LAW CENTER TO PREVENT GUN VIOLENCE
BECAUSE SMART GUN LAWS SAVE LIVES

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POST-*HELLER* LITIGATION SUMMARY

INTRODUCTION AND OVERVIEW

The Law Center to Prevent Gun Violence tracks all litigation involving Second Amendment challenges to federal, state, and local gun laws brought in the aftermath of the United States Supreme Court's controversial, landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). This document summarizes the state of Second Amendment jurisprudence after *Heller* and examines its implications for many different laws designed to reduce gun violence. To date, we have examined over 1,090 federal and state post-*Heller* Second Amendment decisions in the preparation of this analysis.

Our summary of the most recent and important Second Amendment lawsuits and decisions can be found at smartgunlaws.org/post-heller-litigation-summary. We also have a wide variety of Second Amendment resources available on our website.

A. *Heller* and *McDonald*

In a 5–4 ruling in *Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual right to possess an operable handgun in the home for self-defense. Accordingly, the Court struck down Washington D.C. laws prohibiting handgun possession and requiring that firearms in the home be stored unloaded and disassembled or locked at all times.

However, the Supreme Court cautioned that the Second Amendment right is "not unlimited," and should not be understood as conferring a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[1] The Court identified a non-exhaustive list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," laws forbidding guns in "sensitive places" like schools and government buildings, and "conditions and qualifications" on the commercial sale of firearms.[2] The Court also noted that the Second Amendment is consistent with laws banning "dangerous and unusual weapons" not in common use, such as M-16 rifles and other firearms that are most useful in military service.[3] In addition, the Court declared that its analysis should not be read to suggest "the invalidity of laws regulating the storage of firearms to prevent accidents."[4]

In 2010, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held in another 5–4 ruling that the Second Amendment is a "fundamental right," which applies to state and local governments in

[1] *Heller*, 554 U.S. at 626.
[2] *Id*. 626-27.
[3] *Id*. at 627.
[4] *Id*. at 632.

addition to the federal government. The Court invalidated a Chicago law entirely prohibiting the possession of handguns, but reiterated that a broad spectrum of gun laws remain constitutionally permissible.[5]

B. The Post-*Heller* Landscape: A Flood Of Overwhelmingly Unsuccessful Challenges to Federal, State, and Local Gun Laws

Since *Heller* and *McDonald*, courts have been inundated with civil lawsuits claiming that various federal, state, and local laws regulating firearms violate the Second Amendment. The vast majority of these lawsuits have been unsuccessful. Moreover, criminal defendants now routinely claim that criminal statutes violate the Second Amendment. Like the civil lawsuits, those claims have been met with nearly uniform rejection by the courts. **In fact, Second Amendment claims have been rejected in 94% of the more than 1,090 state and federal court decisions tracked by the Law Center since *Heller*.**

As discussed below, courts have upheld numerous commonsense gun laws against Second Amendment challenges, including those:

- Requiring "good cause" for the issuance of a permit to carry a concealed firearm
- Prohibiting the possession of machine guns, assault weapons, and large capacity ammunition magazines
- Requiring that firearms be stored in a locked container or other secure manner when not in the possession of the owner
- Forbidding convicted felons from owning firearms
- Forbidding persons convicted of certain classes of misdemeanors such as domestic violence-related crimes from owning firearms
- Requiring the registration of all firearms
- Forbidding persons who have been involuntarily committed to a mental institution from owning firearms
- Forbidding persons under 21 years of age from owning firearms or carrying firearms in public
- Regulating firing ranges, including zoning, construction, and operation requirements
- Requiring that handguns sold within a state meet certain safety requirements, including the incorporation of chamber loaded indicators and microstamping technology
- Imposing fees on the commercial sale of handguns to fund firearm safety regulations

By contrast, courts have only struck down gun laws in a handful of cases, and even in those cases, the courts have been careful to note that most laws designed to reduce gun violence are not prohibited by the Second Amendment.

As described below, the Supreme Court has declined to grant review ("certiorari") in more than 70 Second Amendment cases since *Heller* was decided in 2008. As a result, lower court decisions upholding gun laws,

[5] *McDonald*, 561 U.S. at 785-86 (restating the "presumptively valid" categories of laws identified in *Heller* and noting that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.").

such as those listed above, have been left undisturbed.

POST-HELLER SECOND AMENDMENT DOCTRINE

The *Heller* and *McDonald* decisions left many questions unanswered about how courts should interpret and apply the individual right recognized in those cases. For example, the Court did not decide in either case whether the Second Amendment extends outside the home or what level of constitutional review should be applied to Second Amendment claims.

Although lower courts have articulated several different ways of handling Second Amendment claims, the most common framework is a two-pronged inquiry that asks: 1) whether a challenged law imposes a burden on conduct falling within the scope of the Second Amendment; and 2) if so, whether the law satisfies the applicable level of constitutional scrutiny.[6] As is discussed in detail below, the proper level of scrutiny is generally determined by looking at how severely the law in question burdens the "core" Second Amendment right of self-defense in the home.[7]

a. The Scope of the Second Amendment

The first step of the two-pronged inquiry is an analysis of whether the challenged law "imposes a burden on conduct falling within the Second Amendment's guarantee."[8] As articulated by the Ninth Circuit, this question generally turns on "whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions" that fall outside the scope of the Second Amendment.[9] In describing the proper scope of the Second Amendment, the *Heller* Court identified a number of categorical limitations, which are described below.

1. "Presumptively Lawful" Regulations

The *Heller* Court identified a non-exhaustive list of "presumptively lawful" regulatory measures. As noted above, those laws include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [and] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms."[10] Arguably, these "presumptively lawful" regulations fall entirely outside the scope of the Second Amendment,[11] and most courts have had little trouble upholding laws falling into the categories identified in

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[6] *See, e.g.*, *Woollard v. Galagher*, 712 F.3d 865, 874-75 (4th Cir. 2013) (collecting cases applying the two-pronged approach).

[7] *See United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) ("the level of scrutiny should depend on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right.") (quotations omitted); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.").

[8] *See, e.g.*, *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

[9] *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014).

[10] *Heller,* 554 U.S. at 626-27.

[11] *See United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("we think the better reading, based on the text and the structure of *Heller*,...[is that] the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment."); *Commonwealth v. McGowan*, 464 Mass. 232, 238 (Mass. 2013) ("we discern meaning from the Supreme Court's willingness to characterize some longstanding limitations on the right to bear arms, such as the prohibition of the possession of firearms by felons and the mentally ill, and the regulation of the commercial sale of arms, as 'presumptively lawful' without subjecting these laws to heightened scrutiny, or identifying the level of heightened scrutiny that would apply. These laws could be presumptively

Heller.[12] At the very least, courts have looked to a law's "presumptively lawful" status to further justify the application of intermediate scrutiny rather than strict scrutiny.[13]

2. "Dangerous and Unusual" Weapons

The *Heller* Court also noted that powerful, military-style weapons that are not in "common use," such as M-16's, fall outside the scope of the Second Amendment and lower courts have used this rationale to uphold laws prohibiting or otherwise regulating particularly "dangerous and unusual" weapons.[14] Courts have uniformly held, for example, that machine guns are "dangerous and unusual" and therefore do not fall within the scope of the Second Amendment.[15] Other weapons found to be "dangerous and unusual" have included silencers, grenades, smoke grenades, pipe bombs, and mines.[16] Exactly where the line should be drawn as to

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lawful without such heightened scrutiny only if they fell outside the scope of the Second Amendment and therefore were not subject to heightened scrutiny."); *United States v. Nowka*, 2012 U.S. Dist. LEXIS 190706 at *12 (N.D. Ala. May 10, 2012) (upholding federal prohibition on engaging in the dealing of firearms without a license and concluding that "[t]he challenged statutes are 'presumptively lawful regulatory measures' that 'impos[e] conditions and qualifications on the commercial sale of arms.'...[t]hus, these statutes are not unconstitutional."). But see *Marzzarella,* 614 F.3d at 92 n.8 (an exception from the Second Amendment right for commercial regulations of firearms would require "examin[ing] the nature and extent of the imposed condition," and could permit "prohibiting the commercial sale of firearms," which the court said would be inconsistent with *Heller*).

[12] *See, e.g.*, *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012) (felon in possession statute is "presumptively lawful" and does not violate Second Amendment); *United States v. Mendez*, 2014 U.S. App. LEXIS 16478 (9th Cir. Aug. 26, 2014) ("Section 922(g)(1) is a presumptively lawful regulatory measure and does not unconstitutionally burden whatever Second Amendment rights") (quotations omitted); *Peña v. Lindley*, 2015 U.S. Dist. LEXIS 23575 (E.D. Cal. Feb. 26, 2015) ("[California's Unsafe Handgun Act] is one of the presumptively lawful regulatory measures identified in Heller and, as such, falls outside the historical scope of the Second Amendment") (quotations omitted); *Bauer v. Harris*, 2015 U.S. Dist. LEXIS 25757 (E.D. Cal. Mar. 2, 2015) ("the DROS fee is a condition on the sale of firearms...[t]he DROS fee, therefore, is a presumptively lawful regulatory measure...[and] is constitutional because it falls outside the historical scope of the Second Amendment."). But see *Marzzarella,* 614 F.3d at 92 n.8; *Teixeira v. County of Alameda,* 2016 U.S. App. LEXIS 8925 (9th Cir. May 16, 2016) (holding that a restriction on the location of firearms dealers was not presumptively lawful because it did not fall within a "category of prohibitions that have been historically unprotected"). The County filed a petition for rehearing *en banc* on July 21, 2016.

