
Constitutional Law—Fourth Circuit Applies Intermediate Scrutiny to Second Amendment Challenge—*Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013)

The Second Amendment to the U.S. Constitution protects the right of an individual to possess a firearm independent of service in a militia, and to use that firearm for traditionally lawful purposes like self-defense.¹ This right is not unlimited and does not obliterate certain prohibitions on individuals' possession of firearms.² Moreover, certain restrictions on the type of firearms individuals can possess have successfully withstood judicial scrutiny.³ In *Woollard v. Gallagher*,⁴ the Court of Appeals for the Fourth Circuit addressed whether Maryland's "good and substantial reason requirement" for the issuance of a handgun permit violated the Second Amendment.⁵ The court held that intermediate scrutiny applied to laws burdening the right to keep and bear arms outside of the home.⁶ Additionally, the court held that the good-and-substantial-reason requirement is reasonably adapted to Maryland's significant interests in protecting public safety and preventing crime, and does not, therefore, violate the Second Amendment.⁷

Outside of a few specified circumstances, if a person in Maryland wishes to carry, wear, or transport a handgun outside of their home, they must first obtain a permit.⁸ The Secretary of the Maryland State Police issues handgun permits,

1. See U.S. CONST. amend. II.; *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (guaranteeing right of individuals to keep and bear arms for purpose of self-defense); see also *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3026 (2010) (recognizing Second Amendment right applicable to states). The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

2. See *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (discussing historically acceptable restrictions on Second Amendment). Restrictions include prohibition of the possession of firearms by the mentally ill and felons, as well as prohibition of the possession of firearms in areas such as schools and government buildings. *Id.*

3. See *United States v. Miller*, 307 U.S. 174, 178-79 (1939) (linking Second Amendment protection to preservation of militia).

4. 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013).

5. See *id.* at 868 (deciding whether requirement violated individuals' right to bear arms for purpose of self-defense).

6. See *id.* at 876 (declaring intermediate scrutiny as appropriate standard of review because of precedent).

7. See *id.* at 868 (holding state's refusal to renew gun permit did not violate Second Amendment rights).

8. See MD. CODE ANN. PUB. SAFETY § 5-303 (West 2013) ("A person [is to] have a permit issued . . . before the person carries, wears, or transports a handgun."). There are numerous enumerated exceptions to this permit requirement. See MD. CODE ANN. CRIM. LAW § 4-203(b) (West 2013) (providing exceptions to permit requirement).

but can only issue one after making enumerated findings.⁹ These findings include whether the applicant's need for a permit meets the good-and-substantial-reason requirement.¹⁰ The Secretary has designated the Handgun Permit Unit (HPU) to determine whether the applicant's need for the permit is good and substantial.¹¹ An applicant can satisfy the good-and-substantial-reason requirement in any one of four ways.¹²

Raymond Woollard obtained a handgun permit in Maryland following a home invasion on December 24, 2002.¹³ During this invasion, Woollard grabbed a shotgun and pointed it at the intruder, but the intruder wrestled it away.¹⁴ Woollard's son then pointed a gun at the intruder, preventing him from moving, while Woollard's wife called the police.¹⁵ The police took two-and-a-half hours to arrive at the Woollard home and apprehend the intruder.¹⁶ The intruder was sentenced to probation for this incident, and was later incarcerated following violations of his probation order.¹⁷ Woollard's first permit renewal was approved in 2006 following the intruder's release from prison, but when he applied for a second renewal in 2009, the HPU and the Handgun Permit Review Board denied his application for failing to satisfy the good-and-substantial-reason requirement.¹⁸

Woollard joined the Second Amendment Foundation, Inc. to initiate a lawsuit in the United States District Court for the District of Maryland, asserting that Maryland's good-and-substantial-reason requirement violated his Second Amendment rights.¹⁹ The district court awarded summary judgment to

9. See § 5-306 (identifying factors applicable to issuance of permit).

10. See § 5-306(a)(6)(ii) (requiring applicant have "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger").

11. See 712 F.3d at 869 (identifying HPU as division responsible for good-and-substantial-reason determination); see also MD. CODE REGS. 29.03.02.04(G) (2013) (directing HPU to consider reasons provided by applicant).

