



## The Second Amendment Case the Supreme Court Must Take

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Until the Supreme Court [ruled](#) in the 2008 case of [District of Columbia v. Heller](#) that the Second Amendment protects the right to armed self-defense, many lower courts gave this important provision short shrift. Lacking guidance from above, they linked the right to some undefined militia service, effectively reading it out of the Constitution.

Six years later, they're at it again.

While Heller clarified that the Second Amendment secures an individual right, the ruling left many questions about the scope of that right unanswered. Since then, several courts have made clear that they plan to take only as much from Heller as they absolutely have to.

Since Heller struck down D.C.'s ban on functional firearms in the home, recalcitrant courts pretend that the Second Amendment is limited to the right to keep arms and that legislatures can for very little (or no) reason to ignore the right to bear them outside the home.

Perhaps the most egregious example is the Philadelphia-based U.S. Court of Appeals for the Third Circuit, which last year [upheld](#) New Jersey's "may-issue" handgun law. This law says that an individual may be granted a carry license—read: may be permitted to exercise her Second Amendment rights—only if she proves an urgent need to do so to the satisfaction of a law enforcement officer.

In order to show this need, one must prove that there are specific, immediate threats to one's safety that can't be avoided in any way other than by possessing a handgun. If someone can actually persuade the local official—who has total discretion to accept or deny the claim—then she gets a license for two years, when the gun owner must repeat the entire discretionary process (proving an imminent threat, etc.) to renew the permit.

The effect of this regulatory regime is that virtually nobody in New Jersey can use a handgun to defend themselves outside their home. The state law inverts how fundamental rights are

supposed to work—the government must justify restrictions, but the right-holder need not explain the exercise of her rights—and the Third Circuit saw no problem with that.

The court applied a highly deferential review far from the heightened scrutiny normally due an individual right enshrined in the Bill of Rights. It assumed the legislature's good faith without requiring the state to show any evidence that a restrictive-carry regime lowers the rate of gun crime. It also excused what constitutional infringements the law may cause because it was passed before Heller came down—and so the legislature's ignorance of the Second Amendment insulates it from legal challenge.

The Third Circuit's opinion makes clear that it, like too many other courts, is “willfully confused” about the right to keep and bear arms as recognized in Heller and the proper judicial methodology to apply when evaluating such cases.

This is an excellent case for the Supreme Court to take up to begin clarifying many of the unanswered questions involving the Second Amendment—such as to what extent it extends beyond the home and whether it can be conditioned on a showing of need. The Court has been hesitant to flesh out the contours of the Second Amendment, which has led to errant rulings that leave the right to bear arms hollow.

If the Supreme Court's [declaration](#) 2010's *McDonald v. City of Chicago* that “the Second Amendment should [not] be singled out for special—and specially unfavorable—treatment,” is to have any weight, the Court must not neglect the persistent confusion regarding that constitutional provision as it did in the decades before Heller. Unless the justices intend the Second Amendment to lapse back into second-class status, they need to set wayward courts straight. Reviewing the Third Circuit's jurisprudential miscarriage would be a great way to demonstrate their commitment to the Second Amendment's normalcy.

Whatever analytical approach the Supreme Court ultimately uses in defining the scope of the Second Amendment, the time has come to fill in the picture that the Court outlined in Heller, and to bring harmony to the cacophony below.