IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 2017-1

DOG PAW STATE RIFLE & PISTOL ASSOCIATION, C. WILLIAM CHOW, DOBERMAN T. PINSCHER, and JACK RUSSELL ("J.R.") TERRIER, **Plaintiffs-Appellants** **v.** **CITY OF DOG PAW and DOG PAW CITY POLICE DEPARTMENT-LICENSE DIVISION,** **Defendant-Appellees**	**Appeal from the U.S. District Court for the Southern District of Dog Paw**

OPINION OF THE COURT

Before, MALTESE, CORGI, and B. FRISE, Circuit Judges. B. FRISE, Circuit Judge, dissenting.

OPINION

MALTESE, Circuit Judge.

The Dog Paw State Rifle & Pistol Association, C. William Chow, Doberman T. Pinscher, and J.R. Terrier (collectively "Plaintiffs") sued Defendants City of Dog Paw and the Dog Paw Police Department-License Division (collectively "the City"), seeking to have Title 38, Chapter Five, Section 23 of the Rules of the City of Dog Paw ("Rule 5-23" or "the Rule") declared unconstitutional under the Second Amendment to the United States Constitution because the "premises licenses" issued under the Rule do not allow Plaintiffs to transport their handguns to shooting ranges and competitions outside of Dog Paw City. The United States District Court for the Southern District of Dog Paw granted the City summary judgment, holding that the restrictions in premises licenses do not violate the Second

Amendment. *Dog Paw State Rifle & Pistol Ass'n v. City of Dog Paw,* 86 F.Supp.3d 249, 268 (S.D.D.P. 2015). The Plaintiffs appeal this judgment.

For the following reasons, we AFFIRM the judgment of the district court.

I. Background

Dog Paw State law prohibits possession of "firearms" absent a license. Dog Paw Penal Law §§ 265.01-265.04, 265.20(a)(3).[1] Section 400.00 of the Penal Law establishes the "exclusive statutory mechanism for the licensing of firearms in Dog Paw State." *O'Connor v. Scarpino,* 638 N.E.2d 950 (1994); *see also Kachalsky,* 701 F.3d at 85. Licenses can be held by individuals at least twenty-one years of age, of good moral character, and "concerning whom no good cause exists for the denial of the license," among other requirements. D.P. Penal Law § 400.00(1)(a)-(b), (n).

To obtain a handgun license, an individual must apply to his or her local licensing officer. "The application process for a license is rigorous and administered locally. Every application triggers a local investigation by police into the applicant's mental health history, criminal history, [and] moral character." *Kachalsky*, 701 F.3d at 87 (internal citation and quotation marks omitted). The licensing officers "are vested with considerable discretion in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license." *Id.* (internal quotation marks omitted). The Dog Paw Penal Law specifies that in Dog Paw City, the licensing officer is the City's Police Commissioner. D.P. Penal Law § 265.00(10). The License Division exercises the Commissioner's authority to review applications for licenses, and issues handgun licenses. *See* 38 RCDP §§ 5-01-5-11.

The Penal Law establishes two primary types of handgun licenses: "carry" licenses and "premises" licenses. D.P. Penal Law §§ 400.00(2)(a), (f). A carry license allows an individual to "have and carry [a] concealed" handgun "without regard to employment or place of possession . . . when proper cause exists" for the license to be issued. *Id*. at § 400.00(2)(f).

The Penal Law does not define "proper cause," but Dog Paw State courts have defined the term to include carrying a handgun for target practice, hunting, or self-defense. When an applicant demonstrates proper cause to carry a handgun for target practice or hunting, the licensing officer may restrict a carry license "to the purposes that justified the issuance." *Kachalsky*, 701 F.3d at 86, *quoting O'Connor*, 638 N.E.2d at 950. Generally, a carry license is valid throughout the state except it is not valid within Dog Paw City

[1] As we explained in *Kachalsky v. County of Westchester*, the term "firearm" in Dog Paw law has a restricted meaning and does not encompass all guns to which the term generally applies in ordinary usage. 701 F.3d 81, 85 (14th Cir. 2012). Essentially, the relevant statutes define "firearm" to include pistols and revolvers, assault weapons, and rifles and shotguns with barrels of specified shortened lengths. *Id., citing* D. P. Penal Law § 265.00(3). A citizen does not need a license to own an ordinary rifle or shotgun.

"unless a special permit granting validity is issued by the police commissioner" of Dog Paw City.[2] D.P. Penal Law § 400.00(6).

A premises license is specific to the premises for which it is issued. The type of license at issue in this case allows a licensee to "have and possess in his dwelling" a pistol or revolver. *Id.* at § 400.00(2)(a). Under the City's Rule 5-23, a "premises license-residence" issued to a Dog Paw City resident is specific to a particular address, and "[t]he handguns listed on th[e] license may not be removed from the address specified on the license except" in limited circumstances, including the following:

> (1) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately.
>
> (2) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the Dog Paw State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department-City of Dog Paw Hunting Authorization" Amendment attached to her/his license.

38 RCDP § 5-23(a).

Under Rule 5-23(a)(3), an "authorized small arms range/shooting club" is one that, among other requirements, is located in Dog Paw City, as the License Division notified Plaintiff Chow in a letter dated May 15, 2012. J.A. 28.[3] When this litigation started, and at the present time, seven such facilities existed in Dog Paw City, including at least one in each of the City's five boroughs.

Plaintiffs Chow, Terrier, and Pinscher hold License-Division-issued premises licenses that allow them to possess handguns in their residences in Dog Paw City. They seek to transport their handguns outside the premises to shooting ranges and competitions outside Dog Paw City. These plaintiffs, along with the Dog Paw State Rifle & Pistol Association, sued in the Southern District of Dog Paw, asking the Court to declare the restriction the Rule imposes unconstitutional.

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[2] Another handgun license available to Dog Paw City residents is a "carry business license," which "permits the carrying of a handgun concealed on the person." 38 RCDP § 5-23(b). This license is available to certain individuals whose business activities regularly include carrying large sums of cash or valuables or otherwise being exposed to extraordinary personal danger. The Plaintiffs have not alleged they applied for, or were denied, carry business licenses. The Plaintiffs also have not claimed to hold premises licenses for their businesses, yet another category of license which is authorized under the Rule. 38 RCDP § 5-23(a). Accordingly, we need not further discuss carry business licenses or premises licenses-business.

[3] We note that due to the very large record compiled on summary judgment, we required the parties to create a sequentially paginated Joint Appendix (J.A.) for our ease of reference.

The Plaintiffs and the City filed cross motions for summary judgment. The district court granted the City's motion and dismissed the complaint. The district court found the Rule "merely regulates rather than restricts the right to possess a firearm in the home and is a minimal, or at most, modest burden on the right." *D.P. Rifle & Pistol Ass'n.*, 86 F.Supp.3d at 260 (brackets and internal quotation marks omitted). Accordingly, the district court held the Rule did not violate the Plaintiffs' Second Amendment rights. *Id*. at 260-61. We agree.

II. Discussion

The Plaintiffs argue Rule 5-23 violates the Second Amendment because it restricts their ability to transport firearms outside the City. We review a district court's summary judgment decision *de novo* (that is, without any deference to the district court), construing the evidence in the light most favorable to the non-moving party. *Dog Paw State Rifle & Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242, 252 (14th Cir. 2015). "We also review *de novo* the district court's legal conclusions, including those interpreting and determining the constitutionality of a statute." *Id.* (internal quotation marks omitted). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For the reasons described below, we reject the Plaintiffs' argument.

