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DOES THE SECOND AMENDMENT ENTAIL THE RIGHT TO CONCEAL CARRY FIREARMS IN PUBLIC FOR SELF-DEFENSE? THE PROPER CAUSE ISSUE FINALLY ADDRESSED

Leah Boston

I. Introduction

The year 2021 has been a long year for mass shootings, and it is not even halfway over. "18 weeks into 2021," and the "U.S. has experienced 194 mass shootings," averaging approximately ten per week.[1] Not surprisingly, "by the end of [2020], at least 20 million guns" had been sold legally, increasing "12.4 million since 2019."[2] Along with this increase in gun sales, and in response to the death of George Floyd, 2020 saw "tens of thousands" protest and march in many cities around the U.S.[3] The increase in gun sales and protests in the same year seems to correlate with the desire to arm oneself amidst the current events. Yet, Americans who favor some form of gun control are unlikely to see it depending on the state they live in.[4]

America saw "its first significant form of gun control laws between the two World Wars"[5]—an example of Congress's

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[1] Saeed Ahmed, *There Have Been, On Average, 10 Mass Shootings in the U.S. Each Week This Year*, NAT'L PUB. RADIO (May 10, 2021, 1:02 PM), https://www.npr.org/2021/05/10/995380788/there-have-been-on-average-10-mass-shootings-in-the-u-s-each-week-this-year.

[2] Martin Kaste, *Did Record Gun Sales Cause A Spike In Gun Crime? Researchers Say It's Complicated*, CRIMINAL JUSTICE COLLABORATIVE (May 10, 2021, 5:03 AM), https://www.npr.org/2021/03/03/971854488/did-record-gun-sales-cause-a-spike-in-gun-crime-researchers-say-its-complicated.

[3] Tens of thousands march against systemic racism and the killing of black people in America sparked by the death of George Floyd. Leanna Garfield & Zoë Ettinger, *14 of the Biggest Marches and Protests in American History* INSIDER POLITICS (June 1, 2020, 5:00 PM), https://www.businessinsider.com/largest-marches-us-history-2017-1.

[4] The political climate coupled with each states' Constitution are varying reasons why some states favor or disfavor some form of gun control. Samuel D. Brunson, *Paying for Gun Violence*, 104 MINN. L. REV. 605, 605 (2019).

[5] Brunson, *supra* note 4, at 606.

constitutional authority to regulate.[6] Congress has the power to write a uniform set of national regulations. "Once Congress exercises this right…, the states are constitutionally prohibited from adopting laws inconsistent with the federal" mandate.[7] This is an example of federal preemption.[8] Congress has the right to elect whether it will insert itself or delegate the responsibility to the states to regulate certain industries or activities.[9] Regulation of the firearm industry is an example of Congress's discretion. Congress has refrained from regulating the firearm industry exclusively, but it has not completely resigned its authority to the states.[10] Instead, the states are free to regulate firearms alongside the federal government.[11] Thus, when purchasing a firearm, an individual must comply with whichever law is the strictest.[12] In turn, for gun rights advocates, states with stricter firearm laws may prove burdensome. Accordingly, firearm laws are frequently litigated.[13] Thus, a possibly more conservative Supreme Court interpreting the Second Amendment is favorable for those who want limited firearm restriction. This paper will address our court systems' different interpretations of the Second Amendment.

Part II will explain how the Supreme Court's interpretation of the Second Amendment has evolved over time and will discuss a recent case that has caught the Court's attention, *N.Y. State Rifle & Pistol Ass'n v. Corlett,*.[14] Part II will also discuss the New York state regulation at issue in that case. Part III will detail the circuit courts' heavy divide over Second Amendment interpretations and this issue's relation to the current makeup of the Supreme Court. This analysis will aid in predicting where each Justice stands on topics of the Second Amendment, firearm possession, and legislative gun regulation. Next,

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[6] William S. Harwood, *Gun Control: State Versus Federal Regulation of Firearms*, 11 ME. POL'Y REV. 58, 60 (2002).
[7] *Id.*
[8] *Id.*
[9] *Id.* at 61.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] After the Supreme Court rulings in *Heller* and *McDonald*, an overwhelming number of claims have been that "various federal, state, and local laws regulating firearms violate the Second Amendment." *Post-Heller Litigation Summary*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE (*last updated* Aug. 25, 2020), https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/.
[14] N.Y. State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021).

this paper will predict how the Supreme Court will rule on this basis. Finally, Part IV will suggest how the Supreme Court should rule in the *Corlett* case.

II. The Gradual Development of Second Amendment Interpretation and the New York Penal Law That Gave Rise to the Cortlett Case

The right to bear arms debate starts with "the specific language of the [S]econd [A]mendment" in "the United States Constitution."[15] 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."[16] The Supreme Court has only addressed the Second Amendment a few times.[17] In *United States v. Cruikshank* of 1876, the Court held that the rights to assemble and bear arms were protections only against the federal government and that these rights did not apply against a state or private citizen.[18] The Court addressed this topic again in *Presser v. Illinois* of 1886,[19] holding that the Second Amendment pertained to "the power of Congress and the National government."[20]

In *Presser*, the militiamen marched a company of armed men on the streets without being part of an organized "militia of the state of Illinois" or "under militia law of the United States."[21] The Court affirmed its conviction that the plaintiff violated the Illinois Military Code, which required membership in an organized militia in order to bear arms, and further held that the statute was not unconstitutional.[22]

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[15] Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 54 (1966).
[16] U.S. CONST. amend. II.
[17] Each time the Supreme Court addressed the Second Amendment in 1876, 1886, and 1939, it held that the people had "a right to bear arms only within the militia." Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3 (2000). The militia refers to what is defined in Article I, Section 8 of the Constitution, which is the militia organized by Congress subject to both federal and state control. U.S. CONST. art. 1, § 8, cl. 16.
[18] United States v. Cruikshank, 92 U.S. 542, 553 (1876).
[19] Presser v. Ill., 116 U.S. 252 (1886).
[20] *Id.* at 265.
[21] *Id.* at 266.
[22] "It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or

The Court did not recognize a right of the individual "to keep and bear arms."[23] "A state [could] pass laws that regulate the privileges and immunities of its own citizens," and because a national privilege conferring rights to form a militia did not exist, Illinois had the power to enact that provision of its military code.[24]

In 1939, the Court addressed the Second Amendment again in *United States v. Miller*.[25] The defendants in *Miller* were indicted for transporting an unregistered shotgun in interstate commerce.[26] The Court held that the Second Amendment did not guarantee an individual right to keep and transport a shotgun because the defendants' possession of the shotgun did not build the preservation of the militia.[27] In doing so, the Supreme Court limited the right to keep and bear arms as part of ordinary military equipment and as a contribution to the Nation's common defense.[28] This has become known as the "collective right" model.[29] The "collective right" model embraces the idea that "the Second Amendment protects the right of the states to have an armed militia" and not the individual.[30]

Relying on these early Supreme Court decisions, the Second Amendment "collective right" model stood unchallenged until an "individual rights" argument appeared in 1960.[31] The individual right argument stemmed from a historical understanding in society that a man had a right to preserve his own species, his property rights, prevent certain felonies, and revolt against oppressive political

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parade with arms in any city, or town, of this State, without a license of the Governor thereof, which license may at any time be revoked…" *Id*. at 253-54.

[23] *Id*. at 265.

[24] *Id*. at 266.

[25] United States v. Miller, 307 U.S. 174 (1939).

[26] *Id*. at 175.

[27] *Id.* at 178.

[28] *Id*. at 181-82.

[29] "[T]he Second Amendment grants the people a collective right to an armed militia" and not "an individual right to keep and bear arms for one's own purposes." Bogus, *supra* note 17, at 4.

[30] Bogus, *supra* note 17, at 19-20.

[31] The controversy surrounds the breakdown between "militia," and "right of the people." Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 396 (1960). "Militia" collectively refers to "a group of people acting under authority as [an] army." *Id.* at 405. Those in the militia are all of the people, "but not all of the people are in the militia." *Id.* at 406. Thus, it follows that the Second Amendment would protect the rights of both groups. *Id.*

leaders.[32] Here, the Second Amendment began to take on a new interpretation that separated individuals from the group within the militia as a historical view of self-preservation.[33]

Nevertheless, up until recently, the lower courts still followed the collective right model. In *United States v. Johnson*, the Fourth Circuit rejected Johnson's argument that 18 U.S.C.S. § 922(g), which stated that it was unlawful for any person who has been convicted in any court for a felony "to ship or transport in interstate or foreign commerce, or possess" a firearm or ammunition, was an unconstitutional violation of his Second Amendment right to keep and bear arms.[34] Johnson was previously convicted of a felony and further convicted of violating § 922(g).[35] In upholding his conviction, the Court referenced that "courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'"[36] The Sixth Circuit came to the same conclusion in *Stevens v. United States* when Stevens challenged Congress's authority to enact Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.[37] It reads that, "Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, and who receives, possesses, or transports in commerce, or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."[38] The Court rejected Stevens's argument that Congress did not have the power to enact the statute because "the Second Amendment right to 'keep and bear Arms'" is only applicable to "the right of the State to maintain a militia" and not the individual.[39] Thus, Stevens did not have a constitutional right as an individual to possess a firearm.[40] Consequently, Congress had the authority to enact the statute "under

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[32] *Id.* at 405.
[33] *Id.* at 388-99.
[34] United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974). 18 U.S.C. 922(g)(1).
[35] *Id*. at 549.
[36] *Id*. at 550.
[37] Stevens v. United States, 440 F.2d 144, 145-46 (6th Cir. 1971).
[38] *Id.*
[39] *Id.* at 149.
[40] *Id*.

the commerce clause."[41] The lower courts relied on the Supreme Court's previous three opinions—*Cruikshank, Presser,* and *Miller*—to strictly adhere "to the collective right model."[42]

However, in 2001, the Fifth Circuit adopted the individual right model in *United States v. Emerson*.[43] Here, Emerson unlawfully possessed a firearm in violation of 18 U.S.C. § 922(g)(8) and he asserted that this statute violated his Second Amendment rights and that Congress was using "an improper exertion of its federal power under the commerce clause" to usurp "powers reserved to the states by the Tenth Amendment."[44] The Fifth Circuit rejected the collective rights model and held that the Second Amendment protects "the rights of individuals," including those who are not actually members of any militia or engaged in the military, "to privately possess and bear their own firearms."[45] They reasoned that "no historical evidence had been found that the Second Amendment intended to convey militia power to the States, limit the federal government's power to maintain" an army, or apply only to members "while on active duty," rather, the evidence indicated that "the Second Amendment, like other parts of the Bill of Rights," was applicable to protect individual Americans.[46] The evolution of the individual right concept has created a sense of doubt as to what the framers intended by "right of the people" and "a well-regulated militia."[47] The collective rights model no longer stands unchallenged.

A. *Heller* and *McDonald*: The Supreme Court's Transition from the Collective Rights Model to the Individual Rights Model

The court's analysis in *District of Columbia v. Heller* expanded the Second Amendment's limitation on the right to carry and bear arms.[48] The Court's analysis in *Heller* determined that the "right of the people" and the "a well-regulated militia" clauses in the Second

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[41] *Id*.
[42] Bogus, *supra* note 17, at 4.
[43] United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).
[44] *Id*. at 212.
[45] *Id*. at 260.
[46] *Id.*
[47] U.S. CONST. amend. II
[48] Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L. J. 1486, 1492 (2014).

Amendment do not limit or expand each other, but rather they represent a division of two parts.[49]

In *Heller*, the plaintiff, a special police officer, was authorized to carry a handgun while on duty and he applied for a registration permit to keep his handgun at home.[50] The District of Columbia refused because the statute prohibited handgun possession in the home without a license, and any lawful handgun issued by the chief of police was to be unloaded, dissembled, or bound by a trigger lock.[51] The Court held that the absolute prohibition of handguns used for self-defense in the home was unconstitutional because the Second Amendment preserved the right of "law-abiding, responsible citizens to use arms in defense of hearth and home."[52]

The Court's breakdown of the Second Amendment in *Heller* inspired the idea that the collective rights model guarantees a hybrid right because the operative clause of "the right of the people to keep and bear Arms shall not be infringed," is not controlled by the militia clause.[53] In *Heller*, the Court's opinion interpreted the Second Amendment to be two independent clauses that connect.[54] This claim is supported by founding-era language, particularly individual-rights provisions of state constitutions, that commonly included a prefatory statement of purpose.[55] The language "right of the people" is used two other times—in the First Amendment and the Fourth Amendment—and it unambiguously refers to individual rights not "collective" rights or rights exercised through an organized body of people.[56] *Heller* supports the claim that the Second Amendment protects rights beyond the militia and guarantees a fundamental right for an individual to bear arms.[57]

The *Heller* opinion reinforces the understanding that constitutional rights are not interpreted to only protect the eighteenth century founding era.[58] The Constitution is an ever-evolving

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[49] Dist. Of Columbia v. Heller, 554 U.S. 570, 577 (2008).
[50] *Id*. at 575.
[51] *Id*. at 576.
[52] *Id*. at 635-36.
[53] Meltzer, *supra* note 47, at 1492.
[54] Christopher M. Johnson, *Second Class:* Heller*, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1589 (2017).
[55] *Heller*, 554 U.S. at 577.
[56] *Id.* at 579.
[57] *Id.* at 577.
[58] *Id.* at 582.

instrument. Thus, the language of the Second Amendment as it pertains to "bearable arms," would extend to modern arms beyond the Framers' weapons during the founding era.[59] "'Arms'" is defined as 'anything that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'"[60] The eighteenth century language to "bear" meant to "carry," thus the natural meaning of "bear arms" translates to carry arms or weapons.[61] "Bear arms" refers to carrying weapons outside of an organized militia because the Court found sources in state constitutional provisions written in both the eighteenth and nineteenth century that gave the citizens a right to "bear arms in defense of themselves and the state."[62] This led the Court to conclude that the Second Amendment includes a pre-existing right to the individual to bear arms for defense purposes,[63] and does not limit weapons solely for military involvement.[64]

Heller further stated that a complete prohibition on handguns, the most popular weapon chosen by Americans for self-defense, was invalid.[65] The Court concluded that it was unconstitutional for the District to impose a prohibition that made it impossible for citizens to use their weapons for the lawful purpose of self-defense.[66] Thus, the Court concluded that the District must permit and allow the registration of a license to carry a handgun in the home.[67] The *Heller* opinion broadly defined the pre-existing right to use arms to defend oneself and the home; however, the Court's efforts to support gun regulations did not include an absolute right to carry.[68]

The Court reevaluated the Second Amendment in *McDonald v. City of Chicago*, in which the City of Chicago prohibited the registration and possession of handguns by private citizens.[69]

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[59] *Id*.
[60] *Id.* at 581.
[61] *Id.* at 584.
[62] 554 U.S. at 601 ("In 1776, Pennsylvania adopted an individual right that gave people a right to bear arms for the defense of themselves and the state, a right which was unconnected to military service. In 1777, Vermont adopted an identical provision. In 1780, Massachusetts adopted a similar provision.")
[63] Dist. Of Columbia v. Heller, 554 U.S. 570, 602 (2008).
[64] *Id.* at 585.
[65] *Id.* at 629.
[66] *Id.* at 630.
[67] *Id.* at 635.
[68] Meltzer, *supra* note 47 at 1494.
[69] McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

McDonald and other Chicago residents wanted to keep handguns in their homes for self-defense but were prohibited by Chicago's firearm laws.[70] The Court considered whether the right to keep and bear arms applied to the States under the Due Process Clause of the Fourteenth Amendment.[71] The City of Chicago argued that its laws were constitutional because the Second Amendment was not applicable to the States.[72] The Court did not adopt City of Chicago's argument but instead initiated a process of "selective incorporation," holding that the Due Process Clause fully incorporates certain rights within the first eight Amendments.[73]

The Court stated that the incorporated Bill of Rights protections were enforceable against the States under the Fourteenth Amendment under the same standards that protect personal rights against federal encroachment.[74] The *McDonald* Court thus overruled earlier decisions holding that the Bill of Rights' guarantees and remedies were inapplicable to the States.[75]

The Court had to decide whether to incorporate the Second Amendment's right to keep and bear arms into the Due Process Clause of the Fourteenth Amendment.[76] *Heller* established self-defense as a longstanding basic right that is the "central component" of the Second Amendment.[77] Further, evidence of state constitutions' protection of the right to keep and bear arms follows that the Framers believed that

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[70] *McDonald*, 561 U.S. at 750 ("'No person shall…possess…any firearm unless such person is the holder of a valid registration certificate for such firearm.'" Chicago, Ill., Municipal Code § 8-20-040(a) (2009). Further, most handguns were prohibited (pistols, revolvers, guns, and small arms) essentially banning all handgun possessions by private citizens.")

[71] *Id.* at 759.

[72] *Id.* at 750.

[73] *Id.* at 763.

[74] *Id.* at 765.

[75] *Id.* at 766; Palko v. Conn., 302 U.S. 319, 322 (1937) (overruling the holding that the Fifth Amendment is not directed to the states but solely the federal government and the Fourteenth Amendment embodies the prohibitions in the Fifth, which is not applicable to the states); Betts v. Brady, 316 U.S. 455 (1942) (overruling the holding that the Supreme Court found that the concept of due process incorporated in the Fourteenth Amendment does not bind the states.)

[76] McDonald v. City of Chicago, 561 U.S. 742, 763-64 (2010).

[77] *Id.* at 767; *See Heller*, 554 U.S. at 628 ("A prohibition of handguns, America's most highly chosen class of arms, would fail constitutional muster especially when the prohibition extends to the home which is where the need for self-defense is the highest. Therefore, the people must be permitted to lawfully use handguns for defense.")

the Second Amendment's core right was fundamental to our system of ordered liberty.[78]

The City of Chicago's argument was contrary to the holding in *Heller* because it asked the Court to subject the Second Amendment right to a different set of rules rather than those guarantees in the Bill of Rights and those incorporated into the Due Process Clause.[79] Further, the City of Chicago directed the Court's attention to public safety implications as a reason to separate the Second Amendment from other provisions within the Bill of Rights.[80] The firearms topic is controversial; however, other constitutional provisions, such as the fourth amendment, equally raise public safety concerns.[81] Therefore, the Court rejected the public safety concern argument because the City of Chicago could not cite cases in which the Court held that the States were not bound to a provision of the Bill of Rights because of public safety implications.[82] The Court in *McDonald*, using the consideration of *stare decisis* from the decision in *Heller*, held that because this provision in the Bill of Rights protects a fundamental right deeply rooted in this nation's history, it must apply equally to the Federal Government and the States.[83] Thus, the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right that the Court established in *Heller*.[84]

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[78] *McDonald,* 561 U.S. at 778; *Heller*, 554 U.S. at 584.
[79] *McDonald*, 561 U.S. at 780 ("The Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.")
[80] *Id.* at 782.
[81] United States v. Leon, 468 U.S. 897, 907 (1984) ("The costs of the exclusionary rule as a part of the Fourth Amendment may have social consequences that allow the guilty to go free or receive reduced sentences in return for plea bargaining which may possibly interfere with the criminal justice system's search for the truth.")
[82] *McDonald*, 561 U.S. at 783.
[83] *Id.* at 791.
[84] *Id.*

B. The Second Circuit's Longstanding Support for New York State Gun Laws: The Proper Cause Challenge That Gave Rise to *N.Y. State Rifle & Pistol Ass'n v. Corlett*

Since *Heller* and *McDonald*, there have been hundreds of Second Amendment challenges in the federal courts.[85] Surprisingly, the lower federal courts agree on a majority of Second Amendment challenges.[86] The circuit courts have uniformly adopted a two-part test to guide in the adjudication process.[87] Additionally, every circuit court has upheld the ban on large-capacity magazines and "assault weapons."[88] Notwithstanding, the circuit courts are not in agreement about public-carry licenses.[89] Some jurisdictions allow looser restrictions that expand an individual's right to possess a gun in public.[90] However, densely populated states like California, New York, and New Jersey, for example, require applicants to show "a good and substantial reason" or a "special need for protection" for public carrying, especially concealed public carry.[91] The First Circuit, Second Circuit, Third Circuit, Fourth Circuit, and Ninth Circuit have all upheld a proper cause requirement "to obtain a permit."[92] The Second Circuit sits in New York City.[93] Thus, the Second Circuit's longstanding, established proper cause requirement to obtain a permit in New York will undergo review by the Supreme Court.[94]

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[85] Jake Charles, *Where Are All the Second Amendment Circuit Splits?* SECOND THOUGHTS BLOG (Aug. 16, 2019), https://sites.law.duke.edu/secondthoughts/2019/08/16/where-are-all-the-second-amendment-circuit-splits/.
[86] *Id*.
[87] *Id.*
[88] *Id.*
[89] *Id*.
[90] Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 218 (2014).
[91] *Id*.
[92] Charles, *supra* note 84.
[93] *About the Court*, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, https://www.ca2.uscourts.gov/about_the_court.html (Last modified at 05/21/2019) ;*: N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (2021), *cert. granted*, 89 U.S.L.W. 3365 (U.S. Apr. 26, 2021) (No. 20-843).
[94] Adam Liptak, *Supreme Court to Hear Case on Carrying Guns in Public*, N.Y. TIMES, (Apr. 26, 2021), https://www.nytimes.com/2021/04/26/us/supreme-court-gun.html.

