An Elevated Need for Constitutional Rights: Good Cause Requirements and Washington, D.C. Concealed Carry Applications

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Introduction

While the public generally acknowledges that there are certain necessary limitations to the Second Amendment right to bear arms, such as preventing the issuance of permits to minors or convicted criminals,[1] the public would be less inclined to necessarily limit that right for an adult citizen with a clean criminal record and no mental health issues.[2] Lawmakers, however, use "good cause" restrictions on concealed carry permits to ensure that only individuals able to prove that they are at risk of a specific personal attack, when such attack can only be prevented with a handgun, are permitted to apply for concealed handgun permits.[3] The Supreme Court has not expressly considered the constitutionality of good cause requirements, but any condition that limits Second Amendment rights to a miniscule minority of the population must be examined in a highly skeptical light.[4]

On September 23, 2014, the Washington, D.C. District Council voted to implement a new handgun policy that would allow for both residents and visitors with appropriate permits to carry concealed firearms within the District of Columbia ("the District").[5] The Council

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1 *See* Pew Research Ctr., Continued Bipartisan Support for Expanded Background Checks on Gun Sales 1 (2015), http://www.people-press.org/files/2015/08/08-13-15-Guns-release.pdf; Ctr. for Am. Progress, What the Public Really Thinks about Guns 4 (2013), https://cdn.americanprogress.org/wp-content/uploads/2013/03/GunPolling-5.pdf.

2 *See* Continued Bipartisan Support for Expanded Background Checks on Gun Sales, *supra* note 1, at 4-5.

3 *See, e.g.*, Drake v. Filko, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting).

4 *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

5 Mike DeBonis, *D.C. Council Votes, Reluctantly, to Allow Public to Carry Concealed Weapons*, Wash. Post (Sept. 23, 2014), http://www.washingtonpost.com/local/dc-politics/dc-

Members unanimously, yet reluctantly, passed the legislation under the assumption that in the absence of new concealed carry laws, much of the District's previous gun-control statute would be invalidated, leaving no effective regulation on the carrying of firearms.[6] The vote came in the wake of the D.C. District Court case, *Palmer v. District of Columbia*, which held the District violated the Second Amendment with its restrictions on concealed carry permits.[7] When combined with the recent case law shaping the limits of gun control, *Palmer* suggested a distinct trend away from limiting concealed carry permits to those with an elevated need for self-defense.[8]

Following the decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*,[9] the question of permit allocation remains, specifically, what requirements may the issuing body impose on those seeking to secure a handgun permit for self-defense? The issue has come to a head in the form of "good-and-substantial-reason requirements," or "good cause requirements" which limit handgun permits to those who can show an absolute necessity for carrying a gun on their person.[10] Such a requirement was weighed in *Woollard v. Gallagher*, where the Fourth Circuit ruled not only that the strict requirement to show good and substantial reason beyond a common desire for self-defense is constitutional, but that the right of an individual to carry a handgun in the absence of a specific threat of bodily harm is outweighed by the government's policy to protect the general public from those who would use handguns for illegal purposes.[11] The *Woollard* ruling does not seek to explicitly contradict the *Heller* decision, but it imposes severe limits on what may be considered self-defense.[12]

Palmer held, following the framework of *Heller*, that the District could no longer continue its ban on concealed carry permits outside of

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council-votes-reluctantly-to-allow-public-to-carry-concealed-weapons/2014/09/23/03e8be1e-4322-11e4-9a15-137aa0153527_story.html.

6 *Id*.

7 Palmer v. District of Columbia, 59 F. Supp. 3d 173, 182 (2014).

8 *See id*. at 182-83.

9 McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the Second Amendment right to bear arms is fully applicable to the states); *Heller*, 554 U.S. at 570 (holding that statutes banning handguns in the home violated the Second Amendment).

10 *See* Drake v. Filko, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting); Woollard v. Gallagher, 712 F.3d 865, 880 (4th Cir. 2013).

11 *Woollard*, 712 F.3d at 881-83.

12 *See id.* at 874.

the home.[13] Accordingly, the District's restrictive policy, which effectively prohibited the issuance of concealed carry permits through vague requirements and widespread denials, was deemed unconstitutional.[14] The *Palmer* court stated *Heller* placed broad, significant emphasis on self-defense, and the court characterized *Heller* as expanding a person's fundamental right to self-defense via the bearing of arms to situations outside the home.[15]

The question now is whether the new restrictive requirements imposed by the Washington, D.C. Council, as well as those currently in place in the Second, Third, and Fourth Circuits, conflict with the scope of the Second Amendment as outlined in *Heller* and the constructive ban deemed unconstitutional in *Palmer*.[16] Washington, D.C. Council Members admitted that if it were not for the ruling in *Palmer* they would continue to ban handguns outright, and they have assented only to allowing the strictest rules that have yet to be proved unconstitutional in the permit acquisition process.[17] It is more than likely that Council Members are operating under the same belief that drove the Fourth Circuit's *Woollard* decision that the general safety of the public would best be served by limiting the issuing of handgun permits to either none or an infinitely small amount of people.[18] Unfortunately, this line of thinking unequivocally infringes upon the Second Amendment rights of the individual, a precedent that was set in *Heller* and became more clearly defined through the rulings up to and including *Palmer*.[19] Restrictions meant to exclude the vast majority of law-abiding citizens from obtaining handgun permits effectively undermine the Second Amendment more than any restriction short of an outright ban.[20] The bare minimum will no longer suffice, especially if the application process and appeals board that the Council installs work in concert with the single goal of granting as few handgun permits as legally

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13 Palmer v. District of Columbia, 59 F. Supp. 3d 173, 182-83 (D.D.C. 2014).

14 *Id*.

15 *Id.*

16 *See* Drake v. Filko, 724 F.3d 426, 443-44, 452 (3d Cir. 2013) (Hardiman, J., dissenting); Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012).

17 DeBonis, *supra* note 5.

18 *See Woollard*, 712 F.3d at 877; DeBonis, *supra* note 5.

19 *See* District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008); *Woollard*, 712 F.3d at 877; Palmer v. District of Columbia, 59 F. Supp. 3d 173, 182-83 (D.D.C. 2014).

20 *Heller*, 554 U.S. at 636.

possible.[21] Justice Scalia may not have delved into the full scope of the Second Amendment when he spoke for the Court in the *Heller* ruling, but he clearly indicated that arbitrary laws meant to keep guns out of the hands of law-abiding citizens who mean to use them for the general purpose of personal protection are unconstitutional.[22]

Part I of this Comment will consider the recent state of Second Amendment interpretation beginning with the *Heller* decision, specifically considering the intent of the Supreme Court pertaining to acceptable restrictions on personal self-defense. Part II will address the current Circuit split over the constitutionality of good cause restrictions and the appropriate interpretation of the Second Amendment. Despite the prevalence of good cause restrictions, they ultimately confine the application of personal self-defense beyond what is guaranteed by the Second Amendment.