A. *Heller* and the Appropriate Analytical Framework.

We begin with the text of the Second Amendment: "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. Our analysis of this text starts with *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court considered whether the District of Columbia's regulations, which barred the possession of handguns both inside and outside the home, and required other firearms to be kept "unloaded and disassembled or bound by a trigger lock or similar device," violated the plaintiff's Second Amendment rights. 554 U.S. at 575. After undertaking a lengthy analysis of the original public meaning of the Second Amendment, the Court concluded that it confers "an individual right to keep and bear arms." *Id*. at 595. Guided by the same historical inquiry, the Court emphasized that "the inherent right of self-defense has been central to the Second Amendment right." *Id*. at 628. Therefore, prohibiting the possession of handguns was unconstitutional. *Id*. at 628-29. Similarly, the District of Columbia's requirement that "firearms in the home be rendered and kept inoperable at all times" made "it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [was] hence unconstitutional." *Id*. at 630.[4]

Heller did not purport to "clarify the entire field" of Second Amendment jurisprudence and does not provide explicit guidance on the constitutionality of regulations which are less restrictive than the near-total ban at issue in that case. *Id*. at 635. But *Heller* 's method of analysis suggests a broad framework for addressing Second Amendment challenges.

[4] *McDonald v. City of Chicago* held that the Second Amendment right recognized in *Heller* is fully applicable to the States, 561 U.S. 742, 791 (2010).

First, *Heller* determined whether the possession of operable weapons in the home fell within "the historical understanding of the scope of the [Second Amendment] right." *Id*. at 625. In conducting this analysis, *Heller* indicated that the Second Amendment does not preclude certain "longstanding prohibitions" and "presumptively lawful regulatory measures," such as "prohibitions on carrying concealed weapons," " prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," "laws imposing conditions and qualifications on the commercial sale of arms," and prohibitions on "the carrying of 'dangerous and unusual weapons,'" referring to weapons that were not "in common use at the time" of the enactment of the Second Amendment. *Id*. at 626-27 & n.26.

Second, after determining that the possession of operable weapons fell within the scope of the Second Amendment, *Heller* considered the appropriate level of scrutiny for the challenged regulation. In light of the severity of the restriction posed by the D.C. regulation, *Heller* determined that it was unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id*. at 628. As *Heller* made clear, "'[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.'" *Id*. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840)). While *Heller* did not specify the appropriate level of scrutiny for Second Amendment claims, it nevertheless confirmed that rational basis review is not appropriate, explaining that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id*. at 628 n.27.

Like the majority of our sister circuits, we have discerned from *Heller* 's approach a two-step Second Amendment inquiry. *See United States v. Chovan*, 735 F.3d 1127, 1136-37 (14th Cir. 2013) (collecting cases). The two-step inquiry we have adopted "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id*. at 1136 (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). As other circuits have recognized, this inquiry bears strong analogies to the Supreme Court's free-speech caselaw. *See, e.g., Ezell v. City of Chicago*, 651 F.3d 684, 702-03, 706 (7th Cir. 2011), a*ff'd*, 846 F.3d 888 (7th Cir. 2017), *mandamus denied*, 678 F. App'x 430 (7th Cir. 2017) ("Both *Heller* and *McDonald* suggest that First Amendment analogies are more appropriate, and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context.").

In the first step, we ask "whether the challenged law burdens conduct protected by the Second Amendment," *Chovan*, 735 F.3d at 1136, based on a "historical understanding of the scope of the [Second Amendment] right," *Heller*, 554 U.S. at 625, or whether the challenged law falls within a "well-defined and narrowly limited" category of prohibitions "that have been historically unprotected," *Brown v. Entm't Merchants Ass'n*, 131 S. Ct.

2729, 2733, 2734 (2011). To determine whether a challenged law falls outside the historical scope of the Second Amendment, we ask whether the regulation is one of the "presumptively lawful regulatory measures" identified in *Heller*, 554 U.S. at 627 n.26, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment, *Chovan*, 735 F.3d at 1137.

If a prohibition falls within the historical scope of the Second Amendment, we must then proceed to the second step of the Second Amendment inquiry to determine the appropriate level of scrutiny. *Chovan*, 735 F.3d at 1136. As described in detail in Section IIC below, when ascertaining the appropriate level of scrutiny, "just as in the First Amendment context, we consider: (1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.'" *Chovan*, 735 F.3d at 1138 (quoting *Ezell*, 651 F.3d at 703).

B. Rule 5-23 Does Not Burden Plaintiffs' Second Amendment Rights.

At the first step of our inquiry, we ask if Rule 5-23 burdens conduct within the scope of the Second Amendment's protections. Plaintiffs have not demonstrated that it does.

1. The Limitations on Transporting a Handgun to a Shooting Range Outside the City Do Not Meaningfully Impair Plaintiffs' Ability to Train.

Text, history, and tradition show it is not significant to the Second Amendment where firearm training occurs, so long as the location readily allows gun owners sufficient opportunities to train. The Rule satisfies that standard: it makes express provision for training, and Plaintiffs have not come forward with any basis to conclude they were unable to train sufficiently or effectively.

Plaintiffs assert the Rule burdens a freestanding right to engage, without geographical limitation, in firearm training. But it is common sense that any right to train cannot be absolute. *Heller*, 554 U.S. at 626 (Second Amendment does not protect a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Surely, for example, gun owners are not entitled to set up their own shooting ranges in a Dog Paw Park or the Dog Paw Central Square. Indeed, text, history, and tradition – the very considerations Plaintiffs advance as the pillars of Second Amendment analysis – all confirm the ability to train may be subject to reasonable regulation as to location.

Take the text first. The Second Amendment protects the right to "keep and bear arms." In *Heller*, the Supreme Court explained the right to "keep arms" is the right to "have weapons," and the right to "bear arms" is the right to "carry[] arms for a particular purpose – confrontation." 554 U.S. at 583-84. Neither phrase describes a right to train.

To be sure, the right to "keep and bear arms" may, as Plaintiffs suggest, imply the right to learn how to handle arms. But it does not follow that the Second Amendment therefore

protects a standalone right to train where one wishes. Instead, training plays a supportive role with respect to express Second Amendment rights by enabling gun owners to use firearms effectively. *See Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (right to keep and bear arms implies a right "to acquire and maintain proficiency in their use"). Limitations on the location or manner of training therefore burden Second Amendment rights only to the extent they meaningfully impair the ability to train.

Plaintiffs' reliance on the Second Amendment's Militia Clause only confirms the point. The value that clause expressly protects is a "well regulated militia" itself. Training is a means of accomplishing that objective.

The historical scope of militia training underscores there was no traditional right to train anywhere one wished – let alone in another state. The training federal and state militia laws outlined typically occurred only several times a year at local muster grounds under tight controls.[5] For example, members of the militia were often precluded from bringing loaded firearms to militia training and from discharging their weapons unless instructed to do so.[6] More broadly, history and tradition confirm training may properly be subject to extensive regulation. For centuries, governments have closely prescribed the location and manner of training in response to local conditions and public-safety concerns. In sixteenth-century England, for example, Parliament responded to a spate of violent crime by restricting residents of cities, boroughs, and market towns to discharging firearms only in defense of their homes or at specific locations designated for target practice. *See* J.A. 1–2, 4, England (1541) (requiring residents to shoot only "at a butt or bank of earth" and "only in place convenient for the same").

From the colonial period onward, localities and states exercised the same authority. Some localities, like eighteenth-century Boston and New York City, limited target practice to specific locations for public-safety reasons. *See* J.A. 5, Boston, Massachusetts (1746) (limiting target practice to the lower end of the common and "the several batteries," with permission, to eliminate the danger and alarm caused by stray bullets); J.A. 6, New York City, New York (1763) (prohibiting target practice in the streets or in any garden or enclosure in the City to reduce the risks of fire). Others, like antebellum Tennessee and Ohio, precluded training within any town or in other area where it might endanger public safety. *See* J.A. 10, Tennessee (1821) (prohibiting target practice "within the bounds of any town, or within two-hundred yards of any public road of the first or second class"); J.A. 10, Ohio (1831) (prohibiting target practice in "any recorded town plat").[7]

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[5] *See, e.g.,* J.A. 27, New Jersey (1778); J.A. 27-28, New York (1786); J.A. 28-29, North Carolina (1786); J.A. 29, South Carolina (1791); J.A. 30, New Hampshire (1792); J.A. 30, Connecticut (1792); J.A. 31, Massachusetts (1793); J.A. 31-32, Rhode Island (1794).

