

## UNITED STATES V. CHESTER

The Second Amendment to the United States Constitution 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.”<sup>1</sup> Although the Second Amendment became part of the Constitution in 1791,<sup>2</sup> the United States Supreme Court had not directly addressed the scope of the right conferred by the amendment until 2008 when it decided *District of Columbia v. Heller*.<sup>3</sup> In *Heller*, the Court held that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home”<sup>4</sup> and struck down the District of Columbia’s gun laws as violating that right.<sup>5</sup> In so holding, the Court determined that, rather than securing a collective “right to possess and carry a firearm in connection with militia service,”<sup>6</sup> the Amendment guarantees a “pre-existing right”<sup>7</sup> of private individuals “to possess and carry weapons in case of confrontation.”<sup>8</sup> The Court was careful, however, to recognize that the right is not without limits, and it identified several examples of permissible limitations on gun ownership and use.<sup>9</sup> Additionally, although the Court stated that an absolute prohibition on firearms kept in the home for self-defense purposes (e.g., the prohibition included in the District of Columbia laws being challenged in the case) would fail any standard of scrutiny,<sup>10</sup> it rejected use of the rational basis test and did not specify the appropriate standard under which lower courts should evaluate gun restrictions.<sup>11</sup> Until recently, the United States

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1. U.S. CONST. amend. II.

2. Lawrence Delbert Cress, *A Well-Regulated Militia: The Origins and Meaning of the Second Amendment*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 55, 65 (Jon Kukla ed., 1987).

3. 128 S. Ct. 2783 (2008). The Court stated, “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.” *Id.* at 2816. On the other hand, Justice Stevens’s dissenting opinion emphasizes the Court’s decision in *United States v. Miller*, 307 U.S. 174 (1939)—where the Court held that the National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended in scattered sections of 26 U.S.C.), did not violate the Second Amendment, *Miller*, 307 U.S. at 177–78—and argues that the decision interpreted the Second Amendment to “protect[] the right to keep and bear arms for certain military purposes, but [not to] curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.” *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting). However, the majority in *Heller* takes Justice Stevens to task for his view, arguing that in *Miller* “the type of weapon at issue was not eligible for Second Amendment protection.” *Id.* at 2814 (majority opinion) (citing *Miller*, 307 U.S. at 178).

4. *Heller*, 128 S. Ct. at 2821.

5. *Id.* at 2821–22.

6. *Id.* at 2789. In their separate dissenting opinions to *Heller*, both Justice Stevens and Justice Breyer discuss collective rights theories of the Second Amendment. See *id.* at 2822–47 (Stevens, J., dissenting), 2847–70 (Breyer, J., dissenting).

7. *Id.* at 2797 (majority opinion).

8. *Id.*

9. See *id.* at 2816–17.

10. *Id.* at 2817–18.

11. *Id.* at 2817 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”); see also *United States v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009) (“Although *Heller* did not settle on a standard of review, it plainly

Court of Appeals for the Fourth Circuit had not addressed *Heller* in a published opinion;<sup>12</sup> however, last year, in *United States v. Chester*,<sup>13</sup> the Fourth Circuit held that in cases addressing Second Amendment challenges by defendants charged with firearm possession after having been previously convicted for a misdemeanor domestic violence crime, intermediate scrutiny is the appropriate standard of review.<sup>14</sup>

William Samuel Chester was convicted in West Virginia state court on February 4, 2005 for a misdemeanor domestic violence offense after he attacked his twenty-two-year-old daughter, Meghan Chester, at the family home.<sup>15</sup> Several years later, on October 10, 2007, Chester's then-wife, Linda Guerrant-Chester, called the police after her husband grabbed her face and throat and strangled her when she discovered him receiving services from a prostitute outside their home.<sup>16</sup> Samantha Chester, the couple's daughter, told Kanawha County police officers that during the attack she heard Chester repeatedly threaten to kill her mother.<sup>17</sup> While conducting a search of the Chester family home, police officers found two weapons—a loaded shotgun in the kitchen and a 9mm handgun in Chester's bedroom—which Chester admitted were his.<sup>18</sup> Following the incident, in May 2008, a federal grand jury indicted Chester for violating 18 U.S.C. § 922(g)(9)<sup>19</sup> by possessing firearms after being previously convicted of a “misdemeanor crime of domestic violence.”<sup>20</sup> Section 922(g)(9) provides:

It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess . . . any firearm or ammunition; or to receive any firearm or ammunition

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ruled out the deferential rational-basis test; this leaves either strict scrutiny or some form of ‘intermediate’ review.”).