12. See 712 F.3d at 869-70 (identifying avenues to satisfy good-and-substantial-reason requirement). The four categories for meeting the requirement include: business activities, regulated professions, "assumed risk" professions, and personal protection against "apprehended danger." *Id.*

13. See *id.* at 871 (detailing Woollard's reasons for seeking permit). Woollard's son-in-law, while under the influence of drugs, broke into his home while Woollard's wife, children, and grandchildren were present. *Id.* The son-in-law was looking for his wife's car keys in order to drive to Baltimore to obtain drugs. *Id.*

14. See *id.*

15. See *id.*

16. See 712 F.3d at 871

17. See *id.*

18. See *id.* Woollard's request for a second renewal was still based on the 2002 Christmas Eve encounter. *Id.* Despite a lack of contact with his son-in-law following the incident, Woollard believed that a gun was still necessary to protect him against the danger posed by his son-in-law. *Id.* The HPU denied his request because he did not submit any documented threats or incidents that had occurred subsequent to the 2002 Christmas Eve incident that could warrant a finding of reasonable apprehended danger. *Id.*

19. See *id.* at 870-71 (detailing parties to complaint along with reasons for complaint). The complaint named the Secretary of Maryland's State Police along with three members of the Handgun Permit Review Board as defendants. *Id.* at 870.

Woollard's constitutional claim after finding that the requirement failed to satisfy an intermediate scrutiny level of review.²⁰ The Court of Appeals for the Fourth Circuit granted the defendants' appeal and held that Maryland's requirement did pass intermediate scrutiny.²¹ Contrary to the district court's finding, the Fourth Circuit held that there was a reasonable fit between the good-and-substantial-reason requirement and the enumerated state interests, sufficient to satisfy intermediate scrutiny review.²²

Prior to the twenty-first century, most courts interpreted the Second Amendment as securing a collective right to bear arms in connection with service in militias rather than a private, individual right.²³ The Supreme Court, in 1939, confirmed that the Second Amendment's purpose was to protect a collective right of the states in *United States v. Miller*.²⁴ Following this decision, courts applied either rational basis review, or another similar standard, when assessing gun regulations, which resulted in the upholding of nearly all gun regulations.²⁵ In *District of Columbia v. Heller*,²⁶ the Supreme

20. See *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 476 (D. Md. 2012) (dictating reason for summary judgment), *rev'd sub nom.* *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). The court found that Second Amendment protection extends beyond the home and followed circuit court precedent in applying intermediate scrutiny. *Id.* at 467-68. According to the court, Maryland's requirement was designed to protect the substantial government interests of public safety and crime prevention. *Id.* at 473. The court stated, however, that the requirement failed intermediate scrutiny review because it was overly broad and functioned as a rationing system. *Id.* at 474. As a result, the court found that Woollard was entitled to wear and carry a handgun for self-defense outside the home. *Id.* at 475-76. The district court awarded summary judgment to Woollard and permanently enjoined enforcement of the good-and-substantial-reason requirement. *Id.* at 464.

21. See 712 F.3d at 882 (using intermediate scrutiny test pursuant to circuit precedent). The court assumed Second Amendment right was burdened by the good-and-substantial-reason requirement, but determined that "such [a] burden is constitutionally permissible." *Id.*

22. See *id.* at 876-82 (determining Maryland requirement met intermediate scrutiny).

23. See *United States v. Chester*, 628 F.3d 673, 674-75 (4th Cir. 2010) (mentioning former collective right to bear arms understanding of Second Amendment); *Parker v. District of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007) (outlining both collective right and individual right interpretations of Second Amendment); see also Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1134 (2011) (elaborating on collective right adoption by many courts).

24. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding Second Amendment protects only guns related to preservation of well-regulated militia). Following the *Miller* decision, courts consistently read the Second Amendment as protecting a right to bear arms strictly for the purpose of state militia activity and routinely upheld gun regulations. See Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 970-71 (1996) (discussing misinterpretation of *Miller* and its role in perpetuating collective rights view of Second Amendment). Lower courts improperly used *Miller* as a test, stating that if the weapon cannot be shown to have a connection to the maintenance of a militia, it is illegal. *Id.* at 971; see Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 708 (2012) (emphasizing courts' consistent use of collective rights approach in twentieth century).

25. See *Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000) (deciding gun regulation statutes should be evaluated according to rational basis); see also Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1223 (N.H. 2007) (evaluating gun control legislation through reasonableness test); Andrew Peace, Comment, *A Snowball's Chance in Heller: Why DeCastro's Substantial Burden Standard Is Unlikely To Survive*, 54 B.C. L. REV. E. SUPP. 175, 183-84 (2013) (discussing Second Circuit's choice of using substantial burden standard in determining scrutiny level). Courts traditionally employ one of three standards when evaluating violations of

