Circuit had held in 2002 in *Silveira v. Lockyer* than an exemption for retired officers from an "assault weapons" ban violated the Equal Protection Clause.[164] The *Gallinger* court determined that *Silveira* was distinguishable "for the commonsense reason that assault weapons are more dangerous than other kinds of firearms."[165] 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."[166]

After distinguishing the *Silveira* precedent, the *Gallinger* court upheld the new 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 them to carry firearms other than assault weapons on school grounds mitigates that risk and increases officer safety."[167]

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."[168] It is unclear how training in the safe storage of firearms

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[162] *Id.* at 1071.
[163] *Id.* at 1050 n.2.
[164] Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002)
[165] Gallinger v. Becerra, 898 F.3d 1012, 1018 (9th Cir. 2018).
[166] *Id.* at 1019.
[167] *Id.* at 1020.
[168] *Id.*

improves one's ability to *carry* a firearm responsibly. As for training, California permit holders may have as many hours as would be typical in a police academy. 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.[169]

E. UPHOLDING BAN ON ALL NEW HANDGUN MODELS. *PENA V. LINDLEY*

California forbids the commercial sale of handgun models that are not listed on a California Department of Justice ("CDOJ"). From time to time California adds new requirements for inclusion on the roster. The plaintiffs challenged three relatively new requirements of semiautomatic handguns: (1) that new models contain a chamber load indicator (CLI)[170]; (2) that new models contain a magazine detachment mechanism (MDM) to prevent the gun from firing if the magazine is not inserted.[171] Although there are pro/con arguments about whether these devices increase or reduce firearms safety, there is no dispute that CLIs and MDMs do exist, and can be incorporated into handgun manufacture.

A third newly required firearms component does not exist: a microstamping mechanism that stamps a handgun's serial number in two places on each cartridge.[172]

The above requirements do not apply to handguns that were already on the roster, which are grandfathered as long as the manufacturer continuously pays a fee.[173]

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

The court continued to race ahead in Part Two. Rather than determine whether the laws implicate the core of the Second Amendment right—which under circuit precedent is a necessary inquiry in determining the appropriate level of heightened scrutiny[174]—the *Pena* court decided that intermediate scrutiny was appropriate "[b]ecause the restrictions do not substantially burden any such right."[175] The burden was unsubstantial because the grandfathered firearms remained available[176] and because the laws "place almost no burden on the physical exercise of Second Amendment rights."[177]

For MDMs, the safety problem is that they render a semiautomatic pistol useless unless a magazine is inserted. Hence, although MDMs have long been available, Americans have long preferred guns without them. In a defensive situation, if a magazine is malfunctioning, the defender can remove the magazine, and still be able to fire the one round that remains in the pistol's firing chamber.

The Ninth Circuit was not concerned: "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

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[169] Cal. Penal Code § 26165.

[170] *Id.* § 31910(b)(5). A "device that plainly indicates that a cartridge is in the firing chamber." *Id.* § 16380.

[171] *Id.* § 31910(b)(5). "[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." *Id.* § 16900.

[172] "[E]ach 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." *Id.* § 31910(b)(7).

[173] Pena v. Lindley, 898 F.3d 969, 983 (9th Cir. 2018).

[174] *See* United States 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).

[175] *Pena*, 898 F.3d at 977.

[176] *Id.* at 978–79.

[177] *Id.* at 978.

magazine in the chamber without inserting the magazine itself."[178] 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."[179] The judicial speculation about the mechanics of gunfights is well beyond the judicial ken, and appears to be the sort of ad hoc interest balancing that was explicitly rejected by *Heller*.[180]

A Chamber Loaded Indicator signals when there is a cartridge in the handgun's firing chamber. To the extent that people rely on CLIs, they disregard the long-standing rule of gun safety to treat *every* gun as if it is loaded. The court, however, reasoned that because a "CLI lets someone know that a gun is loaded without even having to pick it up to check" and because an "MDM prevents a firearm from shooting unless a magazine is inserted," "[t]he CLI and MDM requirements []reasonably fit with California's interest in public safety."[181] Like MDMs, CLIs have existed in the market for years, although demand appears to be low.

