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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ADAM RICHARDS, BRETT STEWART, SECOND AMENDMENT FOUNDATION, INC., and THE CALGUNS FOUNDATION, INC., Plaintiffs, vs. ED PRIETO and COUNTY OF YOLO Defendants.	Case No.:2:09-CV-01235-MCE-DAD (Temp) **DEFENDANTS YOLO COUNTY AND ED PRIETO'S POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT** **Date: March 10, 2011** **Time: 2:00 p.m.** **Courtroom: 7, 14th Floor** **Judge: Morrison C. England, Jr.** Trial Date: None

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I. INTRODUCTION

The Second Amendment does not grant citizens the right to carry loaded, functional, concealed firearms in public based on what amounts to little more than the mere desire to do so. In this case, Plaintiffs challenge the constitutionality of Yolo County Sheriff Ed Prieto's concealed weapon permitting policy and California Penal Code section 12050 which authorizes the implementation of such a policy.[1] Penal Code section 12050 permits county sheriffs to issue concealed weapon permits upon, among other things, the finding that "good cause exists for the issuance" of the permit. Section 12050 does not define "good cause" and thus leaves that determination to each county sheriff. Sheriff Prieto defines "good cause" for the issuance of a permit to exclude "[s]elf protection and protection of family (without credible threats of violence)." *See* Exhibit 1, attached to Declaration of Undersheriff Thomas A. Lopez (hereinafter "Lopez Decl."). Plaintiffs seek concealed weapon permits for self-defense but they admittedly cannot articulate any basis why they should fear for their personal safety. Plaintiffs are not entitled to carry a concealed weapon just because they want to carry one.

Plaintiffs' Second Amendment challenge fails because the Second Amendment simply does not create a right to carry concealed weapons. Instead, courts have regularly upheld concealed weapon bans and regulations, such as Sheriff Prieto's policy, since the early 1800s, and have continued to legally do so after the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Post-*Heller* jurisprudence has interpreted *Heller's* holding to be limited to the right to possess operable handguns in the ***home***. Additionally, California's gun control statutes already allow residents to lawfully defend themselves without a permit. Nothing in California's law prohibits Plaintiffs from openly carrying an unloaded weapon with ammunition close at hand and loading that weapon in an emergency situation where the need for self-defense arises. Thus, contrary to Plaintiffs' argument, Sheriff Prieto is not preventing Plaintiffs from defending themselves. The policy merely prohibits the carrying of a ***concealed*** weapon absent evidence of a threat to the applicant's personal safety.

[1] Hereinafter, any mention of an enumerated section refers to that section of the California Penal Code.

This exact issue has already been decided by one California District Court. *See generally Peruta v. County of San Diego*, __ F.Supp.2d__, 2010 U.S. Dist. LEXIS 130878 (S.D. Cal. Dec. 10, 2010) [notice of appeal filed December 14, 2010].[2] In *Peruta*, the District Court for the Southern District of California upheld a virtually identical policy instituted by the San Diego Sheriff against Second Amendment and Equal Protection challenges. *Id.* at *4. The issues presented in the instant case have already been decided and a policy indistinguishable from Sheriff Prieto's policy has been upheld as constitutional.

Plaintiffs ask this Court to expand the basic right to possess handguns in the home for self-defense recognized in *Heller* by holding that states may not regulate the carrying of concealed handguns in public. Not only is Plaintffs' request completely unprecedented, it would result in extremely serious public safety implications for the County of Yolo and State of California in light of the staggering number of deaths caused by firearms in the United States[3] and the acute risk that concealed handguns pose to police officers[4] and the public alike.[5] Accordingly, Defendants respectfully request that this Court grant Defendant's motion for summary judgment and deny Plaintiff's motion.

II. STATEMENT OF FACTS

Plaintiffs claim that Sheriff Prieto's policy and the California state law authorizing Sheriff Prieto to establish a concealed weapon permitting policy violate their right to keep and bear arms under the Second Amendment and their equal protection rights under the Fourteenth

[2] *Peruta* was designated as a published decision but does not, as yet, have an official cite.

[3] Since 1960, more Americans have been murdered with guns than were killed by all methods in all the wars in the 20th Century combined. *See* David Hemenway, PRIVATE GUNS, PUBLIC HEALTH, 45 (University of Michigan Press 2004).

[4] 90% of police officer killings are caused by guns. *See* Declaration of Franklin E. Zimring (hereinafter "Zimring Decl.) attached to RJN.

[5] *See People v. Marin*, 795 N.E.2d 953, 958-59 (Ill.App. 2003) [stating that "i[]nnocent" motivations may transform into culpable conduct because of the accessibility of weapons as an outlet for subsequently kindled aggression. Additionally, accidents with loaded guns on public streets or the escalation of minor public altercations into gun battles are subject to increase where loaded weapons are readily available]; *People v. Yarbrough*, 169 Cal.App.4th 303, 314 (App.Ct. 2008) ["Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized 'threat to public order,' and is 'prohibited as a means of preventing physical harm to persons other than the offender'"].

Amendment of the United States Constitution. *See generally* Second Amended Complaint (hereinafter "SAC"); Plaintiff's Motion for Summary Judgment (hereinafter "Plaintiff's MSJ").[6]

A. STATUTORY BACKGROUND

Sheriff Prieto's concealed weapon permit policy constitutes one piece of California's statutory scheme for regulating the carrying firearms in public places. Pursuant to California Penal Code section 12025, a person is guilty of the crime of "carrying a concealed firearm" when he or she "carries concealed" on his or her person or in a vehicle under his or her control "any pistol, revolver, or other firearm capable of being concealed." Cal. Penal Code § 12025 (a)(1)(2)-(3). Carrying a concealed firearm is punishable as misdemeanor unless the person falls within certain designated categories, such as a convicted felon, in which case the crime is punishable as a felony. Cal Penal Code § 12025(b). However, firearms "carried openly in belt holsters are not concealed" within the meaning of section 12025. Cal. Penal Code § 12025(f). Further, the law does not prohibit carrying a concealed weapon while in one's residence, place of business, or while on his or her private property. Cal. Penal Code § 12026. Similarly, section 12025's prohibitions do not apply to a number of lawful uses such as: hunting or transporting weapons to and from hunting trips by licensed hunters or fishermen (California Penal Code section 12027(g)); practice shooting at established target ranges by members of gun clubs (section 12027(f)); carrying by retired peace officers (section 12027(a)); and transporting unloaded firearms while in the course of manufacturing, importing or selling firearms by persons licensed to engage in that business (section 12027(b)). Also excepted from section 12025's general prohibition is any person licensed to carry a concealed firearm pursuant to section 12050. Cal. Penal Code § 12027(j).

California Penal Code section 12050 provides that a county sheriff or head of a municipal law enforcement agency may issue a license to carry a concealed firearm under the following circumstances:

[6] Plaintiffs do not name the State of California as a defendant. Rather, Plaintiffs put Sheriff Prieto and the County of Yolo in the position of defending a state law which they did not enact yet are required to enforce.

> Upon proof that the person is of good moral character, that good cause exists for the issuance, and that the person applying satisfies any one of the conditions specified in subparagraph (D) and has completed a course of training as described in subparagraph (E).

Cal. Penal Code § 12050(a)(1)(A)-(B). Subparagraph (a)(1)(D) of section 12050 requires, in turn, that the applicant be a resident of the city or county, or is employed and spends a substantial amount of time there.

Pursuant to California Penal Code section 12050.2, the Yolo County Sheriff's Department publishes the criteria for the issuance of concealed weapons permits. *See* Exhibit 1 attached to Lopez Decl. The published criteria specify that an applicant must show good cause. Examples of good cause include: victims of violent crime and/or documented threats of violence; business owners who carry large sums of cash or valuable items; and business owners who work all hours in remote areas and are likely to encounter dangerous people and situations. *Id.* at 1. The criteria also contain a list of what does not constitute good cause to carry a concealed firearm which includes: "self protection and protection of family (without credible threats of violence.)" *Id.* at 2.

Nothing in section 12025, section 12050, or Sheriff Prieto's policy, directly prohibits the carrying of firearms which are not concealed. Rather, open carrying of a loaded weapon is addressed by California Penal Code § 12031 which provides:

> A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

Cal. Penal Code § 12031(a)(1).

A "prohibited area" is defined to mean anyplace where it would be unlawful to discharge the weapon. Cal. Penal Code § 12031(f). A firearm is considered "loaded" for purposes of this statute when:

> [T]here is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

Cal. Penal Code § 12031(f).

One California case interpreted this definition to mean that a shell must be attached in such a manner that it is capable of being fired in order to be considered "loaded." *People v. Clark*, 45 Cal.App.4th 1147, 1153-54 (App.Ct. 1996) (A shotgun is not "loaded" if shells are attached to the stock, but must be removed from the stock and chambered before firing.) Accordingly, section 12031 does not prohibit a person from openly carrying an unloaded firearm even if the ammunition is close enough at hand so that the weapon can be loaded quickly. Thus, California citizens have the right under the laws to openly carry unloaded weapons with ammunition nearby.

Furthermore, section 12031 not only allows a person to keep a loaded weapon in his or her home, this section also allows for carrying of a loaded weapon at a temporary residence such as a campsite. The prohibitions in section 12031 are likewise inapplicable to the carrying of a loaded firearm by a person who, "reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." Cal. Penal Code § 12031(j)(1). Thus, a person openly carrying an unloaded weapon may lawfully load it when faced with an emergency situation to act in self-defense or the defense of others.

B. PLAINTIFFS' ALLEGATIONS

Plaintiffs Adam Richards and Brett Stewart are residents of the Yolo County. SAC ¶¶ 1, 2; Declaration of Plaintiff Adam Richards (hereinafter "Richards Decl.") ¶1; Declaration of Plaintiff Brett Stewart (hereinafter "Stewart Decl.") ¶ 1. They both claim to be "law-abiding" citizens, members of Second Amendment Foundation, Inc. (hereinafter "SAF"), and participants in functions sponsored by Calguns Foundation, both of which are organizational Plaintiffs in this

lawsuit. SAC ¶¶ 1, 2, 19, 22; Richards Decl. ¶ 1; Stewart Decl. ¶ 1. Neither Mr. Richards nor Mr. Stewart alleges any particularized need to carry a firearm other than a generalized wish to protect themselves and their families. SAC ¶¶ 19, 22; Richards Decl. ¶ 3; Stewart Decl. ¶ 3. Mr. Richards and Mr. Stewart both deny receipt of any threats of violence to themselves or their families. Richards Decl. ¶ 3; Stewart Decl. ¶ 3.

Mr. Richards claims he was informed that he needed to apply to the Davis Police Department for a concealed weapons permit first, and the Sheriff would only consider a permit application for a concealed carry permit if Mr. Richards' application was first denied by the city's police chief. SAC ¶ 19; Richards Decl. ¶ 4. Both Plaintiff Richards and Plaintiff Stewart applied to the City of Davis Police Chief for a permit, and the applications were both denied. SAC ¶¶ 20, 22; Richards Decl. ¶ 5; Stewart Decl. ¶ 5. The Davis Police Chief wrote that because of resource limitations, the city had discontinued the process of issuing concealed weapons permits. *Id.*

Plaintiff Richards claims that he contacted Sheriff Prieto's office to inquire about the process for obtaining a permit to carry a handgun and was advised that the desire to carry a gun for self-protection would not constitute good cause for the issuance of a permit. SAC ¶ 19; Richards Decl. ¶ 4. He does not allege that he ever applied to the Sheriff for a permit to carry weapons.

Plaintiff Stewart alleges that he applied to Sheriff Prieto for a permit to carry a handgun citing a claimed need for self-defense and was denied because he could not establish good cause why a permit should be issued. SAC ¶ 23; Stewart Decl. ¶ 6. Both Plaintiffs allege that if it were not for the lack of a permit, they would carry a handgun in public for self-defense. SAC ¶ 21; Richards Decl. ¶10; Stewart Decl. ¶ 7.

III. LAW & ARGUMENT

A. THE RIGHT TO CARRY CONCEALED WEAPONS IS NOT WITHIN THE AMBIT OF SECOND AMENDMENT PROTECTIONS

Contrary to Plaintiffs' argument that the Second Amendment secures their right to carry a loaded concealed handgun without any reasonable concern for their personal safety, **no** court has

held that citizens have a right to carry concealed weapons. Since the early 1800s, courts have upheld concealed carry regulations. The longstanding recognition of the validity of concealed weapons laws was recently designated by the United States Supreme Court as "presumptively lawful" and has been upheld by state and federal courts throughout the country since the Court's decision in *Heller*. 554 U.S. at 626-27. Plaintiffs seek protection for conduct that is not, and never has been, within the scope of the Second Amendment. To now hold that Plaintiffs have a constitutional right to carry loaded concealed weapons in public would be an unprecedented extension of Second Amendment law.

The Second Amendment of the United States Constitution 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. In *Heller*, the Supreme Court held for the first time that the right to "keep and bear Arms" was an individual right, as opposed to a collective protection of state militia. *Heller, supra*, 554 U.S. at 595.[7] In doing so, the Court emphasized that the right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for any purpose." *Id.* at 626. Specifically, the Court identified "longstanding prohibitions," such as prohibitions on carrying concealed weapons, as "presumptively lawful" under the Second Amendment. *Id.* at 626-27.

The Court in *Heller* limited its holding to "the right of law-abiding, responsible citizens to use arms ***in defense of hearth and home***," and thus, did not provide any dispositive precedent pertaining to the public carry of concealed weapons. *Id.* at 635 (emphasis added). *See also McDonald, supra,* __ U.S. __, 130 S.Ct. 3036 (characterizing *Heller* as safeguarding an individual right of self-defense when ***home*** possession was an issue (emphasis added)); *United States v. Marzzarella,* 614 F.3d 85, 92 (3d Cir. 2010) (reasoning that *Heller* recognized that "the Second Amendment protects the right of law-abiding citizens to possess [handguns] for self-defense ***in the home***" (emphasis added)); *United States v. Skoien,* 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (warning readers not to treat the *Heller* decision "as containing broader holdings

[7] The Court held that the Second Amendment was incorporated to the states through the Fourteenth Amendment in *McDonald v. City of Chicago,* __ U.S. __, 130 S.Ct. 3020 (2010).

than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns ***at home*** for self-defense" (emphasis added)).

Although the holding in *Heller* did not encompass the type of concealed weapon regulations at issue here, the ***process*** by which the Court reached its decision in *Heller* provides guidance on how to evaluate a constitutional challenge under the Second Amendment. The Court made abundantly clear that the extent of rights under the Second Amendment, as it exists today, is to be understood as it was in the eighteenth century when the Second Amendment was adopted. For example, the Court interpreted the word "arms" in specific reference to its "18th-century meaning" as defined in the 1773 edition of Samuel Johnson's dictionary. *Id.* at 581. Likewise, the Court relied on the 1769 edition of Blackstone's *Commentaries on the Laws of England* and 17th century English statutes to define the phrase "keep and bear arms." *Id.* at 582-83 (citing 4 *Commentaries of the Laws of England* 55 (1769); 3 Eng. Stat at Large 422 (1689); 1 W. Hawkins, *Treatise on the Pleas of the Crown* 26 (1771)). Moreover, the United States Court of Appeals for the Third and Fourth Circuits have recently held that the first consideration in evaluating a challenged gun regulation is whether the burdened conduct was understood to be within the scope of the Second Amendment guarantee at the time of ratification. *U.S. v. Chester, Jr.*, __F.3d__, 2010 U.S. App. LEXIS 26508, *18 (4th Cir. Dec. 30, 2010); *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). If the burdened conduct was not understood to fall within the ambit of the Second Amendment guarantee, the inquiry is complete. *Marzzarella, supra*, 614 F.3d at 89. Accordingly, determination of whether the Second Amendment includes the right for citizens to carry loaded concealed weapons in public requires a review of the traditional treatment of concealed weapons laws.

As the Court in *Heller* recognized, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 626. Cases from the founding era establish that the right to keep and bear arms was universally understood not to include a separate right bear arms concealed from others. In *State v. Reid*, 1 Ala. 612, 616 (1840), the court held the Alabama constitutional protection of the right to keep and bear arms is not a right to bear arms upon all

occasions and in all places, but merely in defense of himself and the State. Therefore, a prohibition against carrying concealed weapons did not violate the right because:

> [A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits 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.

Id. at. p. 617.

In *State v. Chandler,* 5 La. Ann. 489 (1850), it was again held that the right to keep and bear arms did not extend to the carrying of concealed weapons. The court viewed such prohibitions as "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons." *Id.* at. 489-90. Hence, the court concluded that regulation of concealed weapons did not interfere with the right to carry arms. *Id.* at. 490.

After a ringing defense of the central importance of the right to keep and bear arms, the court in *Nunn v. Georgia,* 1 Ga. 243, 252 (1846), nonetheless observed, "so far as the act of 1837 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." (emphasis in original.) *See also Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"); *State v. Buzzard,* 4 Ark. 18, 28 (1842) (holding that the right to bear arms did not extend to carrying concealed weapons); *State v. Workman,* 35 W.Va. 367, 373 (1891) (noting that "As early as the second year of Edward III, a statute was passed prohibiting all persons, whatever their conditions, 'to go or ride armed by night or by day'"); *Aymette v. State,* 21 Tenn. 154, 159-61 (1840) ("The Legislature . . . have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not unusual in civilized warfare, or would not contribute to the common defense.") Furthermore, many state governments of the era had legislation which in some fashion or another

regulated or prohibited the carrying of concealed weapons. *See* Clayton E. Cramer, CONCEALED WEAPONS LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE AND MORAL REFORM 143, Appendix A (Praeger, 1999); Ky Const. of 1850, Art. XIII § 25 (amended to allow a concealed weapon ban); 1876 Wyo. Comp. Laws ch. 52 § 1 (1876).

Furthermore, since *Heller*, courts have held that concealed weapon carrying is not a right protected by the Second Amendment. In evaluating the constitutionality of California Penal Code section 12025(a), the California Court of Appeals for the Fourth Appellate District noted that there was an important distinction between the right espoused in *Heller* and concealed weapon carry. The court stated:

> [C]arrying a firearm concealed on the person or in a vehicle in violation of section 12025, subdivision (a), is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller*. Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized "threat to public order," and is "prohibited as a means of preventing physical harm to persons other than the offender.'" A person who carries a concealed firearm on his person or in a vehicle, "which permits him immediate access to the firearm but impedes others from detecting its presence, poses an 'imminent threat to public safety.

169 Cal.App.4th 303, 312-14 (App.Ct. 2008) (internal citations omitted). *See also Williams v. State of Maryland*, __ Md.App.__, 2011 Md. LEXIS 1, *2 (holding that a statute "prohibiting wearing, carrying, or transporting a handgun, without a permit and outside of one's home, is outside of the scope of the Second Amendment."); *State v. Knight*, 42 Kan.App.2d 893 (reasoning that a statute which criminalizes the possession of a concealed firearm was outside of the Second Amendment); *United States v. Hart*, 726 F.Supp.2d 56, 60 (D. Mass. 2010) ("*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional"); *Sims v. U.S.*, 963 A.2d 147, 150 (D.C. 2003) (The Second Amendment does not "compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined").

Neither a historical analysis nor a review of post-*Heller* decisions supports Plaintiffs' claim that they have a right to carry loaded concealed weapons in public. Rather the act of carrying weapons secretly has been understood for more than a century to pose a considerable danger to the public and concealed weapon prohibitions have been widely held not to offend the right to keep and bear arms. Plaintiffs' desired conduct simply falls outside of the protections of the Second Amendment.

