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## Second Amendment: D.C. Circuit Court Creates Split on the Constitutionality of Good-Reason Laws

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# SECOND AMENDMENT: D.C. CIRCUIT COURT CREATES SPLIT ON THE CONSTITUTIONALITY OF GOOD-REASON LAWS

*Madeleine Giese\**

IN *Wrenn v. District of Columbia*, the D.C. Circuit Court held that the individual right to carry common firearms beyond the home for self-defense, even for those lacking special self-defense needs, is the “core” of the Second Amendment’s protection.<sup>1</sup> In its holding, the court declared D.C.’s good-reason law unconstitutional as a violation of the Second Amendment.<sup>2</sup> Even though the court has always applied tiers of scrutiny to gun laws,<sup>3</sup> it decided to use the historical approach set forth in *District of Columbia v. Heller*<sup>4</sup> to reach its holding. In applying the approach in *Heller*, the court ignored both its own precedent and its sister circuits’ adherence to an intermediate scrutiny<sup>5</sup> analysis.<sup>6</sup> The court erred in its holding because the core of the Second Amendment does not extend beyond the home<sup>7</sup> and because the court should have applied an intermediate scrutiny analysis.

For the past forty years, the D.C. Council has attempted to pass legislation limiting the right to carry handguns.<sup>8</sup> In 1976, the District banned all handgun possession.<sup>9</sup> This ban was subsequently struck down by the Supreme Court in *Heller*.<sup>10</sup> Following this Supreme Court ruling, the District issued a ban on carrying in 2009.<sup>11</sup> This statute was then revised in 2015 after it was struck down in *Palmer v. District of Columbia*.<sup>12</sup> The

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1. *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).
2. *Id.* at 664.
3. *Id.* at 666.
4. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008).
5. *Wrenn*, 864 F.3d at 656 (“Intermediate scrutiny looks for a substantial link to an important interest.”).
6. *Id.* at 661.
7. *Id.* at 669 (Henderson, J., dissenting); *see* *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc).
8. *Wrenn*, 864 F.3d at 655.
9. *Id.* (citing D.C. CODE ANN. §§ 7-2502.01(a), 7-2502.02(a)(4) (West 2001)).
10. *Id.* (discussing *District of Columbia v. Heller*, 554 U.S. 570, 635–636 (2008)).
11. *Id.* (citing D.C. CODE ANN. § 22-4504 (West 2009)).
12. *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

“good-reason” law challenged, and subsequently struck down, in *Wrenn* “confines carrying a handgun in public to those with a special need for self-defense.”<sup>13</sup> This provision allows the police chief to limit licenses for concealed carry “to those showing a ‘good reason to fear injury to [their] person or property’ or ‘any other proper reason for carrying a pistol.’”<sup>14</sup> To receive a license based on having a good reason to fear injury, applicants must show a “special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant’s life.”<sup>15</sup> These applicants must “allege, in writing, serious threats of death or serious bodily harm, any attacks on [their] person, or any theft of property from [their] person.”<sup>16</sup> If applicants for a handgun seek to establish another “proper reason for carrying,” an applicants’ “need to carry around cash or valuables as part of [their] job” is a sufficient justification to qualify for and obtain a license to carry.<sup>17</sup> While living or working “in a high crime area [will] not by itself establish a good reason” to carry,<sup>18</sup> “having a close relative who is unable to meet his [or her] own special need for self-defense” establishes a good reason.<sup>19</sup> The D.C. Circuit Court referred to this collection of regulations simply as the “good-reason” law.<sup>20</sup>

It is important to note the D.C. Council’s reasoning behind its third attempt at limiting the carrying of handguns. The D.C. Council thought the newest good-reason law was justified and reasonable given the recent “studies suggesting that expansive right-to-carry laws are associated with higher rates of crime and injury to innocents” and because of D.C.’s “status as an urban area teeming with officials, diplomats, and major landmarks.”<sup>21</sup>

There are two cases at issue in *Wrenn*, both of which involve plaintiffs who were “denied a concealed-carry license solely for failing to show a special need for self-defense.”<sup>22</sup> The plaintiffs bringing the first case included Brian Wrenn, the Second Amendment Foundation, Inc., and two of its other members.<sup>23</sup> The plaintiffs bringing the second case<sup>24</sup> included Matthew Grace and the Pink Pistols, an organization that fights for the “right of sexual minorities to carry guns for self-defense.”<sup>25</sup> In both cases,

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13. *Wrenn*, 864 F.3d at 655.

14. *Id.* (quoting D.C. CODE ANN. § 22-4506(a) (West 2015)).

15. *Id.* (quoting D.C. CODE ANN. § 7-2509.11(1)(A) (West 2015)).