As for the microstamping requirement, microstamping would "address the substantial problem of untraceable bullets at crime scenes and the value of a reasonable means of identification." So the court held that microstamping reasonably fits with California's interests in public safety and crime prevention.[182] On the other hand, microstamping has nothing to do with "bullets," which are lead projectiles. Bullets are found at scenes where a gun has been fired, but they cannot be microstamped. Lead is relatively soft, and deforms on impact, so nothing stamped on a bullet would remain for forensic recovery.

Instead, microstamping is for the metal cartridges that contain the bullet, gunpowder, and primer. Cartridges may be recovered at crime scenes, but not necessarily so. Revolvers retain the spent cartridges in the revolver's cylinder. Semiautomatic pistols do eject cartridges, but they (unlike bullets that have been fired downrange) can readily be retrieved before a criminal flees.

The much more important problem is that microstamping in the form demanded by California does not exist. There is no dispute that the microstamping mandate functions as a ban on all new handgun models in California. Uncontradicted evidence from the plaintiffs showed "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."[183]

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."[184] The court argued that "[s]imply because no gun manufacturer is 'even considering trying' to implement the technology, it does not follow that microstamping is technologically infeasible."[185] "We need not accept wholesale that manufacturers will decline to implement this new public safety technology in the face of California's evidence that the technology is available and that compliance is feasible."[186]

Yet 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."[187] In other words, the Ninth Circuit majority upheld a design requirement that appears to be impossible to comply with. Under heightened scrutiny,

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[178] *Id.*

[179] *Id.* at 980.

[180] *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.").

[181] *Id.*

[182] *Id.* at 986.

[183] *Pena*, 898 F.3d at 988 (Bybee, J., concurring in part and dissenting in part).

[184] *Id.* at 983 (quotations omitted).

[185] *Id.*

[186] *Id.*

[187] *Id.*

which the Ninth Circuit purported to apply, the government bears the burden of proof at every step. No evidence from California showed the existence of even a single prototype firearm that can comply with California's microstamping demand.

While compliance with California microstamp demand is impossible, compliance with the CLI and MDM requirements *is* possible. Those items exist and have been incorporated into handguns by some manufacturers.

The effect of the microstamping law is freezing firearms technology. No new handgun models may be sold in California. *Heller* said 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.[188]

So under *Heller*, a legislature could not forbid all handgun models invented after 1791, or any other year. The California microstamping law operates to ban all handguns invented after the law's 2013 enactment.

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."[189] 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 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

[188] *Heller*, 554 U.S. at 582.

[189] Pena, 898 F.3d at 988 (Bybee, J., concurring in part and dissenting in part).

> 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.[190]

Judge Bybee would have reversed and remanded based on the absence of evidence in the record that firearms manufacturers are capable of implementing the microstamping requirement.

The California freeze on post-2013 handguns is part of a broader effort by some gun prohibition advocates to freeze firearms technology, and even it roll it back by decades or centuries.

For example, California and New Jersey (discussed *supra*) prohibit magazines of over 10 rounds. Yet firearms capable of firing over 10 rounds date back to around 1490.[191] By 1866, firearms with magazines over 10 rounds had become easily affordable and quite common.[192] Modern handgun models with detachable box magazines over 10 rounds begin with Mauser's 1896 "broomhandle" pistol.[193]

Another technology rollback goes all the way to 1903. A new law in Washington State makes "assault rifle" subject to special restrictions, including a permanent waiver of medical privacy, and inspection of medical records by the government at least annually. The law defines every semiautomatic rifle as "assault rifle." Thus, the law reaches back to first semiautomatic rifle commonly sold in the United States—the 1903 Winchester. That "assault rifle" holds 10 rounds in a non-detachable tubular magazine under the barrel; the rifle fires the low-power .22 caliber cartridge.

The first actual "assault rifle" was the German army's 1943 *Sturmgewehr*. As defined by the U.S. Defense Intelligence Agency, the *Sturmgeweher* is an "assault rifle" because it has certain capabilities, among them ability to fire automatically, like a machine gun. Other true assault rifles are the Soviet AK-47 (first produced in 1947), and the U.S. Army M-16 (for which development began in the late 1950s).