[13] *NRA v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012) ("even if such a measure advanced to step two of our framework, it would trigger our version of 'intermediate' scrutiny."); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) ("While the categorical regulation of gun possession by domestic violence misdemeanants thus appears consistent with *Heller's* reference to certain presumptively lawful regulatory measures, we agree with the Seventh Circuit's conclusion in Skoien that some sort of showing must be made to support the adoption of a new categorical limit on the Second Amendment right.").

[14] *Heller*, 554 U.S. at 627 ("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.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"); *see also Hollis v. Lynch,* 2016 U.S. App. LEXIS 12099 (5th Cir. June 30, 2016) ("Machineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection, so we uphold Section 922(o) at step one of our framework."); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136 (3d Cir. 2016) ("In case *Marzzarella* left any doubt, we repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes.").

[15] *See Hollis v. Lynch,* 2016 U.S. App. LEXIS 12099 (5th Cir. June 30, 2016) ("Machineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection, so we uphold Section 922(o) at step one of our framework."); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136 (3d Cir. 2016) ("In case *Marzzarella* left any doubt, we repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes."); *United States v. Zaleski*, 489 Fed. Appx. 474 (2d Cir. 2012) (upholding defendant's conviction for possession of a machine gun and noting the Supreme Court's statement from *Heller* that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").

[16] *See United States v. McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009) ("The weapons involved in this case are dangerous and unusual. McCartney's own expert testified that the machine gun is a dangerous weapon in light of the fact that 'it devastated entire populations in World War I.' And the possession of a machine gun by a private citizen is quite unusual in the United States. The other weapons involved in this case are even more dangerous and unusual than machine guns. Silencers, grenades, and directional mines are not typically possessed by law-abiding citizens for lawful purposes and are less common than either short-barreled shotguns or machine guns. The weapons involved in this case therefore are not protected by the Second Amendment."); *Stauder v. Stephens*, 2016 U.S. Dist. LEXIS 31222 (N.D. Tex. Feb. 19, 2016) (upholding state law prohibiting possession of smoke grenade); *United States v. Garcia*, 2011 U.S. Dist. LEXIS 113748 (E.D. Cal. Oct. 3, 2011) (upholding federal prohibition on the possession of pipe bombs and noting that "Defendant has made no showing that the Constitution protected the right of individual civilian citizens to wage war, or that it was referring to pipe bombs.").

whether a weapon is considered in "common use" is still an issue being litigated in the lower courts and is unlikely to be resolved soon.[17]

3. "Longstanding" Regulations

Lower courts applying *Heller* have recognized that another limit to the Second Amendment are laws that are sufficiently "longstanding" as to be considered beyond the historical scope of the right to bear arms. As the D.C. Circuit has explained, "Heller tells us 'longstanding' regulations are…presumed not to burden conduct within the scope of the Second Amendment…This is a reasonable presumption because a regulation that is 'longstanding,' which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment."[18]

Exactly what counts as a "longstanding" regulation is matter of ongoing litigation. The lower courts' confusion is fueled by the *Heller* decision itself, which referred to limits on firearm possession for felons and the mentally ill as "longstanding." However, as many courts and legal scholars have now pointed out, these restrictions were only enacted in their present form in the middle part of the twentieth century, suggesting that statutes on the books for only several decades may qualify as "longstanding."[19] Some courts have taken a much more narrow approach, requiring proof that a version of a challenged law existed either in 1791, at the time of the ratification of the Second Amendment, or in 1868, when the Fourteenth Amendment was adopted.[20]

A challenged statute's status as "longstanding" has played an important role in a number of Second Amendment decisions in recent years.[21] As such, the relative age of the statute in question—and the historical pedigree of analogous statutes—will remain highly relevant for the foreseeable future.

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[17] *New York State Rifle & Pistol Ass'n v. Cuomo,* 804 F.3d 242, 256-57 (2d Cir. 2015) (assuming, without deciding, that assault wepaons and large capacity magazines are in "common use," and noting that "this analysis is difficult to manage in practice…neither the Supreme Court's categories nor the evidence in the record cleanly resolves the question of whether semiautomatic assault weapons and large-capacity magazines are 'typically possessed by law-abiding citizens for lawful purposes.' Confronting this record, Chief Judge Skretny reasonably found that reliable empirical evidence of lawful possession for lawful purposes was 'elusive,' beyond ownership statistics. We agree.").

[18] *Heller II, 670 F.3d at 1253*.

[19] *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) ("legal limits on the possession of firearms by the mentally ill also are of 20th Century vintage…[s]o although the Justices have not established that any particular statute is valid, we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."); *United States v. Booker*, 644 F.3d at 23-24 ("the modern federal felony firearm disqualification law, 18 U.S.C. § 922(g)(1), is firmly rooted in the twentieth century and likely bears little resemblance to laws in effect at the time the Second Amendment was ratified… [t]he recency of enactment and the continuing evolution of this 'presumptively lawful' limit on gun ownership support the conclusion that, 'although the Justices have not established that any particular statute is valid, . . . exclusions need not mirror limits that were on the books in 1791.'"); Marshall, Why Can't Martha Stewart Have a Gun? 32 Harv. J.L. & Pub. Pol'y 695, 698-99 (2009) ("The federal 'felon' disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than fifty years old. A disability from all such persons' receiving any firearm in interstate commerce dates to a 1961 amendment of the Federal Firearms Act of 1938 ("FFA")…[t]his history does not make disarmament of all felons an infant, but it is hardly 'longstanding.'").

[20] *See Teixeira v. County of Alameda*, 822 F.3d 1047, 1058 (challenged ordinance not "longstanding" where "the County has failed to advance any argument that the zoning ordinance is a type of regulation that Americans at the time of the adoption of the Second Amendment or the Fourteenth Amendment (when the right was applied against the States) would have recognized as a permissible infringement of the traditional right.").

[21] *See id.*; *Drake v. Filko*, 724 F.3d at 429 (we conclude that the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee. Accordingly, we need not move to the second step [of the Second Amendment analysis]."); *Heller II*, 670 F.3d at 1254 ("In sum, the basic requirement to register a handgun is longstanding in American law, accepted for a century in diverse states and cities and now applicable to more than one fourth of the Nation by population. Therefore, we presume the District's basic registration requirement…including the submission of certain information,…does not impinge upon the right protected by the Second Amendment."); *Silvester v. Harris*, 2014 U.S. Dist. LEXIS 118284 (E.D. Cal., Aug. 22, 2014)

4. Guns in Public Places

One of the most hotly litigated questions in Second Amendment jurisprudence is whether, and to what extent, the Second Amendment should apply outside the home. This issue has come up most often in the context of litigation over laws regulating or banning the concealed or open carrying of firearms in public, which is discussed in greater detail below.

In evaluating challenges related to conduct outside the home, a number of courts have concluded that the Second Amendment only protects conduct within the home.[22] However, the U.S. Courts of Appeals for the Second and Seventh Circuits have determined that the Second Amendment applies, or likely applies, outside the home.[23]

Other courts have deferred the question of whether the Second Amendment applies outside the home, but have ultimately upheld restrictions on firearm possession in public places.[24] For example, the Fourth Circuit has declined to explicitly extend the Second Amendment outside the home without further guidance from the Supreme Court, but has upheld Maryland's concealed carry permit law even assuming that there is some application of the Second Amendment outside the home.[25]

In June, 2016, an en banc panel of the Ninth Circuit refused to answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms *openly* in public, Instead the court upheld California's requirement that a person demonstrate "good cause" for a concealed carry permit, finding that the Second Amendment does not protect the right of a member of the general public to carry *concealed* firearms in public.[26] This decision was in accordance with an earlier Tenth Circuit decision, which held that the Second Amendment does not protect a right to carry a conealed firearm in public.[27]

(finding California waiting period law, which traced origin to 1920s, did not qualify as "longstanding."). *Silvester* is currently on appeal in the Ninth Circuit.