I. BACKGROUND

Reasonable application of the Second Amendment to individuals has been an issue of contention throughout the 20th and 21st centuries.[23] The possibility of violent crime stemming from an abundance of concealable guns in highly populated areas has led some lawmakers to conclude that limiting handgun ownership is necessary to ensure crime rates do not spiral out of control.[24] Some lawmakers have looked to justify gun permit limitations by suggesting that regulating who can obtain a handgun permit does not necessarily violate the Second Amendment, so long as those demonstrating an obvious need for the protection associated with a handgun are given the opportunity to procure a handgun permit.[25] Alternatively, others have deemed that strict regulation on permits violate the general need for self-defense promised to the ordinary citizen by the Second Amendment.[26]

Section A will consider the shift from the previous belief that outright bans on guns were constitutional to the present understanding

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[21] *See infra* Part I.C.

[22] *Heller*, 554 U.S. at 628.

[23] *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 95 (2d Cir. 2012); *infra* Part I.A.

[24] *See* Drake v. Filko, 724 F.3d 426, 439 (3d Cir. 2013); *Woollard*, 712 F.3d at 876-77; *Kachalsky*, 701 F.3d at 95-98.

[25] *See Kachalsky*, 701 F.3d at 99-100.

[26] *See* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1171 (9th Cir. 2014); Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012).

that gun ownership is assured by the Second Amendment, except in narrowly defined situations.

Section B will consider the circuit split on whether good cause restrictions are constitutional. The Second, Third, and Fourth Circuits contend that because *Heller* allows for reasonable restrictions on the Second Amendment and because good cause restrictions have been upheld in the past, the restrictions are not unconstitutional. Conversely, the Seventh and Ninth Circuits contend that *Heller* meant to allow the majority of law-abiding citizens to enjoy the Second Amendment right to self-defense, and thus good cause restrictions are unconstitutional.

Section C will consider how the District has adapted its permit requirements to remain in compliance with the Second Amendment and will consider the continuing legal battle over the constitutionality of good and substantial reason requirements in the District.

A. Heller *and the End of Handgun Bans*

In 2008, the United States Supreme Court decided on the validity of the District's previous ban on all handguns and limitations on keeping firearms within the home.[27] In *Heller*, a police officer applied to register his handgun for personal protection within his home but was denied a permit and subsequently filed suit in federal court alleging that the ban on functional handguns within the home violated his Second Amendment rights.[28] Prior to the Supreme Court's decision, the District had strict gun laws in place that effectively resulted in a ban on all handguns.[29] It was a crime to carry any unregistered firearm and the registration of handguns was strictly banned, excluding the issuance of a temporary one-year license by the Chief of Police.[30] Additionally, residents were not allowed to keep licensed long guns, firearms larger than handguns that include a stock, within their homes unless they were completely disassembled or fitted with a trigger lock, effectively rendering them useless for home security.[31] When *Heller* took his case to federal district court, the court dismissed the case, but the court of appeals reversed the decision on Second Amendment

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[27] *See Heller*, 554 U.S. at 630, 636.
[28] *Id.* at 575-76.
[29] *See id*.
[30] *Id*. at 574-75.
[31] *Id*. at 575.

grounds.[32] Subsequently, the Supreme Court ruled that blanket bans on handguns and requirements that render guns inoperable within the home were unconstitutional.[33]

The *Heller* decision, despite not explicitly determining which restrictions might violate the Second Amendment, established a precedent that the individual right to keep and bear arms guaranteed by the Second Amendment was based on the right to self-defense.[34] The Court decided the Second Amendment required a law-abiding citizen be free to keep a gun within his or her dwelling to protect "hearth and home."[35] Because handguns were and continue to be the preeminent form of self-defense, the Court ruled that defense of one's person and home required the ability to keep a handgun within the home.[36]

In the aftermath of the Supreme Court's ruling in *Heller*, the City of Chicago as well as the suburb of Oak Park argued that the Supreme Court's ruling did not apply to the states.[37] Petitioners argued, and the Court upheld, that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms.[38] The decision in *McDonald* ended Chicago's ban on handguns in the home and relied a great deal on the *Heller* decision that limiting self-defense through gun ownership bans is clearly unconstitutional.[39] Relying on *Heller*, the Court determined self-defense was a basic right ensured by the Constitution and deserving of protection.[40] The Court also acknowledged certain restrictions may apply to the right of armed self-defense, but it did not comment on the constitutionality of conditioning gun permit approvals based on an individual's ability to prove a heightened need for self-defense.[41]

In the majority opinion for *Heller*, Justice Scalia explicitly stated that the Court would not evaluate the full scope of the Second Amendment, answering only whether it was unconstitutional to ban handguns within homes.[42] This choice by the Court was spurred by a

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[32] *Id*. at 576.
[33] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
[34] *Id.* at 628-29.
[35] *Id*. at 635.
[36] *Id.* at 628-29.
[37] McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).
[38] *Id.* at 753, 791.
[39] *Id*. at 791.
[40] *Id*. at 767-68.
[41] *See id*. at 786.
[42] *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

lack of necessity to determine specific requirements outside of the home when the District's ban was only being challenged within the home.[43] Both the *Heller* and *McDonald* opinions acknowledged certain limitations could undoubtedly be placed on permits and ownership, specifically mentioning that certain classes of dangerous or inexperienced persons should not be permitted to own handguns.[44] Unfortunately, neither decision explicitly states where the middle ground is between a blanket ban on handgun ownership and complete allowance of any and all firearms.[45] While *Heller* gave some examples of accepted limitations already in place, neither *Heller* nor *McDonald* mentioned any restrictions based on the purpose of the individual seeking a gun permit and their intentions upon attaining a firearm.[46] Numerous circuits have relied heavily on *Heller*'s lack of condemnation of explicit restrictive practices outside of the home to avoid discussion concerning the constitutionality of "good cause" limitations.[47]

Despite these circuits relying on *Heller* to limit access to handguns through good cause limitations, both the *Heller* and *McDonald* decisions place a great deal of emphasis on the right of personal self-defense while striking down bans on handguns within the confines of an individual's home.[48] Rather than focusing on whether there is an undeniable need for heightened self-defense in the individual, Justice Scalia stated that self-defense is "the *central component* of the right [to bear arms] itself."[49]

B. *The Circuit Split over Good Cause Permit Requirements*

The Second, Third, and Fourth Circuits each maintain strict concealed carry handgun policies, which require citizens seeking a permit to demonstrate "justifiable" or "good and proper" need for a handgun to satisfy the self-defense requirement.[50] Despite the vagueness of the

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[43] *Id*. at 635.

[44] McDonald v. City of Chicago, 561 U.S. 742, 786 (2010); *Heller*, 554 U.S. at 626-27.

[45] *See McDonald*, 561 U.S. at 749-91; *Heller*, 554 U.S. at 573-636.

[46] *See McDonald*, 561 U.S. at 749-91; *Heller*, 554 U.S. at 573-636.

