

January 2017

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Recommended Citation

Kevin Ballard, *Peruta v. County of San Diego: An Individual Right to Self-Defense Outside the Home and the Application of Strict Scrutiny to Second Amendment Challenges*, 47 Golden Gate U. L. Rev. 25 (2017).
<http://digitalcommons.law.ggu.edu/ggulrev/vol47/iss1/7>

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NOTE

PERUTA V. COUNTY OF SAN DIEGO: AN INDIVIDUAL RIGHT TO SELF-DEFENSE OUTSIDE THE HOME AND THE APPLICATION OF STRICT SCRUTINY TO SECOND AMENDMENT CHALLENGES

*KEVIN BALLARD**

“When the law disarms good guys, bad guys rejoice.”¹

INTRODUCTION

On July 20, 2012, James Eagan Holmes walked into the only gun-free movie theater within 20 minutes of his home, armed with a rifle.² While excited patrons sat watching the newly released Batman movie, Holmes was sneaking inside through an emergency backdoor. Once inside the dark theater, Holmes opened fire on the moviegoers, killing 12 and wounding 58.³ In another instance, on October 1, 2015, America suffered another tragic mass shooting. A gunman walked into Umpqua Community College in Roseburg, Oregon and killed ten students and injured nine others.⁴ The gunman entered a classroom, asked students

* Doctorate of Jurisprudence Candidate, 2017. Veteran of the United States Army. I would like to thank my family and friends for their support in writing this Note. I would also like to thank Professor Laura Cisneros for her guidance and focusing my attention. I dedicate this Note to my son, Nathaniel. I would also like to thank the late Justice Antonin Scalia, who passed away during the writing of this Note, for his many years of service to our nation. For without his brilliant writing, this Note would not have been possible.

¹ Ted Nugent, AZ QUOTES (Oct. 22, 2016), <http://www.azquotes.com/quote/367607>.

² John R. Lott, Opinion, *Did Colorado Shooter Single Out Cinemark Theater Because It Banned Guns?*, FOX NEWS (Sept. 10, 2012), <http://www.foxnews.com/opinion/2012/09/10/did-colorado-shooter-single-out-cinemark-theater.html>.

³ *Id.*

⁴ KGW Staff, *10 Dead, 9 Injured in Mass Shooting at Oregon College*, KGW PORTLAND (Oct. 3, 2015), <http://www.kgw.com/story/news/crime/2015/10/01/report-15-dead-umpqua-community-college-shooting/73154898/>.

their religion, and then executed them.⁵ Immediately following the Oregon shooting, President Barack Obama demanded gun reform and stricter gun laws.⁶ These shootings for the moment appear to have become the norm with every few passing months another incident strikes at the heart of America, launching the country into another debate about gun control.⁷

Though these mass shootings have been well documented by media outlets and thus have become the basis for a call on gun reform, the reality is that situations where an armed citizen stops a gunman rarely gain national attention. Many Americans do not know that in April 2015, a driver for rideshare company Uber stopped a gunman who open fired on a crowd in Chicago.⁸ The driver had a concealed carry permit and used his own firearm to protect others after witnessing Everardo Custodio fire into the crowd.⁹ Had this occurred only a few years earlier, Chicago's strict gun laws at the time would have made it less likely for this Uber driver to have been armed as Chicago had a prohibition on concealed carry until the law was found unconstitutional in 2012.¹⁰ In March 2015, a gunman open fired inside a Philadelphia barber shop.¹¹ After hearing the shots, a licensed permit holder entered the barber shop and stopped the gunman by killing him.¹² These are but a few examples of how a licensed concealed permit holder can prevent a major tragedy.

These examples show that a licensed permit holder can prevent a mass shooting, and yet some states are moving in the opposite direction by limiting the areas in which a licensed permit holder may carry their weapon. In California, for instance, the legislature responded by banning individuals with concealed carry permits from carrying firearms while on

⁵ Andy Campbell & Daniel Marans, *Oregon Shooter Asked About Religion, Another Survivor Attests*, THE HUFFINGTON POST (Oct. 3, 2015, updated Oct. 13, 2015), http://www.huffingtonpost.com/entry/oregon-shooter-asked-about-religion_us_56103b22e4b0dd85030c4feb.

⁶ Oliver Darcy, *Obama Doesn't Mince Words in Call for Gun Control After Oregon Shooting: 'Prayers Are Not Enough'*, THE BLAZE (Oct. 1, 2015), <http://www.theblaze.com/stories/2015/10/01/obama-doesnt-mince-words-in-call-for-gun-control-after-oregon-shooting-prayers-are-not-enough/>.

⁷ See Ralph Ellis, *Orlando shooting: 49 killed, shooter pledged ISIS allegiance*, CNN, (June 13, 2016), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>.

⁸ Geoff Ziezulewicz, *Uber Driver, Licensed to Carry Gun, Shoots Gunman in Logan Square*, CHICAGO TRIBUNE (Apr. 20, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-uber-driver-shoots-gunman-met-0420-20150419-story.html?reddit>.

⁹ *Id.*

¹⁰ See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

¹¹ David Chang, *Gunman Shot, Killed Inside West Philly Barbershop*, NBC10 PHILADELPHIA (Mar. 22, 2015), <http://www.nbcphiladelphia.com/news/local/Man-Shot-in-the-Chest-Inside-West-Philly-Barbershop-297176271.html>.

¹² *Id.*

college campuses.¹³ California has chosen to leave their college students less protected at a time when there has been an increase in campus shootings.¹⁴

California law generally prohibits a person from carrying a firearm, either openly or concealed.¹⁵ While open carry, which is to openly carry a firearm on one's person, is banned in California, a person may still conceal carry if they obtain a license. To carry concealed means to have the firearm concealed upon the person, generally within a waistband inside a specially designed holster. A person wishing to carry a concealed firearm in California may apply for a license, known as a Concealed Carry Weapons or "CCW," in the city or county of their work or home.¹⁶ To obtain a CCW, an applicant must meet several requirements; in particular, an applicant must establish "good cause" for the issuing of the permit.¹⁷

Many counties in California allow "good cause" to be satisfied with a statement that the applicant wants to carry for self-defense.¹⁸ However, in the County of San Diego, to satisfy the "good cause" requirement, an applicant is required to show a heightened need for security, setting themselves apart from the mainstream population.¹⁹ One applicant, by the name of Edward Peruta decided to challenge this "good cause" requirement after he was denied a license. Relying on the United States Supreme Court's previous decisions in *District of Columbia v. Heller*²⁰ and *McDonald v. City of Chicago*,²¹ Peruta filed suit against the County of San Diego, claiming that the county's "good cause" requirement violates the Second Amendment of the United States Constitution.²²

Although no standard of heightened scrutiny has been affirmatively adopted by the Supreme Court, based upon the Supreme Court's decisions in *Heller* and *McDonald*, courts should apply strict scrutiny to le-

¹³ Alexei Koseff, *California Bans Concealed Handguns on College, School Campuses*, THE SACRAMENTO BEE, (Oct. 10, 2015), <http://www.sacbee.com/news/politics-government/capitol-alert/article38708496.html>.

¹⁴ *Number of Mass Shootings on the Rise, Most at Schools: FBI Report*, NBC NEWS (Sept. 25, 2014), <http://www.nbcnews.com/news/us-news/number-mass-shootings-rise-most-schools-fbi-report-n211261>.

¹⁵ See CAL. PENAL CODE §§ 25400 (prohibiting concealed carry of a firearm), 25850 (prohibiting carry of a loaded firearm), 26350 (prohibiting open carry of a firearm) (West 2016).

¹⁶ See Cal. Penal Code §§ 26150, 26155 (West 2016).

¹⁷ Cal. Penal Code §§ 26150, 26155 (West 2016).

¹⁸ *Peruta v. County of San Diego*, 742 F.3d 1144, 1171 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

¹⁹ *Id.* at 1148.

²⁰ *District of Columbia v. Heller*, 544 U.S. 570 (2008).

²¹ *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

²² *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

gal challenges brought under a Second Amendment claim. Through the application of strict scrutiny, courts can uphold the constitutional right to keep and bear arms, while still allowing for common sense regulations such as preventing felons from possessing a firearm. As such, *Peruta v. County of San Diego* can be a vessel for the Supreme Court to establish strict scrutiny as the appropriate level of heightened scrutiny. The Supreme Court can settle a split in authorities and give the courts much needed guidance as each state continues to use different methods in an attempt to reduce gun violence.

This Note will begin by examining the majority's analysis in *Heller*. The *Heller* case, through historical interpretation, analyzed the language of the Second Amendment and settled a long-held dispute about the meaning of its actual language. This same historical analysis was also significant in the Supreme Court's examination of *McDonald*, which affirmatively applied the Second Amendment to the States. *Peruta* used the same methodology as *Heller* and *McDonald*. Next, this Note will argue that, based on the historical analysis in *Heller*, *McDonald*, and *Peruta*, courts addressing the Second Amendment should apply strict scrutiny review to the legal challenges of the Second Amendment.

Three factors support the application of strict scrutiny as the appropriate level of heightened scrutiny. First, the Second, Third, Fourth and Seventh Circuits examined laws like the one at issue in *Peruta* and arrived at different conclusions after applying intermediate scrutiny. These circuits skipped the basic principle of evaluating whether the right to bear arms outside the home is protected by the Second Amendment and failed to conduct a historical analysis as performed in *Heller* and *McDonald*, and thus wrongfully applied intermediate scrutiny to Second Amendment challenges. Second, the application of anything less than strict scrutiny allows for judicial balancing, which was expressly rejected in the *Heller* case. Third, using strict scrutiny, courts can uphold common-sense gun laws, such as preventing felons from possessing a firearm. This Note will conclude with an application of strict scrutiny to *Peruta*, and show that under such application, San Diego's policy would not survive.

I. BACKGROUND

To properly examine the case of *Peruta*, it is necessary to understand the Supreme Court's decisions in both *District of Columbia v. Heller*²³ and *McDonald v. City of Chicago*,²⁴ and more importantly, the methodology used by the Court to reach these decisions.

²³ *District of Columbia v. Heller*, 544 U.S. 570 (2008).

