

Who Gets To Determine If You Need Self Defense?: Heller and McDonald’s Application Outside the House

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I. Introduction.....	140
II. What is clear: Supreme Court Declares an Individual Right to Bear Arms in the Home.....	142
III. Growing Disparity: Circuit Courts Across Country Take On Gun Regulation in the Aftermath of <i>Heller</i> and <i>McDonald</i>	145
A. Proper Cause and the Second Amendment: <i>Kackalasky v. County of Westchester</i>	145
B. Can a State Ban Handguns Outside the Home?: <i>Moore v. Madigan</i>.....	147
C. Good and Substantial Reason: Maryland’s Handgun Regulation and <i>Woollard v. Gallagher</i>.....	149
D. Justifiable Need: Third Circuit Joins the Split	151
E. Good Cause: California’s Regulation Overturned and Its Aftermath	153
IV. Conclusion	158

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I. INTRODUCTION

As of September 19, 2013, there were ten gun related deaths per 100,000 people.¹ Names like Columbine, Aurora, and Newtown still send shivers up one's spine when mentioned. These modern tragedies are tied to a decision made by our Founding Fathers and ratified on December 15, 1791.² 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."³ The Second Amendment applies to the States through the Fourteenth Amendment by the Due Process Clause.⁴ But what does the Second Amendment mean in today's world? The Supreme Court's decisions in *District of Columbia v. Heller* and *City of Chicago v. McDonald* have defined the individual's right to bear arms in one's home, but these decisions leave little guidance on what is an appropriate standard of review and whether an individual's right to bear arms extends outside of the home.⁵ Since the *Heller* and *McDonald* decisions, there have been over two hundred federal court decisions regarding gun regulation.⁶ What has been created is growing disparity amongst the states and the federal circuits about how to interpret *Heller* and *McDonald*, and whether the Second Amendment guarantees a right to carry a handgun outside the home.

There is a battle of the words happening within the circuit courts. Phrases such as "good cause," "justifiable need," and "good and substantial reason" have taken on new meanings throughout the different circuits. States are using these phrases in an attempt to develop a test to determine whether to grant carrying permits for a loaded gun for self-defense outside the home. A debate has ensued whether these requirements for a handgun permit for self-defense outside the home are

¹ Sydney Lupkin, *U.S. Has More Guns- And Gun Deaths- Than Any Other Country, Study Finds*, ABC NEWS (Sep. 19, 2013) <http://abcnews.go.com/blogs/health/2013/09/19/u-s-has-more-guns-and-gun-deaths-than-any-other-country-study-finds/>.

² *Amendment 2*, NATIONAL CONSTITUTION CENTER (Nov. 11, 2014), <http://constitutioncenter.org/constitution/the-amendments/amendment-2-right-to-bear-arms>.

³ U.S. CONST. amend. II.

⁴ *City of Chicago v. McDonald*, 130 S. Ct. 3020 (2010); U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

⁵ *District of Columbia v. Heller*, 554 U.S. 570 (2008); *City of Chicago v. McDonald*, 130 S. Ct. 3020 (2010).

⁶ *Gun Regulation After Heller and McDonald*, AMERICAN CONSTITUTION SOCIETY (Oct. 15, 2010), <http://www.acslaw.org/acsblog/gun-regulation-after-heller-and-mcdonald>

unconstitutionally burdening a citizen's Second Amendment right.⁷ Currently, the Second, Third, Fourth, Seventh and Ninth Circuits have decided cases regarding gun regulation outside of the home and have created a circuit split that has led to large differences in how gun regulation is handled across the country.⁸ The Second, Third, and Fourth Circuits are in agreement that requiring a heightened burden of proof, such as a "justifiable need," "substantial reason," or "good cause," does not burden the scope of the Second Amendment.⁹ In comparison, the Seventh Circuit found a complete ban on loaded guns in public was unconstitutional and infringed upon Illinois citizens' Second Amendment rights.¹⁰

The Ninth Circuit is the latest court to join the circuit split.¹¹ The Ninth Circuit, in a two-to-one decision, held that the San Diego County Sheriff's department could not demand a citizen to document good cause in order to obtain a handgun for self defense outside the home and that the good cause requirement was unconstitutional.¹² Gun rights advocates saw this decision as a victory, since the Ninth Circuit found that a right to carry a loaded gun existed outside of the home. This decision has furthered the hope for gun advocates that the Supreme Court could potentially confirm the right to carry a loaded gun extended beyond the home.¹³

The debate surrounding the Second Amendment leaves many unanswered questions and highlights the tension regarding what permissible gun regulation is under the Constitution.¹⁴ The questions surrounding permissible gun regulation are ushering in the Second

⁷ *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

⁸ *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

⁹ *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

¹⁰ *Moore v. Madigan*, 702 F. 3d 933 (7th Cir. 2012).

¹¹ *Peruta v. San Diego*, 742 F.3d 1144 (9th Cir. 2014) (holding that the good cause requirement when applying for a permit for a handgun to carry outside the home was unconstitutional).

¹² Frank Miniter, *The Second Amendment's Defining Moment*, FORBES (Aug. 26, 2014) <http://www.forbes.com/sites/frankminiter/2014/08/26/the-second-amendments-defining-moment/>.

¹³ Adam Nagourney, *In California, a Fevered Rush for Gun Permits*, THE NEW YORK TIMES (Apr. 26, 2014) http://www.nytimes.com/2014/04/27/us/politics/in-california-a-fevered-rush-for-gun-permits.html?_r=0.