New York state law prohibits possession of a firearm without a license.[95] New York law allows an individual to have and possess a pistol or revolver, other than an assault weapon, in his or her home, or place of business, in employment in a banking institution or express company, in judicial departments, or as employees of the state.[96] Nevertheless, a license to carry a concealed gun, absent employment or place of possession, is issued "when proper cause exists for the issuance thereof.[97] "Proper cause" is not defined within the New York Penal Code. However,, New York courts have tried to interpret the legislative intent.[98] New York courts have historically interpreted the statutory language of section 400.00 to grant licensing officers broad discretion to determine what constitutes "proper cause."[99] Nevertheless, the discretionary power "of the licensing officers may not be 'arbitrary and capricious.'"[100] However, if a licensing officer chooses to utilize restrictions in his or her county based on the variations in population density and geographical location, this alone does not render the restrictions arbitrary or capricious.[101] In fact, restricting a license for a legitimate purpose, for example, hunting and target shooting, aligns with the statute's purpose to regulate and control the increasing usage and possession of handguns in the state.[102]

Most applicants have the desire to carry a concealed pistol absent the employment or place of possession exception, and this is an issue. The appellate court in *Bernstein v. Police Dep't of New York*, held that being in general areas "noted for criminal activity" is not a sufficient reason to demonstrate a special need for protection.[103] Here,

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[95] N.Y.. PENAL LAW § 400.00(1) (McKinney 2021).
[96] N.Y. PENAL LAW § 400.00(2)(a)-(e) (McKinney 2021).
[97] N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2021).
[98] The term "proper cause" indicates showing a legitimate reason that justifies granting a privilege under the circumstances. In Re O'Connor, 585 N.Y.S.2d 1000,1003 (Westchester Cnty. Ct. 1992).
[99] *Id.* at 1002.
[100] Davis v. Clyne, 58 A.D.2d 947, 947 (App. Div. 1977).
[101] *In Re O'Connor*, 585 N.Y.S.2d at 1003-04.
[102] *Id.* at 1003.
[103] Petitioner applied for a license to carry a concealed pistol because he was an attorney who specialized in criminal and matrimonial law and often traversed areas high in criminal activity with large amounts of cash. Bernstein v. Police Dep't of N.Y., 445 N.Y.S.2d 716, 717 (App. Div. 1981).

the state courts in New York have historically held the high crime area argument is meritless.[104]

Officials in New York City have divided nonoccupational carry licenses into two categories: "Carry Business Licenses," and "Limited Carry Business Licenses."[105] "'Carry Business Licenses' are unrestricted licenses to carry a concealed handgun" , while 'Limited Carry Business Licenses' only permit a person to carry a concealed handgun during specified times and to and from specified place."[106] An applicant may demonstrate proper cause for either of these licenses if he or she is exposed to extraordinary personal danger because of employment or business-related necessity and documents proof of recurrent threats to life and safety.[107]

Nevertheless, New York's stringent proper cause provision has not gone without a challenge. The Second Court of Appeals reviewed a challenge to the provision in which the licensing officer denied plaintiffs' request to full-carry a concealed handgun outside of the home for self-defense in *Kachalsky v. County of Westchester*.[108] New York state's rise in violent crime in connection with concealable firearms in the early twentieth century expedited the need for regulation.[109] New York state courts have expanded the proper cause provision to include an issuance for target practice or hunting because such use demonstrates a restricted reason for the pistol permit.[110] The application process to obtain a license is "rigorous" and triggers a local investigation by the police "revealing the applicant's mental health

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[104] *Matter of* Leo v. City of N.Y., 2020 N.Y. Slip Op 31828(U) (Sup. Ct. June 12, 2020).
[105] Suzanne Novak, *Why the New York State System for Obtaining a License to Carry a Concealed Weapon is Unconstitutional*, 26 FORDHAM URB. L.J. 121, 124 (1998).
[106] *Id.*
[107] *Id.*
[108] Kachalsky v. Cnty of Westchester, 701 F.3d 81, 83 (2d Cir. 2012).
[109] *Id.* at 84. *See Revolver Killings Fast Increasing: Legislative Measure to be Urged for Curbing the Sale of Firearms*, N.Y. TIMES, Jan. 30, 1911, https://www.nytimes.com/1911/01/30/archives/revolver-killings-fast-increasing-legislative-measure-to-be-urged.html (quoting George Petit le Brun, Coroner's clerk, "The other day we had an example of [carrying a concealed weapon], when a man ran out of his house, on one of the crowded avenues, shooting off a revolver at imaginary foes, but fortunately no one was hurt.")
[110] *Kachalsky*, 701 F.3d at 86.

history, criminal history, moral character," alongside a showing of proper cause.[111]

The plaintiffs in *Kalchasky* asserted that the Second Amendment guarantee entitles unrestricted access to a permit without establishing proper cause.[112] The issue in the *Kachalsky* case was whether New York's handgun licensing scheme violated the Second Amendment by requiring an applicant to show proper cause to obtain a license to carry a concealed handgun in public.[113] "The district court held that concealed carrying of handguns in public was outside the core of the Second Amendment."[114] The Second Circuit affirmed because the New York law "does not operate as a complete ban on the possession of handguns in public."[115] The Second Circuit in *Kachalsky* also reasoned that *Heller* did not address the unrestricted right as a Second Amendment guarantee. Rather, *Heller* found that a total ban on the right to keep and bear arms in the home is unconstitutional.[116] In fact, the *Heller* opinion addressed nineteenth-century case law explaining that the Second Amendment right did not confer the right to keep and carry any weapon whatsoever in any manner and for whatever reason and that prohibitions on carrying concealed weapons were lawful.[117] Further, *Heller* did not cast doubt on longstanding prohibitions or laws that impose conditions and qualifications on the commercial sale of arms.[118] For these reasons, the Court in *Kachalsky* found that New York's proper cause requirement was not contrary to the *Heller* decision because the District of Columbia operated on a total ban of possession whereas New York's law does not, and further, it is not a complete ban to guns in public.[119]

The Second Circuit in *Kachalsky* stated that a less than strict scrutiny test should be applied to New York's proper cause requirement because it falls outside the core of the Second

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[111] *Id.* at 87.
[112] *Id.*
[113] *Id.* at 83.
[114] *Id.* at 84.
[115] *Id.* at 91.
[116] *See* Dist. of Columbia v. Heller, 554 U.S. 570, 625, 35 (2008) (holding "[l]ike most rights, the right secured by the Second Amendment is not unlimited." The Second Amendment interests the right of the law-abiding, responsible citizen to use arms in defense of the home.)
[117] *Id.* at 626.
[118] *Id.* at 626-27.
[119] *Kachalsky*, 701 F.3d at 91.

Amendment, which is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home."[120] It can be argued that the New York proper cause requirement would withstand constitutional muster because it does not disturb the *Heller* and *McDonald* decisions. The proper cause requirement simply provides that there are limitations to the Second Amendment's guarantee.[121] Additionally, the Supreme Court expressed that legislators have the option to put regulations in place, including categorical bans.[122] Stricter gun regulations in states like New York have been generally accepted because of either the statute's historical tradition or the courts determination that Second Amendment protections are strongest in the home versus in public spaces.[123] New York's proper cause requirement has been in effect since 1913.[124] Its purpose is to further important governmental interests that are substantially related to the stated interests: "extensive access to handguns in public increases the likelihood of felonies that would result in death and that would transform the safety and character of public spaces."[125] By New York balancing the risks and benefits of concealed carry, the state has created a substantial basis to refute the arbitrary and capricious argument.[126]

C. The Second Circuit Revisits the Proper Clause Requirement in *N.Y. State Rifle & Pistol Ass'n Inc. v. Beach*

The Second Circuit's ruling in *Kachalsky* upheld the constitutionality of the proper cause requirement claim in *N.Y. State Rifle & Pistol Ass'n Inc. v. Beach*.[127] It has remained secure for nearly a decade since it was decided in 2012. Importantly, the *Kachalsky* decision may open a possible revisit to expand on the *Heller* opinion.

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[120] *Id.* at 93.
[121] *Heller*, 554 U.S. at 626.
[122] *Kachalsky*, 701 F.3d at 94.
[123] Andrew Kim, *A "Justified Need" for the Constitutionality of "Good Cause" Concealed Carry Provisions*, 88 FORDHAM L. REV. 761, 764-65 (2019).
[124] *Kachalsky*, 701 F.3d at 92.
[125] Kim, *supra* note 121, at 781.
[126] *Id.* at 787.
[127] "'New York's handgun licensing scheme…requiring an applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public' did not violate the Second Amendment." N.Y. State Rifle & Pistol Ass'n Inc. v. Beach, 354 F. Supp. 3d 143, 148 (N.D.N.Y. 2018).

The *Kachalsky* ruling, following *stare decisis*, prompted the lower Court's decision to dismiss Plaintiff New York State Rifle & Pistol Association Inc.'s (Hereinafter N.Y.S.R.P.A.) federal civil rights lawsuit in the 2018 *Beach* case.[128] Likewise, on appeal, the Second Circuit affirmed the District Court's judgment last year in the *Beach* case relying on precedent in *Kachalsky*.[129] In *N.Y. State Rifle & Pistol Ass'n Inc. v. Beach*, the Second Circuit specifically relied on its earlier holding in *Kachalsky* that New York's proper cause requirement did not violate the Second Amendment.[130] The District Court expressed that the facts of *Beach* are "substantially identical" to the *Kachalsky* case.[131] Thus, the *Kachalsky* ruling is important here because it is the reason why the *Beach* case was dismissed by the district court and later affirmed by the Second Circuit. The Court had already addressed this issue in *Kachalsky* and relied on precedent to dismiss.

Plaintiffs Nash and Koch are members of Plaintiff N.Y.S.R.P.A.[132] N.Y.S.R.P.A. supports and defends New York resident's right to keep and bear arms and New York's firearm restrictions directly offend its central mission; thus they have brought suit on behalf of the individual plaintiffs.[133] Nash and Koch meet the statutory requirements to obtain a handgun carry license under section 400.00, but they fail to satisfy the proper cause requirement because they cannot demonstrate a special need or unique type of danger to their life distinguishable from that of the general public.[134] Further, Nash and Koch were not entitled to a carry license in connection with their occupation pursuant to section 400.00(2)(b)-(e).[135] Instead, both

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[128] The Second Circuit has expressly upheld New York State Penal Law § 400.00(2)(f) as constitutional and therefore plaintiffs' claims must fail. *Id.* at 148. Further, the plaintiffs have not cited any legally plausible claims to advance other factual allegations which would cause the court not to follow the precedent. *Id.* at 149.

[129] N.Y. State Rifle & Pistol Ass'n Inc. v. Beach, No. 19-156-cv 2020 WL 5032995, at *100 (2d Cir. 2020).

[130] *Id.*

[131] A licensing officer denied plaintiffs' applications to carry handguns because of their failure to demonstrate "proper cause" as proscribed by § 400.00(2)(f) and they did not "show any facts demonstrating a need for self-protection distinguishable from that of the general public." *Beach*, 354 F. Supp. 3d at 148.

[132] *Id.* at 146.

[133] *Id.*

[134] *Id.*

[135] *Id.*

Nash and Koch were granted a "Hunting & Target" license that rendered them unable to carry the firearm outside of their homes for the purpose of self-defense, which is what both parties requested.[136] Nash's insufficient request pointed to "a string of recent robberies in his neighborhood" and a completion of an advanced firearm safety training course.[137] Koch's proper cause explanation was also denied despite his "extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed."[138] Both show causes of need plead by Nash and Koch amounted only to examples of their ability to handle firearms safely and no more.[139] Likewise, robberies in the surrounding areas failed to distinguish their need from the general public, who are also placed in similar environments.[140] Therefore, the District Court granted Defendants' motion to dismiss, stating that it was the prerogative of the Second Circuit or the Supreme Court to hold whether the Circuit's precedent is contrary to Supreme Court precedent.[141]

III. Cortlett's Second Amendment Analysis Ten Years Later: Will the Proper Cause Requirement Hold?

The Supreme Court announced on April 26, 2021, that it will hear a major Second Amendment case, *New York State Rifle & Pistol Ass'n, Inc. v. Corlett*.[142] The issue presented is, "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."[143] *Corlett's* challenge to the proper cause requirement might possibly interrupt the Second Circuit's longstanding precedent from the *Kachalsky* ruling that the

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[136] *Id.*
[137] *Id.*
[138] N.Y. State Rifle & Pistol Ass'n Inc. v. Beach, 354 F. Supp. 3d 143, 148 (N.D.N.Y. 2018).
[139] *Id.* at 146-47.
[140] *Id.* at 147.
[141] *Id.* at 149.
[142] Ariane de Vogue and Devan Cole, *Supreme Court agrees to take up major Second Amendment case*, CNN POL., (Apr. 26, 2021, 11:21 AM), https://www.cnn.com/2021/04/26/politics/supreme-court-second-amendment-case/index.html ; *Petition for Certiorari granted:* N.Y. State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021), *cert. granted*, 89 U.S.L.W. 3365 (U.S. Apr. 26, 2021) (No. 20-843).
[143] *Proceedings and Orders,* THE SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html (last visited Jun. 30, 2021).

proper cause requirement does not violate the Second Amendment.[144] The Supreme Court's decision to consider the scope of the Second Amendment after a decade is happening in the wake of increased mass shootings around the United States.[145]

This section of the paper will first analyze past circuit court holdings surrounding the Second Amendment and how each has ruled on the topic of gun regulations if applicable. Next, the paper will address the current makeup of the Supreme Court with the three appointees of former President Donald Trump. Finally, using past lower court holdings and the current constitution of the Supreme Court, this paper will predict how the Supreme Court will rule, and the effects of that judgment within the Nation.

A. A Comprehensive Review of the Circuit Courts' Interpretation of the Second Amendment

The circuit courts have not unanimously agreed on the scope of the right to bear arms.[146] Some circuits, including the Second, Third, Fourth, and Ninth, have upheld showing good cause as constitutional under the Second Amendment.[147] The First Circuit has also upheld the good cause requirement.[148] These circuits have concluded that the core Second Amendment right does not extend beyond the home.[149] The D.C. Circuit disagrees.[150] D.C. rejected its sister circuits' views. It held that the core right of the Second Amendment extends beyond the home without showing special need because self-defense is at its highest in the home, but that does not suggest that it should be confined only to the home based on early English and Founding-era case language.[151] Thus far, only the D.C. Circuit has held that the Second Amendment prohibits the government from requiring individuals to show special

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[144] *Kachalsky*, 701 F.3d at 101.
[145] Gun Violence Archive reports that there have been 293 mass shootings in 2021 so far as of June 21, 2021. Hollie Silverman and Amir Vera, *7 Killed, More than 40 Injured in 10 Mass Shootings Across the US Over the Weekend*, CNN, (Jun. 21, 2021) https://www.cnn.com/2021/06/21/us/gun-violence-weekend-roundup/index.html.
[146] Madeleine Giese, *Second Amendment: D.C. Circuit Court Creates Split on the Constitutionality of God-Reason Laws*, 71 S.M.U. L. REV. 591, 596 (2018).
[147] *Id.* at 595.
[148] Charles, *supra* note 84.
[149] Giese, *supra* note 144 at 596.
[150] *Id.* at 591.
[151] *Id.* at 593-94.

needs in order to obtain a license.[152] Contrary to the First, Second, Third, Fourth, and Ninth Circuits, the Fifth, Sixth, Eighth, and Eleventh Circuits allow law-abiding citizens to obtain permits to carry concealed firearms.[153] The controversial topic of this paper surrounds the proper cause requirement and not the constitutionality of open carry laws. For this reason, this paper will not go into a detailed analysis of those circuit court jurisdictions that allow its law-abiding citizens to obtain permits to carry firearms openly.[154]

The First Circuit recently held that the Massachusetts firearms license statute was valid under the Second Amendment.[155] The facts in *Gould v. Morgan* are similar to *Corlett* because the plaintiffs wanted to carry firearms in public generally rather than only in relation to certain specified activities.[156] Massachusetts regulates its license to carry as long as the person can show a "proper purpose" for carrying a firearm.[157] This statute is similar to New York's "proper cause" requirement. Both statutes operate as justification clauses that will allow an individual to carry in public so long as the proper steps are met.[158] The Massachusetts statute grants the license to carry only (1) if there is a good reason to fear injury or (2) for other reasons such as sport/target practice.[159] Similarly, Massachusetts also mandates that license applicants demonstrate a type of fear that is distinguishable from that of the general public.[160]

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[152] Charles, *supra* note 84.
[153] Robert Leider, *The Supreme Court and the Current Public Carry Petitions: Open Splits and Concealed Vehicle Problems*, DUKE CTR. FOR FIREARMS LAW (May 29, 2020), https://firearmslaw.duke.edu/2020/05/the-supreme-court-and-the-current-public-carry-petitions-open-splits-and-concealed-vehicle-problems/.
[154] *See Id. (stating that* the public carry issue has not surfaced in the Fifth, Sixth, Eighth, or Eleventh Circuits and these jurisdictions are unlikely to rule on a case that has a broad prohibition on public carry especially since most allow individuals to carry firearms in the public.)
[155] Mass. Gen. Laws ch. 269, § 131(d) states that the local licensing authority may issue a license if the applicant is not a prohibited person and the applicant has good reason to fear injury or for any other reason, including carrying a firearm for sport or target practice only. Gould v. Morgan, 907 F.3d 659, 677 (1st Cir. 2018).
[156] *Id.* at 662.
[157] *Id.* at 663.
[158] *Id.* at 676-77. *See Kachalsky,* 701 F.3d at 98 (stating that a license shall be issued when a person demonstrates an actual and articulable need for self-defense.)
[159] *Gould*, 907 F.3d at 663.
[160] *Id.*

In *Gould*, the First Circuit recognized that *Heller* does challenge legislative policies that aim to regulate based on public welfare, and the inherent dangers perceived surrounding public possession of a firearm.[161] The First Circuit interpreted *Heller* and *McDonald's* lack of discussion surrounding Second Amendment rights in public as a grant of discretionary legislative policy power as long as those policies do not offend the lawful citizen's right to possess a firearm in the home.[162] Likewise, the First Circuit recounted that *Heller* was silent about both the scope of the Second Amendment beyond the home and the standard for legislative regulation.[163]

The lower courts adopted a two-step approach to analyze statute challenges that offend Second Amendment rights that the First Circuit has also adopted.[164] First, the Court asked, "whether the challenged law burdens conduct that falls within the Second Amendment's guarantee."[165] If the conduct does not burden the Second Amendment, the statute is valid, and the analysis stops there.[166] However, if the conduct is burdensome, the next step is to determine what proper level of scrutiny is appropriate, and whether the challenge will survive that level of scrutiny.[167]

The First Circuit Court's analysis began with the notion that, following Supreme Court precedent, the Second Amendment is at its strongest in the home.[168] The Supreme Court's possible hesitancy to make a clear distinction about carrying firearms outside the home may rest not only on limited rights outside the home but also on a historical recognition that this argument was strongly limited amongst the slave South.[169] Nevertheless, firearm rights have always been more limited outside the home due to public safety interests.[170] The First Circuit

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[161] *Id.* at 668.
[162] *Id.* at 668-70.
[163] *Id.*
[164] *Id.* at 668.
[165] Gould v. Morgan, 907 F.3d 659, 668-69 (1st Cir. 2018).
[166] *Id.* at 669.
[167] *Id.*
[168] *Id* at 672.
[169] There is strong evidence that permissive open carry rested majorly in the South because considerable evidence shows a legal consensus that outside of the South, no such right existed. Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1722 (2012).
[170] *Gould*, 907 F.3d at 672.

found that public carry of a firearm for self-defense falls outside of the Second Amendment's core right.[171] However, for laws that burden the periphery of the Second Amendment, the First Circuit decided to apply intermediate scrutiny, stating the law must be substantially related to an important governmental objective.[172] Thus, to pass constitutional muster, the firearms licensing statute must be substantially related to one or more important governmental interests.[173] The Court recognized that public safety is an obvious important governmental interest that is better suited to legislative regulation than judicial mandates.[174] Ultimately, like the Second Circuit's holding in *Kachalsky,* the First Circuit held that the Massachusetts firearms licensing statute survived constitutional muster under the Second Amendment because the state had made reasonable attempts to balance the heightened needs for firearms with the demands of public safety.[175]

In *United States v. Marzzarella*, the Third Circuit addressed an issue not expressly stated in *Heller's* list of law-abiding and responsible citizen discussion.[176] Here, the defendant challenged his felony conviction because he was in possession of an unmarked firearm under 18 U.S.C. § 922(k).[177] Like its sister circuits, the Third Circuit also used the two-prong test to determine the constitutionality

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[171] *Id.*
[172] *Id.*
[173] *Id.* at 673.
[174] Institutionally, the legislative body is better equipped to reach predictive judgments about empirical data surrounding gun violence issues. *Id.* at 676.
[175] *Id.* at 666. *But see Id.* at 675 (stating that plaintiffs in this case presented studies and articles that an increased presence of firearms on public streets would deter crime rather than act as a menace to public safety). *Contra* Joseph Blocher and Bardia Vaseghi, *True Threats, Self-Defense, and the Second Amendment*, 48 THE JOURNAL OF LAW, MED. & ETHICS 112 (2020). (recounting in April 2020, thousands of protesters openly carrying assault rifles, handguns, and body armor charged towards state capitols in Ohio, Michigan, and Pennsylvania because of their disapproval in response to the COVID-19 lockdown policies.)
[176] Katherine L. Judkins, *Navigating the Second Amendment Crossfire: The Third Circuit Triggers Working Methodology in United States v. Marzzarella and United States v. Barton*, 57 VILL. L. REV. 711, 722 (2012).
[177] *Id*. It is unlawful for any person to knowingly transport, ship, or receive, in interstate or foreign commerce, any firearm in which the importer's name or manufacturer's serial number has been removed, obliterated, or altered, or to possess or receive any firearm which has had the importer's name or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(k) (LEXIS through Pub. L. No. 117-30).

of the challenged law.[178] It was unclear whether unmarked firearms in the home fall within the Second Amendment, however, the Court proceeded to a discussion of the second prong as if they do.[179] Applying the intermediate standard, the Third Circuit acknowledged that law enforcement's ability to trace marked firearms substantially related to an important governmental interest.[180] Here, the Third Circuit's upholding of the importance of serial numbers in firearms highlighted the individual's limitations even within the Second Amendment.[181] Second Amendment rights are not absolute, and a person may not be in possession of an unlawful firearm for unlimited reasons.[182] While the right to possess a firearm is core to the Second Amendment, it can be argued that the circuit courts, thus far, have recognized that deference should be given to legislative bodies to ensure proper regulatory measures are put in place to protect the public.

An example of a regulatory measure put in place by legislation is how federal law prohibits the possession of firearms by any person convicted of a crime punishable in excess of a one year term.[183] However, excluded from the prohibition is any state offense classified as a misdemeanor and punishable by a term of imprisonment of two years or less by the laws of the state.[184] The Third Circuit additionally opened the argument to discuss this ban on firearms by convicted felons as applied in *Binderup v. A.G. of the United States*.[185] Plaintiff Binderup began a consensual sexual relationship with a minor (sixteen), however, she was over the legal age of consent in the state of Pennsylvania which made his crime a misdemeanor.[186] Nonetheless, this misdemeanor was subject to possible imprisonment for up to five years, which was more than the misdemeanor exclusion of two years.[187] Binderup's conviction was punishable in excess of a one year

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[178] Judkins, *supra* note 174 at 722; *See Gould*, 907 F.3d at 669 (outlining two-step approach).
[179] Judkins, *supra* note 174 at 723.
[180] *Id.* at 723.
[181] United Stated v. Marzzarella, 614 F.3d 85, 101 (3d Cir. 2010).
[182] *Heller*, 554 U.S at 681.
[183] 18 U.S.C.S. § 922(g)(1) (LexisNexis, Lexis Advance through PL 117-65 approved 11/23/21).
[184] *Binderup v. AG of the United States*, 836 F.3d 336, 339 (3d Cir. 2016).
[185] *Id.*
[186] *Id.* at 340.
[187] *Id.*

term. Thus section 922(g)(1), stating that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess any firearm or ammunition, prohibited him from possessing a firearm even though he wanted one in his home to protect himself and his family.[188] Consequently, Binderup challenged section 922(g)(1) and sought declaratory and injunctive relief because he claimed that the statute was unconstitutional as applied.[189] An "as-applied" challenge contends that a law is unconstitutional as applied to a particular person in particular circumstances that deprive a person of a constitutional right.[190] The Third Circuit laid out the framework for deciding as-applied challenges to gun regulations.[191] Misdemeanors for non-violent crimes were not serious offenses and thus burdened Second Amendment rights.[192] The Third Circuit ruled that section 922(g)(1) did not survive heightened scrutiny as applied because the Government could not provide meaningful evidence but instead provided mere speculation as to why individuals with misdemeanors should be banned from possession.[193] This Circuit's expansion of firearm possession opened a new category for individuals to challenge the ban if their state recognizes the offense as a non-violent misdemeanor.[194] One could conclude that the Third Circuit took a less strict and more liberal view by assessing the types of crimes rather than imposing a ban on anyone with a faulty past under section 922(g)(1).