A. THE HELLER DECISION DECLARES THE SECOND AMENDMENT IS AN INDIVIDUAL RIGHT OF SELF-DEFENSE

“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.”²⁵ The meaning of this single phrase has been the subject of numerous debates and interpretations; however, there are generally two competing views concerning the Second Amendment. The first interpretation is that the Second Amendment only gives the right to possess and carry a firearm in connection with militia service.²⁶ The second is that the Second Amendment protects an individual’s right to possess a firearm, unconnected with militia service.²⁷ In *Heller*, the United States Supreme Court settled this long debate by declaring the Second Amendment is an individual right for self-defense, unconnected with militia service.²⁸

The facts of the *Heller* case are simple. The District of Columbia passed a law stating that a person could only carry a handgun if it was registered.²⁹ However, the District prohibited registration of handguns, and the carrying of handguns without a license.³⁰ The District also required that residents who lawfully owned firearms were to keep their firearms in their home unloaded and disassembled or equipped with a trigger lock.³¹ Dick Heller was a special police officer in D.C. who attempted to register a handgun he wished to keep at home.³² D.C. refused to issue him a certificate. Heller filed suit in the Federal District Court for the District of Columbia, seeking to enjoin the City from enforcing the ban on registration of handguns, prohibition of carrying a firearm inside of the home, and the trigger lock requirement.³³

The District Court dismissed Heller’s claim, finding that precedent shows a rejection of the right to bear arms to be an individual right but with the service in a militia.³⁴ The Court of Appeals for the District of Columbia Circuit reversed the decision, holding that the Second Amend-

²⁴ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²⁵ U.S. Const. amend. II.

²⁶ *Heller*, 554 U.S. at 570; A militia is a military force that is made of civilians and is designed to supplement a regular army.

²⁷ *Id.*

²⁸ *Id.* at 592.

²⁹ *Id.* at 574.

³⁰ *Id.* at 574.

³¹ *Heller*, 554 U.S. at 575.

³² *Id.*

³³ *Id.* at 576.

³⁴ *Parker v. District of Columbia*, 311 F.Supp.2d 103, 110 (2004), *rev’d Parker v. District of Columbia*, 478 F.3d 370 (2007), *aff’d District of Columbia v. Heller*, 554 U.S. 570 (2008).

ment protects an individual's right to possess firearms and the D.C. ban on handguns and associated requirement that firearms be kept nonfunctional violated the Second Amendment.³⁵ The Supreme Court granted certiorari in 2007, taking up the first ever examination of the Second Amendment by the Supreme Court.³⁶

Heller was the first time the Supreme Court conducted an in-depth review of the Second Amendment.³⁷ The Supreme Court began by breaking down the language of the Second Amendment into two phrases that could each be examined under two categories: the operative clause and the prefatory clause.³⁸ The Court then looked to the history of the language in the Second Amendment and its development.

1. Operative Clause

Through the examination of the operative clause of the Second Amendment, the Supreme Court concluded the Second Amendment provides an individual's right to possess weapons for self-defense. The Supreme Court first examined the phrase "right of the people,"³⁹ which codifies the Second Amendment as a right of the people. The phrase "right of the people" is mentioned two other times in the Constitution: in the First Amendment and a similar phrase in the Ninth Amendment.⁴⁰ Further, the term "people" is used in six provisions of the Constitution, referring to all and not simply an unspecified subset.⁴¹ This reading creates a poor reasoning that the Second Amendment applies only to militias, as militias in colonial times consisted of able bodied males within a certain age range.⁴² Thus, a more appropriate reading, based upon this language, is that the Second Amendment is an individual right and "belongs to all Americans."⁴³

The Court then turned to the phrase "keep and bear arms"⁴⁴ and determined that "arms" means weapons.⁴⁵ Since the Eighteenth Century the term "arms" means weapons that are not specifically designed for

³⁵ *Heller*, 554 U.S. at 576.

³⁶ *Id.*

³⁷ *Id.* at 635.

³⁸ *Heller*, 554 U.S. at 579. In deciding how to review the Second Amendment, the Court reasoned that there must be a link between a stated purpose and a command. By requiring this logical connection, a prefatory clause may resolve ambiguities in the operative clause.

³⁹ *Heller*, 554 U.S. at 579.

⁴⁰ *Id.*

⁴¹ *Heller*, 554 U.S. at 580.

⁴² *Id.*

⁴³ *Heller*, 554 U.S. at 581.

⁴⁴ *Id.*

⁴⁵ *Id.*

military use.⁴⁶ Therefore, the most natural reading of “keep arms” is to “have weapons.”⁴⁷ Just as the term “arms” meant weapons in the Eighteenth Century, the term “bear” meant “to carry.”⁴⁸ The Supreme Court ultimately adopted a definition for the phrase “bear arms” from a previous opinion of Justice Ginsburg, who dissented in the *Heller* decision. Justice Ginsburg, in a previous analysis of a federal firearm statute, wrote that the Second Amendment indicated that the term “bear” meant to “wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another.”⁴⁹ The majority believed Justice Ginsburg’s statement logically captured the meaning of “bear arms.”⁵⁰

The meaning of “bear arms,” adopted by the Court from Justice Ginsburg, also has historical roots. Nine states’ constitutional provisions adopted in the Eighteenth and Nineteenth Centuries preserved the right of citizens to bear arms for self-defense.⁵¹ The Court reasoned these state constitutions indicate that to “bear arms” means to carry a weapon outside the military context.⁵² There are clear examples in history of when the phrase was not used in a military context. In 1780, Lord Richmond described in the House of Lords that an order to disarm private citizens is a violation of the constitutional right of Protestant subjects to keep and bear arms.⁵³ When taken all together, the Court found the phrase “to keep and bear arms” guarantees “an individual right to possess and carry weapons in case of confrontation.”⁵⁴

The historical context surrounding the phrase “shall not be infringed” points that the Second Amendment was written into the Constitution because of hostility towards disarming of citizens. Prior to the creation of the English Bill of Rights, Kings Charles II and James II used disarmament on regional enemies to suppress opponents.⁵⁵ Protestants then sought assurance, having codified in the English Bill of Rights that they may have arms for defense.⁵⁶ By the time the United States was founded, the right to bear arms was a fundamental right of English sub-

⁴⁶ *Id.*

⁴⁷ *Heller*, 554 U.S. at 582.

⁴⁸ *Heller*, 554 U.S. at 584.

⁴⁹ *Heller*, 554 U.S. at 584 (Ginsburg, J., dissenting) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Heller*, 554 U.S. at 585.

⁵³ *Id.* at 592.

⁵⁴ *Id.*

⁵⁵ *Id.* at 592-93.

⁵⁶ *Heller*, 554 U.S. at 593.

jects.⁵⁷ Blackstone — the preeminent authority on English law — cited the arms right as a fundamental right of Englishmen and described it as “the natural right of resistance and self-preservation.”⁵⁸ During colonial times, George III attempted to do the same as the King and began to disarm the colonists.⁵⁹ Both articles from the time, and Blackstone’s commentaries, show that the right to keep arms was understood in early American history to be a fundamental right of self-preservation.⁶⁰

The Court concluded after the historical examination of the operative clause, that the Second Amendment is meant to be an individual right to possess weapons for self-defense.⁶¹ However, the Second Amendment is not read to mean citizens can carry arms for any sort of confrontation.⁶² The Court then turned to the prefatory clause to examine if their newly ascertained meaning of the operative clause comported with the prefatory clause.

2. *Prefatory Clause*

Through the examination of the operative clause with the prefatory clause, the Supreme Court rejected the idea that the right to bear arms is contingent with militia service. The Court began its examination of the prefatory clause by starting with the phrase “well-regulated militia.” The Court dismissed D.C.’s interpretation of the phrase to mean an organized militia, reasoning that Congress has the sole power to organize militias.⁶³ The Supreme Court also found that “well-regulated” means simply to be properly disciplined or trained.⁶⁴ After reviewing the history and interpretation of the language of the Second Amendment, the Supreme Court found that the prefatory and operative clauses fit “perfectly.”⁶⁵

3. *Historical Examination of the Second Amendment With New Interpretation*

After interpreting the Second Amendment as an individual right, the Supreme Court concluded that their adopted definition was supported by history.⁶⁶ The Court examined the interpretation of the Second Amend-

⁵⁷ *Id.*

⁵⁸ *Heller*, 554 U.S. at 594.

⁵⁹ *Id.*

⁶⁰ *Heller*, 554 U.S. at 594-95.

⁶¹ *Id.* at 595.

⁶² *Id.*

⁶³ *Id.* at 596.

⁶⁴ *Id.* at 597.

⁶⁵ *Id.* at 598.

⁶⁶ *Heller*, 554 U.S. at 605.

ment from its ratification until the end of the Nineteenth Century and found overwhelming evidence that during that time most commentary and legislation supported the interpretation that the Second Amendment is an individual right.⁶⁷

Following post ratification, commentaries viewed the Second Amendment as a right similar to the First Amendment and as a right consistent with the English Bill of Rights.⁶⁸ Specifically, the Supreme Court noted that St. George Tucker reasoned that the right of self-defense is the first law of nature.⁶⁹ As the country moved closer towards civil war, antislavery advocates invoked their right to bear arms for self-defense.⁷⁰ During the “Bleeding Kansas” conflict⁷¹ in 1856, advocates of slavery were attempting to disarm those who wished to see slavery abolished, including one South Carolina Senator openly saying that supporters of abolishment should be disarmed.⁷²

Pre-Civil War case law also concluded that the Second Amendment was an individual right. Many cases that interpreted the Second Amendment universally supported an individual right that was unconnected with a militia service.⁷³ During the 1800s, the Supreme Court of Michigan, Georgia Supreme Court, and the Louisiana Supreme Court all interpreted the Second Amendment as an individual right, unconnected to militia service.⁷⁴ Post-Civil War results led the Supreme Court to a similar conclusion.

Following the Civil War, Congress took steps to preserve the Second Amendment as an individual right. Southern states that continued to try to disarm blacks were subject to frequent outcry that such actions infringed upon constitutional rights.⁷⁵ In 1866, Congress enacted the Freedmen’s Bureau Act and within Section Fourteen it was held that the right to bear arms “shall be secured to and enjoyed by all citizens.”⁷⁶ Similarly in the adoption of the 1871 Civil Rights Act, part of the Act

⁶⁷ *Id.*

⁶⁸ *Heller*, 554 U.S. at 606-08.

