No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

SEAN MASCIANDARO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Second Amendment to the United States Constitution protect a right to possess and carry a firearm for self-defense outside the home?

II. If there is a Second Amendment right to possess and carry a firearm for self-defense outside the home, is it constitutional to prohibit law-abiding citizens' possession and carrying of loaded weapons in motor vehicles while on National Park Service land?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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Petitioner, Sean Masciandaro, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App., *infra*, 1a-17a) is reported at 638 F.3d 458 (4th Cir. 2011). The opinion of the district court (Pet. App., *infra*, 18a-34a) is reported at 648 F. Supp. 2d 779 (E.D. Va. 2009). The opinion of the magistrate judge (Pet. App., *infra*, 35a-42a) is unreported.

JURISDICTION

The United States District Court for the Eastern District of Virginia (magistrate judge Theresa Carroll Buchanan) had jurisdiction over the charge of possession of a loaded weapon in a motor vehicle located on National Park Service land (Violation No. 1745587) pursuant to 18 U.S.C. § 3401(a). Jurisdiction over Mr. Masciandaro's appeal to the United States District Court for the Eastern District of Virginia (district court judge T. S. Ellis, III) derived from 18 U.S.C. § 3402 and Federal Rule of Criminal Procedure 58(g)(2)(B). The court of appeals had jurisdiction over Mr. Masciandaro's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on March 24, 2011. Mr. Masciandaro did not seek rehearing.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

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." U.S. Const., amend. II.

The National Park Service regulation at issue provides that

> Carrying or possessing a loaded weapon in a motor vehicle, vessel or other mode of transportation is prohibited, except that carrying or possessing a loaded weapon in a vessel is allowed when such vessel is not being propelled by machinery and is used as a shooting platform in accordance with Federal and State law.

36 C.F.R. § 2.4(b) (2007).

INTRODUCTION

Three years ago, this Court announced that the Second Amendment protects an individual right to keep and bear arms in self-defense and defense of the home. *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008). Since that time, numerous federal and state appellate courts from around the country have refused to recognize any Second Amendment self-defense right outside the home. Some courts have assumed (without deciding) that the right could extend beyond the home. Others have explicitly refused to recognize any constitutional self-defense right that exists outside of a traditional primary residence. These courts have read *Heller* as identifying a constitutional self-defense right only in one's home or have refused to expand the right until this Court explicitly does so. Lower courts have, to date, upheld every challenged firearm regulation outside the home (with one known exception) using one of four alternative tests.

Mr. Masciandaro is a law-abiding citizen who was found sleeping in his car with a loaded handgun in a bag in the trunk. He was sleeping in a parking lot on Daingerfield Island, which is National Park Service ("NPS") land. Because of the loaded handgun in his car, he was convicted of violating 36 C.F.R. § 2.4(b) (2007), which prohibits possession and carrying of loaded weapons in motor vehicles located on NPS land.

Mr. Masciandaro asks this Court to recognize his right to possess and carry a loaded firearm in his car in case of confrontation. He also asks this Court to consider the constitutionality of the NPS loaded weapons ban.

STATEMENT OF THE CASE

A. Mr. Masciandaro Was Arrested for Having a Loaded Weapon in His Car While on NPS Land.

Mr. Masciandaro owns a small reptile education business, Raging Reptiles. *See* C.A.J.A. 17-18.[1] He travels to trade shows, schools, and other events held in the Northeast and Mid-Atlantic areas to teach children and adults about exotic snakes, monitor lizards, bearded dragons, and other reptiles. During the spring and summer months in 2008, Raging Reptiles' customers scheduled many reptile education shows and show-and-tells. In those hectic months, Mr. Masciandaro spent three to five days each week on the road, sleeping in his car with expensive equipment, cash from shows, and other valuable personal and business items. *United States v. Masciandaro*, 638 F.3d 458, 461, 467 (4th Cir. 2011). He carried a handgun in his vehicle for protection while he was on the road, *id.* at 461, until a United States Park Police officer confiscated it.

On the morning of June 5, 2008, Mr. Masciandaro was sleeping in his car in a gravel parking lot on Daingerfield Island, off the George Washington Memorial Parkway in Alexandria, Virginia. *Id.* at 460. Daingerfield Island is an outcropping of land extending into the Potomac River. *Id.* It has a restaurant, marina, biking trail, parking lots, and other public facilities. *Id.* This area is part of an 84-million-acre network of land and over 4.5 million acres of oceans, lakes, and reservoirs that are governed by NPS regulations and include sites

[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals.

ranging from historic landmarks, untouched wilderness, and underwater coral reefs to commercial areas, RV campgrounds, and rest stops.[2]

While on patrol, a Park Police officer noticed that Mr. Masciandaro's car was parked incorrectly in a "Front End Parking Only" area. *Id.* After approaching the car and finding Mr. Masciandaro asleep in the reclined driver's seat, the officer woke him up and asked for his driver's license. *Id.* Complying, Mr. Masciandaro pulled a messenger bag from the trunk after releasing a latch and pulling down the top of the back seat to expose the car trunk space. *United States v. Masciandaro*, 648 F. Supp. 2d 779, 782 (E.D. Va. 2009). With the seat leaned back, the officer noticed a knife under the driver's seat and asked Mr. Masciandaro if he had any other weapons in the car. *Masciandaro*, 638 F.3d at 460. Mr. Masciandaro said he had a loaded handgun in his bag. *Id.* The officer searched the car, confiscated the Kahr P9 9mm semi-automatic handgun, and arrested Mr. Masciandaro. *Id.*

B. The Magistrate Judge Upheld the NPS Loaded Weapons Ban and Convicted Mr. Masciandaro.

Mr. Masciandaro was charged with unlawful possession of a loaded firearm in a motor vehicle on NPS land, 36 C.F.R. § 2.4(b), and with failure to comply with a parking sign. Pet. App. 35a.

After this Court issued its decision in *Heller*, Mr. Masciandaro filed two pre-trial motions to dismiss the loaded weapon charge. *Id.* One motion asserted that the NPS regulation is unconstitutional under the Second Amendment, either facially or as applied in

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[2] *See About Us*, National Park Service, http://www.nps.gov/aboutus/index.htm (last visited June 20, 2011); *see also* C.A.J.A. 17 n.5.

this case.[3] *Id.* at 36a-37a. At a hearing, Mr. Masciandaro and the officer testified, the magistrate judge heard argument on the motions and took them under advisement, and the government provided additional trial evidence. *Id.* at 35a. The government did not present any evidence regarding public safety on NPS land generally or on Daingerfield Island, or data showing the number of visitors to that area.

On February 3, 2009, the magistrate judge found Mr. Masciandaro guilty of violating the NPS loaded weapons ban and failing to follow the traffic sign. Pet. App. 42a. In a memorandum opinion, the magistrate judge concluded that the NPS loaded weapons ban is not unconstitutional. *Id.* at 37a-38a. In the judge's view, *Heller* struck down a "complete prohibition" on the use of handguns for protection by ordinary citizens, while the NPS loaded weapons ban allowed Mr. Masciandaro "to have both ammunition and a handgun in his car; he simply was required to keep the handgun unloaded while on Daingerfield Island." *Id.* at 38a. Though the judge concluded that § 2.4(b) is "narrowly tailored," *id.*, she did not identify

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[3] The second motion sought to dismiss because § 2.4(b) had been superseded at the time of trial by 36 C.F.R. § 2.4(h), which allowed possession of a loaded weapon in a vehicle so long as such possession is "in accordance with the laws of the state" in which the NPS land is located. Pet. App. 39a. Section 2.4(h) itself was subsequently enjoined by the District Court for the District of Columbia. *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009). Congress later enacted 16 U.S.C. § 1a-7b as part of the Credit Card Accountability Responsibility and Disclosure Act of 2009, which directed that "[t]he Secretary of the Interior shall not promulgate or enforce any regulation" that prohibits possession of a functional firearm on NPS land if such possession complies with the laws of the state in which the land is located. *Masciandaro*, 638 F.3d at 461-62. The magistrate judge, district court, and Fourth Circuit all held that under 1 U.S.C. § 109 (the federal savings statute), the version of § 2.4(b) in effect at the time of Mr. Masciandaro's arrest governed. *Id.* at 462, 465. Mr. Masciandaro does not seek review of that holding. Section 2.4(b) has never been formally repealed and the government could enforce it against other individuals, just as it maintains its enforcement efforts against Mr. Masciandaro.

a compelling government interest or describe how the law withstood a strict scrutiny analysis. The judge later imposed a fine for violation of the NPS loaded weapons ban. *Masciandaro*, 638 F.3d at 461.

C. The District Court Analyzed the NPS Loaded Weapons Ban Under Three Constitutional Tests and Upheld the Conviction.

Mr. Masciandaro appealed the weapons conviction to the district court, which requested supplemental briefs addressing the "sensitive places" aspect of *Heller*. On August 26, 2009, the district court affirmed. *Masciandaro*, 648 F. Supp. 2d at 795. The court concluded that the NPS loaded weapons ban is valid under the intermediate scrutiny, strict scrutiny, and "undue burden" tests. *Id.* at 789. Mr. Masciandaro's as-applied challenge to the NPS loaded weapons ban failed because the regulation is limited to motor vehicles and does not ban loaded weapons in the home. *Id.* at 790.

The district court also determined that *Heller*'s list of "'presumptively lawful regulatory measures' points persuasively" to rejection of the as-applied challenge. *Id.* In its view, the "sensitive places" examples announced in *Heller* "plainly suggest that motor vehicles on National Park land fall within any sensible definition of a 'sensitive place.'" *Id.* And the court rejected the facial challenge, noting that since the Second Amendment does not grant Mr. Masciandaro an absolute right to carry a loaded weapon in his vehicle, "it necessarily follows that § 2.4(b) has at least *some* constitutional applications." *Id.* at 792.

D. The Court of Appeals Avoided the Constitutional Question and Applied an Intermediate Scrutiny Hybrid Analysis to Uphold the Conviction.

On appeal, the Fourth Circuit affirmed the conviction without deciding whether Mr. Masciandaro has a Second Amendment right to carry or possess a loaded handgun in his car for self-defense. *Masciandaro*, 638 F.3d at 460. The court stated that it would await direction from this Court "on the question of *Heller*'s applicability outside the home environment." *Id.* at 475. Judge Niemeyer wrote separately on this issue. He stated that a right outside the home is "plausible" given the Court's discussion of the self-defense right in *Heller* and felt that the court should recognize Mr. Masciandaro's constitutional claim. *Id.* at 467-68. But he concluded that the NPS loaded weapons ban is constitutional. *Id.* at 474.

When analyzing the constitutional challenge, the Fourth Circuit stated that the core of the Second Amendment right is in the home. *Id.* at 470. So while strict scrutiny would be appropriate to evaluate regulations affecting gun possession in the home, the intermediate scrutiny standard was applied here based on the "longstanding out-of-the-home/in-the-home distinction." *Id.* Moreover, the NPS loaded weapons ban "reasonably served [the government's] substantial interest in public safety in the national park area where Masciandaro was arrested." *Id.* at 460. Finally, the court noted that "[t]he arguments of counsel about the meaning of the 'sensitive places' language raise difficult questions about the scope of the Second Amendment and the scrutiny to be given to government regulations in sensitive places." *Id.* at 472. But it declined to decide whether Daingerfield Island is a sensitive place like the schools or government buildings identified in *Heller*. *Id.* at 473.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision in this case highlights the difficulty that law-abiding gun owners and courts face in trying to understand the scope and depth of the individual right to keep and bear arms announced in *Heller*. Because the Fourth Circuit refused to analyze the scope of that right, gun owners have no greater constitutional self-defense right outside the home than they did before *Heller*. Yet *Heller*'s description of the right was not so limited: the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592.

Mr. Masciandaro's case is the right vehicle to address this problem. The issue of whether the right to keep and bear arms in self-defense extends outside the home is squarely presented, even though a divided Fourth Circuit panel avoided deciding the question until this Court gives it guidance. The Fourth Circuit also applied a balancing test to uphold the challenged NPS loaded weapons ban, determining that the law's burden on Mr. Masciandaro's self-defense options was outweighed by speculative gains in safety that flow from a ban of loaded weapons in motor vehicles. Finally, this case is a natural extension of the situation presented in *Heller*. Mr. Masciandaro is a law-abiding, responsible citizen who was barred from having a functional (loaded) handgun available while traveling and sleeping in his car. The only substantial difference between this case and the unconstitutional statute at issue in *Heller* is that here the prohibited conduct occurred outside the home.

This issue is not limited to the decision below. Despite the text of the Second Amendment, federal and state appellate courts either expressly hold that the right to keep and

bear arms ends at the doorway to the home or avoid deciding the constitutional question. If this Court does not halt this trend, the Second Amendment will be reduced to a constitutional bar on laws that prohibit handgun possession for self-defense in the home.

This case highlights another problem with the growing Second Amendment jurisprudence: many lower courts are applying scrutiny tests that this Court explicitly discarded in *Heller*. In particular, a number of federal appellate courts are applying a balancing form of intermediate scrutiny, i.e., they are balancing burdens on the right to keep and bear arms against purported gains in safety. Additionally, a number of state courts are applying a "reasonable regulation" standard, which is little more than the rational basis test that the Court rejected in *Heller*.

Because of the importance of clarifying and protecting the right to keep and bear arms outside the home, this Court should grant Mr. Masciandaro's petition.

I. This Case Is the Right Vehicle to Clarify the Scope of the Second Amendment.

A. This Case Cleanly Presents the Question of Whether a Second Amendment Right to Self-Defense Exists Outside the Home.

Mr. Masciandaro's case offers this Court an ideal opportunity to clarify the scope of the Second Amendment right to self-defense. There are no factual disputes or standing issues. And the practical effect of the restrictions in this case and *Heller* are similar: law-abiding citizens cannot have an operable handgun available in case of confrontation.

First, the facts relevant to this Second Amendment challenge are undisputed. Mr. Masciandaro is a law-abiding, responsible citizen who carried a loaded handgun in his car for self-defense. The regulation Mr. Masciandaro violated, 36 C.F.R. § 2.4(b), bans all loaded weapons in motor vehicles on all land controlled by the NPS, 85 million acres of public and private land under NPS care. This includes the George Washington Memorial Parkway and Daingerfield Island, which has a public parking lot next to the Parkway. *Masciandaro*, 648 F. Supp. 2d at 781. When Mr. Masciandaro was first questioned by the Park Police officer, his handgun was in a gun case, in a messenger bag, and in the car's rear compartment. *Id.* at 782.

Second, explicit recognition of the self-defense right outside the home is appropriate in this case. Like Mr. Heller, Mr. Masciandaro is a law-abiding and responsible citizen. He lawfully possessed his handgun, which is not a dangerous or unusual weapon, and traveled with it for self-defense. The challenged regulation is nearly as extreme as the challenged statutes in *Heller*: there is no way for a law-abiding citizen to have a handgun available for self-defense (i.e., loaded and functional) without violating § 2.4(b).

If there is a Second Amendment right outside the home, it surely applies to law-abiding citizens carrying handguns for self-defense while traveling on public highways. The road trip is a quintessential American experience. *See, e.g.*, Mark Twain, *Roughing It* (1872); John Steinbeck, *Travels with Charley: In Search of America* (1962); Jack Kerouac, *On the Road* (1957). The need to protect "self, family, and property" is acute on the road, as well as at home.

B. The Decision Below Was Incorrect Because It Failed to Recognize a Constitutional Right Outside the Home and Applied a Balancing Test to Uphold a Total Weapons Ban in a Car.

The Fourth Circuit's decision ignores this Court's explicit guidance regarding the fundamental nature of the right to keep and bear arms. First, the court declined to decide whether the Second Amendment right extends beyond the home:

> There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.

Masciandaro, 638 F.3d at 475 (Wilkinson, J., writing for the court as to Part III.B). The court concluded that any right that might exist outside the home is outside the "core right," and hence a "lesser showing" is necessary to demonstrate the validity of a regulation that affects such conduct. *Id.* at 471.

Judge Wilkinson relied on the Court's decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), to justify avoidance of the question of whether the constitutional right to keep and bear a firearm for self-defense exists outside of the home. *Masciandaro*, 638 F.3d at 475. But this is a misreading of *Pearson*, which simply changed the procedure for evaluating qualified immunity. Prior to *Pearson*, judges were required to determine if a constitutional right was violated before determining if that right was clearly established at the time of the accused official's conduct. *Pearson*, 129 S. Ct. at 815-16. The Court held that judges are no longer bound to that sequence and could consider the "clearly established" prong first, if appropriate. *Id.* at 818. It changed the procedure because "there will be cases in which a court

will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all." *Id.* at 820. This change also allowed courts to avoid a situation where a defendant lost on the first prong (i.e., was found to have violated the plaintiff's constitutional right) but won the second, putting the defendant in the uncomfortable position of winning, but potentially being unable to appeal the determination that a constitutional violation occurred. *Id.*

These concerns are not present here. Instead, the decision below denies Mr. Masciandaro (and all other citizens subject to the law of the Fourth Circuit) a determination of the scope of his Second Amendment right. The court simultaneously informed him that if he had such a right outside the home, it would not be worth as much as the gains in public safety the court assures him are realized, notwithstanding the absence of evidence on this point in the record. Mr. Masciandaro is entitled to know what his rights are, even if the NPS loaded weapons ban is a valid limitation on them.

In this case, the Fourth Circuit also improperly applied a balancing test to analyze § 2.4(b) and determined that "[t]he Secretary *could have reasonably concluded that*, when concealed within a motor vehicle, a loaded weapon becomes even more dangerous," to justify the ban. *Masciandaro*, 638 F.3d at 473 (emphasis added). This language parallels Justice Breyer's view in *Heller* of the District of Columbia's handgun ban: "a legislature *could reasonably conclude that* the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime." *Heller*, 554 U.S. at 682

(Breyer, J., dissenting) (emphasis added). Moreover, unlike *Heller*, any gains in safety attributable to § 2.4(b) are purely speculative, as there is no evidence of them in the record.

Mr. Masciandaro, like millions of law-abiding gun owners, should be told the scope of his right to keep and bear arms in case of confrontation. Under the decision below, he is left with no more information about his constitutional right than he had before his arrest.

C. This Case Is Analogous to *Heller* and Squarely Presents the Questions.

The NPS loaded weapons ban is quite similar to D.C. Code § 7-2507.02 (2001), which was struck down as an invalid limitation on Mr. Heller's Second Amendment right. *See Heller*, 554 U.S. at 635. Section 7-2507.02 required "that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628. *Heller* expressly held that a complete prohibition of the use of handguns for self-defense in the home is invalid. *Id.* at 635. The NPS loaded weapons ban also prohibits the use of handguns (or any other firearm) for self-defense, albeit in a motor vehicle.

