IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

MICHAEL BATEMAN, et al.,	)	Case No. 5:10-CV-265-H
	)	
Plaintiffs,	)	**MEMORANDUM OF POINTS AND**
	)	**AUTHORITIES IN OPPOSITION TO**
v.	)	**DEFENDANTS PERDUE AND**
	)	**YOUNG'S MOTION TO DISMISS**
BEVERLY PERDUE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANTS PERDUE AND YOUNG'S MOTION TO DISMISS

COME NOW the Plaintiffs, Michael Bateman, Virgil Green, Forrest Minges, Jr., GRNC/FFE, Inc., and Second Amendment Foundation, Inc., by and through undersigned counsel, and submit their Memorandum of Points and Authorities in Opposition to Defendants Perdue and Young's Motion to Dismiss.

Dated: September 24, 2010

Respectfully submitted,

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PRELIMINARY STATEMENT

Under the provisions challenged by the Complaint, the people of North Carolina lose their fundamental Second Amendment right to bear arms whenever bad weather threatens. Additionally, the mere prospect of foul weather enables every level of North Carolina's government to infringe upon the Second Amendment right to purchase arms and ammunition.

The Second Amendment's very object is to enable individuals to cope with emergencies, especially when the State declares that it may be unable to enforce the law. Laws barring the carrying and sale of arms at precisely those times when individuals most urgently need to access means of self-defense are incompatible with the core of the Second Amendment right. This Court is empowered to, and must, secure the right to keep and bear arms by enjoining enforcement of these provisions. The Complaint plainly states a valid claim for relief.

STATEMENT OF FACTS

The Court may take judicial notice that North Carolina is frequently beset by hurricanes, tropical storms, and other severe weather events endangering public safety. Episodes of public disorder, too, are naturally inherent in the human condition.

To deal with such problems, North Carolina law provides Defendants with broad powers during a "state of emergency." North Carolina Gen. Stat. § 14-288.1(10) defines a "state of emergency" as

> The condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent.

A "state of emergency" may be declared by the Governor, or by any municipality or county. Additionally, the chairman of a county board of commissioners may extend the provisions of a state of emergency into his or her county. N.C. Gen. Stat. §§ 14-288.12-15. North Carolina Gen. Stat. § 14-288.7(a) provides, in pertinent part, "it is unlawful for any person to transport or possess off his own premises any dangerous weapon or substance in any area: (1) In which a declared state of emergency exists; or (2) Within the immediate vicinity of which a riot is occurring." Violation of this provision is a Class 1 misdemeanor. N.C. Gen. Stat. § 14-288.7(c). The term "[d]angerous weapon or substance" includes "[a]ny deadly weapon, ammunition . . ." N.C. Gen. Stat. § 14-288.1(2).

Declarations of states of emergency may contain "prohibitions and restrictions . . . (4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances . . ." N.C. Gen. Stat. § 14-288.12(b) (municipal declarations); *accord* N.C. Gen. Stat. §§ 14-288.13(b) (county declarations), 14-288.15(d) (gubernatorial declarations). Violations of such prohibitions and restrictions declared by the Governor are punishable as Class 2 misdemeanors. N.C. Gen. Stat. § 14-288.15(e).Violations of such prohibitions and restrictions declared by a municipality or county are punishable as Class 3 misdemeanors. N.C. Gen. Stat. §§ 14-288.12(e), 14-288.13(d), 14-288.14(e).

States of emergency are frequently declared in North Carolina. Since September 1, 2004, the Governors of North Carolina have declared at least a dozen states of emergency, usually encompassing the entire state. Executive Order 65 (Hurricane Frances, Sept. 1, 2004); Executive Order 68 (Hurricane Ivan, Sept. 16, 2004); Executive Order 70 (Hurricane Jeanne, Sept. 27, 2004); Executive Order 71 (ice and snow, Wake County, Jan. 19, 2005); Executive Order 82

(Hurricane Katrina, Sept. 3, 2005); Executive Order 88 (Hurricane Ophelia, Sept. 10, 2005); Executive Order 94 (Hurricanes Katrina and Ophelia, Nov. 28, 2005); Executive Order 107 (Tropical Storm Ernesto, Aug. 31, 2006); Executive Order 113 (Dare County severe weather, Nov. 29, 2006); Executive Order 142 (Hyde, Tyrrell, Washington Counties, wildfire, June 6, 2008); Executive Order 144 (Tropical Storm Hanna, Hurricane Ike, Sept. 4, 2008); Executive Order 47 (winter storm, January 10, 2010). Governors typically delegate their emergency powers under such declarations to the Secretary of the Department of Crime Control and Public Safety. Complaint, ¶ 16.

On or about January 30, 2010, Defendant Perdue declared a state of emergency throughout the entire state of North Carolina for up to thirty days. Defendant Perdue delegated her emergency powers to Defendant Young. Complaint, ¶ 19.[1] On or about February 5, 2010, Defendants City of King and Stokes County declared a state of emergency. Defendant City of King's proclamation forbade the sale or purchase of firearms and ammunition, as well as the possession of firearms and ammunition off an individual's premises. Complaint, ¶ 20.

Plaintiffs Michael Bateman and Forrest Minges, Jr., reside in Washington and New Bern, North Carolina, respectively. These towns lie along the coast, and are thus particularly impacted by hurricanes and tropical storms. Plaintiff Virgil Green resides in an unincorporated area of Stokes County, just outside the city limits of King. Green must frequently visit and travel through the City of King. Complaint, ¶¶ 21, 22. Bateman, Green, and Minges have repeatedly been

[1]On September 1, less than three weeks after filing her motion to dismiss, Defendant Perdue declared another such emergency, causing the carrying of firearms to be barred throughout the entire state three days before the start of the dove hunting season. *See* Executive Order 62, *available at* http://www.governor.state.nc.us/NewsItems/ExecutiveOrderDetail.aspx?newsItemID=1328 (last visited Sept. 23, 2010).

impacted by declared states of emergency curtailing their ability to possess, buy, and sell firearms and ammunition. During declared states of emergency, Plaintiffs would carry functional handguns in public for self-defense, and would buy and sell guns and ammunition, but refrain from doing so where possible for fear of arrest, prosecution, fine, and imprisonment. Complaint, ¶ 23. Plaintiffs may also be subject to criminal penalties whenever a state of emergency may be declared if at the time of such declaration Plaintiffs possess firearms outside their homes. Complaint, ¶ 24.

Plaintiffs Grass Roots North Carolina/Forum for Firearms Education ("GRNC/FFE") and Second Amendment Foundation ("SAF") have numerous members and supporters throughout North Carolina, including its coastal areas, Stokes County, and the City of King, who are likewise impacted by declared states of emergency. Owing to their missions, the organizational resources of GRNC/FFE and SAF are taxed by inquiries into the impact of declared states of emergency upon the ability to use firearms. Complaint, ¶¶ 25, 26. The individual Plaintiffs, and the members and supporters of GRNC/FFE and SAF, will continue to be subjected to recurring states of emergency which, absent injunctive relief, will continue depriving them of the ability to buy, sell, possess, transport and carry firearms and ammunition. Complaint, ¶ 28.

SUMMARY OF ARGUMENT

Defendants raise a host of objections to the Complaint, all of which lack merit.

Defendants' claim that state laws restricting the right to arms must be presumed valid contradicts longstanding Supreme Court doctrine that reserves to the courts, not the political branches, the role of safeguarding enumerated constitutional rights. The argument that no law is facially invalid unless it is unconstitutional in all of its possible applications is overstated. Overbreadth is a well-established constitutional doctrine, and it applies in the Second Amendment

context as much as it does in the other fields where Defendants' proposed rule has been rejected. In any event, the Complaint fairly construed presents not only a facial challenge, but also as an as-applied challenge to North Carolina's unconstitutional gun laws to the extent they impact self-defense and hunting.

Nor is the Second Amendment right limited to the confines of one's home. The Supreme Court's precedent is clear: the right to bear arms is the right to carry arms in public, for self-defense and for other traditional lawful purposes. And inherent in the right to keep arms is the right to purchase them, just as is the case with all objects specifically imbued with constitutional protection.

The right to arms is designed for emergencies. While firearms often have value as collectors' items, they are elevated to the status of significant constitutional protection because they secure the right to self-defense – and self-defense, by definition, is exercised only during an emergency. The Second Amendment reflects the fact that the individual, not the government, is the ultimate guarantor of personal safety. Banning guns during times of reduced police availability attacks the core of the Second Amendment right.

Finally, the case presents a ripe, valid controversy. Article III standing does not float in and out with the weather. Even during the pendency of this motion, one state of emergency has already been declared. The fact that the laws are triggered repeatedly and persistently is sufficient to make this a classic case where the injury is "capable of repetition, yet evading review."

ARGUMENT

I. LAWS IMPLICATING FUNDAMENTAL CONSTITUTIONAL RIGHTS ARE NOT PRESUMED CONSTITUTIONAL

The notion that courts must presume the constitutionality of legislative enactments, at least where enumerated, fundamental rights are implicated, is incompatible with the judiciary's role as an independent check on legislative authority.

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution . . .

THE FEDERALIST NO. 78, at 403-04 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). "The interpretation of the laws is the proper and *peculiar* province of the courts." *Id.* (emphasis added).