[6] *See, e.g.,* J.A. 31, Massachusetts (1793); J.A. 32, Maine (1840); J.A. 33, Massachusetts (1866).

[7] *See also* J.A. 7-9, Ohio (1790) (prohibiting target practice within "one quarter of a mile from the nearest building of any such city, town, village or station"); J.A. 18-19, Denver, Colorado (1875) (precluding competitive target practice in the city); J.A. 11, Columbus, Ohio (1879) (prohibiting target practice in town).

Localities and states also exercised strict licensing authority over training. Eighteenth-century Newburyport, Massachusetts, for example, entirely prohibited target practice, except "as from time to time shall be approved of the licensed by the town, or the select-men thereof." [8] Dozens more localities required persons seeking to discharge firearms for any purpose, including training, to obtain a license or written permission from local officials.[9] Still other localities provided for the licensing and construction of shooting galleries and restricted target practice to those galleries.[10] Thus, overwhelming historical evidence shows there has never been a right to train wherever one wishes, and governments have had extensive authority to regulate the location and manner of training.

Moreover, some laws, much like the City's Rule, required training to occur close to home. In the nineteenth century, several localities restricted target practice to one's own premises, absent permission to train elsewhere in the municipality.[11] And militia training – which Plaintiffs repeatedly point to in support of a right to train without geographical imitation – occurred at local muster grounds, not at muster grounds far from home or in another state.[12]

Plaintiffs cite nothing that supports a contrary conclusion. The only Founding-era sources Plaintiffs cite addressed training in the context of the militia, not as an unfettered right to train.[13] And Plaintiffs include no eighteenth-century sources, let alone any materials from the debates surrounding the Bill of Rights, supporting the conclusion that there is a right to train anywhere one wishes.

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[8] J.A. 14, Newburyport, Massachusetts (1785); *See also* J.A. 19-20, Salem, North Carolina (1896); J.A. 20-21, Prince George's County, Maryland (1904) (requiring any individual or group intending to engage in target practice to obtain the written consent of all local residents, and of the relevant county).

[9] *E.g.,* J.A. 13, Philadelphia, Pennsylvania (1750) ("Governor's special license"); J.A. 14-15, Portsmouth, New Hampshire (1823) (police); J.A. 15, Quincy, Illinois (1841) (mayor, marshal, or aldermen); J.A. 15-16, New Haven, Connecticut (1845) (mayor); J.A. 16, Detroit, Michigan (1848) (city council); J.A. 17, Chicago, Illinois (1855) (mayor or common council); J.A. 17, St. Joseph, Missouri (1869) (mayor or city council); J.A. 18, New Orleans, Louisiana (1870) (common council); J.A. 19, Montgomery, Alabama (1879) (mayor).

[10] J.A. 22, Schenectady, New York (1863) (prohibiting target practice "except in a shooting gallery, within the lamp district of this city"); J.A. 22-23, Memphis, Tennessee (1863) (exempting only licensed shooting galleries from restrictions on discharge of firearms); J.A. 24-25, Fort Worth, Texas (1880) (prohibiting discharge of any firearm, except in a licensed shooting gallery); J.A. 25, Ogden, Utah (1881) (prohibiting all discharge of firearms except at a "lawful breastwork"); J.A. 26, Indianapolis, Indiana (1895) (prohibiting unlicensed shooting galleries).

[11] J.A. 12, Northfield, Vermont (1894); *see also* J.A. 11, Indianapolis, Indiana (1869); J.A. 12, Council Bluffs, Iowa (1880).

[12] *E.g.,* J.A. 27-28, New York (1786) (providing for parades "at some convenient place as nearly central as may be" within the regimental district); J.A. 29, South Carolina (1791) (providing for militia training "within their respective regimental districts").

[13] Second Militia Act of 1792, 1 Stat. 271 (1792); the Virginia Declaration of Rights § 13 (1776)

The historical sources the Plaintiffs cite, and upon which the dissent relies, instead show the opposite. Plaintiffs rely on the post-Civil War commentaries cited in *Heller*, but those treatises state that "learning to handle" arms "for their efficient use" is a necessary incident of a well-regulated militia, not that the Second Amendment protects training as an end in itself. Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 271 (1880); *see also* J. Pomeroy, An Introduction to the Constitutional Law of the United States § 239, at 152-53 (1868) ("But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons.").

On this record, the Rule did not impinge upon constitutionally protected conduct. In *Heller*, the Court focused on the degree to which the District of Columbia's handgun ban burdened the right to self-defense in the home, ultimately striking down the law because few historical laws had "come close" to such a "severe restriction." 554 U.S. at 629; *see also id*. (reliance on long guns for self-defense would meaningfully burden the right to self-defense); *id.* at 632 (Court's analysis not meant to "suggest the invalidity" of historical laws imposing lesser burdens); Eugene Volokh, "Implementing the Right to Keep and Bear Arms for Self-Defense," 56 UCLA L. Rev. 1443, 1454-57 (2009) (arguing *Heller's* burden analysis accords with the Court's approach to other rights). Here, by contrast, the Rule did not meaningfully impair Plaintiffs' ability to train. Instead, it made express provision for training in the most logical location – the City where Plaintiffs live and are licensed – and Plaintiffs have not produced any evidence that the Rule impaired their ability to train.

At summary judgment, the City demonstrated Plaintiffs had ample opportunity to maintain proficiency with their licensed handguns. At the time, there were at least seven ranges in the City open to anyone possessing a valid license, including one or more in each of the City's five boroughs. J.A. 92-94. And although Plaintiffs claimed there were no shooting competitions held in the City on a regular basis, *e.g.,* J.A. 51, at least several of the ranges in fact hosted frequent competitions, J.A. 94. The organizational Plaintiff, moreover, pleaded that its members "participate in numerous rifle and pistol matches within and without the City ... on an annual basis." J.A. 27. And the Rule did not limit opportunities to rent handguns for use at shooting ranges and competitions, wherever located.

In opposition to summary judgment, Plaintiffs did not argue, let alone offer any evidence, that the Rule meaningfully impaired their ability to train. They did not contend they had insufficient access to training within the City, or aver they were training with insufficient frequency. They did not even contend out-of-city ranges were more convenient. Instead, their declarations repeated boilerplate text to the effect that attending out-of-city events with their handguns would present a good opportunity to practice, which is not the same as representing that they had insufficient in-city opportunities to maintain proficiency.

Nor does the single case Plaintiffs cite that squarely addresses training under the Second Amendment support their position. In *Ezell,* the Seventh Circuit enjoined a Chicago law that required range training as a prerequisite to lawful gun ownership but banned all range training within Chicago. 651 F.3d at 689-90. The City's Rule does not come close to

imposing such a severe burden. To the contrary, it allowed licensees to train in the city where they lived.

Apparently recognizing the weakness of the record they created, Plaintiffs repeatedly fall back on the assertion that seven ranges in the City obviously cannot satisfy the training demands of the 8.5 million people who live there. But Plaintiffs make no attempt to prove that the number of the ranges in the City is insufficient to satisfy licensees' demand for training, nor contend that the number is anything more than the result of market forces. And indeed, there are good reasons to doubt Plaintiffs' unsupported contentions. The City's total population notwithstanding, there are about 40,000 active handgun licensees in the City; only those licensees can fire handguns at in-city ranges, *see* D.P. Penal Law §§ 265.20(a)(3), (7-a) (generally restricting handgun possession at ranges to persons with valid handgun licenses); *id.* § 400.00(6) (denying out-of-city licenses validity within the City absent a permit from the License Division). Plaintiffs have come forward with no proof – whether rooted in their own experiences or a more general analysis – that the training facilities available in the City are insufficient to accommodate all who want to train.