12. The Fourth Circuit had previously addressed *Heller* only in unpublished opinions. *See, e.g.*, *United States v. McRobie*, No. 08-4632, 2009 WL 82715 (4th Cir. Jan. 14, 2009) (per curiam) (upholding a ban on possession of firearms by persons committed to mental institutions); *United States v. Brunson*, 292 F. App'x 259 (4th Cir. 2008) (per curiam) (upholding a statute prohibiting felons from possessing firearms).

13. 628 F.3d 673 (4th Cir. 2010).

14. *Id.* at 683.

15. *See United States v. Chester*, 367 F. App'x 392, 394 (4th Cir. 2010) (per curiam). Chester was convicted for violating a West Virginia Code section, *id.*, that criminalizes domestic battery and domestic assault against a person's “family or household member,” *see* W. VA. CODE § 61-2-28 (a)–(b) (2010).

16. *Chester*, 367 F. App'x at 394.

17. *Id.*

18. *Id.*

19. Gun Control Act of 1968, 18 U.S.C. § 922(g)(9) (2006).

20. *Chester*, 367 F. App'x at 394.

which has been shipped or transported in interstate or foreign commerce.<sup>21</sup>

The definition of “misdemeanor crime of domestic violence” appears in § 921(a)(33)<sup>22</sup> and includes any offense that is “a misdemeanor under Federal, State, or Tribal law; and [that] has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, “committed by a current or former spouse, [or] parent.”<sup>23</sup>

Although Chester conceded that his domestic assault and battery conviction from 2005 constituted a “predicate misdemeanor crime of domestic violence” for purposes of § 922(g)(9),<sup>24</sup> he moved to dismiss his indictment on the grounds that, in light of the Supreme Court’s decision in *Heller*, § 922(g)(9) was unconstitutional on its face and as it applied to him.<sup>25</sup> The district court denied Chester’s motion, relying on language from *Heller* stating that “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”<sup>26</sup> Drawing an analogy between § 922(g)(9) and § 922(g)(1), which prevents any convicted felon from possessing firearms,<sup>27</sup> the district court reasoned that “like the felon dispossession provision set forth in § 922(g)(1), the prohibition of firearm possession by domestic violence misdemeanants is a danger-reducing regulation designed ‘to protect family members and society in general from potential [violence].’”<sup>28</sup> Thereafter, Chester entered a conditional plea of guilty, per Federal Rule of Criminal Procedure 11(a)(2), reserving the right to argue on appeal that § 922(g)(9) violates the Second Amendment.<sup>29</sup>

The Fourth Circuit heard Chester’s appeal and, in an unpublished per curiam opinion, vacated the district court’s judgment and remanded the case,<sup>30</sup> relying on the approach initially taken by the United States Court of Appeals for the Seventh Circuit in *United States v. Skoien*.<sup>31</sup> In *Skoien*, the Seventh Circuit addressed *Heller* in the context of a challenge to § 922(g)(9) and concluded that

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21. 18 U.S.C. § 922(g)(9).

22. 18 U.S.C. § 921(a)(33)(A) (2006).

23. *Id.*

24. *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010) (internal quotation marks omitted).

25. *Id.*

26. *United States v. Chester*, No. 2:08-00105, 2008 WL 4534210, at \*1–2 (S.D. W. Va. Oct. 7, 2008) (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008)).

27. 18 U.S.C. § 922(g)(1) (2006).

28. *Chester*, 628 F.3d at 677 (alteration in original) (quoting *Chester*, 2008 WL 4534210, at \*2).

29. *Id.*

30. *United States v. Chester*, 367 F. App’x 392, 393–94 (4th Cir. 2010) (per curiam).

