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### Splitting the Circuits in a Post-*Heller* World

INTRODUCTION: In *Peruta v. County of San Diego*, the United States Court of Appeals for the Ninth Circuit held that San Diego County (“the County”) impermissibly infringed the Second Amendment by imposing certain concealed-carry handgun permitting requirements. The court ruled that (1) carrying an operable handgun outside the home for the purpose of self-defense falls within the right to “bear Arms,” and (2) the County’s requirement that applicants for concealed-carry handgun licenses show “good cause” effectively destroyed that right.

The case arose in response to the County’s implementation of state handgun law. California bans most public firearm carriage, but citizens may apply for a license to carry a concealed handgun, which it grants only to those who can show “good cause” for their application. Several County residents (“the applicants”), who were unable to obtain permits, sought to enjoin the County’s interpretation of “good cause” and filed suit in the United States District Court for the Southern District of California. The district court granted the County’s motion for summary judgment, and the applicants appealed.

BACKGROUND: In 2008, the United States Supreme Court overturned the District of Columbia’s ban on handguns, holding that the Second Amendment codifies an individual right of self-defense. Because the District’s ban prevented

citizens from exercising that right in their homes, the Court held the ban unconstitutional. *Heller* provides a methodology for courts to evaluate subsequent Second Amendment challenges. This framework analyses whether the conduct at issue falls “within the meaning of the Second Amendment,” and, if it does, whether the law in question infringes the right to “keep and bear Arms.”

Two years after *Heller*, the Court heard *McDonald v. City of Chicago*, in which it applied the Second Amendment to the states. Through *Heller*’s historical findings, the Court found that self-defense is a basic and ancient right, which the Constitution thus protects. Because the right to self-defense is fundamental, the Court incorporated it directly to the states through the Due Process Clause of the Fourteenth Amendment.

*Heller* and *McDonald* indicate that neither the federal nor state governments may prohibit law-abiding citizens from keeping and bearing firearms in their homes for self-defense. However, they also note that the right is both limited and subject to certain “longstanding prohibitions.” Also, neither indicates how far outside the home the right of self-defense extends. These narrow holdings have left lower courts without clear precedent to interpret subsequent Second Amendment challenges.

*Peruta* arose from the County’s interpretation of California law, which prohibits most public carriage of firearms. However, citizens may apply for permits to carry concealed handguns. Applicants for such permits must demonstrate “good cause” that distinguishes them from the overall population. Notably, in San Diego

County, concern for personal safety does not meet that requirement.” Instead, the county sheriff requires applicants to “provide supporting documents” of such “good cause.”

Plaintiff applicants sought to exercise their right to self-defense and applied for concealed-carry handgun permits. However, none could satisfy the “good cause” requirement, so the County denied their applications, and the applicants filed suit to enjoin it from enforcing its interpretation of the policy. The applicants argued that the County infringed their Second Amendment rights by denying them permits, yet the district court granted the County’s motion for summary judgment. It found that the County’s interest in public safety outweighed any burden on the applicants, and it upheld the “good cause” permitting requirement.

COURT’S ANALYSIS: The Ninth Circuit heard *Peruta* to decide whether the Second Amendment protects the right “to carry a firearm in public for self-defense.” It held that the County’s reading of “good cause,” which it required concealed-carry handgun permit applicants to show, infringed the Second Amendment’s implied right to defend oneself.

Following Ninth Circuit precedent, Judge O’Scannlain’s majority opinion employs a two-step framework to analyze the County’s policy. First, it evaluates whether carrying a firearm for self-defense outside the home falls within the Second Amendment’s right to “bear Arms.” The court finds that the Constitution prohibits states from banning both open and concealed handgun carriage in public. It thus

affirms that the Second Amendment protects an individual right to self-defense, and it finds that this right extends beyond the home.

Second, the court evaluates whether the County's interpretation of "good cause" infringes that right. Eschewing the district court's use of intermediate scrutiny, the majority follows *Heller*, and, instead, looks at the severity of the policy's burden. The court reasons that since typical, law-abiding citizens cannot exercise the right to defend themselves in public, the County policy effectively destroys their right to self-defense. It finds that this destruction of the right parallels that by the District of Columbia's ban, and the Ninth Circuit follows the Supreme Court in striking down the law.

The majority presents two counterpoints to the County's defense that its "good cause" requirement does not amount to an "all-out ban." First, it argues that the applicants' challenge to the concealed-carry policy does not limit the scope of the case. Rather, because California's general prohibitions on handguns in public makes concealed-carry permits the applicants' only practical option, the court interprets their suit as a challenge to the "California licensing scheme as a whole." Second, it notes that though *Heller* positively cites cases that upheld concealed-carry bans, those courts upheld the laws at issue only because those jurisdictions permitted open carriage of handguns, thus relegating such bans to mere manner-of-carry restrictions, which did not infringe the right to self-defense.