The new Washington law imposes no restrictions on people who own real "assault rifles," which are regulated by separate laws that cover machine guns. Instead, Washington State stigmatizes and imposes heavy burdens on owners of old-fashioned guns like the Winchester 1903.

Since 1903, improvements in materials quality and in manufacturing precision have allowed manufacturers to make guns that provide better ergonomic fit for the user. For example, as of 1903, the stock of a rifle or shotgun would made from wood. Although wood is still commonly used, many buyers prefer synthetic or metal stocks that can be adjusted for length. People with longer arms need longer stocks; people with shorter arms need shorter stocks; and everyone can benefit from slight adjustments to create better fit.

California, though, outlaws adjustable stocks, because they supposedly turn a normal rifle into an "assault rifle."

Several decades ago, muzzle brakes became popular on rifles. The devices attach to the front of the gun's barrel and stabilize the gun's barrel.[194] These too are banned in California, as allegedly characteristic of an "assault rifle." Real "assault rifles," as defined by the DIA and

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[190] *Id.* at 988–89 (Bybee, J., concurring in part and dissenting in part).

[191] *See* M.L. Brown, Firearms in Colonial America: The Impact on History and Technology, 1492- 1792, at 50 (1980) (firearm fired 10 rounds utilizing a revolving cylinder (much like a modern revolver does).

[192]

[193] *Id.* at 857.

[194] When a gun is fired, a sine wave to energy is transmitted through the barrel. The vibration moves the gun off target. A muzzle brake partially dampens the vibration.

exemplified by the AK-47, may or may not have adjustable stocks or muzzle brakes. The items are irrelevant to the definition, which is based on caliber and firing capabilities.

Incrementally, the types of gun control laws that are allowed by the Ninth Circuit freeze advances in firearms technology and allow for technological rollbacks of decades or centuries.

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. After being detained for four hours, Sandberg was charged with disorderly conduct, and his firearm, holster, ammunition, and magazine were confiscated. Within months, the charge was dropped, and Sandberg's property was returned to him.

Sandberg later filed a 42 U.S.C. 1983 action alleging that 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."[195]

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."[196] 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."[197]

The Tenth Circuit has previously held that the Second Amendment does not guarantee the right to concealed carry.[198] In a 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 did hypothesize such a right *arguendo*.[199]

The *Sandberg* court acknowledged a Seventh Circuit case that definitively held that the right to bear arms applies beyond the home.[200] Additionally, three circuit court cases that assumed the right applies beyond the home,[201] and a dissent from denial of certiorari (Justice Thomas joined by Justice Gorsuch) had argued that "[t]he most natural reading of [the Second Amendment] encompasses public carry."[202] But this was not enough to "clearly establish" the right, as Sandberg needed to do.

B. SUPPRESSORS NOT PROTECTED ARMS: *U.S. V. COX*

In 2013, Kansas passed the Second Amendment Protection Act (SAPA).[203] SAPA provides, in part:

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[195] Sandberg v. Englewood, Colorado, 727 F. App'x 950, 961 (10th Cir. 2018).
[196] *Id.* at 962.
[197] *Id.* at 961.
[198] Peterson v. Martinez, 707 F.3d 1197 (10th Cir. 2013).
[199] Bonidy v. United States Postal Serv., 790 F.3d 1121 (10th Cir. 2015).
[200] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).
[201] 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).
[202] Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting).
[203] Codified at Kan. Stat. Ann. §§ 50-1201 to -1211 (2014).

> 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.[204]

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, with both parties under the impression that the transaction was legal under SAPA as long as the suppressor (a/k/a "silencer") never left Kansas. Kettler wrote about his new suppressor on Facebook.

Soon after, "federal prosecutors secured a grand jury indictment against Cox and Kettler, charging them with thirteen crimes linked to Cox's firearms-manufacturing venture, Kettler's patronage of it, and the ensuing investigation."[205] All of the counts involved violations of the 1934 National Firearms Act.[206] That act allows the manufacture, sale, and possession of suppressors—but only when every step is compliant with a stringent federal system requiring prior payment substantial taxes, registration, and background checks.