31. *Id.* at 397–99 (citing *United States v. Skoien*, 587 F.3d 803, 808–10, 812, 816 (7th Cir. 2009), *aff’d en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3539 (U.S. Mar. 21, 2011) (No. 10-7005)).

intermediate scrutiny should be applied in such a case.<sup>32</sup> After a thorough discussion of the Seventh Circuit's reasoning in *Skoien*, the Fourth Circuit determined that the facts surrounding Chester's appeal were similar to those in *Skoien*;<sup>33</sup> notably, however, the Fourth Circuit took issue with the district court's failure to determine the level of scrutiny at which to evaluate § 922 (g)(9) or to "substantively apply" a level of scrutiny to the statute.<sup>34</sup> Accordingly, the court instructed the district court upon remand to determine the "precise contours" of Chester's constitutional claim<sup>35</sup> and to "identify, justify, and apply an appropriate level of constitutional scrutiny."<sup>36</sup> After the Fourth Circuit issued its unpublished opinion, the Seventh Circuit, sitting en banc, vacated the *Skoien* decision, and the government petitioned the Fourth Circuit for rehearing.<sup>37</sup> While the rehearing petition was pending, the Seventh Circuit issued its decision in *Skoien*, applying intermediate scrutiny to reject a Second Amendment challenge to § 922(g)(9).<sup>38</sup> Thereafter, the Fourth Circuit granted the government's petition for panel rehearing, and in a published opinion decided to "vacate [its] initial opinion and reissue [its] decision to provide district courts in [the] Circuit guidance on the framework for deciding Second Amendment challenges."<sup>39</sup>

The issue presented on appeal was whether Chester's conviction under § 922(g)(9) for illegal firearm possession unconstitutionally abridged his Second Amendment "right to keep and bear arms" as interpreted by the Supreme Court in *Heller*.<sup>40</sup> After an introductory discussion and analysis of the *Heller* opinion,<sup>41</sup> the Fourth Circuit addressed how to evaluate a challenge to § 922(g)(9),<sup>42</sup> and articulated a two-step approach.<sup>43</sup> The first step determines "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."<sup>44</sup> If the law imposes such a burden, the second step involves applying "means-end scrutiny" to the law.<sup>45</sup> Ultimately, the Fourth Circuit held that for claims such as Chester's intermediate scrutiny is the appropriate standard.<sup>46</sup> Because it also found the record

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32. See *Skoien*, 587 F.3d at 805.

33. See *Chester*, 367 F. App'x at 397–99 (citing *Skoien*, 587 F.3d at 808–10, 812, 816).

34. *Id.* at 393–94.

35. *United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010) (citing *Chester*, 367 F. App'x at 399).

36. *Chester*, 367 F. App'x at 398.

37. *Chester*, 628 F.3d at 678.

38. *Id.* (citing *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc)).

39. *Id.*

40. *Id.* at 674.

41. See *id.* at 674–76.

42. *Id.* at 678–79.

43. *Id.* at 680.

44. *Id.* (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)) (internal quotation marks omitted).

45. *Id.*

46. *Id.* at 683.

insufficient, however, the court once again remanded the case to the district level to provide the government an opportunity to meet its burden under the newly adopted intermediate scrutiny standard.<sup>47</sup>

In his concurring opinion, Judge Davis agreed with the judgment, but disagreed with the majority's characterization of the issue and its reliance on First Amendment doctrines in the context of Second Amendment jurisprudence.<sup>48</sup> Like the Seventh Circuit in *Skoien*, Judge Davis would have applied intermediate scrutiny to § 922(g)(9) to determine that Chester's Second Amendment claim was without merit.<sup>49</sup> Nevertheless, Judge Davis concurred in the judgment because he concluded that "the district court should have no difficulty in concluding that the application of § 922(g)(9) to offenders such as Chester passes Second Amendment scrutiny, exactly as district courts have already concluded."<sup>50</sup>

Although the Supreme Court's decision in *Heller* recognized an individual right to possess and use firearms for purposes unrelated to militia service, the Court expressly recognized the limited scope of that right.<sup>51</sup> Specifically, the Court recognized that the protection the Second Amendment confers is limited based on the type of weapon at issue.<sup>52</sup> For example, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."<sup>53</sup> In addition, the Court stated:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government

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47. *See id.* The court explained:

Having established the appropriate standard of review, we think it best to remand this case to afford the government an opportunity to shoulder its burden and Chester an opportunity to respond. Both sides should have an opportunity to present their evidence and their arguments to the district court in the first instance.