⁶⁹ *Heller*, 554 U.S. at 606.

⁷⁰ *Id.* at 609.

⁷¹ The term “Bleeding Kansas” refers to a conflict between proslavery and free-state settlers during the settling of Kansas. BLEEDING KANSAS, <http://www.history.com/topics/bleeding-kansas> (Oct. 1, 2016). In 1854, the Kansas-Nebraska Act overturned portions of the Missouri Compromise. *Id.* The residents of the state were to determine if the state would become a free state or a slave state. *Id.* This led to a massive influx of both proslavery and abolitionist seeking to influence the decision. *Id.* This ultimately led to intense fighting between the two parties, where small armies would clash throughout the state, leading to the necessity for federal troops to intervene. *Id.*

⁷² *District of Columbia v. Heller*, 554 U.S. 570, 609 (2008).

⁷³ *Id.* at 610.

⁷⁴ *Id.* at 612-13.

⁷⁵ *Id.* at 614.

⁷⁶ *Id.* at 615.

was meant to guarantee the right to “keep and bear arms,” going as far as to make it a crime for any person to attempt to disarm a citizen.⁷⁷ The commentaries on the Constitution following the Civil War also were similar. The commentaries spoke of the Second Amendment being an adoption of the English Bill of Rights and that the Second Amendment is not a right to bear arms as part of a militia. For instance, Thomas Cooley reasoned that the Second Amendment was not connected to militia service but rather to have a population familiar with arms so that a militia may be formed.⁷⁸ Instead, the Second Amendment is an individual right that allows citizens to possess arms *so* that a militia can be formed if necessary.⁷⁹

4. *Supreme Court Strikes Down D.C. Ban*

After concluding that the Second Amendment is an individual right for self-defense, the Supreme Court then turned its attention to the D.C. law to see if the challenged law fell under the protection of the Second Amendment. The Court noted that the D.C. ban would not be upheld on any “constitutional muster.”⁸⁰ In striking down the D.C. law, the majority opinion stated:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.⁸¹

The majority closed its opinion by adding that many believe a prohibition on handguns is a solution to rising gun problems.⁸² “But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”⁸³

⁷⁷ *Heller*, 554 U.S. at 616.

⁷⁸ *Heller*, 554 U.S. at 617.

⁷⁹ *Id.* at 617-18 (emphasis added).

⁸⁰ *Id.* at 629.

⁸¹ *Id.* at 634-35.

⁸² *Heller*, 554 U.S. at 636.

⁸³ *Id.*

B. MCDONALD INCORPORATES THE SECOND AMENDMENT TO STATES THROUGH FOURTEENTH AMENDMENT

Two years after the decision in *Heller*, the Supreme Court incorporated the Second Amendment via the Fourteenth Amendment to the states. Within hours of the Supreme Court's announcement of a ruling in *Heller*, residents of Chicago, including Otis McDonald, filed suit against the City.⁸⁴ A Chicago city ordinance prevented a person from possessing a firearm unless they had a valid registration and simultaneously prevented registration for practically all handguns.⁸⁵ Because the decision in *Heller* decided that the Second Amendment was an individual right for self-defense, the City argued to uphold the law on the grounds the Second Amendment does not apply to the states.⁸⁶ The Supreme Court rejected this argument.⁸⁷

1. *Supreme Court's Historical Analysis Finds Second Amendment is a Fundamental Right Rooted in Our History*

The Fourteenth Amendment states in part that “nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”⁸⁸ The Supreme Court, since the passing of the Fourteenth Amendment, has engaged in “selective incorporation” of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment.⁸⁹ Currently, only a few constitutional rights remain unincorporated from the first eight amendments.⁹⁰ In order to incorporate a right, the Supreme Court must decide whether the right is fundamental to our scheme of ordered liberty or in other words, whether the right has deep roots in America's history and traditions.⁹¹

In *McDonald*, the Supreme Court expanded its historical analysis from *Heller*. The Court started with the foundation that “*Heller* makes it clear that this right is ‘deeply rooted in this Nation's history and tradition.’”⁹²

⁸⁴ *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ *McDonald*, 561 U.S. at 763.

⁹⁰ The Third Amendment (quartering of soldiers); the Fifth Amendment's grand jury indictment requirement; the Seventh Amendment right to a jury trial in civil cases; and the Eighth Amendment prohibition on excessive fines are the only remaining provisions from the first eight amendments that has not been incorporated.

⁹¹ *McDonald*, 561 U.S. at 767.

⁹² *Id.* at 768 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

During the founding of our country, both Anti-federalists and Federalists believed the right to bear arms was important.⁹³ Going as far back as ratification, the fear that a federal government would disarm its citizens in an effort to impose rule through the army or select militias was pushed by Anti-federalism.⁹⁴ Federalists argued that the right to bear arms was adequately protected from the federal government by the limitations placed on the federal government.⁹⁵ However, evident in this is that both the Anti-federalists and Federalists agreed that the right to bear arms was “fundamental to the newly formed system of government.”⁹⁶ By 1850, the belief that the federal government would disarm the public was fading as the country turned towards another pivotal time in our history: The Civil War.⁹⁷

The Supreme Court found following the end of the Civil War, as blacks returned to the States of the Confederacy, there were systematic efforts to disarm them.⁹⁸ States began passing laws that prohibited black people from possessing firearms.⁹⁹ Along with legislative actions intended to disarm black people, throughout the South, armed individuals were forcibly taking firearms from freed slaves and murdering returning blacks.¹⁰⁰ In South Carolina, prominent black citizens drafted a plea to Congress in which they urged the protection of constitutional rights, including the right to bear arms, and that South Carolina’s legislative actions be deemed unconstitutional.¹⁰¹

It was evident by the events in the South that legislative action was needed.¹⁰² The 39th Congress passed the Freedmen’s Bureau Act of 1866, which guaranteed the right to bear arms.¹⁰³ The Freedmen’s bill was specifically amended to include the right to bear arms.¹⁰⁴ The Civil Rights Act of 1866, like the Freedman’s Bureau Act, aimed to protect the right to bear arms and those rights enjoyed by white citizens.¹⁰⁵ These acts were later deemed insufficient and Congress’s adoption of the Four-

⁹³ Anti-federalist supporters opposed the creation of a strong federal government and opposed the Constitution. Federalist were supporters of the adoption of a Constitution.

⁹⁴ *McDonald*, 561 U.S. at 768.

⁹⁵ *Id.*

⁹⁶ *Id.* at 769.

⁹⁷ *Id.* at 770.

⁹⁸ *McDonald*, 561 U.S. at 771.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 772.

¹⁰¹ *McDonald v. City of Chicago*, 561 U.S. 742, 771 n.18 (2010).

¹⁰² *McDonald*, 561 U.S. at 773.

¹⁰³ *Id.*

¹⁰⁴ *McDonald*, 561 U.S. at 773 n.22.

¹⁰⁵ *McDonald*, 561 U.S. at 774.

teenth Amendment was understood to protect those rights set out in the Civil Rights Act of 1964.¹⁰⁶

In debating the adoption of the Fourteenth Amendment, multiple members of Congress specifically mentioned the right to bear arms as a key component for its adoption.¹⁰⁷ Senator Samuel Pomeroy described the right to bear arms as one of the indispensable safeguards of liberty.¹⁰⁸ Other members of Congress also discussed the importance of the right to keep and bear arms as a right necessary to our form of government.¹⁰⁹ Immediately following the adoption of the Fourteenth Amendment, Representative Stevens said “[d]isarm a community and you rob them of the means of defending life . . . the fourteenth amendment, now so happily adopted, settles the whole question.”¹¹⁰

The Court also examined the history of the right to keep and bear arms as applied to state constitutions. Prior to ratification, four states had adopted language similar to the Second Amendment as part of their state constitutions.¹¹¹ Following ratification, nine additional states adopted constitutional provisions guaranteeing the right to keep and bear arms for its citizens.¹¹² In 1868, following the adoption of the Fourteenth Amendment, 22 of 37 states had constitutional provisions protecting the right to keep and bear arms.¹¹³ The Court found that many of these state provisions protected the right to keep and bear arms as an individual right for self-defense, consistent with the language in *Heller*.¹¹⁴

The Court concluded its historical analysis by finding “it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”¹¹⁵

2. *Chicago’s Ban Violates the Second Amendment*

The City of Chicago pleaded with the Supreme Court to treat the Second Amendment differently than other fundamental rights. The respondents argued that the “Second Amendment should be singled out for special — and especially unfavorable — treatment.”¹¹⁶ Chicago’s princi-

¹⁰⁶ *Id.* at 775.

¹⁰⁷ *McDonald*, 561 U.S. at 775.

¹⁰⁸ *Id.*

¹⁰⁹ *McDonald*, 561 U.S. at 776 n.25.

¹¹⁰ *McDonald*, 561 U.S. at 776.

¹¹¹ *Id.* at 769.

¹¹² *Id.*

¹¹³ *Id.* at 777.

¹¹⁴ *Id.*

¹¹⁵ *McDonald*, 561 U.S. at 778.

¹¹⁶ *McDonald*, 561 U.S. at 778-79.

pal argument was that if *any* civilized legal system does not recognize the right to bear arms, then the states are not bound.¹¹⁷ This argument was rejected by the Court, noting that many of our rights are unique to the United States.¹¹⁸ For instance, the right to a jury trial is broader than the right afforded by other countries and the exclusionary rule is distinct to America only.¹¹⁹

The City of Chicago also wanted to single out the Second Amendment because it concerns the ability to possess a weapon and there is disagreement over whether handgun possession increases safety.¹²⁰ The Second Amendment is not the only controversial constitutional amendment that deals with public safety. The Court reasoned that all the amendments that place restrictions on law enforcement have similar public safety implications.¹²¹ For instance, the Fourth Amendment's exclusionary rule alone leads to extensive and costly litigation.¹²² The Court noted that in *Heller* it rejected the argument that the Second Amendment should be subject to judicial interest balancing, considering the importance of the amendment.¹²³

The *McDonald* court held that the Due Process Clause of the Fourteenth Amendment incorporates the right recognized in *Heller*.¹²⁴ The possession of firearms is essential for self-defense, which is the central component of the Second Amendment.¹²⁵ "In *Heller*, [the Court] ruled that the Second Amendment protects the right to possess a handgun in the home for self-defense."¹²⁶ In doing so, the Supreme Court struck down Chicago's ban on handguns in the home.