In an analogous case, the en banc Ninth Circuit upheld a challenged ordinance at the first step of the inquiry based on a similar failure to show a burden on protected Second Amendment rights. *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc). Although the court recognized that the right to purchase arms was a necessary incident of the right to keep and bear arms, it concluded that the plaintiffs had insufficiently pleaded that these rights were burdened by the denial of a zoning variance to a gun store. *See id.* at 678-81. Emphasizing that there were ten gun stores in the county, including one near the intended site of an eleventh gun store, the court reasoned that "gun buyers have no right to have a gun store in a particular location" if "their access [to firearms] is not meaningfully constrained." *Id.* at 680. The same analysis would apply to the Rule. There is no right to train in a specific location, and the record contains no evidence that the City's Rule constrained Plaintiffs' ability to train effectively. At the first step of the two-step inquiry, that is sufficient.

The dissent is concerned that the City has not identified an exact historical analogue for its law. But *Heller* does not require such a direct line from historical precedent. The Court stated that laws "fairly supported" by a "historical tradition" are "presumptively lawful"—not that there must be a specific law precisely on point. 554 U.S. at 626-27 & n.26; *see Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) *aff'd*, 801 F.3d 264 (D.C. Cir. 2015) ("*Heller II*") (Kavanaugh, J., dissenting) (for "new gun regulations" responding to "conditions that have not traditionally existed," "the proper interpretive approach is to reason by analogy from history and tradition"). The lack of an exact historical analogue for a law does not prove that the law burdens conduct protected by the Second Amendment. Instead, it may simply mean that new problems in society have required the government to respond with new solutions.[14]

[14] *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 835 n.2 (2011) (Thomas, J., dissenting) ("To note that there may not be precedent for such state control is not to establish that there is a constitutional right." (internal quotation marks, citation, and brackets omitted)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S.

This lawsuit illustrates the point. Plaintiffs' claims would likely not have arisen prior to the advent of the automobile, which enabled easy transport of firearms over distance. Indeed, Plaintiffs do not demonstrate any historical tradition of traveling significant distances from one's own property or locality to a place of one's choosing to engage in training, as they seek to do in this lawsuit. Instead, Plaintiffs resort to analogies to other activities – like militia training – to support the premise that an unfettered right to train exists. But it makes little sense to demand that the City come forward with a direct analogue to its law when there is no evidence of a history of individuals engaging in the specific conduct at issue that could have created the need for regulation in the first place.

More broadly, adopting a strict view of the role of history and tradition could have disastrous consequences, hamstringing the ability of government to adapt to new circumstances, in contravention of the U.S. Supreme Court's assurance that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald,* 561 U.S. at 785. It would also be inconsistent with fundamental principles of federalism, which preserve space for states under the Second Amendment "to devise solutions to social problems that suit local needs and values." *Id.*; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (denying states the right to experiment "may be fraught with serious consequences to the Nation").[15] At the time the Second Amendment was adopted, urban gun culture and private violence involving firearms were minimal in the United States, and firearms technology was quite limited.[16] Since that time, governments have been required to respond to massive changes on all these fronts. They should not be restricted to only the exact types of laws that were in effect in 1791 (when the states ratified the 2nd Amendment) or 1868 (when the states ratified the 14th Amendment thereby applying the 2nd Amendment to the states).

2. Public Carry is Not at Issue in This Case.

Plaintiffs also contend that they should be able to transport their handguns outside the home for any lawful use because the Second Amendment guarantees a right to carry

334, 373 (1995) (Scalia, J., dissenting) ("[N]ot every restriction upon expression that did not exist in 1791 or in 1868 is ipso facto unconstitutional ....").

[15] Application of a strict historical approach would also endanger a number of federal firearms laws, which have generally been upheld under means-ends scrutiny, not based on historical precedent alone. *See, e.g., United States v. Masciandaro,* 638 F.3d 458, 469-74 (4th Cir. 2011) (ban on carrying or possessing a loaded weapon in a motor vehicle in a national park); *United States v. Reese*, 627 F.3d 792, 801-05 (10th Cir. 2010) (ban on possession of firearms while subject to domestic-violence protection order); *Chester*, 628 F.3d at 680-83 (4th Cir. 2010) (ban on possession of firearm after conviction for misdemeanor domestic-violence conviction); *Marzzarella*, 614 F.3d at 96-101 (ban on possession of a firearm with an obliterated serial number).

[16] *See* Joseph Blocher, "Firearm Localism," 123 Yale L.J. 82, 91, 103, 115 & n.172 (2013); Saul Cornell, "The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities," 39 Fordham Urb. L.J. 1695, 1713-14 (2012); Eric M. Ruben & Darrell A. H. Miller, "The Second Generation of Second Amendment Law & Policy: Preface," 80 Law & Contemp. Probs. 1, 1-2 (2017).

firearms for self-defense in public. But that issue is entirely distinct from the issues before us now. Dog Paw State has a separate licensing regime expressly dedicated to bearing arms for self-defense outside the home. Plaintiffs, however, have never challenged the standards for issuance of such a license. Nor have Plaintiffs ever asserted that they wish to transport their handguns to out-of-City shooting ranges to protect themselves while in transit. Rather, Plaintiffs have consistently limited their challenge to "the right to keep arms in the home and the right to hone their safe and effective use." Appellants Brief at 19. And they have emphasized they have "no desire to carry their handguns on their person in the City." *Id.* at 38; *see also* Pls.' Reply Mem. in Further Supp. of Prelim. Inj. At 6, S.D.D.P. ECF No. 20 ("No plaintiff is complaining that they've applied for, but have been wrongfully denied, a Conceal Carry permit."). It would be nonsensical to recognize a generalized right to carry rooted in a right to bear arms outside the home where Plaintiffs have never challenged the State's separate licensing regime that regulates carrying handguns in public. We will not even consider doing so.

C. Rule 5-23 Satisfies Means-Ends Scrutiny.

1. Selecting the Appropriate Level of Scrutiny.

Even if Plaintiffs had shown that the Rule placed some burden upon the Second Amendment right thereby requiring us to move to the second step of our Second Amendment inquiry, they still would not prevail. The Rule passes Constitutional muster: it does not trigger strict scrutiny, and it survives intermediate scrutiny.

As a preliminary matter, we note that to the extent Judge Bichon's dissenting opinion suggests it is never proper to evaluate Second Amendment rights under means-ends scrutiny – either strict or intermediate – that contention cannot be squared either with our past Second Amendment decisions, which we explicitly refuse to disavow, or with the U.S. Supreme Court's longstanding practice. As we and our fellow judges from other U.S. Circuit Courts of Appeal have noted, some of the most vital constitutional protections – from the Free Speech Clause to the Equal Protection Clause – are subject to means-end scrutiny when they implicate countervailing public interests. Applying such scrutiny here would ensure that the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). And indeed, *Heller* suggested that means-ends scrutiny should apply when it noted that the law challenged there so severely burdened core Second Amendment rights that it "would fail constitutional muster" under any of the standards of scrutiny "applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628-29.