[22] *See Jennings v. McCraw,* No. 10-00141 (N.D. Tex. Jan. 19. 2012) (unpublished); *In re Patano*, 60 A.3d 507 (N.J. Super. Ct. App. Div. 2013); *New Jersey v. Robinson*, 2011 N.J. Super. Unpub. LEXIS 2274 (App. Div. Aug. 23, 2011); *Williams v. Maryland*, 10 A.3d 1167, 1178 (Md. 2011); *People v. Dawson*, 934 N.E.2d 598 (Ill. App. Ct. 2010), *cert. denied by Dawson v. Illinois, 131 S. Ct. 2880* (2011); *People v. Yarbrough*, 86 Cal. Rptr. 3d 674 (Cal. Ct. App. 2008), *review denied by People v. Yarbrough (Ronnie)*, 2009 Cal. LEXIS 2948 (Cal. Mar. 18, 2009); *People v. Davis*, 214 Cal. App. 1322 (2013); *People v. Williams, 962 N.E.2d 1148* (Ill. App. Ct. 2011); *In re Matter of Kelly*, 2012 N.Y. Misc. LEXIS 369 (N.Y. App. Div. June 13, 2012); *see also Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (finding that the Second Amendment does not confer a "right to carry a concealed weapon); *Plastino v. Koster*, 2013 U.S. Dist. LEXIS 58544 (E.D. Mo. Apr. 24, 2013) (same).

[23] *See Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (explaining that "[a]lthough the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court's analysis suggests…that the Amendment must have some application in the very different context of the public possession of firearms."); *Moore v. Madigan*, 702 F.3d 933, 935-36 (7th Cir. 2012) (explaining that "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home"); b*ut see Moore v. Madigan*, 708 F.3d 901, 902 (7th Cir. 2013) (Hamilton, J. dissenting from denial of rehearing en banc) ("The Supreme Court has not yet decided whether the post-*Heller* individual right to keep and bear arms at home under the Second Amendment extends beyond the home. The panel's split decision in these cases goes farther than the Supreme Court has gone and is the first decision by a federal court of appeals striking down legislation restricting the carrying of arms in public…[E]xtending the right to bear arms outside the home and into the public sphere presents issues very different from those involved in the home itself, which is all that the Supreme Court decided in [*Heller* and *McDonald*].").

[24] *Drake v. Filko*, 724 F.3d 426, 430-32 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Young v. Hawaii*, 911 F. Supp. 2d 972 (D. Haw. 2012).

[25] *Woollard*, 712 F.3d at 876-83.

[26] *Peruta v. Cnty. of San Diego,* 2016 U.S. App. LEXIS 10436 (9th Cir. 2016).

[27] *Peterson v. Martinez,* 707 F. 3d 1197, 1212 (10th Cir. 2013) ("we conclude that the concealed carrying of firearms falls outside the scope of the Second Amendment's guarantee.").

Even the courts that have suggested that some form of Second Amendment protection ought to extend outside the home have generally upheld laws restricting firearm possession in public places.[28] The Second Circuit, for example, upheld New York's law which limits the carrying of handguns in public to those with "a special need for self-protection."[29]

The Second, Third, Fourth, and Ninth Circuits have all upheld strong laws limiting the public carrying of concealed firearms in New Jersey, Maryland, and California, respectively.[30] Only those laws completely prohibiting any form of public carry have been struck down consistently. Illinois and Washington DC, for example, were the the last jurisdictions in the country to completely prohibit the public carry of firearms. [31] Both have now adopted public carry licensing systems in response to court decisions striking down those laws.Illinois' licensing system has survived several legal challenges[32] and two cases challenging the Districts' permiting system are now before the D.C. Circuit.[33]

b. The Applicable Level of Scrutiny

If the first step of the two-pronged inquiry establishes that the challenged law does, in fact, burden conduct protected by the Second Amendment, then the second step requires courts to "apply[] an appropriate form of means-end scrutiny."[34] The issue of what constitutes an "appropriate" form of scrutiny in this context is still being fiercely litigated.

1. The Rational Basis Test is Not Applicable

The Court in *Heller* stated that the "rational basis" test—where a law is constitutional if it is rationally related to a legitimate government interest—is not appropriate in the Second Amendment context, noting that "[i]f

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[28] *Kachalsky*, 701 F.3d at 101 ("Our review of the history and tradition of firearm regulation does not 'clearly demonstrate[]' that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment…we decline Plaintiffs' invitation to…call into question the state's traditional authority to extensively regulate handgun possession in public."); *Hall v. Garcia*, 2011 U.S. Dist. LEXIS 34081 at *13 (N.D. Cal. Mar. 17, 2011) ("Under any of the potentially applicable levels of scrutiny…the Gun-Free School Zone Act constitutes a constitutionally permissible regulation of firearms in public areas in or near schools."); b*ut see Nevada v. Schultz*, No. 10-CM-138 (Clark Cty. Cir. Ct. Oct. 12, 2010) (Nevada trial court dismissing an indictment under the state's law prohibiting the carrying of concealed weapons as violating the Second Amendment).

[29] *Kachalsky*, 701 F.3d at 101.

[30] *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Peruta v. Cnty. of San Diego*, 2016 U.S. App. LEXIS 10436 (9th Cir. 2016).

[31] *See Palmer v. D.C.*, 59 F. Supp. 3d 173, 183 (D.D.C. July 26, 2014) (holding that the Second Amendment applies outside of the home and finding that "the District of Columbia's complete ban on the carrying of handguns in public is unconstitutional."); *Moore v. Madigan*, 702 F.3d at 940 (striking down Illinois complete prohibition on the public carrying of firearms and noting that "Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home, though many states used to ban carrying concealed guns outside the home."); *cf. Wrenn v. District of Columbia*, 2015 U.S. Dist. LEXIS 71383 (D.D.C. May 18, 2015) (the Second Amendment "includes the right to carry an operable handgun outside the home for self-defense" and the District's concealed carry permitting scheme "makes it impossible for the overwhelming majority of law-abiding citizens to obtain licenses to carry handguns in public for self-defense, thereby depriving them of their Second Amendment right to bear arms."); *Grace v. District of Columbia,* 2016 U.S. Dist. LEXIS 64681 (D.D.C. May 17, 2016) (same).

[32] *See, e.g., Berron v. Ill. Concealed Carry Licensing Review Bd.,* 2016 U.S. App. LEXIS 10985 (7th Cir. June 17, 2016) (upholding Illinois' concealed carry permitting regime); See Wrenn v. District of Columbia, No. 16-7025, and Grace v. District of Columbia, No. 16-7067 (consolidated for purposes of appeal).

[33] *Grace v. District of Columbia*, 2016 U.S. Dist. LEXIS 64681 (D.D.C. May 17, 2016) (granting plaintiffs' motion for preliminary injunction and noting that self-defense in public is "core" of Second Amendment right); *Wrenn v. District of Columbia*, 2016 U.S. Dist. LEXIS 28362 (D.D.C. Mar. 7, 2016) (denying plaintiffs' motion for preliminary injunction and noting that "Defendants have identified what appears to be substantial evidence of connections between public carrying of guns—and associated regulations on public carrying—and impacts on crime and public safety.").

[34] *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2013) ("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."); *Heller II*, 670 F.3d at 1252 ("We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.").

all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[35] The Court provided no further guidance, however, on the proper level of scrutiny to be applied in Second Amendment challenges, essentially leaving the lower courts to decide the issue for themselves.

2. Intermediate Scrutiny, Strict Scrutiny, or Something Else?

With rational basis review off the table, courts are generally left to choose between two levels of heightened scrutiny: "intermediate scrutiny," which examines whether a law is reasonably related to an important or significant governmental interest, and the more rigorous "strict scrutiny" standard, which asks whether a law is narrowly tailored to achieve a compelling government interest.

Most case law suggests that the appropriate level of scrutiny depends on the severity of the challenged law's burden on Second Amendment rights.[36] The Second Circuit, for example, has stated that heightened scrutiny is only appropriate where the challenged law *substantially* burdens conduct protected by the Second Amendment.[37] The Fourth, Fifth, and Ninth Circuits have said that "the level of scrutiny in the Second Amendment context should depend on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[38]

Using this framework, most federal circuit courts, including the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, have applied intermediate scrutiny to Second Amendment challenges.[39] Courts have arrived at intermediate scrutiny using differing approaches, but the clear trend suggests that laws which do not prevent law-abiding, responsible individuals from possessing an operable handgun in the home for self-defense should face intermediate scrutiny.[40]

However, a few courts have reviewed Second Amendment challenges under strict scrutiny, primarily in cases involving as-applied challenges to lifetime firearm prohibitions under federal law.[41] When an as-applied challenge is sustained, the law is left intact and only its application to a particular individual is overturned. Successful facial challenges to a firearm safety statutes under strict scrutiny have been

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[35] *Heller,* 554 U.S. at 628 n. 27.

[36] *Ezell*, *651 F.3d* at 703 (explaining that the level of applicable scrutiny should be determined by "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right"); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110 (N.D. Ill. June 19, 2012); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012).

[37] *Kachalsky v. County of Westchester*, *701 F.3d 81 (*2d Cir. 2012); *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012).

[38] *Chester*, 628 F.3d at 682; *Chovan*, 735 F.3d at 1138; *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013).

[39] *United States v. Booker*, 644 F.3d 12 (1st 2011); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Baer v. Lynch,* 636 Fed. Appx. 695 (7th Cir. 2016); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *Heller v. District of Columbia* (*"Heller II"*), 670 F.3d 1244 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition on assault weapons and large capacity ammunition magazines); *see also Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (applying intermediate scrutiny to laws concerning weapons outside of the home, but noting that strict scrutiny may apply to restrictions on the "core right of self-defense in the home") (quotations and citation omitted).