¹¹⁷ *Id.* at 781 ("... municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment.").

¹¹⁸ *Id.*

¹¹⁹ *McDonald*, 561 U.S. at 778 n.28.

¹²⁰ *Id.* at 782-83.

¹²¹ See *United States v. Leon*, 468 U.S. 897 (1984) (application of the exclusionary rule may otherwise set a guilty person free.); see also, *Barker v. Wingo*, 407 U.S. 514 (1996) (violation of speedy trial right may cause a guilty person to go free.).

¹²² *McDonald*, 561 U.S. at 785.

¹²³ *Id.*

¹²⁴ *Id.* at 791.

¹²⁵ *Id.* at 787.

¹²⁶ *Id.* at 791.

C. FOLLOWING HELLER AND McDONALD, FEDERAL APPELLATE COURTS HAVE CONSISTENTLY NOT CONDUCTED HISTORICAL ANALYSIS TO SEE IF THE SECOND AMENDMENT EXTENDS OUTSIDE THE HOME.

Since 2010, following the Supreme Court's decision in *Heller* and *McDonald*, citizens began challenging state laws that prevented a person from possessing a firearm in public, claiming such laws violate the Second Amendment. Prior to *Peruta*, four Circuit Courts of Appeal rendered opinions as to whether the Second Amendment applies outside of the home.

The Second, Third, and Fourth Circuits upheld state laws that prevented a person from possessing a firearm in public. Declining to conduct a historical analysis as guided by *Heller* and *McDonald*, these circuits chose to narrowly read *Heller* as applying only to possession of a firearm inside the home, and therefore applied intermediate scrutiny to the challenged laws. In doing so, the circuits skipped the basic principle of a heightened scrutiny analysis when deciding whether the right claimed is within the protection of the Second Amendment. To determine whether a specific right claimed is protected by the Constitution, a reviewing court will perform a historical analysis to decide whether the right is rooted in our country's history and traditions. The Second, Third, and Fourth Circuits skipped this step.

Although the Seventh Circuit reached the appropriate conclusion, its methodology was flawed. The Seventh Circuit failed to conduct a historical analysis, instead relying on *Heller* and *McDonald's* historical analysis. However, *Heller* and *McDonald* never addressed the Second Amendment outside of the home. *Heller* ultimately decided the Second Amendment was an individual right and *McDonald* extended this right to the states, and at the same time clarified that the central component of the Second Amendment is self-defense. It was not until *Peruta* that a court utilized the appropriate method to determine whether the right to carry a firearm outside of the home is protected by the Second Amendment. In doing so, *Peruta* properly concluded that the right to possess a firearm outside of the home is protected.

Both the challenge in *Heller* and *McDonald* dealt with bans on the possession of handguns in the home. In *Heller*, the Supreme Court found that handguns are the preferred weapon “to ‘keep’ and use for protection of one’s home and family.”¹²⁷ The Supreme Court however, has never

¹²⁷ *Heller*, 554 U.S. at 629.

addressed whether the Second Amendment extends outside of the home or what restrictions are lawful by the State.

D. PERUTA THREE-JUDGE PANEL EXTENDS THE SECOND AMENDMENT OUTSIDE OF THE HOME

Peruta v. San Diego began when Edward Peruta sought a CCW from San Diego County.¹²⁸ Peruta wanted to carry a handgun for self-defense but when he applied for a CCW, the County of San Diego denied him because he could not establish “good cause.”¹²⁹ San Diego County’s policy required that in order to show “good cause” the applicant must demonstrate “a set of circumstances that distinguish [the applicant] from the mainstream and cause[s] him [or her] . . . to be placed in harm’s way.”¹³⁰ In 2009, Peruta sued San Diego County under 42 U.S.C. section 1983, seeking injunctive relief to prevent the county from enforcing its “good cause” requirement.¹³¹

The district court granted the County of San Diego’s motion for summary judgment, reasoning that California’s substantial interest in public safety by wanting to reduce the number of concealed handguns “trumped the applicants’ allegedly burdened Second Amendment interest.”¹³² Peruta appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit, guided by the *Heller* and *McDonald* decisions, began by applying a two-step methodology. First, the Court looked to whether the ability to carry a gun outside of the home for self-defense falls within the Second Amendment, and second, if the right is protected by the Second Amendment, does San Diego County’s “good cause” requirement infringe that right.

1. *The Right to Carry a Firearm Outside the Home Falls Within the Second Amendment*

The Ninth Circuit three judge panel, like *Heller* and *McDonald*, began its interpretation by looking to the historical interpretation of the Second Amendment as it relates to carrying a weapon outside the home for self-defense. The Court began with a historical analysis because “the

¹²⁸ Peruta, 758 F.Supp.2d at 1106.

¹²⁹ *Id.* at 1148.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Peruta v. County of San Diego, 742 F.3d 1144, 1149 (9th Cir. 2014), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016).

Second Amendment is a matter not merely of abstract dictionary definitions but also a historical practice.”¹³³

The Court began its historical analysis by examining those cases that have interpreted the Second Amendment and placed the cases into three categories. These categories were: (1) authorities that understand bearing arms for self-defense to be an individual right, consistent with *Heller*; (2) authorities that understand bearing arms is an individual right, other than for self-defense; and (3) authorities that said bearing arms was not an individual right.¹³⁴ Naturally, the decisions in the third category were no help to the court as their premise conflicted with the Supreme Court’s holding in *Heller*.

The Court first examined those cases relied on by the Supreme Court in *Heller*. In *Bliss v. Commonwealth*, Kentucky’s highest court interpreted Kentucky’s version of the Second Amendment and invalidated a ban on concealed weapons.¹³⁵ In *Bliss*, the high court of Kentucky disagreed that a ban on wearing concealed weapons was merely a regulatory measure noting that it was not essential for an entire prohibition against bearing arms in every form and the right to bear arms for self-defense was secured by the Constitution, meaning an act did not need to be a complete destruction of the right to be forbidden by the Constitution.¹³⁶

The Tennessee Supreme Court ruled in 1840 that the right to bear arms extends outside of the home. In *Aymette v. State*, the Tennessee Supreme Court reasoned that if a person were unable to bear arms openly, then they would be unable to bear arms in defense.¹³⁷ The Alabama Supreme Court that same year held that a right to bear arms meant that citizens of Alabama must be permitted to carry a weapon in public.¹³⁸

The *Peruta* court, continuing forth in its historical analysis, noted that the highest courts of Georgia, Arkansas, Louisiana, and Texas all in some manner ruled the Second Amendment extends outside of the home.¹³⁹ The *Peruta* court found that following the Civil War, many legal commentators, including Thomas Cooley, John Pomeroy, Oliver

¹³³ *Peruta*, 742 F.3d at 1151.

¹³⁴ *Id.* at 1156.

¹³⁵ *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

¹³⁶ *Peruta*, 742 F.3d at 1156; *Bliss*, 12 Ky. at 91-2.

¹³⁷ *Aymette v. State*, 21 Tenn. 151 (1840).

¹³⁸ *State v. Reid*, 1 Ala. 612 (1840).

¹³⁹ *Peruta*, 742 F.3d at 1163-1166. *see, e.g.*, *Stockdale v. State*, 32 Ga. 225 (1861) (holding that to prohibit open and concealed carry of pistols would prohibit the right to bear arms altogether). *See also*, *Cockrum v. State*, 24 Tex. 394, (1859) (holding that the right to bear arms in self-defense is an absolute right and that a legislature affixing a deterrent to the exercise of that right would be tantamount to a prohibition of the right.).

Wendell Holmes Jr., and John Ordronaux, wrote in some form that the Second Amendment was a right that extended outside of the home.¹⁴⁰

The *Peruta* court then turned its attention to other circuits that have also interpreted the Second Amendment following *Heller*, and all in some form have concluded or acknowledged the Second Amendment extends outside of the home.¹⁴¹ Viewing both the previous authorities and commentaries, the Ninth Circuit Court concluded that “the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes bearing arms within the meaning of the Second Amendment.”¹⁴² The Court then turned its attention toward San Diego County’s regulation.

2. *San Diego County’s Regulatory Scheme Infringes on the Second Amendment*

In assessing whether the “good cause” requirement by San Diego County infringed on the Second Amendment, the *Peruta* court noted that there has been great dispute on which level of scrutiny or what approach is used to measure whether the right is being infringed.¹⁴³ The one thing the Court expressed certainty about was that rational basis review did not apply, citing a footnote from *Heller* in which Justice Scalia wrote that rational basis could not be used to evaluate a specific enumerated right, “be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”¹⁴⁴

The Court acknowledged that some circuit courts have applied intermediate scrutiny while others have applied some form of heightened scrutiny.¹⁴⁵ However, the Court recognized that there is an alternative approach to applying heightened scrutiny, as the Supreme Court demon-

¹⁴⁰ *Peruta*, 742 F.3d at 1163-66.

¹⁴¹ *Drake v. Filko*, 724 F.3d 426, 4314 (3d Cir. 2013) (“we . . . recognize that the Second Amendment’s individual right to bear arms *may* have some application beyond the home.”); *Woolard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“we merely assume that the *Heller* right exists outside the home. . . .”); *Kachalsky v. County. Of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (analysis proceeded on the assumption Second Amendment has some application to public possession of firearms.); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (“A right to bear arms thus implies a right to carry a loaded gun outside the home.”).

¹⁴² *Peruta*, 742 F.3d at 1166 (omitting internal quotes).

¹⁴³ *Id.* at 1168; noting that some circuits have applied intermediate scrutiny while others have applied a sliding scale approach, and “*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.” (quoting *Heller II*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

¹⁴⁴ *Peruta*, 742 F.3d at 1168 n.14 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 fn.27 (2008)).