The decision below incorrectly implies that § 2.4(b) allows someone to load a firearm if the need for self-defense arises. *See Masciandaro*, 638 F.3d at 474. The text of the NPS loaded weapons ban is unambiguous, and contains no self-defense exception:

> Carrying or possessing a loaded weapon in a motor vehicle, vessel or other mode of transportation is prohibited, except that carrying or possessing a loaded weapon in a vessel is allowed when such vessel is not being propelled by machinery and is used as a shooting platform in accordance with Federal and State law.

36 C.F.R. § 2.4(b). Once a person in a motor vehicle on NPS land loads a firearm and renders it operable, that person violates § 2.4(b). The only exception, which is not relevant here, is that "[a]uthorized Federal, State and local law enforcement officers may carry firearms in the performance of their official duties." 36 C.F.R. § 2.4(e). So an off-duty police officer driving on the Rock Creek Parkway in Washington, DC (which is controlled by the NPS) would violate § 2.4(b) when carrying a loaded weapon in her car.

The Fourth Circuit concluded that allowing the carrying of unloaded firearms while prohibiting loading them "leaves largely intact the right to 'possess and carry weapons in case of confrontation.'" *Masciandaro*, 638 F.3d at 474. This cannot be reconciled with the Court's opinion in *Heller*. The Court held that a requirement that guns have trigger locks (which, according to the District's counsel, could be removed in "3 seconds") and be unloaded made "it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 554 U.S. at 630. Like the challenged statutes in *Heller*, the NPS loaded weapons ban contains no self-defense exception, but does contain a specific enumerated exception for law enforcement.

Moreover, the NPS loaded weapons ban is generally inconsistent with state law. In fact, only Illinois, Wisconsin, and the District of Columbia have such stringent rules regarding carrying loaded weapons in motor vehicles. 720 Ill. Comp. Stat. 5/24-1; Wis. Stat. § 167.31; D.C. Code § 22-4504.02. Other states allow the carrying of loaded weapons in motor vehicles under at least some conditions. Twenty-three states require a license or

concealed weapons permit,[4] three states require a license or concealed weapons permit unless the weapon is secured,[5] thirteen states allow open carry in motor vehicles while requiring a concealed weapons permit for carrying a concealed weapon in a motor vehicle,[6] and nine states have no restrictions on law-abiding citizens' carrying a loaded weapon in a motor vehicle.[7]

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[4] Ala. Code § 13A-11-73; Ark. Code Ann. § 5-73-120; Cal. Penal Code § 12031 (as of January 1, 2012, revised to § 25850); Conn. Gen. Stat. § 29-35; Haw. Rev. Stat. §§ 134-26, 134-51; Ind. Code § 35-47-2-1; Iowa Code § 724.4; Me. Rev. Stat. tit. 12, § 11212; Md. Code Ann. Crim. Law § 4-203; Mass. Gen. Laws ch. 269, § 10; Mich. Comp. Laws § 750.227; Minn. Stat. § 624.714; N.H. Rev. Stat. Ann. § 159:4; N.J. Stat. Ann. §§ 2C:39-5, 2C:39-2; N.Y. Penal Law §§ 265.03, 265.20; N.D. Cent. Code § 62.1-02-10; Ohio Rev. Code Ann. § 2923.16; Okla. Stat. tit. 21, § 1289.7; 18 Pa. Cons. Stat. § 6106; R.I. Gen. Laws § 11-47-8; Tenn. Code Ann. §§ 39-17-1307-08; Wash. Rev. Code § 9.41.050; W. Va. Code §§ 20-2-5, 20-2-6a.

[5] Fla. Stat. § 790.25; S.C. Code Ann. § 16-23-20; Va. Code Ann. § 18.2-308. The Virginia law was amended in 2010, after Mr. Masciandaro's arrest. At the time of his arrest, Virginia required that a weapon not be concealed "about his person, hidden from common observation" without first obtaining a permit. Va. Code Ann. § 18.2-308 (2008). Since his handgun was in a gun case inside a messenger bag in the trunk of his car, Mr. Masciandaro's gun was not about his person.

[6] Ariz. Rev. Stat. § 13-3102; Del. Code Ann. tit. 11, § 1442; Idaho Code Ann. § 18-3302(9); Kan. Stat. Ann. § 21-4201 (as of July 1, 2011, see 2010 Kan. Sess. Laws ch. 136, § 187); Ky. Rev. Stat. Ann. § 527.020; La. Rev. Stat. Ann. §§ 14:95, 32:292.1, 40:1379.3; Mont. Code Ann. § 45-8-316; Neb. Rev. Stat. § 28-1202; Nev. Rev. Stat. § 202.350; N.C. Gen. Stat. § 14-269; Or. Rev. Stat. § 166.250; S.D. Codified Laws § 22-14-9; Wyo. Stat. Ann. § 6-8-104.

[7] Alaska Stat. § 11.61.190 et seq.; Colo. Rev. Stat. § 18-12-105; Ga. Code Ann. § 16-11-126; Miss. Code Ann. § 97-37-1; Mo. Rev. Stat. § 571.030; N.M. Stat. Ann. § 30-7-2; Tex. Penal Code Ann. § 46.02 (weapon cannot be in plain view); Utah Code Ann. § 76-10-505. Vermont does not regulate carrying of firearms.

Because the NPS loaded weapons ban completely prohibits the acts of carrying or possessing a firearm for self-defense while on NPS land, including on heavily traveled parkways used for commuting, it is an invalid limitation on law-abiding citizens' Second Amendment right.

II. Courts Will Not Recognize a Second Amendment Right to Self-Defense Outside One's Home Until This Court Explicitly Tells Them That Right Exists.

A. Lower Courts Are Concluding That the Second Amendment Right to Have a Firearm for Self-Defense Does Not Extend Outside the Home or Are Avoiding Taking a Position on the Question.

Heller established an individual right to self-defense in the home that is protected by the Second Amendment. *McDonald v. City of Chicago* applied this right against the states under the Fourteenth Amendment and recognized its fundamental nature. 561 U.S. ___, 130 S. Ct. 3020 (2010). The decision below highlights an almost unanimous response from the courts: to limit the Second Amendment right to keep and bear arms to the strict holdings of those cases. In fact, Mr. Masciandaro has been unable to identify a single state or federal appellate court that has recognized a Second Amendment right outside the home.[8] And many courts have considered the question.

Heller and *McDonald* left open important questions regarding the scope of the self-defense right beyond the home and the appropriate method for evaluating government regulations affecting it. The lower courts have struggled mightily with these issues. *See, e.g.*,

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[8] A single trial court judge in Wisconsin held that Wisconsin's concealed carry law violates the Second Amendment. *State v. Schultz*, No. 10-CM-138 (Wis. Cir. Ct. Clark County Oct. 12, 2010). That decision does not appear to have been appealed.

Masciandaro, 638 F.3d at 467 ("But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation."); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("*Skoien II*") (*Heller* creates an individual right that includes keeping operable handguns at home for self-defense but "[w]hat other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open."), *cert. denied*, 131 S. Ct. 1674 (2011).

The highest state courts that have considered the issue unanimously decided that the Second Amendment right is limited to the home. Maryland, the District of Columbia, Illinois, Massachusetts, New York, and Kansas have all limited *Heller* to its holding.[9] For example, the Maryland Court of Appeals upheld Maryland's firearm permitting statute, concluding that the right is unavailable outside the home. *Williams v. State*, 417 Md. 479, 496 (Md. 2011) (stating that "[i]f the Supreme Court, in this [*Heller*] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly"), *petition for cert. filed*, 79

[9] *See Wooden v. United States*, 6 A.3d 833, 841 (D.C. 2010) ("Neither self-defense as such, nor even self-defense in the home of another (with a weapon carried there), is entitled to such protection, as we have read *Heller*."); *Mack v. United States*, 6 A.3d 1224, 1236 (D.C. 2010) (no right under *Heller* to carry outside the home); *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010) (same); *People v. Dawson*, 403 Ill. App. 3d 499, 508 (Ill. App. Ct. 2010) (same), *cert. denied*, 2011 WL 766601 (May 2, 2011); *People v. Williams*, 405 Ill. App. 3d 958, 963 (Ill. App. Ct. 2010) (same), *perm. app. docketed*, No. 111594 (Ill. May 9, 2011); *People v. Aguilar*, 408 Ill. App. 3d 136, 944 N.E.2d 816, 827 (Ill. App. Ct. 2011) (same), *perm. app. granted*, No. 112116 (Ill. May 25, 2011); *Commonwealth v. Powell*, 459 Mass. 572, 589 (Mass. 2011) (same); *People v. Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209 (N.Y. App. Div. 2009) (same), *perm. app. denied*, 13 N.Y.3d 748 (N.Y. 2009); *State v. Knight*, 44 Kan. App. 2d 666, 685 (2009) (same), *perm. app. docketed*, No. 100167 (Kan. Nov. 8, 2010).

U.S.L.W. 3594 (Apr. 5, 2011). That court noted that Illinois, the District of Columbia, and California also limited the right in similar cases. *Id.* at 496-99. Given this trend, state courts that confront Second Amendment issues in the future will likely limit its protection to the home.[10]

Other state and federal courts have held that even if the right might exist outside the home, it is substantially weaker than the right enjoyed in the home. The Fourth Circuit declined to decide whether Mr. Masciandaro had a right outside the home and applied a lower standard of scrutiny to uphold the NPS loaded weapons ban. *See Masciandaro*, 638 F.3d at 474-76, 471. In another case involving federal property, the Fifth Circuit merely assumed (without deciding) that the right extends outside the home and upheld a law regulating gun possession on Postal Service property because it is a "sensitive place," without further analysis. *United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009) (per curiam). California appellate courts have also concluded that if the Second Amendment right extends outside the home, it is entitled to less protection.[11] For example, in *People v. Flores*, the defendant challenged several California statutes, including the state ban on

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[10] The *Williams* court also noted that the statute contains an exception for permit holders, and the defendant had never applied for a permit. 417 Md. at 488. The regulation at issue in this case is even more extreme, as here there are no exceptions to the ban except for law enforcement personnel "in the performance of their official duties." *See* 36 C.F.R. § 2.4(e).

[11] *See People v. Yarbrough*, 169 Cal. App. 4th 303, 313 (Cal. Ct. App. 2008) (distinguishing law from *Heller* because no effect on gun possession in home), *perm. app. denied*, No. S169983 (Cal. Mar. 18, 2009); *Garber v. Superior Court*, 184 Cal. App. 4th 724 (Cal. Ct. App. 2010) (unpublished portion) (stating that *Heller* only prohibited total ban on handguns for self-defense in home), *perm. app. denied*, No. S183580 (Cal. Aug. 11, 2010).

carrying a loaded weapon in a public place. 169 Cal. App. 4th 568, 576-77 (Cal. Ct. App. 2008), *perm. app. denied*, No. S170073 (Cal. Mar. 18, 2009). The court upheld the ban and limited the core Second Amendment right to the home, rather than to self-defense.

These courts ignore the import of the term "bear arms." *See Heller*, 554 U.S. at 592 ("Putting all of these textual elements [of the Second Amendment] together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."). *But see McDonald*, 130 S. Ct. at 3119-20 (Stevens, J., dissenting) ("Thankfully, the Second Amendment right identified in *Heller* and its newly minted Fourteenth Amendment analogue are limited, at least for now, to the home."). They will also continue to limit the Second Amendment right to the home until this Court affirmatively extends its scope.

B. This Court's Guidance Is Needed Now, Before the Lower Courts Foreclose Any Constitutional Protection of the Self-Defense Right Outside the Home.

This Court has the opportunity in this case to give the lower courts the critical guidance they have explicitly and implicitly requested relating to the Second Amendment right. In the absence of that guidance, the lower courts are likely to continue to chip away at the constitutional right to keep and bear arms. If this Court does not step in now, the thoughts of one commentator may prove prophetic:

> By the time the Supreme Court gets around to hearing substantive Second Amendment challenges, the only real question for the Court will be, I suspect, whether to give *Heller* a respectful burial by rejecting the individual-rights interpretation it adopted, or to pretend that the Second Amendment protects an individual right while giving essentially no content to it except as a constitutional barrier to complete

> prohibitions on handgun possession in the home for self-defense purposes.

Mark Tushnet, *Permissible Gun Regulations After* Heller: *Speculations About Method and Outcomes*, 56 UCLA L. Rev. 1425, 1441-42 (2009).

This constitutional right should not be allowed to wither. But without intervention, lower courts will continue to limit the Second Amendment right to self-defense in the home. Only this Court can step in and protect the full scope of the individual Second Amendment right to self-defense that it announced, for the first time, three years ago.

III. Federal and State Appellate Courts Are Applying Invalid Tests to Uphold All Weapons Regulations That Impact Activities Outside the Home, Contrary to *Heller*'s Direction.

"*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring). Judge Davis's observation in *Chester* is no exaggeration. Mr. Masciandaro has identified at least four different approaches used by lower courts in analyzing regulations under the Second Amendment: (1) balancing the burden against the benefit to public safety; (2) presuming a regulation is valid if it is short of a total ban on possession of handguns in the home for self-defense (the so-called "reasonable regulation" standard); (3) citing the "*Heller* dicta" as dispositive of different laws with little or no analysis; and (4) historically analyzing a regulation in light of *Heller* to determine if the limitation is valid.

The first two approaches are in tension with Heller. "Interest-balancing" was expressly rejected, and the reasonable regulation standard is little more than rational basis, which was also rejected. *See Heller*, 554 U.S. at 628 n.27, 634-35. The third approach, citing the *Heller* dicta with little analysis, may be consistent with the approach taken in *Heller*, at least for certain laws that are identical or highly analogous to the "presumptively lawful measures" the Court identified. The last approach is similar to the historical analysis described in *Heller*.

This Court's guidance is urgently needed to clarify the appropriate standard to measure burdens on those protected activities. Currently, the analysis depends on the court considering the issue.

A. *Masciandaro* and Other Federal Decisions Employ Balancing Tests Like the Test Proposed by the *Heller* Dissent.

As noted in Part I.B, *supra* page 13, the Fourth Circuit applied a balancing test and upheld 36 C.F.R. § 2.4(b) as constitutional. Similarly, the First, Third, Fourth, Seventh, Ninth, and Tenth Circuits have applied a balancing form of "intermediate scrutiny" in at least some circumstances.[12] That is, they balanced the increase in public safety against the burden

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[12] *See United States v. Booker*, ___ F.3d ___, 2011 WL 1631947, at *9-12 (1st Cir. May 2, 2011) (balancing burden on right to keep and bear arms against benefit of keeping guns out of hands of domestic violence misdemeanants); *United States v. Marzzarella*, 614 F.3d 85, 97-101 (3d Cir. 2010) (balancing burden on right to keep and bear arms against benefit of enabling tracing of weapons via serial numbers), *cert. denied*, 131 S. Ct. 958 (2011); *Chester*, 628 F.3d at 682-83 ("The question then becomes whether the government can justify, under the appropriate level of scrutiny, the burden imposed on Chester's Second Amendment rights by § 922(g)(9)."); *United States v. Skoien*, 587 F.3d 803, 814 (7th Cir. 2009) ("In other words, 'the public benefits of the restrictions must be established by evidence, and not just asserted[;] . . . lawyers' talk is insufficient.'" (quoting *Annex Books*

on individual rights. For example, the en banc court in *Skoien II* emphasized the unsympathetic nature of the defendant to help justify prohibiting the possession of guns by domestic violence misdemeanants. 614 F.3d at 645. In all of these decisions, the court determined the usefulness of the regulation in improving public safety and determined that the improvement was substantial, i.e., worth having.

These approaches ignore this Court's observation that "[w]e know of no other enumerated constitutional right whose *core protection* has been subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634 (emphasis added). The Court warned against allowing judges to "decide on a case-by-case basis whether the right is really worth insisting upon." *Id.*

> A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march

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v. City of Indianapolis, 581 F.3d 460, 463 (7th Cir. 2009)) (alterations in original)) ("*Skoien I*"), *vacated*, 614 F.3d 638 (7th Cir. 2010) (en banc) ("*Skoien II*"), *cert. denied*, 131 S. Ct. 1674 (2011); *United States v. Williams*, 616 F.3d 685, 692-94 (7th Cir.) (balancing burden against benefits of keeping weapons out of hands of violent felons), *cert. denied*, 131 S. Ct. 805 (2010); *Nordyke v. King*, ___ F.3d ___, 2011 WL 1632063, at *5-6 (9th Cir. May 2, 2011) ("[W]e hold that only regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment."); *United States v. Reese*, 627 F.3d 792, 802-05 (10th Cir. 2010) (balancing burden on right to keep and bear arms against benefit of keeping weapons out of hands of people subject to protective orders), *cert. denied*, 131 S. Ct. 2476 (2011); *see also Richards v. County of Yolo*, 2011 WL 1885641, at *3 (E.D. Cal. May 16, 2011) (interpreting *Nordyke* to mean that "if the regulation does not place a substantial burden to an individual's fundamental [Second Amendment] right, then rational basis review applies").

> through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different.

Heller, 554 U.S. at 634-35 (internal citation omitted).

The lower federal courts have also taken the "core protection" of self-defense in the home described in *Heller* to support application of the balancing test that *Heller* rejects. Courts applying intermediate scrutiny generally justify this approach by finding that whatever situation is currently being evaluated is outside the core of the Second Amendment right identified in *Heller*. *See, e.g.*, *Masciandaro*, 638 F.3d at 471 ("While we find the application of strict scrutiny important to protect the *core right* of the self-defense of a law-abiding citizen in his home . . . we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home." (internal quotation omitted, emphasis added)); *Skoien I*, 587 F.3d at 812 ("The Second Amendment challenge in this case is several steps removed from the *core constitutional right* identified in *Heller*." (emphasis added)); *Chester*, 628 F.3d at 682-83 ("[W]e believe [Chester's] claim is not within the *core right* identified in *Heller* . . . ." (emphasis added)).

By labeling whatever right is at issue "outside the core," courts have justified use of the balancing test to uphold the regulations they have considered. Only this Court can stop this weakening of the historical right to keep and bear arms.