As a tax statute, the NFA applies throughout the States, regardless of whether a taxable event involves interstate commerce. All parties agreed that the defendants had relied on SAPA in good faith and had sincerely believed that their activities were not subject to the NFA.

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

First, the Tenth Circuit considered whether the NFA is a valid exercise of congressional power. It 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."[207]

Second, the court considered whether the NFA comports with the Second Amendment. Here, Cox and Kettler maintained that the Second Amendment protected their right to make, sell, and possess suppressors.

The Tenth Circuit applied the Two-Part Test, and none of the challenges made it past Part One. That is, the court found that none of defendants' activities involved the Second Amendment.

What the NFA calls "silencers" are attachment to the front of a firearms barrel to reduce the noise produced by a gunshot. The word "silencer" is marketing hype from the original inventor, Hiram Maxim; the attachments reduce noise but do not eliminate it. Although "suppressor" is the more accurate word, the federal statute uses the term "silencer."

The defendants argued that

> [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

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[204] Kan. Stat. Ann. § 50-1204(a).

[205] United States v. Cox, 906 F.3d 1170, 1175–76 (10th Cir. 2018).

[206] *Id.*

[207] *Id.* at 1179. The NFA's permissibility as tax scheme (notwithstanding its obvious intent as criminal law and not a revenue measure) had been established by *Sonzinsky v. United States*, 300 U.S. 506 (1937).

> 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."[208]

The Tenth Circuit did not dispute the above safety facts. Instead, the court said that suppressors have nothing to do with the Second Amendment, since they are not arms:

> 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 in itself (nor is it "armour of defence"). Accordingly, it can't be a "bearable arm" protected by the Second Amendment.[209]

The Tenth Circuit's hyperliteralism was questionable. The Fourth Amendment protects "persons, houses, papers, and effects" against unreasonable searches and seizures. Camping tents and motel rooms are not literally "houses," but they properly receive Fourth Amendment protection.[210] Firearms accessories, such as scopes, are not themselves weapons; rather they make arms more accurate, and hence safer.

The First Amendment protects "the press."[211] Like firearms, printing presses use silencers. Firearms silencers and printing press silencers (silencers for industrial machines) come from the same source. When Hiram Percy Maxim invented the firearms silencer in the early twentieth century, he attracted prestigious customers, such as President Theodore Roosevelt. But Maxim soon realized that silencer principles—such as slowing the escape of expanding gasses—had many other applications, starting with automobile mufflers.[212] Today, the Maxim Silencers

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[208] *Id.* at 1186. The best-quality ear muffs reduce the decibel level by about as much as good silencer/suppressor does. For hearing protection, the best practice is to use a suppressor *and* ear muffs, for a greater combined reduction in noise. For neighbors who live near a shooting range, only suppressors reduce the noise coming from the range. *See generally* Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33 (2016).

[209] *Id.*

[210] *See*, *e.g.*, United States v. Gooch, 6 F.3d 673 (9th Cir. 1993) (officers may not enter a tent without a warrant); United States v. Carter, 854 F.2d 1102, 1105 (8th Cir.1988) The expectation of privacy associated with a person's home applies with equal force to a properly rented motel room during the rental period.").

[211] U.S. CONST. amend. I. The protection includes news and opinion dissemination in various media, and it also includes printing presses and other reproduction machines. *See* Edward Lee, *Guns and Speech Technologies: How The Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1046–50 (2009). Notably, "'arms' and the 'press'…are the only man-made machines or devices specifically protected in the Bill of Rights." *Id.* at 1048.