Court ended the collective right interpretation by holding that the Second Amendment gave individuals the right to keep and bear arms for self-defense purposes in their homes.²⁷ The Court did not, however, dictate what standard of review should be employed when determining whether gun regulations violate an individual's Second Amendment right.²⁸ In the later case of *McDonald v. City of Chicago*,²⁹ the Supreme Court further elaborated that an individual's right under the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment, but again failed to clarify what standard of review should be used.³⁰

While the Court in *Heller* deemed rational basis an insufficient standard of review for Second Amendment issues, substantial uncertainty remains in the lower courts as to which standard to apply.³¹ Some courts will apply a heightened level of scrutiny only once it is determined that the regulation operates as a substantial burden on the ability of law-abiding citizens to possess

constitutional rights. Peace, *supra*, at 178. The most deferential standard is rational basis, which requires government action to be rationally related to a legitimate government interest. *Id.* The most stringent is strict scrutiny, which requires the government action to be narrowly tailored to a compelling government interest. *Id.* Intermediate scrutiny falls somewhere in the middle, requiring a substantial relation to an important government interest. *Id.* at 179. Despite the uncertainty surrounding the level of review applicable to a Second Amendment challenge, courts were deferential to gun regulation because it was thought to control violence and increase public safety. See *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 275 (Ill. 1984) (deciding village ordinance prohibiting handgun possession was constitutionally sound). The court commented that gun regulation was specifically designed to decrease violence. *Id.* at 275.

26. 554 U.S. 570 (2008).

27. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (rendering lawful firearms in homes for immediate self-defense constitutionally protected by Second Amendment). The Supreme Court struck down several District of Columbia statutes that prohibited the possession of handguns and required any lawfully owned handguns to be kept inoperable in the home. *Id.* After a careful analysis of the original meaning of the Second Amendment, the Court concluded that the Second Amendment provides an individual the right to keep and bear arms in the home for the purpose of self-defense. *Id.* at 628-34. The Court emphasized, however, that the right given to an individual under the Second Amendment was not unlimited, and the holding did not nullify all prior gun regulations. *Id.* at 626-27. The Court dictated that "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," in addition to the historical prohibition on carrying dangerous and unusual weapons, were still valid. *Id.* Additionally, the Court acknowledged the dangers weapons pose, but suggested states could still implement regulations to combat these dangers. *Id.* at 636.

28. See *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (stating ban would fail any standard of scrutiny). The Court commented that the District of Columbia's prohibition would fail under any of the standards of scrutiny that have been used to evaluate enumerated constitutional rights in the past, but failed to dictate which level of scrutiny to apply. *Id.*

29. 130 S. Ct. 3020 (2010).

30. See *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010). In both *McDonald* and *Heller*, the Court stated that an interest-balancing approach would not be an appropriate level of review, but they failed to specify what standard should apply, instead leaving that determination to the lower courts. See *id.*; see also *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

31. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (dictating inappropriateness of using rational basis review). Justice Scalia stated that rational basis review would be inappropriate in this case because a specific, enumerated right was at issue. *Id.*

and use firearms for self-defense.³² Other courts insist on applying strict scrutiny to all regulations because of the fundamental-right classification of the right to bear arms.³³ Most courts, however, have determined that intermediate scrutiny is applicable for possible Second Amendment violations.³⁴ Intermediate scrutiny is the most commonly used standard of review, with several courts having noted it is used for other Amendment violations, provides guidelines for assessing whether or not the standard is met, and allows most gun regulations to remain intact.³⁵

32. See *Nordyke v. King*, 644 F.3d 776, 788 (9th Cir. 2011) (deciding ordinance banning gun shows did not violate Second Amendment right); see also *United States v. DeCastro*, 682 F.3d 160, 164-65 (2d Cir. 2012) (deciding heightened scrutiny not applicable because federal statute did not substantially burden Second Amendment right); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (reasoning burden must exist for application of strict or intermediate scrutiny); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (discussing levels of burden dictating which standard of review to apply). The court stated that only regulations substantially burdening the right of an individual to keep and bear arms would receive heightened scrutiny. See *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011). The court implied that a substantial burden would not exist if there were reasonable alternative means for getting a firearm. *Id.* at 787-88.