B. State Appellate Courts Have Applied a Rational Basis Test to Uphold Weapons Regulations.

Despite this Court's explicit rejection of a rational basis analysis of regulations that impact the Second Amendment in *Heller*, a number of state courts of appeal are applying what has been called the "reasonable regulation" standard. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007). Under the reasonable regulation analysis of gun control regulations, courts consider the question of whether the challenged law is a reasonable method of regulating the right to bear arms. "So long as a gun control measure is 'not a total ban on the right to bear arms,' the courts will consider it a mere regulation of the right" and uphold those regulations. *Id.* at 717 (footnotes omitted). The courts of appeals in the District of Columbia, California, Illinois, Maryland, Massachusetts, New York, and New Jersey have all applied this standard to uphold various weapons regulations.[13]

This approach, too, is invalid under *Heller*. "Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." *Heller*, 554 U.S. at 628 n.27. The sheer number and variety of cases that analyze Second Amendment right issues and uphold every law they

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[13] *See, e.g.*, *Little*, 989 A.2d at 1101 (*Heller* limited to ban on gun possession in home); *Flores*, 169 Cal. App. 4th at 576-77 (same); *Dawson*, 403 Ill. App. 3d at 510 (same); *Williams*, 417 Md. at 496 (same); *Powell*, 459 Mass. at 588-89 (same); *Perkins*, 62 A.D.3d at 1161 (same); *Crespo v. Crespo*, 201 N.J. 207, 210 (N.J. 2010) (upholding law allowing seizure of defendant's firearms after finding of domestic violence because "the right to possess firearms clearly may be subject to reasonable limitations").

consider demonstrate that lower courts have—and will continue to—apply deferential standards that have already been rejected by the Court.

C. Some Courts Have Used the "Presumptively Lawful" Measures Identified in *Heller* to Avoid Any Meaningful Analysis of a Weapon Regulation Under Any Standard of Review.

Other courts have attempted to determine the scope of the right by relying on and analogizing to what has come to be known in the lower courts and the academic community as the "*Heller* dicta":

> [N]othing 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 buildings, or laws imposing conditions and qualifications on the commercial sale of arms.
>
> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S. at 179, 59 S. Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Heller, 554 U.S. at 626-27 (footnote omitted).

Since *Heller*, a number of courts have embraced the caution that these presumptively lawful regulatory measures are examples: "our list does not purport to be exhaustive." *Id.* at 627 n.26. Specifically, the Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, and state appellate courts in California, Florida, Georgia, Kansas, Massachusetts, Ohio, and Virginia, have, in some circumstances, simply identified a "safe harbor" within the *Heller* dicta to

uphold a particular firearm regulation without any true analysis of the law.[14] Although this approach may appropriately dispense of challenges to bans on gun possession by felons, it does not make sense in a case involving a prohibition such as the one at issue here. *Cf. United States v. McCane*, 573 F.3d 1037, 1050 (10th Cir. 2009) (Tymkovich, J., concurring) (wondering "whether Second Amendment law would have been better served if the regulations *Heller* addressed in dicta had been left to later cases").

D. Other Courts Have Attempted to Apply a Historical Analysis to Determine Whether Certain Weapons Regulations Pass Constitutional Muster.

A final group of courts have performed a hybrid historical analysis to determine if a limitation is one that the Founders would have understood to be part of the right to keep and

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[14] *See United States v. Ross*, 323 F. App'x 117, 120 (3d Cir. 2009) ("dangerous and unusual weapons"); *United States v. Anderson*, 559 F.3d 348, 352 n.6 (5th Cir. 2009) (gun possession by felons); *Dorosan*, 350 F. App'x at 875 ("sensitive places"); *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009) (weapons "not typically possessed by law-abiding citizens"); *United States v. Khami*, 362 F. App'x 501, 507-08 (6th Cir. 2010) (gun possession by felons); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (gun possession by drug abusers); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (weapons "in common use by law-abiding citizens"); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (gun possession by domestic violence misdemeanants); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (gun possession by felons); *United States v. Richard*, 350 F. App'x 252, 260 (10th Cir. 2009) (gun possession by drug abusers); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (gun possession by domestic violence misdemeanants); *People v. Delacy*, 192 Cal. App. 4th 1481, 1492 (Cal. Ct. App. 2011) (gun possession by violent misdemeanants); *Flores*, 169 Cal. App. 4th at 574-76 (gun possession by violent misdemeanants and concealed weapons); *Epps v. State*, 55 So. 3d 710, 711 (Fla. Dist. Ct. App. 2011) (gun possession by felons); *Spencer v. State*, 286 Ga. 483, 484 (Ga. 2010) (same); *Knight*, 44 Kan. App. 2d at 685-86 (concealed weapons); *Commonwealth v. McCollum*, 79 Mass. App. Ct. 239, 258 (Mass. App. Ct. 2011) (licensing requirements); *State v. Morris*, 2009 WL 3807159, at *12 (Ohio Ct. App. Nov. 13, 2009) (gun possession by felons); *DiGiacinto v. The Rector and Visitors of George Mason Univ.*, 281 Va. 127, 134-37 (Va. 2011) ("sensitive places").

bear arms.[15] This analysis is consistent with *Heller*'s historical approach and the Court's statement that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them . . . ." *Heller*, 554 U.S. at 634-35. In a similar context, this Court undertook a historical analysis to determine whether the history and purpose of the Petition Clause of the First Amendment, which also enshrined a preexisting right, supports imposition of liability against a government employer. *Borough of Duryea v. Guarnieri*, No. 09-1476, slip op. at 14 (U.S. June 20, 2011) ("Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty."); *see also* slip op. at 2 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The reference to 'the right of the people' indicates that the Petition Clause was intended to codify a pre-existing individual right, which means that we must look to historical practice to determine its scope. *See District of Columbia v. Heller*, 554 U. S. 570, 579, 592 (2008).").

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[15] *See United States v. Rene E.*, 583 F.3d 8, 11-16 (1st Cir. 2009) (gun possession by juveniles); *United States v. Barton*, 633 F.3d 168, 172-75 (3d Cir. 2011) (gun possession by felons); *United States v. Pruess*, 2011 WL 893793, at *1 (4th Cir. Mar. 14, 2011) (per curiam) (vacating and instructing district court to conduct analysis of ban on gun possession by felons); *United States v. Portillo-Munoz*, ___ F.3d ___, 2011 WL 2306248, No. 11-10086, slip op. at 3-8 (5th Cir. June 13, 2011) (gun possession by illegal aliens); *Skoien II*, 614 F.3d at 642-44 (gun possession by domestic violence misdemeanants); *United States v. Yancey*, 621 F.3d 681, 682-87 (7th Cir. 2010) (per curiam) (gun possession by drug abusers); *United States v. Vongxay*, 594 F.3d 1111, 1114-18 (9th Cir. 2010) (gun possession by felons); *State v. Sieyes*, 168 Wash. 2d 276, 294-96 (Wash. 2010) (gun possession by juveniles).

Given the number and types of analyses that have been employed to consider constitutional challenges to regulations that may implicate a Second Amendment right, this Court should provide instruction to the lower courts on the proper framework for analysis.

CONCLUSION

The right to keep and bear arms in self-defense does not disappear when law-abiding citizens leave their homes. Without this Court's intervention and instruction, lower courts will continue to refuse to recognize the full scope of the self-defense right to keep and bear arms that is protected by the Constitution, leaving it confined to one's home. In order to protect this fundamental right, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 22, 2011

APPENDIX TO THE PETITION

H

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Sean MASCIANDARO, Defendant–Appellant.

No. 09–4839.
Argued: Dec. 8, 2010.
Decided: March 24, 2011.

Background: Defendant was convicted in the United States District Court for the Eastern District of Virginia, T.S. Ellis, III, Senior District Judge, 648 F.Supp.2d 779, of carrying or possessing a loaded handgun in a motor vehicle within a national park area, and he appealed.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:
(1) general federal savings statute preserved government's authority to prosecute defendant's pre-repeal conduct covered by prior regulation, and
(2) application of regulation to defendant did not violate his Second Amendment rights.

Affirmed.

Niemeyer, Circuit Judge, wrote separately as to Part III.B.

Wilkinson, Circuit Judge, wrote the opinion for the court as to Part III.B, in which Duffy, Senior District Judge, sitting by designation, joined.

West Headnotes

[1] Weapons 406 ⚿108

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k108 k. Retroactive operation. Most Cited Cases

Although prior regulation prohibiting carrying or possessing a loaded handgun in a motor vehicle within a national park was superseded post-arrest by a more lenient regulation that provided for state law to govern the legality of defendant's actions, general federal savings statute preserved government's authority to prosecute defendant's pre-repeal conduct covered by prior regulation. 1 U.S.C.A. § 109; 36 C.F.R. § 2.4(b).

[2] Criminal Law 110 ⚿15

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k15 k. Repeal. Most Cited Cases

Unless a repealing statute explicitly provides otherwise, the repeal of a criminal statute neither abates the underlying offense nor affects its attendant penalties with respect to acts committed prior to repeal.

[3] Weapons 406 ⚿107(2)

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k107 Construction
406k107(2) k. Right to bear arms in general. Most Cited Cases

Second Amendment provides a fundamental right to possess firearms for self-defense within the home. U.S.C.A. Const.Amend. 2.

[4] Weapons 406 ⚿107(2)

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k107 Construction
406k107(2) k. Right to bear arms in

general. Most Cited Cases

Intermediate scrutiny applied when reviewing a Second Amendment challenge to regulation prohibiting carrying or possessing a loaded handgun in a motor vehicle within a national park, and therefore regulation would be valid if government could demonstrate that it was reasonably adapted to a substantial governmental interest. U.S.C.A. Const.Amend. 2; 36 C.F.R. § 2.4(b).

[5] Weapons 406 ⚿106(3)

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k106 Validity
406k106(3) k. Violation of right to bear arms. Most Cited Cases

Application of regulation prohibiting carrying or possessing a loaded handgun in a motor vehicle within a national park to defendant did not violate his Second Amendment rights; the narrow regulatory prohibition was reasonably adapted to substantial governmental interest in providing for the safety of individuals who visit and make use of the national parks. U.S.C.A. Const.Amend. 2; 36 C.F.R. § 2.4(b).

[6] Constitutional Law 92 ⚿667

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)1 In General
92k667 k. Third-party standing in general. Most Cited Cases

A person to whom a statute was constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court.

***459 ARGUED:** Antigone Gabriella Peyton, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, D.C., for Appellant. Jeffrey Zeeman, Office of the United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Michael S. Nachmanoff, Federal Public Defender, Rachel S. Martin, Assistant Federal Public Defender, Office of the Federal Public Defender, Alexandria, Virginia; Matthew Levy, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, D.C., for Appellant. Neil H. MacBride, United States Attorney, Alexandria, Virginia, for Appellee.

Before WILKINSON and NIEMEYER, Circuit Judges, and PATRICK MICHAEL DUFFY, Senior United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion for the court, in which Judge WILKINSON and Senior Judge DUFFY joined except as to Part III.B. Judge WILKINSON wrote the opinion for the court as to Part III.B, in which Senior Judge DUFFY joined. Judge NIEMEYER wrote a separate opinion as to Part III.B.

OPINION

NIEMEYER, Circuit Judge, writing for the court except as to Part III.B:

Sean Masciandaro was convicted of carrying or possessing a loaded handgun in a motor vehicle within a national park area, in violation of 36 C.F.R. § 2.4(b). He challenges his conviction on two grounds: (1) ***460** that he was improperly charged under § 2.4(b), because after he was arrested but before he was tried, that regulation was superseded by a more lenient regulation that provided for state law to govern the legality of his actions; or alternatively (2) that section 2.4(b) violates the Second Amendment as applied to him and facially.

Because we conclude that the holding in *United States v. Hark,* 320 U.S. 531, 64 S.Ct. 359, 88 L.Ed. 290 (1944), as well as the general federal savings statute, 1 U.S.C. § 109, denies defendants an automatic entitlement to the benefit of post-ar-

rest changes in the law, we find that Masciandaro was properly tried under the law as it existed on the date of his arrest.

On Masciandaro's constitutional challenge, we conclude that Masciandaro's Second Amendment claim to a right to carry or possess a loaded handgun for self-defense is assessed under the intermediate scrutiny standard, and, even if his claim implicates the Second Amendment, a question we do not resolve here, it is defeated by applying that standard. We conclude that the government has amply shown that the regulation reasonably served its substantial interest in public safety in the national park area where Masciandaro was arrested. Thus, we hold that 36 C.F.R. § 2.4(b) is constitutional as applied to Masciandaro's conduct.

Although Masciandaro has also mounted a separate facial challenge to § 2.4(b), we conclude that this challenge is foreclosed by our determination that the regulation is constitutional on an as-applied basis.

Accordingly, we affirm.

I

On June 5, 2008, at about 10:00 a.m., United States Park Police Sergeant Ken Fornshill, who was conducting a routine patrol of Daingerfield Island, near Alexandria, Virginia, observed a Toyota hatchback parked illegally. The vehicle was parked parallel to the side of the parking lot, in violation of the sign indicating "Front End Parking Only." As Sgt. Fornshill approached the vehicle, he saw Masciandaro and his girlfriend sleeping inside and awoke them by tapping on the window. He asked Masciandaro for his driver's license, which Masciandaro produced from a messenger bag located in the vehicle's rear compartment. While Masciandaro was retrieving his license, Sgt. Fornshill noticed a large "machete-type" knife protruding from underneath the front seat, prompting him to ask Masciandaro whether there were any other weapons in the vehicle. When Masciandaro replied that he had a loaded handgun in the same bag, Sgt. Fornshill placed Masciandaro under arrest. Following a search, Fornshill uncovered a loaded 9mm Kahr semiautomatic pistol, and at the police station, Masciandaro produced an expired Virginia concealed weapon carry permit.

Daingerfield Island, where Masciandaro was arrested, is not an island but an outcropping of land extending into the Potomac River near Alexandria. The area, which is managed by the National Park Service, is used for recreational purposes and includes a restaurant, marina, biking trail, wooded areas, and other public facilities.

Masciandaro was charged with "carrying or possessing a loaded weapon in a motor vehicle" within national park areas, in violation of 36 C.F.R. § 2.4(b), and failing to comply with a traffic control device (the parking sign), in violation of 36 C.F.R. § 4.12. These regulations were promulgated by the Secretary of the Interior under 16 U.S.C. § 3, which authorizes the Secretary to "make and publish such rules and regulations as he may deem necessary ***461** or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." Violations of these regulations are punishable by a fine of not more than $500 or imprisonment not exceeding six months, or both. *Id*.

At trial, Masciandaro explained that he carried the handgun for self-defense, as he frequently slept in his car while traveling on business, and that while traveling, he often kept cash, a laptop computer, and other valuables on hand. The place where Masciandaro was arrested on June 5, 2008, was 20 miles from his residence in Woodbridge, Virginia.

On April 30, 2008, slightly more than a month before Masciandaro was arrested, the Secretary of the Interior proposed a revision to 36 C.F.R. § 2.4, which was designed to harmonize the regulation of firearms in national parks with that by the States. *See* General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife

Service, 73 Fed. Reg. 23,388 (Apr. 30, 2008). The proposal advocated adding a new provision to § 2.4 which would allow individuals to possess loaded, operable firearms within national parks whenever it was legal to do so under the laws of the state in which the park was located, so long as the individual was not otherwise prohibited from doing so by federal law. *Id*. On December 10, 2008—six months after Masciandaro's arrest but less than two months before his trial—the Secretary published a final version of the regulation, to take effect January 9, 2009, which provided:

> Notwithstanding any other provision in this Chapter, a person may possess, carry, and transport concealed, loaded, and operable firearms within a national park area in accordance with the laws of the state in which the national park area, or that portion thereof, is located, except as otherwise prohibited by applicable Federal law.

73 Fed. Reg. 74,966, 74,971–72 (codified at 36 C.F.R. § 2.4(h)).

When 36 C.F.R. § 2.4(h) took effect, Masciandaro had not yet been tried, and he promptly filed a motion with the magistrate judge to dismiss the charges against him, arguing that § 2.4(h) had effectively superseded § 2.4(b). He also argued that, in any event, § 2.4(b) violated the Second Amendment, as applied to him and facially. The magistrate judge denied the motion to dismiss, and, on February 3, 2009, found Masciandaro guilty on both counts. The judge imposed a $150 fine on the handgun violation and a $50 fine on the parking violation. Masciandaro appealed only the conviction on the handgun charge to the district court.

On March 19, 2009, while Masciandaro's appeal to the district court was pending, the District Court for the District of Columbia issued a preliminary injunction, blocking enforcement of newly promulgated § 2.4(h), because the Department of the Interior had failed to conduct the required environmental impact analysis. *See Brady Campaign to Prevent Gun Violence v. Salazar,* 612 F.Supp.2d 1 (D.D.C.2009). Responding to this ruling, Congress promptly added language to an unrelated piece of legislation, which in essence reinstated § 2.4(h) by statute. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit CARD Act"), codified at 16 U.S.C. § 1a–7b(b). Section 512 of the Credit CARD Act provides:

> The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Park System or the National Wildlife Refuge System if—
>
> ***462** (1) the individual is not otherwise prohibited by law from possessing the firearm; and
>
> (2) the possession of the firearm is in compliance with the law of the State in which the unit of the National Park System or the National Wildlife Refuge System is located.

16 U.S.C. § 1a–7b(b).

On appeal, the district court rejected Masciandaro's argument for application of § 2.4(h) in lieu of § 2.4(b) and affirmed the magistrate judge's ruling. *United States v. Masciandaro,* 648 F.Supp.2d 779 (E.D.Va.2009). Relying mainly on *United States v. Hark,* 320 U.S. 531, 64 S.Ct. 359, 88 L.Ed. 290 (1944), the court held that it was proper to try Masciandaro under the law as it existed at the time of his arrest. *Id*. at 784–85. Addressing the constitutionality of § 2.4(b), the court did not decide what level of scrutiny to apply but held that even applying strict scrutiny, the provision was narrowly tailored to serve the compelling governmental interest in public safety and thus was constitutional on an as-applied basis. *Id*. at 788–91. The court rejected Masciandaro's facial challenge because he had not "demonstrat[ed] *from actual fact* " that a substantial number of instances exist in which § 2.4(b) could not be applied constitutionally. *Id*. at 792–94.

From the judgment of the district court, dated August 26, 2009, Masciandaro filed this appeal.

II

[1] Masciandaro contends first that he should not have been prosecuted under 36 C.F.R. § 2.4(b) because that provision was effectively superseded first by 36 C.F.R. § 2.4(h), a more permissive regulation making state law applicable, and then by § 512 of the Credit CARD Act, which effectively codified § 2.4(h). Section 2.4(h) was thus in effect when Masciandaro was tried before the magistrate judge and § 512 of the Credit CARD Act is in effect now. He maintains that a court must "apply the law in effect at the time it renders its decision." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)).

Masciandaro does not dispute the fact that on June 5, 2008, he carried or possessed a loaded weapon in a motor vehicle within a national park. Nor does he dispute the fact that at the time he was arrested, 36 C.F.R. § 2.4(b) was in effect and prohibited such conduct. The question that arises is whether legal developments postdating his arrest undermined the government's ability to prosecute him under § 2.4(b).