*Id.*

48. *Id.* at 685 (Davis, J., concurring).

49. *See id.* at 683, 690, 693.

50. *Id.* at 683.

51. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008).

52. *Id.* at 2816–17.

53. *Heller*, 128 S. Ct. at 2815–16 (2008); *see also* *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("The Court made clear that restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment." (citing *Heller*, 128 S. Ct. at 2815–16)).

buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>54</sup>

Thus, another limitation on the scope of the right recognized in *Heller* is “presumptively lawful regulatory measures.”<sup>55</sup> The Court never explained why the regulations it listed were “presumptively lawful,” however,<sup>56</sup> and lower federal courts have recognized that the phrase is susceptible to two meanings.<sup>57</sup>

In the Fourth Circuit’s published *Chester* opinion, it discussed differing approaches to the “presumptively lawful regulatory measures” language<sup>58</sup> and concluded that a two-step approach to Second Amendment challenges under *Heller* would be the most consistent method in light of the decision.<sup>59</sup> The Fourth Circuit rejected the approach of courts that had “treated *Heller*’s listing of ‘presumptively lawful regulatory measures,’ for all practical purposes, as a kind of ‘safe harbor’ for unlisted regulatory measures, such as 18 U.S.C. § 922(g)(9), which they deem to be analogous to those measures specifically listed in *Heller*.”<sup>60</sup> Because the Supreme Court in *Heller* had expressly rejected rational basis review as the level of scrutiny to apply to Second Amendment claims,<sup>61</sup> the Fourth Circuit determined that such an approach would inappropriately

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54. *Heller*, 128 S. Ct. at 2816–17. See generally Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1371–72 (2009) (“The Court offered no citations to support this statement, and its ad hoc, patchy quality has been readily apparent to commentators, who have speculated that it was compromise language designed to secure Justice Kennedy’s vote.”).

55. *Id.* at 2817 n.26.

56. *Id.* at 2816–17.

57. *Marzzarella*, 614 F.3d at 91 (“We recognize the phrase ‘presumptively lawful’ could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny.”); *United States v. Skoien*, 587 F.3d 803, 808 (7th Cir. 2009) (“[I]t is not entirely clear whether this language should be taken to suggest that the listed firearms regulations are presumed to fall outside the scope of the Second Amendment right as it was understood at the time of the framing or that they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights.”).

58. *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

59. *Id.* at 680.

60. *Id.* at 679. The district court in *Chester* took this approach. See *United States v. Chester*, No. 2:08-00105, 2008 WL 4534210, at \*2 (S.D. W. Va. Oct. 7, 2008).

61. See *Heller*, 128 S. Ct. at 2817 n.27. The Court also rejected the “interest-balancing inquiry” proposed by Justice Breyer in dissent. See *id.* at 2821 (quoting *id.* at 2852 (Breyer, J., dissenting)) (internal quotation marks omitted). Under Justice Breyer’s formulation, the inquiry would involve balancing “the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.” *Id.* at 2852 (Breyer, J., dissenting).

approximate the rejected standard.<sup>62</sup> When courts review government regulations using some standard other than rational basis review, they apply a form of heightened scrutiny, and the burden of justifying the challenged regulation is placed on the government.<sup>63</sup> However, the Fourth Circuit concluded that “using *Heller*’s list of ‘presumptively lawful regulatory measures’ to find § 922(g)(9) constitutional by analogy would relieve the government of its burden” and would be inconsistent with *Heller*.<sup>64</sup>