[212] Maxim's insight for silencers came from watching water swirl down a bathtub drain. He observed that the swirling water moved slower than a straight flow. He realized that the loud sound of a gunshot was similar, caused by hot gases exiting the muzzle. If the gasses swirled, they would exit more slowly. The

company makes a wide variety of sophisticated silencers for industrial, hospital, and residential use.[213]

Suppose a printing company wishes to purchase silencers for its printing presses, in order to protect the hearing of employees. Suppose that a government hostile to the press and imposes a special tax on printing press silencers. Louisiana and Minnesota tried something similar—special taxes on high-circulation newspapers or on large annual use of paper and ink. The U.S. Supreme Court struck the taxes because they violated the First Amendment.[214]

According to the Tenth Circuit, the special tax, or even prohibition, of printer silencers would not be a First Amendment issue. As the Tenth Circuit could point out, printing presses can still function without silencers. Silencers are not a "press."

Nevertheless, people who are exercising their First or Second Amendments rights—by operating printing presses or by practicing with firearms—benefit from silencers. When the government impedes access to devices that protect against hearing loss, the government inflicts substantial harms. When the harm infliction is targeted against people who exercise constitutional rights, rigorous judicial review is appropriate.

The Second Amendment expressly protects "the people." The First Amendment implicitly protects people who use printing presses. Because accessories for arms and presses protect people who use arms and presses, accessories are constitutionally protected.

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."[215]

Having declared that the possession of silencers/suppressors is not a Second Amendment issue, the Tenth Circuit readily upheld the tax and registration system for silencer manufacture and sales. "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."[216]

Besides, even if the Second Amendment were involved, the manufacture and sales rules "fit neatly into that category of 'presumptively lawful regulatory measures'"[217] identified by *Heller*, including "laws imposing conditions and qualifications on the commercial sale of arms."[218]

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."[219]

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slower exit would reduce, but not eliminate, the noise of the gunshot. Maxim's sound suppressor was a simple canister attached to the gun muzzle. Maxim placed baffles inside the canister. When the bullet (pushed by propellant gases from burning gunpowder) passed through the canister, the baffles made the gases swirl, producing less sound.

[213] http://www.maximsilencers.com/index.html. The company's products do not include firearms silencers.

[214] Minneapolis Star Tribune Company v. Commissioner, 460 U.S. 575 (1983) (use tax on annual paper and ink usage over $100,000); Grosjean v. American Press Co., 297 U.S. 233 (1936) (2% gross receipts tax on newspapers with over 20,000 circulation).

[215] *Cox* at 1196.

[216] *Id* at 1187.

[217] *Id.* (quoting *Heller*, 554 U.S. at 627 n.26).

[218] *Heller*, 554 U.S. at 626–27.

[219] *Id.* (quoting *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943)). The word "granted" is inapt. As the Supreme Court has explained, 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.

The annual NFA tax for manufacturing $1,00, and the annual dealer tax is $500. 26 U.S.C. § 5801; 27 C.F.R. §§ 479.31, 479.32, 479.32a (half-rate for manufacturer with gross receipts under $500,000), 479.33

"Under *Murdock* and *Cox*,[220] 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."[221] But the constitutional fee jurisprudence was irrelevant, since the court has already decided that suppressors are not protected by the right.

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.'"[222] 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.)."[223]

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 weak reasoning.

Nullification of the right to bear arms remains a continuing problem in a few states. In the Second Circuit, treating the Second Amendment as a second-class right would be an improvement from the current jurisprudence. There, New York City has been 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 Connecticut, and forbidding New York City residents from taking their registered handguns from one home to another.

Hearing protection for people who exercise Second Amendment rights deserves more careful judicial consideration than was provided by the Tenth Circuit's superficial opinion.

There were several 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.

The Ninth Circuit continues to have no objection to laws against firearms technology improvements. The latest such law to come before the Ninth Circuit bans new handgun models from 2013 onward and was upheld 2-1.

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 other

(tax exemption for manufacturers who only work for federal government customers). Transfers require a one-time tax of $200. 26 U.S.C. § 5811.

[220] *Murdock v. Com. of Pennsylvania*, 319 U.S. 105 (1943); *Cox v. State of New Hampshire*, 312 U.S. 569 (1941).

[221] *Cox*, 906 F.3d at 1187.

[222] *Id.* at 1190 (quoting *U.S. v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring)).

[223] *Id.* at 1195.

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.