[40] *See,* supra*,* FN 38.

[41] *See Tyler v. Hillsdale County Sheriff's Dep't,* 2014 U.S. App. LEXIS 23929 (6th Cir. Dec. 18, 2014) vacated by 2015 U.S. App. LEXIS 6638 (applying strict scrutiny when sustaining as-applied challenge to federal firearm prohibition for persons involuntarily committed to a mental institution); *Binderup v. Holder*, 2014 U.S. Dist. LEXIS 135110 (E.D. Penn., Sept. 25, 2014) (sustaining as-applied challenge to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1)); *see also Bateman v. Perdue*, 881 F. Supp. 2d 709 (E.D.N.C. 2012); *Taylor v. City of Baton Rouge*, 2014 U.S. Dist. LEXIS 117919 (M.D. La., Aug. 25, 2014); *United States v. Bay*, 2009 U.S. Dist. LEXIS 106874 (D. Utah Nov. 13, 2009); *United States v. Engstrum*, 2009 U.S. Dist. LEXIS 33072 (D. Utah Apr. 17, 2009); *but see In re United States*, 578 F.3d 1195 (10th Cir. 2009); *United States v. Luedtke*, 589 F. Supp. 2d 1018 (E.D. Wis. Nov. 18, 2008); *United States v. Erwin*, 2008 U.S. Dist. LEXIS 78148 (N.D.N.Y. Oct. 6, 2008).

extremely rare thus far.[42] Alternative standards have also been applied. In one case involving a ban on shooting ranges in Chicago, for example, the Seventh Circuit applied "a more rigorous [standard than intermediate scrutiny], if not quite 'strict scrutiny.'"[43]

In responding to the argument that strict scrutiny should automatically apply when a fundamental right is implicated, the Tenth Circuit has argued that "the risk inherent in firearms and other weapons" distinguishes the Second Amendment "from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others."[44] As a result, the court concluded, intermediate scrutiny is generally the proper level of review for Second Amendment challenges and "appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety."[45] With limited exceptions, courts have seemed to embraced this logic in widely choosing intermediate scrutiny over strict scrutiny in the majority of Second Amendment cases.

3. Residual Use of Rational Basis Review

While intermediate scrutiny is most commonly used in Second Amendment cases, courts have applied rational basis review—or something else less rigorous than intermediate scrutiny—in several cases not directly implicating the Second Amendment right. For example, the Massachusetts Supreme Court applied rational basis review to uphold a law requiring firearms to be secured in a locked container when not in the owner's control.[46] The court reasoned that rational basis review was appropriate because safe storage laws are similar to laws that regulate the commercial sale of firearms in that "[b]oth types of laws are designed to keep firearms out of the hands of those not authorized by law to possess a firearm."

Similarly, the Eastern District of California concluded that rational basis was the appropriate standard for reviewing a National Park Service regulation prohibiting firearms in national parks where they are prohibited by state law because the regulation did not substantially burden Second Amendment rights.[47] Appellate courts in Illinois and Wisconsin have also applied rational basis review to other laws regulating guns outside of the home.[48]

c. Gun Regulations Have Survived Largely Unscathed after Heller

Regardless of the level of scrutiny applied, nearly all of these cases have one thing in common: the Second Amendment challenge has been rejected and the statute at issue upheld. Of the more than 1,090 cases tracked by the Law Center, 94% have rejected the Second Amendment claim. The following sections discuss specific types of gun safety laws and policies that have been upheld by the courts in recent years.

i. Concealed and Open Carry

As discussed above, one of the most litigated Second Amendment issues since *Heller* has been whether the

[42] *See Mance v. Holder,* 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. Feb. 11, 2015) (applying strict scrutiny in striking down federal statutes requiring out-of-state handgun purchases to be processed in-state by a federally licensed dealer). An appeal is pending before the Fifth Circuit.

[43] *See Ezell v. City of Chicago*, 651 F. 3d 684, 708 (7th Cir. 2011).

[44] *Bonidy v. United States Postal Serv.,* 2015 U.S. App. LEXIS 10954 at *10 (10th Cir. Colo. June 26, 2015).

[45] *Id.*

[46] *Commonwealth v. McGowan*, 982 N.E. 2d 495 (Mass. 2013).

[47] *United States v. Parker*, 919 F. Supp. 2d 1072 (E.D. Cal. Jan. 22, 2013).

[48] *Wisconsin v. Brown*, 2012 WI App 62 (2012); *People v. Williams*, *962 N.E.2d 1148* (Ill. App. Ct. 2011); *see also United States v. Laurent,* 861 F. Supp. 2d 71 (E.D.N.Y. 2011) (observing that "intermediate scrutiny seems excessive" for reviewing all gun regulations and opining that "plac[ing] gun rights on the same high protected level as speech rights seems an odd view of American democratic values.").

Second Amendment protects a right to carry a firearm outside of the home. Gun lobby groups and individual plaintiffs have frequently challenged laws regulating the ability of people to carry weapons outside of the home and, thus far, nearly all of those challenges have failed. [49] Courts have upheld laws requiring a license to carry a gun outside the home.[50] Courts have also upheld numerous conditions on such licenses including:

- Requiring an applicant for a license to carry a concealed weapon to show "good cause," "proper cause," "need," or to qualify as a "suitable person"[51]
- Requiring an applicant to submit affidavits evidencing good character[52]
- Prohibiting the issuance of a concealed carry permit based on a misdemeanor assault conviction[53]
- Requiring an applicant to be a state resident[54]
- Requiring an applicant for a concealed carry license to be at least twenty-one years old[55]
- Allowing the revocation of the permit if law enforcement determines that the permit holder poses a material likelihood of harm[56]

Most notably, out of the seven federal courts of appeal that have directly reviewed challenges to regulations on concealed or open carry, six have upheld the laws at issue in their entirety, including the First, Second, Third, Fourth, Ninth, and Tenth Circuits.[57] In the DC Circuit, two separate challenges to the District's strong concealed carry permitting regime have been consolidated for purposes of appeal and are still pending before the court.[58]

For example, the Second Circuit in *Kachalsky v. County of Westchester* rejected a challenge to New York's requirement that applicants for a concealed carry permit obtain a license by demonstrating that they have "a special need for self-protection distinguishable from that of the general community or of persons

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[49] These laws generally allow some form of concealed carry, open carry, or both. In 2014, in light of the *Palmer* decision, Washington D.C. became the last jurisdiction in the country to change its laws to allow for concealed carry. *See Palmer v. D.C.*, 59 F. Supp. 3d 173 (D.D.C. 2014).

[50] *State & Portland v. Christian*, 354 Ore. 22 (2013); *Ohio v. Henderson*, 2012 Ohio 1268 (Ohio Ct. App. 2012); *Williams v. Maryland*, 10 A.3d 1167, 1178 (Md. 2011).

[51] *Peruta v. Cnty. of San Diego,* 2016 U.S. App. LEXIS 10436 (9th Cir. 2016); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Hightower v. Boston, 693 F.3d 61* (1st Cir. 2012); *Gendreau v. Canario*, 2016 U.S. Dist. LEXIS 66957 (D.R.I. 2016) *Young v. Hawaii*, 911 F. Supp. 2d 972 (D. Haw. 2012);; *Kuck v. Danaher,* 822 F. Supp. 2d 109 (D. Conn. 2011); *In re Patano*, 60 A.3d 507 (N.J. Super. Ct. App. Div. 2013).

[52] *Williams v. Puerto Rico*, 910 F. Supp. 2d 386 (D.P.R. 2012).

[53] *Kelly v. Riley*, 733 S.E.2d 194 (N.C. Ct. App. Nov. 6, 2012).

[54] *Peterson v. Martinez*, 707 F. 3d 1197 (10th Cir. 2013); *Osterweil v. Bartlett, 819 F. Supp. 2d 72* (N.D.N.Y 2011), *vacated by Osterweil v. Bartlett,* 738 F.3d 520 (2d Cir. 2013); *but see Palmer v. D.C.*, 2014 U.S. Dist. LEXIS 101945 at *29 n. 5 (D.D.C. July 26, 2014).

[55] *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *see also Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013).

[56] *Embody v. Cooper*, 2013 Tenn. App. LEXIS 343 (May 22, 2013).

[57] *Hightower v. Boston,* 693 F.3d 61 (1st Cir. 2012); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Peruta v. Cnty. of San Diego,* 2016 U.S. App. LEXIS 10436 (9th Cir. 2016); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013).