¹⁴ *Id.*

Amendment's "defining moment in history."¹⁵ With little guidance from the Supreme Court, states and circuit courts are creating their own gun regulations based on their interpretation of the Second Amendment. Until the Supreme Court establishes a standard of review or decides whether the Second Amendment protects a right to bear arms outside the home, the circuit courts and state legislatures will continue to develop and decide upon gun control legislation in a contradictory fashion. Contradictory jurisprudence, citing to the same case law, only adds to the already heated gun control debate. It is the Supreme Court's duty, as the highest court, to lay down the correct standard for the circuit and districts courts to apply. Part II of this Comment discusses the two most important 2nd Amendment cases decided by the Supreme Court, which lays the foundation for the current circuit split. Part III discusses how the circuits have struggled to interpret the Supreme Court cases to extend the 2nd Amendment outside of the home and how there is a growing need for the Supreme Court to provide clarity to the 2nd Amendment jurisprudence. Part IV concludes this comment.

II. WHAT IS CLEAR: SUPREME COURT DECLARES AN INDIVIDUAL RIGHT TO BEAR ARMS IN THE HOME

The first modern Second Amendment case came out of the District of Columbia. In *Heller v. District of Columbia*, a District of Columbia special police officer was authorized to carry a handgun while on duty at his job in the Thurgood Marshall Judiciary Building.¹⁶ Mr. Heller wanted to apply to register a handgun that he could keep at home.¹⁷ According to the District of Columbia regulation, "no person may carry a handgun without a license," and "residents [must] keep their lawfully owned firearms . . . unloaded and disassembled or bound by a trigger lock or similar device' unless they are located in a place of business or are being used for lawful recreational activities."¹⁸ After Mr. Heller's application to maintain a handgun in his home was denied, he filed suit seeking to enjoin the District of Columbia from barring the registration of handguns.¹⁹ The Supreme Court granted certiorari and in a five-to-four decision, found the District of Columbia regulation to be unconstitutional.²⁰

¹⁵ Frank Miniter, *The Second Amendment's Defining Moment*, FORBES (Aug. 26, 2014) <http://www.forbes.com/sites/frankminiter/2014/08/26/the-second-amendments-defining-moment/>.

¹⁶ *District of Columbia v. Heller*, 554 U.S. 570, 574 (2008).

¹⁷ *Id.* at 575.

¹⁸ *Id.*

¹⁹ *Id.* at 575–576.

²⁰ *Id.* at 572.

The *Heller* opinion, delivered by Justice Scalia, stated that the Second Amendment right is not unlimited and that, historically, there have been prohibitions on the possession of handguns in certain circumstances, such as possession of a handgun by a felon or a person with mental illness or the possession of a handgun in a school zone or government building.²¹ Justice Scalia expressly stated that central to the Second Amendment right is the inherent right of self-defense and therefore the District of Columbia regulation, “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”²² Instead of addressing whether a specific standard of scrutiny should apply to Second Amendment inquiries, the majority stated that under any standard of scrutiny, the District of Columbia gun regulation would be found unconstitutional.²³ The majority found that Mr. Heller must be allowed to receive a permit to register his handgun and that he must be allowed a license to carry the handgun inside his home.²⁴

The *Heller* decision established a right to possess a handgun for self-defense; however, the *Heller* decision is limited because it only addresses a regulation concerning handguns inside the home. Before finding that the District of Columbia’s ban on handguns inside the home was unconstitutional under any standard of review, the majority stated that the opinion was not a “full scope” undertaking of Second Amendment analysis.²⁵ The majority acknowledged that the Second Amendment “right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”²⁶ The opinion acknowledges that there are accepted limitations on handgun possession by those mentally ill, felons, and in areas that are deemed to be sensitive.²⁷ But the opinion does not state all of the accepted limitations, which leaves the question open to interpretation by lower courts.²⁸ By failing to specify a standard of review, the majority set courts up for further confusion regarding the scope of the Second Amendment; inevitably, the states and the circuit courts began interpreting the *Heller* decision in a variety of contradictory ways.

Just two years after the *Heller* decision, the Supreme Court was faced with another gun regulation case, this time dealing with state law.²⁹ In

²¹ *Id.* at 626–627.

²² *Heller*, 554 U.S. at 628.

²³ *Id.* at 628–629.

²⁴ *Id.* at 635.

²⁵ *Id.* at 626.

²⁶ *Id.*

²⁷ *Id.* at 626–627.

²⁸ *Heller*, 554 U.S. 570 at 627.

²⁹ *City of Chicago v. McDonald*, 130 S. Ct. 3020 (2010).

City of Chicago v. McDonald, the city of Chicago, with a law similar to the law deemed unconstitutional in *Heller*, argued that its law was constitutional because the Second Amendment did not apply to the States.³⁰ The Chicago regulation prohibited possession of a handgun unless the holder possessed a valid registration.³¹ The reality of the Chicago regulation is that most handguns are prohibited, thereby banning handgun possession for a large majority of private citizens in Chicago.³² The petitioners sought to declare the Chicago regulations unconstitutional as to the Second and Fourteenth Amendment.³³ Chicago argued that the handgun regulation was designed to ensure the protection of its citizens from handgun injuries or death.³⁴ The petitioners sued when they were unable to procure handgun registrations for the home for self-defense because it was prohibited under the Chicago firearm laws.³⁵ Otis McDonald, one of the Chicago petitioners, stated that he needed a handgun in his home for self-defense, as he was a man in his late seventies living in a high crime neighborhood. Additionally, his work as a community activist made him subject to violent threats from drug dealers, furthering his need to have a handgun in his home.³⁶ The petitioners argued that the Second Amendment is among “the ‘privileges or immunities of citizens of the United States,’” and that through the Fourteenth Amendment’s Due Process Clause the Second Amendment right is incorporated.³⁷

The *McDonald* majority, authored by Justice Alito, stated that in *Heller* it was determined that “individual self defense is ‘the central component’ of the Second Amendment right.”³⁸ More specifically, the *McDonald* majority declared that *Heller* solidified the Second Amendment protection “to possess a handgun in the home for the purpose of self defense.”³⁹ Through the Due Process Clause of the Fourteenth Amendment, the *McDonald* majority found that the Second Amendment was incorporated to the states, and, therefore, the Chicago handgun regulation was unconstitutional.⁴⁰ Like the *Heller* majority, the *McDonald* majority failed to provide a standard of review that could give guidance to other courts as to whether a specific handgun regulation is constitutional.

