# 12-4497-cv

## United States Court of Appeals for the Second Circuit

**M. PETER KUCK** and **JAMES F. GOLDBERG**,

*Plaintiffs-Appellants,*

*v.*

**JOHN A. DANAHER III**, *in his Individual Capacity,* **ALBERT J. MASEK**, *in his Individual Capacity*, **ALARIC FOX**, *in his Individual Capacity,* **BARBARA MATTSON**, *in her Individual Capacity,* **THOMAS KARANDA**, *in his Individual Capacity,* **RONALD A. BASTURA**, *in his Individual Capacity*, **CHRISTOPHER A. ADAMS**, *in his Individual Capacity,* **T. WILLIAM KNAPP**, *in his Official Capacity as Secretary, Connecticut State Board of Firearms Permit Examiners,* and **JOSEPH CORRADINO**, *in his Official Capacity as Chairman, Connecticut State Board of Firearms Permit Examiners,*

*Defendants-Appellees.*

On Appeal from the United States District Court
for the District of Connecticut (New Haven)

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## I. DUE PROCESS, LIBERTY INTERESTS, AND THE SECOND AMENDMENT REQUIRE A STRICT SCRUTINY STANDARD

### A. The Variables Brought Together in Kuck

When the state police in Connecticut revoke or decline to renew a state permit to carry a pistol or revolver ("permit") the impacted individual is denied the right to carry a handgun in public. To reinstate the permit the individual appeals to the Board of Firearms Permit Examiners ("Board"). The length of the deprivation is directly related to the length of the period the individual must wait for a hearing before the Board. At some point the period of deprivation violates the Due Process Clause of the Fourteenth Amendment.[1] The deprivation which denies the individual the right to carry a handgun in public implicates the Second Amendment of the United States Constitution. In Connecticut, the state constitution also is

[1] This point has yet to been determined. The government Defendants' statement that "any delay suffered by Kuck in obtaining his permit was solely due to his refusal to file the necessary paperwork" is not accurate and has no place in due process analysis. Appellee Br. at 4-5. See Vietnam Veterans of America v. C.I.A., 288 F.R.D. 192, 210 (N.D.Cal. 2012) ("The Supreme Court has held that the denial of procedural due process is an injury in its own right, 'does not depend on the merits of the claimant's substantive assertions,' and is actionable even without proof of other injury.") (citing Kuck v. Danaher, 600 F.3d at 165 ("The viability of [the plaintiff's] due process claim does not turn on the merits of his initial challenge; rather, it concerns whether he received the process he was due.")(other citations omitted).

implicated: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15; see Kuck v. Danaher, 600 F.3d 159, 163 (2d Cir. 2010) (hereinafter, "Kuck I") ("Appellees concede that Kuck possesses a liberty interest, created by the Connecticut Constitution, in his right to carry a firearm.") (citing Conn. Const. art. I, § 15; Benjamin v. Bailey, 234 Conn. 455 (1995)).

B. Compounded Infringement and Scrutiny of Constitutional Claims

Federal courts have applied a means-end scrutiny standard to review claims that the right to carry a handgun outside the home for self-defense is a Second Amendment right.

1. Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013),

The Woollard court reviewed a Maryland law requiring that persons meet certain eligibility factors, including a good-and-substantial-reason for carrying, wearing, or transporting a handgun, as requirements for issuance of a necessary permit to do so. Woollard was denied a permit renewal in 2009 after a previous renewal in 2006 and the original issuance in 2003. The Handgun Permit Review Board determined that the threat justifying the issuance in 2003 has dissipated and affirmed the renewal denial. The district court granted Woollard summary judgment finding that the good-and-substantial-reason requirement violated the Second Amendment right of individuals to possess and carry firearms in case of confrontation outside the home. Id. at 872. The appellate court applied a "two-part

approach" to the Second Amendment claim, citing United States v. Chester, 628 F.2d 673 (4th Cir.), and its reliance on District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008):

> The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.
> …
> If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.

Woollard, 712 F.3d 875 (quoting Chester, 628 F.3d at 680). The appellate court "assume[d] that "the Heller right exists outside the home and that such right of Appellee Woollard has been infringed" and explained: "We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under what we have deemed to be the applicable standard – intermediate scrutiny." Id. at 876.

2. Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012),

The Madigan court reviewed an Illinois law forbidding, with limited exceptions for law enforcement personnel, hunters, and shooting club members, persons from carrying accessible and ready to use guns in public then remanded for "entry of declarations of unconstitutionality and permanent injunctions" finding the "Supreme Court has decided that the [Second] amendment confers a right to bear

arms for self-defense, which is as important outside the home as inside." Id. at 942. The court's decision was not based on "degrees of scrutiny" but "on Illinois's failure to justify the most restrictive gun law of any of the states." Id. at 941. No further discovery on remand was necessary:

> Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet that burden.

Id. at 942.

3. Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012)

The Kachalsky court reviewed a New York law requiring an applicant for a handgun permit "to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public[.]" Id. at 83. Kachalsky applied for and was denied a "full-carry concealed-handgun license" for failure to show cause beyond self-defense outside the home. The district court granted summary judgment against his claim that the "proper cause" requirement violated the Second Amendment. The court identified the substantial burden placed on the ability of law-abiding citizens to possess firearms for self-defense in public and applied a "heightened scrutiny":

> '[H]eightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in Heller) operate as a substantial burden on the ability of law abiding citizens to possess

> and use a firearm for self-defense (or other lawful purposes).'

Id. at 93 (quoting United States v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012)). "We do not believe, however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment." Id. at 93.

> Although we have no occasion to decide what level of scrutiny should apply to laws that burden the 'core' Second Amendment protection identified in Heller, we believe that applying less than strict scrutiny when the regulation does not burden the "core" protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.

Id. at 93.

C. Strict Scrutiny of Fundamental Rights

When a law interferes with fundamental constitutional rights, it is subject to "strict judicial scrutiny." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54, 100 S. Ct. 948, 960, 74 L. Ed. 2d 794 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). McDonald declared "the right to bear arms was fundamental to the newly formed system of government." 130 S. Ct. at 3037; accord id. at 3042. The Second Amendment does not deserve a lesser status from other rights. See id. at 3043 (plurality op.) ("what [respondents] must mean is that the Second

Amendment should be singled out for special–and specially unfavorable–treatment. We reject that suggestion."); see also id. at 3044.

In short, the "default" standard of review for restrictions on fundamental rights must be strict scrutiny. The right to bear arms is no exception. The Supreme Court has emphasized that, even under intermediate scrutiny, government cannot "get away with shoddy data or reasoning" and "evidence must fairly support [its] rationale for its ordinance." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). Mere "lawyers' talk" unsupported by evidence is insufficient. Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 463 (7th Cir. 2009). Even a case cited approvingly by the *Heller* dissent states government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys., Inc., 512 U.S. at 235; see also National Rifle Ass'n of America, Inc. v. McCraw, 2013 WL 2156571, 7 (5th Cir. 2013 )("In order to withstand intermediate scrutiny, the Texas scheme must be reasonably adapted to achieve an important government interest. Furthermore, '[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation,' or relying 'on overbroad generalizations.'") (citing United States v. Virginia, 518 U.S. 515, 533 (1996)).

D. Woollard, Madigan, and Kachalsky Lack The Kuck "Spinelli" and Liberty/Property Interest Variables

In Woollard, Madigan, and Kachalsky the courts applied a default standard of intermediate scrutiny reasoning that the right to carry a handgun in public, while a right guaranteed by the Second Amendment, is not a "core" Second Amendment right. In essence the Second Amendment right to carry a handgun in public for self-protection, while a right, is less than "core," and so infringement of that Second Amendment right is subject to a heightened or intermediate scrutiny but less than strict scrutiny, except when, as in Madigan, the court finds no rational basis for finding a connection between the means and the ends to justify the infringement.

E. Spinelli v. City of New York, 759 F.3d 160 (2d Cir. 2009),

In Spinelli, a case decided on due process and not Second Amendment grounds, while oral argument was pending in Kuck I, a gun shop owner's due process rights were violated when the City of New York suspended her license without a prompt post-deprivation hearing. Id. at 175. The City conceded that the investigation and hearing process for suspended gun dealer licenses often took "months or years" to complete. Id. Spinelli's lawyer's successful negotiations with the city officials resulted in reinstatement of the suspended license after only fifty-

eight (58) days. Even this delay exceeded the bounds of due process given that Spinelli's business and livelihood were at stake. Id. at 174.

## II. THE FEDERAL RECOGNITION OF THE RIGHT TO BEAR ARMS

### A. The Right to Bear Arms in Public

The instant appeal juxtaposes the Second Amendment right to carry a handgun in public with the Fourteenth Amendment right to a hearing when a government-issued permit that allows this Second Amendment right to be exercised without threat of arrest is revoked or denied renewal. See Martorelli v. Cossette, 2012 WL 1067631, 3 (D.Conn. 2012) (citing Kuck I at 165) ("[P]ermit renewal applicants are entitled to basic due process protections, including a meaningful opportunity to be heard after a denial or revocation.") and (Spinelli, 579 F.3d at 169) ("[W]hile a person does not have a protected interest in a possible future business license, the situation changes once the license is obtained.").

When Spinelli and Kuck I were decided in 2009 and 2010, respectively, federal courts had not yet recognized the Second Amendment individual right to bear arms. See Bach v. Pataki, 408 F.3d 75, 84 (2d Cir. 2005) ("Instead, we hold that the Second Amendment's "right to keep and bear arms" imposes a limitation on only federal, not state, legislative efforts."). The constitutional variables in Kuck I were his Fourteenth Amendment due process claim and his state constitutional liberty interest in the right to bear arms. Since the March 2010

decision in Kuck I an additional constitutional right has been added, specifically the right to bear arms in public as both Kuck and Goldberg held prior to the deprivation of their permits and while they waited for an opportunity to be heard.