In dicta, the court criticizes the Second, Third, and Fourth Circuits for their treatment of *Heller* and for their interpretations of other states' similar permitting

standards. It argues that the Seventh Circuit, conversely, correctly overturned Illinois's ban on concealed-carry handguns.

Judge Thomas dissents, arguing that the majority improperly answers unasked questions by broadening the issue before the court. He argues that not only does the County's permitting scheme fall within the limits imposed by the *Heller* Court, but that the majority flouts *Heller*, conflicts with its own case law, and misinterprets other circuits.

Instead, Judge Thomas construes a narrower issue: whether the Second Amendment protects the right to publicly carry a concealed firearm (rather than any firearm), and whether County policy infringes that right. He concludes that there is no right to publicly carry a concealed firearm, but even if there were, the County's policy would survive intermediate scrutiny.

EVALUATION: In *Peruta*, the court scrupulously evaluates many decades' worth of authority, but it missteps in applying it to the present, and it ultimately issues an improper holding. The court (1) evaluates the wrong issue, (2) misreads prior case law, and (3) applies an ambiguous standard of review.

First, it improperly broadens the issue before it, which colors its historical analysis. The applicants sought only to enjoin the County's interpretation of concealed handgun policy, and did not question the validity of its ban on open-carry. Despite this, the court evaluates the validity of all handgun carriage bans, an issue that the applicants did not present. Furthermore, despite its historical inquiry, the court ignores the fact that the preference for concealed-carry is a modern trend, so

neither *McDonald* nor *Heller* justify its holding. The Second Amendment protects only those rights that are “deeply rooted in this Nation’s history and tradition,” and “longstanding prohibitions on the possession of firearms” are valid. Since concealed carriage is clearly neither historical nor traditional, and laws have long prohibited it, the court’s holding on the issue is thus unsupported by precedent.

Second, it falsely concludes that the Second Amendment protects the right to carry arms in public, even though *Heller* merely held that “the ban on handgun possession in the home violates the Second Amendment” and that Respondent was entitled to “a license to carry it in in the home.”

Similarly, the majority unwisely quotes *Moore*’s reading of the Second Amendment. It cites *Moore*’s proposition that *Heller* must extend beyond the home since keeping arms and bearing arms are distinct rights. However, *Heller* unambiguously limits the right to “carry [a handgun] in the home.” Thus, *Moore* misapplies *Heller*, and the *Peruta* court cites false authority. Furthermore, even if “bearing Arms in the home” is logically inconsistent, *Moore* does not support the court’s reasoning. The laws are dissimilar; Illinois banned all public carriage of handguns, unlike the law before the Ninth Circuit, which offers citizens an opportunity to obtain concealed-carry permits. Thus, *Moore*’s reasoning is inapplicable to *Peruta*, and it should not guide the analysis. As a result, *Peruta* splits the circuit courts and leaves the trial courts without clear precedent regarding concealed-carry regulations.

Moreover, the Supreme Court did not intend *Heller* to clarify all Second Amendment issues; it expects to address them only as they arise. Yet, nonetheless, the majority erroneously expands *Heller* by asserting that the right to self-defense extends beyond the home, thus issuing an unsupported ruling.

Finally, even if the Second Amendment protects the right to carry arms in public, the majority improperly overlooks intermediate scrutiny, which the County's policy withstands. The majority cites *Heller* for the proposition that no standard is appropriate to review the County's policy. Yet, *Heller* does not support that logic; the *Heller* Court merely notes that the District of Columbia's ban was so severe that it would fail "[u]nder any of the standards of scrutiny," not that none should apply. In contrast, the County's policy is less severe, and is thus subject to a proper standard of review. Instead, the court applies an arbitrary standard without precedential support.

CONCLUSION: The court methodically concludes that the Second Amendment protects the right to carry a handgun outside the home in self-defense, and that requiring "good cause" of permit applicants constructively eliminates that right. However, it misapplies the reasoning of important precedents. In doing so, it reaches beyond the scope of the case, falsely cites authority, and incorrectly weighs the merits of the County's policy. In *Peruta*, the court did not so much "[join] an existent circuit split" as create one. Its decision upsets the established and uniform precedent of several circuits, upon which district courts rely. Because of this

division, the Supreme Court should grant certiorari to resolve the issue of how far outside the home the right of self-defense extends.