The Supreme Court's approach to fundamental rights has long reflected this understanding. "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . ." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). Quoting this famous footnote, the Supreme Court recently added, "[T]he [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, *or the right to keep and bear arms*." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2818 n.27 (2008) (citing *Carolene Prods.*) (emphasis added).

Heller added that particular types of gun laws might be "presumptively lawful," precisely because they reflect "longstanding prohibitions" that may fall outside "the full scope of the

Second Amendment." *Heller*, 128 S. Ct. at 2816-17. No such presumptive allowance is made for laws that would be within the Second Amendment's scope.

And finally, removing all doubt as to the presumptive invalidity of nontraditional gun laws, the Supreme Court confirmed that the Second Amendment secures a fundamental right. *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894, 921 (2010) (plurality opinion) & 938 (Thomas, J., concurring). "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). Under this analysis, the government carries the burden of proving the constitutionality of the challenged law. *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010).[2]

The Court's analysis must begin not with a presumption that whatever gun laws enacted by the legislature are constitutional, but with the presumption that the people's right to keep and bear arms "shall not be infringed." U.S. Const. amend. II.

II. LAWS IMPLICATING FUNDAMENTAL CONSTITUTIONAL RIGHTS MAY BE FACIALLY OVERBROAD, BUT IN ANY EVENT, THE COMPLAINT IS NARROWLY DRAWN.

Defendants' assertion that Plaintiffs must "establish that no set of circumstances exists under which the Act would be valid," Def. Br. at 3 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)), is inapposite for a host of reasons.

First, under Defendants' conception of the rule, *Heller* was wrongly decided in sustaining a facial challenge to three generally-applicable gun laws. After all, the Supreme Court

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[2]Courts may presume that legislative bodies did not intend to violate the Constitution, by construing legislative language susceptible to more than one meaning in a constitutionally-permissible manner. Norman J. Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 45.11, at 87 (7th ed. 2008). But the challenged provisions are not ambiguous.

acknowledged that some individuals could be denied handguns and other functional firearms, *Heller*, 128 S. Ct. at 2816-17, and the Court even cautioned that Mr. Heller, specifically, might not be entitled to relief: "*Assuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Heller*, 128 S. Ct. at 2822 (emphasis added).[3]

Indeed, under Defendants' formulation, no gun law could ever be declared unconstitutional so long as at least one individual may be identified who is not legally entitled to possess guns under the circumstance described by the provision. This is clearly not the law. More critically, Defendants fail to identify any *particular* situation where the law would operate validly. A general defense of the law is offered, but that is not a defense based on particular circumstances that would fail the *Salerno* standard. And in any event, the police may always disarm dangerous or uncooperative individuals, state of emergency or not, regardless of the challenged provisions.

Of course, *Heller* satisfied *Salerno*, just as Plaintiffs here do, because the challenged laws deprive *the entire population* of constitutional rights, and no conceivable set of circumstances justifies that result.[4] *Salerno* itself recognized that its rule would not apply in a First Amendment context, where an overbreadth doctrine exists. *Salerno*, 481 U.S. at 745.[5] The facial challenges

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[3]Heller did not apply for a permit to carry his gun in public. *Parker* v. *District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom, Heller*. The District required a permit to carry handguns inside the home, but had refused to make such permits available.

[4]It is critical to recall that at issue in *Salerno* were the procedural requirements of the Bail Reform Act, which quite unlike the provisions challenged here, does not mandate any particular substantive outcomes in all cases.

[5]Given *Heller*'s heavy emphasis on First Amendment doctrines, the Third Circuit recently held that "the structure of First Amendment doctrine should inform our analysis of the Second Amendment." *United States* v. *Marzzarella*, 2010 U.S. App. Lexis 15655 at *7 n.4 (3d Cir. July

sustained in *Heller* and *McDonald* demonstrate that overbreadth applies in Second Amendment analysis as well. Indeed, *McDonald*'s holding that the Second Amendment secures a fundamental right is conclusive on this point, because one prong of the test applicable to fundamental rights is that the challenged provision be narrowly-tailored, leaving no less restrictive alternative. A law that, on its face, is constitutional in only some of its applications fails this test.

Even apart from the realm of fundamental, enumerated rights, *Salerno* is not always controlling. For example, abortion laws are facially invalid where they impose an undue burden on abortion access, not in *all* cases, but "in a large fraction of the cases." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 895 (1992); *see Richmond Med. Ctr. for Women* v. *Herring*, 570 F.3d 165, 173-74 (4th Cir. 2009) (en banc). The standard for facial invalidity outside areas subject to overbreadth is occasionally, perhaps more accurately described as one exempting statutes having a "plainly legitimate sweep." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 202 (2008) (plurality opinion) (citations omitted).

But even if Defendants were correct that *Salerno* applies to Second Amendment cases, their argument would fail for a more basic reason. The Complaint, fairly construed, poses an as-applied challenge as well as a facial challenge. Bateman, Green, and Minges are interested in carrying arms "for self-defense." Complaint, ¶ 23. Bateman and Minges are "avid hunters." Complaint, ¶ 21. Plaintiffs are concerned about getting caught unawares by a sudden emergency declaration. Complaint, ¶ 24. The members and supporters of the organizational plaintiffs are concerned with self-defense and hunting. Complaint, ¶ 25. The emergency provisions aggrieve Plaintiffs, because they wish to defend themselves and their families. Complaint, ¶ 27.

29, 2010) (Exhibit A).

The allegations are clear: Plaintiffs want to have and carry guns for self-defense and for hunting. Whatever else the challenged provisions curtail, the interests in self-defense and hunting are the ones for which protection is sought.

In sum, *Heller* and *McDonald* are the original facial challenges to laws infringing upon Second Amendment rights. In neither case was the Supreme Court troubled by the fact that the laws, being of general application, could be properly applied against individuals having no business possessing firearms. Simply put, *Salerno* did not pre-empt *Heller* and *McDonald*, and it cannot be invoked to render those decisions dead letters. The government may not deprive everyone of fundamental rights, simply because one individual may be barred from exercising those rights. And in any event, Plaintiffs' purposes in challenging the law are finite and clear.

III. THE SECOND AMENDMENT SECURES A RIGHT TO CARRY ARMS IN PUBLIC.

Defendants argue that because the Supreme Court has applied the Second Amendment only in the context of gun possession for home self-defense, the right is necessarily restricted to the home. As a corollary, Defendants cite an array of mostly unpublished decisions rejecting Second Amendment claims, for the uncontroversial and quite irrelevant proposition that the Second Amendment does not secure an absolute right in the sense that all gun laws must be invalidated.[6] The argument are unavailing. Although *Heller* does not require invalidating all laws regulating guns in public, "*Heller* does not preclude Second Amendment challenges to laws regulating firearm possession outside of home." *Peruta* v. *County of San Diego*, 678 F. Supp. 2d 1046, 1051 (S.D. Ca. 2010).

[6]Plaintiffs do not challenge all gun laws, only the ones noted in the Complaint.

Heller and *McDonald* repeatedly referred to Second Amendment activities occurring outside the home. "Americans valued the ancient right [to keep and bear arms] . . . for self-defense *and hunting*." *Heller*, 128 S. Ct. at 2801 (emphasis added). "The settlers' dependence on game for food and economic livelihood, moreover, undoubtedly undergirded . . . state constitutional guarantees [of the right to arms]." *McDonald*, 177 L. Ed. 2d at 921 n.27. "No doubt, a citizen who keeps a gun or pistol under judicious precautions, *practices in safe places the use of it*, and in due time teaches his sons to do the same, exercises his individual right." *Heller*, 128 S. Ct. at 2812 (citation omitted) (emphasis added). Describing Second Amendment rights, the Supreme Court invoked Senator Sumner's famous "Bleeding Kansas" speech: "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest." *Heller*, 128 S. Ct. at 2807 (citation omitted).

These constant references to the right to arms outside the home are not accidental. The Second Amendment applies "*most notably* for self-defense within the home," *McDonald*, 177 L. Ed. 2d at 922 (plurality op.) (emphasis added), but not exclusively so. Analysis begins with the constitutional text. The Second Amendment protects the right "to keep and bear arms." U.S. Const. amend. II. This syntax is not unique within the Bill of Rights. For example, the Sixth Amendment guarantees the right to a "speedy and public trial," U.S. Const. amend. VI, while the Eighth Amendment secures individuals from "cruel and unusual" punishment. U.S. Const. amend. VIII. Just as the Sixth Amendment does not sanction secret, speedy trials or public, slow trials, and the Eighth Amendment does not allow the usual practice of torture, the Second Amendment's reference to "keep and bear" refers to two distinct concepts.

The Supreme Court confirmed as much, rejecting the argument that "keep and bear arms" was a unitary concept referring only to a right to possess weapons in the context of military duty. "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 128 S. Ct. at 2793 (citations omitted). To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 128 S. Ct. at 2793 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)); BLACK'S LAW DICTIONARY 214 (6th Ed. 1998)); *see also Heller*, 128 S. Ct. at 2804 ("the Second Amendment right, protecting only individuals' liberty to keep *and carry* arms . . ."), at 2817 ("the right to keep *and carry* arms") (emphasis added). "[B]ear arms means . . . simply the carrying of arms . . ." *Heller*, 128 S. Ct. at 2796.