The Third Circuit did not extend the liberal ruling in *Binderup* when *Folajtar v. A.G. of the United States* presented the issue of whether Congress may prohibit individuals convicted of federal tax fraud from possessing firearms.[195] The Third Circuit sternly iterated that there is a good reason not to trust felons with firearms, including

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[188] *Id.*
[189] *Id.*
[190] *Id.* at 346.
[191] The first step is for the challenger to prove that the presumptively lawful regulation burdens his Second Amendment rights: "(1) Identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member and (2) present facts about himself and his background that distinguish his circumstances from those persons in the historically barred class." *Id.* at 346.
[192] *Id.*
[193] *Id.* at 356.
[194] *Id.* at. 379-80.
[195] Folajtar v. AG of the United States, 908 F.3d 897, 899 (3d Cir. 2020).

the non-violent ones, because studies show the probability is higher that they will commit a violent crime.[196] The plaintiff in this case removed herself from the Second Amendment protection of *Heller's* "law-abiding citizen" when she committed a federal felony.[197] This case was also a turn of events as well from the *Binderup* ruling because the Third Circuit yielded the power to the legislature for recourse rather than the judiciary.[198] The Third Circuit recognized that it has always been the job of the legislatures to regulate firearms and not the place of the judiciary.[199] The Third Court's ruling in *Folajtar* may come as a surprise for gun advocates because this ruling is a strict reminder that regulation of firearms is the job of the legislature and not for judicial involvement unless it is contrary to the Constitution.

The Fourth Circuit faced a "good and substantial reason" requirement issue in *Woollard v. Gallagher*.[200] Woollard obtained a handgun permit in 2003 and requested renewal in 2009.[201] Woollard failed to satisfy the "good and substantial reason" requirement, and his permit was denied.[202] His home was invaded by his son-in-law in 2002, however seven years after the incident, Woollard had not come in contact with his son-in-law.[203] He used the 2002 incident as the sole reason for his permit renewal in 2009 and the Handgun Permit Review Board found that this was not a "good and substantial reason" to renew his permit.[204]

The Maryland law at issue requires a person to obtain a permit before he or she carries, wears, or transports a handgun[205] The standard to wear, carry, or transport a handgun is that a person must show, following an investigation, that he or she has a "good and substantial reason" that is necessary to prevent apprehended danger.[206] The Handgun Permit Unit has identified four categories that an applicant may demonstrate as a "good and substantial reason" to obtain a

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[196] *Id.* at 909.
[197] *Id.* at 911.
[198] *Id.*
[199] *Id.*
[200] Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013).
[201] *Id.* at 871.
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.* at 868-69.
[206] *Id.* at 869.

handgun permit: (1) business activities at the owner's request or on behalf of an employee; (2) regulated professions such as special police, armored car driver, or private detective; (3) "assumed risk" professions such as police officers, public defenders, prosecutors, or judges; and (4) for personal protection.[207] Moreover, there was an investigation into whether the applicant had any alternatives available other than the handgun permit, and if there were none, the issue became whether the permit was a reasonable precautionary measure.[208] Thus, *Woollard* challenged the "good and substantial reason" requirement as facially violative of the Second Amendment.[209]

The Fourth Circuit in *Woollard* adopted the two-part approach and for the first part of the analysis stated that the *Heller* right existed outside the home and that *Woollard's* permit denial infringed his rights.[210] However, the requirement passed constitutional muster under the intermediate scrutiny standard.[211] In the opinion, the Court discussed the state assertion, supported by codified legislative findings, that the requirement was substantial.[212] The Fourth Circuit concluded that these findings were a substantial, important governmental interest that survived intermediate scrutiny.[213]

The First, Second, Third, and Fourth Circuits all ruled that states may restrict public carry to those who demonstrate both some form of need and a special danger.[214] Assuming that the right to carry exists outside of the home, the first four circuits have found that each necessary requirement passed constitutional muster because the government could prove an important and substantial governmental interest.[215]

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[207] *Id.* at 870.
[208] *Id.*
[209] *Id.* at 871-72.
[210] *Id.* at 876.
[211] *Id.*
[212] (1) an increase in the State of violent crimes committed; (2) high percentage of violent crimes committed in the state involves handguns; (3) as a result there is a substantial increase in deaths traceable to criminals carrying handguns in public places; (4) the current law has been ineffective to curb the frequent use of handguns in crime; and (5) additional regulations are necessary to preserve public safety and protect the rights and liberties of the public. *Id.* at 876-77.
[213] *Id.*
[214] Leider, *supra* note 151.
[215] *Id.*

In *Peruta v. County of San Diego*, the Ninth Circuit strayed from the First, Second, Third, and Fourth Circuits and held that the Second Amendment did not preserve or protect the right to carry concealed firearms in public.[216] The Ninth Circuit focused its opinion on *Heller*, stating that the Supreme Court limited the scope of the *Heller* holding because the Second Amendment had not been generally understood to protect the right to carry concealed firearms.[217] The Ninth Circuit further researched historical materials pertaining to the right to bear arms in England, Colonial America, and the states.[218]

The Ninth Circuit read historical materials on their face and did not look beyond the four corners of the page.[219] The Court's literal interpretation of the wording in the Second Amendment and other precedent material justified its confident holding.[220] The Ninth Circuit's Second Amendment interpretation has thus far been the most restrictive because it essentially bans firearms in public. *Heller* and *McDonald's* failure to address the public firearm right allows the Ninth Circuit to freely interpret the Second Amendment's scope based on precedent.

The Ninth Circuit's restrictive holding was common practice because no court had held that there was a constitutional right to carry firearms outside in public until the Seventh Circuit reviewed Illinois's ban on private citizens carrying firearms in public.[221] The Seventh Circuit started its analysis in *Moore v. Madigan* recognizing that the

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[216]Peruta v. County of San Diego, 824 F.3d 919, 924 (9th Cir. 2016).

[217] Nowhere in the Second Amendment does it contain the justified practice of carrying concealed weapons or the prevention of legislation from enacting penal statutes against those who committed acts against the statute. *Id.* at 936.

[218] Nothing in historical records suggest that the law in early American colonies differed from England which had consistently prohibited carrying concealed arms in public. *Id.* at 933. *See Robertson v. Baldwin* 165 U.S. 275, 282 (1897) (recounting that the Supreme Court unambiguously stated in 1897 that the protection of the Second Amendment does not extend to carrying concealed weapons).

[219] *See Peruta*, 824 F.3d at 933 (holding that a one sentence opinion upholding a state statute prohibiting the general public from carrying concealed weapons as evidence in determining the scope of the right to keep and bear arms).

[220] The Supreme Court stated in *Heller* that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 936.

[221] K.L. Daniels, *Keys, Wallet, and Pistol: The Seventh Circuit Establishes a Constitutional Right to Carry Firearms Outside of the Home*, 8 CHI.-KENT L. REV. 339, 339 (2013).

Supreme Court has left open the discussion about whether the Second Amendment confers the right of self-defense outside of the home.[222] The Illinois law forbid a person to carry a loaded and immediately accessible firearm in public unless an individual fell within the proscribed exceptions, such as: home, his business, on the property of another who has permitted firearm use, police, hunters, and members of target shooting clubs.[223] Unlike the Ninth Circuit's literal reading of the words on the page approach, the Seventh Circuit did not end the *Heller* and *McDonald* conclusion at self-defense is most acute in the home. Rather, the Court implied that although that right is most acute in the home, this does not mean it is not acute outside the home.[224] This statement takes the analysis a step further because the Supreme Court possibly played on its words by inserting "most" in front of acute.[225] In this case, the Seventh Circuit interpreted self-defense in the public to be a step below the highest level of self-defense rights that exist in the home.[226]

Nonetheless, the Seventh Circuit played devil's advocate stating that guns are a potential danger to more people if they are carried in public, but also recognized the argument that criminals might be more timid to commit crimes if many law-abiding citizens are armed.[227] The Illinois law on public carry needed more than "it's not irrational" to hold such a broad ban.[228] The Seventh Circuit interpreted the Supreme Court's Second Amendment right as a possible implied right to carry outside of the home, thus the Illinois ban on ready to use firearms in public failed. [229]

Another failed restriction was brought to the D.C. Circuit in *Wrenn v. District oof Columbia*, the law originally had a "good reason" requirement like the first four circuits.[230] The individuals had to demonstrate "good reason to fear an injury to his or her person or property."[231] The D.C. Circuit's interpretation of the Second

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[222] *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012).
[223] *Id.* at 934.
[224] *Id.* at 935.
[225] *Id.* 935-36.
[226] *Id.*
[227] *Id.* at 937.
[228] *Id.* at 939. *See Id.* at 940. (noting that Illinois is the only state with a complete ban on carrying ready-to-use guns outside the home).
[229] *Id.* at 942.
[230] Leider, *supra* note 151.
[231] *Id.*

Amendment was that the individual right to carry firearms extends beyond the home, and one need not show a special need.[232] In fact, its holding declared the good-reason law unconstitutional and a violation of the Second Amendment.[233] The D.C. legislature has attempted to pass laws limiting the right to carry handguns and each time it has been struck down.[234] More recently, the challenged "good reason" law was struck down in *Wrenn*, where the Court held that carrying a firearm beyond the home, even in densely populous areas or without a special need, falls within the core right of the Second Amendment and the good-reason law impinged on this right.[235] Altogether, the D.C. Circuit departed from the scrutiny analysis used by its sister circuits and used the historical approach in *Heller* to find the "good reason" requirement unconstitutional.[236]

The D.C. Circuit referenced the phrases, "to keep," and "to bear" and elaborated that "bear" means to "wear, bear, or carry…upon the person."[237] The Court's definition of bear demonstrated that there must be an expansion of the Second Amendment's core to possess and carry weapons in case of confrontation.[238] Additionally, the *Wrenn* opinion went on to state that whatever motivating force was behind the Amendment, at its core, was the right to self-defense.[239] Moreover, the Court found that as a rule the Amendment is meant for law-abiding citizens thus gun access should be secured for each type of law-abiding citizen.[240] Additionally, the D.C. Circuit addressed the "total ban" defense with a rebuttal that the ban on ownership in *Heller* was not a total ban, and it was still struck down.[241] In *Heller* there were "minor exceptions" for certain individuals, however this did not save the ban from constitutional review.[242] Thus, since the good-reason

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[232] Giese, *supra* note 144 at 591.
[233] *Id.*
[234] In 1976 the District banned all handgun possession and the Supreme Court struck this ban down in *Heller.* In 2009, the District issued a ban on carrying and soon revised in 2015 after *Palmer v. District of Columbia* struck it down. *Id.*
[235] Wrenn v. District of Columbia 864 F.3d 650, 658 (D.C. Cir. 2017).
[236] Giese, *supra* note 144 at 591.
[237] *Wrenn*, 864 F.3d at 657.
[238] *Id.* at 658.
[239] *Id.* at 659.
[240] *Id.* at 665.
[241] *Id.*
[242] *Id.*

requirement acted as a total ban because it offended a core right, the Court held the regulation unconstitutional.[243]

There has not been clarification on the scope of the Second Amendment since *McDonald* in 2010.[244] The different Second Amendment interpretations among the lower courts have left judicial discord in need of the high Court's intervention.[245] Therefore, it is left to the Supreme Court to resolve the unanswered constitutional questions surrounding the Second Amendment.

B. A 2021 Survey of Supreme Court Justices' Positions

Of the nine Supreme Court justices who make up the bench,[246] the three most recent justices, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett, were all nominated by former President Trump between 2017 and 2020.[247] There is no representation from each circuit, the majority of the bench's justices come from the D.C. Circuit.[248]

Chief Justice Roberts was appointed to the D.C. Circuit in 2003.[249] Shortly after, in 2005, he was nominated to the Supreme Court.[250] The dates are important because Chief Justice Roberts is a current member on the bench who voted with the late Justice Scalia in support of the *Heller* opinion.[251] Chief Justice Roberts's alignment with the late Justice Scalia's *Heller* opinion possibly shows his views that *Heller's* core amendment right was rightly decided. This position

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[243] Javier Sinha, *D.C. Circuit Dissent Cites Volume 123 Article on Gun-Control Regulation*, 123 YALE L.J. (2017).

[244] Ilya Shapiro & Matthew Larosiere, *The Supreme Court is Too Gun-Shy on the Second Amendment*, CATO INST. (Jan. 7, 2019) https://www.cato.org/commentary/supreme-court-too-gun-shy-second-amendment.

[245] *Id.*

[246] *About The Court: Justices Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (Last visited Jul. 14, 2021).

[247] *Id.*

[248] Chief Justice John G. Roberts was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003; Justice Clarence Thomas serves as Judge on the United States Court of Appeals for the District of Columbia Circuit from 1990 to 1991; Justice Brett M. Kavanaugh was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 2006. *Id*.

[249] *Id.*

[250] *Id.*

[251] NCC Staff, *On This Day, A Divided Supreme Court Rules on the Second Amendment*, INTERACTIVE CONSTITUTION: NAT'L CONSTITUTION CTR. (Jun. 28, 2021), https://constitutioncenter.org/interactive-constitution/blog/on-this-day-a-divided-supreme-court-rules-on-the-second-amendment.

on the Second Amendment is not well known, however, because prior to Chief Justice Roberts's seat on the bench, none of the thirty-nine cases he argued before the United States Supreme Court addressed Second Amendment topics.[252] Judging by the varied issues Chief Justice Roberts has argued in front of the Supreme Court, he could be characterized as a wild card on the bench because his expertise surrounds many topics. On the other hand, he clerked for Chief Justice Rehnquist, who was notably known as a conservatist.[253] Nonetheless, Chief Justice Rehnquist believed that the role of the courts was to exercise judicial restraint and deference to lawmaking majorities.[254] Like Chief Justice Rehnquist, Chief Justice Roberts spoke of judicial restraint in his confirmation hearing and refused to answer about specific issues, however his judicial philosophies align with conservative views.[255]

Next, Justice Clarence Thomas has openly voiced his frustration with the Supreme Court's limited input on Second Amendment rights stating that the "lower courts are resisting this court's decision," and are "failing to afford the Second Amendment the respect due for an enumerated and constitutional right."[256] Unlike Chief Justice Roberts, whose position on the Second Amendment is unclear, it is clear where Justice Thomas stands.[257] Further, Justice Thomas wrote a fourteen page dissent in *Silvester v. Becerra*,

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[252] Topics include civil rights, criminal law, antitrust, environmental law, health care and many more. *Chief Justice John G. Roberts, Jr.*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH, https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html (Last visited July 14, 2021).

[253] *Biography: Chief Justice William Rehnquist*, PBS NEWS HOUR: POL.(Sep. 4, 2005), https://www.pbs.org/newshour/politics/law-july-dec05-rehnquist_09-04

[254] Brian P. Smentkowski, *William Rehnquist Chief Justice of the United States,* BRITANNICA, https://www.britannica.com/biography/William-Rehnquist (Last modified Dec. 01, 2020).

[255] Aaron M. Houck, *John G. Roberts, Jr. United States Jurist*, BRITANNICA, https://www.britannica.com/biography/John-G-Roberts-Jr#ref1285213 (Last modified Jan. 23, 2021).

[256] De Vogue, *supra* note 140.

[257] *See Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020). (Justice Thomas dissenting the petition for a writ of certiorari which petitioner challenged New Jersey's justifiable need to carry a handgun requirement and Justice Thomas stated that the Court had the opportunity to acknowledge that the Second Amendment protects the right to carry in public.)

reinforcing the holding in *Heller* and *McDonald*.[258] He stated that a higher scrutiny is required because the right to bear arms is an enumerated right in the Constitution.[259] Justice Thomas disagreed that intermediate scrutiny should be applied as it was in *Silvester* for California's 10-day waiting period for firearms.[260] Justice Thomas opined that the Supreme Court would intervene if another right was treated "so cavalierly" by the lower courts.[261] He did not state which right or rights he was referencing.[262] Thus, Justice Thomas's strong dissent for the Ninth Circuit's interpretation of the Second Amendment did not come as a surprise.

Another clear supporter of an expansive interpretation of the Second Amendment is Justice Alito.[263] Justice Alito previously sat on the Third Circuit.[264] He joined the majority in *Heller* and delivered the opinion of *McDonald*.[265] In addition, Justice Alito dissented from the Supreme Court's dismissal of the *New York State Rifle & Pistol Ass'n v. City of New York*.[266] He believed the case should not be dismissed as moot.[267] He stated that enacting new legislation that reduced, but failed to eliminate, the injury originally alleged was not the meaning of the mootness doctrine.[268] Justice Alito's dissent showed his frustration with the Supreme Court's refusal to address the heavy divide between the circuits about Second Amendment rights.[269] Justice Alito's dissent equated New York City's travel restriction as

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[258] *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018).
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *See* Jake Charles, *Justice Alito's Second Amendment*, DUKE CNTR FOR FIREARMS Law (Jun. 10, 2020), https://firearmslaw.duke.edu/2020/06/justice-alitos-second-amendment/ (stating that Justice Alito concluded New York City's ordinance in NYSRPA is unconstitutional with no evidence to justify the restriction).
[264] *About The Court: Justices Current Members, supra* note 244.
[265] Charles, *supra* note 254.
[266] *Id.*
[267] New York State Rifle & Pistol Ass'n., Inc. v. City of New *York*, 140 S. Ct. 1525, 1539 (2020).
[268] *Id.* at 1540.
[269] *Id.* at 1527-28.

burdensome to the right recognized in *Heller*.[270] He even made a forward comment that the city's public safety arguments were weak.[271]

Prior to his Supreme Court nomination, Justice Alito also dissented in a Third Circuit case upholding a federal ban on machine gun possession.[272] It follows that he does not hold the same majority views as his previous circuit. On the other hand, in *United States v. Castleman*[273] and *Voisine v. United States*,[274] he wrote a concurring opinion for the former and joined the majority in the latter upholding convictions under section 922(g)(9)—a federal ban on possession for those convicted of a domestic violence misdemeanor.[275] Justice Alito's opinions demonstrate that his support for the Second Amendment does not mean he reads the Second Amendment as a guaranteed right for all, rather that he is willing to uphold a legislative framework in place for lawbreakers.[276] His history as a prosecutor may make him hesitant to rule in favor of a law that makes it harder for law enforcement and district attorneys to do their jobs.[277] Justice Alito's position on Second Amendment interpretation therefore cannot be stated with certainty.

Nevertheless, Justices Alito, Thomas, and Gorsuch have been labeled a "hard-core" group pushing for more conservative results.[278] Justice Neil Gorsuch is a past Tenth Circuit Court judge.[279] During his confirmation hearings, he gave vague answers to questions concerning the Second Amendment and stated that *Heller* is "the law of the land."[280] When asked whether he agreed with *Heller's* statements that

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[270] *Id.* at 1544.
[271] *Id.*
[272] Charles, *supra* note 261.
[273] United States v. Castleman, 572 U.S. 157, 173 (2014).
[274] Voisine v. United States, 136 S. Ct. 2272, 2282 (2016).
[275] Charles, *supra* note 261; 18 U.S.C.S. § 922(g)(9) (LexisNexis, Lexis Advance through PL 117-70 approved 12/03/21).
[276] *See Voisine*, 136 S. Ct. at 2281. (stating Congress enacted section 922(g)(9) to take guns out of the hands of abusers convicted under misdemeanor assault laws).
[277] *About The Court: Justices Current Members, supra* note 244.
[278] Noah Feldman, *What's Dividing the Supreme Court's Conservatives?* BLOOMBERG OPINION: POL. & POLICY (Jun. 28, 2021 11:20 AM) https://www.bloomberg.com/opinion/articles/2021-06-28/kavanaugh-and-barrett-split-with-gorsuch-alito-and-thomas.
[279] *About The Court: Justices Current Members, supra* note 244.
[280] Adam Skaggs, *Gorsuch's Gun Lobby Gesture*, U.S. NEWS & WORLD REPORT, (Mar. 23, 2017 3:30 PM), https://www.usnews.com/opinion/civil-wars/articles/2017-03-23/neil-gorsuch-may-have-revealed-second-amendment-views-with-gun-lobby-phrase.

the Second Amendment is not unlimited, he did not agree or disagree.[281] Prior to his Supreme Court nomination, Justice Gorsuch had not ruled on any major Second Amendment cases.[282] His beliefs about the Second Amendment are thus up in the air. Gun rights advocates, however, believe that Gorsuch's originalist views on interpreting the Constitution and the similarities between him and the late Justice Scalia indicate that he would protect their interests.[283] Following Justice Gorsuch's dissent in *United States v. Games-Perez*, many pro-Second Amendment advocates highlighted his commitment to the Second Amendment because he sided with a felon in possession of a firearm.[284]

In *Games-Perez*, the defendant was a convicted felon in possession of a gun.[285] The law banned felons from knowingly possessing guns and the defendant in this case claimed that he did not know he was a felon.[286] Justice Gorsuch's stance challenged Colorado's ban on felons' possession of guns stating that the defendant needed to have both knowledge of being a felon and knowledge of possessing the gun.[287] Gorsuch believed that the defendant's *en banc* hearing should not have been denied because the defendant could not satisfy the "knowingly" requirement of being a felon in possession of a gun.[288] Interestingly enough, Gorsuch's play on words here is like the Seventh Circuit's previous interpretation of the "most acute."[289]

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[281] *Id.*
[282] Holbrook Mohr, *Neil Gorsuch 'is a Second Amendment Mystery' on Key Gun Rights Issues*, INSIDER, (Mar. 16, 2017 10:08 AM), https://www.businessinsider.com/neil-gorsuch-is-a-second-amendment-mystery-on-key-gun-rights-issues-2017-3.
[283] Holbrook Mohr, *Gorsuch View on Scope of Second Amendment a Judicial Mystery*, AP NEWS, (Mar. 15, 2017), https://apnews.com/article/ap-top-news-courts-supreme-courts-antonin-scalia-neil-gorsuch-f94c079f2c9d4e88b1fc930f608024a9.
[284] Nicole Gaudiano, *2012 Case Highlights Supreme Court Nominee Neil Gorsuch's 'Pro-Gun' Record*, USA TODAY, (Feb. 3, 2017 8:27 PM), https://www.usatoday.com/story/news/2017/02/03/2012-case-highlights-supreme-court-nominee-neil-gorsuchs-pro-gun-record/97353700/.
[285] Lauren Carroll, *Does Neil Gorsuch Sie with 'Felons Over Gun Safety,' As Pelosi Says?*, POLITIFACT: THE POYNTER INST., (Feb 2, 2017), https://www.politifact.com/factchecks/2017/feb/02/nancy-pelosi/pelosis-misleading-claim-gorsuch-sides-felons-over/.
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *See Moore, supra* note 220 at 935.