In adopting its two-step approach, the Fourth Circuit relied on the reasoning of the Third Circuit in *United States v. Marzzarella*,<sup>65</sup> as well as that of the *Skoien* panel decision<sup>66</sup> eventually vacated by the Seventh Circuit en banc.<sup>67</sup> Under this approach, the court’s first step is a historical inquiry that “seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification.”<sup>68</sup> Given that *Heller* described the right to bear arms as a preexisting right<sup>69</sup> and emphasized the importance of historical understanding of the Second Amendment,<sup>70</sup> the Fourth Circuit’s incorporation of a historical inquiry into its test<sup>71</sup> seems unsurprising. Under this step, a determination that the challenged law does not burden conduct historically considered within the Second Amendment’s scope ends the inquiry, and the challenged law is upheld.<sup>72</sup> If, on the other hand, the court concludes that the burdened conduct is within the scope of Second Amendment protection, the second step involves applying “means-end scrutiny” to determine whether the challenged regulation is constitutional.<sup>73</sup> Because *Heller* expressly rejected rational basis review,<sup>74</sup> “unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law.”<sup>75</sup>

Applying the two-step approach to Chester’s Second Amendment challenge to § 922(g)(9), the Fourth Circuit first evaluated whether someone convicted of a

62. *Chester*, 628 F.3d at 679. The Fourth Circuit also noted that “the phrase ‘presumptively lawful regulatory measures’ suggests the possibility that one or more of these ‘longstanding’ regulations ‘could be unconstitutional in the face of an as-applied challenge.’” *Id.* (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)).

63. *See id.* at 680.

64. *Id.*

65. 614 F.3d 85 (3d Cir. 2010).

66. *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *aff’d en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3539 (U.S. Mar. 21, 2011) (No. 10-7005).

67. *See Chester*, 628 F.3d at 680 (citing *Skoien*, 587 F.3d at 808–09; *Marzzarella*, 614 F.3d at 89).

68. *Id.*

69. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2804 (2008) (stating that the Second Amendment “was widely understood to codify a pre-existing right”).

70. *See id.* at 2788–2804.

71. *See Chester*, 628 F.3d at 680.

72. *Id.*

73. *Id.*

74. *See Heller*, 128 S. Ct. at 2817 n.27.

75. *Chester*, 628 F.3d at 680.

misdemeanor crime of domestic violence has the right to possess a firearm in his home.<sup>76</sup> For purposes of conducting the historical inquiry into the Second Amendment's scope, the court noted that "[s]ection 922(g)(9), like the felon-dispossession provision set forth in § 922(g)(1), permanently disarms an entire category of persons"<sup>77</sup> and framed the issue as "whether a person, rather than the person's conduct, is unprotected by the Second Amendment."<sup>78</sup> After examining the historical data regarding whether the Second Amendment was understood to exclude felons as a class and determining the data to be inconclusive,<sup>79</sup> the Fourth Circuit concluded that the historical evidence regarding whether the Second Amendment's scope included persons with misdemeanor domestic violence convictions was similarly inconclusive.<sup>80</sup> Moreover, the court noted that the government was not "contend[ing] that "§ 922(g)(9) [was] valid because Chester, having been convicted of a domestic violence misdemeanor, [was] wholly unprotected by the Second Amendment."<sup>81</sup> Thus, the court declined to conclude that "the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors" and assumed that "Chester's Second Amendment rights [were] intact and that he [was] entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense."<sup>82</sup> The Fourth Circuit then proceeded to the next step of the inquiry and decided on intermediate scrutiny as the standard for Second Amendment challenges similar to the one Chester raised.<sup>83</sup>

Although the Fourth Circuit expressly adopted intermediate scrutiny as the appropriate standard to apply in cases involving domestic violence misdemeanants such as Chester, as a practical matter lower courts in the circuit are likely to apply intermediate scrutiny to Second Amendment claims that fall in between the core right identified in *Heller*—"the right of law-abiding, responsible citizens to use arms in defense of hearth and home"<sup>84</sup>—and total bans on firearms possession, such as the District of Columbia's, which would

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76. *See id.* at 680–81.

77. *Id.* at 680.

78. *Id.* In his concurring opinion, Judge Davis disagreed with this conclusion. *Id.* at 685 (Davis, J., concurring) ("I do not agree that the issue presented is whether § 922(g)(9), on its face, properly regulates 'domestic-violence misdemeanants' as a group. This case is only about a congressional prohibition imposed on Appellant William Samuel Chester, Jr.").