¹⁴⁵ *Id.* at 1167-68.

strated in *Heller*. If the court finds that the law is a destruction of the right, rather than a mere burden on it, then no form of heightened scrutiny would apply.¹⁴⁶ Therefore, the *Peruta* court began by first determining whether San Diego County's policy burdens or destroys the right.¹⁴⁷

In California, open carrying of a firearm is prohibited, leaving only concealed carry as the manner for a person to exercise their right.¹⁴⁸ Due to San Diego County's policy, the ability to conceal carry has been effectively "taken off the table" because a typical citizen is unable to differentiate themselves from the mainstream, as required by the policy.¹⁴⁹ Since the Second Amendment confers an individual right to keep and bear arms in public, San Diego's policy allows only a small group of people to exercise their right, while the remaining law-abiding citizens are left with no way to exercise their right outside of the home.¹⁵⁰

The Court reasoned by analogy that if San Diego County's policy was applied to the First Amendment, it would leave the protection to only a small pocket of people, and in doing so, it would be a destruction of the right to free speech as a whole.¹⁵¹ The Second Amendment is no different from the First Amendment in that a right limited to a few people is a destruction of that right.¹⁵² As such, San Diego County's policy was a burden on the Second Amendment outside of the home, as was the Washington D.C. law struck down in *Heller*.¹⁵³

The *Peruta* court struck down San Diego's argument that both the *Heller* Court and other 19th century cases that upheld bans on concealed carry show that San Diego County's policy is lawful. The *Peruta* court pointed out two flaws in the respondent's argument. The first flaw was that Peruta's challenge was not simply because he wanted to conceal carry, but that concealed carry is the only method available to Peruta since California does not permit open carry.¹⁵⁴ Peruta's challenge is not an attack on California's regulatory scheme, but that of San Diego County's, which is out of line with many of the other counties within the State of California.¹⁵⁵

The second flaw of San Diego County's argument was a narrow reading of *Heller's* acknowledgement on concealed carry restrictions.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Peruta*, 742 F.3d at 1169.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1170.

¹⁵² *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

¹⁵³ *Peruta*, 742 F.3d at 1170.

¹⁵⁴ *Id.* at 1170-71.

¹⁵⁵ *Id.* at 1171.

Most cases relied upon in the *Heller* decision state that while concealed carry bans are valid, they are valid so long as they do not destroy the right to bear arms in public.¹⁵⁶ The Court noted that based on these authorities, states are not required to allow for concealed carry, “[b]ut the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home.”¹⁵⁷

The court reiterated that regulation of the Second Amendment is quite appropriate.¹⁵⁸ However, San Diego County’s policy and its effective prohibition on concealed carry amounts to the same destruction of the right outside the home as the D.C. handgun ban amounted to a destruction of the Second Amendment inside of the home.¹⁵⁹ San Diego County’s policy amounts to a near-total prohibition of carrying a firearm in public, either concealed or openly.¹⁶⁰ The court reasoned similar to Alabama in *State v. Reid* that, “[a] statute which, under the pretence [sic] of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence [sic], would be clearly unconstitutional.”¹⁶¹ The Court concluded that San Diego County’s policy regarding “good cause” infringed on the Second Amendment right to bear arms for self-defense.¹⁶²

D. EN BANC COURT REVERSES THREE JUDGE-PANEL DECISION THROUGH “STRAW ARGUMENT”

Immediately following the Ninth Circuit Court’s three-panel decision, San Diego County Sheriff Bill Gore publicly announced that he would not seek a rehearing of the *Peruta* decision.¹⁶³ Sheriff Gore chose not to seek a rehearing of *Peruta en banc* because the three-panel decision provided “clear guidance” on California’s CCW law.¹⁶⁴

On February 27, 2014, California’s Attorney General, Kamala Harris, filed a motion to intervene for seeking *en banc* review,¹⁶⁵ claiming that California should be permitted to intervene because the three-panel

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1172.

¹⁵⁸ *Peruta*, 742 F.3d at 1178.

¹⁵⁹ *Id.* at 1170.

¹⁶⁰ *Id.*

¹⁶¹ *Peruta*, 742 F.3d at 1170 (quoting *State v. Reid*, 1 Ala. 612 (1840)).

¹⁶² *Id.* at 1179.

¹⁶³ Bob Egelko, *San Diego Sheriff Won’t Fight Concealed-Weapon Ruling*, SFGATE, (Feb. 21, 2014, 11:37 PM), <http://www.sfgate.com/news/article/San-Diego-sheriff-won-t-fight-concealed-weapon-5257815.php>.

¹⁶⁴ *Id.*

¹⁶⁵ State of California’s Motion to Intervene at 5, *Peruta v. County of San Diego* 824 F.3d 919 (9th Cir. 2016) (No. 10-56971), http://cdn.ca9.uscourts.gov/datastore/general/2014/02/28/10-56971_motion_to_intervene.pdf.

decision calls into question a California statute.¹⁶⁶ On March 26, 2015, the Ninth Circuit Court, upon a majority vote, ordered *Peruta* to be heard *en banc*.¹⁶⁷ The Court then heard *Peruta en banc* on June 16, 2015.¹⁶⁸

In *Peruta*, 824 F.3d 919 (9th Cir. 2016) (“*en banc*”) the majority of the *en banc* panel held that the “Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.”¹⁶⁹ The majority reached such a conclusion after conducting a similar historical analysis as in *Heller* and *McDonald*, finding that a historical analysis reveals that the right to carry “a concealed firearm in public is not, and never has been, protected by the Second Amendment.”¹⁷⁰ In a concurring opinion, Judge Graber wrote that the San Diego County policy, even assuming the Second Amendment applied outside the home, would still survive under the application of intermediate scrutiny.¹⁷¹ However, the dissenting justices in joining with Judge Callahan’s dissent, noted that the majority “sets up and knocks down an elaborate straw argument by answering only a narrow question—whether the Second Amendment protects a right to carry concealed firearms in public.”¹⁷²

As Judge Callahan noted, the cases cited by the majority either presumed a right to open carry or relied on an interpretation of the Second Amendment pre-*Heller*, that the Second Amendment is an individual right.¹⁷³ Judge Callahan’s dissent focused on the way the majority has framed the question it then answers, and in doing so, ignored California’s regulatory scheme regarding the carrying of firearms outside of the home. Judge Callahan observed that the majority, instead of interpreting the California scheme with a broad view towards constitutional rights, chose to narrowly define the asserted right by the plaintiff as a right to concealed carry, while ignoring that this is the only form in which a person may carry in California.¹⁷⁴ It is important to note, however, that rather than invalidate San Diego’s policy, the majority claims “if there is such a right, it is only a right to carry a firearm openly.”¹⁷⁵

¹⁶⁶ *Id.*

¹⁶⁷ En Banc Order, *Peruta v. County of San Diego* 824 F.3d 919 (9th Cir. 2016) (No. 10-56971), <http://cdn.ca9.uscourts.gov/datastore/general/2015/03/26/10-56971%20EB%20Order.pdf>.

¹⁶⁸ *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*).

¹⁶⁹ *Peruta*, 824 F.3d at 924.

¹⁷⁰ *Id.* at 929 (“[W]e engage in the same historical inquiry as *Heller* and *McDonald*.”).

¹⁷¹ *Peruta*, 824 F.3d at 942 (Graber, S., concurrence).

¹⁷² *Id.* at 946 (Callahan, M., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 954 (Callahan, M., dissenting).

¹⁷⁵ *Peruta*, 824 F.3d at 942.

II. ARGUMENT

When a petitioner challenges a law as infringing on a constitutional right, one of the very first steps the court must undertake is to determine if the right claimed is a fundamental right. A fundamental right is generally considered to be a right that is founded in our history and traditions, identified in the Constitution, and that requires a high degree of protection from the government.¹⁷⁶ Put another way, a fundamental right is “rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁷⁷ When a court determines a right to be fundamental, it triggers the analysis of strict scrutiny.¹⁷⁸ However, the circuit courts have applied a lesser standard of intermediate scrutiny to challenges based on the Second Amendment.

A. COURTS ARE APPLYING INTERMEDIATE SCRUTINY AFTER FAILING TO DETERMINE IF THE SECOND AMENDMENT NECESSARILY EXTENDS OUTSIDE OF THE HOME

Currently five circuit courts, including the Ninth Circuit Court, have addressed the issue of concealed carry outside of the home.¹⁷⁹ As noted in *Peruta*, the circuit courts have all struggled with which level of scrutiny should be applied to the court’s analysis. The Second, Third, and Fourth Circuits have all applied a version less than strict scrutiny.

1. *The Second, Third, and Fourth Circuits Failed to Conduct a Proper Historical Analysis, Leading to the Application of Intermediate Scrutiny*

In *Kachalsky v. County of Westchester*, plaintiffs challenged New York’s requirement of “proper cause” to obtain a concealed carry permit.¹⁸⁰ The Second Circuit court in *Kachalsky* chose to not perform a historical analysis of the Second Amendment as it relates to bearing arms in public, believing “history and tradition do not speak with one voice here.”¹⁸¹ After refusing to conduct a historical analysis, the court decided

¹⁷⁶ Legal Information Institute, *Fundamental Right*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/fundamental_right.

¹⁷⁷ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

¹⁷⁸ Legal Information Institute, *Fundamental Right*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/fundamental_right.

¹⁷⁹ *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

¹⁸⁰ *Kachalsky*, 701 F.3d at 91.

¹⁸¹ *Id.*

that, based upon *Heller*, the “core” of the Second Amendment is the ability to keep arms inside of the home, and that when a right does not burden the “core,” a standard less than strict scrutiny should apply.¹⁸² The Court then concluded that intermediate scrutiny applied,¹⁸³ and after applying that standard upheld New York’s law.

Relying on *Kachalsky*, in *Drake v. Filko*, the Third Circuit also declined to conduct a historical analysis as it relates to the extension of the Second Amendment outside of the home, quoting *Kachalsky* that “[h]istory and traditions do not speak with one voice here.”¹⁸⁴ Without conducting a historical analysis, the Third Circuit Court recognized that “the Second Amendment’s individual right to bear arms *may* have some application beyond the home.”¹⁸⁵ In *Drake*, residents of New Jersey challenged New Jersey’s permit law that required the showing of justifiable need.¹⁸⁶ The court agreed with the District Court that the right to carry a handgun outside of the home was not part of the “core” of the Second Amendment and therefore, intermediate scrutiny should apply.¹⁸⁷ Applying intermediate scrutiny, the court found that New Jersey had an “important interest in protecting its citizens’ safety,” and concluded New Jersey’s law did not burden the Second Amendment.¹⁸⁸

The Fourth Circuit reached a similar conclusion in *Wollard v. Gallagher*, upholding a Maryland law that required “good and substantial reason” for having a permit to carry a firearm in public.¹⁸⁹ The court in *Wollard* acknowledged that the first question in resolving the issue is to decide “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”¹⁹⁰ Nevertheless, with this understanding, the Fourth Circuit declined to find a definitive ruling on whether the challenged law does burden the right claimed by petitioners.¹⁹¹ The court then applied intermediate scrutiny when they determined there was a “reasonable fit between the good-and-substantial-reason requirement and Maryland’s objectives of protecting public safety and preventing crime.”¹⁹²

¹⁸² *Id.* at 93.