³⁰ *Id.* at 3026.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 3027.

³⁴ *Id.*

³⁵ *McDonald*, 130 S. Ct. at 3027.

³⁶ *Id.* at 3027.

³⁷ *Id.* at 3028.

³⁸ *Id.* at 3036.

³⁹ *Id.* at 3050.

⁴⁰ *Id.*

One vague mention to a standard is addressed in the opening paragraph of Justice Alito's opinion.⁴¹ Specifically, Justice Alito posited that, "[a]pplying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States."⁴² Additionally, *McDonald* does nothing more than incorporate the Second Amendment to the States and does not help to address the broader scope of the Second Amendment regarding handgun regulation outside the home.⁴³ Like *Heller*, *McDonald* does not address the question of the constitutionality of possession of a handgun outside the home.⁴⁴ The *McDonald* majority quotes *Heller* when it states, "'the need for defense for self, family and property is most acute' in the home, we found that this right applies to handguns because they are 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.'"⁴⁵ By simply quoting *Heller*'s reasoning, *McDonald* does not address what is constitutionally permissible in terms of gun regulation outside the home.⁴⁶ This omission by the court leaves considerable potential for further litigation.

III. GROWING DISPARITY: CIRCUIT COURTS ACROSS COUNTRY TAKE ON GUN REGULATION IN THE AFTERMATH OF *HELLER* AND *MCDONALD*

A. Proper Cause and the Second Amendment: *Kackalasky v. County of Westchester*

In 2012, two years after the decision in *McDonald*, the Second Circuit addressed whether the New York handgun licensing requirements violated the Second Amendment when requiring applicants to demonstrate proper cause to obtain a license to carry a concealed handgun while in public.⁴⁷ In *Kachalasky v. County of Westchester*, petitioners submitted applications to carry concealed handguns in public but were denied because they failed to establish "proper cause."⁴⁸ New York state courts consider proper cause to include carrying a handgun for self-defense, hunting, or target practice.⁴⁹ Establishing proper cause required an applicant to "demonstrate a special need for self protection distinguishable from that of the general community or of persons engaged

⁴¹ *McDonald*, 130 S. Ct. at 3026.

⁴² *Id.* at 3026.

⁴³ *Id.*

⁴⁴ *Id.* at 3036.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Kachalasky v. County of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012).

⁴⁸ *Id.* at 84.

⁴⁹ *Id.* at 86.

in the same profession.”⁵⁰ When an application for a handgun is submitted, a licensing officer has the discretion to grant the license.⁵¹ In this particular instance, the plaintiffs’ applications were denied due to their failure to demonstrate a need for self-protection that is “distinguishable from the general public.”⁵² The petitioners argued that the proper cause requirement was unconstitutional and that the Second Amendment “guarantees them a right to possess and carry weapons in public to defend themselves from dangerous confrontation.”⁵³

In addressing the proper cause requirement, the Second Circuit turned to the Supreme Court’s decisions in *Heller* and *McDonald* and interpreted those cases as standing for a “pre-existing ‘individual right to possess and carry weapons in case of confrontation.’”⁵⁴ But the Second Circuit held that the right is limited and that the Second Amendment must apply differently in the context of public possession of a handgun.⁵⁵ Additionally, the Second Circuit stated that the *Heller* court avoided creating a standard of review because the law in the District of Columbia was a complete ban on handguns, whereas the regulation in New York dealt with a restriction on handguns in public.⁵⁶

Heller and *McDonald* did not establish a standard of review that the circuit courts could use in determining whether a regulation is unconstitutional as to the Second Amendment. The Second Circuit was faced with an issue of first impression in evaluating New York’s regulation.⁵⁷ The Second Circuit found that heightened scrutiny was not appropriate in this context and stated that applying a lesser standard was more appropriate because the regulation did not burden the core of the Second Amendment, which is the protection of self-defense inside the home.⁵⁸ Heightened scrutiny is described as the strictest form of scrutiny, which places a substantial burden on a citizen’s ability to possess a handgun for self-defense.⁵⁹ In deciding to use an intermediate scrutiny, the Second Circuit found that if the proper cause requirement is substantially related to an important governmental interest, then it would be constitutional.⁶⁰ Additionally, the Second Circuit made clear that strict

⁵⁰ *Id.*

⁵¹ *Id.* at 87.

⁵² *Id.* at 88.

⁵³ *Kachalsky*, 701 F.3d at 88.

⁵⁴ *Id.*

⁵⁵ *Id.* at 89.

⁵⁶ *Id.* at 91.

⁵⁷ *Id.* at 93.

⁵⁸ *Id.*

⁵⁹ *Kachalsky*, 701 F.3d at 93.

⁶⁰ *Id.*

scrutiny did not apply when the core protection of the Second Amendment is not restricted.⁶¹ The Second Circuit found that the New York gun regulation was constitutional because New York has an interest in regulating handguns in order to protect public safety and prevent crime, and therefore by limiting handgun possession to only those who have proper cause for carrying a handgun, the New York regulation was constitutional.⁶²

B. Can a State Ban Handguns Outside the Home?: *Moore v. Madigan*

Shortly after *Kachalsky* was decided, the Seventh Circuit decided *Moore v. Madigan*, a case involving Illinois' complete ban on ready to use firearms outside the home.⁶³ According to the Illinois law, a person could not carry a "ready to use" handgun.⁶⁴ The law did allow the following exceptions: when possessor is on his own property, in his place of business, or on the property of someone who allows him to have a ready to use gun in his possession.⁶⁵ What separates the law in Illinois from the New York regulation addressed in *Kachalsky*, is that the Illinois regulation is an almost complete ban on handguns outside the home, as opposed to the New York regulation that was a restriction on who may carry a handgun in public.⁶⁶ When addressing the Second Circuit's decision in *Kachalsky*, the Seventh Circuit admitted that the Second Circuit's regulation was less restrictive than the Illinois law.⁶⁷ Furthermore, the Seventh Circuit's only issue with the Second Circuit's decision was due to the Second Circuit's suggestion that the Second Amendment has a greater scope inside the home.⁶⁸

In discussing *Heller* and *McDonald*, the Seventh Circuit stated that it was bound by the historical analysis of the Supreme Court.⁶⁹ The majority acknowledged that the *Heller* and *McDonald* decisions emphasized the "'need for defense of self, family, and property is most acute' in the home."⁷⁰ The majority further stated that just because the Supreme Court addressed handguns in the home specifically, that did not

⁶¹ *Id.*

⁶² *Id.* at 98.