B. CALIFORNIA'S STATUTORY FRAMEWORK DOES NOT CREATE AN ABSOLUTE BAN ON CARRYING FIREARMS THAT COULD ARGUABLY BRING SHERIFF PRIETO'S POLICY INTO THE PURVIEW OF THE SECOND AMENDMENT

Plaintiffs admit that concealed carrying may be banned. Plaintiff's MSJ, p. 7 (citing *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). However, in an attempt to bring presumptively lawful concealed weapons laws into the purview of the Second Amendment, Plaintiffs claim that California's regulatory scheme creates a total ban on the carrying of handguns for self-defense. *Id.* at 7-11. Contrary to Plaintiff's argument, neither *Heller* nor any court post-*Heller* has conditioned the presumptive lawfulness of bans on concealed carrying of firearms on the recognition of an unrestricted right to carry a gun openly. Furthermore, what Plaintiffs fail to mention that California's regulations, consisting of Penal Code sections 12025, 12031, and 12050, have already withstood constitutional scrutiny both individually and when considered as an overall scheme. *See Peruta, supra*, 2010 U.S. Dist. LEXIS at *18-*19; *People v. Flores*, 169 Cal.App.4th 568, 575-76 (App.Ct. 2008) (affirmed convictions under sections 12025 and 12031 in the face of a *Heller* challenge); *Yarbrough, supra*, 169 Cal.App.4th at 312-14 (holding that nothing in Penal Code section 12025(a) violates the "limited right of the individual established in *Heller* to possess and carry weapons in case of confrontation"); *See also People v. Dykes*, 46 Cal.4th 731, 778 (2009) ("The high court's decision in *Heller* does not require us to conclude that possession in a public place of a loaded, cocked, semiautomatic weapon with a chambered round, concealed in a large glove and ready to fire, cannot be defined as a crime under state law).

Indeed, as Plaintiffs mention, a few 19th Century ***state*** court cases struck down gun

control laws regulating both open carry and concealed weapons where there was ***no*** alternative form for carrying firearms for self-defense. Although, concealed weapons regulations do not burden a right protected by the Second Amendment, an absolute ban on all firearms without exception has been held to violate the right to keep and bear arms. *See e.g. Nunn, supra,* 1 Ga. at 251. For example, in *Andrews v. State*, 50 Tenn. 165 178 (1871), the Tennessee Supreme Court held that a statute forbidding the open carry of a pistol "publicly or privately, without regard to time or place, or circumstances" violated the right to keep and bear arms. *See also Reid, supra,* 1 Ala. at 616-17 (observing that a regulation that amounts to a total ban would be unconstitutional). However, neither Penal Code section 12050 nor Sheriff Prieto's policy bans the concealed carrying of firearms, but rather merely require a showing of "good cause" before a concealed weapon permit is issued. Moreover, as the United States District Court for the Southern District of California recently held, California's gun control regulatory scheme, which provides specific exceptions for open carry of loaded firearms for the purposes of self-defense in the event of an emergency, does not constitute an absolute ban on firearms that violates the Second Amendment. *Peruta, supra,* 2010 U.S. Dist. LEXIS at *18-*19.

As discussed above, the carrying of firearms in California is regulated by three main statutes: Penal Code sections 12025, 12031, and 12050. Section 12025 prohibits concealed carry of a firearm on one's person or in a vehicle without a permit or absent one of the other enumerated exceptions. Section 12050 provides a county sheriff with the ability to issue carry concealed weapon permits, upon satisfaction of the listed requirements including a showing that good cause exists for the issuance of the permit. And section 12031 prohibits the open carry of firearms in public places where discharge of such weapon would be unlawful. Section 12031 also contains a myriad of exceptions, allowing open carry of a loaded firearm by a person who, "reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." Cal. Penal Code § 12031(j)(1). Nothing in any of the aforementioned statutes precludes a person openly carrying an unloaded weapon with ammunition close at hand from lawfully loading it when faced with an emergency situation to act in self-defense or the

defense of others.

In *Peruta v. San Diego County*, the Southern District of California upheld San Diego Sheriff William Gore's concealed weapons permitting policy based, in part, on the finding that California Penal Code sections 12025, 12031, and 12050 and the Sheriff's policy did not, when considered together, unconstitutionally burden a persons right to carry an operable weapon for the purposes of immediate self-defense. *Peruta, supra*, 2010 U.S. Dist. LEXIS at *17-*19. *Peruta* involved a Second Amendment challenge of San Diego County's concealed weapon permitting policy which, as here, required an applicant to establish "good cause" for seeking a permit. *Id.* at *4. San Diego Sheriff William Gore defined "good cause" as a set of circumstances that distinguishes an applicant from other members of the general public and causes him or her to be placed in harm's way. Akin to Sheriff Prieto's policy, Sheriff Gore's policy provided that generalized fear for one's personal safety was not, standing alone, considered "good cause." *Id.*

Chief Judge Gonzalez stated in her opinion in *Peruta*, that *Heller* provided guidance on the scope of the Second Amendment right in terms of both "place" and "manner." *Id.* at *10. Specifically, the court noted that the *Heller* decision addressed the District of Columbia's total ban on handgun possession in the home and that the regulation at issue required citizens to keep handguns inoperable at all times, without exception, hence, making it impossible for citizens to use firearms for the purpose of self-defense. *Id.* at *10-*11. Significantly, the *Peruta* court found that "an important distinction exists between section 12031 and the District of Columbia law at issue in *Heller*, which required that firearms in the home be rendered and kept inoperable *at all times*. Unlike section 12031, the District of Columbia law did not contain, and the Supreme Court declined to infer, an exception for self-defense." *Id.* at *16-*17 (emphasis in original). The court held that that "to the extent that Penal Code section 12025 and 12050 and Defendant's policy burden conduct falling within the scope of the Second Amendment, if at all, the burden is mitigated by the provisions of section 12031 that expressly permit loaded open carry for immediate self-defense." *Id.* at *19.

In summary, the court in *Peruta* has rejected the argument that that Plaintiffs assert here.

Sheriff Prieto's policy does ***not*** constitute the final brick in a statutory wall blocking Plaintiffs from their right to keep and bear arms. Rather, California law is carefully crafted to ensure that Plaintiffs can carry a loaded weapon, without the need for a permit, in the event that immediate self-defense or the need to defend their families becomes necessary. Accordingly, Plaintiffs' attempt to disguise Sheriff Prieto's modest limitation on the issuance of concealed weapon permits as a "total ban" on firearms in order to sneak it into the ambit of Second Amendment protections necessarily fails. Thus, the Second Amendment does not apply.

C. THE PLAINTIFFS' CHALLENGE FAILS BECAUSE EVEN IF THE SECOND AMENDMENT APPLIES, SHERIFF PRIETO'S GOOD CAUSE POLICY MEETS THE INTERMEDIATE STANDARD OF SCRUTINY

Even if this Court finds that the Second Amendment protects a right to carry a loaded concealed firearm in public, Sheriff Prieto's permitting policy would survive any standard of judicial scrutiny. As the *Peruta* court found, the majority of the courts both before and after *McDonald* have employed an intermediate scrutiny standard when evaluating gun regulations that do not touch on the "core" Second Amendment right: possession in the home. *Peruta, supra,* 2010 U.S Dist. LEXIS 130878 at *23-25 (citing *Skoien, supra,* 614 F.3d 638; *Marzzarella, supra,* 614 F.3d at 97; *Heller v. District of Columbia (Heller II),* 698 F. Supp.2d 179, 188 (D.D.C. 2010) (surveying the landscape of post-Heller decisions and joining "the majority of courts" in holding that "intermediate scrutiny is the most appropriate standard"). The *Peruta* court utilized the intermediate scrutiny standard articulated by the Third Circuit in *Marzzarella, supra,* which requires the asserted governmental end to the challenged regulation to be either "significant," "substantial," or "important" and requires the "fit between the challenged regulation and the asserted objective to be reasonable, not perfect." *Id.* at *26 (citing *Marzzarella, supra,* 614 F.3d at 98).

Sheriff Prieto's concealed weapon permitting policy easily satisfies the intermediate standard of scrutiny. Maintaining public safety and preventing crime are clearly important government interests. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (noting that States have "great latitude" to use their police powers); *United States v. Morrison*, 529 U.S. 598, 618 (2000)

(There is "no better example of the police power" than "the suppression of violent crime"). The regulation of concealed firearms is a critical factor in accomplishing those interests. *McDonald, supra,* 130 S. Ct. at 3126 ("Private gun regulation is the quintessential exercise of a State's 'police power' -- i.e., the power to 'protec[t] . . . the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State,' by enacting 'all kinds of restraints and burdens' on both 'persons and property'").

Handguns are unquestionably dangerous and contribute to the majority of criminal cases that result in a person's death. *See Heller, supra,* 554 U.S. at 636 (acknowledging the problem of handgun violence in the U.S.); RJN ¶ 1, Zimring Decl. ¶ 3. A 2001 study revealed that a ten percent increase in handgun ownership correlates with a two percent increase in homicides. *See* Michael B. de Leeuw et al., *Beyond the Final Frontier: A "Post-Racial" America?: The Obligations of Lawyers, the Legislature, and The Court: Ready Aim, Fire? District of Columbia v. Heller and Communities of Color,* 25 Harv.BlackLetter J. 133, 149 (Spring 2009). Handgun possession is a particular problem in Yolo County due to the influx of gang members in recent years. *See* Lopez Decl. ¶ 8.

Concealed handguns, in particular, pose an obvious threat to the public as a concealed handgun generates no special notice until the weapon is brandished. RJN ¶ 1; Zimring Decl. ¶ 5. As more than 90% of police officer killings are caused by guns, high rates of concealed gun carry especially endanger police officers. *Id.* Of the 536 law enforcement officers killed in the line of duty between 2000 and 2009 (including 47 in California), 490 were killed with firearms and of those, handguns were used by the perpetrator 73% of the time. *See* Fed. Bureau of Investigations, U.S. Dep't of Justice, *Law Enforcement Officers Killed and Assaulted* (2009), tables 1 and 27, *available at* http://www.fbi.gov/about-us/cjis/ucr/leoka/2009/leoka-2009.

Even when in the hands of law-abiding citizens, concealed handguns can create a practical problem for police officers. First, "it is not uncommon for a weapon to be stolen from a person or out of a person's home. Likewise, once a weapon (concealed or otherwise) is lawfully in the possession of a citizen, the Sheriff has little power to prevent that citizen from selling or

giving the weapon away to persons with less moral character." Lopez Decl. ¶ 9.[8] Second, "if multiple persons within a crowd are carrying concealed guns, this creates an increased likelihood that the guns will be brandished or used. Thus, the increased presence of guns may require officers to wait until more officers arrive to provide back-up before addressing a confrontation and/or to apply additional force." Lopez Decl. ¶ 10. Accordingly, even the lawful possession of concealed handguns may result in increased safety problems for officers and for members of the community at large. *Id.*[9]

In *Peruta,* the Southern District of California found that the San Diego Sheriff had "an important and substantial interest in public safety and in reducing the rate of gun use in crime"; "in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations"; and "in reducing the number of concealed handguns in public because of their disproportionate involvement in life-threatening crimes of violence, particularly in streets and other public places." *Peruta, supra*, 2010 U.S.Dist. LEXIS at *26-27. The court also held that the Sheriff's policy which differentiated between "individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not" was reasonably related to the government's important and substantial interest in public safety. *Id.* at *27. Accordingly, the court in *Peruta* upheld the San Diego Sheriff's concealed weapon permitting policy.

For the exact reasons expressed by the court in *Peruta,* this Court should likewise uphold Sheriff Prieto's policy. Sheriff's Prieto's policy creates a balance between the competing Second Amendment interests in self-defense and public safety. The County of Yolo enables those with a

[8] *See also* Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* (2010), *available at* http://www.tracetheguns.org/report.pdf [finding that states who have more permissive concealed carry laws (i.e. states that grant no discretion to law enforcement to deny a private individual a concealed weapon carry permit) are associated with an increase in gun trafficking].

[9] Commentators have noted additional potential problems with high rates of concealed weapon carry such as: (1) that a widely-armed public could increase the number of criminals who decided to carry weapons illegally due to the increased riskiness of criminal activity and also increase the speed at which a criminal decides to shoot or disable potential victims who the criminal believes to be armed; and, (2) the injection of a gun into an angry dispute might escalate more minor disputes into criminal homicides even when no criminal act is initially contemplated. *See e.g.* Mark Tushnet, *Heller and the Perils of Compromise,* 13 Lewis & Clark L. Rev. 419, 429-31 (2009).

legitimate need for self-defense to obtain a concealed weapon permit, so long as they also meet the requirements enumerated in California Penal Code section 12050. Sheriff Prieto's policy is reasonably related to the government's important and substantial interest in public safety and concealed weapon control. Therefore, Sheriff Prieto's policy satisfies the intermediate scrutiny standard.

D. PLAINTIFFS' FACIAL CHALLENGE TO PENAL CODE SECTION 12050 NECESSARILY FAILS

Plaintiffs also assert a facial challenge of Penal Code section 12050's "good cause" and "good moral character" requirements. Plaintiff's MSJ, 11-17. As the U.S. Supreme Court has acknowledged, facial challenges are sometimes permissible but require plaintiffs to demonstrate that the challenged law either: (1) "could never be applied in a valid manner"; or, (2) as has been applied only in First Amendment contexts, when the law is impermissibly overbroad because a "substantial number" of its applications are unconstitutional, as judged in relation to the statute's "plainly legitimate sweep." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

Here, Plaintiffs admit that Defendant could exercise his discretion in a manner that would satisfy their interpretation of the Second Amendment (i.e. to find that good cause for a concealed weapon permit exists without an identifiable need for self-defense). Therefore, Plaintiffs cannot establish that Penal Code section 12050 could never be applied in a valid manner. They also have failed to establish that section 12050 is so overbroad that it inhibits the constitutional rights of third parties.

Additionally, Plaintiffs' analogy to the First Amendment prior restraint jurisprudence is improper. Possession and carrying of lethal firearms obviously affects the public's interest in safety and security more directly than the right to express oneself. *See* Dennis A. Henigan, *The Heller Paradox,* 56 U.C.L.A. L. Rev. 1171, 1198 (2009). As one commentator explained, transplanting First Amendment analysis into the Second Amendment context ignores the fundamental difference between regulation of speech and guns. Tushnet, *supra*, 13 Lewis & Clark L. Rev. at 429-31. For example, the First Amendment "time, place, and manner" analysis

differentiates between regulations that are justified without reference to the content of speech and those that target the content of the speech itself. *Id.* (citing *Kovacs v. Cooper*, 336 U.S. 77 [upheld ban on sound trucks on public streets regardless of message]). However, the content-based and content-neutral distinction is wholly inappropriate in the Second Amendment context. Content-neutral speech regulations are not really "about" speech, but rather concern urban amenities such as keeping the streets quiet whereas, gun regulations specifically target guns. *Id.* Almost every gun regulation would fail under a content-neutral approach, a result that the Court in *Heller* clearly rejected. *Heller, supra*, 554 U.S. at 626-27. The nature of gun regulations, which seek to address the risks inherent in possessing and carrying firearms, versus the speech regulations are simply too different to draw a direct analogy.

Furthermore, as discussed above, post-*Heller* courts have overwhelmingly applied an intermediate scrutiny standard of review. *Peruta, supra*, 2010 U.S Dist. LEXIS 130878 at *23-25 (citing *Skoien, supra*, 614 F.3d 638; *Marzzarella, supra*, 614 F.3d at 97; *Heller II*, *supra*, 698 F. Supp.2d at 188; *United States v. Pettengill*, 682 F.Supp.2d 49, 55 (D. Me. 2010). The cases cited by Plaintiffs lend no support to the proposition that the gun regulation at issue in this case must be assessed under heightened scrutiny applied in prior restraint matters. Plaintiff's MSJ, 11 [citing *Chester, supra*, 2010 U.S. App. LEXIS 26508 at *22; *Marzzarella, supra*, 614 F.3d at 89]. Rather, the courts in both *Chester* and *Marzzarella* apply an intermediate scrutiny standard. *See Chester, supra*, 2010 U.S. App. LEXIS 26508 at *26; *Marzzarella, supra*, 614 F.3d at 97. Plaintiffs' attempt to characterize Penal Code section 12050 and Sheriff Prieto's concealed weapon permitting policy as a "prior restraint" in order to subject it to heightened scrutiny which has been widely rejected, should likewise be rejected by this Court. *See* Henigan, *supra*, 56 U.C.L.A. L. Rev. at 1198 (noting that the *Heller* majority's commentary on presumptively lawful gun control laws and failure to invoke the strict scrutiny standard negates pro-gun advocates' analogies to the First Amendment).

Accordingly, Plaintiffs' facial challenge of the constitutionality of Penal Code section 12050 lacks merit.

E. SHERIFF PRIETO'S CONCEALED WEAPON PERMITTING POLICY DOES NOT VIOLATE PLAINTIFFS' RIGHT TO EQUAL PROTECTION

Plaintiff's second claim alleges that Penal Code section 12050's "good cause" and "good moral character" requirements violate the Equal Protection Clause of the Fourteenth Amendment. This same argument was raised and rejected in *Peruta.* 2010 U.S. Dist. LEXIS at *29.

The Equal Protection Clause provides that, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 5. Essentially, the Equal Protection Clause "is a directive that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburn Living Center, Inc.*, 473 U.S. 432, 439 (1985). The first step in an equal protection analysis is to identify the alleged classification groups who are allegedly treated differently. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166-67 (9th Cir. Or. 2005) (citing *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995)). To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people. *Id.* (citing *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988)). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Id.* An equal protection claim fails where a plaintiff "conflat[es] all persons not injured into a preferred class receiving better treatment" than him or herself. *Id.* (citing *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986).

Here, Plaintiffs fail to establish that they are similarly situated as those who meet Sheriff Prieto's good cause policy. Contrary to Plaintiffs' arguments, the policy "does not treat similarly situated individuals differently because not all law-abiding citizens are similarly situated . . . Those who can document circumstances demonstrating 'good cause' are situated differently than those who cannot." *Peruta, supra*, 2010 U.S. Dist. LEXIS at *29.

Even if Plaintiffs could be seen as similarly situated and treated differently, requiring an identifiable need for self-defense would not violate the Equal Protection Clause under any form of scrutiny. Where the statute in question substantially burdens fundamental rights or employs distinctions based on suspect classifications, such as race or national origin, strict scrutiny

applies. *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003) (racial classifications); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (right to vote)). Under strict scrutiny, a statute will be upheld only if the state can show that the statute is narrowly drawn to serve a compelling state interest. However, where individuals have distinguishing characteristics relevant to the interests of the State, the Equal Protection Clause requires "only a rational means to serve a legitimate end." *City of Cleburne*, 473 U.S. at 442. Regardless of the level of constitutional scrutiny, Plaintiffs' equal protection claim fails.

As discussed above, the interests of public safety and crime prevention are unquestionably important. In fact, courts have held government interests in public safety and crime prevention to be "compelling." *U.S. v. Salerno*, 481 U.S. 739, 749 (1987); *United States v. Scott*, 450 F.3d 863, 870 ("Crime prevention is a quintessential general law enforcement purpose and therefore if the exact opposition of a special need."); *United States* v. *Restrepo*, 946 F.2d 654, 674 (9th Cir. 1991) (en banc) (Norris, J., dissenting) ("It goes without saying that the government has a compelling interest in protecting the community from crime"). The longstanding recognition that concealed weapons pose an acute danger to the public indicates that the compelling interest in public safety is served by protecting the public from "the evil practice of carrying weapons secretly" and "preventing harm to persons other that the offender." *Reid, supra,* 1 Ala. At 616; *People v. Hale*, 43 Cal.App.3d 353, 356 (App.Ct. 1974) (quoting *People v. Jurado*, 25 Cal.App.3d 1027, 1032 (1972); *People v. Marin*, 795 N.E.2d 953, 958-59 (Ill.App. 2003) ("the legislature has a compelling interest in preventing the possession of guns in public under any such circumstances"). Moreover, as previously mentioned, limiting the number of loaded and concealed weapons in public ensures that police are able to respond to emergency situations immediately and safely without the need to wait for back up officers to verify that those with concealed firearms in a crowd are lawfully carrying. Lopez Decl. ¶ 10.

Sheriff Prieto's policy, which requires those seeking a concealed weapon permit for self-defense to indicate his or her need for self-protection, is narrowly tailored to reduce the incidence of unlawful public shooting and prevent substantial delay in police officers' ability to safely respond to a dangerous situation while still ensuring that those with a particular need for self-

defense have access to firearms for lawful purposes.