¹⁸³ *Id.* at 96.

¹⁸⁴ *Drake*, 724 F.3d 431 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012)).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 428.

¹⁸⁷ *Id.* at 436.

¹⁸⁸ *Id.* at 437, 440.

¹⁸⁹ *Wollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013).

¹⁹⁰ *Id.* at 875.

¹⁹¹ *Id.*

¹⁹² *Id.* at 880

2. *Seventh Circuit Reaches the Proper Conclusion With the Wrong Methodology*

Separating itself from the other circuit courts, the Seventh Circuit Court in *Moore v. Madigan* struck down two Illinois statutes as unconstitutional.¹⁹³ Petitioners challenged the Illinois laws that forbid a person from carrying a ready-to-use gun and also forbid the unloaded gun from being in public if ammunition was readily available.¹⁹⁴ Relying on the Supreme Court's determination in *Heller* and *McDonald*, the court declined to engage in "another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home."¹⁹⁵ The Seventh Circuit Court noted that Illinois needed to provide more than a rational basis for its law.¹⁹⁶

While the opinion in *Moore* reached the proper conclusion, all of these cases have one major flaw. None of them conducted the first step inquiry to determine whether the carrying of a firearm in public is a fundamental right guaranteed by the Second Amendment. The Second, Third, and Fourth Circuits flatly rejected to do so, in conflict, as the Fourth Circuit Court noted, with the basic principle that the first step is to determine whether the challenged law burdens conduct that falls within the right. The Seventh Circuit Court relied upon *Heller's* determination, but *Heller's* focus was on the language of the Second Amendment and most notably, handguns in the home. Although the Seventh Circuit Court was correct that *Heller* determined the Second Amendment conferred a right to bear arms for self-defense, the court should have conducted a historical analysis to determine if the right claimed was a fundamental right.

3. *Peruta En Banc Panel's Historical Analysis was Flawed by The Narrow Framing of the Issue*

By narrowly framing the issue in *Peruta* as to whether the right to carry a concealed weapon outside of the home is protected by the Second Amendment, the majority proceeded by following a flawed historical analysis. In conducting its historical analysis, the *en banc* majority in *Peruta* first began with a view back into English prohibition on carrying concealed weapons. Going as far back as 1299, the majority found that

¹⁹³ *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

¹⁹⁴ *Moore*, 702 F.3d at 934.

¹⁹⁵ *Id.* at 942.

¹⁹⁶ *Id.*

there was a general prohibition on carrying a weapon without a license from the king.¹⁹⁷ This policy of prohibiting concealed weapons included Queen Elizabeth I's proclamation in 1594 that no person should have a concealed weapon on their person.¹⁹⁸ The flawed approach is even more apparent when the court turns towards case precedent in the United States; it is then that their historical analysis begins to fall apart.

The first case cited by the en banc panel is *State v. Mitchell*, in which the court in a single sentence wrote “[i]t was *held* in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional.”¹⁹⁹ However the *en banc* panels reliance on this is misguided as this cannot be said to be a total prohibition since the Indiana Supreme Court clearly articulated when it allowed for travelers to carry concealed weapons on their persons. In the second case cited by the en banc majority, *State v. Reid*, the Alabama Supreme Court upheld a conviction for carrying of a concealed weapon.²⁰⁰ In *Reid*, the Alabama Supreme Court based its decision in part on the English Bill of Rights and the practical grounds for regulation of concealed weapons.²⁰¹ However, this case failed to conduct a proper historical analysis for two reasons. The first reason was that, in its decision, the Alabama Supreme Court took as prima facie evidence of the law's constitutionality that the General Assembly and the Governor of Alabama sworn oath to uphold the constitution is evidence that the legislature has not overstepped.²⁰² However, courts regularly strike down laws passed by those who are sworn to uphold the Constitution. The second issue was the practice of concealed carry, where open carry was legal.²⁰³ This was the issue that Judge Callahan warned about in the majority's narrow phrasing of the issue. While a prohibition in *Reid* against concealed carry was found to be constitutional, the court never addresses the right outside of the home because the right to open carry was already protected.

The Georgia Supreme Court similarly upheld a statute that criminalized concealed carry.²⁰⁴ However, this case had the same flaws as *Reid*

¹⁹⁷ *Peruta*, 824 F.3d at 929.

¹⁹⁸ *Id.* at 931.

¹⁹⁹ *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833).

²⁰⁰ *State v. Reid*, 1 Ala. 612 (1840); *Peruta*, 824 F.3d at 933-34.

²⁰¹ *Reid*, 1 Ala. at 615 (reasoning that an English statute preventing the carrying of weapons concealed could guide the court in their interpretation of the constitution.).

²⁰² *Reid*, 1 Ala. at 620-21 (“It has received the assent of the two houses of the General Assembly [sic] and the Governor, under a solemn pledge to support the constitution; and their opinion is at least, prima facie evidence, that they have not overstepped the limits of legislative competency.”).

²⁰³ *Reid*, 1 Ala. at 621.

²⁰⁴ *Nunn v. State*, 1 Ga. 243, 251 (1846).

because while the court upheld a concealed carry ban, it did so because Georgia allowed for *open carry*.²⁰⁵

The majority's historical analysis continues with conflict after conflict with the narrowing of their question and *Heller*. The majority's cases cited for precedent in their decision include: *Aymette v. State*, a case that held that "bear arms" was meant for military use;²⁰⁶ *State v. Buzzard*, a case in which the court rejected the Second Amendment as an individual right, holding its purpose was for the regulation of a militia;²⁰⁷ *State v. Chandler*, upholding a concealed carry ban but also found that the right to open carry is "guaranteed by the Constitution of the United States. . .";²⁰⁸ and *State v. Workman*, a case in which the term "arms" from the Second Amendment was defined as those weapons to be used by the militia.²⁰⁹

Lastly, the en banc majority finished its historical analysis by citing *Walburn v. Territory* and *Robertson v. Baldwin* as authorities supporting the prohibition on concealed carry.²¹⁰ However, the court should not have followed the holdings in these authorities for two reasons. First, they do not distinguish whether the law prohibited or allowed for open carry. Second, they do not indicate if the Second Amendment was in accordance with *Heller's* holding defining the Second Amendment as an individual right.

4. *A Proper Historical Analysis Would Have Led to a Similar Conclusion as the Peruta three-panel*

Since the circuit courts failed to conduct a historical analysis, they proceeded on the assumption that the right to bear arms in public is not a fundamental right and therefore they failed to apply the appropriate standard. Each of these courts should have applied strict scrutiny because, as the *Peruta* three-panel historical analysis shows, the Second Amendment does protect the right to bear arms in public.

As stated, the Supreme Court in *Heller* adopted the definition for the Second Amendment "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another per-

²⁰⁵ *Numm*, 1 Ga. at 251. ("But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and *void*).

²⁰⁶ *Peruta v. County of San Diego*, 824 F.3d 919, 934 (9th Cir. 2016) (en banc); *Aymette v. State*, 21 Tenn. 154, 161 (1840).

²⁰⁷ *State v. Buzzard*, 4 Ark. 18, 24 (1840).

²⁰⁸ *State v. Chandler*, 5 La. Ann. 489, 490 (La. 1850).

²⁰⁹ *State v. Workman*, 35 W. Va. 367, 14 S.E. 9, 11 (W. Va. 1891).

²¹⁰ *Peruta*, 824 F.3d at 938.

son.”²¹¹ As the Court in *Moore* remarked, “confrontations are not limited to the home.”²¹² “To speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.”²¹³

To say that the Second Amendment does not protect the right to carry outside of the home, or that it is not at its *core*, would create an awkward usage of the definition adopted by the Supreme Court in *Heller*.²¹⁴ When you think of carrying a gun on your person or in your pocket, the logical image conjured up is not an image of a person tending to their garden with a semi-automatic. Nor are images conjured of “a father stuffing a six-shooter in his pajama’s pocket before heading downstairs to start the morning coffee.”²¹⁵ Such images are nonsensical. The analysis by the *Peruta* Court, combined with the definition from *Heller*, show the Second Amendment applies to carrying firearms in public. As such, the right to carry in public is protected by the Constitution and, at a minimum, requires the protection of strict scrutiny.

Further, the conclusion by the courts that the right to bear arms in the home is the core of the Second Amendment plainly ignores the language of *McDonald* that “individual self-defense is ‘the central component’ of the Second Amendment.”²¹⁶ Relying on the statement that the Second Amendment is at its core in the home, conflicts directly with this language. If the central component of the Second Amendment is self-defense, this implies that the “core” of the Second Amendment must be self-defense. Therefore, the Second, Third, and Fourth Circuits all proceeded on the wrong assumption that the “core” of the Second Amendment is only in the home. The Ninth Circuit en banc panel chose to proceed by narrowing the question to only concealed carry and not whether the right to carry in some form is protected outside of the home.²¹⁷ A proper historical analysis and a properly framed question, whether the Second Amendment extends outside of the home, would

²¹¹ *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (agreeing with Justice Ginsberg’s analysis on the natural meaning of “bear arms” in her dissenting opinion in *Muscarello v. United States*, 524 U.S. 125, 143 (1998)).

²¹² *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

²¹³ *Moore*, 702 F.3d at 936.

²¹⁴ *See Heller*, 554 U.S. at 584 (adopting “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose. . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”).

²¹⁵ *Peruta v. County of San Diego*, 742 F.3d 1144, 1152 (2014) *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016).

²¹⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010).