Gorsuch's dissent in *Games-Perez* does not mean he has broad Second Amendment beliefs, however, his lack of major Second Amendment holdings does not prove otherwise either.

Justice Kavanaugh, a recent addition to the Court after the appointment of Justice Gorsuch, is a D.C. native and a previous D.C. Circuit Court judge.[290] Judge Kavanaugh wrote a lengthy dissent in the D.C. Circuit's *Heller v. District of Columbia* and in his judgment both D.C.'s ban on semi-automatic rifles and its gun registration requirements are unconstitutional under *Heller*.[291] He stated that most handguns, which are traditionally the common use choice of firearms by law-abiding citizens, are semi-automatic.[292] He reasoned that *Heller* protects semi-automatic handguns, and they are used in connection with far more violent crimes than semi-automatic rifles.[293] Justice Kavanaugh's dissent to the majority opinion on the D.C. Circuit *Heller* case is riddled with frustration that this Court did not take heed or respectfully follow what is already established in the Supreme Court's 2008 ruling in *Heller.*[294] Justice Kavanaugh voiced his disagreement with balancing gun rights against the state's interest of public protection.[295] In his view, he believes courts should take the textualist historical tradition approach.[296] Justice Kavanaugh does not agree with the circuit courts using the intermediate or even strict scrutiny balance test.[297] He claims to greatly respect the motivation behind D.C.'s gun laws, however, he said his job is to follow precedent.[298] Justice Kavanaugh strictly stated that his job is not to decide the best policy but to follow Supreme Court precedents.[299]

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[290] *About The Court: Justices Current Members, supra* note 244.
[291] Heller v. Dist. Of Columbia, 670 F.3d 1244, 1269 (D.C. Cir. 2011).
[292] *Id.*
[293] *Id.* at 1270.
[294] See *Id* at 1271. (stating that D.C. is "pushing the envelope again" by enacting a new ban on semi-automatic rifles and broad gun registration requirement).
[295] Editorial Board, *Kavanaugh Should Be Closely Questioned On Guns,* BLOOMBERG, (Sep. 4, 2018 6:00 AM), https://www.bloomberg.com/opinion/articles/2018-09-04/brett-kavanaugh-and-the-second-amendment.
[296] *Id.*
[297] *Id.*
[298] Corey Berman and Eugene Kiely, *Kavanaugh Files: Second Amendment*, FACTCHECK POSTS: A PROJECT OF THE ANNENBERG PUB. POL'Y CNTR, (Sep. 5, 2018), https://www.factcheck.org/2018/09/kavanaugh-files-second-amendment/.
[299] *Id.*

Based on Justice Kavanaugh's record on the D.C. Circuit, one could argue that Justice Kavanaugh would expand the Second Amendment's reach.

On the other hand, Justice Breyer revealed his narrow approach to Second Amendment interpretation when he wrote the dissenting opinion in *District of Columbia v. Heller*.[300] Justice Breyer focused on the question presented—whether the Second Amendment protects the right to possess and use guns for nonmilitary purposes (hunting and self-defense).[301] Justice Breyer plainly referenced the text of the Second Amendment, the history, and the decision in *United States v. Miller*.[302] In *Miller*, the Court concluded that the Second Amendment protects the right to keep and bear arms for certain military purposes.[303] Justice Breyer's dissenting opinion emitted a tone of surprise because the Supreme Court previously affirmed the *Miller* holding in 1980.[304] Justice Breyer interpreted the Second Amendment on its face as a constitutional guarantee "to keep and bear Arms" for military uses of firearms in the context of state militias.[305]

Consequently, the lower courts took to Justice Breyer's interest-balancing inquiry.[306] The risks must be weighed with the benefits on each side of the controversy.[307] He pushed for an interest-balancing test for Second Amendment claims, which are now being used as described above by the lower courts in the two-step analysis.[308] Justice Breyer's heavy dissent hints that he would not be immediately ready to expand the Second Amendment and interpret it as broadly as the other justices. On January 27, 2022, Justice Breyer announced his retirement to the President of the United States.[309] The Senate

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[300] *Heller*, 554 U.S at 636.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.* at 638, 639.
[305] *Heller*, 554 U.S at 643.
[306] Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second*, 80 GEO. WASH. L. REV. 703, 757 (2012).
[307] *Id.* at 719.
[308] *Gould*, 907 F.3d at 669.
[309] Letter from Chambers of Justice Stephen Breyer, Associate Justice of the Supreme Court, to President Joseph R. Biden, President of the United States of America (Jan. 27, 2022) (on file with Supreme Court of the United States Public Info Press https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf).

confirmed his successor, Justice Ketanji Brown Jackson, the first black woman to sit on the Supreme Court, on April 7, 2022.[310]

Justice Sotomayor, who is more liberal in her views, stated during her confirmation hearing that she would have an "open mind" on the gun rights issue and declined to prejudge any question that might come before her if she were a justice on the Supreme Court.[311] The Brady Campaign to Prevent Gun Violence, a gun-control group, supported her nomination to the Supreme Court. [312] Her hearing differed in relation to Justice Gorsuch's position that he would not agree or disagree about *Heller's* statements that the Second Amendment is not unlimited,.[313] Justice Sotomayor's confirmation hearing strongly referenced *stare decisis*, following precedent, and the incorporation doctrine.[314]

Justice Sotomayor previously sat on the Second Circuit where she joined the majority in a Second Amendment case. [315] *Maloney v. Cuomo* did not involve firearms, but rather possession of a chuka stick (nunchaku),[316] which violated N.Y. Penal Law section 265.01(1) Criminal possession of a weapon in the fourth degree McKinney's Consolidated Laws of New York Annotated.[317] New York's statutory

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[310] Kevin Breuninger, *'We've made it': Emotional Ketanji Brown Jackson, first Black woman to join Supreme Court, touts confirmation as a mark of progress*, CNBC POL. (Apr. 8, 2022 2:06 PM) https://www.cnbc.com/2022/04/08/ketanji-brown-jackson-touts-confirmation-as-supreme-courts-first-black-woman-justice.html.

[311] James Vinci, *Sotomayor Accepts Gun Rights Decision*, REUTERS (July 15, 2009 10:19 AM), https://www.reuters.com/article/us-usa-court-sotomayor-guns-sb/sotomayor-accepts-gun-rights-decision-idUKTRE56D3Y920090715.

[312] *Id.*

[313] *Id.;* Skaggs, *supra* note 278.

[314] *Transcript of the Sotomayor Confirmation Hearings*, L.A. TIMES, https://epic.org/privacy/sotomayor/sotomoyor_transcript.pdf (Last visited June 29, 2021); The incorporation doctrine is a constitutional doctrine that states provisions in the Bill of Rights are applicable to the states if they are fundamental to the American scheme of ordered liberty or deeply rooted in this nation's history. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 164 (2019).

[315] *Maloney v. Cuomo*, 554 F.3d 56, (2d Cir. 2009).

[316] A "chuka stick" is any device designed primarily as a weapon joined together by a rope or chain of rigid material used in a manner to allow free movement capable of inflicting serious injury upon a person by striking or choking. *Id.* at 58.

[317] A person is guilty of criminal possession of a weapon in the fourth degree when he or she possesses a chuka stick. PENAL LAW § 265.01(1) (McKinney 2021).

ban on nunchakus was challenged as a Second Amendment violation as infringing on the right to keep and bear arms.[318] She joined in the opinion that "the Second Amendment applies only to limitations the federal government seeks to impose on this right." [319] Justice Sotomayor's firm standing on precedent and *stare decisis* makes sense when reading *Cuomo*. The Second Circuit, joined by Justice Sotomayor, opined that the New York Penal law did not violate the Second Amendment.[320] Justice Sotomayor seems to rely heavily on precedent. So long as there is precedent to fit the facts in front of her, it is fair to conclude that she could be unpredictable. On the other hand, Justice Sotomayor joined the dissent in *McDonald*, concluding that history does not indicate that the right to private armed self-defense is "deeply rooted in this Nation's history or tradition or otherwise fundamental."[321] The *McDonald* dissent coupled with the *Cuomo* case suggests she would not so easily expand the Second Amendment.

Pro-gun rights individuals may be more concerned about Justice Kagan. The National Rifle Association "examined her career, written documents, and public statements" to see her stance, yet "found nothing to indicate her support for the Second Amendment."[322] Her confirmation hearing did not shed light on her position because she simply stated the Second Amendment was "settled law."[323] She does not have any judicial history to go on, but rather her legal history in general.[324]

Notably, Justice Kagan clerked for Justice Thurgood Marshall.[325] She received criticism from Senate Republicans for her association with him especially because of his significant civil rights background.[326] There is not a lot of information about Kagan's views

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[318] *Cuomo*, 554 F.3d at 58.
[319] *Id.*
[320] *Id.*
[321] *McDonald*, 561 U.S. at 931.
[322] Chris Good, *NRA Opposes Kagan,* THE ATLANTIC (July 1, 2010), https://www.theatlantic.com/politics/archive/2010/07/nra-opposes-kagan/59039/.
[323] *Id.*
[324] *See About The Court: Justices Current Members, supra* note 244 (listing Kagan's involvement with the Clinton Administration, Solicitor General of the United States in 2009, and clerking for Justice Thurgood Marshall).
[325] *About The Court: Justices Current Members, supra* note 244.
[326] Debaron, *The Second Amendment: Supreme Court Offers Handguns As Affirmative Action for the Poor*, WEB OF LANGUAGE (July 1, 2020 6:30 PM), https://blogs.illinois.edu/view/25/29601.

about guns, however, two cited documents allege Justice Kagan's hostility towards the Second Amendment.[327] In one sentence she allegedly stated that she was "not sympathetic" to a Second Amendment claim.[328] Moreover, in 1997, she helped draft a directive that temporarily suspended licenses to import assault rifles and gun-related issues.[329] It is important to note that at the time of her clerkship with Justice Marshall, the Second Amendment had been interpreted as not applicable unless the gun-holder was in a service or an organized militia.[330] Justice Kagan's lack of a judicial history in relation to Second Amendment issues leaves the door open; however, consideration of her past affiliations—democratic presidential administration and Justice Marshall—would suggest that she will agree that the Second Amendment rights are not unlimited.

Finally, Justice Barrett's seat on the bench may foreshadow a shift change in how the current Court will interpret the Second Amendment. Justice Barrett previously sat on the Seventh Circuit and took part in the dissenting opinion in *Kanter v. Barr*.[331] In *Kanter v. Barr*, the majority opinion stated that the felony dispossession statutes are substantially related to an important governmental interest by keeping firearms away from individuals convicted of serious crimes.[332] In this case, Kanter pleaded guilty to a nonviolent crime: mail fraud.[333] Justice Barrett's dissent argued that historically, legislatures' power to strip possession of firearms extended only to people who were dangerous and not peoples' status as felons.[334] She argued that the majority's argument was wrong because dispossessing all felons of firearms, violent and nonviolent, is unconstitutional.[335] In

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[327] Elena Kagan, *SCOTUS blog Briefing Page: Gun Rights*, SCOTUS BLOG (June 28, 2010), https://www.scotusblog.com/wp-content/uploads/2010/06/Kagan-issues_guns-June-28.pdf.
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] Carrie Johnson, *Gun Control Groups Voice 'Grave Concerns' About Supreme Court Nominee's Record*, NAT'L PUB. RADIO POL. (Oct. 9, 2020 8:00 AM), https://www.npr.org/2020/10/09/921713631/gun-control-groups-voice-grave-concerns-about-supreme-court-nominee-s-record ; *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019).
[332] *Kanter,* 919 F.3d at 451.
[333] *Id*, at 440.
[334] *Id.* at 451.
[335] *Id.*

her opinion, she touched on founding-era legislation categorically dispossessing groups judged to be a threat to safety, but there is no evidence that she supports the legislative power to categorically dispossess individuals because of their felony status.[336] She read the plain language of the Second Amendment to conclude the Second Amendment confers an individual right to keep and bear arms.[337] She did not believe the federal government, or Wisconsin, properly showed how disarming Kanter substantially achieved that important interest.[338]

Justice Barrett's detailed dissent is a call to expand the Second Amendment's reach to felons not convicted of dangerous crimes and takes the position that only dangerous felonies should cause an individual to lose their right to keep and bear arms.[339] During her hearing, she talked about *Kanter* as a significant case that needs "a closer look."[340] Her opinion about the Second Amendment demonstrates that only in extreme cases should individuals lose possession of their right to keep and bear arms, which means the Second Amendment should be read to include a larger class of persons to possess firearms.[341] Further, she voiced her agreement with Judge Kavanaugh that the text, history, and tradition, and not the two-part framework, is the appropriate method to resolve Second Amendment issues.[342] Justice Barrett seems to take the Second Amendment seriously and worries it is in danger of becoming a "second-class right" with the current legislation.[343] Remarkably, before she took her place on the bench, Justice Barrett had the backing of the National Rifle Association.[344] Her clear answers, expanding views on the Second Amendment, and possible dissatisfaction with current gun laws today conclude that she may be ready to take another look at today's gun laws.

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[336] *Id.* at 458.
[337] *Id.* at 463.
[338] *Kanter*, 919 F.3d at 468.
[339] Johnson, *supra* note 327.
[340] Jake Charles, *Amy Coney Barrett on Guns*, DUKE CNTR FOR FIREARMS LAW (Oct. 14, 2020), https://firearmslaw.duke.edu/2020/10/amy-coney-barrett-on-guns/.
[341] *Kanter*, 919 F.3d at 451.
[342] Charles, *supra* note 336.
[343] Devan Cole and Jessica Schneider, *Barrett's Confirmation Could Lead to the Supreme Court Taking Rare Action on Gun Rights*, CNN POL. (Oct. 10, 2020 5:33 PM), https://www.cnn.com/2020/10/10/politics/barrett-second-amendment-supreme-court/index.html.
[344] *Id.*

C. Where Will the Second Amendment Go from Here?

The major issue discussed in this paper is the proper-cause requirement. The state of New York is not the only jurisdiction that requires some kind of showing to carry a weapon in public for self-defense.[345] Thus, the Supreme Court's decision to hear the *Corlett* case could be a major ruling affecting the states' gun laws. There is a heavy divide in the lower courts and perhaps this decision will finally bring uniformity.

To recount, the proper-cause requirement boils down to "substantial need," "unique fear," and some sort of "demonstrated threat."[346] If a person does not meet those qualifications, he or she will not be issued a license to conceal carry in public for the purpose of self-defense.[347] I believe the lower court jurisdictions that require some sort of showing have correctly interpreted the Second Amendment as a means to regulate without imposing on a person's right to feel safe. The self-defense term is used frequently, however, one cannot respond recklessly. Generally, the permitted use of force is in relation to the degree of force reasonably believed necessary to repel various threats.[348] This means the use of force a person advances against an aggressor may only be what is reasonable under the circumstances. For example, one cannot justify a slap or kick to the shin as a reason to pull out a gun and shoot. Under the circumstances, the community must review whether, in this case, the use of a firearm was a reasonable reciprocation. Further, verbal provocation cannot justify responding with physical force,[349] and a defendant should lose his or her entitlement to the self-defense claim when the victim was unarmed.[350] Showing a special need to carry a gun may possibly reduce accidental shootings. A person approved by the licensing officer to carry a gun shows a certain level of need in which he or she has or, in the future, could come across a situation that would require the aid of a firearm. A demonstrated example of firearm necessity also limits the problem of subjectivity. It is too unclear to use "high crime areas," as a justifiable means to demand a firearm. Accepting the high crime area

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[345] Giese, *supra* note 144, at 595.
[346] *In re O'Connor,* 585 N.Y.S. 2d at 1003; *Woollard,* 712 F.3d at 870; *Gould,* 907 F.3d at 663.
[347] N.Y. PENAL LAW § 400.00(2)(f).
[348] 35 N.Y. JUR. 2d *Criminal Law: Principles and Offenses* § 166 (2021).
[349] *Id.*
[350] *Id.*

concern would result in the widespread circulation of arming the public because of a neighborhood or zip-code-fear that, in some cases, may even be a speculative problem in the future. Studies show that, overall, violent crime in the United States and the District of Columbia today is lower than it was in the 1990s.[351] A society in which everyone is armed presents its challenges. The "weapons effect" study in 1967 showed that simply seeing a gun and the mere presence of weapons increased thoughts of aggression.[352] Thus, New York's proper-cause requirement is a limitation to the presence of firearms on the street unless it is absolutely necessary.[353]

Heller stated that a total ban on firearms in the home was unconstitutional.[354] However, assuming it is constitutional for firearms to be carried outside of the home for self-defense purposes, *Heller* recognizes the constitutionality of regulating handguns and combatting the issue of handgun violence in the country.[355] One could rebut that New York's proper-cause requirement follows *Heller's* "variety of tools for combating that problem."[356] Freedom of speech enjoys heavy protection, however, it is subject to "regulations of time, place, and manner of expression."[357] The First Amendment's regulation in "places" can be compared to "in public" for firearms. The same could be said in the criminal procedure for the Fourth Amendment because an individual's claim to protection depends upon whether the area has a reasonable expectation of privacy from

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[351] The rate of reported violent crimes fell from 758.20 in 1991 to 366.7 in 2019. Statista Research Department, *Reported Violent Crime Rate in the United States from 1990 to 2019,* STATISTA (July 5, 2021), https://www.statista.com/statistics/191219/reported-violent-crime-rate-in-the-usa-since-1990/.

[352] Arlin Benjamin, Jr., Sven Kepes, Brad Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature,* 22 PERSONALITY AND SOC. PSYCHOLOGY REV. 347, 348 (2017).

[353] *See* Blocher, *supra* note 89 (stating populous states like New York require its applicants to show cause for certain public carrying licenses because the costs and benefits of gun use in the home are different than in public areas).

[354] *Heller*, 554 U.S. at 635.

[355] *Id.*

[356] *Id.* at 636.

[357] Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONGRESSIONAL RSCH. SERV. (Sept 8, 2014), https://fas.org/sgp/crs/misc/95-815.pdf.

governmental intrusion.[358] The Supreme Court in *California v. Greenwood* stated that there is a societal understanding that certain areas deserve the highest protection from government invasion.[359] The *Heller* opinion disbanded D.C.'s governmental invasion by prohibiting the government from telling an individual he cannot lawfully keep a firearm in his home.[360] However, what a person knowingly exposes to the public, even in his own home or office, is not protected.[361] Here, one can analogize that being in public, or in view of the public, may lessen a person's entitlement and protection and raise the restriction. It could be argued that after a person leaves his or her home, the protection could be restricted by the government.

Based on the judicial history and affiliation of the current Supreme Court, it is the prediction of this paper that more of the Justices will be in favor of expanding the Second Amendment. It is predicted that *Corlett* will produce a majority ruling that it is unconstitutional to require a person to demonstrate evidence of a substantial or unique need to carry concealed firearms in public for the use of self-defense.

Justice Barrett believes only felons of violent crimes should not have guns[362] which in turn may mean that she does not believe any limit should be placed upon a law-abiding citizen. Here, the proper-cause requirement would likely be categorized as an obstacle in her opinion.

Justice Alito's opinion in *McDonald* alone shows his support for the expansion of the Second Amendment as applied to the States.[363] Moreover, ruling that the proper-cause requirement is unconstitutional would clear the ambiguity amongst the lower courts.

Justice Thomas has shown his frustration with the lower Court's interpretation of *Heller*, and the Supreme Court's failure to reiterate an enumerated right that should not be burdened by obstacles.[364]

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[358] Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1301 (1981).
[359] California v. Greenwood, 486 U.S. 35, 43 (1988).
[360] *Heller*, 554 U.S. at 636.
[361] *Greenwood*, 486 U.S. at 41.
[362] *Barr*, 919 F.3d at 451
[363] *McDonald*, 561 U.S. at 791.
[364] De Vogue, *supra* note 140.

Justice Kavanaugh's disagreement with the balancing approach of the state's interest[365] may lead him to conclude the proper-cause requirement is unconstitutional. The proper-cause requirement has survived constitutional muster thus far because, although it "burdens" a right, the government will always stand by the demand for public safety. If Justice Kavanaugh disagrees with this approach, and the government's interest is how these requirements stand, a removal of the intermediate scrutiny test would leave the requirement unconstitutional on its face. Thus, it is predicted that Justice Kavanaugh would find New York's proper-cause requirement unconstitutional based on the textual-historical tradition approach.

Justice Gorsuch's position on section 922(g)(1), which states that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess any firearm or ammunition,[366] is an open question. It seems that Justice Gorsuch might expand the Second Amendment's purview because of his dissent in *Games-Perez*. He argues for that additional step that would protect felons from losing their firearm possession rights rather than an outright ban on every felon. He seems to support making it harder for anyone, even a nonviolent felon, to lose the simple right of possessing a firearm. The proper-cause requirement does not involve the possession stage; however, if Justice Gorsuch is already displeased with how the Tenth Circuit interpreted section 922(g)(1) on the basic level of possession, it should follow that he would also be displeased about the additional steps a person must take to obtain a license to carry a concealed firearm in public because of the proper-cause requirement.

To the contrary, Justice Breyer's strong dissent in the *Heller* opinion does not suggest that he would support opening the Second Amendment right any further. In fact, this paper predicts that he will dissent once more and preserve the two-part analysis approach he discussed in the first *Heller*. Justice Breyer's dissent in *Heller* firmly follows how the Supreme Court has always interpreted the Second Amendment (the collective theory approach) up until a few years ago. Justice Kagan's past clerkship with Justice Marshall and her heavy involvement in the Clinton administration, known for its gun control

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[365] Editorial Board, *supra* note 293.

[366] 18 U.S.C.S. § 922(g)(1) (LexisNexis, Lexis Advance through PL 117-65 approved 11/23/21).

seeking policies, supports the prediction that she will find the proper-cause requirement constitutional.

Justice Sotomayor's dissent in *McDonald* is a strong indicator that she will rule that the proper-cause requirement is constitutional. She joined the dissent's opinion that, historically, our nation has not sought to privately arm individuals. Such a strong stance would not create easy access for private individuals to arm themselves.

This paper further concludes that Chief Justice Roberts is too much of a wild card. History has shown him to be an impartial conservative-leaning justice. This is not a negative, however, because a conservative-leaning judge may not always rule in the interests of his or her party. It is the prediction of this paper that he may not take part in the opinion.

Consequently, the current makeup of the Supreme Court may lead the Second Amendment into an expansion. This will possibly create an equal opportunity in all jurisdictions for individuals to obtain permits to conceal carry in public.