Having defined the Second Amendment's language as including a right to "carry" guns for self-defense, the Supreme Court helpfully noted several exceptions that prove the rule. Explaining that this right is "not unlimited," in that there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 128 S. Ct. at 2816 (citations omitted), the Court confirmed that there is a right to carry at least some weapons, in some manner, for some purpose. The Court then listed as "presumptively lawful," *id.*, at 2817 n.26, "laws forbidding the carrying of firearms in sensitive places," *id.*, at 2817, confirming both that such "presumptions" may be overcome in appropriate circumstances, and that carrying bans are *not* presumptively lawful in non-sensitive places.

Heller's dissenters acknowledged that the decision protected the public carrying of arms:

> Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

Heller, 128 S. Ct. at 2846 (Stevens, J., dissenting).

In upholding the right to carry a handgun under the Second Amendment, *Heller* broke no new ground. As early as 1846, Georgia's Supreme Court, applying the Second Amendment, quashed an indictment for the carrying of a handgun that failed to allege whether the handgun was being carried in a constitutionally-protected manner. *Nunn* v. *State*, 1 Ga. 243, 251 (1846); *see also In re Brickey*, 8 Idaho 597, 70 P. 609 (1902) (Second Amendment right to carry handgun). Numerous state constitutional right to arms provisions have likewise been interpreted as securing the right to carry a gun in public, albeit often, to be sure, subject to some regulation. *See*, *e.g.* *Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State ex rel. City of Princeton* v. *Buckner*, 180 W. Va. 457, 377 S.E.2d 139 (1988); *City of Las Vegas* v. *Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. Ct. App. 1971); *State* v. *Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) (striking down ban on concealed carry); *Andrews* v. *State*, 50 Tenn. 165 (1871); *see also State* v. *Delgado*, 298 Or. 395, 692 P.2d 610 (Or. 1984) (right to carry a switchblade knife).

The right to bear arms is not abrogated by recognition of its well-established regulation. To the contrary, precedent approving of the government's ability to regulate the carrying of handguns confirms the general rule to which it establishes exceptions. Traditionally, "the right of the people to keep and bear arms (Article 2) is not infringed by laws prohibiting the carrying of *concealed* weapons . . . ." *Robertson* v. *Baldwin*, 165 U.S. 275, 281-82 (1897) (emphasis added).

But more recently, the Supreme Court has suggested that such bans are only "presumptively" constitutional. *Heller*, 128 S. Ct. at 2817 n.26 (emphasis added). Surveying the history of concealed carry prohibitions, it appears time and again that such laws have always been upheld as mere regulations of the manner in which arms are carried – with the understanding that a complete ban on the carrying of handguns is unconstitutional.

Heller discussed, with approval, four state supreme court opinions that referenced this conditional rule. *See Heller*, 128 S. Ct. at 2818 (discussing *Nunn*, *supra*, 1 Ga. 243; *Andrews, supra*, 50 Tenn. 165; and *State* v. *Reid*, 1 Ala. 612, 616-17 (1840)) and 128 S. Ct. at 2809 (citing *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850)). In *Reid*, upholding a ban on the carrying of concealed weapons, Alabama's high court explained:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional. But a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution.

Reid, 1 Ala. at 616-17.

The *Nunn* court followed *Reid*, and quashed an indictment for publicly carrying a pistol for failing to specify how the weapon was carried:

> so far as the act . . . seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.

Nunn, 1 Ga. at 251 (emphasis original).

Andrews presaged *Heller* by finding that a revolver was a protected arm under the state constitution's Second Amendment analog. It therefore struck down as unconstitutional the application of a ban on the carrying of weapons to a man carrying a revolver, declaring:

> If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained.

Andrews, 165 Tenn. at 187-88.[7]

Finally, in *Chandler,*

> the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

Heller, 128 S. Ct. at 2809 (quoting *Chandler*, 5 La. Ann. at 490).

The legal treatises relied upon by the *Heller* court explained the rule succinctly. For supporting the notion that concealed carrying may be banned, *Heller* further cites to THE AMERICAN STUDENTS' BLACKSTONE, 84 n.11 (G. Chase ed. 1884). *Heller*, 128 S. Ct. at 2816. Here is what that source provides:

> [I]t is generally held that statutes prohibiting the carrying of *concealed* weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence. In some States, however, a contrary doctrine is maintained.

AMERICAN STUDENTS' BLACKSTONE, 84 n.11 (emphasis original). This understanding survives.

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[7] *Andrews* appeared to abrogate in large part *Aymette* v. *State*, 21 Tenn. 154 (1840), upholding the prohibition on the concealed carry of daggers. But even *Aymette*, which found a state right to bear arms limited by a military purpose, deduced from that interpretation that the right to bear arms protected the open carrying of arms. *Aymette*, 21 Tenn. at 160-61.

See, e.g. In re Application of McIntyre, 552 A.2d 500, 501 n.1 (Del. Super. 1988) ("[T]he right to keep and bear arms' does not of necessity require that such arms may be kept concealed.").

It is important, then, to recall that (1) the Supreme Court's definition of "bear arms" as that language is used in the Second Amendment includes the concealed carrying of handguns: "wear, bear, or carry . . . *in the clothing or in a pocket* . . ." *Heller*, 128 S. Ct. at 2793 (citations omitted) (emphasis added); (2) the legality of bans on concealed carrying is only "presumptive," *Heller*, 128 S. Ct. at 2817 n.26; and (3) the cases supporting concealed carry prohibition explain that no abrogation of the right to carry arms is effected because open carrying is still permitted.

North Carolina requires a permit to carry a concealed handgun, but not to carry a handgun openly. *State* v. *Kerner*, 181 N.C. 574, 107 S.E. 222 (1921). Plaintiffs make no claim to a right to carry handguns in a particular manner, but seek to carry guns only consistent with state law in the absence of the unconstitutional restrictions. Their right to do so is secured by the Second Amendment.

IV. THE SECOND AMENDMENT SECURES A RIGHT TO PURCHASE ARMS AND AMMUNITION.

"[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). Accordingly, the right to have and use a constitutionally-protected article includes the right to buy, sell, trade, and display such articles. For example, "[t]he setting of the bookstore or the commercial theater [are] each presumptively under the protection of the First Amendment." *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973).

> [I]t . . . requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices.

Smith v. *California*, 361 U.S. 147, 150 (1959) (citations omitted); *Virginia* v. *American Booksellers Ass'n,* 484 U.S. 383, 393 (1988) (Booksellers have standing to assert First Amendment rights of bookbuyers.). "When a person buys a book at a bookstore, he engages in activity protected by the First Amendment because he is exercising his right to read and receive ideas and information." *Tattered Cover* v. *City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002); *Wexler* v. *City of New Orleans*, 267 F. Supp. 2d 559 (E.D. La. 2005) (enjoining ban on sidewalk book sales); *Washington Free Community, Inc.* v. *Wilson*, 334 F. Supp. 77 (D.D.C. 1971) (enjoining ban on newspaper sales in parks).

Likewise, the sale of contraceptives is protected by the right to make family planning decisions, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and even the sale of sex toys has been held protected by the recently-recognized right to engage in consensual intimate relationships. *Reliable Consultants, Inc.* v. *Earle*, 517 F.3d 738 (5th Cir. 2008); *but see Williams* v. *Morgan*, 478 F.3d 1316 (11th Cir. 2007).

It follows that the people have the right to buy and sell the arms and ammunition whose keeping and bearing is protected by the Second Amendment. "The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews*, 50 Tenn. at 178. This is in keeping with longstanding tradition. "Our citizens have always been free to make, vend and export arms. It is the constant occupations and livelihood of some of them." 3 THE

WRITINGS OF THOMAS JEFFERSON 230 (T.J. Randolph, ed., 1830). As the Third Circuit recently held, a complete ban on commerce in arms would run afoul of the Second Amendment. "If there were somehow a categorical exception for these restrictions [on gun sales], it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*." *Marzzarella*, 2010 U.S. App. Lexis 15655 at *15 n.8.[8]

V. SECOND AMENDMENT RIGHTS CANNOT BE SUSPENDED ON ACCOUNT OF THE EMERGENCIES SUCH RIGHTS ARE DESIGNED TO ALLEVIATE.

Defendants ably argue that the they should have an emergency power to impose curfews, a point not disputed by Plaintiffs. Yet it seems unlikely that courts would uphold, or that Defendants would impose, a curfew on the entire state lasting a full month or more. And it is one thing to impose a curfew, quite another to disarm individuals in the absence of a curfew; or to punish individuals who are caught by happenstance during a curfew for their possession of arms (because the carrying of arms is a normal activity); or to prevent individuals from arming themselves at home, regardless of whether a curfew is imposed.

Law-abiding citizens do not seek arms during times of crisis because they wish to wreak havoc. They seek arms for "the core lawful purpose of self-defense." *Heller*, 128 S. Ct. at 2818.

> As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury."

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[8]Congress has also recognized a right to purchase arms and ammunition. The Protection of Lawful Commerce in Arms Act, immunizing the gun industry from abusive tort claims, was enacted "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes," pursuant to Section 5 of the Fourteenth Amendment. 15 U.S.C. § 7901(b)(2) & (3).

Heller, 128 S. Ct. at 2799 (citations omitted); *McDonald*, 177 L. Ed. 2d at 921 n.27.