[47] *See, e.g.*, Drake v. Filko, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting); Woollard v. Gallagher, 712 F.3d 865, 872 (4th Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 94 (2d Cir. 2012).

[48] *See McDonald*, 561 U.S. at 787; *Heller*, 554 U.S. at 628.

[49] *Heller*, 554 U.S. at 599.

[50] *See, e.g.*, *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 882-83; *Kachalsky*, 701 F.3d at 99-101.

self-defense policy on its face, its evidence requirements are actually quite uniform and well documented throughout Second, Third, and Fourth Circuit states.[51] Individuals who wish to obtain a handgun permit must produce documented evidence of either a past incident where they were subject to some physical attack, or specific threats aimed at them.[52] This documentation must show "a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."[53] Examples of evidence that would satisfy the good and proper requirements, or good cause requirements, include police reports or restraining orders issued by courts.[54]

Good cause requirements are meant to ensure that only those who can demonstrate an elevated need for self-defense, a need that rises substantially above the need shown by an ordinary citizen walking down the city streets of Brooklyn, Baltimore, or Newark, are allowed to exercise the right to self-protection while outside of the home by obtaining a concealed carry permit.[55] Additionally, applicants must not only show that being able to carry a handgun would satisfy their need for self-defense, but that it is the only means of ensuring the proper level of self-protection necessitated by their circumstances.[56] Maryland went so far as to deny a citizen's attempt to renew his concealed carry permit because his police documentation of a home invasion was not recent enough.[57]

Both the Seventh and Ninth Circuits have taken the opposite approach on good cause requirements due to concerns over the constitutionality of denying the vast majority of the population the right to armed self-defense while outside of the home.[58] San Diego and Chicago have each abandoned good cause requirements within the permit process to ensure that citizens are more readily entitled to exercise their constitutional right to self-defense.[59] Both the Seventh and Ninth Circuits consider the decision in *Heller*, despite only specifi-

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51 *See, e.g.*, *Drake*, 724 F.3d at 437-40; *Woollard*, 712 F.3d at 869-72, 879-83; *Kachalsky*, 701 F.3d at 83-85, 97-100.

52 *See, e.g.*, *Drake*, 724 F.3d at 428-29.

53 *See, e.g.*, *id.* at 428 (citing N.J. ADMIN. CODE § 13:54-2.4(d)(1) (2016)).

54 Peruta v. Cty. of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014).

55 *Drake*, 724 F.3d at 428.

56 *Id*.

57 Woollard v. Gallagher, 712 F.3d 865, 871 (4th Cir. 2013).

58 *Peruta*, 742 F.3d at 1178-79; Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

59 *See Peruta*, 742 F.3d at 1178-79; *Moore*, 702 F.3d at 942.

cally addressing the issue of gun ownership within the home, to set forth a clear precedent that laws infringing on the personal right to self-defense, absent a showing that the individual is a danger to himself or others, go against the core principles of the Second Amendment.[60] These courts rejected the idea that the Second Amendment's assurance of a private right to self-defense through the bearing of arms only applied to a minute number of individuals who can provide authorized documentation of an impending attack or who were attacked before, effectively ignoring the possibility of first time or unprovoked attacks while out in public, where such an attack is most likely to occur.[61] In the absence of good cause restrictions, law-abiding citizens who do not fall into the categories of criminals, illegal aliens, or the mentally unstable, would be allowed to carry handguns while outside of their homes to protect themselves from unprovoked and unanticipated violent attacks, per the Seventh and Ninth Circuits.[62]

1. Good Cause Requirements as Acceptable Restrictions

To defend good cause requirements, the courts in *Drake*, *Kachalsky*, and *Woollard* all asserted not only that the requirements do not necessarily violate an individual's right to self-defense under the Second Amendment, but also that even if they were incorrect in that concern, the requirements are still allowable under a moderate scrutiny test that ultimately weighs the harm done to the individual against a possible benefit to the public as a whole.[63]

Drake v. Filko upheld a New Jersey law that required handgun permit applicants to show, aside from handgun training and freedom from disability (including mental illness and felony status), a "justifiable need" for a handgun for the purpose of self-defense.[64] To demonstrate justifiable need under New Jersey law, the applicant needed to show he had either received specific threats or had recently been attacked and the only way to avoid future "special danger" to the

60 District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008); *Peruta*, 742 F.3d at 1178-79; *Moore*, 702 F.3d at 942.

61 *See Peruta*, 742 F.3d at 1178-79; *Moore*, 702 F.3d at 942.

62 *See Peruta*, 742 F.3d at 1178-79; *Moore*, 702 F.3d at 942.

63 *See*, *e.g.*, Drake v. Filko, 724 F.3d 426, 439-40 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 881-82 (4th Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 99-100 (2d Cir. 2012).

64 *Drake*, 724 F.3d at 428.

applicant's life, as linked to the past threats or attacks, was through a permit to carry a handgun.[65]

The court in *Drake* ultimately decided that the good cause requirement that applicants show an elevated need for self-defense was not unconstitutional since it was a "presumptively lawful, long-standing regulation" and therefore "[did] not burden conduct within the scope of the Second Amendment's guarantee."[66] First, the *Drake* court contended that the Supreme Court's decision in *Heller* did not officially extend beyond the dominion of the home.[67] The court expressly stated that the only issue under consideration was whether the District's outright handgun ban, which banned the presence of functional handguns within the home, violated the Second Amendment.[68] The *Drake* court thus cited *United States v. Masciandaro*'s "vast *terra incognita*," determining that absent an official decision by the Supreme Court on the specific realm outside of the home, it was unclear whether bans on public gun ownership violate the Second Amendment.[69]

Kachalsky v. County of Westchester made a number of similar conclusions, ultimately deciding that New York's good cause requirement did not violate the Second Amendment, and if it did, the harm done to the individual's right to self-defense did not overcome the public safety ensured by taking away the ability for that individual to lawfully possess a handgun outside of his residence.[70] New York defended its "proper cause" law primarily under the assumption that because it had been in effect for a long period and there were similar laws on the books in other states, including New Jersey and Maryland, it was a viable restriction that did not completely undermine the scope of the Second Amendment.[71] The specific law in question, the Sullivan Law, came into effect in 1911 and established the good cause requirement in 1913 in an effort to limit the number of handguns on the street.[72]

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65 *Id*.

66 *Id*. at 440 (internal quotation marks omitted).

67 *Id*. at 430.

68 *Id*.

69 *Id.* (citing United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011)).

70 Kachalsky v. Cty. of Westchester, 701 F.3d 81, 101 (2d Cir. 2012).

71 *Id*. at 85, 91-92.

72 *Id*. at 85.