And there is good reason to apply means-ends scrutiny. History and tradition are of course initial touchstones of the analysis, but they will not resolve every challenge. Courts must have analytical tools available where history does not "speak with one voice,"

Kachalsky, 701 F.3d at 91, or where they are required to respond to novel challenges, *McDonald,* 561 U.S. at 785.[17]

The dissent is similarly wrong that if means-ends scrutiny is applied, it must be strict scrutiny to avoid creating a "hierarchy of constitutional rights." A host of rights, including rights held fundamental, are subject to varying levels of scrutiny depending on such factors as the challenged law's level of interference with protected conduct and the degree to which the motivations behind the law are inherently suspect.[18] Treating the Second Amendment differently would render other rights "second class." And indeed, after *Heller*, every circuit to decide the issue has adopted a two-step analysis that applies varying levels of heightened (but not strict) means-end scrutiny at the second step.[19]

We return, therefore, to our analysis. In analyzing the first prong of the second step – the extent to which the law burdens the core of the Second Amendment right – we rely on *Heller*'s holding that the Second Amendment has "the core lawful purpose of self-defense," 554 U.S. at 630, and that "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635; *see also Chovan*, 735 F.3d at 1138 (stating that a core right under the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

In analyzing the second prong of the second step – how severely a challenged regulation burdens the Second Amendment right – we are likewise guided by First Amendment

[17] For example, there are no clear historical reference points for "ghost guns" designed to stonewall criminal investigations or technology that enables individuals to "print" working firearms in their homes and evade restrictions on firearms sales. *United States v. McSwain*, No. CR 19-80 (CKK), 2019 WL 598033, at *3 (D.D.C. Apr. 15, 2019) (describing a "ghost gun" as "a weapon that lacks a serial number" and "is therefore untraceable by law enforcement"); *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 454-55 (5th Cir. 2016) (noting that "[t]hree-dimensional ('3D') printing technology allows a computer to 'print' a physical object" including, for example, with the right files, a "single-shot plastic pistol" or "a fully functional plastic AR–15"); *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1255 (W.D. Wash. 2018) ("3D [printed] guns" are "virtually undetectable in metal detectors and other security equipment.").

[18] *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (applying exacting scrutiny to "core" political speech); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293-94 (1984) (restrictions on speech that are not content-based may properly be subject to intermediate scrutiny); *United States v. Virginia*, 518 U.S. 515, 534 (1996) (gender discrimination subject to intermediate scrutiny because it is not inherently suspect); *see generally* Adam Winkler, "Fundamentally Wrong About Fundamental Rights," 23 Const. Comment. 227 (2006) (refuting, entirely apart from the Second Amendment context, the assertion that burdens on fundamental rights always trigger strict scrutiny).

[19] *See Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018); *Marzzarella*, 614 F.3d at 89; *Chester*, 628 F.3d at 680; *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 206 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell,* 651 F.3d at 701-04; *Reese*, 627 F.3d at 800-01; *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller II,* 670 F.3d at 1252. The Eighth Circuit, too, has acknowledged the framework (although that court has not yet specifically adopted it). *See United States v. Hughley*, 691 F. App'x 278, 279 n.3 (8th Cir. 2017).

principles. *Cf. Ezell*, 651 F.3d at 706-07. As we explained in *Chovan*, laws which regulate only the "*manner* in which persons may exercise their Second Amendment rights" are less burdensome than those which bar firearm possession completely. 735 F.3d at 1138; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that laws that place "reasonable restrictions on the time, place, or manner of protected speech" and that "leave open alternative channels for communication of information," pose less of a burden on the First Amendment right and are reviewed under intermediate scrutiny). Similarly, firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not. *Cf. Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to a regulation which "leaves a person free to possess any otherwise lawful firearm he chooses – so long as it bears its original serial number").

The Rule definitely does not impose a substantial burden on Plaintiff's core Second Amendment rights by prohibiting them from taking their licensed handguns to firing ranges and shooting competitions outside the City. As discussed above, we reject Plaintiffs' argument that firearms practice is itself a core Second Amendment right. We acknowledge that a restriction that effectively prevented firearms owners from acquiring and maintaining proficiency in the use of their weapons could significantly burden the core Second Amendment right to keep and bear arms for the purpose of defending hearth and home. *See, e.g., Ezell,* 651 F.3d 684. But, as discussed above, we are far from that situation in this case. Indeed, Plaintiffs have not shown that the Rule places *any meaningful burden at all* on their ability to train in the use of handguns. The Rule's impact on handgun ownership and use is, at most, analogous to a time, place, and manner restriction on constitutionally protected speech. In the context of First Amendment speech rights, which are undoubtedly fundamental, such laws are subject to intermediate scrutiny. *See Clark,* 468 U.S. at 293-94 (National Park Service could properly prohibit the manner in which protestors engaged in symbolic speech: that is, prohibit them from pitching tents on the National Mall).

The Rule does not trigger strict scrutiny, so we turn then to applying intermediate scrutiny.

2. Applying Intermediate Scrutiny.

Having determined the applicable standard of review, we must now determine whether Rule 5-23 withstands intermediate scrutiny. "[C]ourts have used various terminology to describe the intermediate scrutiny standard." *Chovan*, 735 F.3d at 1139; *compare Ward v. Rock Against Racism*, 491 U.S. at 798 (holding that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the means least restrictive or least intrusive of the constitutional right to free speech) *with Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (requiring "the government goal to be substantial, and the cost to be carefully calculated," and holding that "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require" (internal citation omitted)). But "all forms of the intermediate scrutiny standard require (1) the government's stated objective to be significant, substantial, or important; and (2) a

reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. [20]

Where a regulation is a reasonable means of safeguarding the integrity of another law that the plaintiffs do not challenge (and thus must be presumed valid), it satisfies intermediate scrutiny. For instance, in *United States v. Edge Broadcasting Co*., 509 U.S. 418, 426 (1993), the Court considered a First Amendment challenge to a federal law that banned certain lottery advertisements from airing in states that barred lotteries. Applying intermediate scrutiny, the Court held that the federal law was a legitimate means of "supporting the policy of nonlottery States" that lotteries should be limited. *Id.* at 426.

The same logic applies to Rule 5-32. The State's framework allows premises licensees like the petitioners "to have and possess" a handgun "in [their] dwelling," and separately licenses the public carry of a handgun. D.P. Penal Law § 400.00(2). This distinction reflects the understanding that the possession and use of firearms in public presents a greater public danger than the possession of firearms in the home. *See Bonidy v. U.S. Postal Serv*., 790 F.3d 1121, 1126 (10th Cir. 2015) ("The right to carry weapons in public for self-defense poses inherent risks to others."). The State accordingly made a judgment – one that Plaintiffs have not challenged here – to offer different licenses, with different standards for issuance, for self-defense in public and in the home. The State's statute did not expressly authorize premises licensees to transport their handguns to shooting ranges.

The Rule implements this state-created framework – and the home-based nature of the premises license – by limiting premises licensees' ability to remove their handguns from their homes except to the extent necessary for such activities as training or repair. When police officers encounter a licensee transporting a licensed handgun through the City, they can confirm that the licensee is traveling along a plausible route to an in-city shooting range, or that the visit is reflected in the range's records, to which the License Division has access. J.A. 79-80, 91-92. This kind of verification is necessarily more difficult for destinations outside the City. The range of those possible destinations is significantly greater, and access to records significantly limited.

Even on its own terms, public safety is a compelling interest. *Schall v. Martin*, 467 U.S. 253, 264 (1984). And courts traditionally afford some deference to the judgments of policymakers and law-enforcement agencies like the Dog Paw Police Department, who have experience in these matters. *See, e.g., Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (deferring to "police caretaking procedures designed to secure and protect vehicles and their contents within police custody" in concluding that inventory searches

[20] We note that our dissenting colleague seems to have completely missed the fact that *in the context of First Amendment time, place and manner restrictions* "the requirement of **narrow tailoring** is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation [and does not] burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799 (citing *Clark,* 468 U.S. at 297) (emphasis added).

were permissible under the Fourth Amendment); *United States v. Watson*, 423 U.S. 411, 429 (1976) (deferring to the historical experience of law enforcement in upholding the longstanding tradition of allowing police to effectuate warrantless arrests of felons in public). Here, the License Division had a basis to conclude that the Rule is a valid way to effectuate the State's licensing scheme.

Regulation of firearms has long varied in response to local conditions. Dog Paw City is the Nation's largest and most crowded city. The potential for violent conflict, accidents, or thefts involving firearms is higher in such close quarters and presents particularly serious risks considering the density of sensitive places in the City.[21] Enforcing the state-law restrictions on public possession of handguns thus has heightened urgency in Dog Paw City.