IV. Conclusion

In *Corlett*, the Supreme Court will most certainly have to address the "beyond the home" issues to clear the ambiguity. However, this could be grave to those that push for more gun regulation. Rather than rule in the extreme and take away the legislature's power to regulate, the Supreme Court should rule that the proper-cause requirement is constitutional and yield the power back to legislators to decide. Although this would leave the circuit courts divided as they have been prior to *Corlett*, the district courts and circuit courts would now have binding precedent to dismiss claims that certain regulations are unconstitutional. This ability will discourage the judiciary from encroaching on the legislator's job to regulate and allow the states to preserve their sovereignty and be free to make their own laws. This is a possible solution because then citizens could choose whether they want to reside in a state with heavily or under-regulated firearm laws.

MUSLIM AMERICA: EXTREME ISLAMOPHOBIA PUTS PRESSURE ON THE NATION'S JUDICIAL SYSTEM BY MEANS OF TERRORISM

Aamir Shan Ibrahim

ABSTRACT

When a President passes an executive order or a Presidential proclamation, it is done with the highest regard for the general welfare of the American people. These powers are granted to the President by the Constitution. However, while passing several executive orders and Presidential proclamations, Donald J. Trump intentionally dismissed the interest of the people. He enacted the "Muslim Ban." Rather than guarding the American Dream, he developed systemic racism hidden in the language of terrorist threats.

While the efforts of legal action were made in good faith against the Trump Administration, they failed to address the hidden intent to oust the Muslim population in America. Trump falsified the idea of terrorist threats to further a conservative agenda. As such, the general welfare of America was attacked.

Fortunately, President Joe Biden provided relief; a Presidential proclamation. By using the same resource only available to the executive branch, he restored the fundamental element to the legislation. Thus, in considering that the purpose of both executive orders and Presidential proclamations are to promote the general welfare of Americans, the Muslim Ban was a disguised executive order to substantiate Xenophobia. Therefore, the Muslim Ban was not for the general welfare of America, instead, it was systemic Islamophobia.

I. Introduction

When a President issues an executive order, he intends to do so "to the best of [his] ability, preserve, protect and defend the Constitution of the United States."[1] This policy is issued on behalf of the interest and general welfare of the American people. It was the intent of the drafters to encourage prosperity and equality for every citizen of our nation. Even so, many presidents have issued executive orders with the purpose of serving as "instant law." While some are more controversial than others, executive orders are used to exhibit the control that the executive branch of the government has, and more specifically, the President's power. Through militant authority, the declaration can articulate both the objective and effect in plain language. However, at times various doctrines have been known to mask bigoted agendas.

On January 27, 2017, President Donald J. Trump executed Executive Order 13769,[2] "Protecting the Nation from Foreign Terrorist Entry into the United States."[3] In its opening sentence, the document justifies the basis of minimizing foreign threats by way of "the Immigration and Nationality Act."[4] It suggests that the intent is to "protect the American people from terrorist attacks by foreign nationals admitted to the United States."[5] Its language gave the impression that our country was under imminent attack by terrorist organizations and their plot against the American dream. The doctrine immediately faced much scrutiny from various nonprofits and Muslim individuals alike. While the racial animus exhibited had derived from prior statements on his campaign trail, legal challenges mounted. Still, it did stop the document from being superseded by Executive Order 13780.[6] At his own discretion, the President "suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen."[7]

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[1] U.S. Const. art. II, § 1, cl. 8.
[2] Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017).
[3] *Id.* at 8977.
[4] *Id.*
[5] *Id.*
[6] Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017).
[7] *Id.* at 13209.

With overly broad language, the order authorized, "Whenever the President finds that the entry of aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."[8] It legitimized through carefully crafted verbiage the discrimination of Muslim immigrants by depicting threats from terrorist organizations; "Al-Shabaab … continues to plan and mount operations within Somalia and in neighboring countries."[9] "ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe."[10], and "Al-Qa'ida in the Arabian Peninsula (AQAP) have exploited this conflict to expand their presence in Yemen and carry out hundreds of attacks."[11]

While still facing legal action by both nonprofit and private citizens alike, President Trump signed Presidential Proclamation 9645[12], *Enhanced vetting capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*[13], into effect. While this decree was proposed as a travel restriction on seven countries, it condemned and restricted the entry of foreign nationals to America predominately from nations with an Islamic populous. Together, we know these doctrines as "The Muslim Ban."[14] Despite the intent of a Presidential Executive Order to maintain the prosperity of the American people, President Donald J. Trump used his power to create mass hysteria against the Ummah[15].

The most critical moment against The Muslim Ban was *Trump v. Hawaii*.[16] The Supreme Court addresses the fabricated sweeping threat against Muslim immigration in the policies by broadening the

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[8] *Id.*
[9] *Id.* at 13211.
[10] *Id.*
[11] *Id.*
[12] 82 Fed. Reg. 45161 (Sept. 24, 2017).
[13] *Id*.
[14] Together Executive Order 13769, Executive Order 13780, and Presidential Proclamation 9645 are referenced this way.
[15] Another term to define the Muslim community and its bond by religion.
[16] Trump v. Hawaii, , 138 S.Ct. 2392 (2018).

scope of the Immigration and Nationality Act[17] (INA), which President Trump so fervently relied on to enact. The Court suggests "that had congress instead intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end." Thus, the Court failed to reprimand President Trump by suggesting, "The Proclamation does not fit that pattern[because] it is expressly premised on legitimate purposes and says nothing about religion."[18] At its crux, the case represents the failed abilities of the court to shed light on the racial animus expressed against Muslims, immigrants, and their lack of interest in American welfare. Specifically, the Court delegitimized the public interest of Muslim Americans, and granted racial discrimination, hatred, and promoted the Executive Orders. While the role of executive orders and presidential proclamations are to serve the general welfare of the people, on its biggest stage, our judicial system failed to address the lack of religious equity represented in the Muslim Ban.

Admirably, in *International Refugee Assistance Project v. Trump*,[19] the lower court swiftly recognized that "the individual plaintiffs are themselves Muslims whose own religion is allegedly targeted by the Proclamation."[20] Then in similar fashion, in *Washington v. Trump*,[21] the court contends that "the States' claims raise[d] serious allegations and present significant constitutional questions."[22] Without hesitation, the lower courts laid the foundation for evidence of the various underlying bigoted tactics applied in the doctrines themselves. However, the review of both cases represents the fallacies by the Supreme Court to read between the lines in *Trump v. Hawaii*;[23] the mockery that was made of the Islamic faith, and failed observance of the general welfare of America meant by Executive

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[17] Immigration and Nationality Act § 212(a)(5)(A), 8 U.S.C. § 1192(a)(5)(A).
[18] *Hawaii*, 138 U.S. at 2402.
[19] Intl. Refugee Assistance Project v. Trump, , 373 F. Supp. 3d 650 (D. Md. 2019), *motion to certify appeal granted*, 404 F. Supp. 3d 946 (D. Md. 2019), and *rev'd and remanded*, 961 F.3d 635 (4th Cir. 2020).
[20] *Id*. at 653.
[21] Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).
[22] *Id*. at 1168.
[23] Trump v. Hawaii, 138 S.Ct. 2392 (2018).

Orders and Presidential proclamations alike. *Hawaii*[24] symbolizes the disproportionate equity in this country for Muslims.

However, a new President signifies hope, and at times in the most unexpected way. If the office of the President has the power to outlast judicial review, then perhaps the strongest support for the Muslim community is to enact more Executive Orders or Presidential Proclamations. President Joe Biden, at the beginning of his term, hastily made reparations on behalf of his predecessors' intolerant agenda. His foresight recognized that while the Supreme Court glossed over the racially hidden program in the Muslim Ban, *Presidential Proclamation 10141*[25] proposes in its opening paragraph the lacking religious tolerance in America. He states, "Those actions are a stain on our national conscience and are inconsistent with our long history of welcoming people of all faiths and no faith at all."[26] It exemplifies the meaning of general welfare for all citizens. Thus, Muslim communities locally and abroad condemned by legal authority can retaliate with the continued support of orders and proclamations which are both textually and inherently illustrate our nation's diverse populous.

Is it not the intent of the Presidential office to serve the American people to the best of its ability? Then Executive Orders and Presidential Proclamations alike are enforced to offer equal opportunity and advantage to those within and seeking entry to our borders, no matter who the individual is. Through the lens of impartiality, Part I will discuss the development of these vested authorities in their earliest roots as pronouncements for the growth of civility in the United States of America.

However, not everything is as clear as it is intended to be. At times Presidents can instead create the illusion that the influence of these executive publications are inclusive of all individual's needs. It is with the same smoke and mirrors that President Donald J. Trump masked his planned Muslim Ban in his literally drafted conspiracy against terrorism. Part II shall emphasize the force behind the three doctrines that encompass the Muslim Ban and President Donald Trump's ability to develop systematic Islamophobia, and the Supreme Court's role in its acceptability.

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[24] *Id*.
[25] Ending Discriminatory Bans on Entry to the United States, 86 Fed. Reg. 7005 (Jan. 20, 2021).
[26] *Id*.

Despite judicial proceedings, the Trump administration's efforts were authenticated by the highest court of our land. While lower courts created an avenue to overturn the racial bias against Muslims found in the doctrines, the Supreme Court justified the inadequate interest granted to followers of Islam hidden in the text. Thus, Part III applauds the efforts of the lower courts to recognize the bigoted normalization of the masked Xenophobia found in the executive authorities and condemns the Supreme Court for jeopardizing executive orders and presidential proclamations and their role to benefit all Americans.

Yet, even as we recognize that the highest office in our government can create inequality for various minority groups, it can provide relief for those individuals as well. As quickly as President Trump enacted his distasteful policies, President Biden was capable of revoking them and promoting the well-being of every citizen. As such, Part IV will operate to create a sense of empowerment, sympathy, and apology for the Muslim community and develop a reflection on the opportunity to support the general welfare of all Americans through all executive orders and presidential proclamations as they were intended to do.

Part I: Vesting and Deriving Powers from the Constitution

At the highest seat of government, power rests in the United States Presidency, and every president has issued a decree to communicate various information to the American people. This type of correspondence can come in commemorating significant events, foreign policy decisions, and as a tool for oversight of various government branches. These significant forms of federal directives are otherwise known as executive orders and as presidential proclamations. Though they differ from each individual presidency, it is unclear the amount of power that is authorized by these directives. It is even more uncertain what effects can be lasting once they are inked with a signature and stamped with the presidential seal. While the power to authorize these documents is not enumerated in the Constitution, the power to issue the instruments themselves can be traced to Article II where, "the executive power shall be vested in a President of the United States. … he shall take care that the laws be faithfully executed."[27] This language qualifies that in the chartering of

[27] U.S. CONST. Art. II, § 31.

the United States government, the drafters granted these powers to execute policy with the best intentions on behalf of the general welfare of the American People.

It was on June 8, 1789, George Washington set precedent by issuing the first Executive Order.[28] His goal was to obtain "a full precise, and distinct general idea of the affairs of the United States."[29] He did so with the intent to gain an understanding of our nation's public interest. Thereafter, the country's interests grew, as did the scope of executive publications. The lasting impact of Washington's executive mandate continued a legacy through each presidential term. It was then that intent of executive orders and presidential proclamations were sealed; to protect the freedoms and maintain the best interest of the American people.

Notably, one of the most important Presidential Proclamations to date was the Emancipation Proclamation[30], or Proclamation 95[31], enacted by President Abraham Lincoln. In the most honorable fashion, he declared "that all persons held, as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons."[32] In crafted penmanship on January 1, 1863, President Lincoln had arguably drafted the most controversial declaration at the time. Yet, he still questioned his own resolution by stating that "upon [the] act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind."[33] With crafted language and belief in the value of all Americans, he had granted freedoms to people. A

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[28] Scott Bomboy, *Was Washington's Thanksgiving Proclamation the first Executive Order?*, CONSTITUTION CENTER (Nov. 26, 2020), https://constitutioncenter.org/blog/was-washingtons-thanksgiving-proclamation-the-first-executive-order.

[29] *Id*.

[30] It did not end slavery however it furthered the purpose that ending slavery was for the better of the country.

[31] The official number associated with the Proclamation.

[32] *The Emancipation Proclamation*, NAT'L ARCHIVES (last updated May 25, 2017), https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html.

[33] *Id.*

decree by a President held the power to equip each citizen with racial prosperity.

While each Executive Order and Presidential Proclamation are dictated by the President that has signed it, the intent is simple; promote the general welfare of the American people. This deriving principle from the Constitution is recognized by the highest of legal scholars as well. Barbara Bavis[34] of the Law Library of Congress[35] defines Executive Orders as, "directed to, and govern actions by, Government officials and agencies."[36] She states that Executive Orders are "founded on the authority of the President derived from the Constitution."[37] Further, she suggests that Proclamations "deal with activities of private individuals; do not have the force and effect of law, unless the President is given the authority over private individuals by the Constitution or a federal statute."[38] This meaning suggests that Executive Orders and Presidential Proclamations can be legally binding in their effect. For that reason, the most prioritized element of this executive power is the people of our nation.

The Commander in Chief holds immense influence over the people of this nation with the ability to enact such legislation. This is just as President Washington intended it to be. This motif continues to be carried forward by subsequent presidents, to ensure that the priority is always the protection and well-being of the people. While it should not come as a surprise, there are those Presidents who have created doctrines which negatively impact the nation's public. However, this does not negate that the purpose of each Executive Order and Proclamation is intended to serve the interest of the people's general welfare

Part II: Judicial Review; A Surface Level Interpretation

While the purposes of Executive Orders or Presidential Proclamations are to support the demands and needs of the American

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[34] She is a Legal Reference Librarian. Libr. of Cong., *Barbara Bavis*, L. LIBR. CONG, https://blogs.loc.gov/law/author/bbav/ (last visited Feb. 20, 2022).
[35] Its law collection has more than 1 million titles containing over 2.9 million volumes. Libr. of Cong., *Collections*, L. LIBR. CONG, https://www.loc.gov/research-centers/law-library-of-congress/collections/ (last visited Feb. 20, 2022).
[36] Barbara Bavis, *Executive Orders: A Beginners Guide*, LIBR. CONG. (Oct. 17, 2018), https://guides.loc.gov/executive-orders/order-proclamation-memorandum.
[37] *Id.*
[38] *Id.*

people, President Donald J. Trump used his authority to further bigoted beliefs, and as a result, an Anti-Muslim movement took place. On January 27, 2017, President Trump signed Executive Order 13769,[41] titled "Protecting the Nation from Foreign Terrorist Entry into the United States."[42] In detail, he stated that the purpose of his decree was "to protect the American people from terrorist attacks by foreign nationals admitted to the United States."[43] In an effort to avoid using racist language, he vividly described that "[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas."[44] In his plight, he had tactfully hidden the agenda against a group of people of our nation. Rather than supporting the interest of every member of our nation, his language used terrorism to stop immigration and create fear against the Muslim Americans. He had finally enacted the first piece of his promised policy into effect and disguised its intent with a need to combat terrorism. At one fell swoop the constitutional powers granted to the President were used to favor particular groups of our nation and hinder others. Specifically, the agenda of the "good ol' boy" had become public policy.

It comes as no surprise that such an agenda was developed on his campaign trail. On December 7, 2015, Trump published a "Statement on Preventing Muslim Immigration"[47] on his campaign website. In the opening sentence he called for a "complete shutdown of Muslims entering the United States."[48] He addressed this during in an interview with Fox Business, and stated that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country, we are seeing it."[49] How could someone running for office condemn one group of individuals to benefit

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[41] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[47] Donald J. Trump, *Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.
[48] *Id.*
[49] Donald J. Trump, *Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

another? He had planted the seeds of racial divide that have outlasted his single term in office. Despite the numerous accounts of Trump pointing at Islam as the culprit for American threat, he had done so in furtherance of his desire to blanketly subject Muslims to discrimination, both abroad and within our borders. It was intentional, and he had a plan in place to use the office of the presidency to do so.

President Trump went on to draft Executive Order 13780.[50] On March 6, 2017, the details of the prior Executive Order 13769 were substantiated to justify the suspended "entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen."[51] These countries themselves claim that a majority of their people identify as Muslims. To make matters worse, Trump portrayed each nation as being "identified as presenting heightened concerns about terrorism and travel to the United States."[52] The same platforms, which were used to free the enslaved, were being used to degrade religious freedoms. There was a growing distaste for Islam and its following in America. Without any true understanding of faith, two Executive Orders made it taboo to identify with the religion. Trump was using his vested powers in the directives to further a racist agenda, and as a result, mass Xenophobia was mounting; it was hidden in plain sight.

In a final attempt to abuse the powers of his office, President Trump halted the travel of Muslims to America. On September 24, 2017, Trump enacted Presidential Proclamation 9645,[54] "Enhancing Vetting Capabilities and Process for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats."[55] He was degrading Muslims at the most extreme level, and he was doing so on behalf of national interests against terrorism. Trump wrote, " by the authority vested in [him] by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in

[50] Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).
[51] *Id.*
[52] *Id.*
[54] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
[55] *Id.*

section 2 of this proclamation would be detrimental to the interests of the United States."[56] The document was clear in its directive to bar travel and immigration from Chad, Libya, Iran, North Korea, Somalia, Syria, Venezuela, and Yemen.[57] The Executive Orders were becoming lawful practices of the Anti-Muslim movement, without making any attempt to hide the blatant disregard for the community. Trump had successfully marginalized the exclusion of Islam from public interest through the growing hostility against members of the Ummah.

With his three forms of Presidential Command, Trump had developed the "Muslim Ban". From the beginnings of his desire to take office, he planted the overarching fear of terrorist threat from Islamic nations, immigrants, and American Muslims. By the end of his term, he had successfully legitimized his executive power to exclude the outward practice of Islam. The very Executive Orders and Presidential Proclamations which have offered aid and support for every individual were now being used to redact religious freedom for some. In his attempt to muddle the documents with rhetoric of enhancing security measures and organize counter-terrorism protocols, he had successfully admonished the purpose of Executive Orders and Presidential Proclamations. The documents themselves had become the authorities for various agencies to carry out the racist agenda. The power that gave Trump this right, was granted by the Constitution, and the practices were superseding laws found in the Immigration and Nationality Act. The public interest of America had become represented by the white men in this country. The Muslim Ban represented the stray from the public general welfare, religious acceptance, and opened policies to further the normalization of chauvinism. In organized fashion, President Donald J. Trump had hidden the real identity of his Muslim Ban by overtly sharing nonsense immigration concerns. He belittled his office, and he was legally authorized to do so.[59] The role of Executive Orders was no longer for serving every American. Instead, a smaller group of intolerant individuals were shaping policies behind the meaning of general welfare.

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[56] *Id.* at 45161-62.
[57] *Id.* at 45163.
[59] The power to write and sign off on Executive Orders and Presidential Proclamations is granted by the Constitution.

Part III: The Muslim Ban; Growth of Systemic Racism

Fortunately, Trump's commands were reviewed in court. The judicial system of our nation would challenge the disregard of religious tolerance. More importantly, the system would evaluate the intentions behind executive powers vested in orders and proclamations alike. Thus, Trump faced legal suit, and his deceptive practices to justify increased U.S. security were to be tested. The Muslim Ban raised the question as to what exactly Executive Orders and Presidential Proclamations were meant for, if the President was passing them with bigoted intent, and if the interest of the American people was served by barring Muslims from entry into America.

Almost immediately after President Trump signed Executive Order 13769, the "State of Washington filed suit in the United States District Court for the Western District of Washington."[60] In *Washington v. Trump*,[61] the state alleged that "the Executive Order was not truly meant to protect against terror attack by foreign nationals but rather was intended to enact a 'Muslim ban' as the President had stated during his presidential campaign that he would do."[62] The court had recognized that masked in the jargon regarding domestic threat was the underlying dismissal of an already underrepresented group. In the United States Court of Appeals for the Ninth Circuit, the court recognized "it was well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."[63] The court determined that "[t]he state's claims raise serious allegations and present significant constitutional questions."[64]

Thereafter, the court states that "the Government's interest in combating terrorism is an urgent objective of highest order, the Government has done little more than reiterate that fact. . . . The Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States.[65]

The Court held, "the public also has an interest in free flow of travel, in avoiding separation of families, and in freedom from

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[60] Washington v. Trump, 847 F.3d 1151, 1157 (9th Cir. 2017).
[61] *Id.* at 1151.
[62] *Id.* at 1157.
[63] *Id.*
[64] *Id.* at 1168.
[65] *Id*. at 1168.

discrimination. We need not characterize the public interest more definitely than this: when we considered alongside the hardships discussed above, these competing public interests do not justify a stay."[66]

In this landmark case, the court displayed the true intent of the racist plight that was destroying the meaning of public good. Trump had attempted to deliver on his "promises" to stop Muslim individuals from entering America and create mass hysteria in the form of Islamophobia. The court had seen right through the disguise, defined the function of a Presidential Executive Order, and recognized that nation's public interest and general welfare were at stake. President Donald J. Trump burdened Muslim immigrants and the community for their Islamic beliefs, but the attack on our protected best interests was not over.

In *International Refugee Assistance Project v. Trump*,[68] the plaintiffs expressed that President Trump had made "statements expressing his intent to institute a Muslim ban by barring entry of individuals from predominantly Muslim territories and his 'explicitly bigoted statements about Muslims and Islam.'"[69] Plaintiffs further alleged, "the Proclamation bears no rational relationship to the national security interests it purports to further and identify features of the Proclamation's design, its exceptions, its failure to justify itself, and the waiver process in support of their theory."[70] As such, the court held that,

> [T]he Proclamation would fail rational basis review if the evidence revealed that for each of its stated purposes, either that purpose was not a legitimate state interest or, if legitimate, there was no rational relationship between the Proclamation and that purpose, such that the only identifiable purpose was unconstitutional animus toward Muslims.[71]

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[66] *Id*. at 1169.
[68] Intl. Refugee Assistance Project v. Trump, 373 F. Supp. 3d 650, 658 (D. Md. 2019).
[69] *Id*.
[70] *Id*.
[71] *Id*. at 671.

With a final blow, the court concluded, "Plaintiffs have put forward factual allegations sufficient to show that the Proclamation is not rationally related to the legitimate national security and information-sharing justifications identified in the Proclamation and therefore that it was motivated only by an illegitimate hostility to Muslims."[72] It was abundantly clear that the court had no intention allowing the purpose of Presidential Proclamations to be degraded. If the design as the court stated was to further the national security interests, then it failed to do so by instead barring people who qualified to be in America. Thus, by barring those people from entry into the country, the Proclamation itself was narrowing the meaning of general welfare to serve conservative beliefs instead of the general populous.