16. *Id.* at 656 (quoting D.C. MUN. REGS. tit. 24 § 2333.2 (West 2015)).

17. *Id.* (citing D.C. CODE ANN. § 7-2509.11(1)(B) (West 2015)).

18. *Id.* (quoting D.C. MUN. REGS. tit. 24 § 2333.4 (West 2015)).

19. *Id.* (citing D.C. MUN. REGS. tit. 24 § 2334.1 (West 2015)).

20. *Id.*

21. *Id.*

22. *Id.*

23. See *Wrenn v. District of Columbia*, 167 F. Supp. 3d 86 (D.D.C. 2016), *vacated*, 864 F.3d 650 (D.C. Cir. 2017).

24. See *Grace v. District of Columbia*, No. 15-2234 (RJL), 2016 WL 2888958 (D.D.C. 2016), *vacated*, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

25. *Wrenn*, 864 F.3d at 656.

the plaintiffs sought a preliminary injunction to bar the District from enforcing D.C.'s newest, and third, good-reason law.<sup>26</sup> In March 2016, the *Wrenn* plaintiffs' request for injunction was denied by the district judge.<sup>27</sup> But then, in May 2016, a different district judge granted the *Grace* plaintiffs' preliminary injunction, which barred the District from enforcing its good-reason law.<sup>28</sup> Both cases were appealed, creating this D.C. Circuit case.

Rejecting a tiers-of-scrutiny analysis, the court instead used the historical approach in *Heller* to declare the good-reason law unconstitutional as an infringement on the core right of the Second Amendment.<sup>29</sup> Using *Heller*'s historical approach, the court concluded that "carrying beyond the home[—]even in populated areas, even without special need[—]falls within" the core of the Second Amendment.<sup>30</sup> The court stated that the newest version of D.C.'s good-reason law is "necessarily a total ban"<sup>31</sup> because it "destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations . . . but by design: [looking] precisely for needs 'distinguishable' from those of the community."<sup>32</sup> In declaring the good-reason law a total ban, the court dismissed the application of intermediate scrutiny as unnecessary.<sup>33</sup>

To reach its holding, the court first had to decide whether the good-reason law impinged on a core Second Amendment right,<sup>34</sup> which required an understanding of what the core of the Second Amendment really is. The core of the Second Amendment protects "individual self-defense."<sup>35</sup> Under *Heller*, the "core protection covers the right of a law-abiding citizen to keep in the home common firearms for self-defense."<sup>36</sup> One issue becomes whether the Amendment's core extends to "publicly carrying guns for self-defense."<sup>37</sup> In an attempt to expand the core of the Second Amendment, the court argued that while "the need for self-defense is most pressing in the home," that fact alone "doesn't mean that self-defense at home is the only right at the Amendment's core."<sup>38</sup> In fact, the court argued that looking at the text of the Amendment shows

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26. *See id.*

27. *Id.*

28. *Id.*

29. *Id.* at 664.

30. *See id.* at 664, 668 ("[T]he law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun.").

31. *Id.* at 666; *see* *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

32. *Wrenn*, 864 F.3d at 666.

33. *Id.* ("So we needn't pause to apply tiers of scrutiny, as if strong enough showings of public benefits could save this destruction of so many commonly situated D.C. residents' constitutional right to bear common arms for self-defense in any fashion at all. Bans on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test . . .").

34. *Id.* at 657.

35. *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767–78 (2010)).

36. *Id.*

37. *Id.*

38. *Id.*

that it “protects the right to ‘bear’ as well as ‘keep’ arms.”<sup>39</sup> To support this argument, the court cited *Heller*’s definition of “bear”<sup>40</sup> and concludes that this “definition shows that the Amendment’s core must span . . . the ‘right to possess *and carry* weapons in case of confrontation.’”<sup>41</sup> *Heller*’s historical approach details a study of cases that brought about the need for self-defense in the home. The court then looked at *Heller*’s “parade of early English, Founding-era, antebellum, and late-nineteenth century cases” to conclude that these cases “attest that the Second Amendment squarely covers carrying beyond the home for self-defense.”<sup>42</sup> Further, the court declined to analyze the uniqueness of D.C. as a densely populated and urban area, stating, in light of the approach in *Heller*,<sup>43</sup> that because common-law rights develop over time, “the mature right captured by the Amendment was not hemmed in by longstanding bans on carrying in densely populated areas.”<sup>44</sup> After determining the core of the Second Amendment,<sup>45</sup> the court swiftly concluded that the good-reason law impinged on the core of the Second Amendment because it limits carrying beyond the home to a special need for self-defense.<sup>46</sup>