[58] *See Wrenn v. District of Columbia*, No. 16-7025, and *Grace v. District of Columbia*, No. 16-7067 (consolidated for purposes of appeal); *Grace v. District of Columbia*, 2016 U.S. Dist. LEXIS 64681 (D.D.C. May 17, 2016) (granting plaintiffs' motion for preliminary injunction and noting that self-defense in public is "core" of Second Amendment right); *Wrenn v. District of Columbia*, 2016 U.S. Dist. LEXIS 28362 (D.D.C. Mar. 7, 2016) (denying plaintiffs' motion for preliminary injunction and noting that "Defendants have identified what appears to be substantial evidence of connections between public carrying of guns—and associated regulations on public carrying—and impacts on crime and public safety.").

engaged in the same profession."[59] Although the court assumed that the Second Amendment had "some" application outside of the home, it found that the law satisfied intermediate scrutiny because New York's legislature "reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere."[60]

The Third Circuit upheld a similar New Jersey law, by finding that such restrictions on the concealed carrying of weapons are "longstanding" regulations under *Heller*, and therefore presumptively valid.[61] The Tenth Circuit went even further in *Peterson v. Martinez*, holding flatly that "the Second Amendment does not confer a right to carry concealed weapons."[62] In June, 2016, the Ninth Circuit reached this same conclusion in an en banc panel decision in the *Peruta* case.[63]

In 2012, the US Court of Appeals for the Seventh Circuit struck down an Illinois law that completely banned the carrying of loaded and accessible firearms in public, calling the law "the most restrictive gun law of any of the 50 states."[64] However, even in striking down that law, the court was careful to note that states, including Illinois, have many policy options available to them to regulate the carrying of firearms in public, including the use discretionary public carry permitting, requiring public carry permit applicants to receive firearms training, and allowing private institutions to ban guns from their premises.[65]

ii. Possession of Firearms by Criminals

Courts have nearly uniformly upheld laws banning the possession of firearms by felons and persons convicted of certain misdemeanors, such as crimes of domestic violence. Federal and state courts have repeatedly upheld laws prohibiting:

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[59] *Kachalsky*, 701 F.3d at 86 (quotations and citations omitted).

[60] *Id.* at 89, 98-99.

[61] *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (May 5, 2014). Notably, the New Jersey law at issue had its origins in the early 20th centrury, roughly the same time the first prohibitions on felons possessing firearms were enacted, which *Heller* referred to as "longstanding." *See* Drake, 724 *F.3d* at 434 n.11 ("the current versions of these bans are of mid-20th century vintage."); *United States v. Skoien*, 614 F.3d 638, 640-41 (the ban on receipt of firearms by all felons "was not enacted until 1961" and was not expanded to cover actual possession until 1968, when the law took "its current form."); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244,1253-54 & n.* (D.C. Cir. 2011) ("[t]he Court in *Heller* considered 'prohibitions on the possession of firearms by felons' to be 'longstanding' although states did not start to enact them until the early 20th century."); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."); c*f. Mance v. Holder*, 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. Feb. 11, 2015) ("Defendants list the earliest known state residency restrictions on the purchase or possession of firearms, with the earliest of these restrictions occurring in 1909…these early twentieth century state residency restrictions do not date back quite far enough to be considered longstanding."); *Silvester v. Harris*, 2014 U.S. Dist. LEXIS 118284 (E.D. Cal., Aug. 22, 2014) (finding California waiting period law, which traced origin to 1920s, did not qualify as "longstanding."). *Silvester* is currently on appeal in the Ninth Circuit.

[62] *Peterson*, 707 F.3d at 1211.

[63] *Peruta v. Cnty. of San Diego,* 2016 U.S. App. LEXIS 10436 (9th Cir. 2016) ("We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.").

[64] *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (noting that "Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public" and suggesting that Illinois could adopt a discretionary concealed carry licensing scheme to replace its prohibition on public carry); *see also Palmer v. D.C.*, 2014 U.S. Dist. LEXIS 101945 (D.D.C. July 26, 2014) (striking down the District's policy of requiring a permit to carry a handgun in public, but refusing to issue permits); *Wrenn v. District of Columbia*, 2015 U.S. Dist. LEXIS 71383 (D.D.C. May 18, 2015) (striking down the District's "good reason" / "proper reason" requirement for CCW permits). *Wrenn* is currently on appeal in the D.C. Circuit.

[65] *Moore v. Madigan*, 702 F.3d 933, 940-42 (7th Cir. 2012); s*ee also Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (upholding a requirement in Maryland law that applicants for concealed carry permits show "a good and substantial reason" for carrying a firearm in order to obtain a permit to carry a firearm in public).

- Possession of firearms by felons[66]
- Possession of firearms by domestic violence misdemeanants[67]
- Possession of firearms during the scope of employment by anyone working for a convicted felon (such as a bodyguard)[68]
- Providing a firearm to a fugitive felon[69]
- Possession of firearms by an individual who is under indictment for a felony[70]
- Possession of firearms by an unlawful user of a controlled substance[71]
- Possession of firearms during the commission of a crime[72]

Courts have also rejected challenges to sentence enhancements for convicted criminals who possessed firearms while engaging in illegal activity.[73] The courts have mostly explained these decisions by citing the statements in *Heller* and *McDonald* that "nothing in our opinion should be taken to cast doubt on

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[66] *See, e.g.*, *Baer v. Lynch*, 2016 U.S. App. LEXIS 3390, (7th Cir. Feb. 22, 2016) ("As to violent felons, the statute does survive intermediate scrutiny, we have concluded, because the prohibition on gun possession is substantially related to the government's interest in keeping those most likely to misuse firearms from obtaining them."); *United States v. Shields*, 2015 U.S. App. LEXIS 10058 (7th Cir. Ill. June 15, 2015); *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012); *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012); *United States v. Torres-Rosario, 658 F.3d 110* (1st Cir. 2011); *United States v. Williams,* 616 F.3d 685 (7th Cir. 2010); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750 (D. Kan. Sept 23, 2015) ("Here, Petitioner is a convicted felon, and he falls under § 922(g)(1). Accordingly, Petitioner did not have an unqualified right to possess a firearm, and the Second Amendment was not violated in obtaining his conviction."); *United States v. Rhodes*, 2012 U.S. Dist. LEXIS 76363 (S.D. W. Va. June 1, 2012); *United States v. Edge*, 2012 U.S. Dist. LEXIS 15002 (W.D.N.C. Feb. 8, 2012); *United States v. Loveland*, 2011 U.S. Dist. LEXIS 119954 (W.D.N.C. 2011); *United States v. Kirkpatrick*, 2011 U.S. Dist. LEXIS 82801 (W.D.N.C. July 27, 2011); *Baer v. Lynch*, 2015 U.S. Dist. LEXIS 113663 (W.D. Wis. Aug. 27, 2015); *State v. Eberhardt,* 145 So. 3d 377 (La. 2014); *State v. Merritt*, 2015 Mo. LEXIS 148 (Aug. 18, 2015); *State v. Craig*, 826 N.W.2d 789 (Minn. Feb. 27, 2013); *United States v. Hughley*, 2015 U.S. Dist. LEXIS 137544 (W.D. Mo. Sept. 8, 2015, Recommendation and Report adopted on Oct. 7, 2015); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750 (D. Kan. Sept 23, 2015); *Wisconsin v. Pocian,* 2012 WI App 58 (2012); *People v. Spencer*, 2012 IL App (1st) 102094 (2012); *Pohlabel v. Nevada*, 268 P.3d 1264 (Nev. 2012); *see also Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013) (upholding federal prohibition on firearms ownership for persons convicted of certain common law misdemeanors without a set sentence length); *Chardin v. Police Comm'r of Boston*, 2013 Mass. LEXIS 352 (June 4, 2013) (upholding prohibition on the issuance of firearm carrying permits to persons adjudicated as juvenile delinquents for felony offenses).

[67] *See, e.g.*, *Enos v. Holder*, 2014 U.S. App. LEXIS 19798 (9th Cir. Oct. 16, 2014); *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) *United States v. Chester*, 847 F. Supp. 2d 902 (S.D. W. Va. 2012); *United States v. Staten*, *666 F.3d 154* (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Booker*, *644 F.3d 12* (1st Cir. 2011); *Stimmel v. Lynch*, 2015 U.S. Dist. LEXIS 130312 (N.D. Ohio Sept. 28, 2015) *United States v. Holbrook*, 613 F. Supp. 2d 745 (W.D. Va. 2009); *see also In re United States*, 578 F.3d 1195 (10th Cir. 2009).

[68] *United States v. Weaver*, 2012 U.S. Dist. LEXIS 29613 (S.D. W. Va. Mar. 7, 2012).

[69] *United States v. Stegmeier*, 701 F.3d 574 (8th Cir. 2012).

[70] *United States v. Laurent,* 861 F. Supp. 2d 71 (E.D.N.Y. 2011); *United States v. Call*, 874 F. Supp. 2d 969 (D. Nev. 2012).

[71] *See, e.g., United State v. Emond*, 2012 U.S. Dist. LEXIS 149295 (D. Me. Oct. 17, 2012); *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012); *United States v. Prince*, 2009 U.S. Dist. LEXIS 54116 (D. Kan. June 26, 2009), *rev'd on other grounds*, 593 F.3d 1178 (10th Cir. 2010); *United States v. Bumm*, 2009 U.S. Dist. LEXIS 34264 (S.D. W. Va. Apr. 17, 2009); *Piscitello v. Bragg*, 2009 U.S. Dist. LEXIS 21658 (W.D. Tex. Feb. 18, 2009).