In sum, Plaintiffs' equal protection claim fails on all accounts. Plaintiffs have not shown that they were treated differently than similarly situated individuals. Those who have a specific need for self-defense and those who merely wish to carry a handgun based on a generalized fear that the need for self-defense could arise are ***not*** similarly situated individuals. And even if Plaintiffs' were similarly situated, the compelling interest of public safety and Sheriff Prieto's modest limitation requiring only some reasonable basis for the need to carry a concealed weapon for self-defense meet even the strictest level of scrutiny.

IV. CONCLUSION

For the aforementioned reasons, Defendants' request that this Court grant Defendants' motion for summary judgment and deny Plaintiffs' motion.

Dated: February 10, 2011

ANGELO, KILDAY & KILDUFF, LLP

/s/ Serena M. Sanders

By:_____
SERENA M. SANDERS
Attorneys for Defendants YOLO COUNTY and SHERIFF ED PRIETO

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LEXSEE 2010 U.S. DIST. LEXIS 130878

EDWARD PERUTA, MICHELLE LAXSON, JAMES DODD, DR. LESLIE BUNCHER, MARK CLEARY, and CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, Plaintiffs, vs. COUNTY OF SAN DIEGO, WILLIAM GORE, individually and in his capacity as sheriff, Defendants.

CASE NO. 09CV2371-IEG (BGS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 130878

December 10, 2010, Decided
December 10, 2010, Filed

PRIOR HISTORY: *Peruta v. County of San Diego, 2010 U.S. Dist. LEXIS 63654 (S.D. Cal., June 25, 2010)*

COUNSEL: [*1] For Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, California Rifle and Pistol Association Foundation, Plaintiffs: Carl D. Michel, LEAD ATTORNEY, Michel & Associates PC, Long Beach, CA; Paul H Neuharth , JR, LEAD ATTORNEY, Law Offices of Paul H Neuharth, San Diego, CA.

For County of San Diego, William D Gore, individually and in his capacity as sheriff, Defendants: James M Chapin, LEAD ATTORNEY, County of San Diego Office of County Counsel, San Diego, CA.

For Brady Center to Prevent Gun Violence, Amicus: Neil R. O'Hanlon, Hogan Lovells US LLP, Los Angeles, CA.

For Center for Constitutional Jurisprudence, Doctors for Responsible Gun Ownership, Law Enforcement Alliance of America, Independence Institute, Amicus: John C Eastman, LEAD ATTORNEY, Clarermont Institute Center for Constitutional, Jurisprudence, Orange, CA.

JUDGES: IRMA E. GONZALEZ, Chief Judge, United States District Judge.

OPINION BY: IRMA E. GONZALEZ

OPINION

ORDER:

(1) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, and

(2) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Doc. Nos. 34, 38]

This is an action brought pursuant to *42 U.S.C. § 1983* in which Plaintiffs seek injunctive and declaratory relief from Defendant's policies [*2] for obtaining a license to carry a concealed weapon pursuant to *California Penal Code § 12050*. At the heart of the parties' dispute is whether the right recognized by the Supreme Court's rulings in *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)* and *McDonald v. City of Chicago, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)*--the right to possess handguns in the home for self-defense--extends to the right asserted here: the right to carry a loaded handgun in public, either openly or in a concealed manner. The matter is presently before the Court is a motion for partial summary judgment brought by Plaintiffs and a motion for summary judgment brought by Defendant William Gore. For the reasons set forth below, the Court **DENIES** Plaintiff's motion for partial summary judgment and **GRANTS** Defendant's motion for summary judgment.

BACKGROUND

The Plaintiffs

Each individual Plaintiff is a resident of San Diego County. Pls.' Statement of Undisputed Facts ("SUF") at 6. None of the Plaintiffs is disqualified under federal or California law from purchasing or possessing firearms. Id. Each individual Plaintiff applied to the San Diego Sheriff's Department for a license to carry a concealed weapon ("CCW") or a renewal, and [*3] each was denied for lack of "good cause" or told by the Sheriff's Department that he or she would be ill-advised to apply due to lack of "good cause." [1] Id. at 7. In addition to being denied due to lack of "good cause," Plaintiff Edward Peruta alleges he was denied a CCW license based on his residency. See Pls.' Consolidated SUF ¶ 15. Defendant maintains the residency requirement was not a factor in the denial. Id. Plaintiff California Rifle and Pistol Association Foundation ("CRPAF") is an organization dedicated to educating the public about firearms and protecting the rights thereto. See Pls.' SUF at 6.

1 In 2006, the Sheriff's Department initiated an interview process to assist applicants and staff in determining pre-eligibility and to avoid applicants having to pay application fees and firearms safety course fees when they would not qualify for the license. The interview is voluntary and any person can submit an application without the assistance offered by the interview. Based on what the applicant outlines during the interview, counter clerks are permitted to offer an educated guess as to whether an applicant is eligible for a license based on the scenarios described by applicants. [*4] See Def.'s SUF ¶ 7.

Plaintiffs contend that the counter clerks sometimes discourage applicants from applying for a license, and in doing so, they serve Defendants' purpose of minimizing the number of applicants and the documentation of denials.

Concealed Carry Licensing Scheme

California Penal Code sections 12050-12054 set forth the criteria that applicants for CCW licenses must meet: Applicants must be of good moral character, be a resident of or spend substantial time in the County in which they apply, demonstrate good cause and take a firearms course. In San Diego County, all license applications go to Defendant Sheriff William Gore are handled by his authorized representatives. See Def.'s SUF ¶ 1. The "good cause" provision of *Penal Code section 12050* is at issue in this case.

Defendant defines "good cause" under *Penal Code section 12050* as a set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be placed in harm's way. See Def.'s SUF ¶ 5. Generalized fear for one's personal safety is not, standing alone, considered "good cause." Id. To demonstrate "good cause," new applicants must provide supporting documentation. See [*5] Pls.' SUF ¶ 9.

License holders may renew licenses up to 30 days prior to the expiration date. Def.'s SUF ¶ 8. Renewals are issued on the spot absent any negative law enforcement contacts, crime cases, arrests, etc. See id. Applicants still need to provide some form of documentation to support a continued need but not to the extent of the initial application. Id. Plaintiffs maintain that Plaintiff Cleary was required to produce documentation for his renewal, but that the County granted several renewal applications of Honorary Deputy Sheriffs' Association ("HDSA") members without requiring supporting documentation. Pls.' Consolidated SUF ¶ 10.

Defendant defines residency under *Penal Code section 12050* to include any person who maintains a permanent residence in the County or spends more than six months of the taxable year within the County if the individual claims dual residency. See id. ¶ 16. Part-time residents who spend less than six months in the County are considered on a case-by-case basis and CCW licenses have been issued to part-time residents. Id.

Procedural Background

Plaintiff Edward Peruta filed his original complaint on October 23, 2009, asserting that *Penal Code section 12050* [*6] violated the right to bear arms under the *Second Amendment*, the right to equal protection under the *Fourteenth Amendment*, and the right to travel under the *Fourteenth Amendment*. (Doc. No. 1.) Defendant moved to dismiss Plaintiff's complaint on November 13, 2009. (Doc. No. 3.) The Court denied Defendant's motion to dismiss on January 14, 2010, and Defendant filed an answer soon thereafter. (Doc. Nos. 7, 8.) On April 22, 2010, Plaintiff filed a motion for leave to file a First Amended Complaint to add additional Plaintiffs and claims. (Doc. No. 16.) The Court granted Plaintiffs' motion on June 25, 2010, and Defendant filed an answer to Plaintiffs' First Amended Complaint on July 9, 2010. (Doc. Nos. 24, 28.)

Presently before the Court is a motion for summary judgment by Defendant and a motion for partial summary judgment by Plaintiffs. (Doc. Nos. 34, 38.) Defendant has moved for summary judgment on all claims, whereas Plaintiffs have moved for summary judgment only on the right to bear arms and certain equal protection claims. For purposes of their motions, and with the Court's approval, the parties adopted (and later modified) a stipulated briefing schedule and completed briefing by

November [*7] 10, 2010. The Court held oral argument on the parties' motions on November 15, 2010. (Doc. No. 60.)

LEGAL STANDARD

Summary judgment is proper where the pleadings and materials demonstrate "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* A material issue of fact is a question a trier of fact must answer to determine the rights of the parties under the applicable substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex, 477 U.S. at 323.* To satisfy this burden, the movant must demonstrate that no genuine issue of material fact exists for trial. *Id. at 322.* Where the moving party does not have the ultimate burden of persuasion at trial, it may carry its initial burden of production in one of two ways: "The moving party may produce evidence negating an essential element of the nonmoving party's [*8] case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., v. Fritz Cos., 210 F.3d 1099, 1106 (9th Cir. 2000).* To withstand a motion for summary judgment, the non-movant must then show that there are genuine factual issues which can only be resolved by the trier of fact. *Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000).* The nonmoving party may not rely on the pleadings alone, but must present specific facts creating a genuine issue of material fact through affidavits, depositions, or answers to interrogatories. *Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324.*

The court must review the record as a whole and draw all reasonable inferences in favor of the nonmoving party. *Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003).* However, unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. Id.; *Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008).* Moreover, the court is not required "'to scour the record [*9] in search of a genuine issue of triable fact,'" *Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir.1996)* (citations omitted), but rather "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001).*

DISCUSSION

I. Right to Bear Arms

A. The Scope of the Right: Heller and McDonald

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." In *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008)*, the Supreme Court recognized that the *Second Amendment* protects the individual right to keep and bear arms for self-defense. Two years later in *McDonald v. City of Chicago, 130 S. Ct. 3020, 3026, 3044, 177 L. Ed. 2d 894 (2010)*, the Court evaluated restrictions "similar to the District of Columbia's" in Heller and held that the *Due Process Clause of the Fourteenth Amendment* "incorporates the *Second Amendment* right recognized in Heller."

The Heller Court focused on two restrictions, both of which are relevant to the right asserted in this [*10] case: (1) a ban on handgun possession in the home, which the Court characterized as among the most restrictive in the "history of our Nation," and (2) the requirement that firearms be kept inoperable at all times. *128 S. Ct. at 2817-18.* The Court's analysis of these restrictions is important because it provides guidance on the scope of the *Second Amendment* right in terms of both "place" and "manner."

Place. After evaluating the prefatory and operative clauses of the amendment, the Court turned to the District of Columbia's total ban on handgun possession in the home. *128 S. Ct. at 2817.* In doing so, the Court singled out the home as a place "where the need for defense of self, family, and property is most acute." Id. Likewise, while declining to expound fully on the scope of the *Second Amendment*, the Court observed that "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id. at 2821.* Accordingly, the Court held that "the District's ban on handgun possession in the home violates the *Second Amendment*." Id.

Manner. The Heller Court also addressed the District's [*11] requirement that firearms in the home be rendered and kept inoperable at all times, and without exception. [2] *Id. at 2818.* The Court held that the District's restriction "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." Id. In dicta, the Heller Court explained that the *Second Amendment* right is "not

unlimited" and not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *128 S. Ct. at 2816* (citations omitted). For example, the Court noted that:

> the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the *Second Amendment* or state analogues. 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 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. at 2816-17 [*12] (internal citations omitted). In a footnote immediately following, the Court explained: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id. at 2817 n.26*.

> 2 Against the District's urging, the Court declined to construe the statute as containing an exception for self-defense. *Id. at 2818*.

The Court's recitation of lawful regulatory measures does not provide a blueprint for the validity of future restrictions; it should be interpreted as "precautionary language" that "warns readers not to treat Heller as containing broader holdings than the Court set out to establish: that the *Second Amendment* creates individual rights, one of which is keeping operable handguns at home for self-defense." *United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010)* (en banc) (Easterbrook, J.).

B. Plaintiffs' Challenge in the Context of California's Statutory Framework

Plaintiffs maintain that the right recognized in Heller includes a right to carry a loaded handgun in public, either openly or in a concealed manner. See generally Pls.' Mem. In accordance with such a right, Plaintiffs maintain that under California law, there is a single [*13] outlet for carrying a handgun for self-defense: concealed carry with a license pursuant *Penal Code section 12050*. See id. at 1-2. Because Penal Code *section 12050* allows sheriffs to grant concealed carry licenses, Plaintiffs argue that Defendant's policy--under which an assertion of self-defense is insufficient to demonstrate "good cause"--is unconstitutional both on its face and as applied. See generally id.

Defendant disputes each aspect of Plaintiffs' position and argues against extending Heller beyond its express holding. See generally Def.'s Mem. According to Defendant, the right recognized in Heller does not extend beyond the home, and the right to self-defense does not entail the right to loaded carry in the absence of an immediate threat. Id. Accordingly, Defendant argues that concealed carry pursuant to *Penal Code section 12050* is not the sole outlet for carrying a handgun for self-defense. Defendant highlights other California provisions that permit unloaded open carry and loaded open carry if the individual is in immediate grave danger. [3] Id. In light of the foregoing, and based on the Supreme Court's approval of cases upholding concealed weapons bans, Defendant maintains that [*14] the restrictions at issue here are "presumptively lawful." See id. at 9.

> 3 Defendant also contends that Plaintiffs' challenge amounts to a backdoor attack on the constitutionality of *section 12050*, rather than mere challenge to its policy. See Def.'s Mem. at 8. The Court addresses this contention below.

Before turning to the burden imposed by Defendant's policy, the Court evaluates Plaintiffs' contention that, under California's statutory framework, concealed carry with a license pursuant *Penal Code section 12050* contains the sole outlet for carrying a handgun for self-defense. See Pls.' Mem. at 1-2. Plaintiff's contention is based on the assumption that *Penal Code section 12031* unlawfully burdens the right to self-defense. [4]

> 4 In its order denying Defendant's motion to dismiss, based on the posture of the case and the briefing of the parties, the Court abided the assumption that *section 12031* unlawfully burdens the right to self-defense. At this stage, however, the Court scrutinizes the assumption more carefully.

California Penal Code section 12031 generally restricts the open carry of loaded firearms in public. The statute contains several exceptions, however, including specific exceptions [*15] for self-defense and defense of the home. [5] See *Cal. Penal Code §§ 12031(j)(1)-(2). Section 12031(j)(1)* permits loaded open carry by "a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." The term immediate refers to the "brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arri-

val of its assistance." Id. *Section 12031(j)(2)* permits loaded open carry by a person who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety." And *Section 12031(l)* expressly ensures the right of self-defense in the home: "Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite." As a practical matter, should the need for self-defense [*16] arise, nothing in *section 12031* restricts the open carry of unloaded firearms and ammunition ready for instant loading. See *Cal. Penal Code§ 12031(g)*.

> 5 There are also exceptions for individuals such as security guards, police officers and retired police officers, private investigators, members of the military, hunters, target shooters, persons engaged in "lawful business" who possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property. See *Cal. Penal Code §§ 12031(b)-(d)* and *(h)*.

In their Sur-Reply, Plaintiffs argue that despite its self-defense exception, *section 12031* does not preserve the right to self-defense because such a need can arise "in a split second." See Pls.' Sur-Reply at 1-2. Like the District of Columbia requirement that firearms be "unloaded and dissembled or bound by a trigger lock or similar device," Plaintiffs maintain that a general requirement that handguns be kept unloaded is foreclosed by Heller. See id.

The Court disagrees. There is an important distinction between *section 12031* and the District of Columbia law at issue in Heller, which required that firearms in the home be rendered and kept inoperable *at* [*17] *all times*. See *Heller, 128 S. Ct. at 2818*. Unlike *section 12031*, the District of Columbia law did not contain, and the Supreme Court declined to infer, an exception for self-defense. Id. The Heller Court did not reach the question of whether the law would have been constitutional had there been an exception for self-defense. See id. Asa consequence, the Court declines to assume that *section 12031* places an unlawful burden on the right to carry a firearm for self-defense, and Plaintiffs have elected not to challenge *section 12031*. [6]

> 6 The Court notes that *section 12031* has been challenged and upheld following Heller. See *People v. Flores, 169 Cal. App. 4th 568, 576-77, 86 Cal. Rptr. 3d 804 (Cal. Ct. App. 2008)* (holding "*section 12031* does not burden the core *Second Amendment* right announced in Heller -- the right of law-abiding, responsible citizens to use arms in defense of hearth and home -- to any significant degree").

Although Plaintiffs have elected not to challenge *section 12031*, focusing instead on concealed carry pursuant to *section 12050*, the validity and open carry restrictions of *section 12031* are relevant and important here. The Heller Court relied on 19th-century cases upholding concealed weapons [*18] bans, but in each case, the court upheld the ban because alternative forms of carrying arms were available. See *State v. Chandler, 5 La. Ann. 489, 490 (1850)* (holding concealed weapons ban "interfered with no man's right to carry arms . . . in full open view"); *Nunn v. State, 1 Ga. 243, 251 (1846)* (holding concealed weapons ban valid so long as it does not impair the right to bear arms "altogether"). See also *Andrews v. State, 50 Tenn. 165, 178 (1871)* (holding that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," violated the state right to keep and bear arms); *State v. Reid, 1 Ala. 612, 616-17 (1840)* (observing that a regulation that amounts to a total ban would be "clearly unconstitutional")). For that reason, in its order denying Defendant's motion to dismiss, this Court emphasized that not *all* concealed weapons bans are presumptively lawful. See Order Denying William D. Gore's Motion to Dismiss (Doc. No. 7) at 7-10. Heller and the 19th-century cases it relied upon instruct that concealed weapons restrictions cannot be viewed in isolation; they must be viewed in the context of the government's overall scheme. [*19] Here, to the extent that *Penal Code sections 12025* and *12050* and Defendant's policy burden conduct falling within the scope of the *Second Amendment*, if at all, the burden is mitigated by the provisions of *section 12031* that expressly permit loaded open carry for immediate self-defense. With the foregoing in mind, the Court proceeds to the question of whether Defendant's policy satisfies the appropriate level of judicial scrutiny. [7] Because Defendant's policy for issuing concealed carry licenses under *section 12050* would pass constitutional muster even if it burdens protected conduct, the Court does not need to decide whether the *Second Amendment* encompasses Plaintiffs' asserted right to carry a loaded handgun in public.

> 7 Plaintiffs maintain they are not challenging the constitutionality of any of the California Penal Code sections. Pls.' Reply at 1-3. Instead, Plaintiffs contend they are challenging only the Defendant's policy of issuing concealed weapons licenses, both as applied and on its face. Id. In doing so, Plaintiffs urge the Court to hold that *section 12050*'s "good cause" provision is satisfied

whenever applicants of good moral character assert self-defense as their basis. See [*20] Pls.' Reply at 1 ("This means holding *section 12050*'s 'good cause' criterion to be satisfied where CCW applicants of goodmoral character assert 'self-defense as their basis'"). Defendant, however, maintains Plaintiffs are asserting a back door attack on the constitutionality of *section 12050*. See Def.'s Mem. at 8 ("Plaintiffs are asking the Court to strike the 'good cause' language from the statute"); Def.'s Reply at 1 (Plaintiffs are "asking the court to mandate that the State of California become a 'shall issue' state by forbidding Sheriffs from requiring a showing of 'good cause' for concealed carry licensure").

Section 12050 provides that when applicants meet certain requirements, and the sheriff finds that "good cause" exists, the sheriff "may issue" a license to carry a concealed firearm. *Cal. Penal Code § 12050(a)*. "*Section 12050* explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements." *Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir. 1982)*; see also *Gifford v. City of Los Angeles, 88 Cal. App. 4th 801, 805, 106 Cal. Rptr. 2d 164 (Cal. Ct. App. 2001)* (observing that "*Section 12050* gives "extremely broad discretion" to [*21] the sheriff concerning the issuance of concealed weapons licenses"); *Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1241, 273 Cal. Rptr. 84 (Cal. Ct. App. 1990)* (same). Holding that sheriffs must issue concealed carry licenses all individuals who meet the minimum statutory requirements and assert self-defense as their basis would eliminate the discretion afforded sheriffs under *section 12050*. Accordingly, Plaintiffs' challenge cannot be properly construed as a mere challenge to Defendant's policy.