⁶³ *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

⁶⁴ *Id.* at 934.

⁶⁵ *Id.*

⁶⁶ *Id.*; *Kachalsky v. County of Westchester*, 701 F.3d at 91.

⁶⁷ *Moore*, 702 F.3d at 941.

⁶⁸ *Id.*

⁶⁹ *Id.* at 937.

⁷⁰ *Id.* at 935.

mean the need for defense was not acute outside the home, as well.⁷¹ The majority relied on the core premise of *Heller* and *McDonald* regarding a person's right to possess a handgun in the home for self-defense and found that the right to be armed could not be confined to just the home, because that would "divorce" the Second Amendment from the right to self-defense.⁷²

Similar to the Supreme Court's decision in *Heller* and *McDonald*, the Seventh Circuit failed to name a standard of review. Instead, the Seventh Circuit stated that Illinois failed to even prove a rational basis for an all-out ban on handguns outside the home as a justification for public safety.⁷³ In finding that Illinois failed its burden, the Seventh Circuit held the Illinois regulation to be unconstitutional.⁷⁴

Unlike the Second Circuit's decision in *Kachalsky*, the Seventh Circuit's decision was split. Judge Williams voted against the majority and wrote his dissenting opinion highlighting how the Supreme Court left unclear the extent to which the decision in *Heller* and *McDonald* should apply outside the home for self-defense.⁷⁵ Judge Williams also echoed the Second Circuit's sentiment that, because the Supreme Court did not settle the historical analysis of the Second Amendment in *Heller*, the court should not be bound by that analysis.⁷⁶ More specifically, Judge Williams stated that while the historical analysis in *Heller* is accurate, it fails to address the primary issue: regulation of handguns for self-defense outside the home.⁷⁷ Whereas *Heller* addressed the historical analysis of the Second Amendment's right to bear arms in one's home for self-defense, the question in *Moore* involved the interpretation of the Second Amendment outside the home.⁷⁸ Judge Williams discussed the existence of legislation forbidding handguns in certain public areas and because this type of legislation has been upheld, the right to possess a handgun outside the home for self-defense cannot be absolute.⁷⁹ In alignment with the Second Circuit's conclusion, Judge Williams found that Illinois has a significant interest in protecting the safety of its citizens and that if Illinois finds that these types of regulations are necessary to protect the safety of its citizens, then deference should be given to the judgments of the

⁷¹ *Id.*

⁷² *Id.* at 937.

⁷³ *Moore*, 702 F.3d at 942.

⁷⁴ *Id.*

⁷⁵ *Moore v. Madigan*, 702 F.3d 933, 943 (7th Cir. 2012) (Williams, J., dissenting).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Moore*, 702 F.3d at 947.

legislature.⁸⁰ Judge Williams noted that the state legislatures are the body of government who are most aware of the statistics on gun violence and therefore, are better equipped to balance the worth of those statistics.⁸¹ Judge Williams further noted that the legislature is charged with making gun regulations and therefore better suited to determine if a substantial state interest in regulating handguns exist.⁸² Based upon the uncertainty of whether the Second Amendment provides a general right to carry a handgun in public for self-defense, Judge Williams found that the Illinois state legislature was best equipped to make the determination.⁸³

A few months after the *Kachlasky* and *Moore* decisions, a circuit split developed as a result of the Supreme Court's failure to address the question of the constitutionality of handgun possession outside the home. The Court's failure to address handgun possession outside the home led circuit and state courts to substitute their own interpretations.

C. Good and Substantial Reason: Maryland's Handgun Regulation and *Woollard v. Gallagher*

Woollard v. Gallagher was the next case to join the circuit split. *Woollard* was a Fourth Circuit case involving Maryland's gun licensing regulation.⁸⁴ Maryland's regulation stated that a person had to have a permit to carry a handgun in public.⁸⁵ Furthermore, the permit is issued based on whether or not that person has a "good and substantial reason" to carry a handgun.⁸⁶ In determining whether a person has a good and substantial reason to carry a handgun, the Permit Unit considers, "the 'nearness' or likelihood of a threat or presumed threat; whether the threat can be verified; whether the threat is particular to the applicant, as opposed to the average citizen; if the threat can be presumed to exist, what is the basis for the presumption; and the length of time since the initial threat occurred."⁸⁷

In 2002, on Christmas Eve, *Woollard*'s son-in-law broke into *Woollard*'s house and the police took over two hours to arrive at the

⁸⁰ *Id.* at 949 (citing *Turner Broad Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195)(1997) ("In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risk.")).

⁸¹ *Moore*, 702 F.3d at 949.

⁸² *Id.*

⁸³ *Id.* at 954.

⁸⁴ *Woollard v. Gallagher*, 712 F. 3d 865 (4th Cir. 2013).

⁸⁵ Md. PUBLIC SAFETY Code Ann., § 5-306(a)(5)(ii).