33. See *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (applying heightened standard of scrutiny resembling strict scrutiny to firearm regulation); see also *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009) (interpreting *Heller* Court as dictating strict scrutiny review for Second Amendment challenge); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 693 (2007) (analyzing arguments for application of strict scrutiny). But see Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 484 (2004) (discussing gun laws and regulation as political with social context rather than legal one). A misconception exists that any time an individual right is at issue, strict scrutiny must be applied. *Id.* This is an incorrect assumption because there are various other claims of individual rights under the Constitution that only receive rational basis review. *Id.*; see also Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J.L. & PUB. POL'Y 203, 206 (2010) (analyzing *Heller* decision and its effect on courts and gun regulation). Justice Scalia, the same justice writing the majority opinion in *Heller*, cited the infamous footnote four of *Carolene Products* for the proposition that the Court will heavily protect some rights, like those in the Bill of Rights, while practicing judicial deference to others. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). Because the Second Amendment is an enumerated right, it seems Justice Scalia was insinuating that it should also be heavily protected. See Levy, *supra*, at 206; see also Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago: *Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011) (arguing support for strict scrutiny found in *Heller*).

34. See *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (implying intermediate scrutiny should be applied to Second Amendment challenges); *Powell v. Tompkins*, 926 F. Supp. 2d 367, 389-90 (D. Mass. 2013) (acknowledging First Circuit's standard of applying intermediate scrutiny); see also John W. Whittlesey, Comment, *Second-Amendment Scrutiny: Firearm Enthusiasts May Win the Battle But Ultimately Lose the War in District of Columbia v. Heller*, 58 CASE W. RES. L. REV. 1423, 1425-39 (2008) (discussing which of five different standards of review will end up most prevalent). State courts mainly apply a reasonableness standard, while the federal courts rely on intermediate scrutiny to uphold most gun regulation in the interest of public safety. See Whittlesey, *supra*.

35. See *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) (noting certain First Amendment rights only receive intermediate scrutiny); see also Whittlesey, *supra* note 34, at 1438 (stating federal courts prefer intermediate scrutiny because it allows passage of most gun regulation). The *Marzzarella* court highlights several guidelines for analyzing whether intermediate scrutiny has been met, some of which include: the fit between the regulation in question and the objective must be reasonable rather than perfect; the regulation does not necessarily have to be the least restrictive means of serving the specified interest; and the regulation cannot burden more than is reasonably necessary. *United States v. Marzzarella*, 614 F.3d 85, 97-98

Circuit courts have acknowledged that post-*Heller* Second Amendment challenges can elicit more than one standard of review.³⁶ For example, while the Fourth Circuit has consistently applied intermediate scrutiny to Second Amendment claims, it has justified each use of intermediate scrutiny differently.³⁷ In *United States v. Chester*, the court rationalized its application of intermediate scrutiny by using the appellant's criminal record to distinguish him from the law-abiding, responsible citizen who receives protection of his core right existing under the Second Amendment.³⁸ The Fourth Circuit in *United States v. Masciandaro* again determined that intermediate scrutiny applied to the appellant's Second Amendment claim because the appellant's possession of his gun outside of his home made his possession no longer a fundamental core right.³⁹ As a result, Fourth Circuit precedent strongly indicates that intermediate scrutiny should apply to Second Amendment claims.⁴⁰

In *Woollard v. Gallagher*, the Fourth Circuit addressed both the question of which standard of review to apply to Second Amendment challenges, and whether or not the State of Maryland met that standard.⁴¹ The court began its analysis by reviewing the development of the Second Amendment right to bear arms and deemed it appropriate to apply a two-part approach to the claim.⁴²

(3d Cir. 2010).

36. See *United States v. Marzzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010) (stating Second Amendment claims not limited to one standard of review); see also *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (acknowledging lack of consensus surrounding level of review).

37. See *United States v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011) (deciding not fundamental core right because appellant was outside of his home); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) (using appellant's criminal status to distinguish application of Second Amendment from core rights).

38. See *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) (emphasizing importance of satisfying core right of Second Amendment). The court determined that the core Second Amendment right allows law-abiding, responsible citizens to possess and carry a weapon for self-defense. *Id.* Even though the appellant was in his home, his criminal status meant his claim did not fall within this core right. *Id.* The court held that without the presence of a core right, intermediate scrutiny would suffice as a standard of review. *Id.*

39. See *United States v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011) (using *Chester* as guidance in applying intermediate scrutiny). The court held that the appellant's possession of a gun in a public park fell outside the protection afforded by the Second Amendment's core fundamental right protecting an individual's possession of a firearm in the home. *Id.* The court determined that in deciding the standard of review to apply, they must look at "the nature of a person's Second Amendment interest, the extent to which those interests are burdened by the government regulation, and the strength of the government's justification for the regulation." *Id.* at 470. As a result, the court concluded that only intermediate scrutiny applied. *Id.* at 471.

40. See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (rationalizing intermediate scrutiny application based on precedent).