²¹⁷ *Peruta v. County of San Diego*, 824 F.3d 919, 946 (9th Cir. 2016) (en banc) (Callahan, M., dissenting) (“the majority sets up and knocks down an elaborate straw argument by answering only a narrow question —whether the Second Amendment protects a right to carry concealed firearms in public”).

have allowed these courts to reach a conclusion like *Peruta*'s three-panel as shown above.²¹⁸

B. COURTS SHOULD APPLY STRICT SCRUTINY TO SECOND AMENDMENT CHALLENGES

Strict scrutiny is a heightened level of judicial review applicable to challenged laws or policies that are deemed to conflict with a fundamental right. To pass strict scrutiny, the government must be able to prove: (1) there is a compelling government interest behind the law; and (2) the law is narrowly tailored to achieve the result.²¹⁹ This is a greater standard than the intermediate scrutiny approach applied by the Second, Third, and Fourth Circuit Courts. In applying the lesser standard, these courts have conducted a judicial balancing that was rejected by the majority in *Heller*. Similarly, proponents of intermediate scrutiny point to language in *Heller* that upheld restrictions on firearms, such as convicted felons, as reasoning that such restrictions could not be upheld under strict scrutiny. However, these restrictions can still be upheld under strict scrutiny. Lastly, the application of intermediate scrutiny ignores the similarities between the First and Second Amendment, with the First Amendment having the application of strict scrutiny.

1. *Intermediate Scrutiny Would Allow For Judicial Balancing that was Expressly Rejected in Heller*

Intermediate scrutiny requires that the government's asserted interest must be more than just legitimate.²²⁰ To pass intermediate scrutiny "the law must further a government interest by means that are substantially related to that interest."²²¹ This requires that the government show that there is a "significant, substantial, or important" need for the challenged law.²²² In determining this, the court then must weigh that challenged law with the government interest against the right claimed by the petitioner. This is exactly the kind of judicial balancing test rejected by the majority in *Heller*.

²¹⁸ See *supra* Background, section 4A.

²¹⁹ Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW, (Jan. 27, 2014, 9:05 AM), http://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html.

²²⁰ *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013).

²²¹ Legal Institute Information, *Intermediate Scrutiny*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Oct. 22, 2016).

²²² *Drake*, 724 F.3d at 436.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.²²³

The majority’s rejection of the “interest-balancing” approach for an enumerated constitutional right is on its face a rejection of intermediate scrutiny. The conclusion that this is a rejection of intermediate scrutiny is further supported by Justice Thomas’ dissenting opinion denying certiorari in *Jackson v. City and County of San Francisco*.²²⁴ In *Jackson*, the San Francisco Police Code prevented a person from possessing a handgun in the home unless it was locked in a container or disabled by a trigger lock.²²⁵ Residents filed suit against the city, claiming the city’s requirements infringed on the decision rendered in *Heller*.²²⁶ The district court denied petitioners and the Ninth Circuit Court affirmed.²²⁷ Justice Thomas took issue with the fact that the Ninth Circuit Court acknowledged the law burdened the Second Amendment but reasoned it was not a severe burden and applied intermediate scrutiny.

The decision of the Court of Appeals is in serious tension with *Heller*. We explained in *Heller* that the Second Amendment codified a right “inherited from our English ancestors,” a key component of which is the right to keep and bear arms for the lawful purpose of self-defense The [San Francisco] law burdens their right to self-defense at the times they are most vulnerable — when they are sleeping, bathing, changing clothes, or otherwise indisposed. There is consequently no question that San Francisco’s law burdens the core of the Second Amendment right When a law burdens a constitutionally protected right, we have generally required a higher showing than the Court of Appeals demanded here The [Supreme] Court should have granted a writ of certiorari to review this questionable decision and to reiterate that courts may not engage in this sort of judicial as-

²²³ *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

²²⁴ *Jackson v. City and Cty. of San Francisco*, 135 S.Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari).

²²⁵ *Id.*

²²⁶ *Id.* at 2800.

²²⁷ *Id.*

assessment as the severity of a burden imposed on core Second Amendment rights.²²⁸

Justice Thomas' remarks regarding San Francisco's law show the exact type of judicial balancing that the Supreme Court sought to reject when it decided *Heller*. There is no doubt the Second Amendment, since the decision in *Heller*, has become a hotly contested issue, evident by the many challenges to state's gun laws since the decision in 2008. The majority in *Heller* sought to ensure that decisions by judges or legislatures which encroach on a constitutional right are to be limited to strict scrutiny, where the government is required to show a *compelling* interest on burdening the Second Amendment. Anything less than strict scrutiny would require the very sort of judicial balancing under intermediate scrutiny rejected in *Heller*.

2. *Prohibitions Against Felons and the Mentally-Ill Can Still Be Upheld Under Strict Scrutiny*

Opponents of strict scrutiny have argued that if courts were to apply strict scrutiny to Second Amendment challenges then some of the restrictions the Supreme Court said were appropriate in *Heller* would be found invalid. Specifically, opponents of strict scrutiny in this context point to the language in *Heller* that reads "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill. . ."²²⁹ A recent case out of Missouri allows opponents of strict scrutiny to rest easy, as the Missouri Supreme Court demonstrated common sense gun control laws can be upheld, even under strict scrutiny.

In *State v. Merritt*, the Missouri Supreme Court applied strict scrutiny to a law that prevented felons from possession of firearms and upheld the law.²³⁰ According to Missouri's Constitution, the right to bear arms provision, state courts must apply "strict scrutiny" to "law restricting the right to bear arms."²³¹ Under Missouri's law, it is a crime for a person who has been convicted of a felony to possess a firearm.²³² Merritt was charged with possession of a firearm and challenged the law, arguing that it violated his right to bear arms under the Missouri Constitution.²³³ Missouri's Constitution reads in part "the right of every citizen

²²⁸ *Id.* at 2800-02.

²²⁹ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

²³⁰ *State v. Merritt*, 467 S.W.3d 808, 812 (Mo. 2015).

²³¹ *Id.* at 810.

²³² *See* Mo. Rev. Stat. § 571.070.1(1) (2010).

²³³ *Merritt*, 467 S.W.3d at 810.

to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned.”²³⁴

In addressing the Missouri statute under strict scrutiny, the Missouri Supreme Court found the law would survive. The Missouri Supreme Court reasoned that Missouri has a compelling interest in ensuring public safety and reducing crime. By prohibiting felons from possessing firearms, where it is well established that felons are more likely to commit violent crimes, prohibiting possession is narrowly tailored to achieve Missouri’s interest in public safety.²³⁵ “Furthermore, ‘someone with a felony conviction on his record is more likely than a non-felon to engage in illegal and violent gun use.’”²³⁶

Merritt is a prime example of how challenges to laws that burden the Second Amendment can still survive under strict scrutiny. Although *Merritt* challenged Missouri’s Constitution, the Missouri clause is similar in language to that of the Second Amendment. *Merritt* also shows that it is not impossible for a state law to be upheld under strict scrutiny. A popular belief of strict scrutiny is that it is “fatal in fact,” however, this has been shown to be over-exaggerated and that in nearly thirty percent of cases involving strict scrutiny, the challenged law is upheld.²³⁷ A state can show that felons or the mentally-ill should not be able to possess handguns, as Missouri did.

By applying strict scrutiny, states can limit firearm possession while not burdening the rights of law-abiding citizens. Unlike where the state can show a compelling interest for felons or mentally-ill, it would be difficult for the state to show a *compelling* interest for burdening the rights of law-abiding citizens. The application of strict scrutiny, as shown by Missouri, still allows for laws to be upheld that *Heller* did not wish to cast doubt on. If such laws can still be upheld under strict scrutiny, then there is no reason to apply the lesser standard of intermediate scrutiny, and engage in the interest balancing that *Heller* prohibited.

²³⁴ Mo. Const. art. I, § 23.

²³⁵ *Merritt*, 467 S.W.3d at 814.

²³⁶ *Id.* (quoting *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010)).

²³⁷ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006).

3. *The Supreme Court has Compared the Second Amendment to the First Amendment*

In relation to other constitutional amendments in the Bill of Rights, strict scrutiny is applied to both the First and Fifth Amendments.²³⁸ Many of the Bill of Rights however, do not apply strict scrutiny in challenges including the Fourth, Sixth, and some provisions of the Eighth Amendments.²³⁹ Still, the Supreme Court has regularly compared the Second Amendment to the First Amendment. Strict scrutiny is applied in those cases involving the First Amendment.²⁴⁰ It is generally only applicable to First Amendment cases that are considered content-specific.²⁴¹ This Note will not conduct an analysis of whether obtaining a CCW could be analogous to content-specific speech.

In *Heller*, the Supreme Court noted during its historical analysis that the phrase “right of the people” is found in only two other constitutional amendments, the First and the Fourth Amendment. The Supreme Court also used the First Amendment to address the argument that only the arms available at the time the Second Amendment was adopted should be protected. The Court rejected that argument noting that the First Amendment protects modern forms of communication.²⁴² Lastly, the Court noted that “the First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different.”²⁴³

In *McDonald*, when discussing the incorporation of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment, the Supreme Court offered the First Amendment as an example of how the Supreme Court has incorporated other rights. Specifically, the Court noted that originally the right to peacefully assemble under the First Amendment was found to apply only to the federal government.²⁴⁴ However, the Supreme Court later incorporated the right to assemble through the Fourteenth Amendment Due Process Clause. “We follow the same path here. . . .”²⁴⁵

²³⁸ Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 237.

²⁴² *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

²⁴³ *Heller*, 554 U.S. at 635.

²⁴⁴ *McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010); *see U.S. v. Cruikshank*, 92 U.S. 542 (1875).

²⁴⁵ *McDonald*, 561 U.S. at 759.

Guided by the Supreme Court, *Peruta* made a similar analogy using free speech. The Court reasoned that San Diego County's policy towards concealed carry was as if San Diego County had banned all political speech, but allowed an exemption for certain people, places, and situations. "Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a whole."²⁴⁶ These comparisons show that strict scrutiny applies to the Second Amendment.