⁸⁶ *Id.*

⁸⁷ *Woollard*, 712 F. 3d at 870.

scene.⁸⁸ Woollard was granted a handgun permit after the incident and renewed it in 2006 when his son-in-law was released from jail.⁸⁹ In 2009, the Handgun Permit Review Board denied Woollard's renewal request because Woollard failed to demonstrate a good and substantial reason for carrying a handgun in public besides the Christmas Eve incident in 2002.⁹⁰

The Fourth Circuit relied on the *Heller* precedent in making its decision.⁹¹ The majority found that *Heller* and *McDonald* did little more than establish the right to possess a handgun in the home for the purpose of self-defense and fell short of shining any light on whether or not that right extends outside the home.⁹² The Fourth Circuit found that the *Heller* opinion stated that the Second Amendment right is not an unlimited one.⁹³ The majority pointed to *Heller's* mention of lawful regulatory measures and found that the *Heller* opinion was not intended to clarify the entire scope of the Second Amendment.⁹⁴ The Fourth Circuit's interpretation of *Heller* and *McDonald* is consistent with the Second Circuit decision in *Kachlasky* and Judge Williams dissent in *Moore*.

The Fourth Circuit agreed with the Second Circuit's interpretation of the New York regulation by stating that it "'oriented to the Second Amendment's protection,' and constitute[d] 'a more moderate approach' to protecting public safety and preventing crime."⁹⁵ Similar to the Second Circuit, the Fourth Circuit adopted an intermediate scrutiny standard when examining whether Maryland's good and substantial reason requirement burdened the Second Amendment.⁹⁶ The majority found that Maryland's regulation satisfied intermediate scrutiny because codified legislative findings detailed the reasons why Maryland considered this type of regulation to be an important state interest.⁹⁷ Additionally, similar to both the Second Circuit and Judge Williams' dissenting opinion in *Moore*, the Fourth Circuit stated that the job of the legislature is to make policy choices that serve a substantial governmental interest and deference needs to be given to the legislature in order to make those decisions.⁹⁸ While the Fourth Circuit conceded that the good and substantial reason requirement

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 870-871.

⁹¹ *Id.* at 874.

⁹² *Id.*

⁹³ *Woollard*, 712 F. 3d 874.

⁹⁴ *Id.*

⁹⁵ *Id.* at 881.

⁹⁶ *Id.* at 876.

⁹⁷ *Id.* at 876.

⁹⁸ *Id.* at 881.

does burden Woollard's Second Amendment right, the majority found that the burden was constitutionally permissible.⁹⁹

After the *Woollard* decision, the circuit split stood at two-to-one in favor of handgun regulations outside the home.

D. Justifiable Need: Third Circuit Joins the Split

In July 2013, the Third Circuit joined the circuit split with *Drake v. Filko*. *Drake* involved a handgun regulation in New Jersey that called for a justifiable need when issuing handgun permits.¹⁰⁰ The New Jersey regulation at issue stated that a handgun permit would only be issued if the person demonstrated her familiarity with handling a handgun and had a justifiable need for carrying a handgun in public.¹⁰¹ Justifiable need is defined as, "the urgent necessity for self protection, as evidenced by specific threats or previous attacks which demonstrate 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."¹⁰² Similar to the regulations upheld in the Second and Fourth Circuits, specific documentation is required before a permit for self defense outside the home can be issued.¹⁰³ In this case, four New Jersey residents were denied handgun permits because they failed to demonstrate a justifiable need.¹⁰⁴ The plaintiffs argued that the Second Amendment protected their right to carry a handgun in public for self-defense, the justifiable need standard was unconstitutional, and that the justifiable need standard could not survive any means-end scrutiny that a court could apply.¹⁰⁵

Akin to the other circuits, the Third Circuit relied on *Heller* and *McDonald* to determine how those decisions impact New Jersey's regulation. *Heller* and *McDonald* represented the "zenith" of the Second Amendment and held that the right to bear arms is guaranteed within the home.¹⁰⁶ Without the Supreme Court taking a firmer stand on Second Amendment guarantees, its decisions in *Heller* and *McDonald* can only stand for guaranteeing a right to have a handgun for self-defense inside one's home.¹⁰⁷ The Third Circuit stated that *Heller* provides a non-exhaustive list of regulations that have been found constitutional but failed

⁹⁹ *Woollard*, 712 F. 3d at 882.

¹⁰⁰ *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

¹⁰¹ *Id.* at 429; N.J. Stat. §2C:58-4.

¹⁰² *Drake*, 724 F.3d at 428.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 429.

¹⁰⁵ *Id.* at 428.

¹⁰⁶ *Id.* at 430.

¹⁰⁷ *Id.*

to give any guidance on how to make constitutional determinations.¹⁰⁸ The Third Circuit found that the *Heller* holding was limited to finding that the Second Amendment creates a right to have a handgun at home for self-defense.¹⁰⁹ The Third Circuit viewed the New Jersey regulation as having a long history in New Jersey and that the regulation did comply with the Supreme Court's decisions in *Heller* and *McDonald*.¹¹⁰ Based upon the majority's belief that the New Jersey regulation is in line with the *Heller* and *McDonald* decisions, the majority stated that the New Jersey regulation fell outside the scope of the Second Amendment's guarantee of right to have a handgun in one's home for self defense.¹¹¹ The majority found that even if the justifiable need standard was not a long standing tradition, the regulation would pass intermediate scrutiny.¹¹² Additionally, like the Second and Fourth Circuits, the majority found that there should be substantial deference to the legislature's decision to institute such regulation.¹¹³ The New Jersey justifiable need standard was found to be constitutional based upon the Third Circuit's interpretation of *Heller* and *McDonald* and the application of intermediate scrutiny.¹¹⁴

In interpreting the decisions made by the other circuits, the Third Circuit found itself in agreement with the Second and Fourth Circuit. Finding the New Jersey statute to be analogous to the New York standard that was upheld by the Second Circuit, the majority found that the similar standards are demonstrative of how a regulation with a long-standing history should be upheld on the very basis of its longevity.¹¹⁵ The Third Circuit found the Seventh Circuit's decision in *Moore* to be a too broad reading of *Heller*.¹¹⁶ While acknowledging *Heller* could be interpreted in such a way by the Seventh Circuit, the Third Circuit was not convinced that *Heller* should be taken to represent such a broad holding.¹¹⁷ The acknowledgment that the *Heller* decision derives two very different interpretations demonstrates how the Supreme Court needs to act in order to clarify Second Amendment guarantees.

