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The Right to Keep and Bear Arms in Public: To Be Regulated or Not to Be Regulated? That is the Question.

INTRODUCTION: The United States Court of Appeals for the Ninth Circuit recently considered in *Peruta v. County of San Diego* whether the Second Amendment protects the right “to carry a firearm in public for self-defense” and to what extent that right may be regulated. In California, carrying handguns in public is generally banned by statute. However, one may apply for and be granted a concealed carry license if several requirements, specified by each city or county, are satisfied. San Diego County (“the County”) requires “good cause” which must “distinguish the applicant from the mainstream and cause[] him or her to be placed in harm’s way.” However, a general concern for “one’s personal safety alone is not considered good cause.”

Plaintiff Edward Peruta and several others (“applicants”) applied for concealed carry permits in the County but were denied when they failed to show “good cause”. The applicants filed suit seeking injunctive and declaratory relief from the County’s “good cause” scheme, claiming that it impermissibly burdened those who wanted to carry for general self-defense, thus infringing on a core Second Amendment right.

Despite other Circuits' recent decisions, the Ninth Circuit held that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes 'bear[ing] Arms' within the meaning of the Second Amendment" and that the County's "good cause" permitting requirement impermissibly infringe[d] on" said Second Amendment right.

BACKGROUND: In the Supreme Court case *D.C. v. Heller*, the Court began its opinion with a comprehensive historical analysis of the Second Amendment so to interpret it as voters would have at the time of ratification. After analyzing both the prefatory clause ("A well regulated Militia, being necessary to security of a free State . . .") and the operative clause ("the right of the people to keep and bear Arms, shall not be infringed[,]") the Court held that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."

The Court clarified that, as with most other constitutional rights, the Second Amendment guarantee is not unlimited. The Court was sure to indicate that they were not defining the absolute scope of the Second Amendment, as to not "cast doubt on longstanding . . ." regulations of what firearms can be carried, who can carry them, and where they can be carried.

Finally, the Court turned towards the challenged law- a law that "totally ban[ned] hand-gun possession in the home" and that required "any lawful firearm

in the home be disassembled and bound by a trigger lock at all times, rendering it inoperable.” Within this analysis, the Court laid the basis for the debates to follow in cases like *Peruta*. First, the Court found that self-defense is the core Second Amendment guarantee and that this right to “defense of self, family, and property, is most acute[]” in the home. And second, while the Court clearly rejected the interest-balancing test proposed in Justice Breyer’s dissent, they did not define the standard of scrutiny to be used. The Court only submitted that a law posing such severe restrictions to an enumerated constitutional right “would fail constitutional muster[]” under any level of scrutiny.

Soon after the *Heller* decision, the Court revisited the Second Amendment in *McDonald v. City of Chicago*. Affirming the *Heller* holding, the Court also held that “the Second Amendment right is fully applicable to the States[]” via incorporation.

Following *Heller* and *McDonald*, lower courts have considered laws akin to the County’s “good cause” requirement. They have found a two-part analysis appropriate under *Heller*. First, the courts determined if “the challenged law impose[d] a burden on conduct falling within the scope of the Second Amendment’s guarantee.” If it did not, the law was valid. If it did, the courts “appl[ied] an appropriate form of means-end scrutiny.”

Interpreting *Heller* as holding that the core of the Second Amendment was within the home, the Second, Third, and Fourth Circuits (“the sister circuits”) applied intermediate scrutiny to laws burdening public carriage because the right to

bear arms in public falls outside said core. The sister circuits gave significant deference to legislatures and upheld requirements similar to “good cause.” The Seventh Circuit, without defining the scrutiny used, struck down a law generally banning public carriage because the legislature “fail[ed] to justify the most restrictive gun law” the country.

COURT’S ANALYSIS: In *Peruta*, the Ninth Circuit considered “whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.” The applicants argued by “exclud[ing] a general desire to carry for self-defense, the County impermissibly burden[ed] their Second Amendment right to bear arms.” Circuit Judge O’Scannlain, writing for the majority, noted that *Heller* and *McDonald* did not define the scope of the Second Amendment or specify the standard of scrutiny. However, the court found that *Heller* did suggest a two-step analysis similar to the one used by sister circuits. The court “consulted both text and history[]” through an extensive survey to determine if the County’s law restricted a protected right. After studying the text and other historical sources, the majority concluded “the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes ‘bear[ing] Arms’ within the meaning of the Second Amendment.”