C. USING STRICT SCRUTINY, SAN DIEGO COUNTY'S REGULATORY SCHEME FAILS TO MEET A COMPELLING INTEREST

As stated, for a law that burdens a fundamental right to survive strict scrutiny, the government must show that there is a compelling interest behind the law and that the law is narrowly tailored to achieve the result. The County of San Diego would be unable to argue effectively that there is a compelling interest in its justification that self-defense does not meet good cause. In amicus briefs filed by law enforcement, as well as statistical data, the research showed that concealed carry holders are less likely to commit crime than other citizens. Thus, San Diego cannot show a compelling interest for public safety or that the "good cause" requirement is narrowly tailored to achieve that goal.²⁴⁷

An amicus brief filed by the Western States Sheriffs' Association, signed on by eleven California sheriffs, asserted that San Diego County's "good cause" requirement is out of touch with the rest of California where "many of California's fifty-eight sheriffs, including Amici, recognize self-defense as 'good cause' under the CCW licensing statute."²⁴⁸ The Western State Sheriffs' Association stated its belief that the Second Amendment secures a right to keep and bear arms for the purpose of self-defense and because of this fundamental right, "the scheme adopted by San Diego is not narrowly tailored to advance a compelling government interest . . . instead, the overly subjective San Diego licensing scheme unlawfully prevents law-abiding citizens from exercising their rights to bear arms under the Second Amendment."²⁴⁹

Similarly in an amicus brief filed by the International Law Enforcement Educators and Trainers Association, along with the Law Enforcement Legal Defense Fund, Law Enforcement Action Network, and Law

²⁴⁶ *Peruta v. County of San Diego*, 742 F.3d 1144, 1170 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

²⁴⁷ Brief for Western States Sheriffs' Ass'n et al. as Amici Curiae Supporting Plaintiff-Appellants at 6, *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

²⁴⁸ *Id.* at 11.

²⁴⁹ *Id.* at 6.

Enforcement Alliance of America, the authors noted that a government argument in favor of law enforcement would be at odds with a 2013 poll conducted by PoliceOne which received over 15,000 law enforcement officers input strongly supporting licensed carry.²⁵⁰ In addition, studies have shown that “people who carry licenses are *much more law-abiding* than the general population.”²⁵¹

The International Law Enforcement Educators Amici distinguished their view from San Diego County’s declaration from Franklin Zimring, in which Zimring declared that “concealed handguns are the priority of law enforcement everywhere because of the use of concealed handgun in vast numbers of criminal offenses.”²⁵² This finding by Zimring is at odds with the poll of law enforcement officers and with the data. As counsel for Peruta, former Solicitor General Paul Clement pointed out during oral arguments in the en banc Ninth Circuit Court argument that Zimring’s declaration never answers the real question that would be required by San Diego County. Per Clement, Zimring makes two observations: (1) fewer guns equals less violence, and; (2) fewer concealed guns, less violence.²⁵³ The real question that needed to be addressed is “if there are less concealed licensed guns how does that affect the level of violence? That’s the relevant question and the county has no evidence on that.”²⁵⁴ In fact, San Diego County would have a difficult time in obtaining such evidence because the evidence does not exist, or San Diego would have presented such evidence to the court.

In the amicus briefs filed on behalf of San Diego County, many appear to start their arguments with the presumption that more guns equal more crime. However, they base their conclusions on speculation and assumptions. For instance, in an amicus brief filed by the State of Hawaii, they argue that having a weapon *could* increase the number of conflicts and that the carrying of a firearm *could* increase the likelihood of starting many fights.²⁵⁵ Their briefs further goes on to claim that possession of a firearm by non-law enforcement members means daily the

²⁵⁰ *Id.* at 3.

²⁵¹ *Id.* at 25

²⁵² *Id.* at 5.

²⁵³ See United States Court of Appeals for the Ninth Circuit, *10-56791 Edward Peruta v. County of San Diego*, at 13:30, YOUTUBE, (June 16, 2015), <https://www.youtube.com/watch?v=anKfVru1des>.

²⁵⁴ See United States Court of Appeals for the Ninth Circuit, *10-56791 Edward Peruta v. County of San Diego*, at 13:45, YOUTUBE, (June 16, 2015), <https://www.youtube.com/watch?v=anKfVru1des>.

²⁵⁵ Brief for State of Hawaii as Amici Curiae Supporting Defendants-Appellees at 7, *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (emphasis added).

public safety is more jeopardized than enhanced.²⁵⁶ However, these claims are quickly debunked by amicus briefs filed in support of Peruta.

The brief filed by the Governors of Texas, Louisiana, Maine, Mississippi, Oklahoma, and South Dakota, details the last ten years of data on concealed handgun licenses (“CHL”), the Texas equivalent of a CCW, and the results do not favor Hawaii’s argument. For instance, the data showed that CHL holders were ten times less likely to commit a crime, eleven times less likely to commit an aggravated assault with a deadly weapon, and seven times less likely to commit deadly conduct with a firearm.²⁵⁷ The amicus noted that while there have been at least five studies that show right-to-carry laws reduce violent crime, many critics nitpick the research to say that the CHL laws have no effect on crime rates but are unable to offer any evidence to show that right-to-carry laws increase crime.²⁵⁸

As noted by Clement, one of the biggest flaws in San Diego County’s argument is the lack of evidence to support such a rule.²⁵⁹

The answer is sitting in plain sight. In Sacramento County, in Fresno County, in San Bernardino County, there is no evidence in this record . . . that when those [counties] adopted a more permissive interpretation of the good cause standard that the sky fell, or that violence went up, or that crime went up.²⁶⁰

Clement further commented that it would be difficult for California to claim a public safety interest because if Peruta had lived in a county like Sacramento where self-defense is accepted as “good cause,” then California would not have an interest in this case.²⁶¹

Since California would be unable to put forth a public safety claim and San Diego County’s policy is out of line with the rest of California, San Diego County’s policy would not be upheld under strict scrutiny. As the *Peruta* three-panel court noted, Judge Hardiman’s dissent in *Drake* can almost perfectly summarize San Diego’s “good cause” requirement. Judge Hardiman wrote “the regulation at issue is a rationing system. It aims . . . simply to reduce the total number of firearms carried outside of the home by limiting the privilege to those who can demonstrate ‘good

²⁵⁶ *Id.* at 9.

²⁵⁷ Brief for the Governors of Texas et al. as Amici Curiae Supporting Plaintiffs-Appellants at 11-13, *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

²⁵⁸ *Id.*

²⁵⁹ See United States Court of Appeals for the Ninth Circuit, *10-56791 Edward Peruta v. County of San Diego*, at 14:40-15:10, YOUTUBE, (June 16, 2015), <https://www.youtube.com/watch?v=anKfVru1des>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

reason' beyond a general desire for self-defense."²⁶² Put plainly, a rationing system is not a compelling interest to limit a fundamental right and as such, San Diego's policy interpretation of "good cause" would not survive.

III. CONCLUSION

When our founders decided to form the Bill of Rights, they did not simply place all the choices at random in a hat, pulling them out one by one and giving them a number. The right to keep and bear arms directly follows the amendment that grants us the most freedom, the First Amendment. If viewed in a hierarchy of their specific enumeration, the founders specifically placed the right to bear arms directly following the right granting freedom to the people to speak their mind and to practice their religion. The right to bear arms was so important that it was placed above unreasonable government intrusion.

Courts will continue to struggle with challenges to the Second Amendment until the Supreme Court affirmatively indicates what type of scrutiny should be applied. Based upon the language of *Heller*, *McDonald*, and Justice Thomas' dissent in *Jackson*, the level of scrutiny should be strict scrutiny. By applying strict scrutiny to an enumerated constitutional right that is comparable to the First Amendment, which in many cases receives a strict scrutiny application, the right to keep and bear arms for self-defense can be protected and still allow for sound government policies, such as those that prevent mentally-ill or felons from possessing weapons.

Peruta is the perfect vehicle for the Supreme Court to grant certiorari and provide much needed guidance. With the ruling of the Ninth Circuit Court, there are now five circuit courts that have weighed in on the Second Amendment right as it applies beyond the home. The Seventh Circuit Court struck down those laws that burden the right while the Second, Third, and Fourth Circuit Courts have upheld those laws under an application of intermediate scrutiny. The Ninth Circuit three-panel, after its historical analysis, decided that the Second Amendment extended outside of the home and policies like the County of San Diego are unconstitutional. By conducting a misguided historical analysis, the Ninth Circuit Court en banc went in the opposite direction, finding that there is no right outside of the home, in conflict with all other reviewing courts. Gun control and gun laws will continue to be debated throughout the country.

²⁶² *Peruta v. County of San Diego*, 742 F.3d 1144, 1178 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016) (quoting *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 474 (D. Md. 2012), *rev'd sub nom.* *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013)).

However, just as with the cases involved with gay marriage,²⁶³ there comes a time where the Supreme Court must weigh in on the debate and perform the “duty of the judicial department to say what the law is.”²⁶⁴

Peruta can guide the Supreme Court in its analysis as the three-judge panel is the only one to conduct a historical application, the same as in *Heller* and *McDonald*, and unlike the other circuit courts. *Peruta* also gives the Supreme Court the ability to weigh in on whether a state must allow some form of firearm possession outside of the home. Under *Peruta*, Californians now have no recourse outside of the home should a county choose to refuse to issue concealed carry permits. Until such a time that the Supreme Court decides how to handle challenges to the Second Amendment, private citizens are left in the dark about what *Peruta*’s three-judge panel shows is a fundamental right.

Our society is changing. While some continue to argue that more gun laws and regulations will increase overall gun crime, there is no evidence that shows licensed holders will cause an increase. As noted by Clement, San Diego County could not justify a public safety claim because it does not exist. Requiring San Diego County to issue CCWs, in accordance with the majority of counties in California, will not lead to a massive increase in crime. Based upon the data provided to the court, the opposite will occur. Some of the largest counties in California, including the state capital located in Sacramento County, provide CCWs for self-defense. In these counties, there is no proof that crime rose or that licensed holders began murdering people in the street. What is evident though, just as those brave individuals in Chicago and Philadelphia show, is that when licensed citizens are armed, they have the potential to prevent violent mass shootings and save lives.

There has never been a time when the right to self-defense is more needed in public. Law-abiding citizens are increasingly becoming targets of those bent on causing harm. More than ever, we need a standard that will stop courts from deciding on a case-by-case basis whether the right to self-defense is “worth insisting upon.”²⁶⁵ Through the application of strict scrutiny, citizens will know their constitutional Second Amendment right is protected, free from those who disagree, because “a constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”²⁶⁶

²⁶³ See *Obergefell v. Hodges* 135 S. Ct. 2584 (2015).

²⁶⁴ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁶⁵ *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

²⁶⁶ *Heller*, 554 U.S. at 634-35.