Judge Hardiman dissented in the *Drake* opinion.¹¹⁸ In his dissent, Judge Hardiman quickly highlighted that the *Heller* decision discussed the

¹⁰⁸ *Drake*, 724 F.3d at 432.

¹⁰⁹ *Id.* at 431.

¹¹⁰ *Id.* at 434–435.

¹¹¹ *Id.*

¹¹² *Id.* at 436–437.

¹¹³ *Id.*

¹¹⁴ *Drake*, 724 F.3d at 428.

¹¹⁵ *Id.* at 433–434.

¹¹⁶ *Id.* at 430.

¹¹⁷ *Id.*

¹¹⁸ *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (Hardiman, J., dissenting).

Second Amendment as a right that extends outside the home.¹¹⁹ The *Heller* decision discussed the founding of the Second Amendment as initially regarding the militia and hunting, which are not homebound activities.¹²⁰ Because the history of the Second Amendment demonstrates activities in which it was lawful to bear arms in public, Judge Hardiman found that this is demonstrative that the right extends beyond the home.¹²¹ In addition, Judge Hardiman reasoned that it is only common sense that the principles established in *Heller* and *McDonald* extend beyond the home.¹²² Judge Hardiman further reasoned that the core of the *Heller* and *McDonald* decisions was the right to protect oneself and that is as much prominent inside the home as it is outside.¹²³

E. Good Cause: California's Regulation Overturned and Its Aftermath

It did not take long before the Ninth Circuit heard a case regarding handgun regulation. On February 13, 2014, the Ninth Circuit held the County of San Diego's handgun regulation, calling for good cause, to be unconstitutional, leading to a surge in applications in the short weeks following the decision.¹²⁴ The impact of the Ninth Circuit's decision is not limited to California.¹²⁵ Across the country, more and more advocates from both sides of the gun debate are calling upon the Supreme Court to clarify the Second Amendment's scope once and for all.¹²⁶ This decision, along with the decisions of the other circuits, has greatly impacted how gun regulation is handled throughout the country. The Ninth Circuit's decision has only added to the confusion regarding Second Amendment guarantees and overstates the right established by the Supreme Court.

In *Peruta v. County of San Diego*, the San Diego regulation required individuals to demonstrate good moral character, complete the required training course, and establish good cause to obtain a permit to carry a handgun in public.¹²⁷ In determining good cause, the person is evaluated

¹¹⁹ *Id.* at 444.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 446.

¹²³ *Id.*

¹²⁴ *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014); Paloma Esquivel, Adolfo Flores, and Ryan Menezes, *Concealed Weapons Permits Nearly Double In O.C.*, LA TIMES (Aug. 31, 2014) <http://touch.latimes.com/#section/-1/article/p2p-81233255/>.

¹²⁵ Esquivel, Flores, & Menezes, *supra* note 124; Frank Minitier, *The Second Amendment's Defining Moment*, FORBES (Aug. 26, 2014) <http://www.forbes.com/sites/frankminiter/2014/08/26/the-second-amendments-defining-moment/>.

¹²⁶ Esquivel, Flores, & Menezes, *supra* note 124; Minitier, *supra* note 125

¹²⁷ *Peruta*, 742 F.3d at 1148.

on an individual basis and certain documentations such as restraining orders, letters from law enforcement or a district attorney are reviewed.¹²⁸ Simply stating that one fears for her safety does not establish good cause.¹²⁹ The plaintiffs claimed that they were denied a permit because they could not establish good cause or claimed they did not apply because they knew their applications would be denied.¹³⁰ The plaintiffs argued that requiring good cause and not allowing for a general desire to carry a handgun for self-defense was an undue burden on their constitutional right under the Second Amendment.¹³¹ The majority found that even though the County of San Diego regulation was not a complete prohibition on handguns, similar to the regulation struck down in *Heller*, *McDonald*, and *Moore*, the regulation severely restricted who could obtain a permit, making it a near total prohibition, and therefore could not be upheld.¹³²

The Ninth Circuit held a view similar perspective to that of the Seventh Circuit concerning *Heller* and *McDonald*. The Ninth Circuit found that in *Heller* the Supreme Court clarified that the keeping and bearing of arms has always been an individual right and that right has always been oriented with self-defense in mind.¹³³ Additionally, the majority found that because *Heller* stated that the Second Amendment right “is most acute in the home,” there exists a right outside the home.¹³⁴ While that might be true, it is not specifically stated in the *Heller* decision. *Heller* stating that a right is “most acute” inside the home does not necessarily mean that right carries the same weight once outside one’s front door.¹³⁵ The majority also pointed to the *Heller* and *McDonald* decisions to represent that the “core component” of the Second Amendment is self-defense, and that one needs to protect themselves as much in the home as they would if they were in “a back alley.”¹³⁶

The standard of review presented an issue to the Ninth Circuit, similar to each of the other circuits in this circuit split. The majority took the position that the level of scrutiny depended upon how much the regulation burdened the Second Amendment. Therefore, if the restriction is more severe, then the appropriate level of scrutiny is more in line with strict scrutiny. Whereas, the less severe the burden, the lesser form of

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1149.

¹³² *Id.* at 1169; *District of Columbia v. Heller*, 554 U.S. 570 (2008); *City of Chicago v. McDonald*, 130 S. Ct. 3020 (2010); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

¹³³ *Peruta*, 742 F.3d at 1155.

¹³⁴ *Id.* at 1153.