When Kuck and Goldberg received their permits they were subject to suitability determinations justified by the government as an interest in public safety. The set standard of suitability was accepted as a means to the end of public safety and directed by the liberty interest afforded Connecticut citizens under the state constitution. The deprivation of Kuck's and Goldberg's permits now merit another means-end test based in a Second Amendment guarantee to carry a handgun in public. Courts have applied an intermediate or heightened scrutiny to this deprivation where no liberty or property interest grounded in a state constitution was present.

Kuck and Goldberg have a fundamental "core" right to bear arms protected by the Due Process Clause of the Fourteenth Amendment which recognizes the state constitutional right to bear arms. The deprivation of this right is subject to strict scrutiny similar to the strict scrutiny afforded the right to possess handguns in the home for self-defense set forth in Heller. As strict scrutiny applies to possession of handguns in the home in Heller so does strict scrutiny apply to possession of handguns in public for self-protection under the Connecticut

Constitution's guarantee of the right to bear arms and the Due Process Clause of the Fourteenth Amendment.

B. The Right to a Timely Opportunity to be Heard After Deprivation of a Fundamental Right

Kuck and Goldberg do not challenge merely the deprivation of their permits; they challenge the length of the deprivation without an opportunity to be heard. The government argues in this case that the delay has been decreased since the filing of this action in 2007. The relationship between the filing of this action in 2007 and the changes to the Board that resulted in a decrease of the delay is supported in the record. The district court took note of the decrease in the delay and used this as a basis for its decision that an eight month delay does not violate the Constitution.

The court and the government attribute the delays in 2007 onward to September 11, 2001, and a myriad of other factors including limited resources and the fact that volunteer Board members are dedicated and working diligently to decrease the delay under the conditions. Increases in appeals must be anticipated and planned for, not used as a reason to justify a delay. When rights are implicated a delay caused by an intentional lack of resources cannot be used then to justify the delay.

The delay in hearings has decreased due to the Board's recent practice of holding meetings even more frequently than monthly although state statute requires only that the meetings be held once every ninety days. The current Secretary's testimony is in the record detailing his experience, qualifications, and expertise in Board matters. The Secretary testified in the record about the Spinelli case and how it has impacted his efforts to move those with employment requiring permits to the front of the docket. But this Secretary will not be on the Board forever. He is a thirty-five year veteran of a municipal police department who retired nearly thirty years ago. Similarly the other dedicated Board members will not always be on the Board. Laws provide for a continuity that does not depend on personalities. When fundamental constitutional rights are at issue the mercy or grace or goodwill of the government cannot be the basis of the guarantees. At present there is no court or legislative impediment to the Board holding meetings every three months; to decreasing the matters heard at each meeting from fifteen to three cases; to various Board members deciding not to appear so that a quorum is not met .

As long as the right to a timely hearing is not recognized, and eight months under the Spinelli standard is not a timely hearing,[2] the government will not allocate resources and will rely on the claim that it is performing at optimum level in consideration of the lack of resources. When a right is guaranteed under state or federal law then the resources must be allocated. When the Supreme Court determined that indigent criminal defendants have a right to counsel it was not persuasive that there were not enough attorneys willing to volunteer and work for free. The government had to allocate resources to ensure that protections were afforded as interpreted by the courts to be required under the law. As long as the courts determine that a delay in hearings for individuals deprived of their right to carry a handgun outside the home is subject to the vagaries of change in volunteer Board members appointed to hear their appeals who have no timeline whatsoever that they must follow in scheduling the appeals there will be fluctuations in delay periods and a deprivation of rights which are guaranteed under state and federal laws. In this means-end test, the government achieves the end of saving resources through the means of not imposing strict requirements on the Board that would

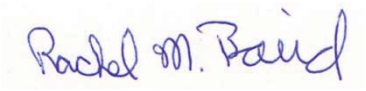
[2] While in Spinelli the court found the deprivation of a livelihood persuasive, in Connecticut where Kuck and Goldberg reside there is a state constitutional right to bear arms that Spinelli could not rely on in New York.

result in a need for more resources to meet the stricter standards. There is no evidence that the delay has anything whatsoever to do with public safety concerns.

No party to this action can state that since Newtown on December 14, 2012, the number of permit applications, denials, revocations and appeals has remained constant to the eight month mark deemed acceptable by the district court. No party to this action can state that when the current Secretary leaves the Board that it will remain as efficiently operated. To deny the individual permit holders a maximum period for when their appeals must be heard is to deny that they have any right to a hearing at all because a hearing only affords due process when it is timely.

## CONCLUSION

For the foregoing reasons and arguments Kuck and Goldberg respectfully request that the Order granting summary judgment in favor of the Defendants be reversed, the judgment vacated, and the matter remanded to the district court for further proceedings.



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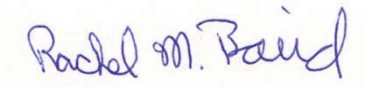
Dated: July 2, 2013

**CERTIFICATION OF COMPLIANCE WITH RULE 32(a)(7)(B)**

I HEREBY CERTIFY that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 3,060 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); the Typeface requirements of Fed. R. App. P. 32(a)(5); and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word software with Times New Roman 14-point font.



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