North Carolina's definition of a "state of emergency" aptly describes situations where "the intervention of society [on a person's] behalf, may be too late to prevent an injury." It disarms individuals whenever "public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent." N.C. Gen. Stat. § 14-288.1(10). Defendants correctly add that "[d]uring the tense and rapidly evolving circumstances attendant to emergency situations, the threat of armed mayhem and social unrest is greatly enhanced." Def. Br. at 7. That is a precise description of why an individual's Second Amendment interests are at their apex during emergencies.

Plaintiffs are not seeking to overturn laws barring armed mayhem and the fomenting of social unrest. They seek only to defend themselves against these evils, at precisely those times during which the State, not ordinarily obligated to provide any police protection, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), expressly declares that it cannot provide even its voluntary protection.

The challenged laws squarely defy the Second Amendment's guarantee, and accordingly, cannot stand. *Heller*, 128 S. Ct. at 2818 (Functional firearm ban "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional.").

VI. THE COMPLAINT ADDRESSES A RIPE CONTROVERSY BECAUSE THE CHALLENGED LAWS HAVE BEEN, AND ARE REGULARLY IMPLEMENTED AND ENFORCED.

Defendants argue that the challenge to the enabling provisions are not ripe, because "[n]o . . . specific prohibition or restriction [enacted pursuant to the provisions] is currently in effect (or, for that matter, even threatened)." Def. Br. at 17. The enabling provisions, according to

Defendants, do not "purport to dictate the content of such regulations . . . [t]hus, there is currently no tangible prohibition or restriction before this Court." Def. Br. at 15. "[T]his Court cannot meaningfully assess the constitutional validity of a prohibition or regulation involving firearms during a state of emergency without knowing the precise language and scope of the regulation at issue." Def. Br. at 16. Curiously, this argument is not advanced in defense of the automatic carrying prohibition, N.C. Gen. Stat. § 14-288.7

The argument is factually and legally erroneous.

There exists no mystery as to what exactly the challenged provisions do. They authorize "prohibitions and restrictions . . .(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances . . ." N.C. Gen. Stat. § 14-288.12(b) (municipal declarations); accord N.C. Gen. Stat. §§ 14-288.13(b) (county declarations), 14-288.15(d) (gubernatorial declarations). The challenge is to application of this provision as against arms protected by the Second Amendment.[9]

Defendant City of King invoked Section 14-288.12(b) to declare, "There shall be no sale or purchase of any type of firearm or ammunition, or possession of such items . . . off owner's own premises." Exhibit B; Complaint, ¶ 20. While in theory, future invocations of this provision might contain different restrictions, that prospect is irrelevant considering (1) that the provision authorizes prohibitions, which have been enacted, and (2) that Plaintiffs challenge the entire concept that their right to keep and bear arms for a lawful purpose can be suspended during a

[9]To the extent this provision reaches materials that would not qualify as "arms" under the Second Amendment, e.g. certain types of explosives, it is not challenged.

time of emergency. The Court need not wonder what the legislation reaches. The legislation is plain on its face, and it was just applied against Plaintiffs in unmistakable terms.

Standing exists where Plaintiffs can point to "a threat of specific future harm." *Laird* v. *Tatum*, 408 U.S. 1, 14 (1972). That is not difficult to do in this case. Earlier this year, Defendant King banned the sale, carrying, and possession of guns and ammunition. State law authorizes Defendant King, and every level of government throughout North Carolina, to do so again.

Defendants' citations to cases such as *Doe* v. *Duling,* 782 F.2d 1202 (4th Cir. 1986), are unavailing. In *Doe*, the Fourth Circuit rejected the credibility of the prosecutorial threat in declining to hear a challenge to Virginia's ancient bans on fornication and cohabitation, the last recorded convictions for which had occurred in 1849 and 1883, respectively. In contrast, in this case, the law's last recorded application occurred on February 5, 2010. And perhaps unlike Virginia's 1986 defense of its fornication and cohabitation laws, Defendants today argue at length that their restrictions are constitutional and advance the public's interests. Indeed, in a different part of the same brief, Defendants invoke precedent upholding invocation of these laws to impose a curfew in 1971. Def. Br. at 10-11 (citing *United States* v. *Chalk*, 441 F.2d 1277 (4th Cir. 1971)).

As a general rule, however, pre-enforcement challenges are permitted where the statutes being challenged are "not moribund." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). As recently as 1968, the Supreme Court let a teacher challenge Arkansas' "monkey law," notwithstanding the possibility that "the statute is presently more of a curiosity than a vital fact of life." *Epperson* v. *Arkansas*, 393 U.S. 97, 102 (1968).

If anything, "[t]here may be a trend in favor of . . . a practical approach" to standing, where "courts are content with any realistic inferences that show a likelihood of prosecution." *New Hampshire Hemp Council, Inc.* v. *Marshall*, 203 F.3d 1, 5 (1st Cir. 2000); *Maryland State Conf. of NAACP Branches* v. *Maryland Dep't of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999) ("[P]laintiffs' likelihood of injury depends only on their status as a member of a minority group and their need to travel on I-95.").

To this end, courts routinely allow challenges to statutes immediately upon their effective date. *See, e.g., Reno* v. *ACLU*, 521 U.S. 844, 861 (1997) ("[I]mmediately after the President signed the statute, 20 plaintiffs filed suit against the Attorney General of the United States and the Department of Justice.") (footnote omitted); *Carhart* v. *Gonzales*, 413 F.3d 791, 792 (8th Cir. 2005) ("The day the President signed the Act into law, plaintiffs filed suit."), *rev'd on other grounds*, 550 U.S. 124 (2007). Simply put, the government is not permitted one or several "free" applications under a new law. The enabling provisions, however, are not new. They have been invoked for decades, and as recently as seven months ago.

Nor does the fact that the "emergency" in King has passed pose any problem. The Supreme Court has long recognized the concept that cases are not moot if they are "capable of repetition, yet evading review." *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 754 n.1 (4th Cir. 2010). "The exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)

(citation and internal quotation marks omitted). The doctrine applies in both facial and as-applied challenges. *Id.* at 463; *Storer*, 415 U.S. at 737 n.8.

"Our cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it will again be subjected to the alleged illegality, or will be subject to the threat of prosecution under the challenged law." *WRTL*, 551 U.S. at 463 (citations and internal quotation marks omitted). Both factors are easily satisfied here. There is no question that future emergencies will arise, and the enabling statutes will again be invoked.[10] Defendants' strenuous defense of firearms restrictions during emergencies, and insistence that there is no constitutional impediment to such laws, signal that Plaintiffs will be prosecuted for violations. "[T]he challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974).

[10]Even if the dispute related to the enactment of a law, rather than its implementation, "the mere amendment or repeal of a challenged ordinance does not automatically moot a challenge to that ordinance." *American Legion Post 7* v. *City of Durham*, 239 F.3d 601, 605 (4th Cir. 2001). "[C]ases will not be dismissed as moot if the Court believes there is a likelihood of reenactment of a substantially similar law if the lawsuit is dismissed." *Id.*, at 606 (quoting Erwin Chemerinsky, FEDERAL JURISDICTION 139 (3d ed. 1999)).

CONCLUSION

The Complaint plainly spells out a simple, but serious, constitutional violation. Defendants' motion should be denied.

Dated: September 24, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of September, 2010, I electronically filed the foregoing Memorandum with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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UNITED STATES OF AMERICA v. MICHAEL MARZZARELLA, Appellant

No. 09-3185

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2010 U.S. App. LEXIS 15655

February 22, 2010, Argued
July 29, 2010, Filed

PRIOR HISTORY: [*1]

On Appeal from the United States District Court for the Western District of Pennsylvania. D.C. Criminal No. 07-cr-0024. Honorable Sean J. McLaughlin.
United States v. Marzzarella, 595 F. Supp. 2d 596, 2009 U.S. Dist. LEXIS 2836 (W.D. Pa., 2009)

COUNSEL: THOMAS W. PATTON, ESQUIRE (ARGUED), Office of Federal Public Defender, Erie, Pennsylvania, Attorney for Appellant.

LAURA S. IRWIN, ESQUIRE (ARGUED), ROBERT L. EBERHARDT, ESQUIRE, Office of the United States Attorney, Pittsburgh, Pennsylvania, Attorneys for Appellee.

JUDGES: Before: SCIRICA and CHAGARES, Circuit Judges, and RODRIGUEZ *, District Judge.

* The Honorable Joseph H. Rodriguez, United States District Judge for the District of New Jersey, sitting by designation.

OPINION BY: SCIRICA

OPINION

OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

This appeal presents a single issue, whether Defendant Michael Marzzarella's conviction under *18 U.S.C. § 922(k)* for possession of a handgun with an obliterated serial number violates his *Second Amendment* right to keep and bear arms. We hold it does not and accordingly will affirm the conviction.

I.

In April 2006, the Pennsylvania State Police were notified by a confidential informant that Marzzarella was involved in the sale of stolen handguns. On April 25, the confidential informant arranged a purchase of handguns from Marzzarella. [*2] The next day, State Trooper Robert Toski, operating in an undercover capacity, accompanied the informant to Marzzarella's home in Meadville, Pennsylvania, where Toski purchased a .25 caliber Titan pistol with a partially obliterated serial number for $ 200. On May 16, Marzzarella sold Toski a second firearm and informed him that its serial number could be similarly obliterated.