The second issue the court faced is whether it should subject the good-reason law to the tiers of scrutiny, an approach used by its sister circuits in analyzing good-reason laws.<sup>47</sup> The court cited *Heller*’s definition of the core of the Second Amendment<sup>48</sup> to conclude that “the right to carry is a right held by responsible, law-abiding citizens for self-defense,” a self-defense that is enabled “at least against the level of threat *generally* faced by those covered by the Amendment.”<sup>49</sup> The court argued that “if the [Second] Amendment is for law-abiding citizens *as a rule*, then it must secure gun access at least for each *typical* member of that class.”<sup>50</sup> Thus, the “class of arms protected must include guns in common use; and the class of citizens who can wield them must include those with common

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39. *Id.*

40. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008)) (“[T]o ‘bear’ means to ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’”).

41. *Id.* at 658 (quoting *Heller*, 554 U.S. at 592).

42. *Id.*

43. *Heller* argued that laws against carrying in public areas banned only the carrying of “dangerous and unusual weapons.” See *Heller*, 554 U.S. at 627 (citing JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON* 79 (1804)).

44. *Wrenn*, 864 F.3d at 660–61.

45. *Id.* at 661.

46. *Id.* at 664.

47. *Id.*

48. *Id.* (“[U]nder [*Heller*], the Second Amendment protects an individual right of responsible, law-abiding citizens to defend themselves.”).

49. *Id.*

50. *Id.* at 665 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627, 629 (2008)) (“[J]ust as the Amendment requires access to weapons ‘in common use,’ . . . including the ‘most popular’ self-defense weapon among citizens today . . . so must the Amendment enable defense under the *circumstances* common among citizens today.”).

levels of competence and responsibility—and need.”<sup>51</sup> The court argued that because “the Amendment shields . . . the ability to carry common arms in self-defense for citizens who are commonly situated,” the District’s good-reason law completely prohibited most residents of D.C. from exercising the right to bear arms.<sup>52</sup> Since, under *Heller*, “complete prohibitions of Second Amendment rights are always invalid,”<sup>53</sup> the court concluded that it is appropriate to strike down D.C.’s newest good-reason laws “without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right.”<sup>54</sup>

The court’s sister circuits, including the Second, Third, Fourth, and Ninth Circuit Courts of Appeals, in applying an intermediate scrutiny analysis, have upheld good reason laws as constitutional under the Second Amendment by reasoning that “burdens on carrying trigger only intermediate scrutiny because the right to carry merits less protection than the right to possess.”<sup>55</sup> Instead of relying on *Heller*, the sister circuits rely on “an inference from the tolerance in American law for certain other carrying regulations.”<sup>56</sup> Further, these circuits have concluded that the core Second Amendment right does not extend beyond the home, given the history upholding public carry regulations.<sup>57</sup> The Second Circuit “reason[ed] that the right to bear must count for less than the right to keep arms since the former has been regulated more rigorously.”<sup>58</sup> In support of this level of scrutiny, the Second Circuit also discussed three nineteenth-century courts that upheld bans on “bearing concealed or concealable weapons.”<sup>59</sup> The Fourth Circuit applied intermediate scrutiny, reasoning that, “‘as we move outside the home, firearm rights have always been more limited,’ as shown by decisions upholding bans on concealed carry.”<sup>60</sup> The Third Circuit, in relying on the analysis used by both the Second and Fourth circuits, analyzed a good-reason law under intermediate scrutiny and also declined to use the historical approach in *Heller*.<sup>61</sup>

Dissenting Judge Henderson argued for the use of intermediate scrutiny and emphasized what the majority opinion ignored: the sister circuits did extensively review the same historical record as *Heller*, just through a different lens.<sup>62</sup> Judge Henderson noted that, after reviewing history, both the Second and Third Circuits commented that “[h]istory and tradi-

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51. *Id.*

52. *Id.*

53. *Id.* (quoting *Heller*, 554 U.S. at 629).

54. *Id.* at 665–66.

55. *Id.*

56. *Id.*

57. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

58. *Wrenn*, 864 F.3d at 662 (citing *Kachalsky*, 701 F.3d at 94–97).

59. *Id.* (citing *Kachalsky*, 701 F.3d at 90, 94).

60. *Id.* (quoting *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013)).

61. *See id.* at 663 (citing *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013)).