41. See 712 F.3d at 882.

42. See *id.* at 874-75; see also *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (deciding two-part approach appropriate for Second Amendment claims); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (interpreting *Heller* as dictating two-prong analysis for Second Amendment claims). The court acknowledged that many other circuits analyze Second Amendment claims with a two-part approach consisting of two questions. 712 F.3d at 874-75.

[T]he first question is whether the challenged law imposes a burden on conduct falling within the

Relying on precedent from the Fourth Circuit, the court decided that intermediate scrutiny should be applied to this Second Amendment claim.⁴³ Next, the court identified the government's substantial interest in protecting public safety.⁴⁴ Lastly, the court looked at whether Maryland's good-and-substantial-reason requirement was reasonably adapted to the State's substantial interests and decided affirmatively, holding that the requirement increased public safety and prevented crime by decreasing the number of handguns carried in public.⁴⁵ Although the Second Amendment does give an individual the right to bear arms for the purpose of self-defense, the court held that this right was subject to regulations and that Maryland's good-and-substantial-reason regulation only needed to pass intermediate scrutiny.⁴⁶

Although the Fourth Circuit quickly dismissed strict scrutiny's applicability to this Second Amendment claim because it was following Fourth Circuit precedent, the court erred in its lack of analysis.⁴⁷ One common, albeit weak,

scope of the Second Amendment's guarantee 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.

Id. at 875 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (internal quotation marks omitted)). Like most courts, the court decided to begin with the second question. *Id.* at 875-76. The court assumed that the *Heller* right existed outside the home and did not discuss that in its analysis. *Id.* at 876.

43. *See* 712 F.3d at 876. The court specifically applied the reasoning in *Masciandaro*. *Id.* In *Masciandaro*, the court explained the assumption that any law burdening a fundamental core right would fall subject to strict scrutiny. *See United States v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011). Because the issue in this case fell outside the home, however, regulation is traditionally more appropriate because of the greater risk to public safety. *See id.* Therefore, only intermediate scrutiny needed to be applied. *See id.* at 471. *But see United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) (deciding intermediate scrutiny applied since not law-abiding citizen).

44. *See* 712 F.3d at 876-78 (analyzing merit of substantial interest). The court was satisfied by the state's legislative findings that violence, especially gun violence, was a serious issue in Maryland. *Id.* at 877. The court then, after looking at other courts' decisions, determined that protecting public safety and preventing crime were substantial government interests, therefore satisfying the first prong of intermediate scrutiny. *Id.* at 877-78.

45. *See id.* at 878-82 (explaining court's conclusion). The court needed to decide if the state had shown that there was a reasonable, not necessarily perfect, fit between the governmental interest and the gun regulation. *Id.* at 878. The "reasonable fit" test would be satisfied if enforcement of the good-and-substantial-reason requirement substantially served the State's interests. *Id.* at 878-79. The good-and-substantial-reason requirement did not have to be the least intrusive method of achieving the state's interest or place absolutely no burden on an individual's Second Amendment right. *Id.* The court determined that because this requirement reduced the number of handguns carried in public, it served the objective of protecting safety and preventing crime. *Id.* at 879-80. The court also stated that the regulation was not overbroad because it ensured that people who needed to protect themselves still could. *Id.* at 880-82. To reach this holding, the court stressed the need to provide deference to the legislature. *Id.* at 881-82 (citing *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

46. *See id.* at 882 (concluding regulation burdening right constitutionally permissible because it passes intermediate scrutiny).

47. *See Levy, supra* note 33, at 208 (criticizing courts' willingness to default to legislative or executive impulses rather than analyze themselves). Levy discusses the courts' lack of effort in defending constitutional rights and the need to vigorously defend the people's rights. *Id.* Levy also comments that the judiciary exists to constrain the government and to protect constitutional rights, implying that one level of scrutiny needs to be

argument for using strict scrutiny is that other Amendments in the Bill of Rights receive strict scrutiny analysis, and so the Second Amendment should too.⁴⁸ This argument is vulnerable to attack, however, because many Bill of Rights Amendments do not, in practice, receive strict scrutiny.⁴⁹ A stronger argument for strict scrutiny's application is that it is a fundamental right distinguishable from others because it deals directly with an individual's health and safety.⁵⁰ Without independently considering strict scrutiny arguments, the Fourth Circuit relied heavily on *Masciandaro* as precedent for applying intermediate scrutiny—a case that declined to apply strict scrutiny out of fear that its application would void a large amount of gun regulations.⁵¹ This assumption is not necessarily correct, and the Fourth Circuit should not have relied so heavily on this precedent in its determination that intermediate scrutiny should apply.⁵²

decided on and applied. *Id.*

48. See Winkler, *supra* note 33, at 693 (analyzing arguments for application of strict scrutiny); see also *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (stating Bill of Rights status does not guarantee strict scrutiny); *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) (noting one argument for strict scrutiny pertains to Bill of Rights status like First Amendment).