On June 12, 2007, Marzzarella was indicted for possession of a firearm with an obliterated serial number, in violation of *§ 922(k)*. [1] No charges were brought for the sale of the Titan pistol or the sale or possession of the second firearm. Marzzarella moved to dismiss the indictment, arguing *§ 922(k)*, as applied, violated his *Second Amendment* right to keep and bear arms, as recognized by the Supreme Court in *District of Columbia v. Heller, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*. The District Court denied the motion, holding the *Second Amendment* does not protect a right to own handguns

with obliterated serial numbers and that *§ 922(k)* does not meaningfully burden the "core" right recognized in *Heller*--the right to possess firearms for defense of hearth and home. Moreover, it held that because *§ 922(k)* is designed to regulate [*3] the commercial sale of firearms and to prevent possession by a class of presumptively dangerous individuals, it is analogous to several longstanding limitations on the right to bear arms identified as presumptively valid in *Heller*. Finally, the District Court held that even if Marzzarella's possession of the Titan pistol was protected by the *Second Amendment*, *§ 922(k)* would pass muster under intermediate scrutiny as a constitutionally permissible regulation of *Second Amendment* rights.

1 *Section 922(k)* provides:

> It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

We recognize the words "removed," "obliterated," and "altered" may denote distinct actions. *See United States v. Carter, 421 F.3d 909, 912-13 (9th Cir. 2005)* (detailing the difference in the ordinary meanings of "obliterated" and "altered" in *U.S.S.G. § 2K2.1(b)(4)*). [*4] Because the disposition of this case does not turn on their distinctions, we use these terms, as well as the term "unmarked," interchangeably.

After the denial of the motion to dismiss the indictment, Marzzarella entered a conditional guilty plea, reserving the right to appeal the constitutionality of *§ 922(k)*. The District Court sentenced him to nine months imprisonment. Marzzarella now appeals. [2]

2 The District Court had jurisdiction over Marzzarella's indictment under *18 U.S.C. § 3231*. We have jurisdiction over the appeal pursuant to *28 U.S.C. § 1291*. We exercise plenary review of a constitutional challenge to the application of a statute. *United States v. Fullmer, 584 F.3d 132, 151 (3d Cir. 2009)*.

II.

The *Second Amendment* provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *U.S. Const. amend. II*. To determine whether *§ 922(k)* impermissibly burdens Marzzarella's *Second Amendment* rights, we begin with *Heller*. [3]

3 The Supreme Court recently issued its decision in *McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)*. *McDonald* dealt primarily with the incorporation of the *Second Amendment* [*5] against the states, *id. at 3050* (plurality opinion of Alito, J.), and does not alter our analysis of the scope of the right to bear arms.

In *Heller*, the Supreme Court struck down several District of Columbia statutes prohibiting the possession of handguns and requiring lawfully owned firearms to be kept inoperable. *128 S. Ct. at 2817-18*. The Court concluded the *Second Amendment* "confer[s] an individual right to keep and bear arms," *id. at 2799*, at least for the core purpose of allowing law-abiding citizens to "use arms in defense of hearth and home," *id. at 2821*. Although the Court declined to fully define the scope of the right to possess firearms, it did caution that the right is not absolute. *Id. at 2816-17* ("Like most rights, the right secured by the *Second Amendment* is not unlimited. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . ."). But because the District of Columbia's laws prevented persons from possessing firearms even for self-defense in the home, they were unconstitutional under any form of means-end scrutiny applicable to assess the validity of limitations on constitutional rights. *Id. at 2817-18* [*6] ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . [the statutes] would fail constitutional muster." (citation and footnote omitted)).

As we read *Heller*, it suggests a two-pronged approach to *Second Amendment* challenges. First, we ask whether the challenged law imposes a burden on conduct

falling within the scope of the *Second Amendment's* guarantee. *Cf. United States v. Stevens, 533 F.3d 218, 233 (3d Cir. 2008), aff'd 130 S. Ct. 1577, 176 L. Ed. 2d 435* (recognizing the preliminary issue in a *First Amendment* challenge is whether the speech at issue is protected or unprotected). [4] If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

> 4 Because *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating *Second Amendment* challenges. We think the *First Amendment* is the natural choice. *Heller* itself repeatedly invokes the *First Amendment* in establishing principles governing the *Second Amendment*. *See, e.g.*, [*7] *128 S. Ct. at 2791-92* ("Just as the *First Amendment* protects modern forms of communications . . . the *Second Amendment* extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citation omitted)); *id. at 2799* ("Of course the right [to bear arms] was not unlimited, just as the *First Amendment's* right of free speech was not." (citation omitted)); *id. at 2821* ("The *First Amendment* contains the freedom-of-speech guarantee that the people ratified, which included exceptions . . . but not for the expression of extremely unpopular and wrong-headed views. The *Second Amendment* is no different. Like the First, it is the very *product* of an interest-balancing by the people . . . ."). We think this implies the structure of *First Amendment* doctrine should inform our analysis of the *Second Amendment*.

A.

Our threshold inquiry, then, is whether *§ 922(k)* regulates conduct that falls within the scope of the *Second Amendment*. In other words, we must determine whether the possession of an unmarked firearm in the home is protected by the right to bear arms. In defining the *Second Amendment*, the Supreme Court began by analyzing the [*8] text of the "operative clause," which provides that "the right of the people to keep and bear Arms, shall not be infringed." *Heller, 128 S. Ct. at 2789-90*. Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *id. at 2821*, the Court interpreted the text in light of its meaning at the time of ratification, *id. at 2797-99*. It concluded that the *Second Amendment* codified a pre-existing "individual right to possess and carry weapons in case of confrontation." *Id. at 2797*. The "prefatory clause"--providing "[a] well regulated Militia being necessary to the security of a Free State"--explains only the purpose for codification, *viz.*, preventing the disbandment of the militia by the federal government. *Id. at 2801*. It says nothing about the content of the right to bear arms and does not mean the right was protected solely to preserve the militia. *Id.* "[M]ost [Americans] undoubtedly thought it even more important for self-defense and hunting," and the interest in self-defense "was the *central component* of the right itself." *Id.*

But the right protected by the *Second Amendment* is not unlimited. [5] *Id. at 2816*; *see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010)* [*9] (plurality opinion of Alito, J.) (reiterating the limited nature of the right to bear arms). First, it does not extend to all types of weapons, only to those typically possessed by law-abiding citizens for lawful purposes. *Id. at 2815-16* (interpreting *United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939)*). In *Miller*, the Supreme Court reversed the dismissal of an indictment of two men for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of then *28 U.S.C. § 1332(c)* and *(d)*. *307 U.S. at 175*. The Court held the shotgun was unprotected by the *Second Amendment*. *Id. at 178*. In *Heller*, the Court explained that "*Miller* stands only for the proposition that the *Second Amendment* right, whatever its nature, extends only to certain types of weapons," *128 S. Ct. at 2814*--those commonly owned by law-abiding citizens, *id. at 2815-16*. This proposition reflected a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id. at 2817*. Accordingly, the right to bear arms, as codified in the *Second Amendment*, affords no protection to "weapons not typically possessed by law-abiding citizens for lawful purposes." *Id. at 2815-16*.

> 5 There is some dispute [*10] over whether the language from *Heller* limiting the scope of the *Second Amendment* is dicta. *Compare United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010)* (characterizing this language as dicta), *petition for cert. filed,* (U.S. June 1, 2010)

(09-11204), *and United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009)* (Tymkovich, J., dissenting) (same), *cert. denied, 130 S. Ct. 1686, 176 L. Ed. 2d 179 (2010) with United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010)* (stating this language is not dicta), *cert. denied, 177 L. Ed. 2d 313, 78 U.S.L.W. 3714 (U.S. June 7, 2010), and United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010)* (same). But even if dicta, it is Supreme Court dicta, and, as such, requires serious consideration. *See Heleva v. Brooks, 581 F.3d 187, 188 n.1 (3d Cir. 2009)* ("[W]e do not view [Supreme Court] dicta lightly." (alterations in original) (internal quotation marks omitted)); *see also Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006)* ("[T]here is dicta and then there is dicta, and then there is Supreme Court dicta."). Several other courts of appeals have followed this dicta. *See, e.g., United States v. Skoien, No. 08- 3770, 2010 U.S. App. LEXIS 14262, 2010 WL 2735747, at *3 (July 13, 2010 7th Cir.)* [*11] (en banc); *United States v. White, 593 F.3d 1199, 1205-06 (11th Cir. 2010)* (extending it to cover a ban on possession by domestic violence offenders); *United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2009)* (finding the prohibition of juvenile possession of firearms was consistent with the approach of *Heller*'s dicta), *cert. denied, 130 S. Ct. 1109, 175 L. Ed. 2d 921 (2010)*; *McCane, 573 F.3d at 1047* (relying solely on this dicta to conclude a ban on possession of firearms by felons did not offend the *Second Amendment*); *United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009), cert. denied, 129 S. Ct. 2814, 174 L. Ed. 2d 308 (2009)*; *United States v. Fincher, 538 F.3d 868, 873-74 (8th Cir. 2008)* (upholding a ban on machine guns), *cert. denied, 129 S. Ct. 1369, 173 L. Ed. 2d 591 (2009)*. Moreover, the Court itself reaffirmed the presence of these limitations in *McDonald. 130 S.Ct. at 3047* (plurality opinion of Alito, J.).

Moreover, the Court identified several other valid limitations on the right similarly derived from historical prohibitions. *Id. at 2816-17*.