[72] *United States v. Jackson*, 555 F.3d 635 (7th Cir. Feb. 18, 2009) (finding no Second Amendment right to possess a firearm during the commission of a felony), *cert denied by Jackson v. United States*, 558 U.S. 857 (2009); *United States v. Spruill*, 2015 U.S. Dist. LEXIS 119640 (E.D. Penn. Sept. 9, 2015); *United States v. Darby*, 2014 U.S. Dist. LEXIS 88392 (June 27, 2014); *Roberge v. United States*, 2013 U.S. Dist. LEXIS 113014 (E.D. Tenn. Aug. 12, 2013); *State v. Tucker*, 2015 La. LEXIS 1712 (Sept. 1, 2015).

[73] *See, e.g., United States v. Napolitan,* 762 F.3d 297 (3rd Cir. 2014); *Garcia v. United States*, 2014 U.S. Dist. LEXIS 101409, (W.D. Mo. July 25, 2014); *United States v. Greeno,* 679 F.3d 150 (6th Cir. 2012); *United States v. Darby*, 2014 U.S. Dist. LEXIS 88392 (D.S.C. June 27, 2014); *Ohio v. Israel*, 2012 Ohio 4876 (Ohio Ct. App. 2012).

longstanding prohibitions on the possession of firearms by felons" and that such prohibitions are "presumptively lawful."[74]

There have been a few outliers among lower courts. A federal district court in Illinois struck down a provision of Chicago law that prohibited the possession of firearms by anyone who had been convicted in any jurisdiction of the crime of unlawful use of a weapon.[75] Also, a federal district court in New York found a federal law imposing a pretrial bail condition prohibiting the defendant from possessing a firearm to be unconstitutional.[76] Finally, an Ohio trial court dismissed, on Second Amendment grounds, an indictment against a defendant for possession of a firearm following a conviction for a drug crime, but only found the law at issue unconstitutional as applied to "a Defendant with no felony convictions . . . [who] possesses firearms in his home or business, for the limited purpose of self-defense."[77]

Recently, a small number of other courts have also sustained as-applied challenges to the federal felon-in-possession statute.[78] Of course, these decisions represent a small minority of courts. As discussed above, the vast majority of decisions on this issue have upheld laws limiting or banning weapons possession by persons convicted of crimes.

iii. Other Regulations

Courts across the country have also upheld numerous other laws regulating firearms, including those related to the following:

- **<u>Firearm Ownership</u>**
  - Generally requiring the registration of all firearms[79]
  - Requiring background checks for private firearm transfers[80]
  - Requiring an individual to possess a license to own a handgun[81]
  - Requiring handgun permit applicants to pay a $340 fee every three years[82]

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[74] *Heller*, 554 U.S. at 626–27 & n.26; s*ee also, e.g.*, *United States v. Moore*, 666 F.3d 313, 317-20 (4th Cir. 2012) (collecting cases relying on this language to uphold the federal felon-in-possession statute and noting the Fourth Circuit's own reliance on it in upholding bans on firearms possession by persons convicted of domestic violence-related misdemeanors).

[75] *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1117 (N.D. Ill. 2012) ("the Chicago Firearm Ordinance basically provides that anyone convicted of a nonviolent misdemeanor offense relating to a firearm is forever barred from exercising his constitutional right to possess a firearm in his own home for self-defense…[d]ue to the significant lack of evidence indicating that a non-violent misdemeanant, like Gowder, poses a risk to society analogous to that of a felon or a violent misdemeanant…the Chicago Firearm Ordinance violates Gowder's constitutional rights under the Second Amendment.").

[76] *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008) ("the Adam Walsh Amendments violate due process by requiring that, as a condition of release on bail, an accused person be required to surrender his Second Amendment right to possess a firearm without giving that person an opportunity to contest whether such a condition is reasonably necessary in his case to secure the safety of the community. Because the Amendments do not permit an individualized determination, they are unconstitutional on their face."); *but* see, *United States v. Kennedy*, *327 Fed. Appx. 706* (9th Cir. 2009) (imposing the same condition but not directly addressing the Second Amendment issue).

[77] *Ohio v. Tomas*, No. 526776 (Ohio Ct. Com. Pl. Dec. 7, 2010).

[78] *Suarez v. Holder*, 2015 U.S. Dist. LEXIS 19378 (M.D. Penn. Feb. 18, 2015) (sustaining as-applied challenge to federal felon-in-possession statute by plaintiff convicted of carrying a firearm without a license); *Binderup v. Holder*, 2014 U.S. Dist. LEXIS 135110 (E.D. Penn., Sept. 25, 2014) (granting as-applied challenge to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1)). Both cases are currently on appeal in the Third Circuit.

[79] *Justice v. Town of Cicero*, 577 F.3d 768 (7th Cir. Ill. 2009) (finding that registration "merely regulated gun possession" rather than prohibiting it*), cert. denied*, 177 L. Ed. 2d 323 (2010); *Heller v. District of Columbia ("Heller III")*, 801 F.3d 264 (D.C. Cir. 2015) (firearm registration generally satisfies intermediate scrutiny and does not violate the Second Amendment, but certain aspects of registration do not survive review, such as knowledge of the law testing, re-registration requirements, limiting registration to one handgun per month, and the requirement to bring the firearm in person to register).

[80] *Colo. Outfitters Ass'n v. Hickenlooper*, 2014 U.S. Dist. LEXIS 87021 (D. Colo. June 26, 2014) (upholding Colorado's requirement that background checks be conducted on certain private transfers of firearms), *vacated on jurisdictional grounds,* 2016 U.S. App. LEXIS 5238 (10th Cir. 2016).

[81] *Gutierrez v. Ryan*, 2015 U.S. Dist. LEXIS 145622 (D. Mass. Oct. 1, 2015); *People v. Perkins*, 880 N.Y.S.2d 209 (N.Y. App. Div. 2009).

- Prohibiting the sale of firearms to individuals who do not reside in any U.S. state[83]

- **Firearm Safety**
  - Requiring the safe storage of handguns in the home[84]
  - Prohibiting the possession of a firearm while intoxicated[85]

- **Particularly Dangerous Weapons and Accessories**
  - Forbidding the possession, sale, and manufacture of assault weapons and large capacity ammunition magazines[86]
  - Prohibiting the possession, sale, and manufacture of machine guns[87]
  - Prohibiting the sale of "particularly dangerous ammunition" that has no sporting purpose[88]
  - Prohibiting the carrying of a concealed dirk or dagger outside of the home[89]

- **Firearm Possession by Particularly Dangerous Individuals**
  - Prohibiting the possession of firearms by individuals who have been involuntarily committed to a mental institution[90]

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[82] *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013); *see also Bauer v. Harris,* 2015 U.S. Dist. LEXIS 25757 (E.D. Cal. Mar. 2, 2015) (upholding $19 fee imposed by California law on sale of all firearms as a "presumptively lawful" condition on the commercial sale of firearms).

[83] *Dearth v. Holder*, 893 F. Supp. 2d 59 (D.D.C. 2012).

[84] *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014); *Commonwealth v. McGowan*, 982 N.E. 2d 495 (Mass. 2013); *Commonwealth v. Reyes*, 982 N.E. 2d 504 (Mass. 2013); *Tessler v. City of New York*, 952 N.Y.S.2d 703 (Sup. Ct. N.Y. Co. 2012) (city ordinance applicable to weapons wherever located, with the exception of weapons being carried).

[85] *Ohio v. Beyer*, 2012 Ohio 4578 (Ohio Ct. App. 2012); *People v. Wilder*, 2014 Mich. App. LEXIS 2076 (Oct. 28, 2014) (finding no Second Amendment violation for defendant's conviction under possession of firearm while intoxicated law); c*f. Michigan v. DeRoche,* 299 Mich. App. 301 (2013) (holding that a state law prohibiting possession of a firearm by an intoxicated person was unconstitutional as applied to the defendant, who was in his own home and where his possession was only constructive).

[86] *See New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (New York and Connecticut laws prohibiting possession of semiautomatic assault weapons and large-capacity magazines do not violate the Second Amendment); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (upholding local ordinance prohibiting assault weapons and large capacity ammunition magazines); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (upholding the District of Columbia's ban on assault weapons and large capacity ammunition magazines after applying intermediate scrutiny); *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. Mar. 4, 2015); *Kampfer v. Cuomo*, 993 F. Supp. 2d 188, at *17-19 & n.10 (N.D.N.Y Jan. 7, 2014) (upholding New York's assault weapons ban by finding it does not substantially burden Second Amendment rights); *Colo. Outfitters Ass'n v. Hickenlooper*, 2014 U.S. Dist. LEXIS 87021 (D. Colo. June 26, 2014) (upholding Colorado's ban on large capacity ammunition magazines); *People v. James*, 174 Cal. App. 4th 662, 676-77 (2009) (upholding California's ban on assault weapons and .50 caliber rifles); *see also United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (affirming conviction for possession of a firearm with an obliterated serial number). *But see Kolbe v. Hogan,* 2016 U.S. App. LEXIS 1883 (4th Cir. 2016) (requiring an evaluation of Maryland's ban on assault weapons and large capacity magazines using strict scrutiny). The panel opinion in *Kolbe* was vacated when the court granted *en banc* review on March 4, 2016.