We disagree with the dissent's suggestion that the Rule increases the risk to public safety by requiring licensees to spend a longer time in their vehicles transporting their firearms to authorized ranges. This argument seems to imagine licensees who live, for instance, at the foot of a bridge or mouth of a tunnel, such that travel to an out-of-city range through those notorious traffic chokepoints might be more efficient than transport to an in-city range. But the License Department was permitted to regulate based on the typical case rather than such an outlier.

Rule 5-23 does not substantially burden the exercise of the core Second Amendment right. And the City has proved the Rule is a reasonable means of safeguarding the integrity of the unchallenged, public-safety-based Dog Paw State firearms licensing scheme. Accordingly, Rule 5-23 survives intermediate scrutiny.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

[21] Research suggests that most firearms used in firearms-involved crimes were stolen at some point from lawful owners -- a significant proportion of them out of vehicles. *See* Megan E. Collins, et al., "A Comparative Analysis of Crime Guns," RSF: The Russell Sage Foundation Journal of the Social Sciences, vol. 3, no. 5, Oct. 2007, available at https://www.jstor.org/stable/10.7758/rsf.2017.3.5.05; Lisa Stolzenberg & Stewart J. D'Alessio, "Gun Availability and Violent Crime: New Evidence from the National Incident-Based Reporting System," Social Forces, vol. 78, no. 4, June 2000, at 1461-82, available at www.jstor.org/stable/3006181.

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 2017-1

DOG PAW STATE RIFLE & PISTOL ASSOCIATION, C. WILLIAM CHOW, DOBERMAN T. PINSCHER, and JACK RUSSELL ("J.R.") TERRIER, **Plaintiffs-Appellants** **v.** **CITY OF DOG PAW and DOG PAW CITY POLICE DEPARTMENT - LICENSE DIVISION,** **Defendant-Appellees**	**Appeal from the U.S. District Court for the Southern District of Dog Paw**

DISSENT

B. FRISE, Circuit Judge, dissenting.

A decade ago, the U.S. Supreme Court in *District of Columbia v. Heller* affirmed that "both text and history" leave "no doubt" "that the Second Amendment confer[s] an individual right to keep and bear arms," not a collective right reserved only to those in the "Militia." 554 U.S. 570, 595 (2008). And, in *McDonald v. City of Chicago,* the Court confirmed that this individual right is "fundamental" and applies with full force against state and local governments. 561 U.S. 742, 750 & 778 (2010). Title 38, Chapter Five, Section 23 of the Rules of the City of Dog Paw ("the Rule") pre-dated those watershed decisions and is fundamentally incompatible with them. The Rule is irreconcilable with the text of the Second Amendment, which protects the right to keep *and bear* arms, and it cannot survive any level of scrutiny appropriate for a constitutional right that is both individual (*Heller*) and fundamental (*McDonald*). Therefore, I dissent.

I. Discussion

A. Rule 5-23 Burdens Plaintiffs' Second Amendment Rights.

Dog Pawers may exercise their constitutional right to keep a handgun in the home only if they succeed in securing from the City a license to do so. Even if they succeed in obtaining a "premises license," they are subject to a host of restrictions, and their Second Amendment rights are strictly limited to the premises. A combination of state and city law prevents holders of premises licenses from carrying their handguns outside the home. *See Kachalsky v. County of Westchester*, 701 F.3d 81 (14th Cir. 2012). City law generally prevents them from removing their handguns from "the inside of the premises" unless they are "unloaded, in a locked container, the ammunition to be carried separately." 38 RCDP §§ 5-23(a)(2), (3). The City then layers on top of those prohibitions the restriction that a law-abiding resident may remove her unloaded, locked-up handgun from her home only to transport it "directly to and from an authorized small arms range/shooting club" within City limits, of which there are presently a grand total of seven. *Id.*

Under the Rule, a premises license is strictly limited to the premises, and licensees can remove their handguns from their homes only under the "limited circumstances" the City deems appropriate. The City's regime thus rests on the premise that the right the Second Amendment protects is a homebound right. I understand that view to be incompatible with the text of the Second Amendment and with the history and traditions that inform the scope of the right it protects.

1. Text, History, and Tradition Confirm that the Second Amendment is Not Confined to the Home.

The Second Amendment provides: "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. As the U.S. Supreme Court concluded in *Heller*, text, history, and tradition confirm that the right enshrined in the Second Amendment is "an individual right to keep and bear arms." 554 U.S. at 595. That same text, history, and tradition confirm that the individual right to keep and bear arms is not confined to the home.

To start with the text, the Second Amendment protects a right "to keep *and bear* arms." U.S. Const. amend. II (emphasis added). By its plain terms, then, the Amendment protects both the right to "have weapons," *Heller*, 554 U.S. at 583, and the right to "wear, bear, or carry" firearms "upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person," *id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). While one certainly may "keep" arms in the home, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). The text of the Constitution thus confirms that the Second Amendment is not a homebound right, strictly limited to the premises. Instead, people have not just the right to possess firearms on their premises,

but the right to transport arms outside the home for lawful use beyond the premises and the right to bear arms outside the home "for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630.

The Second Amendment's structure reinforces that conclusion. The prefatory clause – "[a] well regulated Militia, being necessary to the security of a free State" – performs a "clarifying function" with respect to the meaning of the operative clause. *Id.* at 577-78. Indeed, the Supreme Court *unanimously* agreed in *Heller* that the Second Amendment was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637 (Stevens, J., dissenting). The prefatory clause thus makes plain that the operative clause of the Second Amendment extends beyond the "curtilage" (that is, the area of land attached to a house and forming one enclosure with it) for the simple reason that militia service necessarily involved bearing arms outside the home.

Moreover, in light of the prefatory clause, it is inconceivable that the framers intended the people to keep and bear one set of arms at home and then to use a different set of government-supplied firearms when they mustered to train as a militia, with no right to transport their own firearms from their home to the training grounds. The Second Militia Act of 1792, enacted just a year after the ratification of the Bill of Rights, made the link between the arms that could be kept in the home and the arms that were to be borne on the militia training grounds explicit. The Act required every "free able-bodied white male citizen" not only to "provide himself with" a musket or rifle plus ammunition and various accoutrements, but also to "appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack." 1 Stat. 271 (1792). The Act further required militiamen to keep their arms "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes." *Id*. at 272. Officers, for their part, were required to come equipped with various additional items, including "a pair of pistols" and a suitable horse. *Id.*

At least two conclusions necessarily follow from the combined effect of the operative and prefatory clauses. First, the individual right protected by the Second Amendment is not limited to the premises, as law-abiding, responsible citizens at a bare minimum have a right to transport their arms to other places where they may be lawfully used, whether that be a shooting range in another city or a militia training ground. A right to keep and bear arms designed both to ensure self-defense and to facilitate a militia necessarily assumes a right to transport arms from places where the need for self-defense is undeniable – such as the defense of family and home in a principal or secondary residence – to places where they can be used for other lawful purposes, be it militia service, hunting, or training.

Second, the "right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); a*ff'd*, 846 F.3d 888 (7th Cir. 2017), *mandamus denied*, 678 F. App'x 430 (7th Cir. 2017); *see also Heller*, 554 U.S. at 617-18. After all, "the core right" to keep and bear arms for self-defense "wouldn't mean much without the training and practice that make it effective." *Ezell*, 651 F.3d at 704. Nor would the operative clause of the Second

Amendment further its prefatory clause if "the able-bodied men" who were expected to stand ready to serve in the "well-regulated Militia" were not "trained" in the use of the "arms" that they were required to bring with them when called to service. *Heller*, 554 U.S. at 597-98.

History and tradition confirm what the text of the Second Amendment makes clear: The right to keep and bear arms is not confined to the premises. To the contrary, the historical record makes clear that individuals were permitted not only to transport their firearms between residences and places where they would practice and train with them, but to carry loaded firearms upon their persons as they went about their daily lives. Indeed, much of that history and tradition directly informed *Heller*'s analysis and conclusion that the Second Amendment protects an individual right.