C. Whether Defendant's Policy Satisfies the Appropriate Level of Scrutiny

Plaintiffs acknowledge that the Heller Court expressly declined to prescribe the appropriate level of judicial scrutiny for firearms regulations, but they nevertheless argue that "Heller points clearly to strict scrutiny." See Pls.' Mem. at 9-15. Noting that the Heller Court ruled out a rational basis inquiry and the "interest-balancing" approach suggested by Justice Breyer, Plaintiffs contend that when a law interferes with "fundamental constitutional rights," it must be subject to strict scrutiny. Pls.' Mem. at 9. Plaintiffs also maintain that "the trend after McDonald is toward adopting strict scrutiny." See Pls.' Reply at [*22] 11. Defendant argues that, since Heller, heightened scrutiny has been reserved for instances in which the "core right" of possession of a firearm in the home is infringed. See Def.'s Mem. at 17. Defendant contends the appropriate standard is "reasonableness review," or in the alternative, intermediate judicial scrutiny. See id. at 11-17.

The Court is unpersuaded that strict scrutiny is warranted here. Contrary to Plaintiffs' suggestion, fundamental constitutional rights are not invariably subject to strict scrutiny. In the *First Amendment* context, for example, content-neutral restrictions on the time, place and manner of speech are subject to a form of intermediate scrutiny. See *United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)*. Other restrictions on speech may be held to an even lower standard of review. See *Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992)* (noting that limitations on expressive activity conducted in a nonpublic forum need only be reasonable, as long as they are viewpoint neutral); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)* (same). Drawing on *First Amendment* jurisprudence, several courts have applied intermediate [*23] scrutiny in the *Second Amendment* context. See, e.g., *United States v. Smith, 2010 U.S. Dist. LEXIS 98511, 2010 WL 3743842, at *8 (S.D. W. Va. Sept. 20, 2010)*; *United States v. Walker, 709 F. Supp.2d 460, 466 (E.D. Va. 2010)*; *United States v. Marzzarella, 595 F. Supp. 2d 596 (W.D. Pa. 2009)*. Accordingly, Plaintiffs are wrong in suggesting that the Court must apply strict scrutiny.

Plaintiffs are also wrong in suggesting there a trend after McDonald toward adopting strict scrutiny. In support of such a trend, Plaintiffs cite two cases. [8] The first case is *United States v. Engstrum, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009)*. Engstrum predated McDonald and therefore cannot demonstrate a post-McDonald trend. The second case is State of Wisconsin v. Schultz, No. 10-CM-138, slip. op. (Wis. Ct. App. Oct. 12, 2010). There, the state appellate court appears to have relied on Justice Thomas' concurrence in McDonald, rather than the majority, in deciding the appropriate level of scrutiny. At best, Engstrum and Schultz reveal that a post-McDonald trend toward strict scrutiny may emerge but is thus far indiscernible. To date, a majority of cases citing to McDonald and employing some form of heightened scrutiny--most of which [*24] are challenges to criminal convictions--have employed intermediate scrutiny. E.g., *United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)*; *United States v. Marzzarella, 614 F.3d 85, 97 (3rd Cir. 2010)*. The trend prior to McDonald was intermediate scrutiny. See *Heller v. District of Columbia, 698 F. Supp.2d 179, 188 (D.D.C. 2010)* (Heller II) (surveying the landscape of post-Heller decisions and joining "the

majority of courts" in holding that "intermediate scrutiny is the most appropriate standard").

> 8 Following submission of the case, Plaintiffs filed a Notice of Lodgment of Recent Authority in Support of Plaintiffs' Motion for Partial Summary Judgment. (Doc. No. 62.) The Lodgment contains two cases as exhibits: *United States v. Ligon, 2010 U.S. Dist. Lexis 116272 (D. Nev. Oct. 20, 2010)* and *United States v. Huet, 2010 U.S. Dist. Lexis 123597 (Nov. 22, 2010)*. Neither of the cases changes the Court's analysis in a meaningful way: The court in Ligon employed strict scrutiny for the sake of argument, and the court in Huet did not employ a levels of scrutiny analysis at all, instead focusing on the restriction's impact on the "core right" of possession in the home.

Neither party has cited, [*25] and the Court is not aware of, a case in which a court has employed strict scrutiny to regulations that do not touch on the "core" *Second Amendment* right: possession in the home. [9] If it exists, the right to carry a loaded handgun in public cannot be subject to a more rigorous level of judicial scrutiny than the "core right" to possess firearms in the home for self-defense. See *Heller, 128 S. Ct. at 2817* (focusing on the home as the place "where the need for defense of self, family, and property is most acute"); *McDonald, 130 S. Ct. at 3036* (quoting same). If anything, the opposite is true; unlike possession in the home, carrying a concealed firearm in public presents a "recognized threat to public order" and "poses an imminent threat to public safety." *People v. Yarbrough, 169 Cal. App. 4th 303, 313-14, 86 Cal. Rptr. 3d 674 (Cal. Ct. App. 2010)* (quotation marks and citations omitted); see also *McDonald, 130 S. Ct. at 3105* (Stevens, J., dissenting) ("firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside . . ."). At most, Defendant's policy is subject to intermediate scrutiny.

> 9 In fact, the Court is not aware of a case in which a court has employed [*26] *any* form of heightened scrutiny of regulations that do not affect the "core right."

In contrast with strict scrutiny, intermediate scrutiny, "by definition, allows [the government] to paint with a broader brush." *United States v. Miller, 604 F. Supp.2d 1162, 1172 (W.D. Tenn. 2009)*. In *United States v. Marzzarella, 614 F.3d 85, 98 (3rd Cir. 2010)*, the Third Circuit crafted an intermediate scrutiny standard for the *Second Amendment* based on the various intermediate scrutiny standards utilized in the *First Amendment* context. Pursuant to that standard, intermediate scrutiny requires the asserted governmental end to be more than just legitimate; it must be either "significant," "substantial," or "important," and it requires the "fit between the challenged regulation and the asserted objective be reasonable, not perfect." Id. (citations omitted); *United States v. Huet, 2010 U. S. Dist. Lexis 123597, at *28 (W.D. Pa. Nov. 22, 2010)*.

In this case, Defendant has an important and substantial interest in public safety and in reducing the rate of gun use in crime. In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the [*27] risks to other members of the public who use the streets and go to public accommodations. See Zimring Decl. The government also has an important interest in reducing the number of concealed handguns in public because of their disproportionate involvement in life-threatening crimes of violence, particularly in streets and other public places. Id. Defendant's policy relates reasonably to those interests. Requiring documentation enables Defendant to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not.

The Court acknowledges Plaintiffs' argument that many violent gun crimes, even a majority, are committed by people who cannot legally have guns, and the ongoing dispute over the effectiveness of concealed weapons laws. See Moody Decl. But under intermediate scrutiny, Defendant's policy need not be perfect, only reasonably related to a "significant," "substantial," or "important" governmental interest. *Marzzarella, 614 F.3d at 98*. Defendant's policy satisfies that standard. Accordingly, the Court **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** Defendant's motion for summary judgment on Plaintiffs' [*28] right to bear arms claim.

II. Equal Protection

The "*Equal Protection Clause of the Fourteenth Amendment* commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*; *Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993)*. When a government's action does not involve a suspect classification or implicate a fundamental right, even intentional discrimination will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. *New Orleans v. Dukes, 427 U.S. 297, 303-04, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976)*; *Cleburne, 473 U.S. at 439*; *Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990)*. However, "[w]here fundamental rights and liberties are

asserted under the *Equal Protection Clause*, classifications which might invade or restrain them must be closely scrutinized." *Hussey v. City of Portland, 64 F.3d 1260, 1265 (9th Cir. 1995)* (quoting *Harper v. Va. Bd. of Elections, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966))*.

A. Defendant's "Good Cause" Policy

For the reasons stated in [*29] above, the Court concludes that Defendant's "good cause" policy is valid. Accordingly, the policy does not treat similarly situated individuals differently because not all law-abiding citizens are similarly situated, as Plaintiffs contend. Those who can document circumstances demonstrating "good cause" are situated differently than those who cannot. Therefore, Defendant's "good cause" policy does not violate equal protection.

B. Defendant's Treatment of Honorary Deputy Sheriffs

The Honorary Deputy Sheriffs' Association ("HDSA") is a civilian organization whose primary purpose is to finance projects for the San Diego Sheriff's Department. Plaintiffs allege that Defendant engages in preferential treatment of HDSA members. Pls.' Mem. at 20-22. Defendant denies such allegation and maintains that "Sheriff Gore does not offer special treatment to anyone and membership in the [HDSA] has no bearing on the ability to obtain a CCW license." Def.'s Mem. at 22. Plaintiffs do not contest or attempt to refute the premise that Defendant's policy is facially even-handed, instead asserting arguments consistent with a purely as-applied challenge. See generally Pls.' Mem.; Pls.' Reply.

A concealed weapons [*30] licensing program administered so as to unjustly discriminate between persons in similar circumstances may deny equal protection. *Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984)*; see also *Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1983)* (citing *Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886))*. At this stage, the Court evaluates whether there is actual evidence that would allow a reasonable jury to conclude first, that others similarly situated to Plaintiffs generally have not been treated in a like manner; and second, that the denials of concealed weapons licenses to them were based on impermissible grounds. See *March v. Rupf, 2001 U.S. Dist. LEXIS 14708, 2001 WL 1112110, at *5 (N.D.Cal. 2001)* (citing *Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1983)* (applying this test to a claim of "selective prosecution" in zoning decision context)).

In March v. Rupf, plaintiffs asserted claims similar to those at issue here, that in granting concealed weapons licenses, sheriffs favored a "privileged class" of individuals. *2001 U.S. Dist. LEXIS 14708, 2001 WL 1112110, at *5 (N.D.Cal. 2001)*. Plaintiffs submitted more than 700 pages of applications and renewals. Id. The court observed that "some applicants [*31] were granted concealed weapons licenses after stating on paper basically the same grounds for issuance upon which plaintiffs' applications were denied." Id. Nonetheless, the court held there was no genuine issue of material fact because the records did not establish those who received licenses were similarly situated to plaintiffs. Id. The records were incomplete--they did not reveal information compiled in background checks, oral interviews and the like?and the records did not establish a causal connection between factors suggesting "privileged class" and the issuance of a concealed weapons license. Id. The court concluded that, "without evidence of anything more than vagaries in [] administration," plaintiffs equal protection claim could not survive summary judgment. Id.

Like the plaintiffs in March, Plaintiffs here cannot demonstrate they were treated differently than similarly situated others. To show disparate treatment, Plaintiffs have offered a number of HDS A renewal applications as a contrast to Plaintiffs initial applications. See Exs. U-PP. But the two types of applications are not comparable; renewal applications are generally issued on the spot and subject to less rigorous [*32] documentation requirements than initial applications. See Pelowitz Decl. ¶ 12. Just one of the Plaintiffs contends his renewal was denied, and in that case, the renewal was granted following an appeal. See Exs. K-S. Accordingly, the evidence introduced by Plaintiffs does not establish or create a genuine issue of material fact regarding whether similarly situated individuals were treated differently. At most, it demonstrates "vagaries in [] administration." See *March, 2001 U.S. Dist. LEXIS 14708, 2001 WL 1112110, at *5 (N.D.Cal. 2001)*. Moreover, for the reasons stated above, Plaintiffs have not demonstrated the denials of concealed weapons licenses to them were based on impermissible grounds. Defendant's policy does not favor HDSA members in violation of the *equal protection clause of the Fourteenth Amendment*.

Accordingly, the Court **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** Defendant's motion for summary judgment on Plaintiffs' equal protection claims as they relate to Defendant's "good cause" policy and treatment of HDSA members.

C. Defendant's Residency Requirement[10]

10 The only Plaintiff who alleges the residency requirement impacted his application is Edward Peruta, and the parties agree that Peruta's [*33] application was denied for lack of "good cause."

See Pls.' Consolidated SUF ¶ 15. In addition to challenging the residency requirement as applied to Peruta, Plaintiffs challenge facial validity of the residence requirement.

For the reasons stated below, in differentiating between residents (and part-time residents who spend more than six months of the taxable year within the County) and non-residents, Defendant utilizes means that are substantially related to a substantial governmental interest. Because residents and non-residents are situated differently, the residency requirement of Defendant's policy does not violate equal protection. Therefore, the Court **GRANTS** Defendant's motion for summary judgment on Plaintiffs' equal protection claim as it relates to Defendant's residency requirement.

III. Right to Travel

The right to travel is usually considered to be one of the rights guaranteed by the Privileges and Immunities Clause of Article IV and the *Privileges and Immunities Clause of the Fourteenth Amendment*. See *Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 902, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986)* (plurality) (citations omitted). The right to travel embraces at least three different components: (1) the right [*34] of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. *Saenz v. Roe, 526 U.S. 489, 500, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)*. However, not all regulations that merely have an effect on travel raise an issue of constitutional dimension. Rather, "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Soto-Lopez, 476 U.S. at 903* (plurality) (internal quotation marks and citations omitted). A law embracing means that are "substantially" related to a "substantial" government interest will survive a right to travel analysis. *Bach v. Pataki, 408 F.3d 75, 88 n.27 (2nd Cir. 2005)*. Plaintiffs allege Defendant's residency requirement "penalizes applicants for traveling and spending time outside of San Diego," FAC ¶ 122, and accordingly, Plaintiffs allege the policy burdens the right to travel. Relying on Bach, [*35] Defendant contends that its policy passes muster as a bona fide residence requirement. See Def.'s Mem. at 30.

Like the restrictions at issue here, the Second Circuit in Bach evaluated restrictions that inhibited non-residents from applying for a permit to carry a concealed weapon. Assuming, without deciding, that entitlement to a New York carry license was a privilege under Article IV of the Privileges and Immunities Clause, the Second Circuit concluded that New York had a substantial interest in monitoring gun licensees and that limiting licenses to residents and those working primarily within the state was sufficiently related to that interest. *Bach, 408 F.3d at 91 -94*. The Court is unable to discern a meaningful distinction between the issues facing the Second Circuit in Bach and those at issue here. Adopting the rationale set forth in that decision, the Court concludes there is no genuine issue of material fact as to whether Defendant's policy violates the right to travel. Accordingly, the Court **GRANTS** Defendant's motion for summary judgment on Plaintiffs' right to travel claim. [11]

11 In addition to their right to travel claim, which arises under the Privileges and Immunities Clause of Article IV and the Privileges and Immunities Clause of the [*36] *Fourteenth Amendment*, Plaintiffs have asserted a separate claim for relief under the Privileges and Immunities Clause of Article IV. In its motion for summary judgment, Defendant suggests the claims are identical, see Def.'s Mem. at 29, and Plaintiffs have not disputed Defendant's contention, see generally Pls.' Mem; Pls.' Reply. The Court agrees that separate analyses of the claims would be duplicative and dismisses Plaintiffs' Privileges and Immunities claim along with their right to travel claim.

IV. Due Process

A threshold requirement for asserting a due process claim is the existence of a property or liberty interest. *Board of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*. Plaintiffs' due process claim is governed by *Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir. 1982)*, which held that by virtue its discretionary language, *Section 12050* does not create a property interest. Morever, the Court held that the Plaintiff in that case "did not have a liberty interest in obtaining a concealed weapons license." *Id. at 64*. Pursuant to Erdelyi, the Court concludes that because Plaintiffs do not have "property or liberty interest in a concealed weapons license, the *Due Process Clause* did not require [*37] [Defendant] to provide [them] with due process before denying [their] initial [license] application[s]." Id. In any event, there is nothing to suggest that Defendant's licensing procedures deprive Plaintiffs of the opportunity to be heard at a meaningful time in a meaningful manner. See *Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*. The Court **GRANTS** Defendant's motion for summary judgment on Plaintiffs' due process claim.

CONCLUSION

For the foregoing reasons, the Court concludes that Defendant's policy does not infringe on Plaintiffs' right to bear arms or violate equal protection, the right to travel, the Privileges and Immunities Clause of Article IV, or due process. [12] Accordingly, the Court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

12 Plaintiffs have also asserted a claim for relief under *42 U.S.C. § 1983* for Defendant's alleged violation of *California Penal Code section 12050*. Because there is no cause of action under *section 1983* for violation of a state statute, see *Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1349 (7th Cir.1985)*, the Court dismisses the claim.

IT IS SO ORDERED.

DATED: December 10, 2010

/s/ [*38] Irma E. Gonzalez

IRMA E. GONZALEZ, Chief Judge

United States District Court

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LEXSEE 2011 MD. LEXIS 1

CHARLES FRANCIS WILLIAMS, JR. v. STATE OF MARYLAND

No. 16, September Term, 2010

COURT OF APPEALS OF MARYLAND

2011 Md. LEXIS 1

January 5, 2011, Filed

PRIOR HISTORY: Certiorari to the Court of Special Appeals (Circuit Court for Prince George's County). Sean D. Wallace, JUDGE.
Williams v. State, 188 Md. App. 691, 982 A.2d 1168, 2009 Md. App. LEXIS 169 (2009)

DISPOSITION: [*1] JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY PETITIONER.

HEADNOTES

CONSTITUTIONAL LAW -- *SECOND AMENDMENT -- SECTION 4-203 OF THE CRIMINAL LAW ARTICLE* -- SCOPE OF RIGHT TO BEAR ARMS

Section 4-203(a)(1)(i) of the Criminal Law Article, which prohibits wearing, carrying, or transporting a handgun in public, without a permit, is outside of the scope of the Second Amendment as explicated by the United States Supreme Court in *Heller* and *McDonald* because that Section does not implicate gun ownership for personal protection in the home. Petitioner also lacked standing to challenge *Section 5-301 et seq. of the Public Safety Article, Maryland Code* (2003), as well as *COMAR 29.03.02.04*, governing carry permitting, because he had failed to even apply for a permit to wear, carry, or transport a handgun.

COUNSEL: ARGUED BY James Brewster Hopewell of Riverdale, MD FOR PETITIONER

ARGUED BY Douglas F. Gansler, Attorney General of Maryland (Jeremy M. McCoy, Assistant Attorney General, of of Baltimore, MD) on brief FOR RESPONDENT

JUDGES: ARGUED BEFORE Bell, C.J., Harrell, Battaglia, Greene, Murphy, Adkins, Barbera, JJ. Opinion by Battaglia, J. Murphy, J., concurs. Concurring Opinion by Murphy, J.

OPINION BY: Battaglia

OPINION

Opinion by Battaglia, J.

In this case, we enter into the constitutional fray involving the scope of the Second Amendment right to bear arms, [1] recently explored by the Supreme Court in *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)* and *McDonald v. City of Chicago, U.S. , 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)*.

1 The *Second Amendment of the United States Constitution* 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.

Petitioner, Charles F. Williams, Jr., seeks to overturn his conviction in the Circuit Court for Prince George's County for unlawful possession of a handgun, pursuant to *Section 4-203(a)(1)(i) of the Criminal Law Article*,

Maryland Code (2002), [2] asserting that Maryland's regulatory scheme for handguns violates his right to "keep and carry arms" [*2] under the *Second Amendment*. The Court of Special Appeals affirmed Williams' conviction, in a reported opinion, *Williams v. State, 188 Md. App. 691, 982 A.2d 1168 (2009)*, and we granted certiorari, *Williams v. State, 412 Md. 495, 988 A.2d 1008 (2010)*, to answer the following question:

> Are *Md. Code Ann. Criminal Law § 4-203*, *Public Safety §§ 5-301, et seq.*, and *COMAR 29.03.02.04* unconstitutional in light *of Heller v. District of Columbia*? [3]

We shall hold that *Section 4-203(a)(1)(i) of the Criminal Law Article*, which prohibits wearing, carrying, or transporting a handgun, without a permit and outside of one's home, is outside of the scope of the *Second Amendment*. We also shall hold that, because Williams failed to apply for a permit to wear, carry, or transport a handgun, he lacks standing to challenge *Section 5-301 et seq. of the Public Safety Article, Maryland Code* (2003), [4] as well as *COMAR 29.03.02.04*. [5] As a result, Williams's conviction will stand.