49. See Winkler, *supra* note 33, at 693-94 (emphasizing many amendments do not receive strict scrutiny). Winkler points out that the Fourth, Fifth, and Sixth Amendments do not normally receive strict scrutiny. *Id.* He acknowledges that while the First Amendment has received strict scrutiny in the past, it does not always, and when it does receive such scrutiny, it is used very sparingly. *Id.*; see *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (discussing few times First Amendment issues receive strict scrutiny). The Court suggests that the Second Amendment should not receive strict scrutiny review simply because First Amendment challenges occasionally receive such review. See *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). Applicability of strict scrutiny to the First Amendment hinges on the nature of the conduct regulated as well as the degree to which it burdens the right. *Id.*

50. See Rosenthal & Malcolm, *supra* note 33, at 455 (arguing strict scrutiny should apply to Second Amendment challenges). One author argues that “[s]ince fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights.” *Id.*; see Winkler, *supra* note 33, at 696-97 (discussing strength and weakness of fundamental right argument). While Winkler recognizes some connection between fundamental rights and strict scrutiny, he notes that not all fundamental rights receive this level of scrutiny. *Id.*; see *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3042 (2010) (suggesting Second Amendment guarantees fundamental right); *Nordyke v. King*, 644 F.3d 776, 785 (9th Cir. 2011) (noting automatic application of strict scrutiny to gun regulations not appropriate). But see Levy, *supra* note 33, at 206-07 (distinguishing Second Amendment from other amendments establishing fundamental rights). Simply because not all fundamental rights receive strict scrutiny does not mean the Second Amendment should not. *Id.* Since the Second Amendment has a direct effect on health and safety, it should be distinguished from First Amendment comparisons and, therefore, the same level of scrutiny need not be applicable to both. *Id.*

51. See 712 F.3d at 876 (relying on *Masciandaro* for scrutiny standard). In *Masciandaro*, the court was concerned that strict scrutiny would not allow gun regulations to pass. See *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011). The court also emphasized that once outside the home, the threat guns pose to public safety increases, therefore a lesser showing of the burden imposed on the Second Amendment right is necessary and intermediate scrutiny should be applied. *Id.*

52. See *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009) (deciding strict scrutiny should apply to Second Amendment claim). The court stated that *Heller*'s label of the Second Amendment as a fundamental right and its categorization with other fundamental rights that receive strict scrutiny implied that Second Amendment rights should also receive strict scrutiny. *Id.* at 1231. In *Engstrum*, the court deemed a law regulating guns passed the strict scrutiny requirements, therefore challenging the belief

The other major source of precedent for the Fourth Circuit's application of intermediate, rather than strict, scrutiny came from *Chester's* ruling.⁵³ This was another inappropriate reliance void of any further analysis because the court in *Chester* dealt with a situation falling outside of the core right protected by the Second Amendment.⁵⁴ Instead, the Fourth Circuit should have analyzed which level of scrutiny should apply by determining to what degree the regulation burdened the individual's core right to bear arms for self-defense.⁵⁵ The Maryland requirement that an applicant must provide proof of a good-and-substantial reason for obtaining a permit does substantially burden Woollard's right to bear arms for the purpose of self-defense.⁵⁶ Because Woollard's right

that strict scrutiny leads to little gun regulation and a decrease in public safety. *Id.* at 1232-35. The court emphasized that while strict scrutiny would make the scope of legislation narrow, legislation would still be possible. *Id.* at 1235.

53. See 712 F.3d at 878 (identifying *Chester* as precedent rejecting automatic application of strict scrutiny for fundamental rights). The court in *Chester* ruled out applying strict scrutiny to all fundamental right issues, and instead applied intermediate scrutiny to the Second Amendment claim and determined that the regulation passed this threshold. See *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010). The *Woollard* court relied on *Chester* in determining the appellees' claim that strict scrutiny should be applied to his fundamental right was not valid. See 712 F.3d at 878-79. The *Chester* case, however, emphasized the fact that *Chester's* status as a non-law-abiding citizen rendered him exempt from the core right identified under the Second Amendment and, therefore, only intermediate scrutiny was necessary. See *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); see also *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 467-68 (D. Md. 2012) (recognizing need to distinguish *Chester* from *Woollard's* situation), *rev'd sub nom.* *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

54. See *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (concluding intermediate scrutiny applicable). The court specifically states that intermediate scrutiny should be applied over strict scrutiny for *Chester* and people similarly situated to him. *Id.* *Woollard* is not similarly situated to *Chester* because *Woollard* is a law-abiding, responsible citizen rather than a criminal, and therefore it is inappropriate to blanket his claim under intermediate scrutiny in reliance on *Chester's* precedent. *Contra* 712 F.3d at 877-78 (insinuating *Woollard's* situation is analogous enough to *Chester's* to warrant application of *Chester's* ruling).