79. *See id.* at 680–81 (majority opinion) ("[T]he federal felon dispossession provision has existed in some form or another since the 1930s, and thus there is a much larger body of scholarly work considering the question of whether felons were originally excluded from the protection afforded by the Second Amendment [than there is discussing domestic violence misdemeanants]. Commentators are nonetheless divided on the question of the categorical exclusion of felons from Second Amendment protection.").

80. *Id.* at 681–82.

81. *Id.* at 681.

82. *Id.* at 681–82.

83. *Id.* at 682–83.

84. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

fail under any standard of scrutiny.<sup>85</sup> As Judge Sykes explained in the now-vacated panel decision in *Skoien*:

The Court . . . conspicuously declined to set a standard of review. We take all this to mean that gun laws—other than those like the categorically invalid one in *Heller* itself—must be independently justified.

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. . . We know that rational-basis review is out; *Heller* was explicit about that. This leaves either strict scrutiny—typically reserved for laws that classify on the basis of race or restrict certain fundamental rights and content-based restrictions on speech—or some form of intermediate scrutiny.<sup>86</sup>

Because *Heller* speaks of “presumptively lawful” gun regulations, strict scrutiny would have been inappropriate in such a context.<sup>87</sup> Moreover, as the Fourth Circuit noted in *Chester*, courts do not automatically apply strict scrutiny whenever a regulation implicates one of the rights specifically set forth in the Bill of Rights.<sup>88</sup> Looking to First Amendment jurisprudence as a guide,<sup>89</sup> the court concluded that despite Chester’s assertion of a right to possess firearms for self-defense, his conviction of a domestic violence crime (albeit a misdemeanor) removes him and others like him from *Heller*’s core right; as such, the court applied intermediate scrutiny.<sup>90</sup>

Although several variations on the intermediate scrutiny standard exist,<sup>91</sup> under the basic formulation that the Fourth Circuit adopted in *Chester*, the government bears the burden of showing “a ‘reasonable fit’ between the challenged regulation and a ‘substantial’ government objective.”<sup>92</sup> Governments facing a challenge to a law implicating Second Amendment rights must therefore be able to assert an important government objective; a legitimate end is not enough.<sup>93</sup> In the context of claims such as Chester’s where the government

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85. *See id.* at 2817–18.

86. *United States v. Skoien*, 587 F.3d 803, 808, 810 (7th Cir. 2009) (citations omitted) (citing *Heller*, 128 S. Ct. at 2817, 2818 n.27; *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000); *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

87. *Id.* at 811.

88. *Chester*, 628 F.3d at 682.

89. *See id.* (quoting *Playboy Entm’t Grp.*, 529 U.S. at, 813; *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)).

90. *Id.* at 682–83.

91. *See id.* at 683 (quoting *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010)).

92. *Id.* (quoting *Fox*, 492 U.S. at 480).

93. *See id.*

asserts “the important object of reducing domestic gun violence,”<sup>94</sup> the validity of the challenged regulation may turn on the relationship between the objective and the means used to accomplish it.<sup>95</sup> In *Chester*, the Fourth Circuit concluded that although the “government [had] offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants [was] substantially related to an important government goal[,] . . . it [had] not attempted to offer sufficient *evidence* to establish a substantial relationship between § 922(g)(9) and an important governmental goal.”<sup>96</sup> Thus, it remanded the case “to afford the government an opportunity to shoulder its burden [under the newly-established standard] and Chester an opportunity to respond.”<sup>97</sup>

Going forward, governments should be prepared to offer evidence sufficient to establish a reasonable fit between regulations implicating the right to bear arms and their asserted justifications. Because—other than in extreme cases such as those involving the use of unusually dangerous weapons on the one hand, or those implicating the core right identified in *Heller* on the other—the historical evidence is likely to be inconclusive, a court’s analysis likely will not end with the first step. Additionally, given the Fourth Circuit’s reliance on First Amendment jurisprudence in adopting intermediate scrutiny to apply to Chester’s claim, lower courts in the circuit are likely to engage in context-specific evaluations that focus “on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”<sup>98</sup> The closer the regulated conduct is to the “core right” identified in *Heller*, the greater the need will be for strong justification by the government.

*Marghretta A. Hagood*

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 682.