Woollard also relied on *Heller* for its decision to officially rule on the rights completely guaranteed by the Second Amendment outside of the home.[73] The court did not attempt to defend the good cause restriction on the basis that it did not infringe on the scope of the Second Amendment.[74] It instead focused on the second element of the *Chester* inquiry, arguing that a lower level of scrutiny should be applied.[75] Doing this would elevate the public interest served by the strict control of handguns over the interest of individuals protecting their right to self-defense.[76]

2. Good Cause Requirements as Unconstitutional Restrictions on Second Amendment Right to Self-Defense

Moore v. Madigan and *Peruta v. County of San Diego* take the opposite stance on good cause requirements. First, they assert that the individual right to armed self-defense is necessarily destroyed by good cause requirements explicitly meant to ban the average law-abiding citizen from carrying a handgun.[77] Second, they contend that the regulation cannot be upheld under moderate scrutiny because the vague prospect of possibly limiting violent crime by banning permits for citizens interested in self-defense does not outweigh the harm done to the individual denied his or her constitutional right to protection.[78]

While the court in *Moore* did not specifically address the question of whether good cause requirements could be considered an acceptable limit on gun ownership, its conclusions all but eliminate the possibility.[79] The Seventh Circuit in *Moore* ruled that that the Illinois ban

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[73] Woollard v. Gallagher, 712 F.3d 865, 874 (4th Cir. 2013).

[74] *Id.*

[75] *Id*. at 875 (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)). The *Chester* inquiry asks "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny." United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

[76] *See Woollard*, 712 F.3d at 876.

[77] *See* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1178-79 (9th Cir. 2014); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

[78] *Peruta*, 742 F.3d at 1178-79; *Moore*, 702 F.3d at 942.

[79] *See Moore*, 702 F.3d at 941-42.

on carrying guns in public outside of one's home or place of business necessarily infringes on Second Amendment rights, relying on the precedent established both in *Heller* and *McDonald* which collectively established that "the constitutional right of armed self-defense is broader than the right to have a gun in one's home."[80] Rather than asserting that *Heller* simply ruled that guns could be kept within the home and under certain unidentified circumstances some citizens could carry them outside of the home, *Moore* went beyond the simplistic approach of the Second, Third, and Fourth Circuits and actually considered the intent of the Supreme Court.[81] Under *Moore*'s analysis, the Supreme Court not only opened the door for more lenient permit regulations outside of the home, but mandated them through an emphasis on self-defense that cannot be isolated to the confines of a single dwelling place.[82]

In support of this shift toward allowing handguns outside of the home in most circumstances, the court in *Moore* made the logical claim that because *Heller* was decided based on the Second Amendment's guarantee of self-defense, and the need for self-defense is present in a reasonably similar if not equal proportion when outside of the home, similar guarantees of armed self-defense should be granted for individuals outside of the home.[83]

Finally, *Moore* tackled the "vast *terra incognita*" in *Masciandaro* by asserting that just because the Court did not clearly delineate the permissibility of handgun regulations regarding territory outside of the home (apart from the Court prohibiting outright bans), the states are not free to arbitrarily impose restrictions that will most effectively limit the number of gun permits.[84] *Moore* declared the door "has been opened to judicial exploration by *Heller* and *McDonald*" and the lower federal courts are not at liberty to ignore their established precedents.[85]

Peruta is the most recent circuit court decision where the Ninth Circuit affirmatively condemned good cause restrictions as unconstitutional limitations on the individual right conferred by the Second

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[80] *Id*. at 935.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 941.

[84] *Id*. at 942.

[85] Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

Amendment.[86] *Peruta* relied on a litany of case law in deciding that the right to armed self-defense is an individual right conferred by the Second Amendment; further, *Peruta* concluded the right to bear arms includes the right to carry an operable firearm outside of the home for lawful purposes, leaving only the questions of what constitutes a lawful purpose and the extent to which a government may impose on lawful purposes.[87]

Peruta held that good cause regulations are not a mere limit on the right to bear arms, but that they destroy the right altogether.[88] Simply because a certain regulatory scheme does not prohibit the right to carry weapons outside of the home altogether, the court in *Peruta* explained, does not mean that the Second Amendment right to armed self-defense is not effectively destroyed.[89] *Peruta* disagreed with the scrutiny used in both *Drake* and *Moore* concerning the criteria for determining whether good cause requirements infringe on the personal right to armed self-defense.[90] The *Peruta* court considered the prohibitions struck down in *Heller* and *McDonald* and found the onerous restrictions essentially banned handguns in public.[91] The *Peruta* court offered, "*Heller* teaches that a near-total prohibition on keeping arms is hardly better than a near-total prohibition on bearing them . . . [b]oth go too far."[92]

The opinion in *Peruta* proceeded to criticize *Drake*, *Kalchasky*, and *Woollard* because the three opinions failed to consider the full scope of the Second Amendment, basing their analysis solely on a limited reading of *Heller*.[93] Additionally, *Peruta* claimed that the three cases' assertions that the good cause standard could pass some kind of intermediate scrutiny was incorrect.[94]

C. *The* Palmer *Decision and the District's New Handgun Laws*

In the wake of the district court's decision in *Palmer*, the Washington, D.C. Council retooled the gun permit application to allow, or

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86 Peruta v. Cty. of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014).
87 *Id.* at 1178-79.
88 *Id*. at 1170.
89 *Id*.
90 *Id*. at 1173.
91 *Id*. at 1178-79.
92 Peruta v. Cty. of San Diego, 742 F.3d 1144, 1170 (9th Cir. 2014).
93 *Id.* at 1173.
94 *Id*. at 1175-76.

at least give the impression that they would allow, private citizens to carry concealed handguns.[95] The district court addressed the issue of handgun ownership outside of the home, declaring that the District's previous ban on handguns violated the Second Amendment as outlined in *Heller*.[96] The district court in *Palmer* relied on a number of findings to come to this conclusion, including that the core component of self-defense applies wherever a person happens to be at the time, whether on the street, in an alley, or within the confines of one's own home.[97] *Palmer* recognized necessary restrictions on the issuance of permits, specifically those concerning certain classes of people whose possession of a handgun would pose a danger to themselves or others and sensitive areas where guns would not be allowed.[98] However, the *Palmer* decision did not include any specific mention of good cause requirements in its restrictions.[99]

In the brief stay following the district court's decision in *Palmer*, the Washington, D.C. Council reluctantly voted to impose a new policy for registering handguns that allowed for the possibility of a concealed carry permit, albeit in the most restrictive way possible.[100] The Council was faced with the decision of either loosening the District's excessively tight restrictions on handgun permits or risk having all of the District's gun laws deemed unconstitutional by the end of the stay.[101] Prior to the *Palmer* decision, residents were given the option of applying for a permit to carry a handgun in public, but such permits were rarely if ever awarded.[102] In response to the stay, the District, similar to Maryland's process, declared it would require applicants to provide good and substantial reason for their requests, specifically by showing that their need for self-defense outweighed that of an ordinary citizen.[103]

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95 DeBonis, *supra* note 5.

96 Palmer v. District of Columbia, 59 F. Supp. 3d 173, 183 (D.D.C. 2014).

97 *Id.* at 181 (quoting Peruta v. Cty. of San Diego, 742 F.3d 1144, 1153 (9th Cir. 2014)).