¹³⁵ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹³⁶ *Peruta*, 742 F.3d at 1153.

heightened scrutiny is required.¹³⁷ The majority found that the regulation put forth in the County of San Diego restricted a typical “responsible” citizen from being able to defend him or herself in public because the “responsible” citizen would fail to separate him or herself from the other applicants and that was a severe burden on the individual’s rights under the Second Amendment.¹³⁸ The Ninth Circuit viewed that restriction as being a near total prohibition, similar to that in *Heller*, and because of that the Ninth Circuit did not need to apply a particular standard of scrutiny.¹³⁹ The flaw in the majority’s reasoning was that the regulation in San Diego was not a near total prohibition on a citizen’s right to bear arms. While the regulation did restrict who may be granted a permit, citizens of San Diego were being issued permits once they provided the required criteria and documentation.¹⁴⁰ Prior to this decision, nine hundred people were granted a permit to carry a concealed weapon.¹⁴¹ Thus, while restricting gun permit applications to only those who establish good cause, it is still far from a near total prohibition and therefore should not be viewed under the analytical framework of *Heller*.

The *Peruta* majority was very critical of its sister circuits. The *Peruta* majority determined that the other circuits came to the wrong conclusion.¹⁴² The Ninth Circuit found that even under intermediate scrutiny, the gun regulations involved in *Drake*, *Woollard*, and *Kachlasky* should have been struck down.¹⁴³ The Ninth Circuit believed so strongly in the *Heller* and *McDonald’s* decisions’ holding that it found that the Second, Third, and Fourth Circuits completely misunderstood that the core of the Second Amendment is the right to bear arms for self-defense, both inside and outside the home.¹⁴⁴ Although the Ninth Circuit does not believe this type of regulation could ever pass under intermediate scrutiny, it addressed the issue of the government’s interest in public safety and found that the decisions in *Drake*, *Woollard*, and *Kachlasky* gave too much deference to the legislature.¹⁴⁵ The majority found that the government in those cases failed to establish that the gun regulations in question promoted public safety more than it burdened the Second Amendment.¹⁴⁶ Despite its strong objection to the decisions in *Drake*, *Woollard*, and

¹³⁷ *Id.* at 1167–1168.

¹³⁸ *Id.* at 1169.

¹³⁹ *Id.* at 1175.

¹⁴⁰ Esquivel, Flores, & Menezes, *supra* note 124.

¹⁴¹ Esquivel, Flores, & Menezes, *supra* note 124.

¹⁴² *Peruta*, 742 F.3d at 1178.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1175.

¹⁴⁵ *Id.* at 1177.

¹⁴⁶ *Id.*

Kachlasky, the Ninth Circuit found the Seventh Circuit decision to be much more in line with its own decision.¹⁴⁷ But the reliance on the Seventh Circuit is misguided. The *Moore* decision concerned an all out ban on handguns in public for self-defense, whereas *Peruta* involved a requirement that citizens needed to meet in order to be issued a permit.¹⁴⁸ The *Peruta* court could not give too much weight to the decision in *Moore* as a basis for support of its opinion because it concerned vastly different regulations. Despite the *Peruta* court clearly not being in favor of the current regulation in the County of San Diego, the regulations are very similar to those in *Drake*, *Woollard*, and *Kachlasky* as much as the *Peruta* court tries to suggest otherwise. *Peruta*, *Drake*, *Woollard*, and *Kachlasky*, all involve limiting gun permits for self-defense to only those that establish evidence of the necessity for self-defense and therefore should be decided in similar fashion.

The dissent, written by Judge Thomas, highlighted many of the areas in which the majority got wrong.¹⁴⁹ The first area Judge Thomas highlighted, was the fact that the Supreme Court has not defined the extent to which the Second Amendment applies outside of the home and therefore, the majority could not infer it from the *Heller* and *McDonald* decisions.¹⁵⁰ What the Supreme Court has stated is that the core of the Second Amendment is “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁵¹ What is at issue, in this case, does not involve the defense of hearth and home; therefore being able to carry a concealed handgun in public does not implicate the core of the Second Amendment.¹⁵² Judge Thomas also agreed with the Second, Third and Fourth Circuits that the appropriate standard was intermediate scrutiny and that there needs to be deference to the legislature in these types of situations because it is more aware of how to protect the safety of its constituents.¹⁵³

The effects of *Peruta* have been felt months after the Ninth Circuit’s decision. Prior to *Peruta*, there were nine hundred licensees, but as of August 31, 2014, almost seventeen hundred people were granted licensees to carry handguns.¹⁵⁴ With nearly 7,000 people having filled out an application for a permit, \$1.5 million has already been spent and sixteen

¹⁴⁷ *Id.* at 1173.

¹⁴⁸ *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Peruta*, 742 F.3d at 1148.

¹⁴⁹ *Peruta v. County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014) (Thomas, J., dissenting).

¹⁵⁰ *Id.* at 1180.

¹⁵¹ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

¹⁵² *Peruta*, 742 F.3d at 1181 (Thomas, J., dissenting).

¹⁵³ *Id.* at 1192–1193.

¹⁵⁴ *Esquivel, Flores, & Menezes, supra* note 124.

additional employees had to be added to the application process in order to keep up with the demand.¹⁵⁵ There is now a thirty-month waiting period in order to have the required in-person hearing in order to obtain the permit to carry a handgun in public.¹⁵⁶ The activity that is occurring in California since the *Peruta* decision highlights how these cases are very sensitive and can cause significant change very quickly. This is precisely why the California State Attorney General, Kamala Harris, has asked the Ninth Circuit for a full court review of the *Peruta* decision, stating that it is challenging the state's ability to regulate handguns.¹⁵⁷ The State Attorney General has been criticized for just now stepping in a full four years after the litigation began and days after the Ninth Circuit's decision was handed down.¹⁵⁸ Because the State Attorney General's petition for rehearing en banc came too late, the Ninth Circuit denied the motion.¹⁵⁹ In yet another surprising turn of events, the State Attorney General filed yet another petition for rehearing en banc but this time concerning the order denying her motion to intervene.¹⁶⁰ This time, at least one judge called for a sua sponte vote on a rehearing of the entire case.¹⁶¹ While a sua sponte call for a rehearing is not an unfounded procedure, a complete rehearing of the *Peruta* decision could have very real implications on gun regulation in California, as well as implications on the entire gun control debate. Gun rights advocates should not celebrate the *Peruta* decision, especially since the sole dissenting judge in the decision, Judge Sidney Thomas, is now the Chief Judge of the Ninth Circuit.¹⁶² What effect Judge Thomas being the Chief Judge will have on the rehearing decision remains to be seen, but it could very well change the dynamic of the decision. It has been more than a year since the decision in *Peruta* and the conversation is still not over. Twenty-two groups have filed briefs to the court and the Ninth Circuit went so far as to create a website "due to the level of interest."¹⁶³ The