The district court applied the Supreme Court's decision in *United States v. Hark*, 320 U.S. 531, 64 S.Ct. 359, 88 L.Ed. 290 (1944), to reject Masciandaro's argument. In *Hark*, the defendants violated beef pricing regulations promulgated during World War II pursuant to the Emergency Price Control Act of 1942. But after the defendants committed their acts and before they were arrested, the regulations were revoked. The Supreme Court nonetheless rejected the defendants' argument that they were entitled to the benefit of the change in the law, holding that "revocation of [a] regulation d[oes] not prevent indictment and conviction for violation of its provisions at a time when it remained in force." 320 U.S. at 536, 64 S.Ct. 359. As it explained:

> The reason for the common law rule that the repeal of a statute ends the power to prosecute for prior violations is absent in the case of a prosecution for violation of a regulation issued pursuant to an ***463** existing statute which expresses a continuing policy, to enforce which the regulation was authorized. Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation.

Id. (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936)) (footnote omitted). The Court held that because the Emergency Price Control Act had remained in effect, the fact that the beef pricing regulations promulgated under the Act had been revoked did not preclude the prosecution for an offense that occurred while the regulations were in force.

As in *Hark*, the regulation at issue here was promulgated pursuant to an enabling statute that permitted the Secretary of the Interior to issue rules in furtherance of a specific objective. In *Hark*, the Emergency Price Control Act authorized the Price Administrator to establish "by regulation ... maximum prices" of a variety of goods so as to prevent profiteering, *see* Emergency Price Control Act of 1942, §§ 1(a), 2(a), 56 Stat. 23, 23–24 (1942), whereas the enabling statute here, 16 U.S.C. § 3, provided the Secretary of the Interior with the power to issue regulations "necessary ... for the use and management of the parks ... under the jurisdiction of the National Parks Service." Both statutes made it a crime to violate the regulations, and both set forth specific penalties for violations. *Compare* Emergency Price Control Act of 1942, § 4(a), 56 Stat. 23, 28 ("It shall be unlawful ... for any person to sell or deliver any commodity ... in violation of any regulation or order under section 2"), and *id.* § 205(a)-(b), 56 Stat. 23, 33 (authorizing fines of up to $5,000 or imprisonment for up to two years for willful violations), *with* 16 U.S.C. § 3 ("[A]ny viol-

ation of any of the rules and regulations authorized by this [Act] shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months, or both ...").

Masciandaro claims that *Hark* is distinguishable because 16 U.S.C. § 3 does not "contain substantive provisions directly restricting or prohibiting certain conduct," as did the Emergency Price Control Act. This argument, however, is unpersuasive because it treats what are actually differences in degree as differences in kind. Both laws attach specific criminal penalties to actions that violate regulations issued by an Executive Branch official. They differ, however, in the specificity with which they describe the offending conduct—the Emergency Price Control Act made it unlawful to *sell or deliver commodities* in violation of a regulation's terms, as specified by the Price Administrator, while 16 U.S.C. § 3 makes it unlawful to violate a regulation adopted *for the use and management of national parks,* as specified by the Secretary of the Interior. Thus, both create an offense and both depend on implementing regulations to "call[ ] the statutory [offense] into play." *Hark,* 320 U.S. at 536, 64 S.Ct. 359. We thus conclude, as did the district court, that Masciandaro's effort to distinguish *Hark* falls short and that *Hark* is controlling.

Masciandaro suggests that *Hark* is also distinguishable insofar as it depended on the continuing vitality of the underlying enabling statute. *See Hark,* 320 U.S. at 536, 64 S.Ct. 359 ("Revocation of [a] regulation does not repeal the statute; and though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation"). He claims that in this case, with the enactment of the Credit CARD Act, "Congress expressly ***464** withdrew the authority to enforce the superseded [National Parks Service] regulation against Mr. Masciandaro and other citizens who are similarly situated." He explains, the Credit CARD Act "states that the Secretary of the [Interior] (through the Park Police and local United States Attorneys' offices) *shall* not '*enforce any regulation* that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Parks System' if that individual is acting in conformance with state laws regulating that weapon." Thus, he argues, while *Hark* applies when a regulation, but not the authorizing statute, has been revoked, it does not apply when *both* the regulation *and* the authorizing statute have been eliminated, as, he asserts, occurred here.

While it is true that the Credit CARD Act prohibited the Secretary of the Interior from enforcing a regulation such as § 2.4(b) in certain circumstances, that Act did not modify or revoke 16 U.S.C. § 3, which authorized, and continues to authorize, the Secretary of the Interior generally to issue national park regulations that are enforceable by a fine or imprisonment or both. If we accept the argument that the Credit CARD Act somehow repealed a portion of 16 U.S.C. § 3 by implication by limiting the Secretary of the Interior's authority, the original form of the authorizing statute would nonetheless be saved under the general savings statute, 1 U.S.C. § 109, which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

This provision reversed the common-law rule, under which the repeal of a criminal law "preclude[d] punishment for acts antedating the repeal." *Landgraf,* 511 U.S. at 271, 114 S.Ct. 1483; *see also Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283, 3 L.Ed. 101 (1809) (holding that when a criminal statute expires or is repealed, "no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute").

[2] Accordingly, "unless [a] repealing statute explicitly provides otherwise, the repeal of a criminal statute neither abates the underlying offense nor affects its attendant penalties with respect to acts committed prior to repeal." *United States v. Bradley,* 455 F.2d 1181, 1190 (1st Cir.1972), *aff'd* 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973). This principle extends to criminal laws as well as to regulations which implement them. *Allen v. Grand Cent. Aircraft Co.,* 347 U.S. 535, 554–55, 74 S.Ct. 745, 98 L.Ed. 933 (1954) (interpreting the savings statute to "prevent the expiration of a ... statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, *or of regulations issued under it,* occurring before its expiration" (emphasis added)). Thus, even if it were the case that both the criminal regulation and its enabling act were found to have been repealed, the savings statute would nonetheless preserve the government's authority to prosecute pre-repeal conduct covered by the regulation. *Id.*

While Masciandaro does argue that Congress eliminated the Secretary's power to restrict firearm possession under 16 U.S.C. § 3 by enacting § 512 of the Credit CARD Act, he has not pointed to any language in § 512 "explicitly provid [ing]," ***465** as required by *Bradley,* that the savings statute does not apply. Indeed, the new law makes no mention of 1 U.S.C. § 109 or existing prosecutions. Because there is no explicit language in § 512 of the Credit CARD Act avoiding application of the savings statute, the savings statute's default rule applies. *See Bradley,* 455 F.2d at 1190. And under that rule, the government retains the ability to prosecute previous violations of 16 U.S.C. § 3 or of any "regulations issued under" that provision, such as 36 C.F.R. § 2.4(b). *Allen,* 347 U.S. at 554, 74 S.Ct. 745.

In sum, we conclude that Masciandaro was properly prosecuted under 36 C.F.R. § 2.4(b), the law applicable at the time of his arrest.

III

We now turn to Masciandaro's constitutional challenge to 36 C.F.R. § 2.4(b). Masciandaro contends that the Second Amendment, as construed by the Supreme Court in its "watershed" decision in *Dist. of Columbia v. Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), guaranteed to him the right to possess and carry weapons in case of confrontation and thus protected him from prosecution under § 2.4(b) for exercising that right in a national park area. He explains that

> [H]e travels extensively because of his small business and is frequently forced to sleep in his car while he is on the road. He has a Second Amendment right to keep a loaded handgun in the back of his car for the purpose of self-defense and defense of the valuable business property, cash, and personal property he carries with him in the car.

Masciandaro points out that his handgun is the "quintessential self-defense weapon" and that he is exactly the type of "law-abiding citizen" who is the primary intended beneficiary of the Second Amendment's protections.

The government maintains that the holding of *Heller* is inapplicable here. It argues:

> In *Heller,* the Supreme Court held that the District of Columbia law that "totally ban[ned] handgun possession in the home" and prohibit[ed] rendering any lawful firearm in the house operable for the purpose of immediate self-defense violated the Second Amendment. Because the Supreme Court's decision is limited to the possession of firearms in the home, it does not invalidate the regulation at issue, which narrowly involves only the possession of a loaded firearm in a motor vehicle on National Park Service land.

Both parties are correct, albeit incomplete, in their descriptions of the holding in *Heller,* yet both disagree on the scope of the constitutional right articulated there. Thus, in resolving Masciandaro's constitutional challenge, we will begin with a discussion of *Heller*'s holding and then proceed to address, *seriatim,* the scope of the Second Amend-

ment right to keep and bear arms; the scrutiny that is applied in determining whether a regulation of firearms in national parks is justified; the question of whether a national park is a "sensitive place" where prohibiting firearms is a presumptively lawful regulatory measure; and the application of our conclusions to Masciandaro's circumstances.

A

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

Resolving the longstanding issue whether the Second Amendment guarantees an ***466** *individual* right to keep and bear arms or a *collective* right to do so in connection with militia service, the Supreme Court in *Heller* held, based on "the historical background of the Second Amendment," that the Amendment guarantees the "pre-existing" "individual right to possess and carry weapons in case of confrontation." *Heller,* 128 S.Ct. at 2797 (emphasis omitted). Because the right predated the Constitution, the Court looked to the historical record when articulating its nature, noting that the right was secured to individuals according to " 'libertarian political principles,' not as members of a fighting force," to "protect[ ] against both public and private violence." *Id.* at 2798–99. It also observed that throughout the country's history, Americans have valued the right not only to be able to prevent the elimination of militia, but "even more important[ly], for self-defense and hunting." *Id.* at 2801.

Considering the constitutionality of a District of Columbia statute that prohibited private citizens from possessing handguns and required other legal firearms, such as long guns, to be stored in a fashion that rendered them inoperable, the Court held that the statute violated the Second Amendment, stating:

> The handgun ban amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster.
>
> * * *
>
> We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.

Heller, 128 S.Ct. at 2817–18 (internal quotation marks, footnote, and citation omitted).

But in reaching its holding, the Court did not define the outer limits of the Second Amendment right to keep and bear arms. It did point out, however, that the right was "not unlimited, just as the First Amendment's right of free speech was not." *Id.* at 2799; *see also id.* at 2816 (noting that the right was not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Illustrating this point, the Court related that a majority of the 19th-century courts that considered prohibitions on carrying concealed weapons held them to be lawful under the Second Amendment. *Id.* at 2816. It summarized:

> 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 buildings, or laws imposing conditions and qualifications on the com-

mercial sale of arms.

Id. at 2816–17. The Court explained in a footnote that it was identifying these "presumptively lawful regulatory measures only as examples." *Id.* at 2817 n. 26.

Not only did the *Heller* Court not define the outer limits of Second Amendment rights, it also did not address the level of ***467** scrutiny that should be applied to laws that burden those rights. It found it unnecessary to do so because the District of Columbia law under consideration would violate the Second Amendment "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 2817.

Two years after deciding *Heller,* the Supreme Court revisited the Second Amendment in *McDonald v. City of Chicago,* —— U.S. ——, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), holding that the Second Amendment was applicable to the States by incorporation into the Fourteenth Amendment. Explaining *Heller* further, the *McDonald* Court stated that "self-defense is the central component" of the individual right to keep and bear arms and that this right is "fundamental." *Id.* at 3036, 3038 n. 17 (plurality opinion) (emphasis omitted). *McDonald* also reaffirmed that Second Amendment rights are far from absolute, reiterating that *Heller* had "assur[ed]" that many basic handgun regulations were presumptively lawful. In a similar vein, the *McDonald* Court noted that the doctrine of "incorporation does not imperil every law regulating firearms." *Id.* at 3047.

[3] The upshot of these landmark decisions is that there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.

NIEMEYER, Circuit Judge, writing separately on this Part III.B:

B

Invoking *Heller*'s direct holding, Masciandaro argues that because he regularly slept in his car, as much as three to five days a week while traveling on business, his arrest for carrying or possessing a handgun ran afoul of *Heller*'s core protection of the right "to use arms in defense of hearth and home." *Heller,* 128 S.Ct. at 2821. Alternatively, he contends that if his car is found not to be his home, his arrest nonetheless violated a more general right to carry or possess a handgun outside of the home for self-defense.

I would reject Masciandaro's argument that his car, even when he slept in it frequently, was his "home" so as to fall within the core protection articulated in *Heller.* In the circumstances where Masciandaro had a residence in Woodbridge, Virginia, which was only 20 miles from where he was found sleeping by Sgt. Fornshill, and the place where he was found sleeping was a *public* parking place, we need not explore further the factors essential to making a place a person's home for *Heller*'s core protection. I would conclude, in the circumstances of this case, that Masciandaro's car was not his home.

Masciandaro also argues that he possessed a constitutional right to possess a loaded handgun for self-defense outside the home. I would agree that there is a plausible reading of *Heller* that the Second Amendment provides such a right, at least in some form.

The *Heller* Court began by noting that the right predated the Constitution and always was an important part of individual freedom—one of "the fundamental rights of Englishmen." *Heller,* 128 S.Ct. at 2798. It found that the right included the right to "protect[ ] [oneself] against both *public* and private violence," *id.* at 2799 (emphasis added), thus extending the right in some form to wherever a person could become exposed to public or private violence. *See also id.* at 2797 (finding that the Second Amendment's operative clause ***468**

"guarantee[s] the individual right to possess and carry weapons in case of confrontation"). Because "self-defense has to take place wherever [a] person happens to be," it follows that the right extends to public areas beyond the home. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda,* 56 U.C.L.A. L. Rev. 1443, 1515–18 (2009) [hereinafter " *Implementing the Right for Self–Defense* "]. Moreover, the right to keep and bear arms was found to have been understood to exist not only for self-defense, but also for membership in a militia and for hunting, *id.* at 2801, neither of which is a home-bound activity. Indeed, one aspect of the right, as historically understood, was "to secure the ideal of a *citizen* militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* at 2801 (emphasis added).

Consistent with the historical understanding of the right to keep and bear arms outside the home, the *Heller* Court's description of its actual holding also implies that a broader right exists. The Court stated that its holding applies to the home, where the need "for defense of self, family, and property *is most acute,*" *Heller,* 128 S.Ct. at 2817 (emphasis added), suggesting that some form of the right applies where that need is not "most acute." Further, when the Court acknowledged that the Second Amendment right was not unlimited, it listed as examples of regulations that were presumptively lawful, those "laws forbidding the carrying of firearms in sensitive places such as *schools and government buildings*." *Id.* If the Second Amendment right were confined to self-defense *in the home,* the Court would not have needed to express a reservation for "sensitive places" outside of the home.

What the *Heller* Court describes as the general preexisting right to keep and bear arms for participation in militias, for self-defense, and for hunting is thus not strictly limited to the home environment but extends in some form to wherever those activities or needs occur, just as other Amendments apply generally to protect other individual freedoms. But I would not conclude that the right is all-encompassing such that it extends to all places or to all persons, as the Supreme Court has explicitly recognized. *See Heller,* 128 S.Ct. at 2816–17. The complex question of where it may apply outside the home, and what persons may invoke it, is, however, not one that we need to fully answer, because it appears sufficiently clear that, *in this case,* Masciandaro's claim to self-defense—asserted by him as a law-abiding citizen sleeping in his automobile in a public parking area—does implicate the Second Amendment, albeit subject to lawful limitations. And any analysis of it, therefore, requires review of the government's interest in regulating firearms through 36 C.F.R. § 2.4(b) under the appropriate level of scrutiny, which we now address.[FN*]

FN* In his opinion for the court, my good colleague concludes that we need not decide whether Masciandaro's Second Amendment rights were implicated outside the home. But, I respectfully note, this is not the type of case where constitutional avoidance is appropriate. First, we are confronted directly with the contention that 36 C.F.R. § 2.4(b) violated Masciandaro's Second Amendment right to possess a firearm for self-defense purposes, and, having found that § 2.4(b) applies, we cannot duck the issue. *See Bowers v. NCAA,* 475 F.3d 524, 550 (3d Cir.2007) (observing that the court was "squarely presented with [a] constitutional question" and thus "obliged to enter the fray," despite the "prudential concerns" expressed by Justice Brandeis' concurrence in *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936)). Applying intermediate scrutiny to reject Masciandaro's claim does not avoid the constitutional question—it presumes the existence of the constitutional right and conducts a constitutional analysis to defeat it. As I have written, I would acknowledge that Masciandaro's claim, in the particular

circumstances of this case, implicates the Second Amendment, leading us to reject the claim under the intermediate scrutiny standard.

> Second, I believe that application of the broader Second Amendment right discussed in *Heller* to factual settings arising outside the home involves precisely the kind of "difficult issue[ ]" the Supreme Court prefers to "mature through full consideration by the courts of appeals." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n. 26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977); *see United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Thus, while determining when and where the Second Amendment applies is every bit as complex as Judge Wilkinson suggests, I feel it both necessary and important to address the circumstances presented here.

***469** NIEMEYER, Circuit Judge, writing for the court:

C

[4] Masciandaro argues that § 2.4(b) should be analyzed under strict scrutiny, because at the time of his arrest, he was a law-abiding citizen who was simply seeking to exercise his "fundamental" right to self-defense.

Without responding to Masciandaro's argument directly, the government asserts that § 2.4(b) satisfies the strict scrutiny standard, as it is narrowly tailored to advance a compelling government interest in public safety. In making this argument, however, we do not understand the government to be taking a specific position on the level of scrutiny to apply.

In *Heller*, the Supreme Court expressly avoided deciding what level of scrutiny should be applied when reviewing a law burdening the right to keep and bear arms, *see Heller*, 128 S.Ct. at 2817, 2821, because it concluded that the District of Columbia's handgun ban under consideration before it "would fail constitutional muster" "[u]nder *any* of the standards of scrutiny [traditionally] applied to enumerated constitutional rights," *id.* at 2817–18 (emphasis added). The Court did, however, rule out a rational basis review, because that level of review "would be redundant with the separate constitutional prohibitions on irrational laws." *Id.* at 2817 n. 27. Moreover, by listing several "presumptively lawful regulatory measures," *id.* at 2816–17 & n. 26, the Court provided a hint as to the types of governmental interests that might be sufficient to withstand Second Amendment challenges, as well as the contexts in which those interests could be successfully invoked.

We have held that intermediate scrutiny should be applied when reviewing a Second Amendment challenge to 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by a person convicted of a misdemeanor crime of domestic violence. *United States v. Chester*, 628 F.3d 673, 677 (4th Cir.2010). In *Chester*, officers searching Chester's home in West Virginia uncovered a 12–gauge shotgun and a 9mm handgun, both of which Chester was prohibited from possessing under § 922(g)(9) because he had a prior misdemeanor conviction for domestic violence. In response to Chester's challenge, we concluded that the scope of the Second Amendment extended to Chester's activity in possessing firearms in the home for self-defense and that the burden on possession of the firearms imposed by § 922(g)(9) was subject to intermediate scrutiny. We explained:

> Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue***470** of Chester's criminal history as a domestic violence misdemeanant. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated per-

sons.

Id. at 682–83; *see also United States v. Marzzarella,* 614 F.3d 85, 97 (3d Cir.2010) (applying intermediate scrutiny under the Second Amendment to 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers).