55. See *United States v. Marzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010) (discussing using burden of right to determine level of scrutiny). The court in *Marzarella* determined intermediate scrutiny applied after holding that the gun regulation barring the possession of firearms without valid serial numbers did not pose a severe burden on the possession of firearms. See *id.* at 93-97; see also *Nordyke v. King*, 644 F.3d 776, 785 (9th Cir. 2011) (recognizing substantial-burden framework is necessary approach in determining standard of review). The court in *Nordyke* reasoned that the ordinance banning gun shows did not substantially burden the right of an individual to bear arms. *Nordyke v. King*, 644 F.3d 776, 787-88 (9th Cir. 2011). Because the ordinance did not block alternative avenues for possessing guns in situations that would actually facilitate self-defense, the court determined the Second Amendment right was not substantially burdened and intermediate scrutiny was appropriate. *Id.* Similarly, the court in *United States v. DeCastro* looked to see if a regulation prohibiting traveling out of state to obtain a handgun for self-defense substantially burdened the Second Amendment right. See *United States v. DeCastro*, 682 F.3d 160, 163 (2d Cir. 2012) (determining heightened scrutiny only applicable if regulation substantially burdens right). Because the regulation still allowed an individual to purchase a handgun in his or her own state, it did not substantially burden the Second Amendment right and intermediate scrutiny applied. *Id.* at 168.

56. See MD. CODE ANN. PUB. SAFETY § 5-303 (West 2013) (setting forth Maryland's contested gun regulation). Under Maryland's Public Safety Code, *Woollard* had no alternative to arm himself in public, which is where he could likely run into his son-in-law. 712 F.3d at 871. While his son-in-law had made no recent threats, the 2002 incident evidenced his violent nature and propensity to abuse drugs. *Id.* Without a gun permit, a law-abiding, responsible citizen like *Woollard* cannot exercise his right to self-defense against a violent, drug-driven individual. *Id.* Therefore, this violated his right guaranteed under the Second

to bear arms for the purpose of self-defense was substantially burdened, the court should have applied strict scrutiny to Maryland's regulation.⁵⁷ Instead, the Fourth Circuit blindly followed the majority of courts in applying intermediate scrutiny to the Second Amendment claim.⁵⁸

Most federal courts agree that *Heller* calls for strict or intermediate scrutiny and almost all choose to apply intermediate when forced to choose.⁵⁹ Courts apply intermediate scrutiny because it provides some protection for the Second Amendment core right within the home, while still allowing most gun regulation to remain intact.⁶⁰ However, too much emphasis has been placed on the word "home" from the *Heller* statement and too little on "law-abiding responsible citizen."⁶¹ Also, the presumption that applying strict scrutiny would void the majority of gun regulation is simply incorrect.⁶² The Fourth

Amendment, which the court assumed existed outside the home. *Id.* at 876. Woollard's situation can be differentiated from Masciandaro's—that is, the one on which the district court's decision relied on to apply intermediate scrutiny: unlike Masciandaro, Woollard was threatened by a violent person who exists in the wider world. See *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 468 (D. Md. 2012) (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011)), *rev'd sub nom.* *Woollard v. Gallagher*, 712 F.3d 864 (4th Cir. 2013).

57. See, e.g., *United States v. DeCastro*, 682 F.3d 160, 168-69 (2d Cir. 2012) (dictating heightened scrutiny inappropriate without substantial burden); *Nordyke v. King*, 644 F.3d 776, 787 (9th Cir. 2011) (confirming substantial burden exists when regulation presents no alternative); *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) (suggesting burden must severely limit possession of firearms to warrant strict scrutiny).

58. See *Kiehl*, *supra* note 23, at 1141-42 (commenting on Fourth Circuit following trend towards applying intermediate scrutiny); see also *Peace*, *supra* note 25, at 181 (discussing courts' attempts to either avoid standard of review analysis or default to intermediate scrutiny); *Rostron*, *supra* note 24, at 752-53 (acknowledging trend among lower courts to default to intermediate scrutiny with Second Amendment claims).