[87] *Hollis v. Lynch,* 2016 U.S. App. LEXIS 12099 (5th Cir. 2016); *Watson aka United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame,* 2016 U.S. App. LEXIS 9050 (3rd Cir. 2016); *United States v. Henry,* 2012 U.S. App. LEXIS 16615 (9th Cir. 2012); *United States v. Fincher,* 538 F.3d 868 (8th Cir. 2008).

[88] *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

[89] *People v. Mitchell*, 209 Cal. App. 4th 1364 (2012).

[90] *In re Keyes*, 2013 PA Super 326 (Pa. Super. Ct. 2013) (rejecting challenge to a federal law prohibiting persons who have been involuntarily committed to a mental institution from possessing firearms and finding that such laws were outside the scope of the Second Amendment and,-even if they were not, that they would still satisfy intermediate scrutiny); *Heendeniya v. St. Joseph's Hosp. Health Ctr.*, 2015 U.S. Dist. LEXIS 160968 (N.D.N.Y. Nov. 30, 2015) (18 U.S.C. § 922(g)(4) does not violate the Second Amendment "[i]n light of…the Supreme Court's assurances in *Heller* and *McDonald* that the Court did not intend to cast doubt on longstanding regulatory measures prohibiting the possession of firearms by felons and the mentally ill."); *cf. Yox v. Lynch*, 2016 U.S. Dist. LEXIS 89501 (M.D. Pa. July 11, 2016) (as-applied Second Amendment violation found where plaintiff "was committed for eight days at age 15, and has since served in the military and works as a correctional officer."); *Tyler v. Hillsdale County Sheriff's Dep't*, 2014 U.S. App. LEXIS 23929 (6th Cir. Dec. 18, 2014) (applying strict scrutiny in sustaining as-applied challenge to federal firearm prohibition for persons involuntarily committed to a mental institution). The panel opinion in *Tyler* was vacated when the court granted *en banc* review on April 21, 2015.

- Prohibiting possession of firearms for individuals subject to a domestic violence restraining order[91]
- Authorizing the seizure of firearms in cases of domestic violence[92]
- Prohibiting the possession of handguns by juveniles[93]
- Prohibiting firearm possession for individuals who pose an imminent risk of danger to self or others[94]

- **Conditions on the Sale of Firearms**
  - Prohibiting the sale of firearms and ammunition to individuals younger than twenty-one years old[95]
  - Requiring that all new handguns sold meet certain safety requirements, including firing and drop testing, the inclusion of chamber loaded indicators, and the incorporation of microstamping technology[96]
  - Imposing a fee on all firearm sales conducted with a state[97]

- **Firearms in Sensitive Places**
  - Prohibiting the possession of firearms within college campus facilities and at campus events[98]
  - Prohibiting the carrying of a loaded and accessible firearm in a motor vehicle[99]
  - Forbidding possession of a firearm in national parks or other federal property[100]

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[91] *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), *cert denied* 131 S.Ct. 2476 (2011) (rejecting Second Amendment challenge to prohibition on the possession of firearms by persons subject to domestic violence restraining orders); *United States v. Elkins*, 2012 U.S. App. LEXIS 21536 (4th Cir. Oct. 15, 2012); *United States v. Harris*, 2016 U.S. Dist. LEXIS 19654 (E.D. Wis. 2016) (holding that Second Amendment not violated by statute prohibiting firearm possession for those subject to a domestic violence restraining order); *United States v. Luedtke*, 2008 U.S. Dist. LEXIS 117970 (E.D. Wis. 2008) (holding that Second Amendment not violated by statute prohibiting firearm possession for those subject to a domestic violence restraining order).

[92] *In re State for Forfeiture of Pers. Weapons & Firearms Identification Card Belonging to F.M.,* 2016 N.J. LEXIS 688 (N.J. 2016); *Crespo v. Crespo*, 989 A.2d 827 (N.J. 2010).

[93] *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).

[94] *Hope v. State,* 163 Conn. App. 36, 43 (2016) (the challenged statute "does not implicate the Second Amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms.").

[95] *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives,* 700 F.3d 185 (5th Cir. 2012), *rehearing denied*, 714 F.3d 334 (2013); *see also L.S. v. State*, 2013 Fla. App. LEXIS 11592 (Jul. 24, 2013) (upholding a ban on minors possessing firearms).

[96] *Draper v. Healey*, 2015 U.S. Dist. LEXIS 26976 (D. Mass. Mar. 5, 2015) (upholding Massachusetts requirement that handguns sold in the state contain a load indicator or magazine safety disconnect), affirmed on other grounds by *Draper v. Healey*, 2016 U.S. App. LEXIS 11003 (1st Cir. June 17, 2016); *Pena v. Lindley*, 2015 U.S. Dist. LEXIS 23575 (E.D. Cal. Feb. 27, 2015) (upholding all aspects of California's Unsafe Handgun Act.), currently on appeal with the Ninth Circuit.

[97] *Bauer v. Harris*, 2015 U.S. Dist. LEXIS 25757 (E.D. Cal. Mar. 2, 2015) (upholding California's $19.00 Dealer Record of Sale ("DROS") fee, and stating that the "fee is a condition on the sale of firearms…[t]he DROS fee, therefore, is a presumptively lawful regulatory measure. Accordingly, the…fee is constitutional because it falls outside the historical scope of the Second Amendment."), currently on appeal with the Ninth Circuit.

[98] *Digiacinto v. Rector & Visitors of George Mason Univ.*, *704 S.E.2d 365* (Va. 2011) (noting that weapons were prohibited "only in those places where people congregate and are most vulnerable…Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation."); *Tribble v. State Bd. of Educ.*, No. 11-0069 (Dist. Ct. Idaho December 7, 2011) (upholding a University of Idaho policy prohibiting firearms in University-owned housing); *Fla. Carry, Inc. v. Univ. of Fla.*, 2015 Fla. App. LEXIS 16115 (Oct. 30, 2015) (in upholding policy prohibiting firearms in university housing, the court pointed to the 'presumptively lawful' language in *Heller* that included 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.'").

[99] *Ohio v. Rush*, 2012 Ohio 5919 (Ohio Ct. App. 2012).

[100] *See, e.g., United States v. Masciandaro*, 638 F.3d 458 (4th Cir. Va. 2011) (affirming defendant's conviction for possession of a loaded weapon in a motor vehicle in a national park); *Bonidy v. United States Postal Serv.*, 2015 U.S. App. LEXIS 10954 (10th Cir. Colo. June 26, 2015) (upholding federal regulation prohibiting the storage and carry of firearms on United States Postal Service property); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 2015 U.S. App. LEXIS 9577 (11th Cir. June 9, 2015) (affirming denial of preliminary injunction in challenge to federal regulations that prohibit loaded firearms and ammunition on property managed by the U.S. Army Corps of Engineers); *United States v. Parker*, 919 F. Supp. 2d 1072 (E.D. Cal. Jan. 22, 2013); *United States v. Lewis*, *50 V.I. 995* (D.V.I.

- Prohibiting the possession of firearms in places of worship[101]
- Prohibiting the possession of firearms in common areas of public housing units[102]
- Prohibiting the possession of guns on county-owned property[103]
- Prohibiting the possession of guns in a federal court facility[104]

- **Regulation of Firing Ranges**[105]
  - Requiring firing range patrons to be at least 18 years of age
  - Zoning restrictions, such as requiring that ranges not be located within 500 feet of sensitive locations)
  - Construction requirements (e.g., requiring the use of ballistic-proof walls and doors, and separate ventilation systems to minimize the risk of lead exposure)
  - Operation requirements (e.g., a range master must be present at all times)
  - Noise limitations

iv. Successful Second Amendment Claims

Despite the victories for commonsense gun laws, discussed above, there are a few outliers cases where courts have sustained Second Amendment claims. As discussed above, the Seventh Circuit struck down Illinois' ban on carrying concealed weapons.[106] That same court also enjoined enforcement of a Chicago ordinance banning firing ranges within city limits where range training was a condition of lawful handgun ownership.[107] A district court in the Seventh Circuit struck down a Chicago law completely banning the transfer of firearms except through inheritance, but explicitly reiterated that cities and states have broad authority to regulate the commercial sale of firearms, including limits on the locations where dealers may operate.[108]

A district court in the Ninth Circuit, citing the now-vacated *Peruta* panel opinion, struck down regulations prohibiting the possession and carrying of firearms on property owned by the U.S. Army Corps of Engineers.[109] As discussed above, a handful of as-applied challenges to federal prohibitions on firearm possession for various categories of persons have been sustained, including in the Sixth Circuit.[110] In

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2008); *cf. Morris v. U.S. Army Corps of Engineers*, 2014 U.S. Dist. LEXIS 147541 (D. Idaho Oct. 13, 2014) (striking down regulations prohibiting the possession and carrying of firearms on property owned by the U.S. Army Corps of Engineers).