In the case before us, Masciandaro was a law-abiding citizen at the time of his arrest, without any criminal record, whereas in *Chester,* the defendant was a domestic violence misdemeanant. On the other hand, Chester was in his home, where the core *Heller* right applies, whereas Masciandaro was in a public park. These different contexts might call for different judicial approaches. *See United States v. Yancey,* 621 F.3d 681, 683 (7th Cir.2010). Indeed, as has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented. Under such an approach, we would take into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation. *See United States v. Skoien,* 587 F.3d 803, 809 (7th Cir.2009), *vacated,* 614 F.3d 638 (7th Cir.2010) (en banc), *pet. for cert. filed,* No. 10–7005 (U.S. Oct. 12, 2010). As we stated in *Chester:*

> The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.

Chester, 628 F.3d at 682 (quoting *Skoien,* 587 F.3d at 813–14).

As we observe that any law regulating the content of speech is subject to strict scrutiny, *see, e.g., United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), we assume that any law that would burden the "fundamental," core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense. *See Heller,* 128 S.Ct. at 2816 (noting 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"). Since historical meaning enjoys a privileged interpretative role in the Second Amendment context, *see id.* at 2816; *Skoien,* 587 F.3d at 809, this longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable. Indeed, one of the principal cases relied upon in *Heller* upheld a state concealed carry ban after applying review of a decidedly less-than-strict nature. *See Nunn v. State,* 1 Ga. 243, 249 (1846) ("But a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as ***471** is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution").

Were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to "prevent[ ] armed mayhem" in public places, *see Skoien,* 614 F.3d at 642, and depriving them of "a variety of tools for combating that problem," *Heller,* 128 S.Ct. at 2822. While we find the applic-

ation of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home ("where the need for defense of self, family, and property is most acute," *Heller,* 128 S.Ct. at 2817), we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home. Accordingly, we hold that 36 C.F.R. § 2.4(b) will survive Masciandaro's as-applied challenge if it satisfies intermediate scrutiny— *i.e.,* if the government can demonstrate that § 2.4(b) is reasonably adapted to a substantial governmental interest. *See Chester,* 628 F.3d at 683; *cf. Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (applying intermediate scrutiny to content-neutral time, place, and manner restrictions on speech); *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (applying intermediate scrutiny to commercial speech in light of its "subordinate position in the scale of First Amendment values").

D

Perhaps to avoid being required to carry any burden to justify its firearms regulations in national parks, which are properties owned and managed by the government, the government contends that 36 C.F.R. § 2.4(b) is a law regulating firearms in "sensitive places," as identified in *Heller,* 128 S.Ct. at 2816–17, and therefore is *presumptively* constitutional, *see id.* at 2817 n. 26. Arguing that Daingerfield Island is a sensitive place, the government states that

> a large number of people, including children, congregate in National Parks for recreational, educational and expressive activities. Park land is not akin to a gun owner's home and is far more analogous to other public spaces, such as schools, municipal parks, governmental buildings, and appurtenant parking lots, where courts have found firearms restrictions to be presumptively reasonable. Furthermore, as the district court noted, the locations within the National Parks where motor vehicles travel are even more sensitive, given that they are extensively regulated thoroughfares frequented by large numbers of strangers, including children.

It argues that in these circumstances, the law is presumptively "narrowly tailored to advance the compelling government interest" in public safety.

Masciandaro contends that the parking lot at Daingerfield Island was not a "sensitive place" like a school or governmental building, as referenced to in *Heller.* He argues:

> The George Washington Memorial Parkway, where [he] was charged with violation of the superseded [National Park Service] weapons regulation, is a public road and a major traffic thoroughfare in the Washington metropolitan area and is not a sensitive place....
>
> * * *
>
> There is a patchwork of regulations that allow people to use and possess weapons on NPS land, including parkways and ***472** remote forests and parks across the United States. Those regulations reflect the [Department of Interior's] determination that NPS land is not sensitive, as a general matter. Indeed, the very same NPS regulation [36 C.F.R. § 2.4] that prohibits possession of loaded weapons in motor vehicles indicates that it is lawful to hunt with weapons, use them for target practice, have them in residential dwellings, use them for research activities, and carry them for protection in "pack trains" or on trail rides, all on NPS land.

(*Citing* 73 Fed. Reg. 74,966, 74,971 (Dec. 10, 2008)). Masciandaro points out that the National Park Service itself "has explicitly distinguished between the sorts of 'sensitive places' mentioned in *Heller* (schools and government buildings) on one hand and national parks on the other" when it explained that "nothing in [36 C.F.R. § 2.4] shall be construed to authorize concealed carry of firearms in any *Federal facility or Federal court facility* as

defined in 18 U.S.C. § 930." 73 Fed. Reg. at 74,971 (emphasis added).

These arguments raise the question whether the "sensitive places" doctrine limits the scope of the Second Amendment or, instead, alters the analysis for its application to such places.

The Supreme Court in *Heller* did state twice that the Second Amendment's right to bear arms was "not unlimited." *See* 128 S.Ct. at 2799, 2816. For example, it stated:

> Like most rights, *the right* secured by the Second Amendment *is not unlimited*.... Although we do not take an exhaustive historical analysis today of the *full scope* of the Second Amendment, nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.

Id. at 2816–17 (emphasis added). Because of the relation between the first statement and the examples, one might conclude that a law prohibiting firearms in a sensitive place would fall *beyond the scope* of the Second Amendment and therefore would be subject to no further analysis. But the Court added a footnote to its language, calling these regulatory measures "*presumptively* lawful." *Id.* at 2817 n. 26 (emphasis added). The Court's use of the word "presumptively" suggests that the articulation of sensitive places may not be a limitation *on the scope* of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right.

The arguments of counsel about the meaning of the "sensitive places" language raise difficult questions about the scope of the Second Amendment and the scrutiny to be given to government regulations in sensitive places. In *Chester*, we explained the ambiguity inherent in these questions:

> Having acknowledged that the scope of the Second Amendment is subject to historical limitations, the Court cautioned that *Heller* should not be read "to cast doubt on longstanding prohibitions" such as ... "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." [*Heller*, 128 S.Ct.] at 2816–17. *Heller* described its exemplary list of "longstanding prohibitions" as "presumptively lawful regulatory measures," *id.* at 2817 n. 26, without alluding to any historical evidence that the right to keep and bear arms did not extend to ... the conduct prohibited by any of the listed gun regulations. It is unclear to us whether *Heller* was suggesting that "longstanding prohibitions" such as these were historically understood to be valid limitations***473** on the right to bear arms or did not violate the Second Amendment for some other reason.

Chester, 628 F.3d at 679. In *Marzzarella*, the Third Circuit labored over the same ambiguity:

> 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.

Marzzarella, 614 F.3d at 91.

We need not, however, resolve the ambiguity in the "sensitive places" language in this case, because even if Daingerfield Island is not a sensitive place, as Masciandaro argues, 36 C.F.R. § 2.4(b) still passes constitutional muster under the intermediate scrutiny standard.

E

[5] In reaching this result, we conclude first that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks, including Daingerfield Island. Although the government's interest

need not be "compelling" under intermediate scrutiny, cases have sometimes described the government's interest in public safety in that fashion. *See Schenck v. Pro–Choice Network,* 519 U.S. 357, 376, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (referring to the "significant governmental interest in public safety"); *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (commenting on the "Federal Government's compelling interests in public safety"). The government, after all, is invested with "plenary power" to protect the public from danger on federal lands under the Property Clause. *See* U.S. Const. art. IV, § 3, cl. 2 (giving Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *Utah Div. of State Lands v. United States,* 482 U.S. 193, 201, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987); *Camfield v. United States,* 167 U.S. 518, 525, 17 S.Ct. 864, 42 L.Ed. 260 (1897); *see also United States v. Dorosan,* 350 Fed.Appx. 874, 875 (5th Cir.2009) (per curiam) (noting that U.S. Postal Service is authorized under the Property Clause to exclude firearms from its property); Volokh, *Implementing the Right for Self–Defense,* 56 U.C.L.A. L. Rev. at 1529–33. As the district court noted, Daingerfield Island is a national park area where large numbers of people, including children, congregate for recreation. *See Masciandaro,* 648 F.Supp.2d at 790. Such circumstances justify reasonable measures to secure public safety.

We also conclude that § 2.4(b)'s narrow prohibition is reasonably adapted to that substantial governmental interest. Under § 2.4(b), national parks patrons are prohibited from possessing *loaded* firearms, and only then within their motor vehicles. 36 C.F.R. § 2.4(b) ("Carrying or possessing a loaded weapon in a motor vehicle, vessel, or other mode of transportation is prohibited"). We have no occasion in this case to address a regulation of unloaded firearms. Loaded firearms are surely more dangerous than unloaded firearms, as they could fire accidentally or be fired before a potential victim has the opportunity to flee. The Secretary could have reasonably concluded that, when concealed within a motor vehicle, a loaded weapon becomes even more dangerous. In this respect, § 2.4(b) is analogous to the litany of state concealed carry prohibitions specifically***474** identified as valid in *Heller*. *See* 128 S.Ct. at 2816–17.

By permitting park patrons to carry unloaded firearms within their vehicles, § 2.4(b) leaves largely intact the right to "possess and carry weapons in case of confrontation." *Heller,* 128 S.Ct. at 2797. While it is true that the need to load a firearm impinges on the need for armed self-defense, *see* Volokh, *Implementing the Right for Self–Defense,* 56 U.C.L.A. L. Rev. at 1518–19, intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question. *See United States v. Baker,* 45 F.3d 837, 847 (4th Cir.1995). Moreover, because the United States Park Police patrol Daingerfield Island, the Secretary could conclude that the need for armed self-defense is less acute there than in the context of one's home.

Accordingly, we hold that, on Masciandaro's as-applied challenge under the Second Amendment, § 2.4(b) satisfies the intermediate scrutiny standard.

IV

In view of our determination that 36 C.F.R. § 2.4(b) is constitutional under the Second Amendment as applied to Masciandaro, *a priori* we reject his facial overbreath challenge to § 2.4(b).

[6] Without entertaining the novel notion that an overbreath challenge could be recognized "outside the limited context of the First Amendment," *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095, we conclude that a person, such as Masciandaro, to whom a statute was constitutionally applied, "will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma,* 413 U.S. 601, 610,

93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). This conclusion "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 610–11, 93 S.Ct. 2908; *see also Gonzales v. Carhart,* 550 U.S. 124, 167–68, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) ("It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.... For this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication' " (quoting Richard H. Fallon, Jr., *As–Applied and Facial Challenges and Third–Party Standing,* 113 Harv. L. Rev. 1321, 1328 (2000))); *Skoien,* 614 F.3d at 645 ("[a] person to whom a statute properly applies [cannot] obtain relief based on arguments that a differently situated person might present"). Accordingly, we reject his facial challenge.

* * *

Because we conclude that 36 C.F.R. § 2.4(b) was properly applied to Masciandaro's conduct and that § 2.4(b) is constitutional as applied to the circumstances in this case, we affirm the judgment of the district court.

AFFIRMED

WILKINSON, Circuit Judge, with whom DUFFY, Senior District Judge, joins, writing for the court as to Part III.B:

We are pleased to join Judge Niemeyer's fine opinion with the exception of Part III.B. In our view it is unnecessary to explore in this case the question of whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home.

***475** This case underscores the dilemma faced by lower courts in the post- *Heller* world: how far to push *Heller* beyond its undisputed core holding. On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself. *See Williams v. State,* 417 Md. 479, 10 A.3d 1167, 1177 (2011) ("If the Supreme Court, in [*McDonald*'s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly."); *see also Sims v. United States,* 963 A.2d 147, 150 (D.C.2008).

There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that "self-defense has to take place wherever [a] person happens to be," Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. Rev. 1443, 1515 (2009), appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. And even that may not address the place of any right in a private facility where a public officer effects an arrest. The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.

There is no such necessity here. We have no reason to expound on where the *Heller* right may or may not apply outside the home because, as Judge Niemeyer ably explains, intermediate scrutiny of any burden on the alleged right would plainly lead the court to uphold the National Park Service regulation.

The trend toward constitutional avoidance seems, finally, to be taking hold. *Ashwander,* at long last, is back. *See Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The seminal case seems to be *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), which cut back on *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), and relieved the circuit courts of the need and burden of deciding constitutional questions in cases that could be resolved on nar-

rower grounds. Just as the qualified immunity inquiry in that case could assume arguendo the violation of a constitutional right, so too can the application of intermediate scrutiny in this case assume arguendo the existence of a right. Courts take this approach routinely in harmless error determinations as well.

Sometimes saying a little less, rather than a little more, is a nice way to discharge our primary responsibility to the parties before us of deciding their case. At other times, of course, the need for clarity and guidance in future cases is paramount, but in this instance we believe the most respectful course is to await that guidance from the nation's highest court.

There simply is no need in this litigation to break ground that our superiors have not tread. To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the ***476** *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square.

If ever there was an occasion for restraint, this would seem to be it. There is much to be said for a course of simple caution.

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harm a victim." *Begay,* 128 S.Ct. at 1586. It is the government's burden to prove that defendant qualifies under the ACCA and the record does simply not support a decision that defendant's convictions constitute violent felonies.[15] *See Roseboro,* 551 F.3d at 242–43.

Because this court does not find the consultation of additional materials to be persuasive at all, this court concludes that defendant's convictions for failure to stop for a blue light do not qualify as violent felonies under the ACCA.

As a final note, this court is particularly concerned about the discrepancy in sentencing for defendants who are guilty of the same exact offense. In certain counties in South Carolina, the word "willfully" is inserted as a matter of course in an indictment.[16] By contrast, other counties only charge the language of the statute in an indictment. This court has no way of distinguishing, without looking to the facts behind the conviction, whether it actually involved intentional conduct, let alone violent and aggressive conduct.

V. CONCLUSION

For the reasons set forth above, this court concludes it is bound by Supreme Court precedent to apply the categorical approach to the statute in question. Moreover, the court does not believe that the South Carolina failure to stop for a blue light statute, as written, qualifies as a violent felony under the ACCA. However, in the unlikely event the modified categorical approach is the correct approach to apply, this court finds that the government has failed to meet its burden because the indictment alone is not sufficient to establish that defendant's prior convictions for FTSBL constitute violent felonies under the ACCA.

AND IT IS SO ORDERED.

15. Another court in this district recently held the government failed to meet its burden to prove the defendant's convictions qualified as "violent felonies." *See United States v. Wright,* Cr. No. 9:07–cr–418 (D.S.C. July 29, 2009) (Blatt, Jr., J.). In so holding, the court observed that with only the indictment to consider, it was unlikely that the government could ever meet its burden of a preponderance of the evidence. *Id.*

16. This court has learned in researching this issue that the word "intentionally" is included in Richland County but not in adjoining Lexington County. This is also true in Charleston County where "intentionally" is included, but not in adjoining Dorchester County.

WEST KEY NUMBER SYSTEM

UNITED STATES of America

v.

Sean MASCIANDARO.

No. 1:09cr238.

United States District Court,
E.D. Virginia,
Alexandria Division.

Aug. 26, 2009.

Background: Following conviction by United States Magistrate Judge for possession of loaded weapon in motor vehicle in National Park, defendant sought reversal.

Holdings: The District Court, T.S. Ellis, III, J., held that:

(1) exception to regulation prohibiting the possession of loaded weapons in motor vehicles on National Park land did not apply to defendant;

(2) defendant's conviction did not violate his Second Amendment right to keep and bear arms;

(3) federal regulation criminalizing the possession of a loaded weapon in a motor vehicle on National Park land was not facially unconstitutional as violating the Second Amendment; and

(4) there was no abuse of discretion in not granting post-sentencing request for expungement.

Affirmed.

1. United States Magistrates ⚿26, 27

An appellate review conducted by a district court after a bench trial before a magistrate judge is not a trial de novo; rather, the district court utilizes the same standards of review applied by a court of appeals in assessing a district court conviction.

2. Weapons ⚿3

Exception to regulation prohibiting the possession of loaded weapons in motor vehicles on National Park land, for possession in accordance with laws of state in which park was located, which was enacted after defendant's arrest but before his trial, did not apply to defendant, since enabling statute did not change between defendant's offense conduct and time of his trial. 36 C.F.R. § 2.4(h); National Park Service Organic Act, § 3, 16 U.S.C.A. § 3.

3. Constitutional Law ⚿4582
Criminal Law ⚿13(1)

Where a defendant is convicted of a general charge that is framed in the words of the statute, a constitutional challenge to that conviction must focus on the statute's elements, as conviction upon a charge not made would be sheer denial of due process. U.S.C.A. Const.Amends. 5, 14.

4. Weapons ⚿3

Defendant's conviction for possession of loaded weapon in motor vehicle on National Park land did not violate his Second Amendment right to keep and bear arms; governmental interest in public safety in National Parks was both important and compelling and regulation was narrowly tailored and substantially related to furthering public safety in National Parks since it was limited to individuals who carried loaded firearm in motor vehicle on National Park land. U.S.C.A. Const. Amend. 2; 36 C.F.R. § 2.4(b).

5. Administrative Law and Procedure ⚿390.1
Constitutional Law ⚿1053

Strict scrutiny requires that a statute or regulation be narrowly tailored to serve a compelling governmental interest in order to survive a constitutional challenge.

6. Administrative Law and Procedure ⚿390.1
Constitutional Law ⚿1054

Intermediate scrutiny requires that the challenged statute or regulation be substantially related to an important governmental objective to survive a constitutional challenge.

7. Administrative Law and Procedure ⚿390.1
Constitutional Law ⚿1050

A statute or regulation survives an undue burden analysis where it does not have the purpose or effect of placing a substantial obstacle in the path of the individual seeking to engage in constitutionally protected conduct.

8. Constitutional Law ⚿656

A party ordinarily can only succeed in a facial challenge by establishing that no set of circumstances exists under which the law would be valid, i.e., that the law is unconstitutional in all of its applications.

9. Weapons ⚿3

Federal regulation criminalizing the possession of a loaded weapon in a motor vehicle on National Park land was not facially unconstitutional as violating the Second Amendment; law had at least some

constitutional applications and nothing indicated that a substantial number of instances existed in which regulation could not be applied constitutionally. U.S.C.A. Const.Amend. 2; 36 C.F.R. § 2.4(b).

10. Statutes ⚿64(1)

Where a law has at least some constitutional applications, a facial challenge to that law ordinarily succeeds only where the challenging party demonstrates that any unconstitutional applications of the law are not severable as a matter of statutory construction; this severability inquiry is largely a question of legislative intent, but the presumption is in favor of severability.

11. Criminal Law ⚿1226(3.1)

Courts have inherent equitable power to order the expungement of criminal records, but such power is of exceedingly narrow scope.