2 All references to *Section 4-203 of the Criminal Law Article* throughout are to Maryland Code (2002), unless otherwise noted. *Section 4-203(a)* generally prohibits wearing, carrying, or transporting a handgun:

> (a) *Prohibited.* -- (1) Except as [*3] provided in subsection (b) of this section, a person may not:
>
> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person; or
>
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State.

Section 4-203(b) enumerates several exceptions to the prohibition, significantly when one has secured a permit:

> (2) the wearing, carrying, or transporting of a handgun by a person to whom a permit to wear, carry, or transport the handgun has been issued under *[§§ 5-301 - 5-314 of the Public Safety Article*, Maryland Code (2003)];

and when one wears, carries, or transports a handgun on "real estate that the person owns or leases":

> (6) the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases; . . .

3 In his brief in this Court, Williams also argued that evidence of the handgun should have been suppressed as the fruit of an unlawful search and that a statement he made to police should [*4] have been suppressed, because he was subjected to custodial interrogation. Williams, however, did not include any questions regarding such in his Petition for Certiorari. Further, when asked to address the same concerns, the Court of Special Appeals had determined that those issues were not properly preserved for appellate review.

4 All references to *Section 5-301 et seq. of the Public Safety Article* throughout are to Maryland Code (2003), unless otherwise noted. *Section 5-301(d)* defines a "permit" as follows:

> (d) *Permit.* -- "Permit" means a permit issued by the Secretary to carry, wear, or transport a handgun.

Section 5-302 establishes a "Handgun Permit Review Board" in the Department of Public Safety and Correctional Services. *Section 5-303* requires

a "permit" before a person "carries, wears, or transports a handgun." *Section 5-304* provides that an application for a permit "shall be made under oath." *Section 5-305* states that permit applicants must undergo a "criminal history records check," and *Section 5-306* states various "qualifications for permit," as follows:

> (a) *In general.* -- Subject to subsection (b) of this section, the Secretary shall issue a permit within a reasonable time to [*5] a person who the Secretary finds:
>
> (1) is an adult;
>
> (2)(i) has not been convicted of a felony or of a misdemeanor for which a sentence of imprisonment for more than 1 year has been imposed; or
>
> (ii) if convicted of a crime described in item (i) of this item, has been pardoned or has been granted relief under *18 U.S.C. § 925(c)*;
>
> (3) has not been convicted of a crime involving the possession, use, or distribution of a controlled dangerous substance;
>
> (4) is not presently an alcoholic, addict, or habitual user of a controlled dangerous substance unless the habitual use of the controlled dangerous substance is under legitimate medical direction; and
>
> (5) based on an investigation:
>
> (i) has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another; and
>
> (ii) has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.
>
> (b) *Applicant under age of 30 years.* -- An applicant under the age of 30 years is qualified only if the Secretary finds that the applicant has not been:
>
> (1) committed to a detention, [*6] training, or correctional institution for juveniles for longer than 1 year after an adjudication of delinquency by a juvenile court; or
>
> (2) adjudicated delinquent by a juvenile court for:
>
> (i) an act that would be a crime of violence if committed by an adult;
>
> (ii) an act that would be a felony in this State if committed by an adult; or
>
> (iii) an act that would be a misdemeanor in this State that carries a statutory penalty of more than 2 years if committed by an adult.

5 *COMAR 29.03.02.04* describes "criteria for issuance of permit" and relevantly provides:

> In making a determination as to whether a permit will be issued to the applicant, the following areas will be a part of every investigation and will be considered in determining whether a permit is issued:
>
> A. Verification of the information supplied by the applicant in the application;
>
> B. Occupation or profession of the applicant;
>
> C. Geographical area of residence and employment of the applicant;
>
> D. Criminal record of applicant, including any juvenile record for an applicant younger than 30 years old, as specifically outlined in Public Safety Article, §5-306(b), Annotated Code of Maryland;
>
> E. Medical history of applicant as it may pertain to the [*7] applicant's fitness to wear, carry, or transport a handgun;
>
> F. Psychiatric or psychological background of applicant as it may pertain to the applicant's fitness to wear, carry, or transport a handgun;
>
> G. Reasons given by the applicant as to whether those reasons are good and substantial;
>
> H. Age of applicant;
>
> I. Applicant's use of intoxicating beverages and drugs;

J. Information received from personal references and other persons interviewed;

K. Information received from business or employment references as may be necessary in the discretion of the investigator;

L. Whether the applicant has any alternative available to him for protection other than a handgun permit;

M. Whether the applicant falls within those classes of individuals who do not need permits as outlined in the Handgun Permit Law;

N. The applicant's propensity for violence or instability which could reasonably render his wearing, carrying, or transporting of a handgun a danger to himself or other persons he may come in contact with;

O. Whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger.

During a bench trial before the Honorable Sean D. Wallace, the State presented the following [*8] facts, describing a police officer's encounter with Williams near a bus stop:

> The facts, as stipulated, had the matter gone to trial, the facts would show that on October 1, 2007, at approximately 5:00 p.m., Officer Molake with the Prince George's County Police Department, was in the area of the Baltimore-Washington Parkway and Landover Road in Prince George's County, Maryland, and as he was driving in that area, he observed the defendant going through a backpack near a wooded area nearby the cross area, and at one time, as the officer turned his cruiser around, he observed the defendant turn and place something in the brush area as if he was hiding something.
>
> Officer Molake made contact with the defendant, who he would identify as the gentleman seated to the left with the green shirt and asked him what he was doing. The defendant told him he was going through the backpack to see what was in it. He then asked the defendant what he went and hid in the bushes, and the defendant hesitated and then stated "my gun."

The facts described the police officer's recovery of Williams's handgun and Williams's statement to police:

> Officer Molake then recovered an Austria [sic] made, black Glock handgun [*9] with 15 rounds in the magazine in the brush area where he saw the defendant go.
>
> The defendant gave a written statement after being given his Miranda rights by Officer Santa Cruz, admitting to possession of the gun and placing the gun in the bush area where the officer subsequently located it.
>
> The handgun test-fired as positive.

The facts provided the following, regarding Williams's purchase of the handgun, apparently for "self-defense":

> The defense would have provided evidence by way of documents that would show that the defendant purchased the handgun in Realco at 6108 Marlboro Pike in Forestville, Maryland, on August 15 of 2007, and that would be shown through Exhibit 1. Paid the balance that was due on that handgun on September 14, 2007, which will be shown in Exhibit 2; that the defense would have provided evidence that the defendant completed the Maryland State Police application and affidavit to purchase a regulated firearm application, which is a total of three pages, on August 15, 2007, which will be shown in Exhibit 3. He received the certificate of completion, which is shown in Exhibits 4 and 5, on August 15, 2007.
>
> The defendant would have testified that he purchased the handgun [*10] for self-defense, and that on the date of this arrest, he had just left the handgun at his girlfriend's house, place of residence. When he got off work, he went to her residence and picked up that handgun and was en route to his home when the arrest occurred behind the bus stop.
>
> The defendant was again given Miranda rights and gave a written state-

ment that will be shown in the State's Exhibits Number 3 and 4.

Judge Wallace found Williams guilty of wearing, carrying, or transporting a handgun in violation of *Section 4-203(a)(1)(i)* and sentenced him to three years' incarceration, with two years suspended. The Court of Special Appeals affirmed, determining that the *Second Amendment* is not applicable to the States, [6] and that, were the *Second Amendment* to apply to Maryland, "it would not invalidate the statute at issue here," because *Section 4-203(b)(6)* expressly permits wearing, carrying, or transporting a handgun in one's residence, thereby preserving the right "to keep and bear arms in the home for the purpose of immediate self-defense." *Williams, 188 Md. App. at 699, 982 A.2d at 1172.*

6 The Circuit Court's decision and the Court of Special Appeals's opinion in the present case were rendered [*11] prior to the Supreme Court's decision in *McDonald v. City of Chicago, U.S. , 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)*, which made the *Second Amendment* applicable to the States via the *due process clause of the Fourteenth Amendment.*

Before us, as he did in the Circuit Court in a "Motion to Dismiss Indictment," and in his brief before the Court of Special Appeals, Williams asserts that the prohibition in *Section 4-203(a)* against wearing, carrying, or transporting a handgun without a permit and outside of one's home, infringes upon his Second Amendment right "to keep and bear arms." He contends that the Supreme Court opinions in *Heller* and *McDonald* make clear that the *Second Amendment* establishes a general "right of persons to keep and bear arms for lawful purposes."

The State counters that the opinions in *Heller* and *McDonald* together stand for the proposition that, pursuant to the *Second Amendment*, "states may not generally prohibit the possession of a handgun in the home for the purpose of self-defense, but remain free to enact reasonable restrictions on the possession and use of firearms." The State contends that the statutory scheme embodied in *Section 4-203* is eminently reasonable, [*12] because *Section 4-203(b)(6)* expressly permits wearing, carrying, or transporting a handgun in the home.

We begin by exploring the dictates of *Section 4-203(a) of the Criminal Law Article*, which contains a prohibition against wearing, carrying, or transporting a handgun in public, "whether concealed or open":

> (a) *Prohibited.* -- (1) Except as provided in subsection (b) of this section, a person may not:
>
> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person; or
>
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State.

The exceptions to the prohibition, contained in *Section 4-203(b)*, are many:

> (b) *Exceptions.* -- This section does not prohibit:
>
> (1) the wearing, carrying, or transporting of a handgun by a person who is on active assignment engaged in law enforcement, is authorized at the time and under the circumstances to wear, carry, or transport the handgun as part of the person's official equipment, and is:
>
> (i) a law enforcement official of the United States, the State, or a county or city of the State;
>
> (ii) a member of [*13] the armed forces of the United States or the National Guard on duty or traveling to or from duty;
>
> (iii) a law enforcement official of another state or subdivision of another state temporarily in this State on official business;
>
> (iv) a correctional officer or warden of a correctional facility in the State;
>
> (v) a sheriff or full-time assistant or deputy sheriff of the State; or
>
> (vi) a temporary or part-time sheriff's deputy;

(2) the wearing, carrying, or transporting of a handgun by a person to whom a permit to wear, carry, or transport the handgun has been issued under *[§§ 5-301 - 5-314 of the Public Safety Article*, Maryland Code (2003)];

(3) the carrying of a handgun on the person or in a vehicle while the person is transporting the handgun to or from the place of legal purchase or sale, or to or from a bona fide repair shop, or between bona fide residences of the person, or between the bona fide residence and place of business of the person, if the business is operated and owned substantially by the person;

(4) the wearing, carrying, or transporting by a person of a handgun used in connection with an organized military activity, a target shoot, formal or informal target practice, sport shooting [*14] event, hunting, a Department of Natural Resources-sponsored firearms and hunter safety class, trapping, or a dog obedience training class or show, while the person is engaged in, on the way to, or returning from that activity;

(5) the moving by a bona fide gun collector of part or all of the collector's gun collection from place to place for public or private exhibition if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(6) the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases;

(7) the wearing, carrying, or transporting of a handgun by a supervisory employee:

> (i) in the course of employment;
>
> (ii) within the confines of the business establishment in which the supervisory employee is employed;
>
> (iii) when so authorized by the owner or manager of the business establishment; or

> (8) the carrying or transporting of a signal pistol or other visual distress signal approved by the United States Coast Guard in a vessel on the waterways of the State or, if the signal pistol or other visual distress signal [*15] is unloaded and carried in an enclosed case, in a vehicle.

Here, the relevant exceptions are *Section 4-203(b)(2)*, involving a permit to wear, carry, or transport a handgun in public, as well as *Section 4-203(b)(6)*, permitting the wearing, carrying, or transporting of a handgun in one's residence. What is notable in the present case is that Williams did not apply for a permit. [7] Moreover, at the time of his arrest, he was not wearing, carrying, or transporting a handgun in his residence, as permitted by the statute.

> 7 Williams argues, in this regard, that *Sections 5-301 et seq. of the Public Safety Article, Maryland Code* (2003), as well as Title 29, subtitle 3 of the Code of Maryland Regulations, together governing handgun permitting, impose an impermissible burden on citizens seeking to exercise the right to "keep and carry a handgun." Williams acknowledges that he has "not filed an application for a permit to carry a handgun," but asserts that as a result of the regulatory scheme, "any such application would have been denied." The State counters that nearly 93 percent of handgun permit applicants from 2006 to 2009 were issued permits. *See Maryland Department of State Police 2009 Annual* [*16] *Report*, available at http://www.mdsp.org/downloads/2009 Annual Report.pdf. Nevertheless, because Williams failed to file an application for a permit to carry a handgun, he lacks standing to challenge the constitutionality of *Sections 5-301 et seq. of the Public Safety Article*, as well as Title 29, subtitle 3 of the Code of Maryland Regulations. *See, e.g., Gregg v. State, 409 Md. 698, 704 n.2, 976 A.2d 999, 1002 n.2 (2009)* (reasoning appellant had standing to file "Petition for DNA Evidence-Post Conviction Review," because he had been convicted of first-degree murder); *Evans v. State, 396 Md. 256, 328, 914 A.2d 25, 68 (2006)* (reasoning that "an individual or an organization 'has no standing in court unless he has also suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public'") (citation omitted).

Williams, nevertheless, principally relies upon the Supreme Court's opinions in *Heller, 554 U.S. at 570, 128 S. Ct. at 2783, 171 L. Ed. 2d at 637*, and *McDonald, U.S. , 130 S. Ct. at 3020, 177 L. Ed. 2d at 894*, in asserting that the *Second Amendment* establishes a general "right of persons to keep and bear arms for lawful [*17] purposes." In *Heller*, Mr. Heller had applied for and was denied a "registration certificate" to possess a handgun in his home, pursuant to the District of Columbia's gun control scheme. *554 U.S. at 575, 128 S. Ct. at 2788, 171 L. Ed. 2d at 647. Section 7-2502.01(a) of the D.C. Code* (2001) prohibited "possess[ion] or control" of any firearm, without a "valid registration certificate":

> (a) Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm.

Section 7-2502.02(a)(4) of the D.C. Code (2001) prohibited the registration of handguns, without an exception for possession in one's home:

> (a) A registration certificate shall not be issued for a:
> (1) Sawed-off shotgun;
> (2) Machine gun;
> (3) Short-barreled rifle; or
> (4) Pistol [8] not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply [*18] to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department.

Section 7-2507.02 of the D.C. Code (2001) mandated that any other firearm within one's home be kept "unloaded and disassembled or bound by a trigger lock":

> Except for law enforcement personnel described in *§ 7-2502.01(b)(1)*, each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

Sections 22-4504(a) and *22-4515* of the D.C. Code (2001) made carrying an unlicenced pistol in one's home or on one's land a misdemeanor. *Section 22-4504(a)* stated, in relevant part:

> (a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. [*19] Whoever violates this section shall be punished as provided in *§22-4515* . . . .

Section 22-4515 of the D.C. Code (2001) in turn, stated:

> Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000 or imprisonment for not more than 1 year, or both.

8 *Section 7-2501.01(12) of the D.C. Code* defines a "pistol" as "any firearm originally designed to be fired by use of a single hand." (emphasis added).

Mr. Heller filed a complaint in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from the denial of his application for a "registration certificate" to possess a handgun in his home, the licensing requirement insofar as it prohibited the carrying of a handgun in the home, and the trigger-lock requirement insofar as it prohibited the possession of "functional firearms" in the home. The District Court dismissed the complaint, and the United States Court of Appeals for the District of Columbia Circuit reversed, reasoning that the *Second Amendment* precluded the District from "flatly ban[ning] the keeping of a handgun in the home." *Parker v. District of Columbia, 478 F.3d 370, 400, 375 U.S. App. D.C. 140 (D.C. Cir. 2007)*. [*20] The Supreme Court granted the District's petition for a writ of certiorari, presenting the following question:

> Whether the following provisions--*D.C. Code §§ 7-2502.02(a)(4), 22-4504(a)*, and

> *7-2507.02*--violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

Before the Court, the District argued that the *Second Amendment* protects "only militia-related firearm rights." Alternatively, the District contended that prohibiting handgun possession in the home was reasonable, because residents were permitted to possess shotguns and rifles, albeit unloaded or bound by a trigger lock. Mr. Heller countered that the *Second Amendment* protects an individual right to possess a firearm for "traditionally lawful purposes, such as self-defense within the home." *554 U.S. at 577, 128 S. Ct. at 2789, 171 L. Ed. 2d at 648.*

Embracing an original meaning approach, Justice Antonin Scalia, writing for the Court, interpreted the language of the *Second Amendment* as conferring an individual right "to keep and bear Arms." *554 U.S. at 580, 128 S. Ct. at 2791, 171 L. Ed. 2d at 651*. The Court [*21] considered the substance of that individual right as "simply a common way of referring to possessing arms, for militiamen and everyone else." *Id. at 583, 128 S. Ct. at 2792, 171 L. Ed. 2d at 652*. Similarly, the phrase "bear Arms," reasoned the Court, referred to the "carrying of weapons," both in an organized militia and for other purposes, such as self-defense. *Id. at 584-585, 128 S.Ct. at 2793-94, 171 L. Ed. 2d at 653-54*. The Court concluded that "preserving the militia" was not the only aim of the *Second Amendment*, as the founders "most undoubtedly thought it even more important for self-defense and hunting." *Id. at 599, 128 S.Ct. at 2801, 171 L. Ed. 2d at 662*. This right "to keep and bear Arms," however, has limitations:

> Like most rights, the right secured by the *Second Amendment* is not unlimited. From Blackstone through 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th- century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the *Second Amendment* or state analogues. [*22] 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 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. at 626-627, 128 S. Ct. at 2816-17, 171 L. Ed. 2d at 678 (internal citations omitted).

In declaring *Sections 7-2502.02(a)(4)* (prohibiting the registration of handguns, without a home exception) and *22-4504(a)* (prohibiting carrying a handgun within one's home, without a license) unconstitutional, the Court emphasized that handguns were "overwhelmingly chosen by American society" for self-defense and determined that under any standard of scrutiny, "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster." *Id. at 628-629, 128 S. Ct. at 2817-18, 171 L. Ed. 2d at 679* (citation omitted) (internal quotation marks omitted). The District's trigger-lock requirement, contained [*23] in *Section 7-2507.02*, did not fare any better, according to the Court, because the provision "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense" within the home. *Id. at 630, 128 S. Ct. at 2818, 171 L. Ed. 2d at 680*. Therefore, the prohibition against handguns, even within one's home, as well as the trigger-lock requirement for all firearms kept within the home, were declared unconstitutional.

Shortly thereafter, in *McDonald, U.S. at , 130 S. Ct. at 3020, 177 L. Ed. 2d at 894*, the Supreme Court was asked to consider whether the *Second Amendment* applied to the States. [9] In that case, Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson filed a complaint in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that several Chicago ordinances violated the *Second* and *Fourteenth Amendments*. The Chicago residents alleged that the City had denied their applications to register handguns for possession in the home, in violation of the Constitution. In a related lawsuit, the National Rifle Association and two residents of Oak Park, a Chicago suburb, filed a complaint in the United States [*24] District Court for the Northern District of Illinois, seeking a declaration that several Oak Park ordinances were invalid pursuant to the *Second* and *Fourteenth Amendments*. That complaint alleged that, but for the gun control laws, the individual plaintiffs would keep handguns in their homes for self-defense.

9 In so doing, the Supreme Court considered the following question on certiorari:

> Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or *Due Process Clauses*.

The statutes at issue were "similar to the District of Columbia's," according to the Court. *U.S. at , 130 S. Ct. at 3026, 177 L. Ed. 2d at 903*. Section 8-20-040(a) of the Chicago, Illinois Code prohibited possession of a firearm unless registered, while Section 8-20-050(c) provided that "[n]o registration certificate shall be issued for any of the following types of firearms . . . (c) Handguns." The only non-governmental exception to the prohibition against handguns was for "[t]hose validly registered to a current owner in the City of Chicago prior to [1982]." Section 27-2-1 of the Oak Park, Illinois Code also provided that [*25] "[i]t shall be unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm." Section 27-1-1, in turn, defined "firearms" as "pistols, revolvers, guns and small arms of a size and character that may be concealed on or about the person, commonly known as handguns."