As St. George Tucker explained in his American version of Blackstone's *Commentaries*, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 St. George Tucker, *Blackstone's Commentaries*, app. n.B (1803). Indeed, in many parts of early America, the carrying of arms was not only permitted but *mandated* for certain segments of the population. Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 106 (2012). Many of the Founders, including Washington, Jefferson, and Adams, likewise carried firearms and defended the right to do so. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016). And, as noted, the Second Militia Act of 1792 drew an express link between the keeping of firearms in the home and the transport of those same firearms for use on the training field. In short, "it is unquestionable that the public carrying of firearms was widespread during the Colonial and Founding Eras." *Id.* at 136.

That tradition continued well after the founding. Indeed, many of the authorities the U.S. Supreme Court surveyed in *Heller* confirm that the Second Amendment was understood both before and after the Civil War to protect a right to carry a loaded firearm upon one's person should the need for self-defense arise. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489, 490 (1850) ("right to carry arms ... 'in full open view'" is "guaranteed by the Constitution of the United States"); *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."); *Nunn v. State*, 1 Ga. 243, 251 (1846) (Georgia statute invalid to the extent it "contains a prohibition against bearing arms openly").

At a minimum, both *Heller* and the historical record it surveyed confirm that the right to keep and bear arms is not *confined* to the premises of one's home. The Court repeatedly discussed historical evidence that the right was understood to extend outside the home. *See, e.g.*, *Heller*, 554 U.S. at 599 (discussing historical importance to founding era of using firearms to hunt); *id.* at 609 (relying on Charles Sumner's famous speech proclaiming that "[t]he rifle has ever been the companion of the pioneer"); *id.* at 614 (noting objections to post-Civil War laws that interfered with the ability of black citizens "to kill game for subsistence, and to protect their crops from destruction by birds and animals").

The historical record is likewise replete with sources confirming that the right to keep and bear arms "implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use." *Id.* at 617-18 (quoting Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1868)). Indeed, as far back as 1541, Englishmen were entitled "to use and shoot the same, at a butt or bank of Earth ... whereby they and every one of them, by the exercise thereof ... may the better aid and assist to the defence of this Realm, when need shall require." 33 Hen. VIII, ch. 6 (1541). As the Crown recognized, possessing arms alone was not enough; those keeping them needed to have some level of familiarity with their use.

That commonsense principle carried over to this side of the Atlantic, where the author of the original Dog Paw Penal Code observed: "No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right." Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880); *cf.* Va. Declaration of Rights § 13 (1776) (referring to "a well-regulated militia, composed of the body of the people, trained to arms"). That is unsurprising, as few things would more obviously frustrate the exercise of the right to self-defense, the people's interest in a well-regulated militia, and public safety, than to entitle the people to keep and bear arms but then deprive them of the means to hone their safe and effective use.

Taken together, text, history, and tradition confirm that the right to keep and bear arms is not confined to the premises. To the contrary, the Second Amendment protects a right to carry arms outside the home, and at a minimum to transport them to other places where they may be lawfully used. Those places undoubtedly include places where individuals would hone their ability to safely and effectively use them.

2. Rule 5-23 is Plainly Inconsistent with that Text, History, and Tradition.

As the foregoing confirms, the City's restrictive premises-only license and accompanying transport ban rest on a supposition that is incompatible with the text, history, and tradition of the Second Amendment. The Second Amendment does not confer a premises-only right. Nor does it allow the government to proceed on the assumption that once it allows the people to keep arms in the privacy of their homes, it has exhausted the right and possesses plenary power to restrict transport and use outside the home. Yet the City's ban prohibits law-abiding individuals from transporting their lawfully owned handguns – even locked-up, unloaded, and separated from their ammunition – outside the borders of Dog Paw City, with the limited exception that they may transport them to a designated hunting area within the state if (but only if) they obtain separate written authorization from the Police Department. Individuals may not transport their handguns to ranges and shooting competitions outside the borders of Dog Paw City. Even within the City, moreover, individuals may take their handguns nowhere other than seven approved ranges that must serve all 8.5 million of the City's residents. In fact, individuals may not

even transport their handguns to a gunsmith for servicing without first obtaining written permission from the City. *See* 38 RCDP § 5-22(16).

The City's regime is inescapably based on the view that the rights protected by the Second Amendment, like the City's license, are confined to the home. Indeed, the City has openly acknowledged that the transport ban is designed to help it ensure that individuals will be unable to remove their handguns from their homes except under "the limited circumstances" the City deems permissible. Those "limited circumstances" do not even come close to including all the places where the Second Amendment applies. The transport ban thus conflicts with the most basic guarantees of the Second Amendment, for it treats as a mere privilege, to be granted or denied at the City's pleasure, what the Constitution declares a fundamental right.

Unsurprisingly, there is no historical analog to the City's regime. There is no record of any longstanding tradition of confining firearm rights to the premises or prohibiting the removal of a firearm beyond the curtilage of one's principal residence. When Washington, Jefferson, and Adams extolled the virtues of carrying firearms, they made no mention of any need to leave their firearms behind when they traveled between the seat of government and their personal residences. The Second Militia Act not only permitted, but required, the transport of firearms from the home to the training ground. And while a few jurisdictions required a license to use designated ranges for target practice at the founding, *see Ezell*, 651 F.3d at 705 & n.13, none appears to have had restrictions on transporting a firearm either outside city limits for target practice or within the city for other purposes. Rather, as explained above, individuals historically were freely permitted not just to transport their firearms if they were unloaded and inaccessible, but to carry loaded firearms upon their persons for self-protection as they went about their daily lives. In short, any attempt to characterize the transport ban as the kind of "longstanding prohibition," *Heller*, 554 U.S. at 626, that the people would have understood the Second Amendment to allow is a nonstarter.

The majority fails to recognize that the City has not identified any other jurisdiction in the country that prohibits law-abiding individuals from taking their lawfully owned handguns outside the jurisdiction. Most states do not confine their residents to "transporting" their firearms, but rather protect their right to carry loaded firearms upon their persons. And most of the handful of states that do not protect the right to carry allow their residents to transport a handgun to any place where it may be kept and carried, so long as it is unloaded and secured during transport. The federal government takes the same approach in the Firearm Owners Protection Act, which protects a firearm owner's ability "to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm," so long as "the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle." 18 U.S.C. § 926A.

As these laws illustrate, even jurisdictions that expressly regulate the transport of lawfully owned firearms generally consider a requirement that a handgun be unloaded and

locked-up as exhausting their regulatory authority. And even the exceedingly small number of jurisdictions that restrict both how *and where* a firearm may be transported do not confine the transport of firearms to places within the geographic limitations of the jurisdiction. *See, e.g.*, Haw. Rev. Stat. Ann. §§ 134-23(a), 134-24(a), 134-25(a), 134-27(a); Md. Code, Crim. Law § 4-203.

The City thus stands alone, both historically and presently, in precluding its residents from transporting unloaded, locked-up handguns outside the jurisdiction to places where they may lawfully keep and bear them, like out-of-town shooting ranges and competitions. That is likely because every other jurisdiction recognizes that such a restriction could not be reconciled with the individual and fundamental right to keep and bear arms for self-defense.

B. The City's Regime Is Unconstitutional Under Any Mode of Analysis.

The obvious incompatibility of the City's regime with text of the Second Amendment and the complete absence of any historical (or even modern-day) analog suffice to resolve this case. "*Heller* established that the scope of the Second Amendment right—and thus the constitutionality of gun bans and regulations—is determined by reference to text, history, and tradition." *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1272-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The transport ban has zero grounding in text, history, and tradition. For that reason alone, it is "not consistent with the Second Amendment individual right." *Id.* at 1285.

The same result would obtain, however, were the Court inclined to subject the ban to any level of meaningful means-end scrutiny. The proper form of means-end analysis should be strict scrutiny, because the right the Second Amendment protects is fundamental.