98 *Id*. at 182.

99 *See id*.

100 DeBonis, *supra* note 5.

101 *See id.*

102 Palmer v. District of Columbia, 59 F. Supp. 3d 173, 176-78 (D.D.C. 2014).

103 Aaron Davis, *D.C. to Begin Accepting First Applications in Decades for Concealed-Firearm Permits*, WASH. POST (Oct. 16, 2014), http://www.washingtonpost.com/local/dc-politics/dc-to-begin-accepting-first-applications-in-decades-for-concealed-firearm-permits/2014/10/16/9173ca86-5555-11e4-892e-602188e70e9c_story.html.

In the wake of the District's new laws requiring an elevated need for personal safety as a prerequisite for a handgun permit, individual citizens and the Second Amendment Foundation filed suit against the District claiming an infringement on constitutional rights.[104] In *Wrenn v. District of Columbia*, the plaintiffs specifically challenged the constitutionality of the good cause requirement in the application while leaving the remaining elements of the application process untouched.[105] In a telling decision, Senior Judge Scullin of the district court granted a preliminary injunction in favor of the private citizens, finding that the plaintiffs demonstrated a great likelihood of success on the merits of their claim.[106] On December 15, 2015, the order in *Wrenn* was vacated because of a jurisdictional argument over whether Senior Judge Scullin had the authority to hear the case based on his assignment status.[107] Ultimately, the reviewing court found a lack of jurisdiction nullified the order, but that nullification did not consider the reasoning behind the *Wrenn* decision.[108]

While determining whether to grant the request for a preliminary injunction against the District's new good cause gun requirements, Senior Judge Scullin considered whether the plaintiffs demonstrated "(1) a substantial likelihood of success on the merits, (2) that [they] would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction."[109]

First, the *Wrenn* court determined that there was a high likelihood of success based on the merits of the plaintiffs' argument.[110] Relying on the rulings in both *Heller* and *Palmer*, Senior Judge Scullin determined that the new good cause requirements were neither longstanding nor deserving of an assumption of legitimacy.[111] Additionally, the *Wrenn* court found that, even assuming that the strict requirements were longstanding, the requirements clearly presented

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104 Wrenn v. District of Columbia, 107 F. Supp. 3d 1, 3 (D.D.C. 2015), *vacated*, 808 F.3d 81 (D.C. Cir. 2015) (vacating the District Court's injunction order because the court lacked jurisdiction).

105 *Wrenn*, 107 F. Supp. 3d at 3.

106 *Id*. at 14.

107 Wrenn v. District of Columbia, 808 F.3d at 83-84.

108 *Id.* at 84.

109 *Wrenn*, 107 F. Supp. 3d at 5.

110 *Id*. at 6.

111 *Id*. at 6-8.

more than a "de minimus effect" on the Second Amendment rights that they barred.[112] Senior Judge Scullin decided that the plaintiffs had a substantial likelihood of success on the merits when he balanced out the law's implications; specifically, he weighed the clear infringement of the individual rights that the Second Amendment seeks to protect against the unsupported claim that fewer law abiding citizens legally obtaining handgun permits would somehow reduce murders, robberies, and rapes in the District.[113]

Next, the *Wrenn* court relied on a comparison between violations of the First Amendment and violations of the Second Amendment to determine that a failure to provide for a preliminary injunction would amount to irreparable harm to the public.[114] Senior Judge Scullin relied on *Ezell v. City of Chicago*, which stated that constitutional violations, particularly First Amendment violations, were typically presumed to impose irreparable harm on those denied the freedoms guaranteed by the Constitution.[115] Senior Judge Scullin then reasoned that the harm felt by a denial to exercise free speech is similar to the harm felt by denial to bear arms for self-defense, especially since both harms are exceptionally difficult to monetize in any meaningful way.[116] Building off of this position, the *Wrenn* court also concluded that a denial of constitutional rights inevitably runs contrary to the public interest, which satisfied the fourth prong of the evidentiary test for a preliminary injunction.[117]

The test for a preliminary injunction also required a balance of equities, and the *Wrenn* opinion stated that the harm to law-abiding citizens seeking a lawful handgun permit in the District outweighed the unsupported harm asserted by the defendant.[118] Regardless of whether District residents must show that they have some elevated need for protection, they must still undergo some of the most rigorous background checks and training requirements in the nation to apply for a gun permit, limiting the potential for incompetent or dangerous individuals receiving permits.[119] The injunction sought was very lim-

112 *Id*. at 8.
113 *See id*. at 11-12.
114 *Id*. at 12-13.
115 *See* Ezell v. City of Chicago, 651 F.3d 684, 699 (7th Cir. 2011).
116 Wrenn v. District of Columbia, 107 F. Supp. 3d 1, 12 (D.D.C. 2015).
117 *Id*. at 13-14.
118 *Id*. at 13.
119 *Id*.

ited and would only eliminate the unconstitutional good or proper cause requirements and none of the other stringent safeguards in place. Additionally, the defendants in *Wrenn* admitted that they were not concerned with law-abiding citizens obtaining handguns, essentially eliminating any argument that that the injunction would harm the District's interests.[120] Accordingly, the court found that equities weighed in favor of the plaintiffs seeking the injunction.[121]

Ultimately, the *Wrenn* court decided that the opponents of the District's new handgun permit regulations were entitled to a preliminary injunction against enforcement of the good cause element of the application process.[122] Although the preliminary injunction was granted in May 2015, a reviewing court ultimately nullified it in December 2015 based on an element unrelated to the merits of the initial decision.[123] The D.C. Circuit Court of Appeals vacated Senior Judge Scullin's judgment after determining he lacked the necessary jurisdiction to rule on the constitutionality of elements of D.C. gun permit laws because he was merely a sitting judge on the D.C. District Court.[124]

While opponents to any change affecting the stringent gun permit standards will dwell on the nullification of Senior Judge Scullin's ruling, the court of appeals did not attack the substance of the opinion in any form, which allows for the same arguments to be advanced in the future.[125] What is most telling concerning the nullification of Senior Judge Scullin's opinion because of jurisdictional issues and whether the current handgun laws in the District will remain in place is that his home jurisdiction of New York has very similar laws pertaining to handgun registration.[126] Senior Judge Scullin regularly presides over cases in a jurisdiction that require a showing of elevated need for the granting of a concealed carry permit, and yet he ruled that the requirement to demonstrate such need for a handgun permit impedes

120 *Id*.

121 *Id*. at 14.

122 Wrenn v. District of Columbia, 107 F. Supp. 3d 1, 14 (D.D.C. 2015).

123 Wrenn v. District of Columbia, 808 F.3d 81, 84 (D.C. Cir. 2015).

124 *Id.* at 83-84.