With another opportunity to shed light on an attack of the general welfare of the American people, the court was successful. In the United States District Court of Maryland,[73] Trump's mandates may be characterized as lacking national security interest and were determined to be intolerant acts against Muslims. With its opinion, the court made it apparent that Donald J. Trump had tactfully advanced the agenda of racism and had done so with his executive power. Not only did he degrade the office of the President of the United States, he also altered the intent of the Executive Order and Presidential Proclamation. His constituents had observed with each version of the Muslim Ban, the documents served one purpose, to continue the advancement of their own well-being and suppress the benefits of anyone who did not fit the standard.

It was not until *Trump v. Hawaii*,[74] we were able to comprehend the harm done to the credibility of executive actions found in both orders and proclamations. In *Hawaii*, the "plaintiffs argue that the Proclamation is not a valid exercise of the President's authority."[75] The court held that, "the language … is clear, and the Proclamation does not exceed any textual limit on the President's authority."[76] The plaintiffs further argued that the President's entry suspension violated the Immigration and Nationality Act (INA), which states that "no Person shall… be discriminated against in the issuance

[72] *Id*. at 674.
[73] Referring to the District Court where the case was heard.
[74] *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).
[75] *Id*. at 2408.
[76] *Id*. at 2410.

of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[77] Thus, the court held, "[t]he Proclamation is squarely within the scope of the Presidential authority under the INA."[78] In its efforts to hear the case, the Supreme Court rationalized the shroud of immigration concerns and failed to recognize the intentions behind the documents themselves. Thus, in a final effort to repair the meaning of general welfare, the court failed to reprimand Trump's discriminatory actions, it instead authenticated the masked verbiage. The "plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims."[79] They furthered that "the Proclamation 'establishes a disfavored faith' and violates 'their own right to be free from federal [religious] establishments.'"[80] The court upon its review held, that "[t]he Proclamation, moreover, is facially neutral toward religion."[81] It furthered that,

> The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet the fact alone does not support an inference of religious, hostility, given that that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.[82]

As quickly as the lower courts had been able to identify the lacking support for the entire American population in the executive orders and proclamations that were enacted, the Supreme Court had glazed over the issue entirely. The court failed to recognize that even though Muslim Ban included a small proportion of Muslim countries, it still

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[77] *Id*. at 2413.
[78] *Id*. at 2415.
[79] *Id.*
[80] *Id*. at 2416.
[81] *Id*. at 2418.
[82] *Trump v. Hawaii*, 138 S.Ct. 2392, 2421 (2018).

failed to support the interest of all American people. It is here that the Supreme court was given the opportunity to address the veil that President Trump placed over the shrouded systemic racism projected on the American public by his actions.

The Muslim community had been ostracized in the highest court of the land. The Muslim populous had been used to degrade the meaning of general welfare and public good intended in the enactment of all executive orders and proclamations. Trump succeeded, in the highest form of judicial review, "religious gerrymandering" was legitimized and the policies behind orders and proclamations were lowered to serve a smaller community of bigots. With it holding the court had officially allowed Xenophobia to be permitted and solidified its place in the American culture. Further, Muslims were excluded abroad and from communities in the United States from receiving equal protections. From the most distinguished legal scholars, we failed to comprehend that the Executive Orders and Presidential Proclamations are indeed meant to further the public's interest and propel this nation's people to reach their personal desire. The Supreme Court altered the perception of the Ummah in America, substantiated personal presidential agendas over the people, and as a result, discrimination of Muslims become a social norm. The American Dream was blocked by closing borders and stopping our fellow Muslim citizens from practicing and immigrating to our nation. Thus, hopes to further equality and justice for all were degraded. The power of the Presidential Office to further the people's personal interest turned into a personal affair, and Muslim Ban represented a well-executed, hidden attack on our democracy. There was no question, while the office of the president had the authority to enact Executive Orders and Proclamations for the better of the American public, the Muslim Ban itself was enacted to further racism and Islamophobia. Unfortunately, the Supreme Court approved of this, and the agenda was a message hidden in plain language.

IV: Conclusion: Onwards, A New Hope for the Presidential Office

On January 20, 2021, President Donald J. Trump was officially relieved of his duties as the President of the United States. The memory of a tainted Presidency was written on the walls of a capitol building which was infiltrated by the same racist and intolerant individuals who

benefited from the Muslim Ban.[86] A divided America we stood. However, a beacon of hope came with a new president. With the inauguration of our newly elected President Joe R. Biden, the majority of America waited to see the changes that were promised for the common prosperity of the American people. The answer originated in the presidential powers to enact new executive orders and presidential proclamations. The general welfare and public interest that had been stripped as a result of the Muslim Ban, could be rectified with broad policies in new orders and proclamations themselves.

On the same day he was inaugurated into office, President Joe R. Biden, signed a proclamation into effect. Only this time, President Biden followed what the drafters of the constitution intended. He used his vested authority to further the agenda of the American people in their desire for general welfare. Americans stood corrected as the Proclamation itself used rhetoric and language that was inclusive of all people. For the first time in four years the general welfare of America was regarded as an unbiased program for all to prosper.

In his opening paragraph of Presidential Proclamation 10141[87] he writes, "The United States was built on a foundation of religious freedom and tolerance, a principle enshrined in the United States Constitution."[88] President Biden suggested that tolerance was a necessary respect derived from the founding document of our nation. If our country's Constitution could convey this principle, then the presidential powers were meant to guard it. He furthered that, "[n]evertheless, the previous administration enacted a number of Executive Orders and Presidential Proclamations that prevented certain individuals from entering the United States… from primarily Muslim countries. . . . Those actions are a stain on our national conscience and are inconsistent with our long history of welcoming people of all faiths and no faith at all."[89] Thus, President Biden had recognized the importance of preserving the intent of his executive authority when enacting such legislation. More importantly, he suggested it in plain text with no ulterior motive. He then addressed the fabricated threat of terrorism by suggesting, "where there are threats to our Nation, we will address them . . . . And when visa

[86] This reference is to the Capital Riot that took place on January 6, 2021.
[87] 86 FR 7005.
[88] *Id*.
[89] *Id*.

applicants request entry to the United States, we will apply a rigorous, individualized vetting system. But we will not turn our backs on our values with discriminatory bans on entry into the United States."[90] He recognized that there was a difference between taking precautions and forcibly excluding others for their religion. With his rhetoric and clear meaning he states,

> [B]y the authority vested in [him] by the Constitution and the laws of the United States of America … in the interests of the United States… [he revoked] Executive Order 13780 of March 6, 2017 (Protecting the Nation From Foreign Terrorist Entry into the United States), Proclamation 9645 of September 24, 2017 (Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats) … Our national security will be enhanced by revoking the Executive Order and Proclamations. [91]

In one fell swoop, President Biden overturned what the Supreme Court in *Trump v. Hawaii*[92] was unwilling to do—define the general welfare of the American people. He fought fire with fire and corrected purpose of the Executive orders and Presidential Proclamations by using them for their intended purpose. The four-year mask that had hid systemic racism and substantiated Xenophobia in America was uncovered and discarded. Islam was given the respect it deserved, and Muslims in America and abroad felt a sigh of relief. We finally understood how our biggest threat could be our biggest asset, the Executive Order and Presidential Proclamations themselves could be used to undue the harms of prior orders and proclamations. This was the answer: to use the very powers vested in the office of the President of the United States to ensure that the public and its general welfare is the priority.

While the Muslim Ban was a reminder of the blatant exclusivity in the meaning of common welfare, it showcased the unmatched capabilities of a sitting president to undue the most sacred

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[90] *Id*.
[91] *Id*.
[92] *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

of tenets that our nation was founded upon. The general welfare of American citizens should be expressed in the clear language in the executive branch's intentions. With the Muslim Ban, the intention was to alter the text, portray imminent threat of terrorism, and mask the true lack of color in the nation's public eye. Specifically, Donald J. Trump altered the intent of the Presidential Proclamation and Executive Order, and as a consequence he created an Islamophobic wet dream.[94]

In a high praise of intelligence, our current sitting President, Joe R. Biden, resolved our largest concerns as Americans, equality. With the same means that than President Trump used to undo the hard work those before him, President Biden finally created a remedy, using a resource that only he could force on the people. The Executive Order and Presidential Proclamation were meant to further the general welfare of the people, it was restored. Yet, while Muslims continue to face Xenophobia in the land of the free,[95] we hope that hereafter America recognizes the impact of each of these documents and hold them to the highest standard when conferring benefits on its people and for the people.

[94] Conservative followers of the Trump administration found excitement in the agenda they had proposed.
[95] Referring to America and the American Dream.

COLLATERAL CONSEQUENCES: WHY THE CONSEQUENCES OF CRIMINAL CONVICTIONS AFFECT MUCH MORE THAN THE INDIVIDUAL, AND A CASE FOR AUTOMATIC EXPUNGEMENT

Moka Ndenga

I. Introduction

Don't do the crime if you can't do the time. This popular idiom is often touted when seeking to justify the carceral nature of the American criminal justice system. But what happens when "the time" extends indefinitely for the rest of a criminal offender's lifetime? Some will argue that crime and punishment have their necessary place in any orderly society, and one wishing to skirt justice must bear the consequences of their actions. Others will posit that our system needs a complete overhaul since justice is hardly ever equitably served, and race or socioeconomic status are better predictors of an individual's chances of conviction as opposed to actual guilt or innocence. Either way, once one has paid their debt to society, a phenomenon haunts individuals convicted of a criminal offense. It makes their re-entry into society difficult, if not all but impossible. With every job or housing application, a person with a criminal record is reminded of their lowered value to society. Collateral consequences to a criminal offense all too often shackle those caught violating the law with a scarlet letter of sorts: C for convict. This note will argue that although our criminal justice system needs a complete overhaul, automatic expungement is the most effective, and least costly method of reintegrating those who have already been convicted of an offense back into society for the betterment of all.

I. What Are Collateral Consequences?

A. Collateral Consequences Defined

A collateral consequence of a criminal conviction is defined as a consequence that indirectly stems from a federal or state criminal

conviction.[1] In contrast, direct consequences flow naturally from the sentence, such as jail terms, fines, or parole.[2] The most jarring aspect of collateral consequences is that they are not often readily quantifiable. It is not uncommon for attorneys, prosecutors, and judges alike to be unaware or unconcerned with the collateral consequences of a conviction.[3] Therefore, defendants may knowingly plead guilty to a vast array of direct consequences at the time of conviction while simultaneously unknowingly overlooking the perhaps more critical and longer-lasting collateral or indirect consequences.[4]

In 2006, there were, on average, 650,000 inmates released from federal and state institutions in the United States per year.[5] There were also approximately nine million American citizens released from local jails per year.[6] To make matters even worse, nearly two-thirds of all incarcerated individuals would be arrested again within three years of their initial release from jail.[7] These high recidivism rates directly correlate to the mounting number of individuals being released from correctional facilities.[8] While legislation often focuses on curtailing violent recidivism, it is inevitable that many who have been convicted of both violent and non-violent crimes alike will need to re-enter society and may find themselves with scant options for affording food, finding employment, and securing housing.[9] The main topic of discussion then becomes, how do we help these individuals reacclimate into society and avoid recidivism?

To understand global carceral punishment, it is essential to note that the United States holds the world's highest rate of incarceration.[10] The United States claims almost twenty-five percent of the world's inmates while only holding approximately five percent of the world's

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[1] Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 625 (2006).
[2] *Id.* at 634.
[3] *Id.* at 639.
[4] *Id.*
[5] *Id.* at 628.
[6] *Id.*
[7] *Id.* at 629.
[8] *Id.*
[9] Michael O'Hear, *Managing the Risk of Violent Recidivism: Lessons from Legal Responses to Sexual Offenses*, 100 B.U. L. REV. 133, 140 (2020).
[10] Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010).

population.[11] Studies have shown that citizens of the United States face more severe and longer-lasting collateral consequences than similarly situated citizens of nations like South Africa, Canada, and England.[12] These same studies show that collateral consequences in the United States are much more far-reaching and permanent than those of the aforementioned countries.[13] But this sensation did not come about by happenstance. The founding of the United States offers excellent insight into how these harsh consequences came into existence.

B. History of Collateral Consequences in the United States: Civil Death

It has long been a tenet of cultures around the world that the punishment of undesirable actions is necessary to curtail repeated societally accepted wrongs at a minimum while also keeping all members of society safe. So, it is no surprise that some collateral consequences that we see today are legitimate in that they function to restrain individuals and ensure public safety. Examples of these types of collateral consequences might include not allowing violent offenders to own firearms, and barring those convicted of violence or abuse from working with sensitive populations, such as children or the elderly.[14] Collateral consequences have a long history that dates back to the colonial period in America.[15] Collateral consequences began to gain the interest of those concerned with legal reform in the 1960s-1970s, but have become increasingly problematic in recent years for three distinct reasons: (1) they are gaining traction both in number and severity (2) they are affecting more people, and (3) they are becoming harder to mitigate or altogether avoid.[16]

After the Industrial Revolution, the English still wholeheartedly embraced the concept of "civil death," where all of one's property and political rights were necessarily relinquished after being convicted of a criminal offense.[17] So it naturally followed that

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[11] *Id.*
[12] *Id.* at 465.
[13] *Id.*
[14] MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §1.2 (2018).
[15] *Id.*
[16] *Id.*
[17] *Id.* at §1.3.

when the colonies were in their early stages of development, the concept of "civil death" would play an integral part in the expansion of criminal punishment.[18] During the Civil War era, the concept of "civil death" was euphemized and termed "civil disabilities" and were most often used for African-Americans' political and social disenfranchisement.[19] Americans were able to rest and relish in the fact that their noble ideals of freedom and second chances were secure since there was a readily available remedy for "civil death": a pardon.[20]

It would not be until the middle of the 20th century and the adaptation of the Model Penal Code that there would first be an acknowledgment and proposed reform for collateral consequences.[21] It became widely accepted that executive pardons were an unreliable form of relief; only those with means and connections could acquire them.[22] By 1962, the Model Penal Code had called for a precise judicial process to offer criminal offenders rehabilitation and social restoration.[23] By the end of the 1970s, most states had set up automatic restoration of voting and many other civil rights after a criminal sentence was completed.[24] Then as a nation, we took a step back. The Sentencing Reform Act of 1984 enacted harsh mandatory prison terms for crimes that in the past held minor punishments.[25] The war on drugs would prove to be a wrench in the mechanism of justice that had just begun to proliferate rehabilitation efforts. It would be the start of what James B. Jacobs termed an "eternal criminal record" that would send millions of Americans down a spiraling staircase of destruction:

> An estimated twenty million Americans, about 8.6 percent of the total adult U.S. population, have recorded *felony convictions*. The number of individuals with recorded misdemeanor convictions is several times greater. Indeed, a conviction is not a criminal record prerequisite; a criminal record is created for every arrest, regardless of the ultimate disposition. All

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at §1.4.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at §1.5.

> told, federal and state criminal record repositories contain criminal records for approximately 25 percent of the U.S. adult population."[26]

This means that one in four adults in the United States has some sort of criminal record. It was at this point in history that criminal records yet again began to mean a life sentence with no statute of limitations.[27]

With the increased dissemination of public information through the internet, it became glaringly apparent that Americans did not own any sort of privacy interest in their criminal convictions, thereby making it easier for all kinds of discrimination to remain unchecked.[28] In many parts of Europe, criminal records are not publicly accessible information, and each convicted person has a privacy interest in their own records.[29] It is vital to appreciate the dangers of misinformation that then come into issue. With knowledge came new ways for those who had already paid their debt to society to be discriminated against, which often has dire effects on the community they live in, and on their offspring.

II. Types of Collateral Consequences

A. Housing Discrimination and the Denial of Public Assistance

Once released from incarceration, it is logical that one would need food to eat and somewhere to lay their head at night. With most individuals being released back into the general public without a home, it would seem that public assistance would be the next logical step towards their route to reintegration and becoming contributing members of society. Instead, these newly released individuals quickly realize that they are, more often than not, barred from receiving public assistance. The United States federal government places stringent restrictions on those who qualify for public housing. Federal law bars some convicted drug producers, sex offenders, and the like from

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[26] JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 1 (2015).
[27] *Id.* at 4.
[28] *Id.*
[29] *Id.* at 5.

receiving federal public assistance in the form of public housing.[30] Each United States jurisdiction varies in the length and measure of its respective restrictions. Some jurisdictions allow inclusion in housing benefits after a demonstration of rehabilitation.[31] Regardless of whether there is a shorter or longer exclusionary waiting period, this denial of a necessity, in this case, housing, only further stigmatizes and cripples an individual's reacclimation into society by making them struggle at the onset of their re-entry.

Similar to public housing, since 1996, federal law has allowed the denial of cash assistance and food stamps to those convicted of felony drug offenses.[32] These items are often distributed by the states with federal funds. Though some may incorrectly and affectionately argue that the right to shelter is not a fundamental right, it can scantly be debated that anyone should deny those convicted of felony drug offenses the right to a meal. States are allowed to opt out of the federal ban on cash assistance and food stamps for those convicted of felony drug offenses, and many have done just that.[33] As of 2010, fourteen states have adhered to this federal ban on public benefits, twenty-two states have chosen a partial ban, and fourteen states plus the District of Columbia have decided to do away with the ban entirely.[34] While it is up to each individual state to decide how it wishes to proceed, it is fundamentally inhumane to deny assistance to those who need it the most, no matter what indiscretions they may have had in the past. Suppose one is crippled by being rejected from access to such basic human needs as food and shelter. In that case, we may plausibly conclude that this may steer certain individuals towards re-offending just to have something to eat and somewhere to sleep.

B. Employment Opportunities and Voting Rights

One of the most concerning collateral consequences is legal discrimination in employment. Competition in the job market is already stark. Add to that the fact that people convicted of crimes face narrower job prospects, re-entry is made that much harder. It is perfectly legal to deny jobs to those with a criminal record in most

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[30] Pinard, *supra* note 10, at 491.
[31] Pinard, *supra* note 10, at 492.
[32] Pinard, *supra* note 10, at 494.
[33] *Id.*
[34] *Id.*

states.[35] Personal circumstances, an individual's work history, and the passage of time do not make the job search any simpler.[36] Most employers will not consider these mitigating circumstances when other applicants are just as qualified and do not have a criminal record. Those with criminal records are ineligible for many employment categories and are unable to obtain certain occupational licenses.[37] Both state and municipal licensing agencies will run a background check on all applicants and deny many licenses to those with criminal histories.[38] One would think that this type of cherry-picking would be barred as unacceptable discrimination. Though, while there are some anti-discrimination statutes that seek to protect individuals with criminal records, they are often hard to enforce, leaving those with criminal records in short supply of meaningful employment prospects or meaningful remedies against discrimination.[39]

Voting restrictions are also levied against those with criminal convictions. The Supreme Court allows voting restrictions based on criminal convictions, citing Section 2 of the Fourteenth Amendment to the United States Constitution.[40] With the District of Columbia and forty-eight states banning those currently incarcerated for felony offenses from exercising the right to vote, voter suppression issues necessarily come to light.[41] While most states ban those incarcerated or on probation for felony convictions from exercising the right to vote, Virginia and Kentucky have also enacted lifetime bans for anyone who has ever been convicted of a felony.[42] With more and more Americans being incarcerated and released every year and simultaneously finding it harder to reacclimate to society, adding a lifetime ban on voting rights increases the stigma of conviction. This type of punishment, more times than not, does not fit the crime.

III. Legal Remedies for Collateral Consequences

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[35] ACLU, *Words from Prison: The Collateral Consequences of Incarceration,* https://www.aclu.org/other/words-prison-collateral-consequences-incarceration.
[36] *Id.*
[37] Pinard*, supra* note 10, at 493.
[38] *Id*.
[39] *Id.*
[40] Pinard*, supra* note 10, at 494.
[41] *Id.*
[42] *Id.*

A. Collateral Consequences in the United States Courts: Ineffective Assistance of Counsel Claims

The Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[43]

The last portion of the Sixth Amendment references assistance of counsel. This portion has become the basis for those convicted of criminal offenses to find recourse within the very same courts that convicted them. These suits measure an attorney's competence against the current prevailing norms in the profession.[44] Since the extent of collateral consequences is often hard to quantify, traditionally, many lower state and federal courts have created a rule called the "collateral consequences rule," whereby the accused need only be informed by their attorney of the direct consequences of their conviction, while the indirect collateral consequences may be excluded.[45] These indirect collateral consequences have historically included, but are not limited to: the loss of employment opportunities, restrictions on housing and voting rights, sex-offender registration, involuntary civil commitment, and most importantly, deportation.[46] Since the courts had historically found no obligation for attorneys to inform their clients about the possibility of deportation by labeling deportation an indirect collateral consequence, courts have justified not allowing the accused to withdraw their guilty pleas once the accused has learned of the possibility of deportation.[47] This is shocking for those who have made

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[43] U.S. CONST. amend. XI.
[44] Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 (2009).
[45] *Id.* at 125.
[46] *Id.*
[47] *Id.* at 128.

the United States their long-term home, and who would have their world turned upside down by deportation.

A noteworthy case that set the framework for ineffective assistance of counsel claims was heard in 1984. In *Strickland v. Washington*, a man was convicted on three counts of murder and sentenced to death.[48] The Supreme Court granted certiorari and created what would later be cited as the Strickland Test. The Strickland Test is used to generally determine whether counsel's assistance to the accused is defective enough to mandate a reversal of a death sentence.[49] Two requirements must be shown: (1) that the counsel's performance was, in fact, deficient, and (2) that counsel's deficient performance caused the accused to be prejudiced.[50] If both prongs of the Strickland Test are met, then a conviction may be overturned.[51]

Hill v. Lockhart followed just two years later in 1986, and applied the two-prong Strickland Test to support challenges to guilty pleas.[52] The second prong of the Strickland Test was at issue in this decision.[53] The Court held that a defendant must show that there was a reasonable probability that if not for counsel's errors in representation, they would not have agreed to a guilty plea and would have instead taken the case to trial.[54] In *Hill,* the petitioner was not granted relief because he could not demonstrate that he would not have pled guilty to his charges if he had known his parole eligibility date.[55] This case narrowed the two-prong test in *Strickland* and further qualified the requirements for an ineffective assistance of counsel claim, while still not wholly delineating which direct or indirect collateral consequences need be communicated to the accused to demonstrate effective assistance of counsel.