62. *Id.* at 669 (Henderson, J., dissenting).

tion do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms.”<sup>63</sup> The Fourth Circuit, in reviewing the history of cases on gun laws, noted that “firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”<sup>64</sup> The Ninth Circuit noted that in U.S. history, “the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.”<sup>65</sup> Further, Judge Henderson agreed with the District’s argument regarding the unique nature of D.C., arguing that the majority’s “analysis should reflect an appreciation of ‘the unique challenges that confront the District.’”<sup>66</sup>

The D.C. Circuit Court erred in its holding that D.C.’s good-reason law was against the core of the Second Amendment because the core of the Second Amendment does not extend beyond the home<sup>67</sup> and because the court was wrong to dismiss the use of intermediate scrutiny.<sup>68</sup> The court’s sister circuits, as well as the dissent, all agreed that “[t]he sole Second Amendment ‘core’ right is the right to possess arms for self-defense in the home.”<sup>69</sup> This conclusion is evidenced most clearly in *Heller*: “the need for self-defense of self, family, and property is *most acute*’ in the home.”<sup>70</sup> Even though the majority opinion argued that there are two parts to the core right, it is clear that the Supreme Court, “[b]y characterizing the Second Amendment right as . . . *most acute* in the home . . . [the Court] implied that the right is . . . *less acute* outside the home.”<sup>71</sup> Accordingly, such “right that is . . . less acute cannot reside at the Second Amendment’s core.”<sup>72</sup> The core of the Amendment is within the home. Because D.C.’s good-reason law does not affect the Amendment’s core, it necessarily does not “impose a substantial burden upon the core right of self-defense.”<sup>73</sup> Consequently, the court’s use of the approach in *Heller* is unwarranted.<sup>74</sup>

“Nothing in *Heller* . . . suggests a case involving a restriction significantly less severe than the total prohibition of handguns at issue could or should be resolved without reference to one or another of the familiar

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63. *Id.* (quoting *Kachalsky*, 701 F.3d at 91); *see also Drake*, 724 F.3d at 431.

64. *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011).

65. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc).

66. *See Wrenn*, 864 F.3d at 670 (Henderson, J., dissenting) (citing *Heller v. District of Columbia* (*Heller III*), 801 F.3d 264, 283 (D.C. Cir. 2015); *see also id.* at 669 (citing Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82, 108 (2013) (explaining that “American cities have traditionally had much more stringent gun control than rural areas”)).

67. *Wrenn*, 864 F.3d at 669.

68. *Id.*

69. *Id.* at 668 (first quoting *Drake*, 724 F.3d at 431 (“The individual right to bear arms for the purpose of self-defense in the home is the ‘core’ of the right as identified by *Heller*.”); and then quoting *Kachalsky*, 701 F.3d at 89 (“Second Amendment guarantees are at their zenith within the home.”)).

70. *Id.* at 668–69 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

71. *Id.* at 669.

72. *Id.*

73. *Id.*

74. *Id.*

constitutional standards of scrutiny.”<sup>75</sup> Given the court’s previous adherence to the use of intermediate scrutiny, the proper standard of review is not the historical approach in *Heller*. “[U]nder intermediate scrutiny, [the District] must show that the regime is ‘substantially related to an important governmental objective.’”<sup>76</sup> The District’s two government objectives underlying its law, the prevention of crime and the promotion of public safety, “pass[] muster under intermediate scrutiny,”<sup>77</sup> especially given the fact that in *Heller III* the court held “that ‘promoting public safety’ is indeed a substantial government interest.”<sup>78</sup> Further, the District provided empirical evidence of the “connection between a profusion of guns and increased violent crime.”<sup>79</sup> In addition, because D.C. is unique—it is the “seat of our national government [and] ‘a city full of high-level government officials, diplomats, [and] monuments’”—the court’s decision should have “reflect[ed] an appreciation of ‘the unique challenges that confront the District.’”<sup>80</sup> This court should have deferred to the legislature and upheld the good-reason law, as “it is the legislature’s job . . . [to assess] the risks and benefits of handgun possession and . . . maximize the competing public-policy objectives.”<sup>81</sup>

The court erred in its holding by expanding the core of the Second Amendment to include “less acute” rights and failing to use intermediate scrutiny to analyze D.C.’s good-reason law. In a time where gun violence is prevalent and causes innocent deaths in astounding numbers, the court should have erred on the side of caution so it is not “even minutely responsible for some unspeakably tragic act of mayhem because in the peace of [its] judicial chambers [it] miscalculated as to Second Amendment rights . . . . If ever there was an occasion for restraint, this would seem to be it.”<sup>82</sup>

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75. *Id.* at 668 (quoting *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1266 (D.C. Cir. 2011)).

76. *Id.* at 670.

77. *Id.*

78. *Id.*

79. *Id.* at 671.

80. *Id.* at 670.

81. *Id.* at 671 (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

82. *Id.* (quoting *United States v. Masciandaro*, 638 F.3d 458, 475–76 (4th Cir. 2011)).