[101] *GeorgiaCarry.Org, Inc. v. Georgia,* 764 F. Supp. 2d 1306 (M.D. Ga. 2011), *aff'd*, 687 F.3d 1244 (11th Cir. 2012).

[102] *Doe v. Wilmington Hous. Auth.,* 880 F. Supp. 2d 513 (D. Del. 2012), *rev'd on other grounds*, 2014 U.S. App. LEXIS 10579 (3d Cir. June 6, 2014).

[103] *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc).

[104] *United States v. Giraitis*, 2015 U.S. Dist. LEXIS 114648 (D.R.I. June 16, 2015) (Report and Recommendation adopted on Aug. 28, 2015) (upholding conviction for possession of a handgun in a federal court facility and noting that this prohibition would survive even strict scrutiny).

[105] *Ezell v. City of Chicago*, 2014 U.S. Dist. LEXIS 136954 (N.D. Ill., Sept 29, 2014) (upholding all firing range regulations except requirement that ranges only be located in manufacturing districts and limit on hours of operation from 9am to 8pm).

[106] *See Moore v. Madigan*, 702 F. 3d 933, 942 (7th Cir. 2012); *see also Palmer v. D.C.*, 2014 U.S. Dist. LEXIS 101945 (D.D.C. July 26, 2014); *Wrenn v. District of Columbia*, 2015 U.S. Dist. LEXIS 71383 (D.D.C. May 18, 2015) (striking down the District's "good reason" / "proper reason" requirement for CCW permits). *Wrenn* is currently on appeal in the D.C. Circuit.

[107] *See Ezell v. City of Chicago*, *651 F.3d 684* (7th Cir. 2011).

[108] *See Illinois Ass'n of Firearms Retailers v. Chicago*, 961 F. Supp. 2d 928, at 939-47 (N.D. Ill. 2014) ("To address the City's concern that gun stores make ripe targets for burglary, the City can pass more targeted ordinances aimed at making gun stores more secure—for example, by requiring that stores install security systems, gun safes, or trigger locks . . . . Or the City can consider designating special zones for gun stores to limit the area that police would have to patrol to deter burglaries . . . . nothing in this opinion prevents the City from considering other regulations—short of the complete ban—on sales and transfers of firearms to minimize the access of criminals to firearms and to track the ownership of firearms.").

[109] *Morris v. U.S. Army Corps of Engineers*, 2014 U.S. Dist. LEXIS 147541 (D. Idaho Oct. 13, 2014).

[110] *Tyler v. Hillsdale County Sheriff's Dep't,* 2014 U.S. App. LEXIS 23929 (6th Cir. Dec. 18, 2014) (applying strict scrutiny in sustaining as-applied challenge to federal firearm prohibition for persons involuntarily committed to a mental institution); *see also Suarez v. Holder*, 2015 U.S. Dist. LEXIS 19378 (M.D. Penn. Feb. 18, 2015) (sustaining as-applied challenge to federal felon-in-possession statute by plaintiff convicted of carrying a firearm without a license); *Binderup v. Holder*, 2014 U.S. Dist. LEXIS 135110 (E.D. Penn., Sept. 25, 2014) (granting as-applied challenge to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1)).

addition, a federal district court, applying strict scrutiny, recently struck down a federal law requiring out-of-state purchases of handguns to be completed by an in-state FFL.[111]

In 2016, in *Radich v. Guerrero*, a federal district court struck down a regulatory system in the Northern Marianas Islands, a US territory, which prohibited most private individuals from possessing and importing handguns and handgun ammunition. The court found this general prohibition on handgun possession to violate the Second Amendment, noting that "[b]ecause the Commonwealth's ban on handguns cannot be squared with the Second Amendment right described in Heller and McDonald…it is invalid and must be enjoined."[112]

Other outliers include a North Carolina federal district court decision finding that a state law prohibiting the carrying of firearms during states of emergency violated the plaintiffs' Second Amendment rights,[113] a Massachusetts federal district court decision finding that a U.S. citizenship requirement for possessing and carrying firearms violated the plaintiffs' Second Amendment rights,[114] and a Michigan appellate court decision striking down a state law prohibiting the possession of tasers and stun guns, concluding that the Second Amendment protects the possession and open carrying of those devices.[115]

THE SUPREME COURT HAS REPEATEDLY DENIED CERTIORARI IN CASES RAISING SECOND AMENDMENT CHALLENGES

Since issuing its opinions in *Heller* and *McDonald*, the Supreme Court has repeatedly declined to hear any new cases raising Second Amendment issues. To date, the Supreme Court has denied cert in more than 70 Second Amendment cases since *Heller*, including:

- Cases challenging laws restricting the concealed and/or open carrying of firearms in public[116]
- Cases challenging the constitutionality of laws prohibiting felons, domestic abusers, and/or certain misdemeanants from possessing firearms[117]
- Cases challenging laws enhancing sentences for possessing a firearm while committing a crime[118]
- Cases challenging laws restricting the possession of machine guns, assault weapons, large capacity ammunition magazines, and other types of military-style weapons[119]
- Cases challenging firearm registration requirements and related fees[120]

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[111] *See Mance v. Holder,* 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. Feb. 11, 2015) (applying strict scrutiny in striking down federal statutes requiring out-of-state handgun purchases to be processed by an in-state FFL).

[112] *Radich v. Guerrero,* 2016 U.S. Dist. LEXIS 41877 at *7 (D.N. Mar. I. Mar. 28, 2016).

[113] *Bateman v.* Perdue, 881 F. Supp. 2d 709 (E.D.N.C. 2012).

[114] *Fletcher v. Haas, 851 F. Supp. 2d 287 (D. Mass.* 2012).

[115] *Michigan v. Yanna*, 297 Mich. App. 137 (2012). Notably, prior to this decision, the former law at issue was replaced by a new law that allows the carrying of a taser or stun gun with a valid concealed weapon license.

[116] *Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Scharder v. Holder*, 134 S. Ct. 512 (2013); *Brown v. United States*, 131 S. Ct. 819 (2010); *Dawson v. Illinois*, 131 S. Ct. 2880 (2011).

[117] *See, e.g.*, *Enos v. Holder*, 2015 U.S. LEXIS 4416 (2015); *Booker v. United States*, 132 S. Ct. 1538 (2012); *Torres-Rosario v. United States*, 132 S. Ct. 1766 (2012).

[118] *Kearns v. United States*, 181 L. Ed. 2d 226 (2011).

[119] *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015); *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799 (2015); *Hamblen v. United States*, 130 S. Ct. 2426 (2010); *James v. Cal.*, 130 S. Ct. 1517 (2010).

[120] *Justice v. Town of Cicero*, 130 S.Ct. 3410 (2010); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013), cert denied, *Kwong v. De Blasio*, 2014 U.S. LEXIS 3857 (2014).

- Cases challenging restrictions of firearms in national parks and other publicly owned places[121]

As a result, the numerous federal and state court decisions upholding the laws described above have been left undisturbed. To read more about the Supreme Court's pattern of denying cert in Second Amendment cases, see the full report on the Law Center's website, available at: smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched.

CONCLUSION

Because of the Supreme Court's decisions in *Heller* and *McDonald*, the nation's lower courts have been inundated with a substantial volume of Second Amendment litigation. However, as described above, the vast majority of this litigation has been unsuccessful because most federal, state and local firearms laws satisfy the established standards of constitutional review. Nevertheless, going forward, the gun lobby will likely continue to employ the threat of litigation to obstruct state and local efforts to enact common sense gun violence prevention measures. Policymakers should rest assured, however, that nothing in either *Heller* or *McDonald* prevents the adoption of a wide variety of reasonable laws to reduce gun violence.

ABOUT THE LAW CENTER TO PREVENT GUN VIOLENCE

Founded in the wake of the July 1, 1993, assault weapon massacre at 101 California Street in San Francisco that left eight dead and six wounded, the Law Center to Prevent Gun Violence is now the premier resource for legal expertise and information regarding state and federal firearms laws. We track and analyze gun laws in all 50 states, file amicus briefs in Second Amendment cases across the country, and work with lawmakers and advocates to craft and promote legislation that will reduce gun violence and save lives. We regularly partner with law firms and nonprofit organizations dedicated to combating the epidemic of gun violence in our country, and we invite you to learn more about our work by visiting our website, smartgunlaws.org.

FOR MORE INFORMATION, VISIT OUR WEBSITE SMARTGUNLAWS.ORG OR CALL OUR OFFICE AT (415) 433-2062.

[121] *Bonidy v. United States Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015), *cert denied* 2016 U.S. LEXIS 2105 (2016); *United States v. Masciandaro,* 638 F.3d 458 (4th Cir. 2011), *cert denied* 2011 U.S. LEXIS 8647 (Nov. 28, 2011); *United States v. Dorosan,* 350 Fed. Appx. 874 (5th Cir. 2009), *cert denied* 176 L. Ed. 2d 198 (2010).