12. Criminal Law ⚿1226(3.1)

A court's equitable expungement power is to be reserved only for extreme and compelling circumstances, such as when necessary to remedy the denial of an individual's constitutional rights, or when the government concedes the defendant's innocence.

13. Criminal Law ⚿1226(3.1)

Even if magistrate judge had discretion to grant defendant's post-sentencing request for expungement of conviction, there was no abuse of discretion in not granting the request, where conviction was constitutionally valid and upheld.

Rosie Haney, United States Attorney's Office, Alexandria, VA, for Plaintiff.

Rachel Sarah Martin, Office of the Federal Public Defender, Alexandria, VA, for Defendant.

MEMORANDUM OPINION

T.S. ELLIS, III, District Judge.

Appellant, Sean Masciandaro, seeks reversal of his conviction by a United States Magistrate Judge of possession of a loaded weapon in a motor vehicle in a National Park, in violation of 36 C.F.R. § 2.4(b) (2007) and 16 U.S.C. § 3. Specifically, Masciandaro argues

(i) that the Magistrate Judge erred by applying the regulation in force at the time of the offense conduct, rather than the later-amended regulation in force at the time of trial and sentencing;

(ii) that the Magistrate Judge erred in rejecting Masciandaro's as-applied and facial Second Amendment challenges to the regulation, in light of the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. ——, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); and

(iii) that the Magistrate Judge erred in rejecting Masciandaro's post-sentencing request for expungement of his conviction.

For the reasons that follow, these arguments fail and the judgment of conviction must be affirmed.

I.

On the morning of June 5, 2008, United States Park Police ("USPP") Sergeant Kenneth Fornshill was on patrol duty in the area surrounding Daingerfield Island, a National Park Service ("NPS") property located appurtenant to and east of the George Washington Memorial Parkway in Northern Virginia.[1] At approximately 10:00 a.m., Sergeant Fornshill, who was in a marked patrol car, entered the Daingerfield Island gravel parking lot and ob-

1. Daingerfield Island, which is not an island, is located due south of Ronald Reagan National Airport and due north of Old Town Alexandria, Virginia.

served an illegally parked Toyota hatchback.[2] After parking next to the vehicle and exiting his patrol car, Sergeant Fornshill approached the Toyota and noticed two individuals asleep inside, namely (i) a man, later identified to be Masciandaro, who was asleep in the driver's seat; and (ii) a woman, later identified to be Masciandaro's girlfriend, asleep in the front passenger seat. Sergeant Fornshill then awakened Masciandaro and the passenger by tapping on the driver's side window and asked Masciandaro, the owner of the vehicle, to produce his driver's license. Masciandaro reached behind the reclined passenger seat and pulled a latch on the back seat, giving him access to the vehicle's trunk. He then retrieved a messenger bag from the trunk and placed it on the back seat, which was obscured by the vehicle's tinted rear windows. After removing his wallet from the bag, Masciandaro, who had remained in the driver's seat, produced his Virginia driver's license.

As Masciandaro was retrieving his driver's license, Sergeant Fornshill observed a large knife in plain view protruding from under the vehicle's driver's seat. This observation prompted Sergeant Fornshill to direct Masciandaro to step out of the vehicle, and to inquire of Masciandaro whether there were other weapons in the vehicle. In response, Masciandaro said that he had a loaded handgun in the messenger bag from which he had obtained his wallet. Sergeant Fornshill then handcuffed both Masciandaro and the female passenger. After a second officer arrived, Sergeant Fornshill searched the vehicle and discovered Masciandaro's Kahr P9 9mm semiautomatic handgun in a gun case inside the messenger bag. Sergeant Fornshill confirmed that the firearm was loaded; six rounds of ammunition were in the weapon's magazine and a seventh was in the weapon's chamber. Sergeant Fornshill then arrested Masciandaro on two charges: (i) unlawful possession of a loaded firearm in a motor vehicle on NPS land, in violation of § 2.4(b); and (ii) failure to comply with a traffic control device, in violation of 36 C.F.R. § 4.12 (2007). Masciandaro was then taken to the nearby USPP station, where he produced an expired Virginia concealed-carry permit and was processed and released pending trial.

Prior to trial before a United States Magistrate Judge, Masciandaro filed two motions to dismiss the firearm charge, arguing (i) that § 2.4 had been amended after his arrest to provide an exception decriminalizing his offense conduct; and (ii) that § 2.4(b), as it existed at the time of the offense conduct, is unconstitutional under the Second Amendment, both facially and as applied to him. On January 14, 2009, Masciandaro appeared, with counsel, before the Magistrate Judge for trial and a hearing on his motions to dismiss. The Magistrate Judge received evidence and heard the live testimony of Masciandaro and Sergeant Fornshill. Following oral argument, the Magistrate Judge took the case under advisement.

Thereafter, on February 3, 2009, the Magistrate Judge issued an Order denying Masciandaro's motions to dismiss and finding him guilty of both the traffic violation and firearm charge. In an accompanying Memorandum Opinion setting forth the reasons for denying the motions to dismiss, the Magistrate Judge ruled (i) that because Masciandaro must be adjudicated under the regulation in force at the time of his offense conduct, and not the subsequently amended regulation, any exception set forth in a post-offense amendment to § 2.4 is inapplicable; and (ii) that § 2.4(b), both facially and as applied to Mascianda-

2. More specifically, the Toyota was improperly parked parallel to the edge of the parking lot in an area clearly marked as front-end parking only.

ro, does not violate the Second Amendment right to keep and bear arms as that right was interpreted by the Supreme Court in *Heller.*[3] Thereafter, on March 10, 2009, Masciandaro appeared for sentencing, and the Magistrate Judge imposed a $50 fine on the § 4.12 sign violation and a $150 fine and a $10 special assessment on the § 2.4(b) firearm violation. Following imposition of sentence, Masciandaro orally moved for expungement of the firearm conviction, arguing that "extenuating circumstances, including the fact that the regulation has changed," warranted exercise of the Magistrate Judge's equitable expungement power. Sentencing Tr. 4. The Magistrate Judge denied the request, noting that:

> I understand what you are saying. I don't think I can get into that business. I think that the rules are clear here, that the law is clear here and that it still applies. And I took that into consideration, frankly, I think, in the fine. But I don't feel that's appropriate given the case law. So, I am sorry, that is denied.

Id. at 4–5.

On March 24, 2009, Masciandaro filed a timely notice of appeal of the firearm conviction, pursuant to Rule 58(g)(2)(B), Fed. R.Crim.P. Following an order granting the parties' joint motion for an extension of time, Masciandaro filed his opening brief on June 19, 2009, arguing (i) that the Magistrate Judge erred in denying Masciandaro's request to apply the amended version of § 2.4 in force at the time of trial and sentencing; (ii) that the Magistrate Judge erred in denying Masciandaro's as-applied and facial Second Amendment challenges to § 2.4(b)'s prohibition on loaded weapons in motor vehicles on National Park land; and (iii) that the Magistrate Judge erred in refusing to exercise jurisdiction over Masciandaro's post-sentencing expungement request. On July 31, 2009, the parties appeared, by counsel, for oral argument. By Order issued that same day, the appeal was taken under advisement, and the parties were directed to submit supplemental briefs. The parties complied, and Masciandaro's appeal is now ripe for disposition.

II.

[1] Jurisdiction over Masciandaro's appeal derives from 18 U.S.C. § 3402, and original jurisdiction below was proper under 18 U.S.C. § 3401(a). Importantly, "[a]n appellate review conducted by a district court after a bench trial before a magistrate judge is not a trial *de novo;* rather, the district court utilizes the same standards of review applied by a court of appeals in assessing a district court conviction." *United States v. Bursey,* 416 F.3d 301, 305 (4th Cir.2005) (citing Rule 58(g)(2)(D), Fed.R.Crim.P.); *see also United States v. Steinert,* 470 F.Supp.2d 627, 630 (E.D.Va.2007) (same). With respect to Masciandaro's first two arguments, which were preserved below and raise purely legal issues regarding the denial of his motions to dismiss, review is *de novo. See Bursey,* 416 F.3d at 306. Review of the Magistrate Judge's denial of Masciandaro's post-sentencing expungement request is for abuse of discretion. *See Hodge v. Jones,* 31 F.3d 157, 166 (4th Cir.1994) (noting that "[e]xpunction ... is a discretionary function of the court, rarely utilized absent extreme circumstances").

3. In the course of the January 14 oral argument, Masciandaro also moved orally to dismiss the firearm charge on the ground that the government failed to prove, as he contends was required, that the firearm was operable at the time of the arrest. The Magistrate Judge denied this motion in the February 3 Opinion, ruling that neither the regulation, nor the definition of "weapon" set forth in 36 C.F.R. § 1.4 (2007), required such a showing. Masciandaro has not appealed that ruling here.

III.

Masciandaro's appeal presents three questions. First, it is necessary to determine whether Masciandaro was entitled to the benefit of an exception set forth in an amended regulation in effect at the time of trial and sentencing but not at the time of the offense conduct. Second, assuming the Magistrate Judge correctly held that only the regulation in force at the time of the offense conduct controls, it is next necessary to determine whether that regulation, either as applied to Masciandaro's offense conduct, or on its face is unconstitutional under the Second Amendment. And finally, assuming that Masciandaro was constitutionally convicted under the appropriate regulation, it is necessary to determine whether the Magistrate Judge's rejection of Masciandaro's post-sentencing expungement request constituted an abuse of discretion.

Each of these questions is separately addressed.

A. Applicable Regulation

[2] Masciandaro's first argument, distilled to its essence, is that he was entitled to the benefit of an exception to § 2.4(b)'s general prohibition on possession of loaded weapons in motor vehicles on National Park land, which exception was not in force at the time of his offense conduct. In this regard, Masciandaro was convicted of violating § 2.4(b), which prohibits "[c]arrying or possessing a loaded weapon in a motor vehicle, vessel or other mode of transportation" on National Park land.[4] The exception Masciandaro contends should have been applied at his trial is set forth in 36 C.F.R. § 2.4(h) (2008), which went into effect on January 9, 2009, and was in force at the time of Masciandaro's trial and sentencing. That exception provides that

> [n]otwithstanding any other provision in this Chapter [providing for NPS regulations], a person may possess, carry, and transport concealed, loaded, and operable firearms within a national park area in accordance with the laws of the state in which the national park area, or that portion thereof, is located, except as otherwise prohibited by applicable Federal law.

§ 2.4(h). Masciandaro argues that because he was not in violation of the applicable Virginia firearm regulations at the time of his arrest, the exception set forth in § 2.4(h) decriminalizes his conduct.

Masciandaro's arguments in this regard fail, however, as it is clear that with respect to federal criminal regulations promulgated under federal enabling statutes, the regulation in effect at the time of the alleged offense conduct applies absent an express retroactivity statement to the contrary in the regulation's amendment or its enabling statute. The Supreme Court essentially disposed of this issue more than sixty-five years ago in *United States v. Hark,* 320 U.S. 531, 64 S.Ct. 359, 88 L.Ed. 290 (1944). There, the Supreme Court held that "revocation of [a] regulation d[oes] not prevent indictment and conviction for violation of its provisions at a time when it remained in force" because "[r]evocation of [a criminal] regulation does not repeal the [regulation's enabling] statute." *Id.* at 536, 64 S.Ct. 359. This follows from the fact that although a "regulation calls the [enabling statute's] statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation." *Id.* Here, § 2.4(b)'s enabling statute, 16 U.S.C. § 3,

4. Section 2.4(b) includes an exception, not applicable here, for nonmoving vehicles being used as shooting platforms.

did not change between Masciandaro's offense conduct and the time of his trial. Nor does that enabling statute or § 2.4(b) contain any express retroactivity statement excepting the regulation at issue from the rule set forth in *Hark.* Accordingly, Masciandaro was not entitled to the benefit of § 2.4(h)'s amendment to § 2.4(b).

This result is both sensible and fair, as Masciandaro's conduct was clearly proscribed at the time he engaged in it.[5] Of course, it would be neither fair, nor constitutional to apply a regulation or statute that changed *after* a defendant's alleged offense conduct to establish a more *stringent* standard. *See Collins v. Youngblood,* 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)(quoting *Beazell v. Ohio,* 269 U.S. 167, 169–70, 46 S.Ct. 68, 70 L.Ed. 216 (1925)). In addition, where, as here, a regulation is amended to become more *lenient* after a defendant's alleged offense conduct, the government is free to elect not to prosecute or to prosecute under the new, more lenient standard. Masciandaro's argument that he is *entitled* to such leniency, however, is precluded by *Hark* 's clear holding.[6] Accordingly, the Magistrate Judge's application of the regulation in effect at the time of Masciandaro's offense conduct must be affirmed.[7]

5. In this respect, it is worth noting that the general federal savings statute, 1 U.S.C. § 109, provides that repeal of a federal criminal *statute* (or partial repeal by amendment) does not preclude prosecution under the prior statute for offense conduct occurring before the statutory change, absent an express retroactivity statement to the contrary. Section 109 reversed the common-law rule, which required application of a statute as it existed at the time of trial, rather than the version existing at the time of the offense conduct. *Hark,* which issued prior to the enactment of § 109, essentially anticipates § 109's reversal of the common-law rule and applies § 109's underlying principle to regulations. *See Allen v. Grand Cent. Aircraft Co.,* 347 U.S. 535, 554–55, 74 S.Ct. 745, 98 L.Ed. 933 (1954). Indeed, there is no reason in principle to treat a statute and a regulation promulgated pursuant to a statute disparately in this regard.

6. It is worth noting that application of the amended regulation might be problematic, as nine days after Masciandaro's sentencing, a D.C. federal district court issued a preliminary injunction against application of § 2.4(h). *See Brady Campaign to Prevent Gun Violence v. Salazar,* 612 F.Supp.2d 1 (D.D.C. 2009). Just over two months later, Congress passed, and the President signed, a statute codifying the since-enjoined exception. *See* Pub.L. No. 111–49, Title V, § 512, 123 Stat. 1735, 1764 (May 22, 2009) (codified at 16 U.S.C. § 1a–7b) (effective February 22, 2010). Thus, Masciandaro's argument, if accepted, would lead to application of different statutory or regulatory provisions based on whether he went to trial (i) before January 9, 2009; (ii) between January 9, 2009, and March 19, 2009; (iii) between March 19, 2009, and February 22, 2010; and (iv) after February 22, 2010. *Hark* and the operation of § 109 sensibly avoid this anomaly.

7. Even assuming, *arguendo,* that Masciandaro had been entitled to § 2.4(h)'s exception, it is not at all clear that his conduct was in compliance with the applicable Virginia statute, Va.Code § 18.2–308(A), which prohibits carrying a concealed firearm ''about [the] person'' without a permit. To the contrary, a brief review of Virginia case law suggests that Masciandaro, whose concealed-carry permit had expired, carried the firearm at issue in this case ''about his person'' and in a concealed manner when he held the messenger bag (in which the firearm was hidden) in the backseat of his vehicle. *See, e.g., Schaaf v. Commonwealth,* 220 Va. 429, 432, 258 S.E.2d 574 (1979) (concealed firearm carried in a handbag is ''about the person''); *Leith v. Commonwealth,* 17 Va.App. 620, 621–22, 440 S.E.2d 152 (1994) (concealed firearm located in locked console of automobile is ''about the person'' because it is ''close to the carrier'' and ''readily accessible''). The cases relied on by Masciandaro in this regard appear either to be factually distinguishable or to have been overruled. *See, e.g., Pruitt v. Commonwealth,* 274 Va. 382, 389, 650 S.E.2d 684 (2007) (firearm placed by defendant between front seats of vehicle as he exited following an accident was not ''about his person'' because ''once [defendant] exited the vehicle and closed the door, the [firearm] was no longer accessible to him so as to afford 'prompt and

B. Second Amendment Challenge

Masciandaro next argues that the Magistrate Judge erred in denying his as-applied and facial Second Amendment challenges. More specifically, Masciandaro contends (i) that application of § 2.4(b) to him violates his Second Amendment right to keep and bear arms, as that right was announced by the Supreme Court in *Heller;* and (ii) that even assuming his as-applied challenge fails, § 2.4(b) is unconstitutionally overbroad on its face. Where, as here, a party brings both as-applied and facial constitutional challenges, it is appropriate to determine first whether the law is constitutional as applied to the challenging party's conduct, and then only if the as-applied challenge fails, to determine whether it is necessary to consider the facial challenge. This is so "for reasons relating both to the proper functioning of courts and to their efficiency," as addressing facial challenges unnecessarily "would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Bd. of Trs. of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 485, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *see also Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 502–04, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). In addition, "the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires . . . consideration of many more applications than those immediately before the court." *Fox,* 492 U.S. at 485, 109 S.Ct. 3028 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).[8] Thus, Masciandaro's as-applied challenge is addressed first. Before doing so, however, it is necessary to summarize briefly *Heller*'s narrow holding and *dicta,* in which the Supreme Court—for the first time—held that the Second Amendment protects an individual's right to keep and bear arms in certain circumstances.

(1) Heller's Holding

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Just over a year ago, the Supreme Court in *Heller* interpreted this language to "guarantee [an] individual right to possess and carry weapons in case of confrontation." 128 S.Ct. at 2797. Of course, *Heller*'s holding was much narrower. More specifically, the Supreme Court in *Heller* addressed three District of Columbia weapons laws, which taken together "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it

immediate use' ''); *Sutherland v. Commonwealth,* 109 Va. 834, 65 S.E. 15 (1909) (holding that a firearm ''in a scabbard and in a pair of saddlebags'' is not ''readily accessible for use or surprise if desired''), *overruled in part by Schaaf,* 220 Va. at 431, 432, 258 S.E.2d 574 (observing that ''*Sutherland* was decided seventy years ago, and it is doubtful that this court in 1909 envisioned the modern day handbag'' and holding application of *Sutherland* to such situations ''would render [§ 18.2–308(A)] useless''). In any event, the Magistrate Judge explicitly declined to address this issue at trial, holding that § 2.4(h)'s exception did not apply. Because that ruling is affirmed here, it is unnecessary to reach or decide whether Masciandaro would qualify for the § 2.4(h) exception.

8. Indeed, in *Fox,* the Supreme Court remanded the case, first for a ''determination, pursuant to the standards described above, of the validity of [the] law's application'' to the particular plaintiffs ''and, [only] if its application . . . is found to be valid, for determination whether [the law's] substantial overbreadth nonetheless makes it unenforceable.'' 492 U.S. at 486, 109 S.Ct. 3028.

inoperable." *Id.* at 2817.[9] Importantly, *Heller* involved an as-applied challenge to these provisions by a D.C. special police officer who sought an injunction ordering the District of Columbia to issue him a license to carry his handgun, operable and free of a trigger lock, in his home. In finding that the officer was entitled to the relief sought, the Supreme Court summarized its holding as follows:

> In sum, we hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it *in the home.*

Id. at 2821–22 (emphasis added). Thus, *Heller*'s narrow holding is explicitly limited to vindicating the Second Amendment "right of law-abiding, responsible citizens to use arms in defense *of hearth and home.*" *Id.* at 2821 (emphasis added).