> Although we do not undertake an exhaustive historical analysis today of the full scope of the *Second Amendment*, nothing in our opinion should be taken to cast doubt on longstanding prohibitions [*12] on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. The Court explained that this list of "presumptively lawful regulatory measures" was merely exemplary and not exhaustive. *Id. at 2817 n.26*.

We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated *Second Amendment* doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the *Second Amendment*. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think the better reading, based on the text and the structure of *Heller*, is the former--in other words, that these longstanding limitations are exceptions to the right to bear arms. [6] Immediately following the above-quoted passage, the Court discussed "another important limitation" on the *Second Amendment*--restrictions [*13] on the types of weapons individuals may possess. *Heller, 128 S. Ct. at 2817*. The Court made clear that restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment. *Id. at 2815-16* ("[T]he *Second Amendment* does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ."). By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the Court intended to treat them equivalently--as exceptions to the *Second Amendment* guarantee.

> 6 *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375, 413 (2009)* ("*Heller* categorically excludes certain types of 'people' and 'Arms' from *Second Amendment* coverage, denying them any constitutional protection whatsoever.").

This reading is also consistent with the historical approach *Heller* used to define the scope of the right. If the *Second Amendment* codified a pre-existing right to bear arms, *id. at 2797*, it codified the pre-ratification understanding of that right, *id. at 2821* ("Constitutional rights are enshrined [*14] with the scope they were understood to have when the people adopted them . . . ."). Therefore, if the right to bear arms as commonly understood at the time of ratification did not bar restrictions on possession by felons or the mentally ill, it follows that by constitutionalizing this understanding, the *Second Amendment* carved out these limitations from the right. Moreover, the specific language chosen by the Court refers to "prohibitions" on the possession of firearms by felons and the mentally ill. *Id. at 2816-17*. The endorsement of prohibitions as opposed to regulations, whose validity would turn on the presence or absence of certain circumstances, suggests felons and the mentally ill are disqualified from exercising their *Second Amendment* rights. [7] The same is true for "laws forbidding the carrying of firearms in sensitive places." [8] *Heller, 128 S. Ct. at 2817*.

7 *See Blocher, supra note 5, at 414* (reading this language to stand for the proposition that "felons and the mentally ill, however defined, are excluded entirely from *Second Amendment* coverage").

8 Commercial regulations on the sale of firearms do not fall outside the scope of the *Second Amendment* under this reading. *Heller* [*15] endorsed "laws imposing conditions and qualifications on the commercial sale of firearms." *128 S. Ct. at 2817*. In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.

Accordingly, *Heller* delineates some of the boundaries of the *Second Amendment* right to bear arms. [9] At its core, the *Second Amendment* protects the right of law-abiding citizens to possess non-dangerous [10] weapons for self-defense in the home. *Id. at 2821* ("[W]hatever else [the *Second Amendment*] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). And certainly, to some degree, it must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes. *See, e.g., id. at 2801* (discussing hunting's importance to the pre-ratification [*16] conception of the right); *id.* (discussing the right to bear arms as a bulwark against potential governmental oppression). The right is not unlimited, however, as the *Second Amendment* affords no protection for the possession of dangerous and unusual weapons, possession by felons and the mentally ill, and the carrying of weapons in certain sensitive places. *Id. at 2816-17*.

9 *McDonald* concerns primarily the incorporation of the *Second Amendment*; its discussion of the scope of the right to bear arms is coextensive with *Heller*'s.

10 By "non-dangerous weapons," we refer to weapons that do not trigger *Miller*'s exception for dangerous and unusual weapons.

But *Heller* did not purport to fully define all the contours of the *Second Amendment*, *id. at 2816* ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the *Second Amendment* . . . ."), and accordingly, much of the scope of the right remains unsettled. While the *Second Amendment* clearly protects possession for certain lawful purposes, it is not the case that all possession for these purposes is protected conduct. For example, although the *Second Amendment* protects the individual right to possess firearms for defense [*17] of hearth and home, *Heller* suggests, and many of our sister circuits have held, a felony conviction disqualifies an individual from asserting that interest. *See 128 S. Ct. at 2816-17*; *United States v. Rozier, 598 F.3d 768, 770 (11th Cir. 2010)* ("We find *18 U.S.C. § 922(g)(1)* to be constitutional, even if a felon possesses a firearm purely for self-defense."), *cert. denied, 177 L. Ed. 2d 313, 78 U.S.L.W. 3714 (U.S. June 7, 2010)*; *see also United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010)*; *United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009)*, *cert. denied, 129 S. Ct. 2814, 174 L. Ed. 2d 308 (2009)*. This is so, even if a felon arguably possesses just as strong an interest in defending himself and his home as any law-abiding individual.

Moreover, *Heller*'s list of presumptively lawful regulations is not exhaustive, *128 S. Ct. at 2817 n.26*, and

accordingly, the *Second Amendment* appears to leave intact additional classes of restrictions. But the approach for identifying these additional restrictions is also unsettled. *Heller*'s identified exceptions all derived from historical regulations, but it is not clear that pre-ratification presence is the only avenue to a categorical exception. For example, does *18 U.S.C. § 922(g)(3)*'s [*18] prohibition of possession by substance abusers violate the *Second Amendment* because no restrictions on possession by substance abusers existed at the time of ratification? Or is it valid because it presumably serves the same purpose as restrictions on possession by felons--preventing possession by presumptively dangerous individuals? *See Scarborough v. United States, 431 U.S. 563, 572, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977)* ("[By prohibiting possession by felons,] Congress sought to rule broadly--to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." (internal quotation marks omitted)); *United States v. Cheeseman, 600 F.3d 270, 280 (3d Cir. 2010)* (noting, in a criminal forfeiture action, that congressional intent in passing *§ 922(g)(3)* was "to keep firearms out of the possession of drug abusers, a dangerous class of individuals"), *petition for cert. filed*, 78 U.S.L.W. 3731 (U.S. June 1, 2010) (No. 09-1470). Therefore, prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*. *Cf. Stevens, 533 F.3d at 225* (counseling restraint when extending the logic of categorical exceptions [*19] for unprotected speech to new types of speech).

Section 922(k)'s prohibition of the possession of firearms with "removed, obliterated, or altered" serial numbers is one of those regulations unmentioned by *Heller*. Marzzarella argues *§ 922(k)* is unconstitutional because the *Second Amendment* categorically protects the right to possess unmarked firearms. *Heller* defined the *Second Amendment* by looking to what the right meant at the time of ratification. *128 S. Ct. at 2798-99*. Because the *Second Amendment* protects weapons "of the kind in common use at the time," *id. at 2815* (quoting *Miller, 307 U.S. at 179*), it must, says Marzzarella, protect firearms in common use at the time of ratification. He alleges that firearms in common use in 1791 did not possess serial numbers. Accordingly, he contends the *Second Amendment* must protect firearms without serial numbers.

We are not persuaded by Marzzarella's historical syllogism. His argument rests on the conception of unmarked firearms as a constitutionally recognized class of firearms, in much the same way handguns constitute a class of firearms. That premise is unavailing. *Heller* cautions against using such a historically fact-bound approach when [*20] defining the types of weapons within the scope of the right. *128 S. Ct. at 2791* ("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."). Moreover, Marzzarella himself asserts that serial numbers on firearms did not exist at the time of ratification. [11] Accordingly, they would not be within the contemplation of the pre-existing right codified by the *Second Amendment*. It would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms.

> 11 Marzzarella does not cite to any source for this assertion, but it appears that serial numbers arose only with the advent of mass production of firearms. *See* Thomas Henshaw, The History of Winchester Firearms 1866-1992, at ix (6th ed. 1993) (listing the first recorded serial number on a Winchester firearm as appearing in 1866); National Park Service, U.S. Department of the Interior, Springfield Armory National Historic Site -- M1865-88 rifles, http://www.nps.gov/spar/historyculture/m1865-88-rifles.htm [*21] (last visited July 8, 2010) (stating that no serial numbers appeared on Springfield Armory weapons until 1868).

Furthermore, it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. *Heller* distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality. *Id. at 2818* (citing handguns' ease in storage, access, and use in case of confrontation). But unmarked firearms are functionally no different from marked firearms. The mere fact that some firearms possess a nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic.

Although there is no categorical protection for unmarked firearms, Marzzarella's conduct may still fall within the *Second Amendment* because his possession of

the Titan pistol in his home implicates his interest in the defense of hearth and home--the core protection of the *Second Amendment*. While the burden on his ability to defend himself is not as heavy as the one involved in *Heller*, infringements on protected rights can be, depending on the facts, as constitutionally suspect [*22] as outright bans. *See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)* ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."). Marzzarella contends that by preventing him from possessing this particular handgun in his home, *§ 922(k)* unconstitutionally limited his ability to defend himself. [12]

> 12 The Government argues Marzzarella did not possess the firearm for self-defense purposes because he intended to sell it to Toski. But the Government elected to indict Marzzarella only for possession of the handgun, not the sale. If he possessed the pistol for self-defense purposes, its subsequent sale would not somehow retroactively eliminate that interest.