The district court judge entered judgment on the pleadings for both municipalities. The United States Court of Appeals for the Seventh Circuit affirmed, reasoning that the Supreme Court had never considered whether the *Second Amendment* should be applied to the States through the *Due Process Clause of the Fourteenth Amendment. Nat'l Rifle Ass'n v. City of Chicago, Illinois and Village of Oak Park, Illinois, 567 F.3d 856 (7th Cir. 2009)*.

In reversing, the Supreme Court determined that the Second Amendment right to keep and bear arms "is fundamental to *our* scheme of ordered liberty," and as a result, the *Due Process Clause* rendered it applicable to the States. *Id. at , 130 S. Ct. at 3036, 177 L. Ed. 2d at 914*, citing *Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)*. The Court characterized *Heller* as [*26] safeguarding an individual right of "self-defense," when home possession was in issue, *id.* at , *130 S. Ct. at 3036, 177 L. Ed. 2d at 914*, but, nevertheless, reiterated that regulatory schemes prohibiting handgun ownership by dangerous individuals, or prohibiting wearing, carrying, or transporting handguns in various public places outside of the home, were permissible:

> We made it clear in *Heller* that our holding did not cast doubt on such long-standing regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "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. at , 130 S. Ct. at 3047, 177 L. Ed. 2d at 926, quoting *Heller, 554 U.S. at 626, 128 S. Ct. at 2817, 171 L. Ed. 2d at 678*. [10]

10 In determining that *Heller* and *McDonald* addressed prohibitions and limitations on handgun possession in the home, we find informative decisions from other courts interpreting those opinions. *See United States v. Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010)* (reasoning that *Heller* and *McDonald* recognized that "the *Second Amendment* [*27] protects the right of law-abiding citizens to possess [handguns] for self-defense in the home"); *United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010)* (noting that *Heller* recognized that "the *Second Amendment* creates individual rights, one of which is keeping operable handguns at home for self-defense"); *People v. Dykes, 46 Cal. 4th 731, 95 Cal. Rptr. 3d 78, 209 P.3d 1, 49 (Cal. 2009)* (concluding that a statute prohibiting possession of a loaded and concealed firearm without a permit did not violate the *Second Amendment*, because *Heller* recognized a limited right to keep and bear arms for personal protection in the home); *State v. Knight, 42 Kan. App. 2d 893, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009)* (reasoning that a statute which criminalizes the possession of a concealed firearm was outside the province of the *Second Amendment*, because the Supreme Court's decision in *Heller* "turned solely on the issue of handgun possession in the home"); *Commonwealth v. Runyan, 456 Mass. 230, 922 N.E.2d 794, 799 (Mass. 2010)* (determining that a statute requiring safe storage of a firearm was outside the scope of the *Second Amendment*, because the statute in issue "does not [*28] make it impossible for those persons licensed to possess firearms to rely on them for lawful self-defense" as did the District of Columbia ordinances in *Heller*); *People v. Perkins, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209 (N.Y. App. Div. 2009)* (reasoning that "New York's licensing requirement remains

an acceptable means of regulating the possession of firearms," because the statute at issue did not "effect a complete ban on handguns" as in *Heller*); *State v. Sieyes, 168 Wn.2d 276, 225 P.3d 995, 1005 (Wash. 2010)* (determining that a statute regulating the circumstances under which children could lawfully possess firearms was outside the scope of the *Second Amendment*, because no authority supported "an original meaning of the *Second Amendment*, which would grant children an unfettered right to bear arms").

In addition, after oral argument in the present case, the District of Columbia Court of Appeals filed *Herrington v. United States, 6 A.3d 1237, 2010 D.C. App. LEXIS 611 (D.C. 2010)*, upon which Williams relies, in which the defendant was convicted of "unlawful possession of ammunition," after police found two boxes of ammunition in his bedroom. The statute in issue required the prosecution to demonstrate only "that the defendant possessed [*29] ammunition, and that he did so knowingly and intentionally." *Id. at *4.* Herrington argued that his conviction should be reversed, because the *Second Amendment* as interpreted by the Supreme Court in *Heller* "encompass[ed] the possession of handgun ammunition in the home." *Id. at *7.* The court reversed Herrington's conviction, reasoning that "the *Second Amendment* guarantees a right to possess ammunition in the home that is coextensive with the right to possess a usable handgun there." *Id. at *12.* Thus, *Herrington* is consistent with our interpretation of *Heller* and *McDonald* as addressing prohibitions against handgun possession in the home, as banning possession of ammunition in the home would certainly undermine the interest in "defense of self, family, and property" recognized in *Heller.*

In the present case, *Section 4-203(a)(1)(i)* of which Williams was convicted, prohibits "wear[ing], carry[ing], or transport[ing] a handgun, whether concealed or open, on or about the person," in public, without a permit. Here, sufficient evidence was adduced to demonstrate that Williams was wearing, carrying, or transporting a handgun in public, and Williams had conceded that he had not obtained, or even [*30] applied for, a permit.

Williams, however, attempts to bring his conviction of wearing, carrying, or transporting a handgun in public, without a permit, within the ambit of *Heller* and *McDonald* by claiming that those opinions would prohibit his conviction. This is not the case, because *Heller* and *McDonald* emphasize that the *Second Amendment* is applicable to statutory prohibitions against home possession, the dicta in *McDonald* that "the *Second Amendment* protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home," notwithstanding. *U.S. at , 130 S.Ct. at 3044, 177 L. Ed. 2d at 922.* Although Williams attempts to find succor in this dicta, it is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.

Williams was convicted of wearing, carrying, or transporting a handgun in public, rather than for possession of a handgun in his home, for which he could not be prosecuted under *Section 4-203(b)(6).* It is the exception permitting [*31] home possession in *Section 4-203(b)(6)* that takes the statutory scheme embodied in *Section 4-203* outside of the scope of the *Second Amendment*, as articulated in *Heller* and *McDonald. Section 4-203(b)(6)* clearly permits wearing, carrying, or transporting a handgun "by a person on real estate that the person owns or leases or where the person resides," without registering or obtaining a permit, wholly consistent with *Heller's* proviso that handguns are "the most preferred firearm in the nation to keep and use for protection of one's home and family." *554 U.S. at 628, 128 S. Ct. at 2817-18, 171 L. Ed. 2d at 689.*

In affirming Williams' conviction, we find persuasive opinions from other courts, addressing analogous situations, in which a defendant was convicted pursuant to a statute prohibiting public possession of a firearm, while providing an exception for possession within the home. For example, in *People v. Dawson, 403 Ill. App. 3d 499, 934 N.E.2d 598, 343 Ill. Dec. 274 (Ill. App. Ct. 2010)*, Dawson had been found guilty of three counts of aggravated discharge of a firearm and two counts of aggravated unlawful use of a weapon in connection with the attempted murder of Mario Brantley. *Id. at 599.* Dawson argued that his convictions [*32] under the Illinois aggravated unlawful use of a weapon statute should be reversed, because the measure violated the *Second Amendment. Id. at 599-600.* The Illinois aggravated unlawful use of a weapon statute under which Dawson was convicted mirrors Maryland's *Section 4-203* and relevantly provides:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm;

* * *

[and]

* * *

(3) One of the following factors is present:

> (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense[.]"

> A person is guilty of carrying a concealed firearm when he or she does any of the following:
> (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed on the person.
> (2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person.
> (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

Id. at 604, quoting *720 ILCS 5/24-1.6(a)(1), (a)(3)(A)* (West 2006) (alteration in original) (emphasis added). The Illinois intermediate appellate court affirmed Dawson's conviction, reasoning that in *Heller*, the Supreme Court "ultimately limited its holding to the question presented -- that the Second Amendment right to bear arms protected the right to possess a commonly used firearm, a handgun, in the [*33] home for self-defense purposes." *Id. at 605* The court further emphasized that, in *McDonald*, the Supreme Court addressed "the limited question of whether a ban on the possession of a handgun in the home violated the Second Amendment right to bear arms." *Id.* The court concluded that the statute under which Dawson was convicted was constitutional, because it specifically permitted possession of a firearm within one's home. *Id. at 607*.

In *Little v. United States, 989 A.2d 1096 (D.C. 2010)*, Little was convicted by a jury of one count of carrying a pistol without a license, one count of possession of an unregistered firearm, and one count of unlawful possession of ammunition, as a result of his involvement in an attempted robbery. Little argued that his convictions must be reversed in light of the Supreme Court's decision in *Heller*, because the statutes "functioned as a total ban on handguns." *Id. at 1100*. The District of Columbia Court of Appeals rejected that argument and affirmed Little's conviction, reasoning that in *Heller*, "the issue was the constitutionality of the District of Columbia's ban on 'the possession of usable handguns *in the home*,'" *id. at 1101*, quoting *Howerton v. United States, 964 A.2d 1282, 1287 (D.C. 2009)*, [*34] and Little had conceded that he was outside of his home.

In *People v. Yarbrough, 169 Cal. App. 4th 303, 86 Cal. Rptr. 3d 674 (Cal. Ct. App. 2008)*, Yarbrough was arrested and convicted of carrying a concealed weapon in public, in violation of a California statute, which provided:

Id. at 313 n.5, quoting *Section 12025(a) of the California Penal Code*. The California intermediate appellate court noted that a separate measure provided an exception for possession of concealed weapons "anywhere within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident." *Id. at 314* [*35] and n.6, quoting *Section 12026 of the California Penal Code*. Although Yarbrough argued that the concealed weapons statute was unconstitutional in light of *Heller*, the court rejected that argument and affirmed his conviction, reasoning that in *Heller*, the Supreme Court considered a narrow question, namely whether "the District's ban on handgun possession in the home violate[d] the *Second Amendment*." *Id. at 312*. The court concluded that, "[u]nlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender." *Id. at 314* (internal quotation marks omitted).

As a result, we affirm Williams' conviction of wearing, carrying, or transporting a handgun in violation of *Section 4-203(a)(1)(i) of the Criminal Law Article.*

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY PETITIONER.

CONCUR BY: Murphy

CONCUR

While I agree with the majority that the Petitioner's conviction should be affirmed, I would not hold that the Petitioner's conduct is "outside of the scope of the *Second Amendment*." [*36] I would affirm on the ground that, although the *Second Amendment* is applicable to an

"on the street" possession of a handgun, that Amendment is *satisfied* by a statute that places reasonable restrictions on the constitutional right to bear arms.

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LEXSEE 2010 U.S. APP. LEXIS 26508

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM SAMUEL CHESTER, JR., Defendant-Appellant.

No. 09-4084

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2010 U.S. App. LEXIS 26508

December 4, 2009, Argued
December 30, 2010, Decided

PRIOR HISTORY: [*1]
Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. (2:08-cr-00105-1). John T. Copenhaver, Jr., District Judge.
United States v. Chester, 2008 U.S. Dist. LEXIS 80138 (S.D. W. Va., Oct. 7, 2008)
United States v. Chester, 367 Fed. Appx. 392, 2010 U.S. App. LEXIS 3739 (4th Cir. W. Va., 2010)

DISPOSITION: VACATED AND REMANDED.

COUNSEL: ARGUED: Edward Henry Weis, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant.

Elizabeth Dorsey Collery, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

ON BRIEF: Mary Lou Newberger, Federal Public Defender, Jonathan D. Byrne, Appellate Counsel, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant.

Charles T. Miller, United States Attorney, Gerald M. Titus, III, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

JUDGES: Before TRAXLER, Chief Judge, and AGEE and DAVIS, Circuit Judges. Chief Judge Traxler wrote the majority opinion, in which Judge Agee joined. Judge Davis wrote a separate opinion concurring in the judgment.

OPINION BY: TRAXLER

OPINION

TRAXLER, Chief Judge:

The sole issue presented in this appeal is whether William Samuel Chester's conviction for illegal possession of a firearm under *18 U.S.C. § 922(g)(9)* abridges his right to keep and bear arms under the *Second Amendment* in light of *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*. [*2] We vacate the decision below and remand for further proceedings.

I.

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. Heller* resolved a decades-long debate between those who interpreted the text to guarantee a private, individual right to bear arms and those who generally read it to secure a collective right to bear arms in connection with service in the state militia. [1] *See Heller, 128 S. Ct. at 2789. See generally Parker v. District of Columbia, 478 F.3d 370, 379, 375 U.S. App. D.C. 140 (D.C. Cir. 2007)* (explaining the collective right and individual right positions in the *Second Amendment* debate); *United States v. Emerson, 270 F.3d 203, 218-20 (5th Cir. 2001)* (same). Interpreting the text in light of how it would have been understood by "ordinary citizens in the founding generation," *Heller, 128 S. Ct. at 2788*, the Supreme Court sided with proponents of the individual right view and held that the *Second Amendment* guaranteed protection of an individual right to possess and carry arms without regard to militia service. *See id. at 2799.*

> 1 There are two basic manifestations [*3] of the collective-right view of the *Second Amendment*. The first model understands the *Second Amendment* simply to "empower state governments to arm militias," while the second model "argues that individuals have a right to own and possess firearms under the *Second Amendment*, but only insofar as it is connected with state militia service." *See* Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of the Second Amendment, 18 Geo. Mason U. Civ. Rts. L.J. 167, 175-76 (2008).*

The Court began its textual analysis by explaining that the function of the *Second Amendment's* prefatory clause ("A well regulated Militia, being necessary to the security of a free State") is merely to announce a purpose for the command given by the operative clause ("the right of the people to keep and bear Arms, shall not be infringed")--"apart from that clarifying function, [the] prefatory clause does not limit or expand the scope of the operative clause." *Id. at 2789.* [2] The operative clause, *Heller* concluded, "guarantee[s] the individual right to possess and carry weapons in case of confrontation," a meaning that "is strongly confirmed by the historical background of the *Second Amendment.*" *Id. at 2797.* [*4] Consideration of the historical sources was important because, as *Heller* explained, "the *Second Amendment*, like the *First* and *Fourth Amendments*, codified a *pre-existing* right." *Id.* Finally, the Court explained why the prefatory clause was consistent with an individual right interpretation of the operative clause:

> The debate with respect to the right to keep and bear arms, as with other guarantees in the *Bill of Rights*, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. . . . It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.
>
> It is therefore entirely sensible that the *Second Amendment's* prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy [*5] the citizens' militia by taking away their arms was the reason that right-unlike some other English rights-was codified in a written Constitution.

Id. at 2801.

> 2 The collective versus individual right debate turned largely on the relationship between the two clauses. "[I]ndividual right theorists say that the operative clause's effect is unmodified by the civic purpose announced in the prefatory clause, . . . while collective right theorists claim that the prefatory clause limits the scope of the Amendment . . . [to] the perpetuation of the militia system." *See* Klukowski, *Armed by Right, supra*, at 180-81.

Significantly, *Heller* recognized that the right to keep and bear arms, like other Constitutional rights, is limited in scope and subject to some regulation: "[W]e do not read the *Second Amendment* to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the *First Amendment* to protect the right of citizens to speak for *any purpose." Id. at 2799*; *see id. at 2816* ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever [*6] and for whatever purpose."). One specific limitation recognized in *Heller* concerned the *types* of weapons protected by the *Second Amendment*. In accordance "with the historical understanding of the scope of the right," the *Second Amendment* protected only weapons "typically possessed by law-abiding citizens for lawful purposes." *Id. at*

2816; *see id. at 2817* (explaining that the *Second Amendment* protected "the right to keep and carry arms . . . in common use at the time") (internal quotation marks omitted).

The other type of limitation identified in *Heller* involved what the Supreme Court termed "presumptively lawful regulatory measures," *id. at 2817, n.26*, although *Heller* did not explain *why* the listed regulations are presumptively lawful:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions 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. at 2816-17. [3] Although the Court expressly declined to "undertake an exhaustive historical analysis . . . of the full scope [*7] of the *Second Amendment*," *id. at 2816*, it clearly staked out the core of the *Second Amendment*. Indeed, *Heller* explained that "whatever 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." *Id. at 2821.*

> 3 The Supreme Court reiterated, without further explanation, these presumptively valid limitations in *McDonald v. City of Chicago, 130 S. Ct. 3020, 3047, 177 L. Ed. 2d 894 (2010).*

In light of these principles, the Supreme Court invalidated two District of Columbia statutes at issue in *Heller*. First, *Heller* invalidated the District's total ban on the possession of handguns, concluding that such a complete ban--which extended "to the home, where the need for defense of self, family, and property is most acute[,]"--was incompatible with the *Second Amendment* "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id. at 2817-18.* Although the Court acknowledged that rational-basis scrutiny would be inappropriate, *see id. at 2817, n.27*, it declined to choose the proper level of scrutiny for *Second Amendment* challenges. Second, *Heller* [*8] concluded that the District's requirement that citizens keep their firearms in an inoperable condition "[made] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense." *Id. at 2818.*

II.

In October 2007, officers from the Kanawha County, West Virginia, Sheriff's Department responded to a 911 call reporting a domestic disturbance at Chester's residence. Chester's wife reported to the officers that Chester grabbed her throat and threatened to kill her after she caught him receiving the services of a prostitute on their property. In a subsequent search of the home, officers recovered a 12-gauge shotgun in the kitchen pantry and a 9mm handgun in the bedroom. Chester admitted both firearms belonged to him.

In May 2008, as a result of this incident, Chester was indicted for possessing firearms after having been convicted "of a misdemeanor crime of domestic violence" in violation of *18 U.S.C. § 922(g)(9)*. The indictment charged that in February 2005, Chester had been convicted in Kanawha County Magistrate Court of domestic assault and battery, a misdemeanor offense under West Virginia law. *See W. Va. Code § 61-2-28(a)* and *(b)*. Chester conceded that the 2005 domestic [*9] assault and battery offense qualified as a predicate "misdemeanor crime of domestic violence" under *§ 922(g)(9).* [4]

> 4 For purposes of *18 U.S.C. § 922(g)(9)*, a "misdemeanor crime of domestic violence" is defined as an offense that "is a misdemeanor under Federal, State, or Tribal law" and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse . . . of the victim." *18 U.S.C. § 921(a)(33)(A).*

Chester moved to dismiss the indictment, arguing that *§ 922(g)(9)*, both on its face and as applied to him in this instance, violated his *Second Amendment* right to keep and bear arms under *Heller*. Seizing upon *Heller's* list of "presumptively lawful regulatory measures" including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," *128 S. Ct. at 2817 & n.26*, the district court reasoned by analogy that "the prohibition by Congress as embodied in *§ 922(g)(9)* of the possession of a firearm by a misdemeanant who has committed a crime of domestic violence is a lawful exercise by the government of its regulatory authority notwithstanding the *Second Amendment.*" *United States v. Chester, No. 2:08-00105, 2008 U.S. Dist. LEXIS 80138, 2008 WL 4534210, at *2 (S.D.W.Va. Oct. 7, 2008)* [*10] . The district court concluded that, like the felon dispossession provision set forth in *§ 922(g)(1)*, the prohi-

bition of firearm possession by domestic violence misdemeanants is a danger-reducing regulation designed "to protect family members and society in general from potential [violence]." *Id.* In fact, the district court believed that, if anything, "the need to bar possession of firearms by domestic violence misdemeanants" is "often far greater than that of the similar prohibition of *§ 922(g)(1)* on those who commit nonviolent felonies." *Id.* Thus, the district court denied the motion to dismiss the indictment, and Chester entered a conditional guilty plea, reserving his right to raise on appeal the application of the *Second Amendment*.