125 *See id.*

126 *Compare* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 83-84 (2d Cir. 2012) (involving New York penal law requiring "proper cause," defined as a special need for self-protection, for a full-carry concealed handgun license), *with Wrenn*, 107 F. Supp. 3d at 3-4 (involving District of Columbia license to carry law requiring a license applicant show "good reason to fear injury to his or her person or property or . . . any other proper reason for carrying a pistol.").

on the Second Amendment as outlined in the *Heller* and *Palmer* decisions.[127] If a judge from a foreign jurisdiction with almost identical gun restrictions comes to the conclusion that District laws are unconstitutional, then it is likely only a matter of time before judges in the District conclude the same.[128]

II. ANALYSIS

Although the Second, Third, and Fourth Circuits contend that good cause requirements for permit seekers are acceptable restrictions on the Second Amendment, they effectively deny the vast majority of citizens from obtaining Second Amendment protection outside of the home.[129] Denying the majority of law-abiding citizens their Constitutional right extends beyond the realm of restriction and undermines the Constitution.[130] The only appropriate course of action after *Palmer* is to end the unreasonable practice of good cause restrictions on gun permits.

Section A will consider the conclusions of the *Heller* and *McDonald* cases as well as how good cause requirements violate the Supreme Court's interpretation of the Second Amendment. Section B will consider the present circuit split, specifically the flawed reasoning of the Second, Third, and Fourth Circuits pertaining to the constitutionality of good cause requirements. Section C will consider the District's current handgun permit requirements, which effectively continue the pre-*Palmer* denial of Second Amendment rights.

A. *The Supreme Court on the Constitutional Rights of the Average Law-Abiding Citizen*

Good cause requirements that limit the use of handguns outside of the home arbitrarily deny Second Amendment rights as outlined in *Heller*.[131] *Heller* placed emphasis on the right of law-abiding citizens to protect themselves through the use of arms and did not require any showing of past threats or dangerous situations for citizens to keep

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127 *See Wrenn*, 107 F. Supp. 3d. at 6-7, 14.

128 *See id.* at 14.

129 *See* Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013); *Kachalsky*, 701 F.3d at 101.

130 *See* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1167 (9th Cir. 2014).

131 *See id*.

handguns in their homes for protection.[132] Because citizens are not required to show a heightened need for self-defense in the home, they should not be required to show a heightened need for self-defense in public areas where violent attacks against them are much more likely.[133] The Second Amendment does not now, nor has it ever limited the right of self-defense to those who have been previously subjected to a dangerous situation that required the use of a gun.[134]

Both *Heller* and *McDonald* ultimately decided that handgun bans were unconstitutional because they unreasonably limited the assurance of self-defense present in the Second Amendment.[135] The logical extension of this simple decision is that it would be naïve to claim that an individual walking down the streets of Chicago possesses less of a need for self-defense than he does while he is eating dinner within the secure confines of his home. By limiting handgun permits in a manner that ensures that the vast majority of applicants interested in self-defense are turned away, good cause requirements undermine the reasoning behind *Heller* and re-write the Second Amendment to exclude both the common understandings of the terms "bear" and "self-defense."[136]

Good cause requirements impose hurdles that not only limit self-defense through the carrying of a handgun, but also destroy the self-defense right altogether for the vast majority of applicants who cannot prove that they were previously assaulted or have documentation of an impending assault.[137] The Supreme Court has decided that the Second Amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.[138] The District imposing restrictive good cause requirements on its citizens perpetuates the fallacy that limiting handgun ownership outside of the home to individuals with documentation of past assaults conforms either to the letter or the spirit of the Second Amendment. *Heller* not only limited the examples of restricted gun ownership to sensitive areas and individu-

132 *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

133 Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).

134 *See Heller*, 554 U.S. at 592.

135 McDonald v. City of Chicago, 561 U.S. 742, 791 (2010); *Heller*, 554 U.S. at 636.

136 *Moore*, 702 F.3d at 935-36.

137 *See* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014).

138 *Moore*, 702 F.3d at 942.

als who pose a genuine risk to the safety of others, but also advocated for the individuals the Second Amendment should protect.[139]

The Second Amendment itself is a product of the interest balancing of the people, and a new balancing cannot be imposed to deny the rights "of law-abiding, responsible citizens to use arms in the defense of hearth and home."[140] *Heller*'s emphasis on both "responsible" and "law abiding" established a template for the citizen who is guaranteed Second Amendment rights, a template that did not exclude citizens who could not demonstrate a need for self-defense greater than that of their fellow responsible and law-abiding Americans.[141] The good cause restrictions effectively deny constitutional rights to a majority of the population, rather than enforcing *Heller*'s position that a majority of citizens, absent some elevated risks, are entitled to avail themselves of the Second Amendment's protection.[142]

B. *Application of the* Heller *Decision to the Circuit Split and the Fallacy of Good Cause Constitutionality*

To determine what the District will ultimately decide concerning restrictions on its eligibility for gun permits, and whether that decision will conform with the Second Amendment, it is important to first consider the developing circuit court split over the constitutionality of "good and proper cause" restrictions. In one camp, several circuits tout the restrictive requirement to be sound on constitutional grounds; they claim the requirements do not infringe on the essential elements of the Second Amendment which are still reserved for many citizens within their homes or places of business, and that they do not offend the rights of a select few who can provide documentation that they have a highly elevated need for self-defense.[143] Additionally, those circuits supporting good cause requirements contend that, even if the requirement infringes on Second Amendment rights, such restrictions are necessary to enforce the public policy of collective safety over the private right of individual self-defense.[144] *Woollard* suggested that

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139 *See Heller*, 554 U.S. at 626-27, 634-35.

140 *Id*. at 635.

141 *See id*. at 634-35.

142 *Id*.

143 *See* Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876, 882 (4th Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).

144 *See Drake*, 724 F.3d at 439; *Woollard*, 712 F.3d at 882; *Kachalsky*, 701 F.3d at 97.

individuals possess a diminished right to self-defense outside of the home, allowing for government interests to outweigh the burdens imposed by good cause requirements.[145]

In the argument's other camp, critics of the requirements suggest that the core emphasis of the Second Amendment, the individual right to self-defense, is necessarily violated when state governments impose arbitrary definitions on what qualifies as self-defense.[146] They argue good cause requirements amount to the blatant destruction of the Second Amendment, rather than merely imposing limiting requirements, and that no amount of balancing may justify such an affront to the Constitution.[147]

Because forcing law-abiding citizens to produce proof of past attacks or specific threats to qualify for a handgun permit excessively burdens the core principles of the Second Amendment and individual rights, there can be no interest balancing between possible public policy goals and individual rights.[148] So long as citizens are forced to obtain specific evidence that their own lives are in danger to exercise a constitutional right, the good cause requirements do not meet the constitutional requirements of the Second Amendment as determined by the Supreme Court.[149]

Drake's requirement, that a handgun permit be proven as one's only way to avoid a life-threatening encounter, fails scrutiny as it can be argued that a handgun is never the only means to avoid a dangerous situation.[150] Under *Drake*'s logic, a citizen who was once robbed at knife-point could be categorically denied a handgun permit because there are other methods to avoid such violent acts, like avoiding city streets or public transportation after dark, or only leaving one's residence when accompanied by a friend.[151] Individuals are not granted free reign to fight back against their attackers with unnecessary force, but they should be granted the right to pursue reasonable methods of self-defense.