59. See *United States v. Marzzarella*, 614 F.3d 85, 95-96 (3d Cir. 2010) (stating *Heller* rejected rational basis and insinuated strict or intermediate scrutiny applicable). The Third Circuit noted that the District of Columbia law in *Heller* would have failed rational basis. *Id.* at 96. This implies that the *Heller* court intended to apply intermediate or strict scrutiny. *Id.*; see *Kiehl*, *supra* note 23, at 1145-46 (observing most courts pick intermediate scrutiny); *Peace*, *supra* note 25, at 181 (noting trend towards intermediate scrutiny).

60. See *Peace*, *supra* note 25, at 187 (identifying reasons courts favor application of intermediate scrutiny); see also *Kiehl*, *supra* note 23, at 1145 (reviewing courts' reasonings in favoring intermediate scrutiny). Many courts take *Heller*'s list of lawful regulations as contrary to strict scrutiny. *Kiehl*, *supra* note 23, at 1145. However, as shown in *Engstrum*, a regulation can still survive strict scrutiny if it has a narrow scope. See *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1235 (D. Utah 2009).

61. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (discussing need of review to protect interests of law-abiding, responsible citizens). Courts applying intermediate scrutiny rely on this statement to pass regulation regarding an individual's gun possession outside of the home. See *Kiehl*, *supra* note 23, at 1145-46. However, emphasis on the word "home" as being part of the core right guaranteed in the Second Amendment obscures the words "law-abiding, responsible citizens," which are also supposed to be a part of this core right. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); see also *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (identifying core right of *Heller* as law-abiding, responsible citizens' right to possess or carry weapons for self-defense). The court in *Chester* did not identify the core right in *Heller* as involving possession of a gun in the home, but rather as the core right of law-abiding, responsible citizens to have means to defend themselves. *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010). By using intermediate scrutiny to pass legislation relying on only one part of the core right, law-abiding responsible citizens like Woollard have no refuge. See 712 F.3d at 882.

62. See *Winkler*, *supra* note 33, at 731-32 (comparing outcomes of strict scrutiny analysis to intermediate

Circuit justified applying intermediate scrutiny based on precedent, yet its failure to analyze which standard of review was necessary resulted in the application of the wrong one; the court should have instead applied strict scrutiny.⁶³

Fourth Circuit courts need to cease blindly following precedent in applying intermediate scrutiny to all Second Amendment claims. The court in *Woollard* did not analyze whether or not *Woollard*'s Second Amendment right to bear arms for the purpose of self-defense was substantially burdened by Maryland's good-and-substantial-reason requirement, but rather automatically applied intermediate scrutiny. Where a fundamental right is involved, this burdening test must be applied, and if met, the regulation must pass strict scrutiny to be constitutional. If strict scrutiny had been applied in *Woollard*, the court would have found that *Woollard*'s right as a law-abiding, responsible citizen to protect himself against a violent, drug addicted offender was substantially burdened by the multitude of factors behind Maryland's good-and-substantial-reason requirement. If the courts do not vigorously protect rights given to individuals under the Constitution, such as the Second Amendment right to bear arms, from executive and legislative encroachment, we risk losing the rights altogether.

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scrutiny analysis). Since courts have already decided that protecting public safety is a compelling government interest, the only difference between strict and intermediate scrutiny is needing narrowly tailored means rather than reasonably or substantially adapted ones. *Id.* at 731. Because the fit with gun regulation will never be perfect, the distinction between the two is minimal. *Id.* But see *Nordyke v. King*, 644 F.3d 776, 785 (9th Cir. 2011) (discussing strict scrutiny's similarity to interest-balancing test). The court in *Nordyke* claimed that strict scrutiny would involve courts assessing effectiveness of gun-control laws. *Id.* The court reasoned that to determine if the means were narrowly tailored, courts would have to decide if the regulation was going to be effective. *Id.* This would not be necessary under intermediate scrutiny because it is easier to determine only whether a law substantially burdens a right. *Id.* This argument is not convincing, however, because narrowly tailored does not correlate into an effectiveness review. See *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1234 (D. Utah 2009). The district court in *Engstrum*, when analyzing the narrowly tailored component of strict scrutiny, made no mention of an effectiveness test. *Id.* This case also provided proof that gun regulation can in fact pass strict scrutiny as long as the regulation contains a narrow scope. *Id.* at 1234-35.

63. See 712 F.3d at 876 (following precedent stating intermediate scrutiny applied to Second Amendment issues). Although precedent indicated intermediate scrutiny, Maryland's code substantially burdened *Woollard*'s Second Amendment right and should have been subject to strict scrutiny. *Id.*