Interestingly, *Heller* does not squarely address or decide the appropriate level of scrutiny to be applied to statutes and regulations subjected to Second Amendment challenges. Justice Scalia's majority opinion sidesteps this issue, noting that it is preferable to address it in the future on a case-by-case basis. *See Heller,* 128 S.Ct. at 2821. *Heller* itself suggests that some elevated level of scrutiny—either strict scrutiny or some intermediate level of scrutiny—is appropriate, and the D.C. laws at issue in *Heller* failed under any such standard. *Id.* at 2817–18 and n. 27. Those lower courts to address Second Amendment challenges to statutes and regulations post-*Heller* have not been uniform in this respect; some have applied strict scrutiny,[10] others have used intermediate scrutiny,[11] and still others have formulated an "undue burden"-type approach similar to that used in the context of abortion regulations.[12] In any event, it is reasonable to conclude from *Heller* that some elevated level of scrutiny is required when assessing the Second Amendment constitutionality of statutes and regulations.

(2) Heller's Dicta

Because *Heller* also "represents [the Supreme] Court's first in-depth examination of the Second Amendment," Justice Scalia's majority opinion provides some guidance, in *dicta,* for future courts evaluating Second Amendment claims. *Id.* at 2821. In this regard, *Heller*'s *dicta* is notable for

9. In describing the provisions at issue. *Heller* observed that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 128 S.Ct. at 2818.

10. *See, e.g., United States v. Engstrum,* 609 F.Supp.2d 1227, 1231–35 (D.Utah 2009) (applying strict scrutiny and upholding 18 U.S.C. § 922(g)(9), which prohibits individuals convicted of domestic violence crimes from possessing firearms).

11. *See, e.g., United States v. Miller,* 604 F.Supp.2d 1162, 1171–72 (W.D.Tenn.2009) (applying intermediate scrutiny and upholding federal felon-in-possession statute, 18 U.S.C. § 922(g)); *United States v. Bledsoe,* No. SA–08–CR–13(2)–XR, 2008 WL 3538717, at *4 (W.D.Tex. Aug. 8, 2008) (unpublished) (applying intermediate scrutiny and upholding 18 U.S.C. § 922(a)(6), which places age restrictions on firearm purchases).

12. *See, e.g., Nordyke v. King,* 563 F.3d 439, 460 (9th Cir.2009) (ordinance prohibiting firearm possession on county property did "not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it"); *People v. Flores,* 169 Cal. App.4th 568, 577, 86 Cal.Rptr.3d 804 (2008) (statute prohibiting carrying of loaded firearms in public did "not burden the core Second Amendment right announced in *Heller*").

the degree to which it confirms the limited scope of the case's holding. For example, the majority opinion emphasizes that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 2816. Thus, *Heller* recognizes (with approval) that "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* In addition, the majority opinion cautions that

> [a]lthough 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 buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816–17 (emphasis added). Moreover, *Heller* "identif[ied] these presumptively lawful regulatory measures only as examples" that did "not purport to be exhaustive." *Id.* at 2817 n. 26. Accordingly, although *Heller* does not *preclude* Second Amendment challenges to laws regulating firearm possession outside the home,[13] *Heller*'s *dicta* makes pellucidly clear that the Supreme Court's holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations.[14] With these as guiding principles, the analysis turns to Masciandaro's as-applied challenge.

(3) As–Applied Challenge

[3, 4] With respect to Masciandaro's as-applied challenge, the analysis properly begins with § 2.4(b)'s elements. This is so because where, as here, a defendant is convicted of a "general" charge that is "framed in the words of the statute," a constitutional challenge to that conviction must focus on the statute's elements, as "[c]onviction upon a charge not made would be sheer denial of due process."

13. To be sure, in rejecting the District of Columbia's argument that the Second Amendment provided only a collective right connected to militia service, *Heller* relied on at least two 19th-century state supreme court cases interpreting the Second Amendment as protecting an individual right to carry weapons openly (but not concealed) in public. More specifically, *Heller* cited approvingly to *Nunn v. State,* 1 Ga. 243 (1846), in which "the Georgia Supreme Court construed the Second Amendment as protecting the 'natural right of self-defence' and therefore struck down a ban on carrying pistols openly." *Heller,* 128 S.Ct. at 2809 (quoting *Nunn,* 1 Ga. at 251). The *Heller* majority described *Nunn* as "perfectly captur[ing] the way in which the operative clause of the Second Amendment furthers" the Amendment's purpose. *Id.* Similarly, *Heller*'s *dicta* also cited with approval to *State v. Chandler,* 5 La. Ann. 489 (1850), in which "the Louisiana Supreme Court held that citizens had a right to carry arms openly" under the Second Amendment. *Heller,* 128 S.Ct. at 2809 (citing *Chandler,* 5 La. Ann. at 490). Of course, like *Heller,* these 19th-century state supreme court decisions were silent on the constitutionality of the narrower regulation at issue here: a prohibition on carrying or possessing loaded weapons in motor vehicles on National Park land.

14. In this regard, at least one commentator has observed that *Heller*'s list of presumptively lawful regulatory measures "is a crucial cue to lower court judges that is likely to minimize greatly the *Heller* decision's impact." A. Rostron, *Protecting Gun Rights and Improving Gun Control after District of Columbia v. Heller,* 13 Lewis & Clark L. Rev. 383, 394 (2009). Thus, "[r]ather than being a win for the 'pro-gun' side or a setback for the 'anti-gun' forces, [*Heller*] may turn out simply to have been a victory for all Americans, having finally driven home to everyone that respecting gun rights and achieving sound gun control are not mutually exclusive endeavors." *Id.* at 418.

Thornhill v. Alabama, 310 U.S. 88, 96, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed. 278 (1937)).[15] Here, 2.4(b) required the government to prove essentially three elements, namely (i) that Masciandaro "carr[ied] or possess[ed] a loaded weapon"; (ii) that he did so "in a motor vehicle"; and (iii) that he did so on National Park land. § 2.4(b). Thus, the question presented is whether Masciandaro's conviction based on conduct satisfying these elements violates his Second Amendment right to keep and bear arms, as that right was elucidated by the Supreme Court in *Heller*. Put differently, the question is whether Masciandaro has a Second Amendment right to carry a loaded firearm in his vehicle on National Park land.

[5–7] As a threshold matter, it is important to observe that *Heller*'s narrow holding does not reach or decide this issue. This is so because § 2.4(b), unlike the laws at issue in *Heller*, does not prohibit possession of a loaded firearm *in the home;* rather, § 2.4(b) prohibits carrying or possessing a loaded weapon *in a motor vehicle on National Park land.*[16] Thus, it is necessary to determine whether § 2.4(b)'s application to Masciandaro's offense conduct withstands the appropriate level of elevated constitutional scrutiny—either strict scrutiny, intermediate scrutiny, or an "undue burden" analysis. In this respect, strict scrutiny requires that a statute or regulation "be narrowly tailored to serve a compelling governmental interest in order to survive" a constitutional challenge. *Abrams v. Johnson*, 521 U.S. 74, 91, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). Intermediate scrutiny requires that the challenged statute or regulation "be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). Finally, a statute or regulation survives an "undue burden" analysis where it does not have the " 'purpose or effect [of] plac[ing] a substantial obstacle in the path' " of the individual seeking to engage in constitutionally protected conduct. *Gonzales v. Carhart*, 550 U.S. 124, 146, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (quoting *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)).

These principles, applied here, compel the conclusion that under any elevated level of constitutional scrutiny, Masciandaro's as-applied challenge must fail. First, the governmental interest furthered by § 2.4(b)—public safety in National Parks—is both important and compelling. In addition, § 2.4(b) is both narrowly tai-

15. *See also Dunn v. United States*, 442 U.S. 100, 106–107, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) ("To uphold a conviction on a charge that was neither alleged in the indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.")

16. In this respect, Masciandaro argued that because he often slept in his vehicle when traveling long distances, his vehicle is in effect his home. This argument is unpersuasive. First, occasionally sleeping in one's vehicle on someone else's property does not convert that vehicle into a home. And more importantly, Masciandaro himself testified at trial that he often carries numerous personal items in his vehicle precisely because he "[g]enerally ... do[es not] know at what point ... [he] *will be home.*" Trial Tr. 17 (emphasis added). Thus, even Masciandaro acknowledged at trial that he sometimes slept in his vehicle because *he was away from home*, not because his vehicle *was his home.* Accordingly, Masciandaro's argument that the regulation in question violated his Second Amendment right to carry a weapon in his home must be rejected. Neither reached nor decided here is whether a person using a camper or recreational vehicle (RV) on National Park land has a Second Amendment right to carry or possess a loaded, operable firearm in the camper or RV.

lored and substantially related to furthering public safety in National Parks. In this respect, § 2.4(b) does not prohibit carrying or possessing a loaded firearm on National Park land *outside* motor vehicles, nor does § 2.4(b) prohibit carrying or possessing *unloaded* firearms in motor vehicles on National Park land. Rather, § 2.4(b) is limited to those individuals, like Masciandaro, who elect to carry or possess a loaded firearm in a motor vehicle, and who do so on National Park land. Moreover, given these limitations, it is clear that § 2.4(b) does not have the purpose or effect of placing a substantial obstacle in the path of Masciandaro's exercise of his Second Amendment right, as announced in *Heller,* "to use arms in defense of hearth and home." *Heller,* 128 S.Ct. at 2821. Accordingly, because § 2.4(b) plainly withstands any elevated level of scrutiny, Masciandaro's as-applied challenge must fail.

In addition, *Heller*'s list of "presumptively lawful regulatory measures" points persuasively to rejection of Masciandaro's as-applied challenge. *Id.* at 2817 n. 26. In this respect, *Heller*'s *dicta* explicitly acknowledges that "laws *forbidding* the carrying of firearms *in sensitive places* such as schools and government buildings" do not violate the Second Amendment rights of those prosecuted under such laws. *Id.* at 2817 (emphasis added). Although *Heller* does not define "sensitive places," the examples given—schools and government buildings—plainly suggest that motor vehicles on National Park land fall within any sensible definition of a "sensitive place." Schools and government buildings are sensitive places because, unlike homes, they are public properties where large numbers of people, often strangers (and including children), congregate for recreational, educational, and expressive activities. Likewise, National Parks are public properties where large numbers of people, often strangers (and including children), congregate for recreational, educational, and expressive activities. Moreover, the locations within National Parks *where motor vehicles travel*—roads and parking lots—are even more sensitive, as roads and parking lots are extensively regulated thoroughfares frequented by large numbers of strangers, including children. Thus, unlike a home or other private property, where the "need for defense of self, family, and property is most acute," the locations in National Parks where vehicles travel, like schools and government buildings, are sensitive places where the Second Amendment leaves the judgment of whether (and if so, how) to regulate firearms to the legislature, not the judiciary. *Id.* at 2817. Similarly, *Heller*'s approval of concealed weapons bans provides further support for rejecting Masciandaro's as-applied challenge, as carrying a loaded weapon in a motor vehicle—an act which, by definition, is almost always outside the view of those nearby—presents the sort of compelling safety risk more adequately resolved by legislation than judicial *ipse dixit.*[17]

Finally, the result reached here also finds support in the scant post-*Heller* case law addressing firearms regulations in "sensitive places." For example, in *Nordyke v. King,* 563 F.3d 439 (9th Cir.2009), a Ninth Circuit panel rejected a Second Amendment *Heller* challenge to a county ordinance broader than the regulation at issue in this case. More specifically, *Nordyke* held that an ordinance banning *all* possession of weapons *or ammunition* on

17. *See, e.g.,* J.H. Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law,* 95 Va. L. Rev. 253, 303 (2009) (arguing that "gun control is one area where 'the answers to most of the cruel questions posed are political and not juridical.' " (quoting *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 532, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring in part and concurring in the judgment))).

county property "fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized." *Id.* at 460. This is so, the Ninth Circuit panel explained, because county property includes many "gathering places where high numbers of people might congregate" and, like government building and schools, "possessing firearms in such places risks harm to great numbers of defenseless people (*e.g.*, children)." *Id.* at 460, 459. Thus, the ordinance upheld in *Nordyke* did "not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it." *Id.* at 460.

The same result should obtain here for essentially similar reasons. Significantly, § 2.4(b) is more narrowly framed than the ordinance at issue in *Nordyke;* § 2.4(b) does not prohibit *all* possession of firearms and ammunition on National Park land, but rather limits the prohibition at issue to carrying or possessing *loaded* firearms *in motor vehicles.* Thus, if the county ordinance at issue in *Nordyke* is constitutional under the Second Amendment, the constitutionality of § 2.4(b) follows *a fortiori.*[18] Accordingly, Masciandaro's § 2.4(b) conviction, which rested on proof that he possessed a *loaded* firearm *in a motor vehicle* and *on National Park land,* does not violate his Second Amendment rights.[19]

18. It is worth noting that the Ninth Circuit has since voted to rehear *Nordyke en banc. See* 575 F.3d 890 (9th Cir.2009) (Order). Of course, it is also worth noting that the bulk of the panel opinion in *Nordyke* confronted an issue not present in this case, namely whether the Second Amendment applies to state and county ordinances via Fourteenth Amendment incorporation. In any event, the panel opinion in *Nordyke* is persuasive with respect to its "sensitive places" analysis, and no *en banc* reconsideration of that analysis would affect the result reached here.

In addition, the result reached here also finds support in other *post-Heller* cases upholding weapons regulations based on both *Heller*'s "sensitive places" exception and *Heller*'s recognition that concealed weapons bans are constitutional. *See, e.g., United States v. Davis,* 304 Fed.Appx. 473, 474 (9th Cir.2008) (unpublished) (upholding conviction for carrying concealed weapon in an airplane and observing that "nothing in [*Heller*] was intended to cast doubt on the prohibition of concealed weapons in sensitive places"); *United States v. Dorosan,* No. 08cr042, 2009 WL 273300, at *1 (E.D.La. Jan. 28, 2009) (Mem. Op.) (affirming magistrate judge's judgment of conviction for violation of 39 C.F.R. § 232.1(1), which prohibits possession of firearms on United States Postal Service property, finding the regulation constitutional under *Heller*'s "sensitive places" exception); *United States v. Walters,* No. 08cr31, 2008 WL 2740398, at *1 (D.Vi. July 15, 2008) (Order) (upholding conviction for possession of a firearm within 1,000 feet of a school zone); *People v. Yarbrough,* 169 Cal. App.4th 303, 314, 86 Cal.Rptr.3d 674 (2008) ("concealment of a firearm under ... clothing on a residential driveway that was not closed off from the public and was populated with temporary occupants falls within the 'historical tradition' of prohibiting the carrying of dangerous weapons in publicly sensitive places" (quoting *Heller,* 128 S.Ct. at 2817)).

19. In this respect, because proof that Masciandaro's conduct satisfied the elements of § 2.4(b) is sufficient to defeat the as-applied challenge, it is unnecessary to determine whether the Magistrate Judge could have applied a narrowing construction that would have placed the conduct for which Masciandaro was convicted even further outside the scope of his Second Amendment rights. *See, e.g., Osborne v. Ohio,* 495 U.S. 103, 125–26, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (rejecting as-applied constitutional challenge based on state supreme court's narrowing construction but "remand[ing] for a new trial ... to ensure that [defendant's] conviction stemmed from a finding that the [government] had proved each of the elements" of the offense). *But see, e.g., Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874(1997) (observing that courts "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction" (quoting *Virginia v. Am. Bookseller's Ass'n,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988))); *United States v.*

(4) Facial Challenge

[8, 9] Next, although Masciandaro's as-applied challenge fails, it is necessary to address his facial challenge. This is so because a facial challenge generally permits a "defendant to attack a statute because of its effect on conduct other than the conduct for which defendant is being punished, thus protecting the right to engage in conduct not directly before the court." *Massachusetts v. Oakes,* 491 U.S. 576, 586, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989) (Scalia, J., concurring) (citing *Brockett,* 472 U.S. at 503, 105 S.Ct. 2794). The Supreme Court has recently recognized that there are generally two types of facial challenges to a law's constitutionality. First, a party ordinarily "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [law] would be valid,' *i.e.,* that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 128 S.Ct. 1184, 1190, 170 L.Ed.2d 151 (2008) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). In addition, the Supreme Court's "cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.' " *Id.* at 1190 n. 6 (quoting *New York v. Ferber,* 458 U.S. 747, 769–71, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)).[20] Thus, the analysis turns to whether Masciandaro's Second Amendment facial challenge to § 2.4(b) succeeds under either type of facial challenge.

[10] First, it is pellucidly clear that Masciandaro has not "establish[ed] that no set of circumstances exists under which" § 2.4(b) would be valid. *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. In this respect, it is important to observe as a threshold matter that because, as discussed *supra,* the Second Amendment does not grant *Masciandaro* an absolute right to carry a loaded weapon in his vehicle on National Park land in all circumstances, it necessarily follows that § 2.4(b) has at least *some* constitutional applications. And where, as here, a law has at least some constitutional applications, a facial challenge to that law ordinarily succeeds only where the challenging party demonstrates that any unconstitutional applications of the law are not "severable" as a matter of statutory construction. This "severability" inquiry "is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.,* 468 U.S. 641, 653, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984). Thus, absent a clear showing that the law's enacting body "would not have enacted those provisions [or applications] which are within its power, independently of [those] which [are] not, the invalid part[s] may be dropped if what is left is fully operative as a law." *Id.* (internal quotations omitted).[21] Masciandaro has made no such showing. Notably, the only applications of § 2.4(b) raised by Mascian-

Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.") Similarly, because the judgment of conviction here did not rest upon any factual findings (nor did the charging document at issue set forth any allegations) concerning the nature of Daingerfield Island, it is unnecessary to determine whether such findings may have provided further support for rejecting Masciandaro's as-applied challenge.

20. *See also United States v. Booker,* 543 U.S. 220, 314, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (Thomas, J., dissenting in part) ("Absent an exception such as First Amendment overbreadth, we will facially invalidate a statute only if the plaintiff establishes that the statute is invalid in all its applications.").

21. *See also Booker,* 543 U.S. at 323, 125 S.Ct. 738 (Thomas, J., dissenting in part) ("We pre-

daro that are even *arguably* unconstitutional under *Heller* are (i) application of § 2.4(b) to a person legitimately using a motor vehicle as a home, or (ii) application of § 2.4(b) to a person who loads a firearm in a vehicle on National Park land for immediate and articulable self-defense purposes. Yet, even assuming, *arguendo,* that such applications might infringe on some hypothetical individual's Second Amendment right, narrowing constructions of § 2.4(b) could easily remedy any unconstitutionality.[22] Accordingly, Masciandaro has not "establish[ed] that no set of circumstances exists under which" § 2.4(b) would be constitutionally valid and hence has failed to satisfy the first type of facial challenge. *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095.