Historically, attorneys have not been required to inform defendants of the immigration consequences of criminal pleas. However, this changed in 2010, when the landmark decision in *Padilla v. Kentucky* definitively allowed for deportation to be considered of

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[48] *See* Strickland v. Washington, 466 U.S. 668 (1984).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See* Hill v. Lockhart, 474 U.S. 52 (1986).
[53] *Id.*
[54] *Id.*
[55] *Id.*

enough consequence to be necessarily disclosed as a direct consequence of criminal convictions.[56] In this case, counsel did not effectively communicate the risk of deportation, and the Court found that this was deficient under prevailing norms of the profession.[57] However, the Court ultimately remanded the matter to the state Court on the issue of whether Padilla could demonstrate prejudice.[58] In *Padilla v. Commonwealth,* it was determined that counsel's failure to advise the accused of the collateral consequence of deportation amounted to ineffective assistance of counsel, because the accused was unfairly prejudiced by his counsel's failure to disclose.[59] The accused would not have accepted the plea agreement if the collateral consequence of deportation had been clearly communicated to him beforehand.[60] This case set monumental precedent for the type of recourse available for individuals convicted of criminal offenses, who are often railroaded by the criminal justice system and coerced into accepting plea agreements without adequately appreciating the potential consequences of their guilty pleas.[61] Recent cases such as *Garza v. Idaho* have further expanded a defendant's right to know all of their viable options before committing to waive an appeal.[62] This holding was tremendous in that it demonstrated that counsel is not off the hook, even at the appellate level, when it comes to communicating to defendants all the possible consequences of their pleas at all levels of the appellate process.[63] These recent rulings should make all attorneys more diligent in communicating every possible outcome that is cognizable as a result of a criminal conviction. Attorneys being more proactive would not only make plea agreements fairer and more transparent, but would also shield them against ineffective assistance of counsel claims.

IV. Collateral Consequences of Collateral Consequences

A. The Criminalization of Race and Addiction

[56] *See* Padilla v. Kentucky, 559 U.S. 356 (2010).
[57] *Id.*
[58] *Id.*
[59] *See* Padilla v. Commonwealth, 381 S.W.3d 322 (2012).
[60] *Id.*
[61] *Id.*
[62] *See* Garza v. Idaho, 139 S. Ct. 738 (2019).
[63] *Id.*

While some may argue that the criminal justice system was always meant to keep society in order and keep us safe from harm, some more sinister motives are certainly at play. In the Jim Crow South, it was legal to discriminate against citizens based solely on the color of their skin.

> In the era of colorblindness, it is no longer socially permissible to use race, explicitly as a justification for discrimination, exclusion, and social contempt. So, we don't. Rather than rely on race, we use our criminal justice system to label people of color criminals and then engage in all the practices we supposedly left behind.[64]

Essentially, the mass incarceration of Black and Brown bodies has become a form of social control which is able to operate in almost exactly the same way that Jim Crow laws did over half a century ago.[65] African Americans and other people of color are thereby once again relegated to second-class citizenship through the stigma and crippling effects of collateral consequences.[66]

By the same token, those with addictions are often criminalized and sent to jail when in actuality, they are in desperate need of treatment. Addiction should be a critical health concern that warrants treatment, not punishment or jail time.[67] A large percentage of those already socioeconomically and racially disenfranchised end up suffering from addiction and end up incarcerated.[68] For those who are severely addicted, incarceration can lead to an abrupt halt in usage and forced withdrawal.[69] Withdrawal is extremely dangerous when not properly treated or supervised, and may result in death.[70] The solution

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[64] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2012).
[65] *Id.* at 4.
[66] *Id.*
[67] Rahsaan Hall, *District Attorneys and the Criminalization of Addiction,* ACLU MASSACHUSETTS (July 20, 2018), https://www.aclum.org/en/publications/district-attorneys-and-criminalization-addiction.
[68] *Id.*
[69] *Id.*
[70] *Id.*

is simple: instead of sending those in need of treatment to jail, send them to treatment.[71] District attorneys are often responsible for what occurs after an arrest, and they may choose to drop charges, prosecute the case, or divert the person with a potential addiction to a program for treatment.[72] If those holding the authority to bring charges are concerned with the welfare and safety of society at large, they would be well served in stopping the criminalization of both race and addiction. After all, helping those in need of treatment overcome their substance use disorders will ultimately lead to safer communities and healthier citizens.[73]

B. Cycles of Poverty for the Community and the Children of the Imprisoned

The most troubling repercussions of collateral consequences often fall on the community and the children of those imprisoned. When a specific community, such as the Black community, is already facing vast amounts of social and economic disadvantages, the removal and return of large numbers of individuals stifled by collateral consequences will only exacerbate the problem.[74] The experiences and psychological effects suffered in prison often impacts an individual's reacclimating into society.[75] It is not uncommon for individuals convicted of criminal offenses to return home and have high recidivism rates while simultaneously struggling with drug or alcohol abuse which may, in turn, lead to family tensions and domestic violence.[76]

This becomes an even bigger issue when we see that more than fifty-five percent of state prisoners have at least one minor child waiting for their return home.[77] These children are forced to grapple with the social stigma of having a family member incarcerated, the emotional trauma of being abandoned, and the loss of financial support

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 2 (Jeremy Travis & Michelle Waul eds., 2004).
[75] *Id.* at 3.
[76] *Id.*
[77] *Id.* at 4.

that flows from one or both of their parents' incarceration.[78] These minors will face many issues related to the loss of sources of support, instability, and poverty in their lives.[79] Studies have shown that these children are more likely to suffer from depression, emotional withdrawal, low self-esteem, and inappropriate disruptive behavior both at home and in school.[80] All of this accumulated trauma on a child of imprisoned parents diverts the child's energy from critical developmental tasks.[81] The child will most likely become more concerned with emotional survival, resulting in maladaptive coping strategies and delayed development.[82] This is troubling not only for the children of the incarcerated, but also for the immediate and more expansive community that the children find themselves in. Incarceration effectively cripples these innocent children before they even have a chance at life and making their own decision. Cycles of poverty, substance abuse, violence, and criminal convictions may ultimately await these children as they enter adulthood if the consequences of mass incarceration are not dealt with and mitigated.

V. Alternatives to Criminalization

A. Rehabilitation and Re-entry Services

Rehabilitation and re-entry services are needed to give formerly incarcerated individuals the tools to succeed outside of jail. Formerly incarcerated individuals tend to leave prison without treatment or any vocational training.[83] There are so many collateral consequences placed on employment and housing that becoming a law-abiding citizen is almost always riddled with obstacles.[84] As a society, we should not be committed to hampering the re-entry efforts of those who genuinely want to become law-abiding citizens. Still,

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[78] *Id.* at 13.
[79] *Id*.
[80] *Id.* at 15.
[81] PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 16 (Jeremy Travis & Michelle Waul eds., 2004).
[82] *Id.*
[83] JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105 (2003).
[84] *Id.*

when they encounter hurdles at every turn, may we essentially be jeopardizing public safety by tacitly coercing those previously convicted of offenses back into a life of crime?[85] If lawmakers sincerely cared for their constituents, state-funded rehabilitation programs and viable re-entry counseling programs would be implemented to ensure that individuals do not feel forced back into a cycle of breaking the law and ending up incarcerated.

B. Automatic Expungement and a Concrete Model: Michigan's Clean Slate Initiative

While rehabilitation and re-entry programs are much needed, they do not remove the burden of collateral consequences from a criminal record once a citizen is released and attempts to move on with their life. Automatic expungement of crimes after a waiting period would effectively allow individuals who have no intent of reoffending to start over with a clean slate. Michigan recently passed a clean slate package that is the first of its kind.[86] In 2020, Michigan became the first state to automatically clear felonies that qualified under this initiative.[87] The process is automatic under this new expungement program, with no need to apply anywhere.[88] Misdemeanor convictions that are more than seven years old and felony convictions that are more than ten years removed from the conclusion of sentencing or a prison term (whichever is later) will automatically be cleared.[89] Although most serious crimes would not be eligible for expungement, the eligible crimes will be cleared from the public record without any action from the person who committed the offense.[90] While law enforcement officers will still have access to non-public records detailing one's criminal record, previously convicted individuals with their expunged records will no longer be required to disclose past criminal convictions

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[85] *Id.*
[86] Julia Cusick, *Statement: Michigan Becomes Latest State to Pass Clean Slate Legislation, First to Include Felonies*, CENTER FOR AMERICAN PROGRESS (September 25, 2020), https://www.americanprogress.org/press/statement/2020/09/25/477053/statement-michigan-becomes-latest-state-pass-clean-slate-legislation-first-include-felonies/.
[87] *Id.*
[88] David Eggert*, Michigan Legislature Approves Automatic Expungement Bills,* AP NEWS *(September 24, 2020),* https://apnews.com/article/legislature-marijuana-michigan-archive-crime-77bbdebd7465068029be42cdc247895b.
[89] *Id.*
[90] *Id.*

on job, housing, or any other similar applications.[91] This move for automatic expungement by Michigan lawmakers is remarkable because most states that have begun to offer automatic expungement only offer it for misdemeanors, or crimes that did not involve unpaid fees, fines, or restitution.[92]

VI. Why Automatic Expungement Is the Best Option

Automatic expungement is the best option to reintegrate those negatively affected by the criminal justice system because it is the most effective means of helping those who have convictions in their past reacclimate without the stigma of their past. Since there are so many collateral consequences associated with criminal convictions, living life and accessing everyday neccessities becomes extremely difficult for those with criminal convictions.[93] A study found that those with criminal records are sixty percent less likely to receive call-back interviews than those without criminal convictions.[94] This tends to leave many with little choice:

> These setbacks affect not only the record-holding individual but also their family members. This is especially true for dependent children, as the collateral consequences of a parent's record can significantly affect children's mental development, education, future employment opportunities, and overall well-being. An estimated 33 million to 36.5 million children in the United States have at least one parent with a criminal record. This means that nearly half of America's youth population may be denied the opportunity for a successful future even before they have the chance to reach their full potential.[95]

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[91] *Id.*
[92] *Id.*
[93] Akua Amaning, *Advancing Clean Slate: The Need for Automatic Record Clearance During the Coronavirus Pandemic*, CENTER FOR AMERICAN PROGRESS (June 25, 2020, 9:02 AM), https://www.americanprogress.org/issues/criminal-justice/news/2020/06/25/486857/advancing-clean-slate-need-automatic-record-clearance-coronavirus-pandemic/.
[94] *Id.*
[95] *Id.*

The most reasonable and effective cure to the impediment that old criminal convictions place on citizens of the United States is automatic expungement. Michigan has laid out a blueprint, and other states should follow suit. Although expungement was available for much of the population prior to this initiative, it was still often extremely costly and complicated.[96] Automatic expungement can be implemented if it is made to be a priority – Michigan has clearly shown this by example. Laws and initiatives must be enacted at the state and federal levels in order to shield U.S. citizens from being shackled with criminal convictions for the rest of their lives. If each state is not willing to enact these measures, federal grants should be allocated to incentivize states to follow in Michigan's footsteps.

VII. Conclusion

Even so, it would be remiss not to note the systemic issues at play:

> Stated simply, any reforms that focus on "tweaking," "fixing," or "reforming" any aspect of the criminal legal system do not address the harsh fact that even if (and after) these measures are realized, Black men, women, and children will continue to be disproportionately introduced to, punished by, and devastated by the criminal legal system. Thus, much deeper measures—those that reach the root of racial criminalization— are necessary for true transformation.[97]

What we must first do is trace the root cause of criminalization and attack it at its source.[98]

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[96] *Id.*

[97] Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. 119, 131 (2020).

[98] *Id.*

> The root cause—and thus the broader problem—is racialized criminalization. Black men, women, and children are tracked into the criminal legal system through the countless ways they are perceived, viewed, interpreted, confined, devalued, and dehumanized by institutions, systems, decision-makers, and individual prejudices and biases. Because criminality is "inextricably" linked to race in the United States, at all moments of their lives Black men, women, and children live on the cusp of criminal legal system interaction. They navigate life while travelling in the wide and clear lanes that lead to the criminal legal system.[99]

In a nation purportedly founded on the ideals of freedom and liberty, it is genuinely disturbing to witness how deeply entrenched the criminalization of addiction, poverty, and especially race have relegated large portions of the population to second-class citizenship. To rebalance the scales of justice, it is now necessary to break the shackles of criminal records that have restrained the disenfranchised for far too long. The stigma attached to convictions must be broken down and dismantled at its core.[100] Only then may we begin to rebuild and stop cycles of poverty and recidivism. Human beings should not be defined by their worst moments. Those who violate the law and then pay their debt to society should not be punished indefinitely for the rest of their lives. Automatic expungements will allow those who have made mistakes to begin with a somewhat clean slate, and add even more value to society.

To those that will still argue that offenders will be getting off easy, ask yourself this probing question: who amongst us has never made a mistake? In a criminal justice system that is known to disproportionately dole out convictions to its Black populace and the poor, the only way to begin to level the playing field is to allow individuals to move on from their past indiscretions, treat underlying traumas and addictions, and aid those willing to become viable members of a society. Even if that society is one that they were fundamentally never meant to succeed in.

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[99] *Id.*
[100] *Id.*

THE END OF LEGALIZED HOMICIDE: ABOLISHING POLICE BRUTALITY USING THE PROVOCATION RULE

Evan Rodriguez

ABSTRACT

Police brutality is an epidemic that leads to more violence. The courts offer a cure for this disease. When an officer uses excessive force, courts determine the reasonableness of the force using three prongs based on the totality of the circumstances. Courts view the circumstances from an "objective" point of view but examine the facts from the perspective of a "reasonable" officer in that scenario. This analysis is known as the objective reasonableness or the *Graham* standard. The standard cannot foster objectivity because the standard places the trier of law or fact in the officer's perspective without asking whether the officer created the circumstances that led to violence. The Ninth Circuit Court created a new standard in response, the provocation rule. This rule states that "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is a Fourth Amendment violation, he may be held liable for his defensive use of deadly force." The rule helps victims of police brutality who are victims because an officer initiated the violent confrontation unconstitutionally. Although the Supreme Court rejected this rule in 2017, case law illustrates that the old standard must change. The *Graham* standard, based on the 4th Amendment, protects citizens from excessive police force. However, this standard fails to protect citizens and requires a new prong to protect them. The Supreme Court must adopt a fourth prong under the *Graham* approach to excessive force claims, analyzing whether an officer proximately provoked a violent confrontation.

I. How Do We Police the Police?

The current law used to hold police accountable for excessive force fails to protect citizens and should include a new prong under the

Graham standard, which analyzes whether a police officer proximately provoked a violent confrontation.

A. The *Graham* Standard Is the Basis for Determining If Police Used Excessive Force

In 1989, the Supreme Court ruled in *Graham v. Connor* that courts must use the Fourth Amendment's "objective reasonableness" standard (*Graham* standard).[1] This standard analyzes a citizen's claim against a law enforcement official using excessive force while making an arrest, investigatory stop, or seizure.[2] These claims against excessive force invoke the protections of the Fourth Amendment because the Amendment guarantees Americans the right to be secure in their persons against unreasonable seizures.[3] Under the Fourth Amendment, courts analyze whether an officer's actions are reasonable based on the facts of the circumstances they face without a focus on their subjective intent or motivation.[4] Further, courts examine the reasonableness of the force based on the perspective of a reasonable officer in that situation, along with the fact that police must make "split-second decisions" about the amount of force to use.[5] With these thought processes in mind, courts must then assess a case from the totality of the circumstances using the following prongs: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[6] Notice how each prong places the fact finder in the position of the officer at the scene.

While the Supreme Court decided to use the Fourth Amendment because of its guarantees designed to protect citizens against law enforcement, the inquiry into the reasonableness of the officer's actions centers on the officer's perspective. The calculation of "reasonableness" reinforces protection for the officer's actions because it demands that a person recognize that police must use "split-second" decision-making. Police must make quick decisions, but the prongs only cement protection for police. The *severity of the crime* prong puts

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[1] Graham v. Connor, 490 U.S. 387, 399 (1989).
[2] *Id.* at 388.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Graham*, 490 U.S. at 396.

a person in the place of the responding officer on the scene. The *immediate threat of the suspect* prong puts a person through the fear and anxiety facing an officer on the scene. The *resisting arrest or evading arrest* prong puts a person in the position of an officer who must pursue a suspect or exert some level of force to make the arrest. Any analysis using these prongs immediately puts the judge or jury on the defensive for the officer's actions without regard to whether the officer initiated the series of events that led to violence. This new standard fails to protect victims of police brutality, including the victim in *Graham v. Connor*, Dethorne Graham.[7]

In *Graham v. Connor*, Dethorne Graham, a diabetic, started to feel the symptoms of an insulin reaction and asked his friend, William Berry, to drive him to a store.[8] After seeing a long line of customers checking out, Graham asked Berry to take him home instead of waiting.[9] Officer Connor saw the quick entry and exit, became suspicious of the two, and pulled over the individuals.[10] Berry told the officer that Graham had a "sugar reaction," but the officer told the two men to wait until he investigated the situation at the store.[11] Graham got out of the car and passed out as more officers arrived on the scene in response to a call for backup.[12] Berry tried to plea for help and explain the situation, but one of the officers stated, "I have seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the mother fucker but drunk. Lock the son of a bitch up."[13] Graham eventually woke up and attempted to show his diabetic decal, but the officers threw him onto a police car and roughed him up.[14] After everything finished, Graham sued the officers for his broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and a

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[7] Charles Lane, *Opinion: A 1989 Supreme Court ruling is unintentionally providing cover for police brutality*, THE WASHINGTON POST, (June 8, 2020), https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc7b0c-a9a7-11ea-94d2-d7bc43b26bf9_story.html.
[8] *Graham*, 490 U.S. at 396.
[9] *Id.* at 389.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Graham*, 490 U.S. at 389.
[14] *Id.*

constant, loud ringing in his ear that continues to this day.[15] Graham appealed his way up to the Supreme Court from the Fourth Circuit Court of Appeals, which affirmed the trial court's ruling that Graham failed to prove that the police acted maliciously or sadistically to cause harm.[16] The Supreme Court rejected this subjective standard, instituted the "objective" standard mentioned above, and remanded the case to the district court.[17] With the new and improved standard to protect victims of police brutality, the jury in the North Carolina District Court found law enforcement's use of force reasonable.[18]

B. The Birth of the Provocation Rule

The Ninth Circuit Court of Appeals recognized the injustice that could come out of the standard used in *Graham v. Connor* and implemented the provocation rule announcing that, "the law does not condemn citizens to death any time they resist arrest."[19] The provocation rule states that: "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."[20] This rule came out of *Billington v. Smith*, where an off-duty police officer with his wife and daughter in the car decided to pull over a speeding, drunk driver.[21] Officer Smith got out of his vehicle and approached the car with his gun in one hand and his flashlight in the other while ordering the driver, Hennessey, to put his hands on the wheel.[22] Hennessey had his window down and appeared unconscious, so Officer Smith repeated his order instead of waiting for the backup he requested to arrive.[23] Hennessey looked at the officer and asked, "If I don't, are you going to shoot me?"[24] Officer Smith replied, "If I have to."[25] The officer decided to handcuff him, but Hennessey retaliated, and a fight

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[15] *Id.* at 390.
[16] *Id.* at 388.
[17] *Id.*
[18] Lane, *supra* note 7.
[19] Billington v. Smith, 292 F.3d 1177, 1191 (9th Cir. 2002).
[20] *Id.* at 1189.
[21] *Id.* at 1180.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1181.
[25] *Id.*

ensued.[26] Hennessey managed to move the gun's slide backward to enable the safety lock on the officer's weapon, so Smith could not fire at Hennessey.[27] Officer Smith claimed that he feared for his life, but did not want to disarm his weapon, so he moved the slide forward, turning the safety off.[28] While still fighting for control of the gun, Officer Smith says that he fired and killed Hennessey.[29] Some witnesses say the two were only inches away, while others say they were up to four feet apart when Officer Smith killed Hennessey.[30]

The Court found many issues with how Officer Smith conducted the traffic stop.[31] However, the Court also stated that, precedent does not allow a "plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided."[32] Precedent only allows a victim of excessive force to succeed on their claim when an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation.[33] The Court further asserted that the "reasonableness" standard differs from the "reasonable care" standard in tort law because negligent acts, such as Smith's, may still hold up in court as a constitutional and reasonable response from an officer.[34] Despite this difference, the Court reasoned that an officer's unconstitutional provocation, which stems from intentional or reckless conduct, would proximately cause the subsequent use of deadly force.[35] This blending of constitutional and tort law resulted in the birth of the provocation rule designed to protect citizens from rogue police officers who may commit homicide in self-defense when they unconstitutionally and intentionally provoke an attack.[36]

C. The Death of the Provocation Rule

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[26] *Billington*, 292 F.3d at 1181.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 1182.
[31] *Billington*, 292 F.3d at 1191.
[32] *Id. at 1190*.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1191.
[36] *Id.*

The provocation rule survived fifteen years until the Supreme Court reversed this standard in *Cty. of Los Angeles v. Mendez*.[37] In *Mendez*, officers received a tip that a potentially armed and dangerous parolee was at a specific home.[38] Officers legally searched the house while two deputies entered a shack in the backyard without a warrant or knocking.[39] Mendez and Garcia were asleep inside the shack when the deputies came in.[40] Mendez got up from the bed with a BB gun that he used to kill bugs.[41] One officer saw Mendez reach for the weapon and yelled, "gun!"[42] Both officers fired multiple rounds into Mendez and Garcia.[43] The officers on the scene never found the parolee, and as a result of the shooting, Mendez had to amputate his right leg below the knee.[44]

The Supreme Court vacated the Ninth Circuit's judgment affirming the district court's order which granted Mendez and Garcia $4 million in damages because the provocation rule provided the basis for the decision.[45] As a reminder, the provocation rule allows for an excessive force claim, "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation."[46] Essentially, the Court argued that the provocation rule, through the Fourth Amendment, uses a separate constitutional violation to create an excessive force claim that would not exist without the violation.[47] The Fourth Amendment prohibits unreasonable searches and seizures.[48] Courts assess the reasonableness by weighing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.[49] More specifically, the standard outlined in *Graham v. Connor* establishes the basis for analyzing whether a seizure complies with the Fourth

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[37]Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1542 (2017).
[38] *Id.* at 1542.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Mendez*, 137 S. Ct. at 1542.
[43]*Id.*
[44] *Id.* at 1545.
[45] *Id.* at 1542.
[46] *Id.* at 1546.
[47]*Id.*
[48] U.S. CONST., amend. IV.
[49] Tennessee v. Garner, 471 U. S. 1, 8 (1985).

Amendment.[50] This basis uses an "objective" standard from the reasonable officer's viewpoint on the scene with the information available to them at the time the incident occurred.[51] Therefore, once a police officer's use of force is considered reasonable under the totality of the circumstances, the *Graham* standard, the inquiry into whether there is an excessive force claim stops there.[52] However, the provocation rule adds an extra step by asking courts to decide if a separate constitutional violation, which led to violence, renders the otherwise reasonable force unreasonable.[53] Additionally, the Supreme Court stated that the causation standard in the provocation rule is too ambiguous and fails to follow a proximate cause standard.[54] Finally, the Court had an issue with how the provocation rule considers the officer's subjective intent, "intentional" or "reckless," when precedent commands that courts examine the circumstances from an objective view of a reasonable officer on the scene.[55] Despite the death of the provocation rule, the Supreme Court offered valuable insight in the *Mendez* opinion on how to construct a better version of the *Graham* standard.