Chester then filed this appeal. In February 2010, we vacated the judgment and remanded in an unpublished opinion. *See United States v. Chester, No. 09-4084, 367 Fed. Appx. 392, 2010 WL 675261 (4th Cir. Feb. 23, 2010)* (per curiam). We declined to find *§ 922(g)(9)* valid by analogy based on *Heller's* "presumptively lawful" language, and we remanded for the district court to conduct an analysis [*11] of whether *§ 922(g)(9)* could be "'independently justified'" in light of *Heller*. *Id. at 398*. Our approach followed that taken in *United States v. Skoien, 587 F.3d 803 (7th Cir. 2009), vacated, 614 F.3d 638 (7th Cir. 2010)* (en banc), a panel decision that was vacated by the Seventh Circuit for *en banc* review at about the same time that we released our opinion in *Chester*. In *Skoien*, the defendant was convicted under *18 U.S.C. § 922(g)(9)* for illegally possessing a shotgun that he claimed to have kept for hunting purposes. The *Skoien* panel reasoned that because "the core right of self-defense identified in *Heller* [was] not implicated," intermediate scrutiny was the appropriate standard to apply to the defendant's *Second Amendment* challenge to *§ 922(g)(9)*. *Id. at 805*. The panel voted to remand the case to give the government an opportunity to carry its burden imposed by the intermediate constitutional framework:

> Under intermediate scrutiny, the government need not establish a close fit between the statute's means and its end, but it must at least establish a *reasonable* fit. The government has done almost nothing to discharge this burden. Instead, it has premised its argument almost entirely [*12] on *Heller's* reference to the presumptive validity of felon-dispossession laws and reasoned by analogy that *§ 922(g)(9)* therefore passes constitutional muster. That's not enough.

Id. at 805-06. Similarly, we remanded Chester's appeal for clarification of the precise contours of his *Second Amendment* claim--a necessary step in determining the appropriate standard of constitutional scrutiny to apply--and for development of the record under the appropriate means-end framework. *See Chester, 367 Fed. Appx. 392, 2010 WL 675261, at *6*. We stopped short, however, of identifying the proper level of scrutiny, leaving that task to the district court on remand.

After we issued the unpublished *Chester* opinion, the government filed a petition for panel rehearing in light of the fact that the *Skoien* panel decision had been vacated by the Seventh Circuit *en banc*. While Chester's petition for rehearing was pending, the Seventh Circuit issued its en banc decision in *Skoien*, rejecting the *Second Amendment* challenge to *§ 922(g)(9)* on the basis that "logic and data" demonstrate "a substantial relation between *§ 922(g)(9)* and [an important governmental] objective." *614 F.3d at 642*. We now grant panel rehearing, vacate our initial [*13] opinion and reissue our decision to provide district courts in this Circuit guidance on the framework for deciding *Second Amendment* challenges.

III.

We turn first to the question of how to evaluate Chester's *Second Amendment* challenge to *§ 922(g)(9)*. To the extent *Heller* provides an answer to this question, it would be found in the Court's truncated discussion of the limitations on the right to bear arms preserved by the *Second Amendment*. As noted previously, *Heller* recognized that the pre-existing right guaranteed by the *Second Amendment* "was not unlimited, just as the *First Amendment's* right of free speech was not." *Heller, 128 S. Ct. at 2799*; *see id. at 2816*. And because "it has always been widely understood that the *Second Amendment*, like the *First* and *Fourth Amendments*, codified a *preexisting* right," *id. at 2797*, determining the limits on the scope of the right is necessarily a matter of historical inquiry. *Heller* declined to "undertake an exhaustive historical analysis . . . of the full scope of the *Second Amendment*," *id. at 2816*, but did identify one specific historical limitation as to *which* arms a citizen had the right to bear. In accordance "with the historical understanding [*14] of the scope of the right," the *Second Amendment* protected only weapons "typically possessed by law-abiding citizens for lawful purposes." *Id. at 2816*; *see id. at 2817* (explaining that the *Second Amendment* protected "the right to keep and carry arms . . in common use at the time") (internal quotation marks omitted). The Court found support for this limitation in "'the historical tradition of prohibiting the carrying of dangerous and unusual weapons.'" *Id. at 2817*. Thus, a

citizen's right to carry or keep sawed-off shotguns, for instance, would not come within the ambit of the *Second Amendment*. *See id. at 2816*.

Having acknowledged that the scope of the *Second Amendment* is subject to historical limitations, the Court cautioned that *Heller* should not be read "to cast doubt on longstanding prohibitions" such as "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." *Id. at 2816-17*. *Heller* described its exemplary list of "longstanding prohibitions" as "presumptively lawful regulatory measures," *id. at 2817, n.26*, without alluding to any historical evidence that the right to keep [*15] and bear arms did not extend to felons, the mentally ill or the conduct prohibited by any of the listed gun regulations. It is unclear to us whether *Heller* was suggesting that "longstanding prohibitions" such as these were historically understood to be valid limitations on the right to bear arms or did not violate the *Second Amendment* for some other reason. *See United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2009)* (concluding that *Heller* "identified limits deriving from various historical restrictions on possessing and carrying weapons," including the felon dispossession provision, that "were left intact by the *Second Amendment*"). Federal felon dispossession laws, for example, were not on the books until the twentieth century, and the historical evidence and scholarly writing on whether felons were protected by the *Second Amendment* at the time of its ratification is inconclusive. But even if the listed regulations were not historical limitations on the scope of the *Second Amendment*, the Court could still have viewed the regulatory measures as "presumptively lawful" if it believed they were valid on their face under any level of means-end scrutiny applied. [5]

> 5 Other courts have found [*16] *Heller's* list of "presumptively lawful" firearm regulations susceptible to two meanings. *See United States v. Marzzarella, 614 F.3d 85, 91 (3rd Cir. 2010)* ("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."); *Skoien, 587 F.3d at 808* ("[I]t is not entirely clear whether this language should be taken to suggest that the listed firearms regulations are presumed to fall outside the scope of the *Second Amendment* right as it was understood at the time of the framing or that they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights.").

Some courts have treated *Heller's* listing of "presumptively lawful regulatory measures," for all practical purposes, as a kind of "safe harbor" for unlisted regulatory measures, such as *18 U.S.C. § 922(g)(9)*, [*17] which they deem to be analogous to those measures specifically listed in *Heller*. *See, e.g., United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010)* ("We see no reason to exclude *§ 922(g)(9)* from the list of long-standing prohibitions on which *Heller* does not cast doubt."). This approach, however, approximates rational-basis review, which has been rejected by *Heller*. *See Heller, 128 S. Ct. at 2817, n.27*. In fact, the phrase "*presumptively* lawful regulatory measures" suggests the possibility that one or more of these "longstanding" regulations "could be unconstitutional in the face of an as-applied challenge." *United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010)*.

In view of the fact that *Heller* ultimately found the District's gun regulations invalid "under any standard of scrutiny," it appears to us that the Court would apply some form of heightened constitutional scrutiny if a historical evaluation did not end the matter. The government bears the burden of justifying its regulation in the context of heightened scrutiny review; using *Heller's* list of "presumptively lawful regulatory measures" to find *§ 922(g)(9)* constitutional by analogy would relieve the government of its [*18] burden.

Thus, a two-part approach to *Second Amendment* claims seems appropriate under *Heller*, as explained by the Third Circuit Court of Appeals, *see Marzzarella, 614 F.3d at 89*, and Judge Sykes in the now-vacated *Skoien* panel opinion, *see 587 F.3d at 808-09*. The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the *Second Amendment's* guarantee." *Id.* This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. *See Heller, 128 S. Ct. at 2816*. If it was not, then the challenged law is valid. *See Marzzarella, 614 F.3d at 89*. If the challenged regulation burdens conduct that was within the scope of the *Second Amendment* as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny. *See id. Heller* left open the issue of the standard of review, rejecting only rational-basis review. Accordingly, unless the conduct at issue is not protected by the *Second Amendment* at all, the Government bears the burden of justifying the constitutional validity of the law.

A.

Under this approach, the first question is whether [*19] *§ 922(g)(9)* burdens or regulates conduct that comes within the scope of the *Second Amendment--i.e.*, whether the possession of a firearm in the home by a domestic violence misdemeanant is protected by the *Second Amendment*. *Cf. Marzzarella, 614 F.3d at 89* ("Our threshold inquiry, then, is whether [the challenged law] 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."). *Section 922(g)(9)*, like the felon-dispossession provision set forth in *§ 922(g)(1)*, permanently disarms an entire category of persons. Thus, we are seeking to determine whether a person, rather than the person's conduct, is unprotected by the *Second Amendment*. *See Skoien, 614 F.3d at 649* (Sykes, J., dissenting) (framing the threshold question as "whether persons convicted of a domestic-violence misdemeanor are completely 'outside the reach' of the *Second Amendment* as a matter of founding-era history and background legal tradition").

In this case, the government has not taken the position that persons convicted of misdemeanors involving domestic violence were altogether excluded [*20] from the *Second Amendment* as it was understood by the founding generation. Moreover, it appears to us that the historical data is not conclusive on the question of whether the founding era understanding was that the *Second Amendment* did not apply to felons. *See Williams, 616 F.3d at 692* (noting that "[t]he academic writing on the subject of whether felons were excluded from firearm possession at the time of the founding is inconclusive at best" (internal quotation marks omitted)); *Skoien, 614 F.3d at 650-51* (Sykes, J., dissenting) ("[S]cholars disagree about the extent to which *felons*-let alone misdemeanants-were considered excluded from the right to bear arms during the founding era. . . . We simply cannot say with any certainty that persons convicted of a domestic-violence misdemeanor are wholly excluded from the *Second Amendment* right as originally understood."); *United States v. McCane, 573 F.3d 1037, 1048 (10th Cir. 2009)* (Tymkovich, J., concurring) ("[T]he felon dispossession dictum may lack the 'longstanding' historical basis that *Heller* ascribes to it. Indeed, the scope of what *Heller* describes as 'longstanding prohibitions on the possession of firearms by felons' . . . is [*21] far from clear.").

Of course, we are dealing in this appeal not with felons but people who have been convicted of domestic-violence misdemeanors. If the historical evidence on whether felons enjoyed the right to possess and carry arms is inconclusive, it would likely be even more so with respect to domestic-violence misdemeanants. The federal provision disarming domestic-violence misdemeanants is of recent vintage, having been enacted in 1996 as part of the Lautenberg Amendment to the Gun Control Act of 1968. *See* Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (1996). By contrast, the federal felon dispossession provision has existed in some form or another since the 1930s, and thus there is a much larger body of scholarly work considering the question of whether felons were originally excluded from the protection afforded by the *Second Amendment*. Commentators are nonetheless divided on the question of the categorical exclusion of felons from *Second Amendment* protection. *Compare* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*?, *32 Harv. J.L. & Pub. Pol'y 695, 714 (2009)* (reviewing founding-era precedents and explaining that, "much like the American authorities for [*22] a century and a half after the *Second Amendment's* adoption, the actual English antecedents point against lifetime total disarmament of all 'felons,' but do support lesser limitations"), *and* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit, 60 Hastings L.J. 1371, 1376 (2009)* (explaining that because state and federal "felon disarmament laws significantly postdate both the *Second Amendment* and the *Fourteenth Amendment*[,] [a]n originalist argument that sought to identify 1791 or 1868 analogues to felon disarmament laws would be quite difficult to make"), *with* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations, 60 Hastings L.J. 1339, 1360 (2009)* ("[T]here is every reason to believe that the Founding Fathers would have deemed persons convicted of any of the common law felonies not to be among 'the [virtuous] people' to whom they were guaranteeing the right to arms."), *and* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 480 (1995)* (opining that "felons, children, and the insane were excluded from the right to arms precisely as (and for the same [*23] reasons) they were excluded from the franchise").

The government has not contended that *§ 922(g)(9)* is valid because Chester, having been convicted of a domestic violence misdemeanor, is wholly unprotected by the *Second Amendment*. Based on this and the lack of historical evidence in the record before us, we are certainly not able to say that the *Second Amendment*, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that Chester's *Second Amendment* rights are intact and that he is entitled to some measure of *Second Amendment* protection to keep and possess firearms in his home for self-defense. [6] The question then becomes whether the government can justify, under the appropriate level of scrutiny, the burden imposed on Chester's *Second Amendment* rights by *§ 922(g)(9)*. *Cf. Marzzarella, 614 F.3d at 95* (applying intermediate scrutiny after finding insufficient evidence to establish with certainty "that the possession of unmarked firearms in the home is excluded from the right to bear arms").

6 We do not address any issue with respect to possession of firearms for lawful hunting purposes under the *Second Amendment* as neither [*24] party has raised that as an issue in this case.

B.

Heller left open the level of scrutiny applicable to review a law that burdens conduct protected under the *Second Amendment*, other than to indicate that rational-basis review would not apply in this context. *See Heller, 128 S. Ct. at 2817, n.27* ("If all that was required to overcome the right to keep and bear arms was a rational basis, the *Second Amendment* would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). Our task, therefore, is to select between strict scrutiny and intermediate scrutiny. Given *Heller's* focus on "core" *Second Amendment* conduct and the Court's frequent references to *First Amendment* doctrine, we agree with those who advocate looking to the *First Amendment* as a guide in developing a standard of review for the *Second Amendment*. *See Marzzarella, 614 F.3d at 89 n.4*; *Skoien, 587 F.3d at 813-14*.

Chester urges us to adopt a strict scrutiny standard because *§ 922(g)(9)* severely burdens an enumerated, fundamental right. This argument is too broad. We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the *Bill of Rights*. In the [*25] analogous *First Amendment* context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. For example, a "content-based speech restriction" on noncommercial speech is permissible "only if it satisfies strict scrutiny."*United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865(2000)*. But, courts review content-neutral time, place, and manner regulations using an intermediate level of scrutiny.*See Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*.Likewise, a law regulating commercial speech is subject to amore lenient intermediate standard of scrutiny in light of "its subordinate position in the scale of *First Amendment* values."*Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477, 109 S. Ct. 3028, 106 L. Ed. 2d 388(1989)* (internal quotation marks omitted). As Judge Sykes observed in the now-vacated *Skoien* panel opinion:

> The *Second Amendment* is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on *Second Amendment* rights, and individual assertions of the right will come in many forms. A severe burden on the core *Second Amendment* [*26] right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the *Second Amendment*, may be more easily justified.

Skoien, 587 F.3d at 813-14.

Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*--the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense--by virtue of Chester's criminal history as a domestic violence misdemeanant. *Heller, 128 S. Ct. at 2821*. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons. *See Marzzarella, 614 F.3d at 97*; *cf. Skoien, 614 F.3d at 641* (en banc) ("The United States concedes that some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that *§ 922(g)(9)* is valid only if substantially related to an important governmental objective. . . . The concession is prudent, and we need not get more deeply into the 'levels of scrutiny' quagmire [*27] . . ."). Accordingly, the government must demonstrate under the intermediate scrutiny standard that there is a "reasonable fit" between the challenged regulation and a "substantial" government objective. *Fox, 492 U.S. at 480*; *see Marzzarella, 614 F.3d at 98* ("Although [the various forms of intermediate scrutiny] 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' . . . [and] require the fit between the challenged regulation and the asserted objective be reasonable, not perfect."). Significantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government. *See Fox, 492 U.S. at 480-81*.

We cannot conclude on this record that the government has carried its burden of establishing a reasonable fit between the important object of reducing domestic gun violence and *§ 922(g)(9)*'s permanent disarmament of all domestic-violence misdemeanants. The government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important [*28] government goal; however, it has not attempted

to offer sufficient *evidence* to establish a substantial relationship between *§ 922(g)(9)* and an important governmental goal. Having established the appropriate standard of review, we think it best to remand this case to afford the government an opportunity to shoulder its burden and Chester an opportunity to respond. Both sides should have an opportunity to present their evidence and their arguments to the district court in the first instance.

IV.

For the foregoing reasons, we vacate the order of the district court and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

CONCUR BY: DAVIS

CONCUR

DAVIS, Circuit Judge, concurring in the judgment:

I concur in the judgment.

In light of the highly persuasive decision of the Seventh Circuit in *United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)* (en banc), *pet. for cert. pending*, sustaining the constitutionality of *18 U.S.C. § 922(g)(9)*, the district court should have no difficulty in concluding that the application of *§ 922(g)(9)* to offenders such as Chester passes *Second Amendment* scrutiny, exactly as district courts have already concluded. *See United States v. Smith, 2010 U.S. Dist. LEXIS 98511, 2010 WL 3743842 (S.D.W. Va. Sept. 20, 2010)* [*29] (applying *Skoien* and sustaining statute); *United States v. Staten, 2010 U.S. Dist. LEXIS 91653, 2010 WL 3476110 (S.D.W. Va. Sept. 2, 2010)* (same).

I.

On April 26, 2004, Chester savagely attacked his 22-year-old daughter, Meghan Chester ("Meghan"). Apparently, their dispute arose over what Meghan had eaten for lunch that day. In this attack, Chester slammed his daughter on the kitchen table. Meghan attempted to leave but Chester followed her, threatened her, and punched her in the face. Meghan fell to the floor in pain, but Chester continued to attack her. He began kicking her as she lay on the ground, and also dumped buckets of water over his daughter's head. After her father "beat her up and assault[ed] her" for some time, J.A. 41, Meghan escaped from her father and locked herself in the bathroom. Eventually, Chester left the residence and Meghan's mother took Meghan to the hospital. Meghan had a swollen nose and a knot on her forehead. Based on his physical abuse of his daughter, on February 4, 2005, Chester was convicted in state court in Kanawha County, West Virginia for the misdemeanor crime of domestic battery and domestic assault in violation of *W. Va. Code § 61-2-28(a) & (b)*.

On October 10, 2007, the Kanawha [*30] County police returned to the Chester family home in response to a second domestic violence call. This time, the call was placed by Mrs. Linda Guerrant-Chester ("Guerrant-Chester"), Chester's then-wife. When the officers arrived, Guerrant-Chester told them that she awoke at 5:00 a.m. and discovered her husband outside the house, receiving oral sex from a prostitute. When Chester realized that Guerrant-Chester had seen him, he yelled, "[s]o you fucking caught me" and proceeded to drag Guerrant-Chester inside the house. Once inside, Chester grabbed Guerrant-Chester's face and throat and strangled her while repeatedly shouting "I'm going to kill you!" Chester's daughter, Samantha Chester, heard Chester repeatedly threaten to kill Guerrant-Chester and came to the kitchen. She attempted to calm Chester down, and while she distracted him, Guerrant-Chester called the police. When the police arrived, they located a loaded 12-gauge shotgun in the kitchen pantry and a 9mm pistol in the defendant's bedroom. Both firearms belonged to Chester.

II.

On May 6, 2008, a federal grand jury indicted Chester for violating *18 U.S.C. § 922 (g)(9)*. Chester moved to dismiss the indictment, and after considering [*31] the parties' arguments in light of the Supreme Court's opinion in *Heller v. District of Columbia, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*, the district court denied Chester's motion. In the district court's brief written opinion, it cited *Heller's* observation that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." J.A. 60 (citing *Heller, 128 S. Ct. at 2816-17*). The court then drew an analogy between non-violent felons and domestic vio-

lence misdemeanants, finding that the *Heller* language could, and in this case, should, be read to include both. The court analyzed the issue as follows:

> The thrust of the majority opinion in *Heller* leaves ample room for the government to control the possession of firearms by misdemeanants found guilty of domestic violence. Indeed, the need to bar possession of firearms by domestic violence misdemeanants in order to protect family members and society in general from potential violent acts of such individuals is quite often far greater than that of the similar prohibition of *§ 922(g)(1)* on those who commit nonviolent felonies.

J.A. 61.

Chester then entered a conditional guilty [*32] plea, preserving his right to appeal the district court's denial of his motion to dismiss. He was sentenced to five months in prison, followed by a three-year term of supervised release. J.A. 5. Chester timely appealed; we have jurisdiction pursuant to *28 U.S.C. §1291.*

III.

A.

The majority holds that, "[a]lthough Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*--the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." Maj. Op. at 16. I agree. The majority further notes, however, "We cannot conclude on this record that the government has carried its burden of establishing a reasonable fit between the important object of reducing domestic gun violence and *§ 922(g)(9)*'s permanent disarmament of domestic-violence misdemeanants." *Id.* at 17. I do not agree that the issue presented is whether *§ 922(g)(9)*, on its face, properly regulates "domestic-violence misdemeanants" as a group. This case is only about a congressional prohibition imposed on Appellant William Samuel Chester, Jr. More generally, I have concerns about the majority's invitation [*33] to import *First Amendment* doctrines into *Second Amendment* jurisprudence. But in any event, I am confident that the district court will have no difficulty satisfying the majority's mandate.