Similarly, Masciandaro has not demonstrated that § 2.4(b) must be struck down on its face as unconstitutionally overbroad. First, it is debatable whether the facial "overbreadth" doctrine *ever* extends beyond the First Amendment context and, if it does, whether it is applicable to Second Amendment challenges.[23] And even assuming, *arguendo,* that facial overbreadth challenges *are* permissible in the Second Amendment context,[24] it appears more

sume that the unconstitutional application is severable. This presumption is a manifestation of *Salerno* 's general rule that we should not strike a statute on its face unless it is invalid in all its applications. Unless the Legislative clearly would not have enacted the constitutional applications independently of the unconstitutional application, the Court leaves the constitutional applications standing." (citing *Regan,* 468 U.S. at 653, 104 S.Ct. 3262)).

22. For example, where, unlike here, a person prosecuted under § 2.4(b) lawfully *resides* in a "vehicle" (like a motor home), a construing court could simply narrow the meaning of "motor vehicle" in § 2.4(b) to exclude vehicles actually used as homes. Similarly, in the unlikely event that a person were prosecuted for loading a weapon in circumstances presenting an imminent danger, a construing court could read a common-law "justification" defense into § 2.4(b). Although these observations do not purport to determine whether (and under what facts) such constructions would be appropriate or necessary, these observations illustrate that any unconstitutional applications of § 2.4(b) are resolvable on a case-by-case basis.

Of course, *Heller* did not read a common-law "justification" or "self-defense" exception into the D.C. law at issue in that case, instead finding that such statutory construction was foreclosed by a prior opinion of the D.C. Court of Appeals, the statute's plain text, and "the presence of certain other enumerated exceptions." *Heller,* 128 S.Ct. at 2818–19 (citing *McIntosh v. Washington,* 395 A.2d 744, 755–56 (D.C.1978)). In this regard, it is important to note that the Supreme Court typically "defer[s] to the decisions of the courts of the District of Columbia on matters of exclusively local concern." *Whalen v. United States,* 445 U.S. 684, 687, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *But see Heller,* 128 S.Ct. at 2853–54 (Breyer, J., dissenting) ("[B]ecause I see nothing in the District law that would *preclude* the existence of a background common-law self-defense exception, I would avoid the constitutional question by interpreting the statute to include it."). By contrast, neither § 2.4(b)'s plain text, nor any enumerated exceptions, foreclose a common-law self-defense exception. Nor is it necessary here to consider deference to the construction of a state court, as the regulation at issue is federal, and not local, in nature.

23. *See* Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System,* 194–97 (5th ed.2003) (describing debate in Supreme Court and among scholars as to scope of overbreadth doctrine).

24. To be sure, *Heller* likens the Second Amendment right to keep and bear arms in at least some respects to the First Amendment right to free speech, most notably in observing that "rational basis" scrutiny was not the appropriate standard of scrutiny for the D.C. regulations at issue in that case. *See Heller,* 128 S.Ct. at 2817 n. 27 ("Obviously, [a rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.").

doubtful still that such challenges are appropriate with respect to firearms laws *not affecting the home.*[25] In any event, it is unnecessary here to decide whether (and under what circumstances) a facial overbreadth challenge may succeed on Second Amendment grounds, as Masciandaro has failed to satisfy his burden of demonstrating "*from actual fact* that a substantial number of instances exist in which" § 2.4(b) cannot be applied constitutionally. *N.Y. State Club Ass'n Inc. v. City of New York,* 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) (emphasis added).[26] Indeed, Masciandaro's allegations of § 2.4(b)'s overbreadth are purely hypothetical and are unsupported by any showing that the alleged overbreadth is real, let alone substantial. Accordingly, Masciandaro's facial challenges must be rejected and the Magistrate Judge's ruling in that regard affirmed.

C. Expungement

[11, 12] Masciandaro's final argument—that the Magistrate Judge committed an abuse of discretion in refusing to exercise jurisdiction over or grant his expungement request—is patently meritless. To be sure, "courts . . . have inherent equitable power to order the expungement of criminal records[,] . . . [but] such power is of 'exceedingly narrow scope.'" *United States v. Salleh,* 863 F.Supp. 283, 283–84 (E.D.Va.1994) (quoting *Coles v. Levine,* 561 F.Supp. 146, 153 (D.Md.1983), *aff'd,* 725 F.2d 674 (4th Cir.1984)). Thus, a court's equitable expungement power "is to be reserved only for extreme and compelling circumstances, such as when necessary to remedy the denial of an individual's constitutional rights, or when the government concedes the defendant's innocence." *Id.* at 284 (internal citations and quotation marks omitted).

[13] This case presents no such circumstances. Indeed, where, as here, a conviction is constitutionally valid and upheld, it is difficult to imagine circumstances warranting expungement. Thus, even assuming the Magistrate Judge had discretion to grant Masciandaro's expungement request, the record does not support Masciandaro's contention that it was an abuse of discretion not to grant the request. Rather, the Magistrate Judge found that expungement was not "appropriate given the case law" and that any extenuating circumstances were taken into account by the modest fine imposed. Sentencing Tr. 4, 5. Accordingly, Masciandaro has failed to demonstrate that the Magistrate Judge's denial of his expungement request was an abuse of discretion.

IV.

In sum, the Magistrate Judge correctly held that Masciandaro must be adjudicated under the regulations in effect at the time of the alleged offense conduct. In addition, the Magistrate Judge correctly held

25. In this respect, it is worth noting that *even in the First Amendment context,* overbreadth challenges are inappropriate to challenges only involving regulation of "commercial speech." *See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496–97, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("[O]verbreadth doctrine does not apply to commercial speech."); *Bates v. State Bar of Ariz.,* 433 U.S. 350, 380–81, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (same). Thus, given *Heller*'s focus on the home, where the Second Amendment right to keep and bear arms for self-defense is "most acute," it appears doubtful that overbreadth challenges are appropriate where, as here, a firearm limitation does not even arguably affect firearms in the home. *Heller,* 128 S.Ct. at 2817.

26. *See also Wash. State Grange,* 128 S.Ct. at 1190 n. 6 ("We generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.").

that Masciandaro's as-applied and facial Second Amendment challenges are not supported by *Heller* and hence must fail. Finally, the Magistrate Judge's denial of Masciandaro's post-sentencing expungement request was not an abuse of discretion. Accordingly, Masciandaro's appeal must be dismissed and his judgment of conviction affirmed.

An appropriate Order will issue.

In re DIGITEK® PRODUCT LIABILITY LITIGATION.

This Document Relates to all Cases.

MDL No. 1968.

United States District Court,
S.D. West Virginia,
Charleston.

July 23, 2009.

Background: Consumers brought product liability action against corporation. Following transfer to multidistrict litigation (MDL) court, consumers moved for order permitting ex parte contact with corporation's former employees.

Holding: The District Court, Mary E. Stanley, United States Magistrate Judge, held that counsel for consumers would be permitted to conduct ex parte interviews of former employees.

Ordered accordingly.

1. Federal Courts ⚿157

Transfer of a case to a multidistrict litigation court requires the application of the law of the circuit of the transferee court considering motions with respect to discovery disputes and other pretrial issues.

2. Attorney and Client ⚿32(12)

Counsel for consumers in multidistrict products liability action would be permitted to conduct ex parte interviews of defendant corporation's former employees to the extent allowed by American Bar Association (ABA) Model Rules and comment, without giving advance notice of intention to contact employees or to send such employees a form letter approved by the court. U.S.Dist.Ct.Rules S.D.W.Va., Rule 83.7.

PRETRIAL ORDER # 31 (*Ex Parte* Contact with Former Actavis Employees)

MARY E. STANLEY, United States Magistrate Judge.

Pending before the court is Plaintiffs' motion for an order permitting *ex parte* contact with former Actavis employees (docket # 153). The Actavis defendants have responded in opposition (# 156), and Plaintiffs have filed a reply (# 158).

Positions of the parties

Plaintiffs contend that the court should apply the West Virginia Rules of Professional Conduct with respect to counsel's *ex parte* contact with the former employees of the Actavis defendants. (# 153, at 1.) They assert that in multidistrict litigation, the transferee court applies the law of the circuit in which it is sitting when ruling on discovery disputes. *Id.*, at 4. Plaintiffs argue that the West Virginia Rules permit *ex parte* contact with former employees of an adverse corporate party. *Id.*, at 1.

The Actavis defendants respond that Plaintiffs' motion does not comport with either New Jersey or West Virginia law. (# 156, at 2.) They urge the court to adopt reasonable restrictions and protections for *ex parte* interviews of their former employees, including identification and notice of each former employee to be contacted,

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Violation Nos. 1745586 & 1745587
	)	
SEAN MASCIANDARO	)	Trial date: January 14, 2009
	)	

MEMORANDUM OPINION

I. Introduction

BEFORE THE COURT are two Motions to Dismiss the Charge of Violating 36 C.F.R. § 2.4(b) filed by defendant Sean Masciandaro ("defendant"). On June 5, 2008, the National Park Service ("NPS") arrested and charged defendant with a sign violation under 36 C.F.R. § 4.12 (Violation No. 1745586) and possession of a loaded weapon in a motor vehicle, in violation of 36 C.F.R. § 2.4(b)[1] (Violation No. 1745587). On January 14, 2009, this Court heard oral argument from representatives for defendant and the government regarding the motions to dismiss and also accepted trial evidence and testimony.

The undisputed facts are that on June 5, 2008, defendant was sleeping in his car, which was parked on Daingerfield Island, a national park located within the Commonwealth of Virginia.

[1] In its original (unamended) form, 36 C.F.R. § 2.4(b) reads as follows:

Carrying or possessing a loaded weapon in a motor vehicle, vessel or other mode of transportation is prohibited, except that carrying or possessing a loaded weapon in a vessel is allowed when such vessel is not being propelled by machinery and is used as a shooting platform in accordance with Federal and State law. 36 C.F.R. § 2.4(b) (2007).

(Transcript of January 14, 2009 hearing (hereinafter "Tr.") at 5.) Defendant's car was parked in a manner contrary to the posted signs in the park.[2] (Id. at 22.) A United States Park Police patrol supervisor noticed the car and approached the vehicle where he found defendant asleep inside. (Id. at 21-22.) At the request of the officer, defendant retrieved his Virginia state driver's license from his wallet, which was located in a leather bag behind his seat. (Id. at 23.) Looking through the open driver's window, the officer saw a large knife protruding from under the driver's seat of the vehicle. (Id.) Upon seeing the knife, the officer asked defendant to get out of the car. (Id.) In response to questioning, defendant acknowledged that he had a loaded weapon in the same bag from which he had retrieved his driver's license. (Id. at 24.) Defendant later produced an expired Virginia concealed weapon carry permit. (Id. at 26.)

Defendant asks this Court to dismiss the 36 C.F.R. § 2.4(b) violation charge against him for three reasons.[3] First, defendant argues that this Court should find 36 C.F.R. § 2.4(b) invalid in light of the United States Supreme Court's decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), which struck down a District of Columbia handgun ban as violating the Second Amendment to the United States Constitution's right to

[2] The signs instruct that "front end parking only" is allowed. (Tr. at 22.) Defendant does not dispute that he was parked in a manner that was inconsistent to the signs' instructions.

[3] Defendant does not challenge the sign violation charge.

keep and bear Arms.[4] Second, defendant asks this Court to dismiss the 36 C.F.R. § 2.4(b) violation charge on the grounds that the NPS amended the regulation after his arrest and the amended version no longer criminalizes the conduct for which he was charged. Lastly, at the January 14, 2009 hearing, counsel for defendant argued that the weapon charge should be dismissed on the grounds that the government had a burden to prove that the weapon was operable, but failed to meet that burden at trial. (Tr. at 45.)

For the reasons discussed below, the Court denies defendant's Motions to Dismiss.

II. Discussion

A. 36 C.F.R. § 2.4(b) is Not a Violation of the Second Amendment

Defendant urges this Court to find that the version of 36 C.F.R. § 2.4(b)[5] under which he was charged violates the Second Amendment right of all citizens to possess and carry weapons in case of confrontation. (Defendant's Motion to Dismiss ("Def. First Mot. to Dismiss") at 4.) Specifically, defendant argues that the federal regulation's requirement that firearms be kept inoperable at all times while on national parkland prevents citizens from being able to use firearms for the lawful purpose of self-defense and, thus, unconstitutionally restricts the right

[4] Defendant brought his requests for dismissal in two separate motions. Defendant's Motion to Dismiss the Charge of Violating 36 C.F.R. § 2.4(b) for Violation of his Second Amendment Rights shall hereinafter be referred to as "Defendant's First Motion to Dismiss" and his Second Motion to Dismiss the Charge of Violating 36 C.F.R. § 2.4(b) Due to Change in the Regulation will hereinafter be referred to as "Defendant's Second Motion to Dismiss."

[5] 36 C.F.R. § 2.4(b) will hereinafter be referred to as the "federal regulation."

to bear Arms. (Id.) To support this argument, defendant relies on the United States Supreme Court's decision in Heller, which struck down a District of Columbia ("D.C.") handgun ban. Indeed, the Heller Court held that the D.C. law's "complete prohibition" on the use of handguns for protection by ordinary citizens was unlawful. Heller, 128 S. Ct. at 2818.

This Court finds, however, that the federal regulation at issue in the instant matter is not analogous to the handgun ban struck down in Heller. Unlike the legislation at issue in Heller, 36 C.F.R. § 2.4(b) is narrowly tailored and only prohibits carrying or possessing a loaded weapon in a motor vehicle when that vehicle is on national parklands. Indeed, the federal regulation allowed defendant to have both ammunition and a handgun in his car; he simply was required to keep the handgun unloaded while on Daingerfield Island. Defendant was not required to be on Daingerfield Island and did not have to travel through the park to get where he was going; he chose to park his car in a national park. (Tr. at 18.) 36 C.F.R. § 2.4(b)'s prohibition against carrying or possessing of a loaded weapon in vehicles located on national parkland is not unconstitutional under these circumstances.

B. The Version of the Federal Regulation in Effect at the time of Defendant's Arrest Applies

On June 5, 2008, the date on which defendant was charged, the original (unamended) version of 36 C.F.R. § 2.4(b) was in effect. In April 2008, the DOI proposed amendments to the

regulation and requested written comments from the public. General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service, 73 Fed. Reg. 23388 (April 23, 2008). On December 10, 2008, the Department of the Interior ("DOI") published the final amended rule, which allows individuals to "possess, carry, and transport concealed, loaded, and operable firearms within a national park area in accordance with the laws of the state in which the national park area . . . is located." General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service, 73 Fed. Reg. 74966, 74971 (Dec. 10, 2008) (quoting new subsection 36 C.F.R. § 2.4(h)). The new amendment became effective on January 9, 2009. Id. at 74966.

Defendant urges this Court to apply the amended regulation in this case and argues that, under the amended rule, his conduct would not constitute a violation of 36 C.F.R. § 2.4(b). Newly-added subsection 2.4(h) looks to the law of the particular state in which a national parkland is located to determine if it is lawful to carry a concealed, loaded weapon in that particular national park. According to defendant, his conduct on Daingerfield Island would not violate the federal regulation because Virginia law does not require a concealed weapon permit in order to legally carry a loaded weapon in one's car.[6] (Def.

[6] Specifically, defendant points to Virginia Code § 18.2-308(A), which provides that it is illegal to carry "about his person, hidden from common observation" a weapon "designed or intended to propel a missile of any kind by action of an explosion of any combustible material." (Def. Second Mot. to Dismiss at 3.) Defendant argues that Virginia caselaw demonstrates that having a loaded weapon in a bag behind his seat does not constitute "about his person," and, therefore, his actions on Daingerfield Island did not violate

Second Mot. to Dismiss at 3.) The Court declines to address this theory, however, as it finds that the amended rule does not apply to defendant's case.

The General Federal Savings Statute instructs that new federal statutes that decrease punishment normally do not affect pending prosecutions. 1 U.S.C. § 109. Specifically, the statute states that:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. A series of federal statutes grant the Department of the Interior ("DOI") the authority to promulgate regulations to govern the use and maintenance of national parks, monuments and reservations. See, e.g., 16 U.S.C. §§ 1, 3, 9a, 462(k). See also General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service, 73 Fed. Reg. 74966, (Dec. 10, 2008)(noting that "Congress has enacted various statutes authorizing the Secretary [of the Interior]" to manage national parklands and resources). Indeed, 36 C.F.R. § 2.4 is one such regulation.

It is undisputed that defendant was arrested and charged under the original (unamended) version of 36 C.F.R. § 2.4. Thus, the "penalty, forfeiture or liability" he faces were incurred

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Virginia Code § 18.2-308(A).

under the original regulation and, absent express language to the contrary, the original regulation must "be treated as remaining in force for the purpose of sustaining any proper action or prosecution . . . ." 1 U.S.C. § 9. Importantly, 36 C.F.R. § 2.4 contains no language expressly providing that the amended regulation is intended to release or extinguish any penalty, forfeiture, or liability incurred under the original version. Thus, this Court finds that the original version of the federal regulation, which was promulgated pursuant to a federal statute, remains in effect for the prosecution of defendant.

C. The Language of 36 C.F.R. § 2.4(b) Does Not Require a Showing that the Weapon was Operable

At the hearing on January 14, 2009, counsel for defendant argued that the government had failed to prove that the loaded firearm found in defendant's possession was operable.[7] (Tr. at 45.) Subsection 2.4(b), however, does not require such a showing. Indeed, neither the text of § 2.4(b) nor the definitions in § 1.4 include the word "operable." This Court finds that a requirement that the loaded firearm was operable is not an element of the regulation and, thus, the government was not required to make such a showing at trial.

III. Conclusion

For the reasons stated above, defendant's Motions to Dismiss

[7] Counsel for defendant appears to be relying on the definitions in 36 C.F.R. § 1.4 (2007). In that subsection, "firearm" is defined as "a loaded weapon which is designed to, or may readily be converted to, expel a projectile by the ignition of a propellant" and "weapon" is "a firearm . . . or any other implement designed to discharge missiles . . . ." 36 C.F.R. § 1.4 (2007). Notably, neither of these definitions include the term "operable."

the Charge of Violating 36 C.F.R. § 2.4(b) are denied. As the other facts in this matter are not in dispute, the Court finds defendant Sean Masciandaro guilty of failing to comply with a traffic control device, in violation of 36 C.F.R. § 4.12 (2007), and possession of a loaded weapon in a motor vehicle, in violation of 36 C.F.R. § 2.4(b) (2007). An Order shall issue forthwith.

THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

February 3, 2009
Alexandria, Virginia