Next, considering levels of scrutiny, the court reasoned that “severe restrictions on the ‘core’ right” merit a “kind of strict scrutiny, while less severe burdens” merit a lesser scrutiny. The court also found that a right “is, in effect,

destroyed when exercise of the right is limited to a few people, in a few places, at a few times.” Following this reasoning and rejecting the sister circuits’ readings of *Heller* and the Second Amendment, the court held that the County’s policy targeted and effectively destroyed the right because it did not allow a “typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense.” Thus, because the scheme used excessively broad restrictions to achieve certainly legitimate ends, the court held that it unnecessary to “apply a particular standard of heightened scrutiny[,]” because the law would be unconstitutional under any test.

Circuit Judge Thomas criticized the majority’s “sweeping decision” for not answering the narrow issues at hand: if the Second Amendment “protects the concealed carrying of hand-guns in public” and if “good cause” requirements “unconstitutionally infringe on the right.” After conducting his own textual and historical analysis of whether concealed carriage was within the scope of the Second Amendment right at ratification, Thomas “conclude[d] that carrying concealed weapons has routinely been restricted, and has often been outright banned.” Because concealed carriage was outside the scope, the analysis should end and the “good cause” rule should be deemed constitutional.

Thomas continued his analysis as if the right was within the Second Amendment scope, and concluded that the County’s scheme would “easily pass[] constitutional muster.” Applying intermediate scrutiny, Thomas found that the State’s goal of public peace is compelling and the means are narrowly tailored.

Allowing for legislative deference, the “good cause” requirement should be found constitutional under intermediate scrutiny.

EVALUATION: The main issue that distinguishes the *Peruta* majority from the Thomas dissent and the sister circuits stems from the *Heller* analysis of the Second Amendment’s scope. All discussed opinions agree that *Heller* implies that the right extends beyond the home. However, they differ on whether the right to carry arms in public for self-defense falls within the guarantee’s core, and thus requires the strictest of scrutiny.

Heller stated that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” The Court went on to note lawful limitations on activities within the scope but outside the First Amendment core, thus implying the same could be true for the Second Amendment. This critical language shows that Thomas’s dissent and the sister circuits correctly placed the right to public carriage outside the Second Amendment core.

The next issue concerns the standard of scrutiny used to evaluate challenged laws. If the *Peruta* majority’s conclusion were correct and public carriage was within the Second Amendment core, then the declaration that the law would not pass under any level of scrutiny would be accurate under *Heller*. But, because it is evident that the law impacts activity outside the core, it should be subject to a lesser level of scrutiny. The Thomas dissent and the sister circuits found intermediate scrutiny appropriate by considering “how close the law comes to the

core of the Second Amendment,” “the severity of the law’s burden on the right,” and the legislative regulatory history.

A challenged law survives intermediate scrutiny “if it is substantially related to the achievement of an important governmental function.” The Supreme Court has found protecting public peace to be an important government function. Thus, the County’s goal is a non-issue. However, the *Peruta* majority accused the sister circuits of using a flawed intermediate scrutiny test to find the challenged laws constitutional. However, courts have consistently held that the law’s fit need not be perfect, but instead “must strike a reasonable balance between the burdened right and the public need.” Therefore, as the Thomas dissent accurately reasons, the County properly balanced the goal of public safety with the individual right to carry a firearm in public to enact a constitutional regulation.

Although the Thomas dissent and sister circuits accurately applied current law to find the challenged laws constitutional, State legislatures may still be advised to reevaluate the efficiency and success of the means they have chosen to achieve their goal of public safety. While research in this field is still in its infancy, many ongoing studies indicate that cities and states that allow and have higher rates public carriage have lower violent crime rates. This research, along with changing cultural attitude towards public carriage, may dictate a change in gun laws throughout the country within the near future.

CONCLUSION: The *Peruta* decision has fueled the ongoing debate regarding the scope of the Second Amendment core guarantee and the standard of scrutiny

used to examine laws that infringe upon it. The *Peruta* court's interpretation and application of *Heller* and *McDonald* directly contradict other circuits, thus creating more confusion in the field. Due to the variation of holdings among the circuits, the Supreme Court will likely be urged to grant certiorari within the coming years to further examine, define, and clarify the scope of the Second Amendment and the regulations that can be imposed upon it.