B.

Section 922(g)(9) was enacted in 1996 along with *18 U.S.C. § 922(g)(8)* as part of the so-called Lautenberg Amendment to the Gun Control Act. It states, in pertinent part:

> (g) It shall be unlawful for any person--
>
> . . . .
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9). The term "misdemeanor crime of domestic violence" is defined as follows:

> (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that-
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> *(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,* committed by a current or former spouse, parent, or guardian of the victim, by a person with [*34] whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

> (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless-
>
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
>
> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by a jury, or
>
> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
>
> (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or [*35] restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33) (emphasis added). Thus, a defendant must use or attempt to use force before he is convicted of "a misdemeanor crime of domestic violence" under *18 U.S.C. § 922(g)(9)*.

C.

As has been amply discussed, in *Heller*, the Supreme Court invalidated a gun ban in the District of Columbia, holding that the *Second Amendment* guarantees to law-abiding citizens the right to possess handguns for the purposes of self-defense. The Court identified the right to self-defense as "the central component of the right itself," *Heller, 128 S. Ct. at 2802*, and it declared that the "core right" preserved by the *Second Amendment* was the right for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id. at 2821*. *Heller* failed, however, to identify the proper standard of scrutiny for analyzing whether a statute that regulates gun possession infringes on *Second Amendment* rights, instead finding that the D.C.'s outright ban on possession would fail to survive under any "of the standards of scrutiny that we have applied to enumerated constitutional rights." [*36] *Id. at 2817*.

The Court acknowledged the existence of limits on the scope of the individual right protected by the *Second Amendment*, and explained that certain so-called "longstanding prohibitions" were "presumptively lawful regulatory measures." *Id. at 2816-17 & n.26*; *id. at 2816* ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."). The Court provided a non-exclusive, illustrative list of such "presumptively lawful" exceptions, including but not limited to "longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id. at 2816-17*, but did not explain how lower courts were to identify other such "presumptively lawful" exceptions. More recently, the Court restated its belief in the existence of "presumptively lawful" regulations but again declined to provide any guidance to lower courts in our efforts to identify them. *McDonald v. Chicago, 130 S. Ct. 3020, 3047, 177 L. Ed. 2d 894 (2010)* (holding that the *Second Amendment* constrains state and local laws through its incorporation under the *Fourteenth Amendment Due Process Clause*). [*37] [1] *Post-Heller*, and now, *post-McDonald*, lower federal courts have theorized about the meanings of a "longstanding prohibition[ ]" and a "presumptively lawful regulatory measure[ ]", but, as the majority candidly concedes, no consensus has emerged.

1 The Court stated:

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "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." We repeat those assurances here.

McDonald, 130 S. Ct. at 3047 (internal citations omitted).

D.

The majority, on the basis of "the [*Heller*] Court's frequent references to *First Amendment* doctrine, . . . look[s] to the *First Amendment* as a guide" in its analysis. Maj. Op. at 15. To be sure, *Heller* does refer to the *First Amendment*, but only for several quite limited purposes: (1) to compare its language, along with that of other amendments in the *Bill of Rights*, to the language of the *Second Amendment*, *see, e.g., Heller, 128 S. Ct. at 2790*; (2) to establish that constitutional [*38] rights are not limited to the use of equipment available at the time of ratification, but extend to modern analogues, *see id. at 2791* (citing to *First Amendment's* protection of "modern forms of communication"); (3) to make the simple point that unqualified constitutional language does not imply an "unlimited" right, *id. at 2799*; (4) to note that initial recognition of a right sometimes comes long after ratification, *see id. at 2816*; and finally, (5) to remind its audience that our constitutional rights are "the very *product* of an interest-balancing by the people" and thus that balancing them away in the manner ascribed to Justice Breyer would be inappropriate, *id. at 2821*. Certainly the *First Amendment*, as a fount of rights the dissenting Justices have frequently championed, was a useful source for the *Heller* majority. But these limited references are hardly an invitation to import the *First Amendment's* idiosyncratic doctrines wholesale into a *Second Amendment* context, where, without a link to expressive conduct, they will often appear unjustified. To the extent some commentators and courts, frustrated with *Heller's* lack of guidance, have clung to these references and attempted to [*39] force unwieldy *First Amendment* analogies, they muddle, rather than clarify, analysis.

1.

Most problematic is the majority's suggestion that the government must show "a reasonable fit between the important object of reducing domestic gun violence and *§ 922(g)(9)*'s permanent disarmament of domestic-violence misdemeanants" as a class. Maj. Op. at 17. Chester can plainly challenge the statute as applied to him. And insofar as any legislative enactment may be attacked on its face on the grounds "that no set of circumstances exists under which the Act would be valid," *United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*; *see also Greenville Women's Clinic v. Bryant, 222 F.3d 157, 164 (4th Cir. 2000)* (quoting Salerno and applying this rule in the abortion-regulation context), Chester may raise that claim as well. But Chester *cannot* simply complain that, while the statute is permissible as applied to him, there may be different sets of facts under which its application would be invalid.

This "second type of facial challenge," *United States v. Stevens, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010)*, which presumes "a species of third party (*jus tertii*) standing," *City of Chicago v. Morales, 527 U.S. 41, 55 n.22, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)* [*40] (Stevens, J., concurring), has not been permitted outside of the *First Amendment* context, *see Salerno, 481 U.S., at 745* ("The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the *First Amendment*."). As the Supreme Court taught in *Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)*,

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, *in* other situations not before the Court. . . . [These principles] rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

Id. at 610-11.

One of the only exceptions to this rule is the *First Amendment's* overbreadth doctrine, which is justified on grounds unique to the regulation of expressive conduct. Concerned about the [*41] chilling effect of overly broad regulations--the fear that a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression," *id. at 612*--the Supreme Court has "long . . . recognized that the *First Amendment* needs breathing space," *id. at 611*; and the overbreadth doctrine is the Court's solution to this speech-specific problem, *id. at 611-12*. With free expression, the classes of protected speech that are unduly burdened may be quite particularized--e.g., unpopular expression that has "serious literary, artistic, politics, or scientific value," *Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*. And as expression is, by its very nature, so mutable, overbroad regulations can easily encourage speakers to modify their speech, shifting it away from controversy. No analogous arguments obtain in

the *Second Amendment* context. As there can be little doubt that advocates of a robust individual right to bear arms will continue to challenge *all* firearm regulations, importing the overbreadth doctrine, an "extraordinary" exception to prudential standing requirements, *Ward v. Rock Against Racism, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*, into the *Second Amendment* [*42] context would be inappropriate.

2.

As for the majority's observation that here "we are seeking to determine whether a person, rather than the person's conduct, is unprotected by the *Second Amendment*," Maj. Op. at 12, I am dubitante. This seems to invite a comparison to the *First Amendment's* application to expressive conduct and to suggest that, because here we would exclude a "person, rather than the person's conduct," from constitutional immunity, the government should bear a heavier burden in establishing that Chester's claim is outside the purview of the *Second Amendment*. Again, however, the *First Amendment* analogy breaks down. The law has long believed that "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion," and that "the remedy to be applied is more speech, not enforced silence." *Whitney v. California, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)* (Brandeis, J., concurring). This principle has no application to gun violence, and prohibiting violent criminals from owning guns cannot fairly be compared to permanently silencing some class of persons.

E.

Heller has left [*43] in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations. Many courts have upheld provisions of *§ 922(g)* under the "presumptively lawful regulatory measure[ ]" or the "longstanding prohibition[]" language in Heller. These courts generally affirm a particular provision of *§ 922(g)* either because *Heller* specifically stated the particular regulations were constitutional, as regarding felons and the mentally ill, *§§ 922(g)(1) & (4)*, or, as did the district court here, via analogy to the so-called "presumptively lawful regulatory measures." [2] Other federal courts have individually analyzed the specific statutory provision at issue, determined the appropriate level of constitutional scrutiny, and then analyzed the statute in light of the factual circumstances before the court. [3]

2 We have upheld the statutory prohibitions on possession by felons and the mentally ill after *Heller* in unpublished, non-precedential, cases. *United States v. Brunson, No. 07-4962, 292 Fed. Appx. 259, *261 (4th Cir. Sept. 11, 2008)* (upholding *§ 922(g)(1)*); *United States v. McRobie, No. 08-4632, 2009 U.S. App. LEXIS 617, 2009 WL 82715, *1 (4th Cir. Jan. 14, 2009)* (upholding [*44] *§ 922(g)(4)*). Other circuits concluded similarly. *See, e.g., United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009)* (upholding *§ 922(g)(1)*); *United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009)* (same); *United States v. Stuckey, No. 08-0291, 317 Fed. Appx. 48, 50 (2d Cir. March 18, 2009)* (same).

We have also previously analogized between perpetrators of domestic violence and felons. *United States v. Bostic, 168 F.3d 718, 722 (4th Cir. 1999)*. There, Bostic challenged the constitutionality of his conviction under *§ 922(g)(8)*. We upheld the statute, explaining:

> We disagree, however, with Bostic's premise that he remained an "ordinary citizen" after the [final protection] Order was entered against him. By engaging in abusive conduct toward Kelly and Ryan which led to the entry of the Order, Bostic removed himself from the class of ordinary citizens we discussed in *Langley. Like a felon, a person in Bostic's position cannot reasonably expect to be free from regulation when possessing a firearm.*

Id. at 722 (emphasis added).

Other federal courts *have* upheld *§ 922(g)(9)* based on analogies between domestic violence misdemeanants and felons. *E.g., United States v. White, 593 F.3d 1199, 1205 (11th Cir. 2010)*; [*45] *United States v. Booker, 570 F. Supp. 2d 161, 163-64 (D. Me. 2008)* ("if anything, as a predictor of firearm misuse, the definitional net cast by *922(g)(9)* is tighter than the net cast by *922(g)(1)*. . . . [and] the manifest need to protect the victims of domestic violence and to keep guns from the hands of the people who perpetuate such acts is well-documented and requires no further elaboration.").

3 *See, e.g., United States v. Miller, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009)*; *United States v. Engstrum, 609 F. Supp. 2d 1227, 1231-34 (D. Utah 2009).*

Recognizing that an attempt to operationalize the *Heller* Court's "longstanding" language would lead to "weird" results unconnected even to any court's divination of the ratifiers' original intent, the Seventh Circuit simply read this language to acknowledge that "exclusions [from *Heller's* qualified right to bear arms] need not mirror limits that were on the books in 1791." *Id. at 641.* I, too, find this the most persuasive interpretation of that passage in *Heller.*

The *Skoien* court then conducted a further analysis to determine whether the statute was constitutional. The court did not explicitly adopt a level of constitutional scrutiny, however. [*46] Instead, the court embraced the government's concession that "some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that *§ 922(g)(9)* is valid only if substantially related to an important governmental objective." *Skoien, 614 F.3d at 641.* Then, after disavowing involvement in the "'levels of scrutiny' quagmire," the court concluded that *§ 922(g)(9)* satisfied the appropriate test, a test that appears to any discerning eye identical to intermediate scrutiny. *Id. at 641-42* ("[F]or no one doubts that the goal of *§ 922(g)(9)*, preventing armed mayhem, is an important government objective. Both logic and data establish a substantial relation between *§ 922(g)(9)* and this objective."). The court went on to explain why the statute satisfied intermediate scrutiny, identifying three distinct justifications for the constitutionality of *§ 922(g)(9)*: domestic abusers often commit acts that would be charged as felonies if the victim were a stranger, but that are charged as misdemeanors because the victim is a relative; (2) firearms are deadly in domestic strife; and (3) persons convicted of domestic violence are likely to offend again. *Id. at 643-44.* Distilled to [*47] its essence, *Skoien* holds that *§ 922(g)(9)* passes muster under the *Second Amendment* as applied to recidivist violent offenders.

IV.

Despite its hesitation to do so explicitly (in contrast to the majority in this case), the Seventh Circuit correctly applied intermediate scrutiny in *Skoien* and correctly sustained *§ 922(g)(9)* against constitutional attack.

A.

Intermediate scrutiny is the proper level of scrutiny for *§ 922(g)(9). Heller* eliminated rational basis scrutiny and Justice Breyer's proposed balancing test as possibilities. *Heller, 128 S. Ct. at 2817 n.27*; *id. at 2821.* The Court also made it clear that strict scrutiny is unwarranted in *Second Amendment* analysis. *See id. at 2851* (Breyer, J., dissenting). Moreover, it is clear here that *§ 922(g)(9)* does not even burden the core right of the *Second Amendment* as established by the Supreme Court in *Heller*, namely, the right for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id. at 2821.* Undisputedly, those convicted for having committed violent assaults against cohabitants and family members in general, and Chester in particular, are not law-abiding, responsible citizens. Chester had been convicted of a [*48] serious crime in which violence is an element, *18 U.S.C. § 922(g)(9)*; *W. Va. Code § 61-2-28(a) & (b)*, and in which the facts indicate that he acted particularly violently: he lashed out at his daughter, kicking and punching her, at times while she was on the ground. Further, our own precedent dictates that an individual who assaulted a family member thereby "'removed himself from the class of ordinary citizens' to the point where he could not 'reasonably expect to be free from regulation when possessing a firearm,'" *United States v. Mitchell, 209 F.3d 319, 323 (4th Cir. 2000)* (quoting *United States v. Bostic, 168 F.3d 718, 722 (4th Cir. 1999))*, separately suggesting that strict scrutiny is inapplicable to Chester because of his previous criminal activity. For all these reasons, intermediate scrutiny is the proper approach for the district court's analysis.

Intermediate scrutiny queries whether a statute is substantially related to an important governmental interest. *See Craig v. Boren, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)* ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related [*49] to achievement of those objectives."); *see also Lehr v. Robertson, 463 U.S. 248, 265-66, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983)* ("The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. . . . when there is no substantial relation between the disparity and an important state purpose") (internal citations omitted); *Adkins v. Rumsfeld, 464 F.3d 456, 468 (4th Cir. 2006)* (for facially neutral gender-based classifications we demand "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."); *cf. Skoien, 614 F.3d at 642.*

The government contends that the governmental interests at stake here, and, indeed, the very purpose of *§ 922(g)(9)*, include, *inter alia*, to "keep[ ] firearms away from presumptively risky persons." Appellee's Br. at 9. I readily

agree. *Mitchell, 209 F.3d at 321* ("Congress determined that the possession of a gun by one convicted of domestic violence put the possessor's partner at undue risk."). In enacting legislation which prohibits certain classes of persons from possessing firearms, [*50] "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.'" *Scarborough v. United States, 431 U.S. 563, 572, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977)* (quoting 114 Cong. Rec. 14773 (1968)).

More specifically, the government argues that the purpose of *§ 922(g)(9)* is to keep firearms away from presumptively risky individuals with a demonstrated history of actual or attempted violence. Appellee's Br. at 10-13. Again, the government's argument is persuasive. In 1996, Congress recognized that existing felon-in-possession prohibitions were not keeping firearms out of the hands of domestic abusers, because such individuals, although dangerous, were often charged with misdemeanors instead of felonies. 142 Cong. Rec. S2646-02 (1996) (statement of Sen. Lautenberg) (explaining that "many people who engage in serious spousal or child abuse ultimately are not charged with convicted of felonies. . . and these people are still free under Federal law to possess firearms"). Thus, Congress enacted *§ 922(g)(9)* to deny these violent offenders the right to possess guns. *Hayes, 129 S. Ct. at 1087* (finding that "[f]irearms [*51] and domestic strife are a potentially deadly combination nationwide."); 142 Cong. Rec. at S2646-02 (explaining that adding domestic violence misdemeanants to the Gun Control Act of 1968 in 1996 was intended to "close this loophole, and will help keep guns out of the hands of people who have proven themselves to be violent and a threat to those closest to them."); *see also United States v. Beavers, 206 F.3d 706, 710 (6th Cir. 2000)* ("[I]t should not surprise anyone that the government has enacted legislation in an attempt to limit the means by which persons who have a history of domestic violence might cause harm in the future").

Under intermediate scrutiny, the governmental purpose must be *important*. But who could possibly dispute the importance of the governmental interest in keeping firearms away from individuals with a demonstrated history of actual or attempted assaultive violence? The need to protect victims of assaultive domestic violence from further, more lethal harm from gun violence is unquestionable; its unfortunate and horrifying effects are well-documented. As the government argues:

> Domestic violence misdemeanants, even more so than most convicted felons, have demonstrated [*52] a specific propensity for violence and thus pose and unacceptable risk of firearm misuse. Such persons have demonstrated an unwillingness or inability to resolve domestic disputes without threats of physical violence. Just because a domestic abuser does not employ a firearm in this first instance does not mean he will refrain from using a firearm the next time. Further, because victims of domestic violence often seek assistance from law enforcement agencies, domestic violence misdemeanants are likely to encounter law enforcement officers. The United States interest includes eliminating firearm possession by domestic violence misdemeanants during adverse encounters with law enforcement officers.

Appellee's Br. at 12. And sound research of unquestionable reliability (much of it empirical) indicates that the presence of firearms greatly increases the risk of death for women suffering from domestic abuse. For example, in 2006, 1,905 women were murdered with guns and 4,772 women were treated in emergency rooms for gunshot wounds stemming from an assault. [4] On average, more than three women in the United States are murdered by their husbands or boyfriends every day. [5] *Abused women living* [*53] *in homes with firearms are six times more likely to be killed than other abused women.* [6] Women are more than twice as likely to be shot to death by their male partner as killed in any way by a stranger. [7] And women living in homes with guns are more than three times as likely to be victims of homicide. [8] Although it is the government's role to provide these data, courts have long taken judicial notice of dispositive facts in constitutional cases; judicial notice of the data underlying the government's interests is entirely appropriate.

4 CDC, Nat'l Ctr. for Injury Prevention & Control, *Injury Mortality Reports*, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (query for "Homicide" and "Firearm" and "Females" and "2006"); *Id., Nonfatal Injury Reports*, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (query for "Assault-All" and "Firearm" and "Females" and "2006").

5 U.S. Dep't of Justice, Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence*, 1976-2001 (Feb. 2003), available at http://www.endabuse.org/userfiles/file/Children_and_Families/Children. pdf.

6 Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, Nat'l Inst. Just. J., [*54] Nov. 2003, at 15, 16, available at http://www.ncjrs.gov/pdffiles1/jr000250e.pdf. In another study, it was found

that access to firearms increases the risk of intimate-partner homicide more than five-fold. Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084-91 (1993).

7 Arthur L. Kellerman & James A. Mercy, Men, Women, and Murder: Gender-Specific Differences in Rates of Fatal Violence and Victimization, 33 J. Trauma 1, 1 (1992).

8 James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 Archives of Internal Med. 777, 777 (1997).

It is also quite clear that *§ 922(g)(9)* is substantially related to the government's important interests, as the statute directly prohibits the possession of firearms by those with a demonstrated history of actual or attempted violence. *See American Life League, Inc. v. Reno, 47 F.3d 642, 651-52 (4th Cir. 1995). Section 922(g)(9)* is not merely intended to accomplish bureaucratic shortcuts or administrative convenience. *Craig v. Boren, 429 U.S. 190, 198-99, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), reh'g denied, 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed. 2d 574 (1977); Reed v. Reed, 404 U.S. 71, 76, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), mandate conformed to, 94 Idaho 542, 493 P.2d 701 (1972).* This [*55] statute, simply stated, is substantially related to the goal proffered by the government: to keep firearms from individuals with a demonstrated history of violence. This statute was intended to prevent individuals like William Samuel Chester, Jr., a violent man who has attacked and assaulted his own daughter and wife, from purchasing or possessing guns. Thus, based on readily available data of undoubted reliability, *§ 922(g)(9)* satisfies intermediate scrutiny and is therefore constitutional.

V.

I can foresee no difficulty for the district court in sustaining the constitutional validity of the application of *§ 922(g)(9)* in this case. Nevertheless, under the circumstances of the law's understandably slow evolutionary course of development, I am content to give Appellant Chester a full opportunity to offer evidence and argument showing the district court how and why he escapes the law's bite.