¹⁵⁵ *Id.*

¹⁵⁶ Adam Nagourney, *In California, a Fevered Rush for Gun Permits*, THE NEW YORK TIMES (Apr. 26, 2014) http://www.nytimes.com/2014/04/27/us/politics/in-california-a-fevered-rush-for-gun-permits.html?_r=0.

¹⁵⁷ Esquivel, Flores, & Menezes, *supra* note 124.

¹⁵⁸ Jonathan Keim, *Four Years Late, CA Attorney General Tries to Intervene in Second Amendment Litigation*, NATIONAL REVIEW (Jan. 5, 2015) <http://www.nationalreview.com/node/411073>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Susan Shelley, *For California gun-rights advocates, hope rests in U.S. Supreme Court*, LOS ANGELES DAILY NEWS (Jan. 9, 2015) <http://www.dailynews.com/opinion/20150109/for-california-gun-rights-advocates-hope-rests-in-us-supreme-court-susan-shelley>.

¹⁶³ *Id.*

sheer amount of amicus briefs highlights just as heated the gun control debate is. There are large numbers of interest groups that believe very passionately in their position and because the Supreme Court has not heard a gun regulation outside the home case, interest groups are forced to go to their circuit courts.

The *Peruta* decision has even been picked up by the District Court for the District of Columbia in its decision from July 24, 2014, as a reason for overturning a District of Columbia handgun regulation that restricted handguns in public to those with licenses but did not have a system in which to issue handgun carry licenses to individuals.¹⁶⁴ Agreeing with *Peruta* that the Second Amendment right is secured outside the home as well, the *Palmer* decision highlighted that courts are currently grouping together handgun regulation that restricts handguns outside the home with regulations that act as an all out ban on handguns in public.¹⁶⁵ The distinction between these two categories is extremely important as it calls for a completely different analytical framework. The Florida Court of Appeals has also cited to *Peruta* in *Norman v. State*.¹⁶⁶ The *Norman* court agrees with the Ninth Circuit in *Peruta* that legislatures should not be given broad discretion regarding gun regulation and that the Second, Third, and Fourth Circuits went too far in finding legislative deference consistent with the rights of the Second Amendment.¹⁶⁷ It remains to be seen what will happen to these cases citing *Peruta* once the Ninth Circuit rehears the case.

IV. CONCLUSION

The impact of the *Peruta* decision in such a short period only highlights the need for the Supreme Court to step in and define the scope of the Second Amendment right inside and outside the home. So much about the scope of the Second Amendment has been left unanswered, and the result has become inconsistent interpretations and increasing debate across the country about what exactly the Second Amendment protects. With the circuits effectively split three-to-two on the issue, it is only a matter of time before the Supreme Court is going to have to take up a Second Amendment case concerning a handgun regulation that not only bars handguns outside the home but also a regulation that restricts handguns. The Supreme Court should have known in *Heller* that by failing to establish a standard of review, it was effectively paving the road to

¹⁶⁴ *Palmer v. District of Columbia*, 2014 U.S. Dist. LEXIS 101945, *4 (D.D.C. July 24, 2014).

¹⁶⁵ *Id.* at *16.

¹⁶⁶ *Norman v. State*, 159 So.3d 205 (Fla. Dist. Ct. App. 2015).

¹⁶⁷ *Id.* at 225.

further confusion regarding the scope of the Second Amendment. It was only a matter of time before the States and Circuit Courts began interpreting the *Heller* and *McDonald* decisions in a contradictory fashion.

The Supreme Court needs to lay down a standard of review in order for courts and legislatures across the country to come to a consensus regarding what is constitutionally permissible under the Second Amendment. At the moment some courts are using a form of intermediate scrutiny, as seen in the Second, Third, and Fourth Circuits, whereas others are finding a level of scrutiny does not need to be established because the Supreme Court never established one, such as the Seventh and Ninth Circuits. Without a clear standard of review the Second Amendment jurisprudence will continue to vary dramatically across the country and burden courts as Second Amendment legislation continues to be litigated. Once a standard is developed for the Second Amendment, courts could begin focusing on ensuring that the standard is enforced, rather than trying to reinvent the Second Amendment jurisprudence.

The issue with Second Amendment regulation is that several of the cases and legislation that give rise to these types of litigation concern more issues of politics rather than law. In order to focus this type of litigation on the law and not the politics and personal beliefs of those deciding the cases, the Supreme Court has the responsibility to develop the scope of the Second Amendment. Gun control is not on the docket for this term, but it is only a matter of time before the Supreme Court will be faced with pressure by both sides of the gun control debate, that it will have to take a case of this type.¹⁶⁸ Until then, the scope of the Second Amendment is going to continue to be interpreted in contradicting ways and divide the country further on the gun control debate.

¹⁶⁸ Associated Press, *A Look At Cases Before the Supreme Court*, THE WASHINGTON POST, (Oct. 6, 2014), <https://www.washingtonpost.com/national/supreme-court-to-hear-capital-cases-roiling-kansaspolitics/2015/10/06/7afe3f16-6c88-11e5-91eb-27ad15c2b723-story.html>.