We are skeptical of Marzzarella's argument that possession in the home is conclusive proof that *§ 922(k)* regulates protected conduct. Because the presence of a serial number does not impair the use or functioning of a weapon in any way, the burden on Marzzarella's ability to defend himself is arguably *de minimis*. *Section 922(k)* did not bar Marzzarella from possessing any otherwise lawful marked firearm for the [*23] purpose of self-defense, and a person is just as capable of defending himself with a marked firearm as with an unmarked firearm. With or without a serial number, a pistol is still a pistol. Furthermore, 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. Possession of machine guns or short-barreled shotguns--or any other dangerous and unusual weapon--so long as they were kept in the home, would then fall within the *Second Amendment*. But the Supreme Court has made clear the *Second Amendment* does not protect those types of weapons. *See Miller, 307 U.S. at 178* (holding that short-barreled shotguns are unprotected); *see also United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008)* ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."), *cert. denied, 129 S. Ct. 1369, 173 L. Ed. 2d 591 (2009)*.

It is arguably possible to extend the exception [*24] for dangerous and unusual weapons to cover unmarked firearms. "[T]he *Second Amendment* does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ." *Heller, 128 S. Ct. at 2815-16*. The District Court could not identify, and Marzzarella does not assert, any lawful purpose served by obliterating a serial number on a firearm. Because a firearm with a serial number is equally effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm. These weapons would then have value primarily for persons seeking to use them for illicit purposes. *See United States v. Carter, 421 F.3d 909, 910 (9th Cir. 2005)* (noting that unmarked firearms have a "greater flexibility to be utilized in illicit activities" (alteration and internal quotation marks omitted)); *cf. United States v. Tagg, 572 F.3d 1320, 1326 (11th Cir. 2009)* (finding no *Second Amendment* protection for pipe bombs because they could not be used for legitimate lawful purposes); *State v. Chandler, 5 La. Ann. 489, 489-90 (1850)* (holding concealed weapons could be prohibited because of their tendency to be used in violent [*25] crimes on unsuspecting victims). Nevertheless, a handgun with an obliterated serial number seems distinct from a weapon like a short-barreled shotgun. While a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, it is also dangerous and unusual because of its heightened capability to cause damage. *See United States v. Amos, 501 F.3d 524, 532 (6th Cir. 2007)* (McKeague, J., dissenting) ("With its shorter barrel, a sawed-off shotgun can be concealed under a large shirt or coat. It is the combination of low, somewhat indiscriminate accuracy, large destructive power, and the ability to conceal that makes a sawed-off shotgun useful for only violence against another person . . . ."); *see also United States v. Upton, 512 F.3d 394, 404 (7th Cir. 2008)* (likening sawed-off shotguns to "other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns"). An unmarked firearm, on the other hand, is no more damaging than a marked firearm.

Accordingly, while the Government argues that *§*

922(k) does not impair any *Second Amendment* rights, we cannot be certain that the possession of unmarked firearms in the home is excluded from the [*26] right to bear arms. Because we conclude *§ 922(k)* would pass constitutional muster even if it burdens protected conduct, we need not decide whether Marzzarella's right to bear arms was infringed.

B.

Assuming *§ 922(k)* burdens Marzzarella's *Second Amendment* rights, we evaluate the law under the appropriate standard of constitutional scrutiny. *Heller* did not prescribe the standard applicable to the District of Columbia's handgun ban. *128 S. Ct. at 2817-18*. Instead, it held that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights [the ban] . . . would fail constitutional muster." *Id.* (footnote omitted).

The Government argues a rational basis test [13] should apply to *§ 922(k)*, but *Heller* rejects that standard for laws burdening *Second Amendment* rights. *Id. at 2816 n.27*. The Court noted that even a law as burdensome as the District of Columbia's handgun ban would be constitutional under a rational basis test. *Id.* The fact that the ban was struck down, therefore, indicates some form of heightened scrutiny must have applied. Moreover, "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the *Second Amendment* [*27] would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.*

> 13 A rational basis test presumes the law is valid and asks only whether the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*.

Marzzarella, on the other hand, contends we must apply strict scrutiny [14] because the right to bear arms is an enumerated fundamental constitutional right. *See McDonald, 130 S. Ct. at 3050* (plurality opinion of Alito, J.). Whether or not strict scrutiny may apply to particular *Second Amendment* challenges, it is not the case that it must be applied to all *Second Amendment* challenges. Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat *First Amendment* challenges that way. [15] Strict scrutiny is triggered by content-based restrictions on speech in a public forum, *see Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009)*, but content-neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny, *see Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)* (upholding such restrictions [*28] if they "are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." (quoting *Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984))*). Regulations on nonmisleading commercial speech trigger another form of intermediate scrutiny, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)* (requiring the regulation to directly advance a substantial governmental interest and not be more burdensome than necessary to serve that interest), whereas disclosure requirements for commercial speech trigger a rational basis test, *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)* ("We do not suggest that disclosure requirements do not implicate the advertiser's *First Amendment* rights at all. . . . But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."). In sum, the right to free speech, an undeniably [*29] enumerated fundamental right, *see W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)*, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the *Second Amendment* would be any different.

> 14 Strict scrutiny asks whether the law is narrowly tailored to serve a compelling government interest. *Playboy Entm't Group, 529 U.S. at 813*.
>
> 15 While we recognize the *First Amendment* is a useful tool in interpreting the *Second Amendment*, we are also cognizant that the precise standards of scrutiny and how they apply may differ under the *Second Amendment*.

If the *Second Amendment* can trigger more than one particular standard of scrutiny, *§ 922(k)* should merit a

less stringent standard than the one that would have applied to the District of Columbia's handgun ban. While it is not free from doubt, we think this means that *§ 922(k)* should be evaluated under intermediate scrutiny. The burden imposed by the law does not severely limit the possession of firearms. The District of Columbia's handgun ban is an example of a law at the far end of the spectrum of infringement on protected *Second Amendment* rights. *Heller, 128 S. Ct. at 2818* [*30] ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."). It did not just regulate possession of handguns; it prohibited it, even for the stated fundamental interest protected by the right--the defense of hearth and home. *Id.* But *§ 922(k)* does not come close to this level of infringement. It leaves a person free to possess any otherwise lawful firearm he chooses--so long as it bears its original serial number.

Furthermore, the legislative intent behind *§ 922(k)* was not to limit the ability of persons to possess any class of firearms. While the intent of the District of Columbia's ban was to prevent the possession of handguns, *§ 922(k)* permits possession of all otherwise lawful firearms. As Congress indicated with respect to the Omnibus Crime Control and Safe Streets Act of 1968--which included *§ 922(k)*'s predecessor:

> It is not the purpose of the title to place any undue or unnecessary restrictions or burdens on responsible, law-abiding citizens with respect to the acquisition, possession, transporting, or use of firearms appropriate to . . . personal protection, or any other lawful activity. The title is not intended to discourage [*31] or eliminate the private ownership of such firearms by law-abiding citizens for lawful purposes . . .

S. Rep. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2114. *Section 922(k)* is designed to prohibit possession of only unmarked firearms, while leaving the possession of marked firearms untouched.

Because *§ 922(k)* was neither designed to nor has the effect of prohibiting the possession of any class of firearms, it is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their *Second Amendment* rights. The distinction between limitations on the exercise of protected conduct and regulation of the form in which that conduct occurs also appears in the *First Amendment* context. Discrimination against particular messages in a public forum is subject to the most exacting scrutiny. *See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)*. Regulations of the manner in which that speech takes place, however, receive intermediate scrutiny, under the time, place, and manner doctrine. *See Ward, 491 U.S. at 791*. Accordingly, we think *§ 922(k)* also should merit intermediate, rather than strict, scrutiny.

In the *First Amendment* speech context, [*32] intermediate scrutiny is articulated in several different forms. *See Turner Broad. Sys., 512 U.S. at 662* (requiring the regulation serve "an important or substantial" interest and not "burden substantially more speech than is necessary" to further that interest (internal quotation marks omitted)); *Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)* (requiring a "substantial" governmental goal and a "reasonable fit" between the regulation and that objective); *Ward, 491 U.S. at 791* (applying the time, place, and manner standard which asks whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication); *Cent. Hudson, 447 U.S. at 566* (requiring the regulation directly advance a substantial interest and be no more extensive than necessary to serve the interest). Although these standards differ in precise terminology, they essentially share the same substantive requirements. They all require the asserted governmental end to be more than just legitimate, either "significant," "substantial," or "important." *See, e.g., Turner Broad Sys., 512 U.S. at 662*; *Ward, 491 U.S. at 791*. They generally [*33] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect. *See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)*; *Fox, 492 U.S. at 480*. The regulation need not be the least restrictive means of serving the interest, *see, e.g., Turner Broad. Sys., 512 U.S. at 662*; *Ward, 491 U.S. at 798*, but may not burden more speech than is reasonably necessary, *see, e.g., Turner Broad. Sys., 512 U.S. at 662*; *Ward, 491 U.S. at 800*.

Those requirements are met here. First, we think it plain that *§ 922(k)* serves a law enforcement interest in

enabling the tracing of weapons via their serial numbers. *Section 922(k)* was enacted by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1221. [16] The objective of this Act was "to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett v. United States, 423 U.S. 212, 218, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976)*. The goal of *§ 922(k)*, in particular, is to assist law enforcement by making it possible to use the serial number of a firearm recovered in a crime to trace and identify its owner and source. *See United States v. Adams, 305 F.3d 30, 34 (1st Cir. 2002)* ("[A]nyone can [*34] see what Congress was getting at in the statute. . . . [T]he statute aims to punish one who possesses a firearm whose principal means of tracing origin and transfers in ownership--its serial number--has been deleted or made appreciably more difficult to make out."); *United States v. Mobley, 956 F.2d 450, 454 (3d Cir. 1992)* ("It is no secret that a chain of custody for a firearm greatly assists in the difficult process of solving crimes. When a firearm is stolen, determining this chain is difficult and when serial numbers are obliterated, it is virtually impossible."). Firearms without serial numbers are of particular value to those engaged in illicit activity because the absence of serial numbers helps shield recovered firearms and their possessors from identification. *See Carter, 421 F.3d at 910*. Their prevalence, therefore, makes it more difficult for law enforcement to gather information on firearms recovered in crimes. Accordingly, preserving the ability of law enforcement to conduct serial number tracing--effectuated by limiting the availability of untraceable firearms--constitutes a substantial or important interest.