1. If Means-End Scrutiny Governs Second Amendment Claims, Strict Scrutiny Should Apply.

It is black-letter law that "strict judicial scrutiny" applies when a regulation interferes with "fundamental constitutional rights." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). Indeed, a long line of cases confirms that the government may not infringe on "'fundamental' liberty interests ... unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *see also Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

The right the Second Amendment protects is not only individual, but fundamental. That conclusion follows directly from the framers' decision to enshrine the right in the Constitution. But to the extent there were ever any doubt on that score, the U.S. Supreme Court laid it to rest in *McDonald*. *See* 561 U.S. at 778 (plurality op.) ("[T]he Framers and

ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment) ("agree[ing]" that "the right to keep and bear arms ... is 'fundamental'"). Accordingly, if means-end scrutiny applies, the applicable level of scrutiny must be strict.

Subjecting laws that burden the right protected by the Second Amendment to lesser scrutiny than those that burden other fundamental rights would be tantamount to imposing "a hierarchy of constitutional values" by judicial fiat. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). The U.S. Supreme Court has already squarely refused "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality op.). For good reason: "To view a particular provision of the Bill of Rights with disfavor ... is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

That said, the City's policy could not survive *any* meaningful form of heightened scrutiny, whether strict or intermediate. Under both strict and intermediate scrutiny, a court must assess both the strength of the government's interest and "the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality op.). And even under intermediate scrutiny, the government must prove that its law is "narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *Ward v. Rock Against Racism*, 491 U.S. 781, 798.) In other words, the question is not just whether the means advance the government's stated end, but whether they do so in a way that "avoid[s] unnecessary abridgement" of constitutional rights. *McCutcheon*, 572 U.S. at 199. And both strict and intermediate scrutiny "place[] the burden of establishing the required fit . . . squarely upon the government." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989)).

2. The City Cannot Carry Its Burden of Demonstrating Narrow Tailoring.

The City claims that its restrictive premises-only license and accompanying transport ban promotes public safety and crime prevention and implements the Dog Paw State firearms licensing scheme. These are undoubtedly substantial interests. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002) (opinion of O'Connor, J.). But no matter how important its asserted interest may be, the City may "pursue that interest only so long as it does not unnecessarily infringe an individual's" Second Amendment rights. *McCutcheon*, 572 U.S. at 206 (plurality op.). And courts may "not truncate this tailoring test" based on their perception that the interest imprecisely pursued is very important. *Id.*

The first problem is that the City's principal justification for its policy is at fundamental odds with the Second Amendment. According to the City, the ban furthers public safety because it better enables the City to ensure that individuals remove their handguns from

their homes only under "the limited circumstances" of the City's choosing. As I explain above, however, the right to keep and bear arms is not confined to the home. Thus, even if the City could demonstrate that confining handguns to the home furthers public safety, it could not enact laws with the objective of furthering that end, because that is a policy choice that "the enshrinement of" the right to keep and bear arms "necessarily takes ... off the table." *Heller*, 554 U.S. at 636. The City cannot justify the transport ban on the ground that it aids the City's efforts to achieve a policy preference that is directly contrary to the views of the Framers who enshrined a right to keep *and bear* arms in the Second Amendment without ever suggesting that the right is enjoyed on the premises and nowhere else. *Compare* U.S. Const. amend. III (prohibiting unauthorized quartering of soldiers "in any house"); U.S. Const. amend. IV (distinctly protecting security of, among other things, "houses").

The problems with the narrow tailoring of the City's approach hardly end there. In scrutinizing the fit between the City's stated ends and its chosen means, it is important to take closer stock of the broader firearms licensing scheme the City is seeking to implement with the Rule. Under Dog Paw State law, before City residents may possess a handgun in the home, they must obtain a license from the City, which requires them to pass multiple background checks, satisfy City officials that the statements on their license applications are truthful, and establish that they are extraordinarily law-abiding. *See* 38 RCDP § 1-03(d) (implementing Dog Paw State Penal Law). Even after they obtain that "premises license," Dog Paw State law precludes individuals from carrying their handguns on their persons outside the home, either openly or concealed. *See Kachalsky*, 701 F.3d at 87. Instead, premises licensees may remove their handguns from their homes only if they are "unloaded, in a locked container, the ammunition to be carried separately." 38 RCDP § 5-23(a)(3). And on top of all that, the City imposes the additional and novel restriction that a premises licensee may only "transport her/his handgun(s) directly to and from an authorized small arms range/shooting club," *id.*, thereby precluding law-abiding residents from taking their handguns to out-of-city ranges or competitions or anywhere else inside or outside of the city or state.

The Majority relies on *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), for the proposition that any "regulation [that] is a reasonable means of safeguarding the integrity of another law" necessarily satisfies intermediate scrutiny. But, in *Edge Broadcasting* the underlying law whose integrity was being safeguarded "implicate[d] no constitutionally protected right." 509 U.S. at 426. Here, by contrast, the City seeks to justify restrictions on Second Amendment rights as useful to its efforts to enforce *another* restriction on Second Amendment rights. Even accepting the proposition that the carry ban "must be presumed valid," that hardly means that the Majority opinion was right to ignore the fact that it is a restriction on constitutional rights. Indeed, "[t]his 'prophylaxis-upon-prophylaxis approach' requires that [a reviewing court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221.

It also hurts the City's argument that it stands alone in taking this approach to gun regulation. "[I]t would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second

Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). As explained above that is precisely the case here: The City stands alone in prohibiting its residents from transporting unloaded, locked-up handguns even to ranges or shooting competitions outside the jurisdiction.

The complete absence of other jurisdictions following Dog Paw City's lead is truly remarkable. It would be comforting to think that the absence of comparable restrictions reflects other jurisdictions' greater respect for Second Amendment rights, but that supposition is belied by continuing efforts to ban handguns, *see Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), and confiscate long-legal firearms, *see Guns Save Life, Inc. v. Village of Deerfield*, No. 18CH498 (Ill. Ct. Cl. June 12, 2018). Instead, the most logical explanation for why the City stands alone is that its policy does not meaningfully advance its stated interests. In fact, in many respects it runs directly contrary to those interests, for it ensures the transport of handguns across Dog Paw City to inconvenient ranges when a quick trip to across the river to a neighboring state would suffice.

Worse still, even if the City's speculation had some grounding, it is not clear that its policy actually reduces the number of unloaded handguns in trunks of automobiles on city streets, because it forces residents to use a training facility across town, rather than crossing a bridge or tunnel and getting the handgun out of the city. Thus, to the extent the transport ban rests on the notion that spending time on city streets with an unloaded, locked-up handgun in tow is itself a public-safety risk, it cannot survive either strict or intermediate scrutiny, as a law that affirmatively undermines the government's stated interest is manifestly not "narrowly tailored." *Packingham*, 137 S. Ct. at 1736.

Rule 5-23 substantially burdens the exercise of the fundamental Second Amendment right "to keep and ***bear*** arms". For the reasons discussed above, it cannot survive any level of means-end scrutiny. Accordingly, I dissent.

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 18-208

DOG PAW STATE RIFLE & PISTOL ASSOCIATION, C. WILLIAM CHOW, DOBERMAN T. PINSCHER, and JACK RUSSELL ("J.R.") TERRIER, **Petitioners** **v.** **CITY OF DOG PAW and DOG PAW CITY POLICE DEPARTMENT - LICENSE DIVISION,** **Respondents**	**On Writ of Certiorari to the United States Court of Appeals for the 14th Circuit**

ORDER GRANTING CERTIORARI

The petition of the Dog Paw State Rifle & Pistol Association *et. al.* is GRANTED. Oral argument shall occur on October 19, 2019, in Crawfordsville, Indiana, and be limited to the following issue:

> Whether the City of Dog Paw's ban on transporting a licensed, locked, and unloaded handgun to a shooting range or competition outside city limits is consistent with the Second Amendment to the United States Constitution.

Petitioner shall open and close the argument.

FOR THE COURT

Coton de Tulear

Coton de Tulear, Clerk of Court