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145 *Woollard*, 712 F.3d. at 876.

146 *See, e.g.*, Peruta v. Cty. of San Diego, 742 F.3d 1144, 1167 (9th Cir. 2014); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

147 *Peruta*, 742 F.3d at 1167.

148 *Id.* at 1167-68; *Moore*, 702 F.3d at 942.

149 *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008); *Peruta*, 742 F.3d at 1167-68; *Moore*, 702 F.3d at 942.

150 *See* Drake v. Filko, 724 F.3d 426, 439 (3d Cir. 2013).

151 *See id.* at 428-30.

Unfortunately, *Drake* conformed to the letter of the *Heller* decision and not the spirit, which was to ensure the constitutional guarantee to the right of self-defense, a right which is "most acute within the home" but certainly also present outside of one's domicile where violent attacks are most likely to occur.[152]

Drake acknowledged the Second Amendment as determined by *Heller* may have some application beyond the confines of the home, but it refused to delve into what these applications may be, despite clear confusion over those exact issues.[153] Mainly, the Third Circuit in *Drake* relied on the presence of similar long-existing laws in other jurisdictions as evidence that good cause requirements do not substantially infringe on the core elements of the Second Amendment.[154]

Heller did state that there were certain undeniable restrictions that could be imposed on handgun ownership, but it limited its examples to two categories, neither of which were subject to the good cause requirement.[155] First, the Court stated that certain public places such as government buildings, schools, and private businesses could ban guns from their premises.[156] Second, the Court suggested that minors, convicted felons, the mentally unstable, and illegal aliens could not carry handguns, presumably because they pose an elevated danger to themselves or others by virtue of inexperience handling firearms or malicious intent.[157] While the Court stated that its list of accepted restrictions was not exhaustive, individuals who wish to protect themselves from violent attacks but who cannot prove themselves currently in danger of an imminent attack only preventable with a handgun do not fit into either of the two broad categories.[158] Areas where a person may become the victim of violent crime are not limited to schools or government buildings, and an adult who has a clean criminal record, no mental health problems, and who can demonstrate basic gun safety need not show that he is being stalked by an armed assailant to prove that he does not pose an overt danger to himself or the

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152 *Id*. at 444 (Hardiman, J., dissenting) (quoting District of Columbia v. Heller, 554 U.S. 570, 628 (2008)).

153 *Id*. at 430-31.

154 *Id*. at 438.

155 *See* District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008); *Drake*, 724 F.3d at 428-29, 438.

156 *Heller*, 554 U.S. at 626-27.

157 *Id*.

158 *See id*.

public.[159] Unfortunately, these law-abiding citizens are denied their Second Amendment rights because of good cause requirements.[160]

Kachalsky, much like *Drake*, acknowledged *Heller* only to the extent that the Court outlawed bans on handguns within the home while allowing for some restrictions in public.[161] Like *Drake*, the opinion declined to investigate the examples listed in *Heller* and selectively pulled out the phrase that the listed restrictions were "not exhaustive."[162] Rather than considering *Heller*'s suggestions for reasonable limitations, the *Kachalsky* court cited a Tennessee case decided more than 150 years ago to show that similar restrictions exist.[163] Additionally, the *Kachalsky* court acknowledged that there is some ambiguity over the constitutionality of its restrictions in other circuits, but rather than apply this ambiguity to the issue at hand, the court simply concluded that because the peripheral facts of its case did not match up explicitly with those of the other cases which damage the good cause argument, it would refrain from even trying to make the comparison.[164]

Because the standard in New York existed and had existed for some time, the court in *Kachalsky* refused to reasonably consider that changes in the legal landscape, particularly the Supreme Court's renewed emphasis on self-defense as the core principle of the Second Amendment and recent decisions by other circuits condemning proper cause restrictions, could mean that its handgun laws violated the Second Amendment.[165] *Heller* and *McDonald* showed a movement away from the strict handgun laws that were nevertheless enforced in *Kachalsky*.[166] *Woollard* relied on *Kachalsky*'s simplification of the *Heller* decision as free reign to continue enforcing anything less than an outright ban on handguns outside of the home, interpreting the Court's statement, that the right to self-defense secured by the Second Amendment outside of the home is not unlimited, to mean that the average law-abiding citizen who wished to protect himself

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159 *See id.*

160 *See id.*; *Drake*, 724 F.3d at 440; Woollard v. Gallagher, 712 F.3d 865, 869-70 (4th Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 88-87 (2d Cir. 2012).

161 *Kachalsky*, 701 F.3d at 88.

162 *Id*. at 89.

163 *Id.* at 96.

164 *Id*. at 91.

165 *Id.*

166 *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010); District of Columbia v. Heller, 554 U.S. 570, 636 (2008); *Kachalsky*, 701 F.3d at 88.

with a handgun outside of his home could not do so, reserving the basic right for an incredibly exclusive class.[167]

Heller may have stopped short of defining the full scope of the Second Amendment, but Justice Scalia explained that, because it was the Court's first effort at defining the right to keep and bear arms, the Court could not explicitly cover all aspects of the right.[168] The appropriate deference should be paid to the Court's decision in *Heller*. Merely maintaining good cause restrictions because they were not explicitly banned rather than considering their constitutionality under the fundamental elements of the *Heller* decision confuses the underlying intent of the Court.[169]

In *Woollard*, the Fourth Circuit made broad and unquantifiable statements to justify its assertion that the public necessity of ensuring a limited number of registered handguns on the street outweighed the private right to self-defense.[170] The court claimed that the number of violent crimes had increased in recent years and that there was a reasonable connection between these violent crimes and guns owned by citizens who could not prove an elevated need for self-defense.[171] The conclusions reached by the *Woollard* court on public interest, much like those concerning the scope of permissible regulations in *Heller*, were overly simplistic and not supported by proper analysis.[172] *Woollard* only considered the improperly basic assumption that more gun permits for law-abiding citizens who could not show a prohibitively high need for elevated security would undoubtedly lead to more violent crime.[173]

The majority in *Heller* rejected "free-standing interest balancing" that pitted private Second Amendment rights against broad public concerns.[174] The Court in *Heller* stated, "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[175] Allowing judges to decide on a case-by-

167 *See* Woollard v. Gallagher, 712 F.3d 865, 874 (4th Cir. 2013).

168 *Heller*, 554 U.S. at 635.

169 *See id*.

170 *See Woollard*, 712 F.3d at 876-77.

171 *Id.*

172 *See id*.

173 *See id*.

174 District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

175 *Id*.

case basis whether a right is "really worth insisting upon" undermines the very meaning of the word "right."[176]

In a 1913 decision upholding the "good cause law," the New York Court of Appeals referred to a general fear of the handgun as "the handy, the usual, and the favorite weapon of the turbulent criminal class," whereas the Supreme Court in 2008 described the handgun as "the quintessential self-defense weapon."[177] This difference in views between the New York Court of Appeals in 1913 and the Supreme Court in 2008 suggests a clear gap in the reasoning employed by the present Second Circuit and the Supreme Court.[178] Their interpretations of what violates the Second Amendment share a similar disconnection.