16 This restriction was originally enacted by the Federal Firearms [*35] Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250, 1251.

Section 922(k) also fits reasonably with that interest in that it reaches only conduct creating a substantial risk of rendering a firearm untraceable. Because unmarked weapons are functionally no different from marked weapons, *§ 922(k)* does not limit the possession of any class of firearms. Moreover, because we, like the District Court, cannot conceive of a lawful purpose for which a person would prefer an unmarked firearm, the burden will almost always fall only on those intending to engage in illicit behavior. Regulating the possession of unmarked firearms--and no other firearms--therefore fits closely with the interest in ensuring the traceability of weapons. Accordingly, *§ 922(k)* passes muster under intermediate scrutiny.

Although we apply intermediate scrutiny, we conclude that even if strict scrutiny were to apply to *§ 922(k)*, the statute still would pass muster. For a law to pass muster under strict scrutiny, it must be "narrowly tailored to serve a compelling state interest." *FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 465, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007)*. We presume the law is invalid, and the government bears the burden of rebutting that presumption. [*36] *Playboy Entm't Group, 529 U.S. at 817*.

While *First Amendment* jurisprudence has articulated a comprehensive doctrine around what can and cannot be a compelling interest for restrictions on speech, *see, e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. Pa. L. Rev. 2417, 2419-21 (1996)*, *Second Amendment* jurisprudence is not yet so developed. As we discussed above, serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms. Because it assists law enforcement in this manner, we find its preservation is not only a substantial but a compelling interest. *See United States v. Salerno, 481 U.S. 739, 749, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)* (holding that the government interest in preventing crime is compelling).

Marzzarella would have us conclude that serial number tracing is not a genuine compelling interest because current federal law does not mandate an intensive enough registration and tracing system to always provide a picture of the entire chain of custody of a recovered firearm. If a regulation fails to cover a substantial amount of conduct implicating the asserted compelling interest, its underinclusiveness [*37] can be evidence that the interest is not significant enough to justify the regulation. *See Carey v. Brown, 447 U.S. 455, 465, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980)*; *see also Fla. Star v. B.J.F., 491 U.S. 524, 541-42, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)* (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (citation and internal quotations marks omitted)). As Marzzarella points out, firearms are normally traceable only to the first retail purchaser. [17] Because private sellers are not required to record their sales, firearms sold secondhand

generally cannot be tracked by serial number. [18] Moreover, even federally licensed dealers, who must record their sales, are only required to keep these records for twenty years, not in perpetuity. *27 C.F.R. § 478.129(e)*. The absence of a more comprehensive recordation scheme means the serial number tracing of a recovered firearm generally does not permit law enforcement agencies to follow the firearm through every transfer from the initial retail sale to the end user. Marzzarella argues this renders *§ 922(k)* fatally underinclusive.

17 *See* Department of the Treasury, Bureau of [*38] Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* x (2000), *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/following_the_gun_exec2000.pdf. Although the ATF report *Following the Gun* does not appear in the record, Marzzarella cites to it in his opening brief. We consider its use unobjectionable.

18 *See id.* at 17 (referring to firearms sold secondhand as "untraceable").

We see no reason to view serial number tracing so narrowly. The direct tracing of the chain of custody of firearms involved in crimes is one useful means by which serial numbers assist law enforcement. [19] But serial number tracing also provides agencies with vital criminology statistics--including a detailed picture of the geographical source areas for firearms trafficking and "time-to-crime" statistics which measure the time between a firearm's initial retail sale and its recovery in a crime [20]--as well as allowing for the identification of individual dealers involved in the trafficking of firearms and the matching of ballistics data with recovered firearms. [21] *Section 922(k)*, therefore, "demonstrate[s] [Congress's] commitment to advancing" the compelling [*39] interest of preserving serial number tracing. *Fla. Star, 491 U.S. at 540*.

19 *See Following the Gun*, *supra* note 17, at 44 ("[T]racing was used as an investigative tool to gain information on recovered crime guns in 60 percent of the investigations . . . .").

20 The reporting of trace data by the ATF has been partially restricted by the Tiahrt Amendments to federal appropriations bills, Pub. L. No. 111-8, 123 Stat. 524, 575 (2009) (codified as Note to *18 U.S.C. § 923*). Currently, the restriction prevents the ATF from publicly disclosing trace data, and precludes the data from being disclosed or used in any civil action. *Id.* It does not restrict the reporting of this data to law enforcement agencies. *Id.*

21 *See Following the Gun*, *supra* note 17, at 41-44.

Section 922(k) must also be narrowly tailored to serve that interest. Narrow tailoring requires that the regulation actually advance the compelling interest it is designed to serve. *See Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 226, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989)*. The law must be the least-restrictive method of serving that interest, and the burdening of a significant amount of protected conduct not implicating [*40] the interest in question makes the regulation insufficiently tailored. *See Ashcroft v. ACLU, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)*. *Section 922(k)* restricts possession only of weapons which have been made less susceptible to tracing. Because it does not limit the possession of any otherwise lawful firearm, it does not burden more possession than necessary to protect the interest in serial number tracing.

Marzzarella argues *§ 922(k)* is overinclusive and, therefore, fails narrow tailoring. Because in certain cases--such as Marzzarella's--it is possible through laboratory procedures to discern the original serial number of a firearm despite efforts to remove, obliterate, or alter it, he contends *§ 922(k)* goes further than is required. Presumably, Marzzarella believes the overinclusiveness could be cured by applying *§ 922(k)* only where, upon recovery of the firearm and subsequent laboratory testing, the serial number still cannot be read. [22] But we do not think the fact that, in some cases, ex post circumstances can allow for the deciphering of a serial number renders *§ 922(k)* insufficiently tailored. The statute protects the compelling interest of tracing firearms by discouraging the possession and use of firearms that are harder or impossible [*41] to trace. It does this by criminalizing the possession of firearms which have been altered to make them harder or impossible to trace. That these actions sometimes fail does not make the statute any less properly designed to remedy the problem of untraceable firearms. Accordingly, we find *§ 922(k)* is narrowly tailored.

22 We have our doubts about the administrability of such a standard. For starters,

> how much effort by law enforcement agencies would be required before courts could determine the serial number was unreadable? Moreover, the standard would provide uneven deterrence because persons would be unaware at the time of commission whether their conduct would lead to criminal liability or not. *Section 922(k)*, read in this manner, would likely be difficult to apply.

III.

Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller*. Accordingly, we hesitate to say Marzzarella's possession of an unmarked firearm in his home is unprotected conduct. But because *§ 922(k)* would pass muster under either intermediate scrutiny or strict scrutiny, Marzzarella's conviction must stand.

For the foregoing reasons, we [*42] will affirm the District Court's denial of Marzzarella's motion to dismiss the indictment and affirm his judgment of conviction and sentence.

CITY OF KING
PROCLAMATION OF A STATE OF EMERGENCY

Section 1. Pursuant to Chapter 166A of the General Statutes and Article 36A Chapter 14 of the General Statutes, I have determined that a state of emergency as defined exists in the City of King.

Section 2. I, therefore, proclaim the existence of a state of emergency in the City of King.

Section 3. I, hereby order all law enforcement officers and employees, and all other emergency management workers subject to my control to cooperate in the enforcement and implementation of the provisions of the City emergency ordinances which are set forth below.

Section 4. **Evacuation.** I have determined that, in the best interest of public safety and protection, it is necessary to evacuate the civilian population from the N/A areas of the City of King. Citizens are free to use any type of transportation, but they are to use only (routes):

N/A

in leaving the county. Evacuation is to occur as soon as possible. Further proclamation concerning evacuation will be issued as needed.

Section 5. **Curfew.** Unless a member of a law enforcement agency or the emergency management program, every person who is located within City of King is to be inside a house dwelling from the hours of 12 AM to 5 AM

Section 6. **No Alcoholic Beverages.** There shall be no sale, consumption, transportation, or possession of alcoholic beverages during the state of emergency in the City of King, except possession or consumption is allowed on a person's own premises.

Section 7. **No Firearms, ammunition, or Explosives.** During the state of emergency, there shall be no sale or purchase of any type of firearm or ammunition, or any possession of such items along with any type of explosive off owner's own premises.

Section 8. **Restrictions on Access to Areas.** During the state of emergency, there shall be no access or attempting to obtain access to any area which has been barricaded, or otherwise clearly posted indicating that access is denied or restricted by law enforcement officers.

Section 9. **Execution of Emergency Plan.** All civilians and emergency management workers are ordered to comply with the Emergency Operations Plan.

Section 10. This proclamation shall become effective immediately. Proclaimed this the 5th day of Feb. 2010, at 13:00.

Mayor, City of King