D. The Solution: Using the Provocation Rule as a Fourth Prong to the *Graham* Standard

As mentioned before, there are a few issues with the *Graham* standard that can improve when blended with the feedback from the Supreme Court on the provocation rule. *Graham* looks at the totality of the circumstances surrounding an excessive force claim and asks the court to consider: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.[56] The primary issue with the *Graham* standard is that it forces courts to look at the situation from the perspective of a "reasonable" officer on the scene without any protection for the victim of police brutality. As a result, courts allow officers, similar to those

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[50] Graham v. Connor, 490 U.S. 386, 395 (1989).
[51] Saucier v. Katz, 533 U. S. 194, 207 (2001).
[52] *Mendez*, 137 S. Ct. at 1547.
[53] *Id.*
[54] *Id.* at 1548.
[55] *Id.*
[56] Graham v. Connor, 490 U.S. 386, 396 (1989).

in *Mendez*, to escape liability for unreasonable actions, even though it seems that the "reasonable" officer would not enter a dwelling illegally without a warrant. The best solution is to create a new *Graham* standard by adding another prong that resembles the provocation rule but holds up in the land's highest court. Concisely, the Supreme Court disapproved of the provocation rule's extra-constitutional inquiry: the causation standard and the officer's subjective intent.[57] Thus, the new fourth prong would force courts to examine whether an officer proximately provoked a violent confrontation.

The fourth prong would conform with the Supreme Court's *Mendez* opinion and precedent on how courts must examine excessive force claims. The fourth prong would not add an extra-constitutional step to determine if there was excessive force after finding reasonableness but would add another prong to the *Graham* standard. The prong's causation standard would use proximate cause to determine the connection between the officer's actions and the victim's injuries, which is acceptable under precedent.[58] Finally, the prong would use an objective perspective of an officer, which conforms to the reasonableness standard of a search or seizure under the Fourth Amendment. [59] Thus, the new prong would reject the "intentional" or "reckless" subjective intent of the officer used in the provocation rule.[60] In the future, when faced with an excessive force claim, courts would have to examine the officer's actions more closely than the current *Graham* standard requires because the current law only places the focus on the suspect's actions.[61]

II. Is the *At the Moment* Standard Better?

Some may argue that the current standard works well. The only issue that arises with the *Graham* standard is the different interpretations of the law leading to various rulings across the country. For example, the Second Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, and the Eighth Circuit follow a more strict interpretation of the *Graham* standard, which examines the totality of the circumstances as well as the reasonableness of the excessive force claim, but with a

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[57] *Mendez*, 137 S. Ct. at 1539.
[58] Heck v. Humphrey, 512 U. S. 477, 483 (1994).
[59] Whren v. United States, 517 U. S. 806, 814 (1996).
[60] *Id.*
[61] *Graham*, 490 U.S. at 396.

closer look at the exact moment that the officer applied force.[62] Although the Supreme Court should clarify how to interpret the *Graham* standard, it is worth examining whether the *at the moment* approach is a better alternative than adding a new prong.

A. How the *At the Moment* Approach Would Not Save Mendez

Using the *at the moment* approach to the *Graham* standard with a case we know well at this point, the Defendants in *Mendez* would not receive justice if the Ninth Circuit Court followed this interpretation of the law. In *Mendez*, the officers walked into a shack in the backyard of a home without knocking and without a search warrant.[63] The officers saw Mendez holding a BB gun and immediately fired multiple rounds into Mendez and Garcia.[64] Initially, the Defendants won in the trial court using the provocation rule, but if an *at the moment* approach court had this case, it would never reach the Supreme Court. Additionally, there would not be any instructions on how to amend the provocation rule to protect citizens. An *at the moment* court would declare that an officer's use of deadly force is not excessive and, thus, not a constitutional violation when the officer reasonably believes the suspect poses a threat of serious harm to the officer or others.[65] The officers in *Mendez* would succeed on this point because they saw Mendez wielding a BB gun, and although a BB gun is much smaller than a real gun, it is at least a somewhat reasonable mistake to make in a situation that lasted only a few seconds. Next, the court would determine whether the officer used excessive force because he was in danger at the moment that resulted in the officer's use of deadly force.[66] Once again, the officers would most likely succeed on this prong if the judge or jury found the mistaken identity of the BB gun reasonable. Then, the officer's gunfire in response to the threat they believed they faced would be reasonable as well. Finally, a court following the *at the*

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[62]Ryan Hartzell C. Balisacan, Note, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda*, 54 HARV. C.R.-C.L. L. REV. 327, 339.
[63] Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1542 (2017).
[64] *Id.*
[65]Rockwell v. Brown, 664 F.3d 985, 991 (5th Cir. 2011) (citing Ontiveros v. Cty of Rosenberg, Tex., 546 F.3d 379 (5th Cir. 2009).
[66] *Id.*

moment approach would ask, regardless of the actions leading up to the shooting, whether the suspect's movements gave the officer reason to believe, at the moment, that there was a threat of physical harm.[67] Based on Mendez grabbing the weapon, the officers would escape any liability for their actions because Mendez showed a threat of physical harm. In each of these situations, the courts never considered the fact that the officers failed to receive a warrant to search the shack, and thus, the officers provoked the violent confrontation.

B. The Cruelty of the *At the Moment* Standard in Other Cases

The *at the moment* approach failed to provide justice in *Mendez*, but no court in the Ninth Circuit would follow that analysis. So, it is essential to examine the approach from a court in the Fifth Circuit to understand how nearly half of the country follows the *Graham* standard. In the recent case *Tucker v. City of Shreveport*, Officer Cisco pulled over the Defendant Gregory Tucker for driving with broken brake and license plate lights.[68] Tucker continued for two minutes before stopping in a neighborhood where Officer Cisco commanded Tucker out of the vehicle and to submit to a pat-down.[69] Officer Cisco then brought Tucker over to his police car, where he conducted a more thorough pat-down, removing a pocket knife from Tucker's pocket.[70] The dashboard camera showed that Tucker did not resist or show signs of fleeing, but he was upset with the officer's excessive attention to him stemming from a traffic stop alone.[71] During the second pat-down, Officers McIntire and Johnson arrived on the scene and quickly forced Tucker to the ground, where a fight began, even though Tucker was not under arrest.[72] Tucker suffered from repeated punches, kicks, muscle strain in his left shoulder, headaches, and a severe cut on his forehead as the officers attempted to handcuff him.[73] The Fifth Circuit Court overruled the District Court and found

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[67] *Id.*
[68] Tucker v. City of Shreveport, No. 17-1485, 2019 U.S. Dist. LEXIS 32486, at 2 (W.D. La. 2019).
[69] *Id.*
[70] *Id.* at 3.
[71] *Id.*
[72] *Id.* at 4.
[73] *Tucker*, No. 17-1485, 2019 U.S. Dist. LEXIS 32486, at 2 (W.D. La. 2019). Tucker v. City of Shreveport, 998 F.3d 165 (5th Cir. 2021).

the police used reasonable force when dealing with Tucker.[74] In this case, the Court took a close examination of the *at the moment* actions of the officers saying that the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[75] Specifically, the Court had an issue with Tucker's anger with the police, the pointing of his finger, his clapping at the officers, the smell of marijuana coming off his clothes, his height, and a slight arm movement when the officers tried to place Tucker in handcuffs.[76] The Court believed these circumstances, at the moment the officers applied force, were sufficient to qualify as a "tense, uncertain, and rapidly evolving" situation, where officers used reasonable force.[77] All of this violence over a simple traffic stop.

In *Mendez*, the officer responded to an incorrect, but somewhat reasonable response to the Defendant grabbing a BB gun thought to be a real gun. In *Tucker*, the officers responded to a traffic violation with completely unwarranted, aggressive force, causing injuries to the Defendant. In both cases, the *at the moment* approach shields the officer's actions despite the absence of a warrant in *Mendez* and a routine traffic stop in *Tucker*. There is a need for courts to stop using inadequate laws, which fail to protect citizens, and adopt a new law that will examine police actions that provoke citizens.

III. Is the *Totality of the Circumstances* Standard Better?

While the *at the moment* approach to the *Graham* standard offers a narrow analysis for examining excessive force claims, other jurisdictions follow a broader interpretation. For example, the First Circuit, Third Circuit, Seventh Circuit, Tenth Circuit, and Eleventh Circuit Courts follow the original *Graham* standard, which looks at the *totality of the circumstances* of the situation, including all police actions.[78] Thus, the *totality of the circumstances* approach sounds more reasonable than the *at the moment* interpretation when it comes to offering citizens adequate protection against excessive force.

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[74] Tucker v. City of Shreveport, 998 F.3d 165 (5th Cir. 2021).
[75] *Id.*
[76] *Id.* 23–25.
[77] *Id.* at 25.
[78] Balisacan, *supra* note 62, at 338.

However, after examining the case law, the *totality of the circumstances* approach is equally inefficient at protecting citizens because it places the law or factfinder in the position of the police officer without any regard for whether the officer initiated the violence.

A. The *Totality of the Circumstances* Is a Better Standard

The following case shows how the *totality of the circumstances* approach works well if the facts are overwhelmingly in favor of the victim of an excessive police force. In *El v. City of Pittsburgh*, two brothers, Will and Beyshaud El, left a corner store in their neighborhood known for selling synthetic marijuana.[79] Suspicious of the two, Officer Kacsuta followed them in her car and asked to speak with them, but they declined.[80] Officer Kacsuta called two police officers for backup and continued to follow the brothers.[81] She ordered the boys to sit down and empty their pockets.[82] As more officers arrived on the scene, the police accused the boys of buying tobacco underage, and only Will had his identification on him to verify his age.[83] The boys accused the officers of harassing them, to which Officer Welling replied, "Do you want to know what it feels like to be harassed?"[84] Will took one or two small steps towards two officers when Officer Welling grabbed him by the wrist and neck and slammed him into a wall.[85] Beyshaud immediately stood up and tried to defend his brother against Officer Welling; then, Officer Warnock tased Beyshaud.[86] Six police officers arrested the boys, and Beyshaud went to the hospital before joining his brother Will in jail.[87] The Court looked to the reasonableness of the officers' actions in light of the facts and circumstances surrounding the claim of excessive force.[88] Here, the Court concluded that Will's step towards the police officer did not occur in a threatening manner, and Officer Welling grabbing Will was

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[79] El v. City of Pittsburgh, 975 F.3d 327, 331 (3d Cir. 2020).
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 332.
[84] *El*, 975 F.3d at 332.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *El*, 975 F.3d at 336.

an unreasonable, excessive use of force.[89] In this case, with two barely legal adults and little evidence of any wrongdoing against six grown police officers, the Court found excessive force under the *totality of the circumstances* approach. The rule offers some protection if the facts fit cleanly and overwhelmingly in favor of unreasonable force. However, not everyone will find their facts as fitting but are still the victims of police-initiated violence. These are the kinds of cases that call for a new prong under the *Graham* standard, to ensure protection for these victims.

B. The *Totality of the Circumstances* Standard Is Not Perfect

The following case shows how the *totality of the circumstances* approach is still an imperfect standard for holding police officers accountable for their excessive force. Richard Turner was a homeless man known in the community and by the police as a man who many officers often took to the hospital for mental health issues without a struggle.[90] Officer Young arrived on the scene and noticed Turner appeared more disoriented than usual, rolling on the ground with his pants down.[91] Officer Young returned to his police car and waited for Officers Talbott and Wilson to arrive.[92] Once they arrived, Turner kept crossing the street back and forth while incoherently responding to the officers' questions.[93] The police then detained Turner for his protection and called an ambulance for mental-health treatment at a local hospital.[94] Officer Young asked Turner to sit on a curb, but Turner decided to run away.[95] The officers caught up to Turner while Officer Wilson grabbed his shoulder.[96] Turner pulled away, shoving Officer Wilson and grabbing for Officer Young.[97] The police struggled with Turner but eventually wrestled him to the ground, turned him on his stomach, and attempted to handcuff him.[98] While attempting to handcuff Turner, Officer Young pressed his right knee into Turner's

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[89] *Id.* at 335-36.
[90] Turner v. City of Champaign, 979 F.3d 563, 565 (7th Cir. 2020).
[91] *Id.* at 565.
[92] *Id.*
[93] *Turner*, 979 F.3d at 566.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Turner*, 979 F.3d at 566.

shoulder.[99] Working together, the three officers handcuffed Turner as he continued to flail his legs.[100] Then, Officer Frost arrived on the scene to use a hobble, which restrained Turner's legs.[101] After the police completely wrapped up Turner, Officer Frost asked, "Is he still breathing?"[102] An autopsy report found that Turner died from cardiac arrhythmia.[103] A cardiac arrhythmia occurs when someone's heart stops after beating too fast. However, in what sounds like a conflicting statement, the report also mentions that Turner likely died from an underlying condition in which his enlarged heart had an insufficient blood supply.[104]

The Court concluded that the officers' actions were reasonable and not the cause of Turner's death. When examining the facts of this case, the Court looked at the *totality of the circumstances*.[105] The Court focused their analysis from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[106] While the Court acknowledged Turner's mental problems, the Court ultimately sided with the police because of his active resistance throughout the process.[107] Turner actively resisted when he ran away from police, when they placed him in a prone position on the ground, when they pinned down his shoulder, when they handcuffed him, and when they hobbled him.[108] Without a doubt, a reasonable officer would categorize every one of Turner's actions as actively resisting arrest.

Turner v. City of Champaign clearly shows how the courts scrutinize the Defendant's every action without questioning whether the officer initiated the violent confrontation. Of course, the law does not require courts to examine an officer's provocations, but *Turner* demonstrates the importance of adding a prong to the *Graham* standard that considers police provocations as part of the totality of the circumstances. For example, the opinion in *Turner* points out the Defendant's every instance of active resistance but fails to examine

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Turner*, 979 F.3d at 567.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 569.
[108] *Id.*

whether the officers proximately caused Turner's death. Proximate cause analysis requires courts to consider the foreseeability or the scope of the risk created by the predicate conduct and some direct relation between the injury asserted and the injurious conduct alleged.[109] The officers in *Turner* could not foresee Turner dying of cardiac arrhythmia during their attempts to constrain him, but the scope of the risk they created in using four officers to constrain a mentally ill man visibly suffering from a health crisis shows a direct relationship between their actions and his ultimate death. The autopsy report determined that Turner died after his heart failed from beating too fast during the encounter.[110] At the same time, the report states that Turner's underlying condition "likely" caused his death.[111] So, either Turner died due to the encounter, or he died due to his underlying condition, and the officers' actions had nothing to do with his death. The Court treats the autopsy report as a document that confirms the police had no part in Turner's death, despite these two conflicting statements.[112] Whether Richard Turner died from the excessive police force or underlying health issues is debatable. What is not debatable is that Richard Turner died during his struggle with the police. He did not die while suffering a mental health issue alone in a park or a few hours later at a hospital. How many more knees on the necks of citizens will we tolerate before we realize that the law needs to change?

IV. The *Graham* Standard Blended with an Updated Provocation Rule

The solution to police brutality lies in this new fourth prong of the *Graham* standard that borrows from the Ninth Circuit Court's provocation rule. The objective reasonableness or the *Graham* standard should adopt a fourth prong, analyzing whether an officer proximately provoked a violent confrontation. If the prong existed previously, there would be a different decision from the Supreme Court in *Cty. of Los Angeles v. Mendez*, and citizens would feel safer when interacting with police.

A. Mendez Would Receive Justice Under the New Prong

[109] Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1548-49 (2017).
[110] *Turner*, 979 F.3d at 567.
[111] *Id.*
[112] *Id.*

As previously mentioned, *Cty. of Los Angeles v. Mendez* occurred when deputies arrived at a home searching for an armed and dangerous parolee.[113] The police did not find the parolee, but they did find a shack in the backyard, which they did not have a warrant to search.[114] Without a warrant and without knocking and announcing their presence, the police stormed into the shack where Angel Mendez and Jennifer Garcia were sleeping.[115] Mendez reached for a BB gun that he kept there for pests.[116] The police saw this and yelled, "gun!"[117] Immediately, the police fired fifteen rounds, inflicting severe injuries on both Garcia and Mendez, with Mendez requiring a right leg amputation.[118] The Ninth Circuit Court used the *Graham* standard in addition to the provocation rule, which states that an officer's otherwise reasonable and lawful defensive use of force was unreasonable as a matter of law if the officer intentionally or recklessly provoked a violent response and the provocation was an independent constitutional violation.[119] The Supreme Court rejected the provocation rule because it required an additional constitutional step, failed to use a clear causation standard, and examined the officers' subjective intent.[120] As a result, Mendez lost $4 million worth of damages, and Americans lost a vital protection against police-initiated excessive force.[121]

The new fourth prong under the *Graham* standard would reinstitute the Ninth Circuit Court's provocation rule. More importantly, the Supreme Court should uphold it because it passes their previous criticisms. In the future, courts will assess an excessive force claim by looking at (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; and (4) whether an officer proximately provoked a violent confrontation. For example, in *Mendez*, a court would note that the officers were on the scene searching for an armed

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[113] *Mendez*, 137 S. Ct. at 1544.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1545.
[118] *Id.*
[119] *Mendez*, 137 S. Ct. at 1542.
[120] *Id.* at 1548-49.
[121] *Id.* at 1545.

and dangerous parolee. This reason would strengthen the officer's defense against an excessive force claim especially combined with the fact that the parolee posed a threat to the safety of the community and police. Also, it is easy to imagine how severe the crime at issue could become in a few moments. Right now, it is just a dangerous parolee on the run, but the facts could quickly turn into a hostage situation, robbery, murder, or any other countless violent interactions. The threat may not be immediate, but it is foreseeable. The parolee is also evading arrest by flight because the police could not find the parolee previously and during the lawful search of the home. Under the current *Graham* standard, nothing about the facts of *Mendez* finds the police wrongful for using excessive force. However, once courts add the fourth prong, the police may immediately lose the excessive force claim against them.

The police proximately provoked a violent confrontation when they entered the shack in the backyard without a warrant and without knocking and announcing their presence. A proximate cause is a cause that is likely among all potential or analyzed causes to be considered at least one responsible cause for a particular result.[122] Proximate cause can also be understood using the but-for test, which asks whether the result would occur but for the cause under consideration without a significant intervening cause.[123] There is a direct connection between the officers' unlawful entry of the shack and Garcia and Mendez's injuries from the gunfire. Some may argue that a superseding cause occurred when Mendez grabbed the BB gun. A superseding cause is an act that fully interposes and terminates the causal effect of the prior cause, which cuts off the liability of the person who set in motion the cause and result that led to an injury.[124] The superseding cause would absolve the police officers from liability because a reasonable officer in that situation would likely respond with gunfire. However, this interpretation of the facts is too narrow because the *Graham* standard requires courts to examine the totality of the circumstances.[125] Looking at the totality of the facts, the police officers unlawfully overstepped

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[122] *Direct Cause or Efficient Cause or Jural Cause or Legal Cause*, BOUVIER LAW DICTIONARY, (The Wolters Kluwer Bouvier Law Dictionary Desk Edition 2012).
[123] *Id.*
[124] *Intervening Cause*, BOUVIER LAW DICTIONARY, (The Wolters Kluwer Bouvier Law Dictionary Desk Edition 2012).
[125] Graham v. Connor, 490 U.S. 386, 396 (1989).

their boundaries when they entered the shack without a warrant and without announcing their presence.[126] They had no reason to be in the shack. It is perfectly reasonable for a person to defend their home against an intruder, especially when the homeowner does not know the police are the ones entering the home. Mendez also did not attempt to use deadly force to defend his home because he reached for a BB gun. Although this observation would not be immediately apparent to the police upon their entry, it likely would not be an issue if they announced their presence before entering the shack. Also, but for the officers' unlawful entry of the shack, Garcia and Mendez would not have suffered any injuries. After looking at the totality of the circumstances, it is apparent that the officers were the proximate cause of the violent confrontation, and no superseding factors would cut off liability. The survival of the provocation rule through the new fourth prong of the *Graham* standard is crucial for justice and healing in this country.

B. The New Provocation Prong Will Help Heal the Country

There must be a solution to the long history of racism and brutality between the police and citizens, especially those in black and brown communities. If there is no solution, tensions will only worsen, and it will be impossible to live together in the same country. While there are many educational and communal issues to solve before this country can establish a perfect relationship between its citizens and its police, the first step is always a legal solution. Only a legal solution can push this country in the right direction most quickly and peacefully. The new fourth prong under the *Graham* standard does not abolish the legal standards of the past in place of a radically different future. Instead, the fourth prong enforces and upholds the groundwork upon which the Supreme Court created the *Graham* standard, the Fourth Amendment.[127] A society with laws designed to protect people will ensure that citizens feel safer in their communities. When people feel safer in their communities, they begin to trust those who uphold and swear to protect those communities. Thus, the fourth prong for the *Graham* standard will rehabilitate the relationship between police and black and brown communities and create a more united country.

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[126] *Mendez*, 137 S. Ct. at 1542.
[127] *Graham*, 490 U.S. at 388.

V. Conclusion

The new fourth prong under the *Graham* standard will offer new protections for citizens while maintaining legal precedent.

A. The Fourth Prong Relies on Precedent

Courts are often hesitant to change the law because of the unintended consequences that may occur as opposed to all the known problems associated with precedent, especially if they are minor issues. Fortunately, the new fourth prong relies on precedent, and the legal theory behind the provocation rule is nothing new. The fourth prong under the *Graham* standard analyzes whether an officer proximately provoked a violent confrontation. This prong fixes the issues the Supreme Court had with the Ninth Circuit Court's provocation rule. Unlike the provocation rule, the new prong does not add an extra-constitutional step; it uses a known causation theory, and assesses a situation from the perspective of an objective officer on the scene. This prong also reinforces the Fourth Amendment upon which the Supreme Court founded the *Graham* standard because it protects citizens from unreasonable police seizures when an officer provoked a violent situation. Additionally, the idea of examining whether a police officer unlawfully provoked a situation is already part of the current law. For example, warrantless searches are allowed under the Fourth Amendment when emergency or exigency circumstances make it reasonable to conduct a search without a warrant.[128] However, the warrantless search remains illegal if the police created or manufactured the exigent circumstances, known as the "police-created exigency" doctrine.[129] Some courts added more requirements to ask whether the police created the circumstances through bad faith with the intent to avoid the warrant requirement rule or ask if their investigations were contrary to good law enforcement practices.[130] The doctrine states that the police cannot provoke the exigent circumstances allowing for a warrantless entry through their unlawful actions.[131] Essentially, the "police-created exigency" doctrine follows the same theory of law proposed in the new fourth prong of the *Graham* standard. Therefore, it would not be a stretch for the courts to impose a similar law that

[128]Kentucky v. King, 563 U.S. 452, 453 (2011).
[129] *Id.*
[130] *Id.*
[131] *Id.*

examines whether police proximately provoked a violent confrontation. This proposed fourth prong will hold police officers accountable for their actions, will protect citizens from excessive police force, and will rely on current laws to improve society for all.