The court in *Moore* expressly disagreed with the Second Circuit's analysis of the scope of the Second Amendment, refuting the Second Circuit's assertion that the scope of Second Amendment self-defense is somehow greater within the home than outside of it.[179] *Kachalsky* relied on *Lawrence v. Texas*, a case that limited the government's ability to intrude on the private sexual conduct between adults within the home, to make the misguided conclusion that there is a greater privilege to be enjoyed while within the home versus outside of it in all matters that the government may regulate.[180] The difference between private sexual acts and gun ownership is clear; there is almost no interest in performing a sexual act while in public compared to the home, while the need to protect one's person obviously extends to wherever a person is physically present. If handguns within the home are permitted for the purpose of self-defense and not subject to scrutiny over whether the individual has some clear or pressing need to defend himself from an armed attacker, the scope of the Second Amendment, for the purpose of reasonable self-defense, carries over onto public streets.

Peruta ruled that determining what the scope of the Second Amendment entails is key in resolving what limitations may be consti-

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176 *Id*.

177 *Id*. at 629; Kachalsky v. Cty. of Westchester, 701 F.3d 81, 85, 88 (2d Cir. 2012) (citing People *ex rel.* Darling v. Warden of City Prison, 139 N.Y.S. 277, 284 (App. Div. 1913)).

178 *See Kachalsky*, 701 F.3d at 85; People *ex rel.* Darling v. Warden of City Prison, 139 N.Y.S. 277, 284 (App. Div. 1913).

179 Moore v. Madigan, 702 F.3d 933, 941-42 (7th Cir. 2012).

180 *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003); *Kachalsky*, 701 F.3d at 94; *Moore*, 702 F.3d at 941.

tutionally imposed.[181] The Second, Third, and Fourth Circuit decisions glossed over the full scope to arrive at the simplified conclusion that they need not consider the constitutionality of good cause restrictions because they have yet to be ruled unconstitutional.[182] *Peruta* ruled that self-defense outside of the home is part of the core right to bear arms under the Second Amendment, and good cause restrictions that essentially prohibit that right are unconstitutional and unjustifiable regardless of whatever issue balancing test is applied.[183]

The question at hand in *Peruta* was not merely whether good cause restrictions allow some citizens the ability to carry weapons at some times, but rather whether they permit the "typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense."[184] The obvious answer to this question was "no," because the only citizens who are allowed permits are those who have distinguished themselves from the general public through exceptional circumstances and an almost impossibly high bar.[185] San Diego's policy, similar in this narrow sense to the policies imposed in New York, New Jersey, and Maryland, stated that a typical citizen concerned with personal safety could not distinguish himself from the general population and avail himself of the Second Amendment's protection.[186] So long as the average citizen is treated as an outsider and as unfit for his constitutional rights, the Second Amendment is necessarily violated.

The broad principle of self-defense is necessarily impeded by good cause requirements.[187] The decision in *Peruta* also considered the balance between the Second Amendment and public safety, which the Second, Third, and Fourth Circuits rely on heavily to justify limiting handgun permits.[188] There, the court concluded that any action which effectively serves as a ban on handguns outside of the home so substantially limits the Second Amendment that there must be more than just a mere possibility that the public might benefit from its implementation.[189] Although the circuit court decisions affirming the

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181 Peruta v. Cty. of San Diego, 742 F.3d 1144, 1150 (9th Cir. 2014).

182 *Id*. at 1173; Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874 (4th Cir. 2013); *Kachalsky*, 701 F.3d at 94.

183 *Peruta*, 742 F.3d at 1169-70.

184 *Id*. at 1169.

185 *See id*.

186 *Id.* at 1148, 1173.

187 *See id*. at 1178-79.

188 *Id*. at 1177.

189 Peruta v. Cty. of San Diego, 742 F.3d 1144, 1177 (9th Cir. 2014).

legality of good cause requirements vehemently argue that preventing those who cannot show an elevated need for self-defense will necessarily lead to increased public safety, the decisions lacked concrete facts to support their claims. As the court in *Peruta* reasoned, good cause requirements that essentially weed out all applicants are similar to bans, and no blanket ban may be considered constitutional.[190]

C. *Flaws of the District's Current Gun Permit Process*

The new handgun permit regulations established by the Washington, D.C. Council in the wake of the *Palmer* decision, as well as most good cause permit requirements, conflict with the reasoning set forth in the Supreme Court's rulings in *Heller* and *McDonald*.

First, considering the blatant reluctance of the Council to change the onerous D.C. laws, it is highly likely that the District will continue to set an unreasonably high standard for concealed carry permits.[191] Council Member Muriel Bowser explicitly stated that the Council did not "want to move forward with allowing more guns in the District of Columbia, but we all know we have to be compliant with what the courts say."[192] Despite the changes made necessary by *Palmer*, the District is still in violation of the Second Amendment so long as it imposes good cause requirements that deny permits to citizens seeking self-defense who have no documentation of past attacks or precise threats. There is no guarantee that the new laws will change the actual availability of concealed carry permits. The District will remain free to continue restricting permits under the guise that an individual is not able to produce evidence specific enough to qualify for the good and substantial reason of self-defense.[193] So long as applicants are not able to effectively show that a handgun is the only method that will ensure their safety, these law-abiding citizens will be denied access to a concealed carry permit.[194]

Additionally, there is a high level of deference given to state legislatures which limit open carry permits so that the average law-abiding citizen loses the option of carrying a handgun. Absent independent scientific studies or any substantial proof, it cannot be

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190 *Id*. at 1178-79.

191 DeBonis, *supra* note 5.

192 *Id*.

193 *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

194 *See id*.

assumed that simply keeping handgun permits out of reach of ordinary citizens will inevitably lead to fewer violent crimes, or even fewer handguns. Along these lines, the dissent in *Drake* compared the law to an arbitrary rationing system.[195] The twin assertions of the Second, Third, and Fourth Circuits, that the effects of good cause laws are mere restrictions and do not violate the core principles of the Second Amendment and that the public good resulting from destroying these rights exceeds the harm to the individual, are unsupportable in the wake of the Supreme Court's decision in *Heller* and would effectively "pronounce the Second Amendment extinct."[196]

CONCLUSION

Despite the Washington, D.C. Council's claims that the changes made to the District's permit restrictions, which include good cause requirements, are constitutional, little has effectively changed for the private individual. An infinitely small amount of permits will continue to be awarded and the good cause requirements will continue to violate the core principles of the Second Amendment through excessive limitations on self-defense for the average law-abiding citizen.

195 Drake v. Filko, 724 F.3d 426, 455 (3d Cir. 2013) (Hardiman, J., dissenting).
196 *Heller*, 554 U.S. at 636.